







### Power of Attorney for Personal Care

**Getting your Questions Answered!** 

February 24, 2023

1:00 PM - 2:30 PM











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### **Respecting Privacy and Confidentiality**

EAPO appreciates there may be personal circumstances or issues which participants may wish to address. However, in keeping with our commitment to maintaining your privacy and confidentiality, today we will be answering general questions posed through the Q&A.

If someone wishes to discuss specific circumstances, we invite you to contact EAPO following this webinar to arrange for a confidential conversation so that we may further assist you.

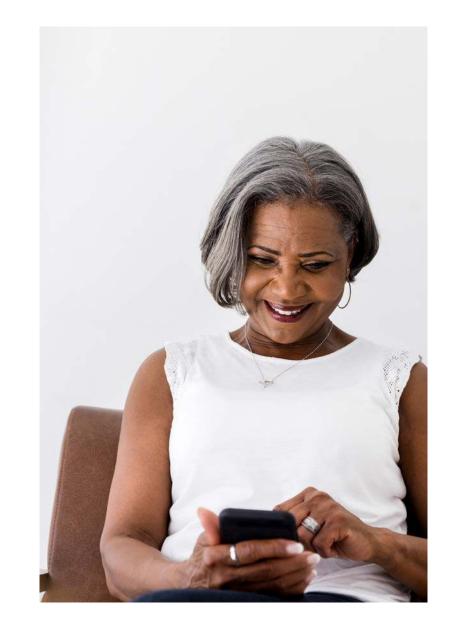


#### **MISSION**

EAPO envisions an Ontario where ALL seniors are free from abuse, have a strong voice, feel safe and respected.

#### **ACTION**

Raising awareness, delivering education and training, working collaboratively with likeminded organizations and assisting with service coordination and advocacy.



# STOP ABUSE – RESTORE RESPECT

SIMPLY PUT, WE ALL HAVE A ROLE TO PLAY

EAPO is mandated to support the implementation of Ontario's Strategy to Combat Elder Abuse.

Funded by the ON Government, under the Ministry for Seniors and Accessibility (MSAA)







## Ontario's Strategy to Combat Elder Abuse

1

#### **Public Education and Awareness**

A Province-wide, multi-media public education campaign to promote awareness about elder abuse and provide information on how to access services.

2

#### **Training for Front-Line Staff**

Specialized training to staff from various sectors, who work directly with seniors, to enhance their knowledge and skills to recognize and respond to elder abuse.

3

#### **Co-ordination of Community Services**

To strengthen communities across the province by building partnerships, promoting information sharing and supporting their efforts to combat elder abuse.



3 Pillars of the Strategy

## Power of Attorney for Personal Care Getting your Questions Answered

### Speakers

Megan Stuckey is a staff lawyer at the Sudbury Community Legal Clinic. She was called to the bar in 2017 and spent four years practicing criminal defence, appearing in the Ontario Court of Justice, Superior Court of Justice, and the Court of Appeal.

In 2022, she transitioned into Elder & Senior Law and currently runs the Advocacy North for Elders & Seniors program, providing legal services to low-income seniors across Northern Ontario.



**Megan Stuckey** 

Lawyer, Advocacy North for Elders & Seniors and the Sudbury Community Legal Clinic

## Power of Attorney for Personal Care Getting your Questions Answered

Shauna is an Occupational Therapist with over 25 years experience working with seniors and the disabled. She is based in the City of Kawartha Lakes but has been providing virtual and in-person assessments throughout central Ontario and beyond. She works with adults and seniors with memory or cognitive impairments to determine if they can understand and appreciate their financial, health, social and/or legal affairs in order to make informed decisions and to reason and problem solve how to manage their affairs.

Shauna was trained by the Capacity Assessment Office through the Ministry of the Attorney General in 2012 to become a Designated Capacity Assessor.

She is a member of the Kawartha Lakes Haliburton Elder Abuse Prevention Network. She has a wide network of connection in health care, legal and social services supports for clients who have cognitive impairment and are vulnerable. She is frequently called upon to do assessments with the most challenging clients and the most challenging circumstances. Shauna is firm and dedicated in her role as an advocate for people with cognitive impairment, whether that role involves advocating for their rights or protecting them from those who might take advantage of them.

