

MISUSE OF POWERS OF ATTORNEY FOR PERSONAL CARE

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Seniors are often advised to sign a power of attorney for personal care so they can choose who will make personal care decisions for them if they become incapable. The ACE has seen cases where powers of attorney for personal care (POAPC) have been misused to restrict the freedom of seniors to make or participate in decisions.

Types of Personal Care Decisions

A POAPC does not come into effect immediately upon signing. There are two categories of decisions: *Health Care Consent Act* decisions and non-*Health Care Consent Act* decisions.

The *Health Care Consent Act* deals with treatment, admission to long-term care homes, and personal assistance services received in long-term care homes. If a person does not have a POAPC, the legislation sets out a hierarchy or list of substitute decision-makers who will make health and personal decisions on the incapable person's behalf, so long as they are available, capable and willing to make the incapable person's decisions. A POAPC does not come into effect until there has been a finding by a health care practitioner or evaluator that a particular individual is incapable with respect to the treatment or admission decision. If the individual disagrees with the finding of incapability, a hearing can be held before the Consent and Capacity Board. This provides some protection to the individual.

For all other personal care decisions, the POAPC comes into effect when the attorney for personal care has reasonable grounds to believe that the grantor is incapable of making the decisions, subject to any condition in the POAPC document that requires confirmation of the grantor's incapability by some independent means. In the writer's experience, this is where problems may arise.

Restrictions of Liberty Arising from Misuse of POAPCs

Personal care decisions that do not come within the scope of the *Health Care Consent Act* are very broad and can have a huge impact on an individual's quality of life. I have seen cases where attorneys for personal care have used their authority to place a senior in a private care home with instructions that the senior cannot leave the home, receive visitors (including lawyers) or make or receive telephone calls. Even if the senior is residing in their own home, attorneys sometimes use their authority to limit access to the senior or to limit the senior's ability to decide who they want to live with. In some cases, the police have been called by the attorney to complain that the senior has been "kidnapped" and to request that the senior be picked up by the police and returned.

Although the Bill of Rights in the *Long-Term Care Homes Act* set out many rights available to seniors living long-term care homes, I have seen cases where the attorney will attempt to place restrictions on the senior. The attorney may impose rules on who

can visit the senior, or when the senior can leave the facility for social activities or other activities. The motive for such restrictions is sometimes the fear that the senior will sign a new POAPC, granting decision-making authority to someone else. If a senior has signed a POAPC, there is a tendency for many care providers to accept directions given by the attorney, without examining the circumstances too closely. This happens even if it is fairly evident that the attorney is not following the legislation and is not permitting the senior to participate in decisions being made. The attorney may also fail to consult with supportive family and friends, and may fail to choose the least restrictive and intrusive course of action that is available. Unlike *Health Care Consent Act* decisions, there is no right to request a hearing before the Consent and Capacity Board for these types of personal care decisions. A court remedy is always available, but is financially impractical in most situations.

Danger Signals

Before a senior signs a POAPC, they should consider whether personal circumstances might suggest that there will be possible future problems. Are any of the senior's family or friends bossy or controlling? Is there a history of family rivalry or dispute? Will family members become upset and feel left out if another family member is chosen to be an attorney? Instead of appointing one individual, is it better to have several family members participate in making the decisions? Will the family fight and will family members or the senior be alienated as a result? Is the senior being pressured to sign a POAPC? Is it even necessary to sign a POAPC, or would the hierarchy under the *Health Care Consent Act* be enough to address most issues? Does the senior always want to have maximum involvement in all personal care decisions? If so, it may be better for the senior not to sign a POAPC, or to sign one that is limited to *Health Care Consent Act* decisions only. If a POAPC is not signed, people will have to approach the senior first to discuss any personal care decisions. If the senior's capacity is in issue, it will have to be dealt with at that time. The senior would be part of the discussion and to voice their preferences, to the extent that they could participate.

Think Before You Sign

It is all too easy to sign a POAPC without thinking about the possible disadvantages. There are many situations where it may be preferable for the senior not to make a POAPC. At most, it may be advisable for the senior to sign a POAPC that contains instructions, conditions and restrictions, and also contains a provision that the grantor's incapacity must be confirmed before the POAPC comes into effect.

If there is no POAPC disputes about personal care decisions will have to be resolved on a case by case basis. Dealing with these disputes is becoming more common as the population ages. It is a good idea for seniors to educate themselves and to think about what options will be available to them. I would also encourage seniors to discuss their wishes with their family and friends.