

## **Powers of Attorney for Personal Care**

In the last issue of *LegalEase*, we discussed the importance of a Power of Attorney for Property and the duties of the attorney named in that document. In this article, we will discuss Powers of Attorney for Personal Care, and the duties of the named attorney.

A Power of Attorney for Personal Care is a document by which a person (the grantor) authorizes a named individual or individuals (the attorney(s)) to make decisions concerning the grantor's personal care, if and when the grantor becomes incapable of making such decisions through illness or injury. Personal care decisions relate to hygiene, nutrition, housing, health care, safety, clothing, and other similar matters.

The *Ontario Health Care Consent Act* contains provisions listing the people who can make personal care decisions for an incapable person, but a Power of Attorney for Personal Care allows a grantor to designate for him/herself the person he/she wishes to perform this function (which may or may not be a person listed in the *Health Care Consent Act's* list).

If a person becomes incapable of making his or her own personal care decisions, and does not have a Power of Attorney, an interested family member will have to make a court application to be appointed the incapable person's guardian for personal care. This normally will require an assessment by a qualified capacity assessor to determine whether or not the "incapable" person truly is incapable of making his or her own personal care decisions. A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the consequences of a decision or lack of decision.

### **Duties and responsibilities of the attorney under a Power of Attorney for Personal Care**

As with attorneys for property, the attorney for personal care is required to explain to the incapable person what his or her powers and duties are. He or she is required to act in the best interests of the incapable person, and to keep records of all decisions made on behalf of the incapable person.

In deciding what the incapable person's best interests are, the attorney must consider the values and beliefs that the attorney knows the person held when capable. These include:

- the person's current wishes if they can be ascertained;
- whether a decision to be made by the attorney is likely to improve the quality of the person's life, or to prevent the quality of the person's life from deteriorating, or reduce the extent to which, or the rate at which, the quality of the person's life is likely to deteriorate; and
- whether the expected benefit from the decision outweighs the risk of harm from an alternative decision.

The attorney is required to encourage the incapable person to participate, to the best of his or her abilities, in the decisions being made by the attorney on his or her behalf. The attorney is also required to foster the incapable person's independence, to the extent possible, and in making decisions, to seek the least restrictive and least intrusive course of action available.

Finally, the attorney must seek to foster regular personal contact with the incapable person's family and friends, and also to consult with supportive family members and friends who are in regular personal contact with the incapable person.

While the *Substitute Decisions Act* does not state explicitly that compensation is available to attorneys under a Power of Attorney for Personal Care, courts have held that compensation can be claimed under section 61(1) of the *Trustee Act*. That section provides that trustees, guardians and personal representatives are entitled to fair and reasonable allowance for the care, pains and trouble, and the time expended in carrying out their duties. Reimbursement for expenses incurred by an attorney in caring for an incapable person may also be claimed.

If you think you may need, or you have a close friend or family member who may need, a Power of Attorney for Property and/or a Power of Attorney for Personal Care, contact us at SorbaraLaw. We can help to make sure the proper attorneys are chosen, the necessary arrangements are made, and all the appropriate needs and duties are addressed.

**Lisa S. Toner, B.Soc. Sci., LL.B.** Lisa is a native of Kitchener-Waterloo and attended Eastwood Collegiate. She graduated from the University of Ottawa in 1989 with a Bachelor of Social Sciences in Political Science. She obtained her law degree at the University of Western Ontario in 1992, and was called to the Ontario Bar in 1994. Lisa has worked in the private practice of law in the areas of criminal law, family law, civil litigation and wills and estates. She has also worked as in-house corporate counsel in the Estates and Trusts department at Canada Trust and spent five years working at Manulife Financial in its Tax and Estate Planning department and its Canadian Division Law and Compliance department. Lisa is certified as a mediator by the Association of Mediators and Arbitrators of Ontario, and has trained in the collaborative law process. She has also taught criminal and civil law at Conestoga College.

Lisa joined SorbaraLaw in September 2007 and now focuses her practice in the areas of wills, estate planning and estate administration.