# TAB 4

# Power of Attorney for Personal Care: The Power to Decide

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# Practice Gems: Drafting and Administering Powers of Attorney for Personal Care and Property 2010
## *Avoiding the Pitfalls*


The Law Society of Upper Canada | Barreau du Haut-Canada

CONTINUING PROFESSIONAL DEVELOPMENT

# POWER OF ATTORNEY FOR PERSONAL CARE: THE POWER TO DECIDE

Peter Lillico
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*You are the person who has to decide.*
*Whether you'll do it or toss it aside;*
*You are the person who makes up your mind.*
Edgar A. Guest, American author, poet

*Every single moment of your life you must choose from a number of alternatives.*
*What you choose determines where you will end up.*
Shall Sinha, Indian scholar and teacher

*The difficulty in life is the choice.*
George Moore, Irish writer

*When you have to make a choice and don't make it, that in itself is a choice.*
William James, American psychologist, professor, author

*Most of life is choices, and the rest is pure dumb luck.*
Marian Erickson, American author

The Ontario Power of Attorney for Personal Care (POAPC) is a very powerful risk management tool. It permits us to choose who may make life decisions for us when we are unable to do so ourselves. It determines the manner of our medical treatment, our preferences for residential situation and the resolution of other personal issues in circumstances when we are unable to communicate these directly. It enables reductions in delays in obtaining treatment in medical emergencies.

But too often the great potential value of this document is diminished or obstructed by the impractical structuring of attorneys, the inappropriate wording of health and personal care directives, and a lack of timely and meaningful access to the document and the vital information it contains.

This paper describes some common pitfalls, and provides suggestions on avoiding them. The first point addressed is, how best to organize the people appointed as attorneys for personal care.

## I STRUCTURING ATTORNEYS

### A SINGLE ATTORNEY

A POAPC that appoints only one attorney to act is a fragile document indeed. No matter how competent and reliable the named attorney, if he or she is dead or incapable or simply

unavailable when the need for a substitute decision maker arises, then the value of the POAPC is nullified. Most lawyers realize this and so recommend to clients that they appoint multiple attorneys in their POAPC. This is prudent practice, but the devil is in the details. If there are to be multiple attorneys appointed, then several options exist for their organization.

B COMMITTEE

One drafting approach is to name all attorneys acting together as a team, in the same manner as executors. This however gives rise to two practical problems. The first is that all may not be available at the critical time, and so delay may result until all appointed attorneys can be contacted. Delays in medical emergencies should be precluded rather than encouraged by the structure of the POAPC!

The second is that if the named attorneys are collectively authorized to make decisions, not all may agree upon a choice of treatment or changes to the residential situation of the donor. Again, delays can occur until a consensus or unanimity is achieved.

It is true that these two problems can be mitigated by additional drafting, such as a provision that any two of several attorneys are authorized, or that majority rules in the event of disagreement. However it is the writer's submission that using the committee approach to substitute decision making is in almost all cases potentially problematical, giving rise to as many issues as it resolves.

B JOINTLY AND SEVERALLY

Appointing two, three or more attorneys to act "jointly or severally" addresses the two problems posed by the committee approach. The availability of multiple people to respond to a medical emergency widens the scope of persons authorized to consent and increases the odds of finding one in a timely fashion, reducing the potential for delay. Since any one of the attorneys can act unilaterally to consent to needed medical treatment, then the risk of delay in arriving at a consensus decision is also obviated.

However this approach also has its drawbacks. The primary one is the obvious one. If all are authorized to act independently of the others, and with equivalent authority, then when difficult or divisive choices are confronted there is an increased probability of disputes or deadlocks arising. This can also seriously interfere with effective decision making. A tug-of-war can result, when different attorneys with various opinions provide contradictory decisions or instructions.

C RANKING OF ATTORNEYS

The approach that provides the most advantages with the fewest disadvantages is, in the writer's opinion, a structured hierarchy or ranking of attorneys. This means a primary attorney with ultimate authority at the top of the decision making "ladder", buttressed by a number of other attorneys on lower rungs of the ladder. If the first named attorney is unavailable in a medical emergency, then the second in line is authorized to make decisions. If he or she cannot be quickly contacted, then the third is also authorized to act. Legally though, not all of these appointed attorneys are created equal. The first named primary attorney is the ultimate substitute

decision maker. His or her decisions will prevail over the lower ranked individuals, whose main purpose is to serve as emergency responders until the primary attorney becomes available.