She owns and operates CARES – Capacity Assessment & Risk Evaluation for Seniors. Over the past 9 years she has built a very busy professional practice and she is often sought out by legal, health and financial providers to provide a comprehensive, unbiased and fair assessment of a person's capacity to make their own decisions.



## Shauna MacEachern

Occupational Therapist and Designated Capacity Assessor, Capacity Assessment & Risk Evaluation for Seniors (CARES)

### Today's Topics

- 1. Elder Abuse
- 2. Picking your Attorney
- 3. Signing & Witnesses
- 4. Safe Storage & Sharing
- 5. Capacity Tests & Capacity Assessors

## Elder Abuse



## Can an Attorney for Personal Care restrict visitors or outings with friends or family?

- Only when a significant and imminent risk to health or safety is in evidence (not just feared)
- ➤ A POA-PC covers HEALTH, SAFETY, SHELTER, NUTRITION, CLOTHING and HYGIENE
- The attorney has no authority over who visits, whether a person has a phone, if a person can go out of lunch or what they talk about in private.



## Furthermore, residents in LTC have rights under the long term care act

Residents' rights are guaranteed by law

In Ontario, long-term care homes must follow a law called the Long-Term Care Homes Act. It includes a Residents' Bill of Rights.

The purpose of this Bill of Rights is to make sure that long-term care homes are truly homes for the people who live in them.



#### Right #6

#### Citizens' rights

"Every resident has the right to exercise the rights of a citizen."

#### In other words...

#### You keep all your rights as a citizen. These include:

- •your democratic rights, including the right to vote,
- •your equality rights, including the right to be protected against discrimination,
- the right to practise your religion,
- the right to express yourself,
- •the right to meet with anyone you wish, or to join any organization or group, and
- •the right not to have your possessions looked through or taken without your
- permission, except as allowed by law.



#### Right #9 Participation in decisions

"Every resident has the right to have his or her participation in decision-making respected."

#### In other words...

## You have the right to be involved in decision-making about all aspects of your life in the home.

The home should respect your right to participate by:

- making sure you are told about any changes they are considering,
- riving you all the information you need to help you understand the issues,
- ➤ giving you a chance to speak
- ➤ listening to what you have to say, and
- >trying to make room for your wishes.



#### Right # 15 – Communicate and visit in private

"Every resident has the right to communicate in confidence, receive visitors of his or her choice and consult in private with any person without interference."

#### In other words... You have the right to meet and talk with people in private.

- > You can invite your family, friends, or anyone else to visit you.
- ➤ You get to choose who visits you. Your family or substitute decision-maker might not want certain people to visit you and might even tell the home not to let them visit you. But neither they nor the home can stop anyone from visiting you if you wish to see them.
- > If you want to speak to someone alone, you have the right to do this. Tell the staff at the home if you do not have enough privacy in your room. They should make arrangements if you give them notice.
- ➤ You have the right to keep your mail private, whether you are sending or receiving it. No one is allowed to open your mail or read it unless you want them to.

## Can a POA –PC be changed/revoked if the attorney is misusing their authority?

- Yes, if the grantor has capacity
- ➤ A person is capable of giving a POA for personal care if they:
  - have the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
  - appreciate that the person may need to have the proposed attorney make decisions for the person. 1992, c. 30, s. 47 (1).



## What else can be done if an attorney is abusing their authority?

- Report to the Long Term Care Action
- Report to the Retirement Home Regulatory Authority
- Report to the Investigations Unit of the OPGT
- Report to the police
- Report to the bank or financial institutions
- Family can apply to the Consent and Capacity Board
- > Any interested party can apply for Guardianship to court

## Picking your Attorney

## Who can make health care decisions if I don't have a POA?

Relatives = related by blood, marriage or adoption and not divorced or legally separated Other relatives
Siblings
Parent with right of access only
Children / Parents / CAS
Spouse / Partner

Spouse/partner = includes common-law partners of one year. Not divorced or separated due to a breakdown in the relationship

Representative Appointed by CCB (HCCA, s. 33)

Attorney under POA (SDA, s. 46)

