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THE ROLE OF AN ATTORNEY FOR PERSONAL CARE

Introduction

The purpose of this fact sheet to explain the important role of an attorney for personal care. It explains what is involved in being an attorney for personal care, what the attorney is allowed to do and how the attorney is supposed to meet his or her obligations to an incapable person.

The powers and duties of an attorney for personal care are fully set out in the *Substitute Decisions Act, 1992* and the *Health Care Consent Act, 1996*. **This fact sheet is a summary only.** It is not legal advice, and if you have questions about how to interpret this information, you should consult with a lawyer.

The purpose of a power of attorney for personal care

Most people make their own personal care decisions. Personal care decisions can include decisions about where to live, what to eat, safety, clothing, personal hygiene and health care, including treatment.

Making a power of attorney for personal care is an important step in planning for mental incapacity. By making a power of attorney for personal care, a person selects **who** he or she wants to make personal care decisions if he or she becomes incapable.

A power of attorney for personal care may also include wishes or instructions regarding how the person wants decisions to be made about him or her if he or she becomes incapable. These wishes or instructions can apply to decisions about the person's health care, including treatment, where the person lives, what the person eats as well as matters such as safety, clothing and hygiene.

The essential role of any attorney for personal care is to be a **substitute decision maker**. The attorney “steps into the shoes” of the person, if he or she becomes incapable, and makes personal care decisions when necessary. These need to be made carefully and sensitively.

When a power of attorney for personal care is used

An attorney for personal care only makes personal care decisions that the person is incapable of making for himself or herself. For example, a person may be incapable of making decisions about a complicated medical treatment, such as surgery under a general anesthetic. If such surgery is recommended, the surgeon may ask the attorney to consent. However, the person may be capable of consenting to a routine physical examination. The fact that the attorney has been asked to consent to the surgery does not mean that the attorney will be asked to consent to all treatment given to the person. In most cases, it is up to the individual health practitioner to decide whether the person is incapable and the attorney is needed to make a decision.

Most frequently, an attorney for personal care is asked to make a decision for an incapable person regarding treatment or placement in a long-term care facility. However, a power of attorney for personal care that covers all types of personal care decisions extends beyond these situations. An attorney for personal care may need to assist an incapable person by making decisions regarding the person’s safety, where the person lives, what he or she eats and matters of personal grooming.

An attorney for personal care is a decision maker, and is not expected to provide personal care services directly to the incapable person. However, the attorney may sometimes have to be involved in making arrangements for an incapable person. For example, an attorney for personal care may be the one who arranges for home care services, although these are actually provided by someone else.

A typical power of attorney for personal care does not give an attorney the power to force the incapable person to go along with his or her

decisions. For example, an attorney cannot make the person eat food delivered by meals-on-wheels.

Some powers of attorney for personal care require that it be confirmed that the person is incapable of making personal care decisions before the attorney can make decisions. Some powers of attorney for personal care contain special provisions that allow an attorney to use force, if necessary, to require the person to undergo a capacity assessment or be admitted to hospital. Attorneys who have been appointed under such powers of attorney should consult with a lawyer before starting to make decisions.

Legal responsibilities of an attorney for personal care

An attorney for personal care must exercise his or her duties and powers diligently, and in good faith. When an attorney steps in and makes a personal care decision for an incapable person, that decision must be made solely for the benefit of the incapable person.

The following are some of the legal responsibilities of an attorney for personal care:

- The attorney must explain his or her powers and duties to the incapable person.
- The attorney must encourage the incapable person to participate in decisions the attorney makes, to the best of the incapable person's ability to do so.
- The attorney must seek to foster the incapable person's independence.
- The attorney must choose the least restrictive and intrusive course of action that is available and is appropriate.
- The attorney must seek to foster regular personal contact between the incapable person and supportive family members and friends.
- The attorney must consult from time to time with supportive family members and friends who are in regular personal contact with the incapable person and with the persons from whom the incapable person receives personal care.
- The attorney must keep records of decisions he or she makes on the incapable person's behalf.