This structure provides the best of all worlds:

- There are multiple attorneys available to consent, deepening the pool of authorized helpers.
- The attorney who first becomes available can unilaterally respond to the needs of the donor, avoiding the need and inherent delay in contacting others.
- If more than one attorney is present, and their opinions or decisions differ, then the hierarchical structure ensures that one voice, preferred by the donor and expressly authorized by the POAPC, will be the one heard and obeyed.

## II CHOOSING ATTORNEYS

Regardless of the preferred structure of the attorneys for personal care, careful consideration of the choice of attorneys is also very important. For many clients the selection of attorneys may seem simple. A donor with family will typically appoint the spouse and children to act. However the simple solutions are not necessarily the ideal solutions, and of course not all clients wishing to obtain the protection of a POAPC will be blessed with suitable family members to act as attorneys. Even those with several available family members may have difficulty in deciding whether the son, or the daughter, or both should be named, and if named, how best to "rank" them on the decision making ladder.

Except in the most straightforward of situations, the lawyer can and should be of assistance to the client in determining who the best candidates are to serve in the important role as attorney for personal care. As well even if there are several good choices available, considerations of structuring the attorneys give significance to a ranking of the attorneys, as discussed above. The following are some of the relevant factors in this selection and ranking process.

### A EXPERTISE

If a family member has medical or health care training, he or she is a high candidate to be appointed as an attorney for personal care. His or her expertise will allow a speedy analysis of important factors related to the choice of treatment options, and a quick and competent decision.

### B PROXIMITY

In a medical emergency, the discussions and consents do not have to take place face to face. In most cases an attorney will be contacted by telephone if possible, and the situation addressed in that manner. However, proximity of a potential attorney can also be relevant. An attorney who can travel to the hospital within an hour should be considered for higher ranking than an attorney of equivalent capabilities who lives geographically distant. The former may be in a position to converse directly with the medical team quite quickly, thus obtaining a higher level of information to support the decision making. The latter may be out of contact for hours while en route to the hospital.

C AVAILABILITY

If an otherwise appropriate candidate for attorney is often travelling, or whose job requires him or her to be on the road routinely, or whose remote location makes contact more difficult, then his or her suitability as an attorney for personal care is diminished. He or she may have considerable expertise, but if he or she cannot reliably be reached during an emergency, then he or she should be assigned to a lower ranking, or another attorney selected instead.

D JUDGEMENT

I had a senior client who was widowed and living with her adult daughter. They enjoyed a close and mutually beneficial relationship. In discussing a POAPC with her, I assumed that this daughter would be her first choice as attorney for personal care. When I suggested this, it was summarily rejected by the lady. Upon inquiring, her response was that while her daughter was a lovely and loving child, she was also emotionally fragile. My client's firm opinion was that in a medical emergency involving her mother, the daughter would "fall to pieces". She did not wish to visit the additional stress and responsibility of decision making upon her daughter at the time of a health crisis, and also felt that any decisions made by her would be driven by emotion rather than considered judgement. She did include her daughter as a lower-ranked attorney for personal care so that at least the daughter was authorized to provide initial consents to treatment if she found her mother in need of emergency medical assistance, but she named as the highest ranked attorney her sister, a retired nurse who lived several miles away.

Apart from all other considerations, if a candidate as attorney for personal care has substance abuse issues, mental health problems, emotional vulnerabilities, religious convictions that impact upon treatment decisions, or a tendency towards poor or imprudent decision making, then he or she should either be a lower-ranked attorney, or in some circumstances passed over entirely.

## III WORDING HEALTH CARE DIRECTIVES

How many of us have heard the phrase, "heroic measures"?

How many of us can accurately and concisely define an "heroic measure"?

How many of us have seen or used that phrase, or "No life support" or "No resuscitation" in a POAPC?