Court Appointed Guardian of the Person (SDA, s. 55)



### What are the responsibilities of an Attorney?

- Explain to the grantor the attorney's powers and duties, and encourage the grantor's participation in decisions
- Act in accordance with the known wishes or instructions of the grantor or in the best interests of the grantor, and
- ➤ Generally, considerations of quality of life and the benefits of actions taken on behalf of the grantor



### More responsibilities of an Attorney:

- > Keep records of all decisions made on the grantor's behalf
- > Facilitate contact between the grantor, relatives and friends
- > Consult with relatives, friends and other attorneys on behalf of the grantor
- > Facilitate the grantor' independence
- ➤ Make decisions which are the least restrictive and intrusive to the grantor



### What are prior expressed wishes?

- An attorney for personal care or property is first to act within the prior expressed wishes of the grantor
- ➤ If that is no longer reasonable or possible then they must act in the best interests of the grantor
- ➤ Prior expressed wishes may be in any format written or verbal. In a POA-PC or an advanced planning document or on a napkin. If the POA knows what the wishes are, they are obligated to follow them to the best of their abilities
- ➤ NOTE COMMUNICATE YOUR WISHES!! Make sure everyone knows what you want.

### Who cannot be an attorney?

#### Substitute Decisions Act, s. 46(3)

A person may not act as an attorney under a power of attorney for personal care, unless the person is the grantor's spouse, partner or relative, if the person,

- (a) provides health care to the grantor for compensation; or
- (b) provides residential, social, training or support services to the grantor for compensation.
- ie. a son may pay rent to his mother, and also name her as his attorney

### Is the attorney ever compensated?

- > Yes, an attorney may be compensated
- There are specific rules and amounts for compensating an attorney for **property.**
- ➤ An attorney for personal care **may** be compensated if the POA provides for payment



## Can an attorney for personal care or property resign?

- Yes If a person can no longer act as attorney they can resign with a simple note.
- > The letter should be signed, dated and witnessed.
- The letter of resignation must be provided to the grantor, any other named attorneys and to all banks, lawyers, doctors or other agencies who have been relying on the power of attorney documents.



## If I don't have anyone I trust, can I appoint the PGT as attorney for personal care?

- PGT may be named as attorney if consent is obtained from them in writing (this is exceptionally rare)
- If you are uncertain you can name two or more people and require that they work jointly to agree on all decisions before anything can be done. (Two agree, two of three agree...)
- ➤ If you don't name anyone then your family will be the automatic SDM according to the hierarchy



### What is a triggering clause?

- > A POA document may have an "Effectiveness" clause.
- > In most cases this says the document is effective on signing
- However, more and more people are including clauses that say that document is not effective on signing but rather needs something to happen in order to trigger it's effect.
- Effectiveness clause may require note from doctor, opinion from two or more doctors, assessment by Designated Capacity Assessor or any number of other requirements to be met.
- ➤ If a trigger cannot be met or it is not specified how capacity is to be determined then a Designated Capacity Assessor is required.



# Question: If I am alone, adult children don't visit often, who is the proper person to ask about POA for personal care and property?

- There is no "proper" person. This depends on who you have in your life, that you would trust with your life.
- ➤ If you don't have anyone you would trust with all your money and/or to make decisions the way you would make them, you can choose not to do POAs and rely on the Office of the Public Guardian and Trustee as the decision maker of last resort.



# Question: Why would supportive family have to ask PGT to make decisions? Wondering if without a power of attorney is there guarantee family support people would be able to make decisions.

- ➤ Remember that capacity is domain specific. PGT is only decision maker for money (as statutory guardian of property).
- Family make the personal care decisions when they are available (as the SDM).
- There is no PGT involvement at all if there is a POA in place for money or care (PGT is last resort).
  - ➤ Property decisions can ONLY be made by the client, the POA-P or the Guardian (PGT or court appointed)
  - ➤ Personal care decisions are made by the client, the POA-PC, the family, the guardian or the OPGT Treatment decisions unit



# Question: If an incapable adult does not have family or a trustee and needs support with making decisions around personal care, who makes those decisions?

