



Decision-Making For An Incapable Person

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Introduction

When a situation causing diminished mental ability arises for an individual (whether a senior or not), the law recognizes that someone may need to step in and make decisions for that person. However, families are often surprised that their ability to make decisions on behalf of a loved one is very limited unless the loved one has a valid *Power of Attorney for Personal Care* and a *Power of Attorney for Property*.

Personal Care Decisions

In Ontario the *Health Care Consent Act* ensures that *some* health care decisions may be made on behalf of another person who is deemed incapable of making those decisions for themselves, irrespective of whether there is a valid *Power Attorney for Personal Care*. The person who may act (i.e. make the decision) is the first available person (of the people listed below) having the right to act before those that follow:

1. a person who has been appointed by the Court as a Guardian of the Person;
2. an Attorney for Personal Care;
3. a legal guardian;
4. a representative appointed by the Consent and Capacity Board;
5. a spouse, common-law spouse or partner;
6. a child or parent (including adopted children and parents, or someone legally authorized to act in the place of a parent, such as the Children's Aid Society);
7. a parent who has only a right of access (as opposed to a custodial parent);
8. a brother or sister (including half siblings); or
9. any other relative (i.e. related by blood, marriage, or adoption).

Pursuant to the *Health Care Consent Act*, the above-mentioned persons can only make decisions about the following:

- health care, such as treatments;
- admission to a long-term care home; and
- personal assistance services in a long term care home.

It is important to note that all persons within each class in the ranking have an equal right. For

instance, if there is no Court appointed guardian, attorney for personal care, legal guardian, representative, spouse, or partner, then all of the parents or children of the person will have equal decision-making authority. If there is a disagreement among equally ranked decision makers that cannot be resolved, the Office of the Public Guardian and Trustee then has the authority to make the decision on the incapable person's behalf.

Regarding number 4 in the list above, anyone, including family or friends, may apply to the Consent and Capacity Board to be appointed as a substitute decision maker pursuant to the *Health Care Consent Act*.

With respect to personal care decisions that fall beyond the scope of the *Health Care Consent Act*, if there is no Attorney for Personal Care or Court appointed Guardian of the Person, a concerned friend or family member would have to bring an application to the Court pursuant to the *Substitute Decisions Act* to be appointed as the individual's Guardian of the Person. A Guardian of the Person is someone appointed by the Ontario court to make personal care decisions about food, safety, security, clothing, personal hygiene and housing.

Decisions Related to Property

Families do not have the same kind of statutory decision-making authority when it comes to making decisions with respect to an individual's property.

In order to make decisions about a person's property, a family member would have to bring an application to the Court pursuant to the *Substitute Decisions Act* to be appointed as the individual's Guardian of Property. A Guardian of Property is someone who is appointed to manage the financial affairs of a person who is mentally incapable of doing so for himself or herself.

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