One of the greatest benefits of the Substitute Decisions Act, 1992 is the ability to make medical, residential and other personal care decisions now, with the certainty that they will have legal effect in the future. This is true even if at the relevant time we are not able to communicate our decisions directly, due to lack of mental capacity, physical infirmity, or other impediment. With respect, failing to include appropriate health care directives in a POAPC is an omission comparable to failing to provide a contingent beneficiary in a Will, with the added consideration that in the latter case at least the client is beyond caring!

One of the greatest pitfalls of a POAPC that includes health care directives is for the wording of the directive or instruction to be vague, or poorly considered, or impractical.

Let's take the example of "heroic measures". Shortly after the implementation of the Substitute Decisions Act, 1992 I was addressing an audience of doctors and nurses at their request at a hospital. I posed them the same question above, "What is an heroic measure?" To say that the debate that followed was vigorous would be euphemistic! A family doc put forward a specific example, only to be greeted with hoots of derision from a specialist colleague who opined that in fact that this was not an heroic measure but standard operating procedure for many years, and where did the first speaker obtain his medical degree anyway?

If qualified physicians and surgeons cannot reliably agree upon what is or is not an heroic measure, then what value is there for the phrase to be included in a POAPC? I suggest that it is a negative value, in that this only increases uncertainty about the true wishes of the donor. The poor attorney for personal care, desperate to "do the right thing", receives no reliable guidance from the only document that has any legal effect. Instead he or she is confronted by a vague term that even experts dispute. Instead of clarity and certainty in a crisis, there is confusion and conflict. Please avoid the use of "heroic measures" and similarly ambiguous terms in drafting a POAPC. Your clients and their families will be grateful that you did.

As another example, how do you respond to a client who says he or she doesn't want to be on "life support", and this wish is to be included in the POAPC? Perhaps you follow this instruction but later in life the same client, now robbed of sufficient capacity to make medical decisions due to Alzheimer's Disease or the after effects of a stroke, is in need of a bypass operation to save his or her life. The POAPC precludes "life support", but without this no bypass operation can be accomplished. The client never contemplated this situation when requesting a "no life support" provision in the POAPC, but that is the legal consequence of the wording.

My point is that while health care directives and their personal care ilk are very important pieces of a properly prepared POAPC, vague or careless wording of the directives can create serious and unnecessary problems. Tragically this wording and these problems will almost certainly surface at a point in time when it is too late for the client to express a different instruction, or for the lawyer to remedy the situation with a revised POAPC.

The key in drafting health care directive wording is to use clear, rather than vague, terminology. It's important to use phrases that are capable of reliable interpretation by the health care teams, rather than common parlance or catch phrases. It's critical to employ triggering events and thresholds with objective, definable meanings rather than using arbitrary and simplistic rejections and refusal language.

Attached to this paper as Appendix A are several samples of directives and instructions that I have developed over the years with the assistance of health care professionals. These may not be the best possible, and in fact are continually being revised and improved upon with constructive criticism by clients or their families with direct experience of the medical and personal care issues addressed. They are simply the best I have to date, and if any of you have better then please share them with me and I will gratefully adopt yours as well.

## IV ACCESSING INFORMATION

Even the most competently drafted POAPC, with the clearest wording of directives, and involving the most reliable of attorneys, is wasted if the right information is not accessible at the right time.

Often I will ask clients or members of an audience at a seminar if they have a POAPC, and if the answer is positive, then I ask "Where is it?" Most will respond with answers like:

- It's in the safety deposit box at the bank, with my other important papers.
- At home, in one or the other of my desk drawers.
- I'm not sure.

I then ask them, "If you are in the emergency room of a hospital on a Saturday, needing medical treatment but unable to speak for yourself, of what possible use is your POAPC?" Much mumbling and scratching of heads ensues.

While the value of a POAPC certainly extends beyond the first minutes of a medical emergency, it is arguable that there is no more critical role for it than to ensure that the right people are contacted to respond to the need to consent, the appropriate health care directives are available to be followed, and the necessary medical information accessed to support treatment decisions without delay.