- ➤ Every person in Ontario has a substitute decision maker for medical treatment, long term care and support services (HCCA, 1996)
- ➤If there is no family available and/or willing then the Office of the Public Guardian and Trustee Treatment Decisions Unit is the SDM of last resort.
- ➤ The doctor or another regulated health care provider should generate a treatment plan and submit it to the OPGT to give consent. HINT a person with cognitive impairment needs support for ADLs due to a medical condition.

## Signing & Witnesses

### Can I alter the document once signed?

➤ Best not to make alterations directly on your document (ie. crossing out names, writing down phone numbers).

Always inspect a POA carefully for alterations, white-out.

## Can a POA be signed using audio-visual technology?

➤ With Covid-19, the legislation was amended to allow witnessing of POAs using audio-visual communication technology

One witness must be a lawyer

## A grantor has to be 16 to make a POA for Personal Care – how old can the witnesses be?

- ➤ Witnesses must be at least 18 years old (SDA, s. 10(2))
- Witness must not be your spouse/partner, your attorney, their spouse/partner, your child, a person under guardianship

#### Does the POA need to be notarized?

- No, the POA needs to be witnessed by two people, but they do not need to be a notary public or lawyer
- No requirement under law for notary
- However, some institutions may still request it (usually property related)

## If I go to a notary public, do they have to assess my capacity?

- The person who makes your POA will assess your capacity (ie. you, your lawyer)
- ➤ A Notary Public has the power to witness/attest to the execution of a document.

## Are the witnesses to a POA also verifying the person's capacity to sign?

Their role is to witness the signing of the document, not to determine the person's capacity to sign

Not expected to know the test for capacity

## Safe Storage & Sharing

If you distribute your POA, write down the names and dates so you know who has a copy of this document!

#### Where should I store the POA?

- Always keep an original copy of the document for yourself
- Store in a safe but accessible place (ie. with other legal/medical documents)
- > There is no POA registry

### Are digital copies valid?

The document must be signed and witnessed in person (no electronic signatures)

Most institutions require a physical copy of the POA to determine its validity (not a PDF, or picture of a POA)

### Should I give the POA to my attorneys?

- Your attorney should have an original/notarized copy, or know where to access one
- In the case of an emergency, you likely won't be able to access your own copy
- A POA for Personal Care is not valid unless you are deemed mentally incapable, so "safer" to distribute
- This is different from the POA for Property, which may be valid upon signing!

## Should I give my POA to my children?

> Every family is different

➤ If you have named your children as your attorneys, then they should each have a copy or know how to get a copy



**Question:** Sally asked me to be co-attorney with her executor. I signed a document but was not given a copy, it was given to the intended executor. When Sally went to hospital I did not have copy of document and I was not able to make decisions for her.

#### Answer:

- > A Will has an executor. An executor only has a role after a person dies
- A POA has an attorney. There can be one or the other attorneys to act, joint attorneys to act together or one or more substitute attorney to act if the first one cannot. You need to be clear on the writing in the document and what it asks of you. An attorney can only act while a person is alive.
- ➤ An executor and an attorney are not the same thing.
- It is vitally important that you understand the job description before agreeing to be an attorney or an executor. Make no mistake, these are jobs. They are not positions of honour, nor of respect. They require difficult decisions and careful consideration of the risks, benefits and consequences. Agreeing to be an attorney or executor should not be entered into lightly.

## Should I give my POA to my doctors?

- ➤ If you are receiving regular medical services, you may wish to provide your POA to the service provider
- ➤ Not all of your medical professionals need a copy ie. your dentist

## Does the LTCH or Retirement Home require a copy of my POA?

- No one can require that you make a POA or provide them with a copy
- You cannot be refused admission because you do not provide a POA

## How do I know the document is the latest signed document?

- Check the date of the document, and ensure there are no alterations to it.
- Must have the document someone saying "there's a newer one" doesn't count
- Disclose information to your friends/family while capable



