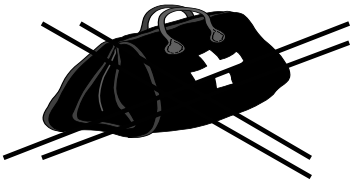
ACE NEWSLETTER

Spring 2001, Vol. 3, No. 3 ACE is a Legal Clinic Serving Low Income Seniors

Your In-Home Care Services Are Being Cut or Terminated: What Should You Do?



By George T. Monticone

ACE has received an increasing number of calls in the last few weeks from persons receiving in-home services from Community Care Access Centres ("CCACs") who have been told that their hours of service will be cut back. These callers are in some cases persons who have been in receipt of in-home care services for many months or years. Their health has not changed for the better, and if anything, it has deteriorated. The cut back in services is not being justified by the CCAC on the basis that the person now needs less care. Instead, CCACs are telling clients that they do not have enough money to provide (continue providing) the level of care services the client requires. If this happens to you, this article will help you understand how to respond.

Rumours abound concerning shortfalls in home care funding. CCACs are funded by the Ontario government to provide in-home services. There is concern that CCACs will not be given increases in funding sufficient to match increasing demand for services. Bill 46 was introduced in the Ontario Legislature and has received first reading. This Bill, should it become law, will among other things, require an organization such as a CCAC that runs a deficit, to plan for a surplus in the two years following to offset the deficit.

In addition, in Toronto there are 19 local agencies that provide in-home services on shoestring budgets provided by the City of Toronto. These agencies have been notified that as of 2002, the City will no longer provide the $380,000 provided in 2001 for this purpose.

If you are in receipt of in-home services from a CCAC, and you are told that because of funding shortages your hours of services will be cut back, or that some services will be terminated, here are some suggestions as to what to do.

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Care Services Con't From P. 1

1. **Contact your CCAC case manager and tell him or her that you are not satisfied with the decision and why you are not satisfied. Ask for a review of the decision. Also ask for a written description of the complaints and appeals process.**

It is advisable to put your request in writing so that you have a clear record of your concern, and of when you asked for a review. Every CCAC is required by law to have a complaints process, and to inform you in writing as to what that process is. The *Long-Term Care Act, 1994* requires every CCAC to have a complaints process. In addition, the Bill of Rights for persons receiving in-home services found in that Act says that you have the right to be informed of the complaints process *in writing* .

Once you know what the complaints process is, follow it as closely as you can. Failure to do so will work against you in the future if you want to appeal the decision to a tribunal or court.

There are currently 43 CCACs in Ontario, each providing services to a designated area. Each CCAC may have a slightly different complaints and appeals process. A typical process involves three steps: (1) tell your case manager you are not happy about the reduction/termination of services and ask him or her to reconsider, (2) if the case manager refuses to change the original decision to reduce or terminate services, the next step in the process is likely to be an independent review by another case manager not previously involved in your case, and (3) if the decision still goes against you, the next step in the process is likely to be a complaint to a review body of the CCAC which reviews the earlier decisions.

The written description of the complaints process will tell you how and to whom to make a complaint. Be aware that there may be deadlines to meet. If you don't understand the process, ask questions. You may also want to seek legal advice in preparing your case. It may be important to present evidence of your current health status and your need for services.

2. **If the case manager refuses to change his or her original decision to reduce or terminate services, follow the next step(s) in the complaints process, and use all avenues open to you in complaining to the CCAC. The next step may involve asking another case manager to review the facts and come to an independent decision, or it may be an appeal to a special body set up by the CCAC. The complaints procedure for that particular CCAC may provide for both. What you must do must be set out in the description of that CCAC's complaints and appeals process.**

Even if the complaints and appeals process does not require you to put anything in writing, it is important to do so. Not only does this help make your concerns clear, it will be useful if the CCAC decides against you and you want to appeal the matter further. Again, you may need to provide evidence about your state of health and your need for in-home services. You may want the assistance of a lawyer to prepare your case.

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The **Advocacy Centre for the Elderly (ACE)** is a legal clinic for low income seniors 60 years of age and over, funded by Legal Aid Ontario. ACE is incorporated as a non-profit corporation under the name "Holly Street Advocacy Centre for the Elderly Inc.".