These essential goals can best be met by ensuring that the POAPC and the vitally important information it contains are readily accessible, even when the donor cannot speak for him or herself, and other family members are as yet unaware of the health crisis.

I address this important issue by having my clients sign three original copies of the POAPC. I then offer to retain one of them in my office for safekeeping. This will typically not come forward in a health emergency, because in my experience doctors seldom contact lawyers asking for medical advice! However, the client may well contact me later, having failed to locate their copy when looking to remind themselves of the type of directives made, or the order of names of their attorneys for personal care. I assure them that there is no problem, I will promptly copy the one I have in my possession and pop it in the mail for them. I then invite them to read it over and call me back with any questions or concerns.

The other two originally signed and witnessed copies are to be taken away by the client, together with an Emergency Contact Card (referred to below) and a handout sheet "Recommendations for Storage and Use" (attached to this paper as Appendix B). I advise them to take one of the signed copies to their family doctor to be filed with their health records, together with a list of the names and contact information for each of their attorneys for personal care.

The final signed copy I recommend be retained at their home, for ease of future reference and review by them.

I strongly encourage the client to discuss the POAPC fully with their chosen attorneys for personal care. Those individuals need to know their role, to learn which decisions the donor has

already expressed in the POAPC, and to have the opportunity to ask questions and receive answers about health and personal care issues. When the attorneys are eventually contacted by a doctor or called upon to make residential or other personal care decisions, they then have the tools and information in mind to respond in the manner the donor contemplated.

Finally, I provide each client with an Emergency Contact Card (samples attached as Appendix C). I ask them to fill in the blanks with the names and phone numbers of their attorneys, and the name and phone number of their family doctor. If they have more than two attorneys, then those names and addresses are put on the back of the Card.

When completed, the Card is simply attached to the Ontario Health Card with one piece of tape, along the long side so that the Card can flip out of the way of the magnetic strip if it is to be swiped. Then it folds back together and into the wallet or purse where we invariably keep our Health Cards.

The client is thus well prepared for a medical emergency, even a worst case situation. Perhaps the client, while engaged in a shopping expedition, slips and falls on a patch of ice which the merchant negligently knew or ought to have known was endangering the parking area. The client is rushed by ambulance to an emergency room, but arrives concussed. The doctor diagnoses the concussion, but wants to have an x-ray taken to determine if there's been a closed head injury.

The client is unable to provide an informed consent in the circumstances. The client may have appointed attorneys for personal care, but they are not present, are not even aware at this time of the problem, and so cannot assist.

The client knows who the attorneys are and how to contact them, but the concussion prevents this information from being shared.

This situation is not an "emergency" within the meaning of s.25.1 of the Health Care Consent Act, 1996, and so consent is required from the patient or the authorized substitute decision maker. Accordingly, s.10 of that Act applies, and no treatment can lawfully be provided until either the consent is obtained, or the medical condition deteriorates into a s.25.1 emergency involving the risk of serious bodily harm. (Possibly you might argue on behalf of your client that subparagraph (g) in the definition of "treatment" under the Act should apply, but you're not an ambulance chaser hanging around emergency rooms with your business cards at the ready, so you're no help either.)

The result can be significant delays in obtaining treatment until either the client recovers sufficiently to provide the necessary consent, or the spouse eventually notices the undue absence of his/her loved one and starts calling hospital emergency rooms, or the client did indeed have a closed head injury, a stroke results, and thus a s.25.1 emergency obviates the need for a consent.

None of these are desirable results, and none will occur if your well-served client has the Emergency Contact Card attached to the Health Card. We all know that this is the first order of business in any emergency room in any developed country. If you stroll in under your own

power, it's the first thing you are required to produce. If you're dragged in on a gurney, the procedure is always to go straight for wallet or purse to obtain health insurance information. Examining your admirably prepared client's Health Card will immediately disclose the Emergency Contact Card, informing the health care team that:

- this patient has a Power of Attorney for Personal Care;
- the names of the attorneys for personal care;
- the order in which those attorneys are to be contacted; and
- at least one phone number for each attorney.

This will get the right people informed and involved with a minimum of delay, and the necessary consents flowing for treatment.