## What If I cannot find the originals?

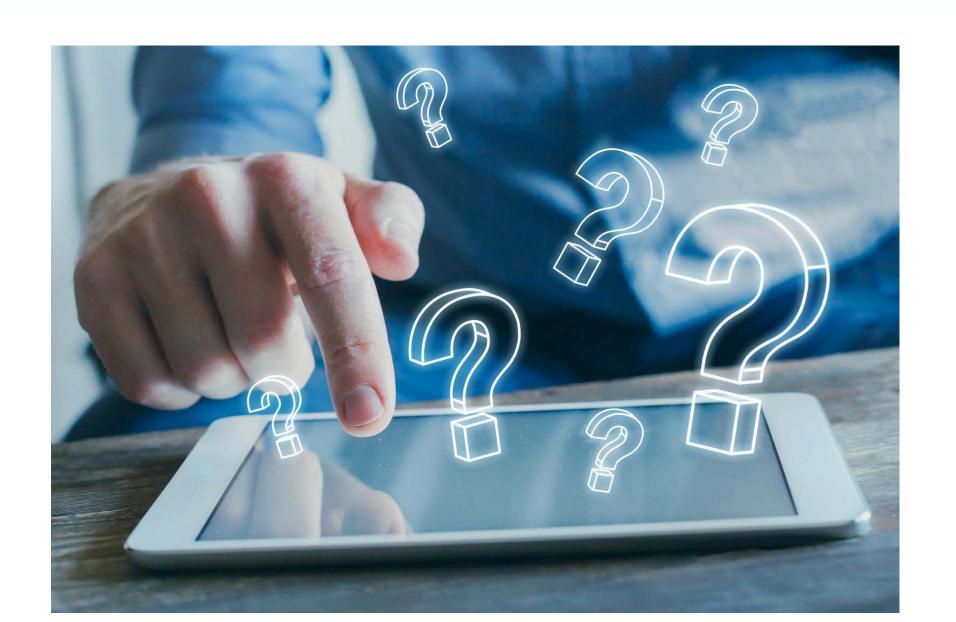
- Best practice for anyone taking direction from an attorney is to only accept an original or a certified copy of an original document.
- No document = No POA!
- ➤ Keep those originals safe, but accessible. An incredible amount of time, money and effort are expended trying to find the POA documents after a lawyer retired or moved practice or in the 30 years worth of papers in mom and dad's spare room.



## Question: What is a "Direction to Release Power of Attorney." Why won't the lawyer provide information about what the conditions are for release of the POA?

- People granting a POA for property or personal care have the right to put safeguards in place to prevent misuse of the document. In some cases they sign a POA document that is effective on signing, but then direct their lawyer to only release that document to the attorney when a condition is met, typically evidence of incapacity.
- If the lawyer will not release information to you, you may not be the authorized attorney and/or you may not have provided sufficient information to show incapacity.
- If you provide evidence of incapacity to make property and/or personal care decisions to the lawyer, then the lawyer should release the document(s) to the named attorney.

## QUESTIONS



## Capacity and Capacity Assessments



### Do I have to prove I am capable?

- Ontario has a legal presumption of capacity.
- There needs to be evidence of incapacity, not evidence of capacity.

## Correction – presumption of capacity

- Under Ontario legislation, you are presumed capable of making health care decisions, regardless of age
- At the last presentation, I stated that a person had to be 16. This is incorrect.
- ➤ It is up to the medical practitioner proposing health decisions to decide if the patient has capacity to make the decision(s) at hand
- For property decisions however, you must be at least 18 years old



### What does capacity mean?

- Capacity mean the ability to make decisions
- Capacity is a cognitive or a mental test, not function or physical test
- A person can be completely paralyzed and still legally capable of making decisions



#### What is the SDA?

The Substitute Decisions Act, 1992 outlines the legal test for determining capacity to make decisions.

### What is the HCCA?

➤ The Health Care Consent Act, 1996 further clarifies how consent and capacity are to be determined for treatment, long term care and support services decisions.



## What does capacity mean?

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### What types of capacity are assessed?