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Once you have exhausted all the possible avenues of complaint or appeal to the CCAC, you have the right to appeal to the Health Services Appeal and Review Board (HSARB). The HSARB is a special tribunal that is required under the *Long-Term Care Act, 1994* to hear appeals regarding a change in service levels or termination of services. While you may take an appeal to the HSARB yourself, it is advisable to seek legal advice and assistance. An appeal to the HSARB will run into difficulty if you have not followed all of the complaints and appeals process at the CCAC. If you have not given the CCAC a full opportunity to review and reconsider your case, the CCAC will likely be successful in arguing that the HSARB should not hear your case. This is why it is important to follow the complaints process closely.

The CCAC is required by law to respond in writing to a complaint within 60 days, either by affirming the original decision, rescinding the original decision, or by substituting a different decision.

1. **You may appeal a CCAC decision to the HSARB, a special tribunal which is required to hear appeals regarding (1) whether you are eligible for services from a CCAC, (2) whether a particular service may be excluded from your plan of service, (3) the amount of any particular service to be included in your plan of service, and (4) the termination of any particular service from your plan of service.**

The HSARB hears these appeals from CCACs as well as other matters. The *Long-Term Care Act, 1994* governs appeals to the HSARB. In addition, the HSARB has Rules of Practice and Procedure which govern procedural matters. A copy of the Rules and other information may be obtained from the HSARB (phone (416) 327-8512, Fax (416) 327-8524). While the *Long-Term Care Act, 1994* says that a decision of the HSARB is final and binding and not subject to appeal, there is always a possibility of what is termed "judicial review" of a decision. If the HSARB decision is biased or patently unreasonable, or the procedures unfair, a court may be asked to review the decision. For this reason, the services of a lawyer are important, since the question of whether judicial review is advisable or possible is a highly technical matter.

The parties to an appeal from a CCAC decision will be the person appealing, the CCAC, and the Minister of Health and Long-Term Care, each of whom may be represented by legal counsel. The hearing shall begin within 30 days of requesting it, unless the parties agree otherwise. In practice this does not always happen.

The HSARB listens to oral evidence from witnesses, and legal arguments from each of the parties. Witnesses are cross-examined. Once all of the parties have completed their submissions, the HSARB is required to render a decision within three days and provide written reasons as soon as possible thereafter. The HSARB may affirm the decision of the CCAC, rescind the CCAC decision and refer the matter back to the CCAC for a new decision in accordance with directions, or it may substitute its own decision for that of the CCAC and direct the CCAC to implement that decision.

2. **You may want to contact a local advocacy group, your MPP, or a local newspaper**.

In addition to asking the CCAC or the HSARB to review a CCAC decision to cut-back or terminate in-home services, you may want to take a more political approach to the problem. Normally, this would not be advisable until you have exhausted all the complaints and appeals available to you.

If services to you are cut-back or terminated because the CCAC has insufficient funding, the issue is a political one, and contacting your MPP is appropriate. There are also advocacy groups such as Care Watch Toronto (phone (416)-590-0455) which are very much interested in these issues, and which try to keep track of these problems. ✷

ADVANCE CARE PLANNING – Alzheimer Initiative Number 7

By Judith A. Wahl

The Alzheimer Society of Ontario (ASO), in partnership with the Ontario Seniors Secretariat, has undertaken to develop and deliver training in advance care planning for health care professionals and for seniors and persons affected by Alzheimer disease and related forms of dementia. The main goals of this project are to increase the confidence of health professionals in discussing advance care planning issues with the people they work with, and to change performance and practices about advance care planning in health services of all types across the province. This project is also intended to disseminate accurate information on advance care planning to Ontario seniors and other persons affected by dementia.

ACE is delighted to be part of this initiative. ACE has been retained by ASO to assist in the development of the curricula for the training, as well as help train resource people who will do the training in their own community. ACE will also assist in the training of long-term care facility administrators and CEOs of Community Care Access Centres ("CCACs").

Through this project, the following will be done:

- the development of two curricula – one for health professionals and the other for seniors and persons affected by Alzheimer and other forms of dementia
- the training of 100 Resource team members (the trainers)
- 20-25 educational sessions for health professionals in the fall of 2001
- 80 sessions for seniors and the public over the next 12 to 18 months
- special sessions for long-term care facility administrators and CEOs of CCACs in the fall of 2001
- the development of materials for the public to be distributed at the education sessions and through health facilities, doctors offices, and elsewhere.

This project is interconnected with other parts of the Alzheimer's Initiatives, such as the physician education and the Ian Anderson Foundation training on End of Life care.