As well, should the emergency room doctor required more detailed medical information in order to best determine treatment, he or she does not have to randomly call every doctor within miles to try to find out. Instead the family doctor's name and contact information is conveniently located on the front of the Emergency Contact Card.

By the way, prompt access to the health records can be critical even in emergency situations to which s.25.1 applies and consent is not required to provide treatment. An example would be a patient presenting with a heart attack. The usual treatment is to administer a clot-buster like TNK as soon as possible – but if that patient is on a blood thinner like Coumadin, the clot-buster will tend to kill him or her dead. Even a readily available attorney for personal care may not know which medications the patient is taking, but the health records will readily disclose this.

This paper is not intended to be an academic exercise, nor does it contain all of the information necessary for a lawyer to prepare a proper Power of Attorney for Personal Care. It is hoped that the practical advice it does provide may help some lawyers to assist some clients with better protections in a critical area of their lives, and if so it has served its purpose.

APPENDIX A

# POWER OF ATTORNEY FOR PERSONAL CARE

## *SAMPLE INSTRUCTIONS AND DIRECTIVES*

1. FAMILY CONSULTATION BY ATTORNEY

   To the extent possible and reasonable in the circumstances, I instruct my Attorney to consult with other family members in making personal care decisions on my behalf. This instruction does not diminish the authority of the individual Attorney to make such decisions unilaterally if other family members cannot be contacted or do not agree or arrive at a consensus.

2. DISCONTINUE LIFE SUPPORT

   If I am in a coma and life support systems are required to maintain my vital functions, then I consent to such life support systems only so long as there is a reasonable medical likelihood of my recovery from such coma to normal cognitive functionality. If in the opinion of two physicians with relevant expertise there is no reasonable medical likelihood that I will recover normal cognitive function, then I do not consent to life support systems. If such are in place, I direct that such life support systems be discontinued notwithstanding the medical consequences.

3. PROLONGATION OF LIFE

   I direct my Attorneys to ensure that all reasonable efforts are made to prolong and sustain my life regardless of any diminishment of my physical or mental state, however severe.

4. PALLIATIVE CARE PRIORITY

   If I have been diagnosed with an irreversible terminal illness and I am in pain, my pain is to be managed by sufficient medication or other palliative care treatment as may be required to alleviate my suffering, even if such treatment may have other detrimental health consequences or may have the effect of shortening my life. The priority for my medical treatment shall be relief of suffering and provision of comfort, rather than the prolongation of a diminished quality of life.

5. NO RESUSCITATION - SPECIFIC

   If I am so severely physically and mentally impaired that I am totally bedridden and totally dependent upon others for personal care, and not capable of recognizing or responding to family or friends, and in the opinion of two physicians with relevant expertise there is no reasonable medical likelihood that I will recover normal cognitive function, then I am to be provided with palliative care only. I instruct that the palliative care may include pain management treatment that may have the effect of shortening my life. It is my wish that such impaired condition not be unduly prolonged, and in such circumstances I do not consent to cardio-pulmonary

resuscitation. For clarity, this instruction does not preclude medical treatment that may improve my physical or mental condition, if such treatment will enhance my comfort or quality of life.

6. NO RESUSCITATION - GENERAL

   I do not consent to cardio-pulmonary resuscitation under any circumstances, notwithstanding the medical consequences.

7. BLOOD TRANSFUSION (JEHOVAH'S WITNESS)

   I do not consent to a transfusion of blood or blood products under any circumstances, notwithstanding the medical consequences. I do consent to a transfusion of non-blood products such as a saline or Ringer solution.

8. HOME CARE - GENERAL

   I direct that I be maintained in my usual residence for so long as this may reasonably and safely be done, even if such maintenance may not be the most cost effective manner of maintaining me. I further direct that if such maintenance requires the provision of home nursing and other care, such care shall be provided for me. However, if I am so severely physically or mentally impaired that I am totally bedridden and totally dependent upon others for personal care, or not capable of recognizing or responding to my family, and there is no reasonable medical likelihood that I will recover from such severe physical or mental impairment, then I instruct that I be moved to an appropriate care facility.