- Property (money)
- Grant POA
- Execute a Will
- Consent to
  Treatment / LTC

- Personal care:
  - > Health
  - > Safety
  - > Shelter
  - Nutrition
  - Hygiene
  - Clothing



### Who does a SDA capacity assessment?

- Designated Capacity Assessors are required to conduct assessment that have potential to change or remove a person's rights on an ongoing basis.
  - Guardianship applications to court
  - Statutory guardianship by the OPGT
- Designated Capacity assessors are medical professionals specifically trained by the Ministry of the Attorney General through the Office of the Public Guardian and Trustee



## Who does a Medical capacity assessment?

- All Regulated Health Professionals (Doctors, nurses, therapists, Social Workers) are required by legislation to evaluate capacity in order to determine if a client can consent to treatment, long term care admission or support services.
- Designated Capacity assessors MAY be asked to provide an opinion regarding capacity in difficult or contentious situations, but are not required.

## Who does a POA or Will capacity assessment?

- Lawyers are primarily responsible to determine if their client understands any legal documents and that they appreciate the risks and benefits of signing those documents.
- Designated Capacity assessors MAY be asked to provide an opinion regarding capacity in difficult or contentious situations, but are not required.



## Does being in capable in one area mean you are incapable in all areas?

- Absolutely not!!
- Capacity is time and situation specific. It must be assessed in relation to the decision at hand.
- Just because someone can or cannot make decisions in one area does not automatically translate to capacity or incapacity in another



## Can capacity assessments be done virtually?

- > Yes, if a person has access to technology and assistance to set it up.
- Client must have adequate hearing, vision and communication skills to participate fully over video



## What tests or documents does a doctor or service provider use to determine capacity?

- There are no standardized tests used to determine capacity.
- Medical records might support capacity or incapacity but the test still has to be applied:
- Does the person have the ability to understand and the ability to appreciate the decision they face in that moment.



### How are capacity assessments paid for?

- Medical capacity to consent to treatment or long term care or support services is covered under OHIP
- Legal capacity to make property, personal care, POA or Will decisions are usually out of pocket expenses for the client or family.



## How much do capacity assessments cost?

- ➤ A straight forward assessment by a Designated Capacity Assessor, for one area of capacity is typically \$800-1200.
- The price will vary where more than one area of capacity is assessed, by the level of expertise of the assessor and with more complexity including difficult family dynamics and court proceedings.
- > Travel is billed on top in most cases

## How long does an assessment by a Designated Capacity Assessor take?

- Most property assessments are 1-2 hours interview with the allegedly incapable person.
- ➤ Gathering of collateral documents and interviews with others can take another 1-2 hours
- Writing the report generally takes 4-6 hours

## How do I support my loved one to get assessed?

- In most cases, less is more. If you are calm and relaxed about the capacity assessment a person with dementia is more likely to be as well.
- It is not necessary for family to try to get a loved one to agree to a capacity assessment. Get them to agree to a visit with a nice man or lady to talk. That is all you need to do.
- > The onus is on the capacity assessor to provide rights advice.
- Even the most suspicious and difficult clients with dementia are more likely to cooperate if they are asked to prove they ARE capable and that they should make their own decisions.
- > It is all in the presentation.

### How do I locate a Designated Capacity Assessor?

https://www.ontario.ca/page/list-capacity-assessors#section-2

You can find assessors by region, municipalities, regulatory body and language.

Availability, experience and costs will vary

# How do you navigate the capacity fluctuation for deeming one incapable of personal care? le, assessment and doctor appointments?

- You cannot deem someone incapable for personal care on an ongoing basis.
- Every visit, every assessment, every treatment the health care provider proposing the care must determine capacity to consent at that specific point in time.



#### Senario:

I have a client whose POA has found a doctor to deem him incapable, but his other family members are saying that is incorrect and has proof that the current POA is grossly misusing funds. How may he move forward with appointing someone else?



#### Response:

- The test for capacity to make money decisions is NOT the same as the test to grant or revoke a POA
- > A Doctor is not applying the legal test to assess capacity to grant or revoke POA that is the lawyer's job
- A person may not be able to make decisions about their income, assets or expenses but may be able to make decisions about who they trust to manage those things on their behalf
- > See a lawyer about granting a new POA. Very likely the lawyer will ask for a capacity assessment by a Designated Capacity Assessor
- > If the client is not capable of revoking or granting a POA then a guardianship investigation or guardianship application to court may be options.



#### Scenario:

I recently spoke with my Mother's Family Physician to inquire about getting her POA's updated and her Will.