The following is a summary of some of the main points in the education programme.

- **What is advance care planning?**

Advance care planning is a process of planning for a time when you may not have the mental capacity to make decisions about your care or treatment. It may involve choosing someone to make decisions for you, a substitute decision maker. It also involves communication between you and the substitute decision maker. You must communicate who you are as a person, what your likes and dislikes are, how you want to be treated, where you want to live and how you want to live, as well as communicate your specific wishes about health treatments, medications, and end-of-life care.

In accordance with the *Health Care Consent Act*, your substitute decision maker is required to follow your last known wishes, however expressed, when making decisions for you when you are incapable. If your substitute does not know of any wishes applicable to the particular situation, then your substitute is to act in your best interests, taking into account your values and beliefs.

Advance care planning may also be an opportunity to express your values and beliefs to guide your substitute decision maker in situations that you are not able to anticipate.

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CIVIL CASE MANAGEMENT RULES

By Graham Webb

On July 3, 2001 an important change for the conduct of civil actions in the Ontario Superior Court of Justice will take place. Civil Case Management Rules will then apply to 100% of actions and applications commenced in the City of Toronto. The same change took place for actions commenced in the Regional Municipality of Ottawa-Carlton on January 2, 1997. Full case management is expected to fundamentally change the way that civil actions proceed through Ontario courts.

New Rules for a Speedier Process

One of the chronic complaints that civil litigants in Ontario have had over the past thirty years has been the increasing cost and complexity of civil litigation, and the abhorrently slow speed at which civil claims have typically proceeded through courts. In the past, it has not been at all uncommon for civil claims to take several years to reach trial, and then longer for subsequent appeals. Case Management Rules are procedural rules designed to insure that a civil action is always moving forward within a defined timetable, for the purpose of reducing unnecessary costs and delay, facilitating early and fair settlements and bringing civil proceedings expeditiously to a just determination.

There are several different types of case management rules. Family law cases in the Family Court in eighteen counties, regional municipalities or districts (including York Region, Durham Region, Simcoe County, Peterborough County, Victoria County but not including the City of Toronto) came into effect on September 15, 1999. The Toronto Superior Court case management rules came into effect in 1991. Partial case management has applied to civil actions randomly chosen in Toronto since 1991, and all of these rules have had a profound effect on speeding up case managed actions.

Full Case Management of Civil Actions

Civil Case Management Rules will now apply in Toronto and Ottawa to all civil actions commenced in Superior Court, including claims for payment of a debt, recovery of money, insurance actions, professional negligence or medical malpractice claims, and most real estate or property claims. Case Management Rules will not apply to commercial actions on a Commercial List, estate proceedings, mortgage actions, constructions liens, bankruptcy and insolvency proceedings, and class proceedings under the *Class Proceedings Act*.

Timetables for Undefended Cases

The essence of case management is that once a court case is commenced, strict time limits, or "timetables", will apply that are intended to make sure that the case reaches a speedy resolution and does not languish before the court for years on end.

According to a 1997 practice direction given by Madam Justice Lang, 60% of civil actions are not defended. In those cases, the plaintiff, or claimant, would be entitled to obtain judgment as soon as the 21st day after a statement of claim is served on a defendant. Despite that, many undefended civil actions do not proceed to judgment quickly or at all. In those cases, Case Management Rules give the claimant 180 days from the time an undefended action is started to obtain judgment. When that time passes, if default judgment is not obtained, the court registrar is required to dismiss the action as abandoned. This should have the effect of clearing deadwood out of the court files, and allowing speedier and more efficient administration of cases that are genuinely proceeding.

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- **How do you advance care plan?**

The key to advance care planning is COMMUNICATION. Communication may be oral, in writing, or through an alternative means such as a Bliss board or sign language.

Wishes expressed orally or through alternative means of communication are just as valid as wishes expressed in writing. Some people may feel more comfortable about writing down their wishes as the written wishes may be clearer and less subject to misinterpretation than oral wishes.

- **If I want to do an advance care plan in writing, how do I do that?**

Written documents may be in the form of a Power of Attorney for Personal Care or an advance directive/living will.