9. PREFERRED CARE FACILITY

   I direct that, if it is no longer reasonable and safe for me to continue to reside in my usual residence, my Attorneys ensure I then reside in the best possible care facility, even if there are less expensive alternative care facilities available. My preferred facilities are:

   1_____2_____

10. CONSENT TO LIVING WITH CHILD - PERMISSIVE

    In the event that it is no longer reasonable or safe for me to remain in my home, I consent to live with one of my children, but I do not wish any childr to feel obligated to care for me in his or her home.

11. CONSENT TO LIVING WITH CHILD - REFUSAL

    In the event that it is no longer reasonable or safe for me to remain in my home, I do not consent to live with one of my children, but direct that my Attorneys ensure I then reside in an appropriate care facility.

12. ORGAN DONATION

    I direct that my Attorneys shall take all necessary steps to ensure that the instructions expressed by me in my Gift of Life Consent form are fulfilled.

APPENDIX B

# POWER OF ATTORNEY FOR PERSONAL CARE

## *RECOMMENDATIONS FOR STORAGE AND USE*

1. One of the three original signed copies will be retained at our office. The purpose of this copy is not for use in a medical emergency, but for physical security of the document. It is to ensure that if other copies are lost, mislaid, damaged or destroyed, an original signed copy is still available to replace them.

2. The two other signed copies are provided to you to take with you. One of those copies should be delivered to your family doctor to be kept on file with your own medical records. When you give this copy to the doctor, please attach a note that sets out the names, addresses, work, home and other phone numbers of all of the people you have chosen to act as your Attorneys. If you are to have an operation, then your medical record will be routinely accessed by the doctor. This will disclose your Power of Attorney for Personal Care (POAPC), communicate specific medical instructions, identify your chosen Attorneys for Personal Care, and provide information on how to contact them even if you are unable to, and your family is not present at the crucial time.

3. The other signed copy is primarily for your own future reference, to remind you of its provisions upon review. This copy should not be locked up or hidden away by the Attorney but kept in an accessible place like a desk drawer or file cabinet at home. It is recommended that you review this at least annually to ensure that it continues to reflect your current medical situation accurately, and express your personal care decisions appropriately.

4. It is important to share the contents of the POAPC with your attorneys so that they are aware of their role, the role of other attorneys named by you, and the personal care decisions you have made. You can provide the attorneys with photocopies of your original signed POAPC if you wish, but the crucial step is to review it with your attorneys and discuss it with them in person. This is the best way to ensure that they know your intentions and decisions about medical and health matters, and provides an opportunity for questions and to clarify issues before an emergency arises.

5. The Emergency Contact Card should be completed by filling in the name of your Attorneys and their phone numbers (with area codes) in the spaces provided. If you have appointed more than two Attorneys, simply put the additional names and phone numbers on the back of the card. Please also fill in your family doctor's name and phone number at the bottom on the front, to assist in accessing your medical records in an emergency. Attach the completed Emergency Contact Card to your Ontario Health card with a piece of tape and keep it in your wallet or purse. In a medical emergency when you are unable to speak for yourself, this will disclose the fact that you have a POAPC; who your Attorneys are; what order in which to contact them; and how to contact them. It also identifies your doctor, which will assist in accessing your health records and obtaining needed medical information without delay. Accessing your health records will also disclose the original POAPC, communicate your own personal care decisions, and with the note provide more ways to contact your Attorneys.

APPENDIX C

IN CASE OF MEDICAL EMERGENCY
I have a Power of Attorney for Personal Care
My Attorneys are:

1 _____

2 _____

My Dr. is _____

IN CASE OF MEDICAL EMERGENCY
I have a Power of Attorney for Personal Care
My Attorneys are:

1 _____

2 _____

My Dr. is _____

IN CASE OF MEDICAL EMERGENCY
I have a Power of Attorney for Personal Care
My Attorneys are:

1 _____

2 _____

My Dr. is _____

IN CASE OF MEDICAL EMERGENCY
I have a Power of Attorney for Personal Care
My Attorneys are:

1 _____

2 _____

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2 _____

My Dr. is _____