

# LEGAL NEWS & VIEWS

## Powers of Attorney, Living Wills & Prior Capable Wishes

A Power of Attorney is a legal document in which you authorize another person – your “attorney” – to act on your behalf. (In Canada, the word “attorney” does not mean a lawyer, as it does in the U.S.A.) A power of attorney may only be used during your lifetime; it terminates upon your death.

### Continuing Powers of Attorney for Property

Powers of attorney have been used for generations to permit others to handle a person's financial affairs. Under a Continuing Power of Attorney for Property, your attorney can do almost anything with your property that you can do. It can be used as soon as it is signed, (unless the document states otherwise), and it continues in effect, even if you cease to be mentally capable. It constitutes a major delegation of authority and should only be given to a trusted individual who will not misuse this authority.

### Powers of Attorney for Personal Care

A major change in the law in Ontario occurred in 1995. New legislation made it possible for the first time to appoint an attorney to make decisions about some or all aspects of your personal care, including your health care and admission to a long-term care facility. Unlike a Continuing Power of Attorney for Property, however, a Power of Attorney for Personal Care comes into effect only when you cease to be mentally capable.

### Why have Powers of Attorney?

If powers of attorney are not signed while you are mentally capable, a family member or trusted friend will have to resort to the courts or to the Public Guardian and Trustee in order to obtain authority to act on your behalf as a guardian. (The term “substitute decision-maker” is generally used to refer to both attorneys and guardians. The term “attorney” is used throughout this article, although most of the comments would apply to any substitute decision-maker.)

Advance planning helps minimize future expense and uncertainty and allows you to maintain an important element of control over your quality of life.

### Living Wills

The term “living will” is often used to refer to a document containing a person's preferences or wishes regarding the use of life-sustaining treatments that could be provided or foregone in specific circumstances. This term, however, is not used or defined in Ontario legislation and therefore means different things to different people. Furthermore, a living will cannot be relied on to appoint an attorney unless the document meets the formal execution requirements of a Power of Attorney for Personal Care.

### Advance Care Planning

Advance care planning is the process of preparing for a time when through age or circumstances you no longer have the capacity to make decisions about aspects of your personal care or treatment or the ability to communicate your wishes.

In Ontario, advance care planning can include:

- the preparation of a Power of Attorney for Personal Care
- the preparation of a living will, in which no attorney is named and only written wishes about personal care are expressed
- wishes about care expressed orally or by means of an alternative form of communication such as a video tape or a Bliss Board.

### Prior Capable Wishes

Advance care planning focuses on discussions and communication between you and your family and your attorney regarding your wishes. It can relieve them of the stress of trying to guess what your wishes might be, or of feeling guilty for making or supporting a tough decision on their own.

The legislation in fact provides that the wishes expressed by you while capable (sometimes referred to as “prior capable wishes”) are binding on your attorney and that these wishes do not need to be in writing.

If you have not expressed prior capable wishes, your attorney must determine what is in your best interests. To do so, he or she must take into consideration a number of matters, including your values, beliefs and preferences while you were capable.

### Responsibilities of your Attorney

As far as your personal care is concerned, your attorney must try to ascertain your prior capable wishes before he or she can act. In fact, if it is possible to do so, your attorney must also continue to communicate with you to determine your current wishes and to take these wishes into consideration in determining what is in your best interests.

### Risks involved in acting as an Attorney

Most of the powers and duties of an attorney are set out in the Substitute Decisions Act and the Health Care Consent Act. The duties are substantial and an attorney has an obligation to be informed of and to carry out these duties. Failure to do so can result in potential legal liability.

It is acceptable and often desirable for an attorney to seek advice and assistance from professionals. Lawyers practicing in this area can provide checklists and other guidance.

An attorney, who has acted in good faith and who has consulted professionals regarding the duties and issues that are beyond his or her knowledge or experience, is more likely to be considered to have acted honestly, reasonably, diligently and in the incapable person's best interests.

*This article was prepared by Joanna J. Ringrose, who has been practicing law in the areas of estate and incapacity planning for over 20 years. The article provides general information only and does not constitute legal advice. For inquiries, please contact Joanna at (905) 844-5021 or ringroselaw@cogeco.ca*



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