- **What is the difference between a Power of Attorney for Personal Care and an advance directive or living will?**

Powers of Attorney for Personal Care are documents in which you can name a substitute decision maker (an attorney), as well as set out your wishes about care, and express your values and beliefs. Powers of Attorney for Personal Care are authorized by the *Substitute Decisions Act,* which sets out the formal requirements for these documents. They must be in writing and must be witnessed by two witnesses who sign the document at the same time that you sign as grantor. You must be mentally capable of preparing the document. You must also be mentally capable of making decisions about any of the care and treatments about which you express specific wishes in the document.

If you want to keep the same substitute decision maker but change the wishes expressed in the Power of Attorney for Personal Care, you may do this in writing by revoking the old Power of Attorney for Personal Care and by creating a new one. You can also express your new wishes orally, without changing the written document. This would be sufficient to be an "oral override" of the written document. However it is good practice to make a new document so that there won't be any confusion as to what are your current wishes.

In contrast, a living will/advance directive does not name a substitute decision maker. It ordinarily is only a statement of your wishes, values and beliefs. These wishes are a guide to the person who would be your substitute decision maker for health from the list of decision makers in the *Health Care Consent Act*. As neither the *Substitute Decisions Act* nor any other statute in Ontario makes reference to living wills/advance directives, there are no formal requirements for these documents, such as witnessing.

To change a living will/advance directive, you can tear up the old one and make a new one, but you can also express new wishes orally and these will override any wishes expressed in your previously prepared living will. Despite this ability to do an oral override, it is still a good idea to make another written document with a date on it if you previously had expressed wishes in writing in a living will. This will serve to avoid confusion as to what are your last capable wishes.

- **Do I have to advance care plan? What if I don't believe that I should do this for religious or cultural reasons?**

Not all people want to advance care plan, sometimes because of religious beliefs or cultural practices. Sometimes people don't plan as they simply are not interested in doing an advance care plan. No one should be "required" to engage in any advance care planning process. Advance care planning is a voluntary process and it is not legally or otherwise necessary to express wishes about future care. Under the *Health Care Consent Act*, everyone in Ontario always has a substitute decision maker, even if they have not prepared a Power of Attorney for Personal Care.

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Therefore, it is not necessary to do advance care planning to name a substitute decision maker. The law states that substitutes must make decisions for the people for whom they act, following any expressed wishes. However, if wishes applicable to the situation are not known, then substitutes must act in what they believe to be the "best interests" of the person. Therefore, it is not necessary to advance care plan, as your substitute is required by law to make decisions for you in accordance with the best interests standard.

- **Can a hospital or long-term care facility require that I prepare an advance care plan or use a particular form?**

No. Preparation of an advance care plan or written directive is not an admission requirement for a health facility of any kind in Ontario. Nor is it a requirement for access to any type of health services. It is not a requirement for continued receipt of care services in a facility or in the community. Health facilities may suggest a particular form for an advance care plan, but it is up to you as to whether you want to use that particular form, or use one of your own choice, such as a Power of Attorney for Personal Care. It is appropriate for staff at health facilities and services to raise the issue with you about advance care planning, and to facilitate your involvement in the process if you want to do this. However, you have the right to say you are not interested.

- **If I haven't expressed advance wishes about my care, what will happen to me if I am in a health facility (hospital or long-term care facility)?**

Health practitioners are required to get consent or refusal of consent for treatment from you while you are mentally capable. This is true even if you have prepared an advance care plan. Advance care plans are directions to your substitute to guide the substitute in decision making only when you are not mentally capable.

If you are in a health facility and are mentally incapable in respect to the treatment or care you need, then the health practitioner must turn to your substitute decision maker for consent or refusal of consent to your treatment and care.

Your substitute, in making decisions for you, must follow any wishes that he or she knows that you expressed while capable. If no wishes are known, then your substitute must act in your best interests. In doing this, your substitute considers your values and beliefs and looks at whether the treatment proposed will benefit or harm you. If there are no advance care plans, your substitute must still think about who you are and what you believe in and value when thinking about how to decide for you. The substitute still makes decisions for you even if he or she does not know of specific wishes.

If there is a medical emergency, your health practitioner does not need to get consent or refusal of consent for treatment. Your health practitioner makes decisions about your care in the emergency taking into consideration what is medically possible, what is needed to prevent serious bodily harm to you, and what is needed to be done to relieve your suffering.

