

CONDITIONS FOR CONFIRMING CAPACITY IN POWERS OF ATTORNEY FOR PERSONAL CARE

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Powers of Attorney for Personal Care do not come into effect immediately after they are signed. Rather, they only come into effect when the grantor (the person appointing the attorney for personal care) becomes incapable. Furthermore, the *Substitute Decisions Act*, the legislation that governs Powers of Attorney for Personal Care, contains provisions that permit a Power of Attorney for Personal Care document to contain conditions that prevent the attorney from making certain decisions unless the fact that the grantor is incapable of personal care has been confirmed. In ACE's experience, health practitioners and members of the public frequently misunderstand the effect of such conditions. As set out below, these conditions are only effective for decisions not governed by the *Health Care Consent Act*.

HEALTH CARE CONSENT ACT DECISIONS

Section 49(1)(a) of the *Substitute Decisions Act* provides as follows:

When power of attorney effective

49. (1) A provision in a power of attorney for personal care that confers authority to make a decision concerning the grantor's personal care is effective to authorize the attorney to make the decision if,

(a) the *Health Care Consent Act, 1996* applies to the decision and that Act authorizes the attorney to make the decision; or

...

Accordingly, the pertinent question is: to what decisions does the *Health Care Consent Act* apply?

The *Health Care Consent Act* deals with three types decisions:

1. Consent to treatment or a plan of treatment proposed by a health practitioner (such as a doctor, nurse, etc.).
2. Consent to admission to a long-term care home. This type of decision does not include consent to live in other types of accommodation, such as a private residence, a private care home, or a retirement home.
3. Consent to receipt of personal assistance services in a long-term care home.

For decisions governed by the *Health Care Consent Act*, a power of attorney for personal care comes into effect only when there has been a finding of incapacity by a health practitioner (for treatment decisions) or an evaluator¹ (for admission to a long-

term care home and/or receipt of personal assistance services). The finding of incapacity must be made with respect to the particular decision at issue. In order for the attorney for personal care to have authority under the *Health Care Consent Act*, the incapable patient must also not have a court ordered guardian of the person with authority to give or refuse consent to treatment, admission to long-term care, or receipt of personal assistant services, as applicable.

If the Power of Attorney for Personal Care document contains a condition that the Power of Attorney for Personal Care does not become effective until, for example, the grantor has been assessed by their long-time doctor, that condition does not apply to *Health Care Consent Act* decisions. If the grantor is in hospital and if that doctor has proposed surgery and believes that the grantor is incapable of consenting to the proposed surgery, the doctor proposing surgery may make the legal finding of incapacity and obtain a consent or refusal of consent from the attorney for personal care (assuming there is no guardian of the person with authority over this decision). This is because the *Health Care Consent Act* authorizes the health practitioner or evaluator to make this finding of incapacity and to obtain a consent or refusal of consent from the appropriate substitute decision-maker. In these circumstances, there are already protections in place for grantors who disagree with the finding of incapacity, as grantors can request a hearing before the Consent and Capacity Board to dispute that finding.

NON-HEALTH CARE CONSENT ACT PERSONAL CARE DECISIONS

For decisions not governed by the *Health Care Consent Act*,ⁱⁱ the *Substitute Decisions Act* provides that the Power of Attorney for Personal Care comes into effect as follows:

When power of attorney effective

49. (1) A provision in a power of attorney for personal care that confers authority to make a decision concerning the grantor's personal care is effective to authorize the attorney to make the decision if,

...

(b) the *Health Care Consent Act, 1996* does not apply to the decision and the attorney has reasonable grounds to believe that the grantor is incapable of making the decision, subject to any condition in the power of attorney that prevents the attorney from making the decision unless the fact that the grantor is incapable of personal care has been confirmed.

Method for confirmation

(2) A power of attorney that contains a condition described in clause (1) (b) may specify the method for confirming whether the grantor is incapable of personal care and, if no method is specified, that fact may be confirmed by notice to the attorney in the prescribed form from an assessor stating that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of personal care.

Instructions to assessor

(3) A power of attorney that contains a condition described in clause (1) (b) may require an assessor who performs an assessment of the grantor's capacity to consider factors described in the power of attorney.

As stated above, a Power of Attorney for Personal Care may specify a method for confirming whether the grantor is incapable of personal care. For example, the grantor may name a particular individual or a particular doctor as the person who is to confirm whether the grantor is incapable with respect to a particular personal care decision (such as what clothing the grantor will wear). Where this is the case, the specified method for confirming incapacity must be followed before the attorney for personal care can make a non-*Health Care Consent Act* personal care decision for the grantor.

If no method is specified for determining capacity (but the Power of Attorney still states that incapacity must be confirmed), then an “assessor” must be used to perform an assessment of whether the grantor is incapable with respect to personal care. Assessors are social workers or members of regulated health professions (such as doctors, nurses, psychologists, etc.) who are registered with the Capacity Assessment Office and meet the other legislated requirements.ⁱⁱⁱ Assessors charge fees for their services. If a Power of Attorney for Personal Care contains such a condition, the Power of Attorney document may also require an assessor who performs an assessment to consider particular factors.

Where there is no condition requiring incapacity to be confirmed, the attorney for personal care may begin making non-*Health Care Consent Act* decisions where he/she has reasonable grounds to believe that the grantor is incapable of making the decision.

FINAL THOUGHTS

There are many circumstances in which individuals should not sign a Power of Attorney for Personal Care. There are cases in which attorneys have used the Power of Attorney for Personal Care document to restrict the liberty of donors who have signed these documents. For a more detailed discussion of this issue, read the paper on our web site entitled "Think Before You Sign: Misuse Of Powers Of Attorney For Personal Care".^{iv}

ⁱ An “Evaluator” is defined under s. 2(1) the *Health Care Consent Act* to be (a) a member of the College of Audiologists and Speech-Language Pathologists of Ontario, (b) a member of the College of Dieticians of Ontario, (c) a member of the College of Nurses of Ontario, (d) a member of the College of Occupational Therapists of Ontario, (e) a member of the College of Physicians and Surgeons of Ontario, (f) a member of the College of Physiotherapists of Ontario, (g) a member of the College of Psychologists of Ontario, or (h) a member of a category of persons prescribed by the regulations as evaluators. In addition to the various health practitioners listed in this definition, the *Health Care Consent Act*, Regulation 104/96 states that social workers are also considered to be evaluators. The term “social worker” is defined as a member of the Ontario College of Social Workers and Social Service Workers who holds a certificate of registration for social work.

ⁱⁱ This would include personal care decisions about, *inter alia*, nutrition, shelter, clothing, or hygiene that do not fall within the three types of decisions governed by the *Health Care Consent Act*, discussed above.

ⁱⁱⁱ See O. Reg. 460/05 under the *Substitute Decisions Act*.

^{iv} <http://www.ancelaw.ca/appimages/file/Misuse%20of%20Powers%20of%20Attorney%20for%20Personal%20Care-LR%203.pdf>