- The attorney must make reasonable efforts to find out if the incapable person expressed any wishes and instructions, while capable, that apply to the decision the attorney is making.
- The attorney must not use confinement, monitoring devices or physical or chemical restraints on the incapable person or consent to their use unless doing so is essential to prevent serious bodily harm to the incapable person or others, or allows the incapable person greater freedom or enjoyment.

An attorney who is asked to consent to electric shock as aversive conditioning, sterilization or the removal of tissue for transplantation, or the incapable person's participation in a procedure whose primary purpose is research should consult with a lawyer before making a decision.

Guiding principles for decision making

In making a decision for an incapable person, an attorney for personal care must follow these principles:

1. If the attorney knows of a **wish** the person expressed when capable, and the wish applies to the circumstances, the attorney must make the decision in accordance with the wish. For example, if the attorney knows that the incapable person did not wish to receive antibiotics for the treatment of pneumonia, the attorney must refuse to consent to treatment with antibiotics.

The wish can be in writing, such as in a "living will", but it does not have to be.

2. If the attorney does not know of any wish, or if it is impossible to comply with the wish, the attorney must act in the incapable person's **best interests**. In doing so, the attorney must consider:

- The values and beliefs the attorney knows the person held when capable and believes the person would still act on if capable
- The person's current wishes (if they can be ascertained)
- Whether the decision is likely to improve the person's situation, prevent the person's situation from deteriorating or reduce the extent to which, or the rate at which, the person's situation is deteriorating. The person's situation could include his or her

- condition and well being (where a treatment decision is being made) or his or her quality of life (where a placement decision or other personal care decision is being made).
- Whether the incapable person's situation is likely to improve, remain the same or deteriorate if the attorney does not choose the course of action under consideration.
 - Whether the benefit to the incapable person from the proposed course of action outweighs the risk of harm to him or her
 - Whether there is a more desirable alternative to the course of action under consideration (for example, a less restrictive or intrusive course of treatment, or a less restrictive option than admission to a long-term care facility)

An attorney for personal care is entitled to receive the information relating to the incapable person that is necessary for the attorney to make a decision regarding treatment or admission to a long-term care facility. This may include medical reports, hospital records and reports and records from a community care access center.

Assistance from the Consent and Capacity Board

Sometimes an attorney may find it difficult to interpret a wish, or may believe that if the incapable person were capable at the present time, and asked to make the decision, he or she would now make a decision contrary to the wish.

If the decision is about treatment or admission to a long term care facility, the attorney may ask the Consent and Capacity Board to assist him or her in interpreting the wish or deciding whether the attorney may depart from the wish.

An attorney who wants to ask the Consent and Capacity Board for assistance may wish to consult with a lawyer before doing so.

Records to be kept by an attorney for personal care

An attorney should always keep a copy of the power of attorney for personal care in a safe place.

The records that an attorney must keep include:

- A list of all decisions regarding health care, safety and shelter made on behalf of the incapable person, including the nature of each decision, the reason for it and the date
- A copy of medical reports or other documents, if any, relating to each decision
- The names of any persons consulted, including the incapable person, in respect of each decision and the date
- A description of the incapable person's wishes, if any, relevant to each decision, that he or she expressed when capable and the manner in which they were expressed
- A description of the incapable person's current wishes, if these can be ascertained, and if they are relevant to the decision
- For each decision taken, the attorney's opinion on each of the guiding principles listed above

Maintaining confidentiality

An attorney is not allowed to disclose any information contained in his or her records unless required to do so in order to make decisions on the incapable person's behalf or otherwise fulfill the attorney's duties, or if ordered to do so by a court.

An attorney must produce copies of his or her records to:

- The incapable person
- The incapable person's attorney under a continuing power of attorney for property or guardian of property
- The Public Guardian and Trustee

Conclusion

The role of an attorney for personal care is to take on the important responsibility of making decisions for an incapable person about shelter, diet, clothing, safety, hygiene and health care, including treatment. These decisions must be made sensitively, with respect for the incapable person and in consultation with supportive family members and friends. The attorney also has a duty to follow the guiding principles for decision making set out in the law.

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