If your health practitioner knows of any wishes that you made while capable to refuse any particular treatments then the health practitioner is required by law to not give you that treatment in the emergency. If you have not advance care planned, or the health practitioner is not aware that you wanted to refuse a particular treatment, you may end up receiving this treatment in the emergency. This is one of the reasons that many people want to do some advance care planning, to communicate their wishes to not receive certain treatments in an emergency.

Contact your local chapter of the Alzheimer's Society of Ontario in the fall 2001 for the dates of any scheduled public sessions in your area on advance care planning.

For further information about Powers of Attorney for Personal Care, you can get a pamphlet describing these documents from your local community legal clinic or by contacting Community Legal Education Ontario at their website at www.cleo.on.ca, or by phoning 416-408-4420. ✷

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Fast Track/Standard Track Defended Cases

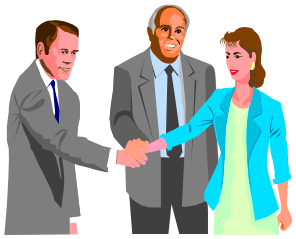
When a case is started, the claimant will have a choice of choosing a "fast track" or "standard track" for the proceeding. The fast track requires that all of the procedural issues will be completed and the case be made ready for a pre-trial within 150 days from the time that the action is defended. The standard track gives the plaintiff a longer period of 240 days to ready the action for pre-trial. These timeframes of approximately five and eight months from the time a defence is first delivered are remarkably shorter than the months and years that might ordinarily lapse before a civil action reaches pre-trial.

Once an action is defended, the case is assigned to a case management team that will follow the case's progress through the courts until it is concluded. There are some time requirements that will automatically apply in every case (such as the 150 or 240 day limit to be ready for pre-trial). Where either party fails to comply with the automatic time requirements, the case management team can create a new custom-made timetable and order the party to comply with it, and to pay costs thrown away. Where a party does not meet a custom-made timetable that was ordered by the case management team, the court can invoke sanctions that effectively would decide the case in favour of the other party; or make a new timetable, order the payment of costs, or make any other order that the court deems just.

Case Conferences

A "case conference" can be convened at any time by the court on its own initiative, or at a party's request. A case conference would be called where the court or any party is not satisfied with the progress of the action, or where directions on how to proceed are needed. Usually in a civil proceeding parties are not required to attend court unless they choose to do so, or are required to give evidence. Under Case Management Rules the court may require parties to personally attend a case conference to ensure that everyone that is needed to move the action along is present in court and available to make decisions.

In the past, meetings that are similar to case conferences (such as "pre-trial conferences") have chronically caused unnecessary delay when the lawyer in charge of one party's case does not attend and sends instead another lawyer that is not familiar with the case and does not have authority to reach a settlement. The Case Management Rules attempt to overcome this problem by explicitly stating that the lawyers attending a case conference must have authority to deal with the issues in the case, and be fully acquainted with the facts and legal issues. Judges at a case conference have wide ranging powers to order timetables for events to happen, to make procedural orders, to give directions, to convene a settlement conference or a hearing of the action. A case conference is intended to deal with all procedural issues needed to keep the action moving along, but does not necessarily address the substance of the dispute.



Pre-Trial Settlement Conferences

All civil actions already have a requirement that a pre-trial settlement conference be held to thoroughly explore the substance of a dispute and facilitate any possible settlement short of trial. The fundamental change is that in ordinary actions there is no fixed time limit as to how long it can take before a pre-trial settlement conference is reached. In case managed actions, the pre-trial settlement conference must take place not later than 150 days after the first defence is filed in fast track actions, and not later than 240 days after the first defence is filed in regular track actions.

By the time the pre-trial settlement conference is reached, all of the procedural steps that are necessary before the action can be tried must be completed. As with procedural case conferences,

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the case management judge also has power to require a party or its representative to attend the pre-trial conference for the purpose of making settlement decisions and instructing its lawyer. These rules are intended to make sure that settlement conferences will be effective and timely, and not merely another delaying tactic.

Simplified Trials
Where an action is for less than $25,000.00, or where the parties agree, the actual trial of the action can be held according to a simplified procedure that will usually ensure that the trial is completed within one day. The trial date would always be different from the pre-trial date, but usually would be scheduled not long after. Small case-managed actions that follow the simplified procedure, therefore, ought usually to be completed within six or nine months from the time they are started, even where the action is defended and a trial is held.

Regular Civil Trials
In larger actions, the simplified rules would not apply to the trial, and, depending on the number of witnesses and the complexity of the issues, the trial could take many days or even months to complete. However, newfound efficiencies in the court system have made civil trial dates more readily available in Toronto than ever before in recent memory. Most case-managed actions could expect to be ready for trial within the five or eight months timeframes that the Case Management Rules provide, and be tried not long after that time.

Call-Over Courts
The Case Management Rules have also created "call-over courts" that will review older non-case managed cases, and bring them into the case management system. Call-over courts will determine whether an existing case has been settled or whether it might benefit from setting a timetable, scheduling a pre-trial conference, or setting a trial date. The Case Management Rules should, therefore, have a spill-over effect speeding up not just new actions, but older actions that might already be proceeding at a much slower pace.

Faster Litigation
The overall effect of 100% case management in Toronto on the conduct of civil litigation, and the civil litigation bar, is expected to be profound. Previously civil litigation lawyers have carried a very large caseload of perhaps 300 cases at once, all of which might proceed very slowly through the courts. The new Case Management Rules create new timelines where before none existed, and demand that civil litigation lawyers pay more attention to the active cases they are carrying. The predictable effect is that lawyers will be less likely to commence a law suit unless they genuinely intend to proceed to trial quickly, and that at any point in time an individual lawyer will likely have fewer cases in progress that demand more time and proceed more quickly through the system.

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ONTARIO CELEBRATES SENIORS

See Seniors; See Life

is the theme of Ontario's Seniors' Month 2001. Ontario has celebrated Seniors' Month every June for more than 20 years!

Seniors' Month is a tribute to the men and women who have helped build this province and who continue to participate and contribute to the quality of life we all enjoy.

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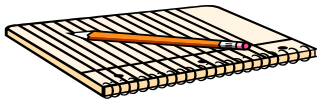
Accelerated Fees

Litigants too should expect fundamental changes in the way that civil actions are funded. Previously, a civil litigation lawyer might have been able to accept a smaller retainer to commence an action, and allow greater flexibility to the client in the speed and expense at which the litigation proceeds. However, Case Management Rules virtually demand that the lawyer with responsibility for the case must spend time, and therefore the client's money, towards that case within a short fixed period of time. The necessary result is that those litigants who wish to advance a claim through the court should expect to pay for the full cost of the proceeding fairly quickly as the case proceeds.

The Advocacy Centre for the Elderly is a non-profit non-share charitable corporation that is funded by Legal Aid Ontario, and does not charge fees for service. It provides legal advice and representation to low-income seniors that ask for its advice in the areas of elder abuse, consent and capacity, long-term care facilities, care homes and other areas of law that it practices. Prospective clients must meet financial eligibility criteria that can be waived in exceptional circumstances.

While it cannot accept every case for every senior, ACE does not charge fees for services and its clients should not suffer from the financial stresses that will accompany Case Management Rules. ✷



ACE
Annual General Meeting

Thursday, October 18, 2001
More Information
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See Attached Order Form

Long-Term Care Facilities in Ontario: The Advocate's Manual (2nd edition)

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Long-Term Care Facilities in Ontario: The Advocate's Manual (2nd edition)

The Advocacy Centre for the Elderly is proud to announce the 2nd edition of *Long-Term Care Facilities in Ontario: The Advocate's Manual*. The 500 page 1st edition produced in the fall of 1998 has proven to be an excellent resource for residents of long-term care facilities, their families and advocates, and service agencies. The manual includes discussions of the admission process, the costs of long-term care, and the rights of residents.

The 650 page 2nd edition has significant changes and additions, including a discussion of in-home services from Community Care Access Centres, the legality of the use of restraints in long-term care facilities, and a discussion of significant recent case law and court decisions in relation to substitute decision making.

Long-Term Care Facilities in Ontario: The Advocate's Manual (2nd edition)

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For further information call ACE at (416) 598-2656

The Issues Behind Signing A Power of Attorney

Video

ACE is proud to remind you that in the fall of 2000 we produced a 20 minute video on Powers of Attorney.

This video looks at three situations in which a senior is thinking about preparing a Power of Attorney or has prepared a Power of Attorney and now has some concerns about it. The video highlights important information which should be kept in mind when considering signing a Power of Attorney, and what to do if you want to make changes to a Power of Attorney.

The video is a resource to seniors and persons involved in providing services to seniors. The video can be used as part of an education program, workshop, or seminar and can also be viewed at home as a personal education resource.

The Issues Behind Signing A Power of Attorney

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