The Doctor did not agree that she was competent to make decisions about these documents

My mother does have dementia, but she is not incapacitated

The doctor had no advice or knowledge of where we could go to learn more.



#### Response:

- ➤ Would you ask a plumber why your car does not run? Don't ask a doctor for legal advice!
- ➤ A medical doctor is not generally trained to apply the legal test to assess capacity to grant or revoke POA that is the lawyers job
- Capacity is domain specific. Unless the doctor asked your mom questions about her Will and POA, her assets and her options, he did not even come close to assessing capacity to grant or revoke legal documents.

### Other



# Question: Can I do an advance directive without having an attorney for personal care?

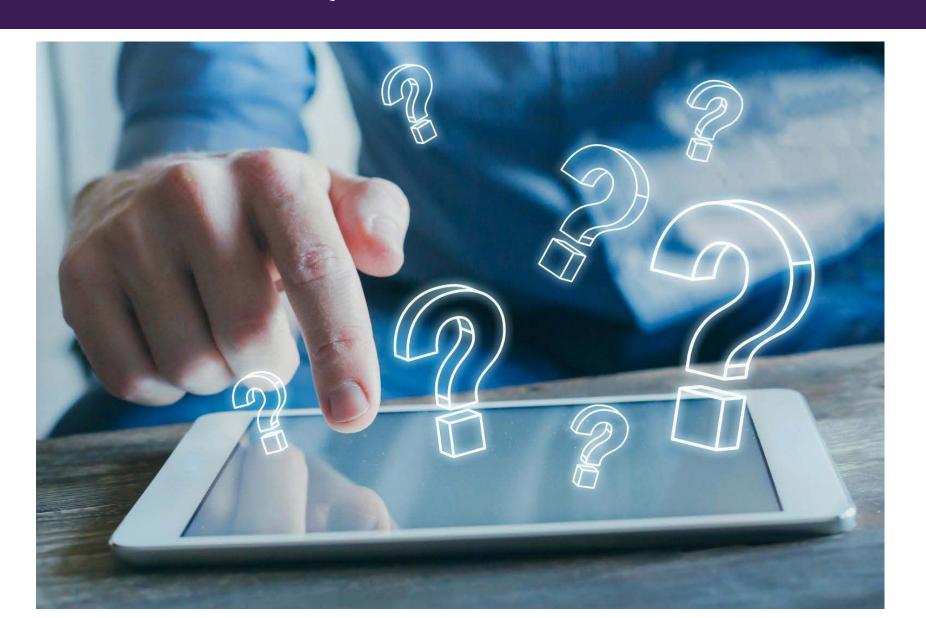
- ➤ A paper document can inform a person providing consent but cannot direct medical professionals.
- ➤ Every person has a SDM, even if they don't have a POA-PC. If there is no family, that SDM will be the Office of the Public Guardian and Trustee.
- ➤ You might draft advance directives and ensure that your family has them, or if that is not possible then your doctor and care providers can be asked to submit them to the OPGT if it becomes necessary for the Treatment Decisions Unit to provide consent on your behalf. No guarantees.

#### Can I rely on a POA made outside of Ontario?

#### Can I use my Ontario POA outside of the province?

- ➤ If your POA is from outside Ontario:
  - ➤ It is valid if it meets the requirements for a POA in Ontario (ie. two witnesses).
- ➤ If you leave Ontario:
  - Your POA is only valid outside of Ontario if it meets the legislative requirements of the new province

## QUESTIONS





#### **Megan Stuckey**



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Phone 888-535-4460 fax 888-975-0253

Designated Capacity Assessor

Advocate, consultant & resource for those
with memory or cognitive impairment

admin@cares-ot.ca

Capacity Assessment & Risk Evaluation for Seniors

### Resources and Supports

#### **CLEO's Steps to Justice**

- POA for Property
- POA for Personal Care
- Wills

#### CLEO's Guided Pathways Tools (also in French)

- Making a Power of Attorney
- Make a Simple Will
- Community Advocacy and Legal Centre (CALC)

  <u>Tips Sheets</u> (including POA, Financial abuse by a POA and Consider acting as a POA)
- Trillium Health Partners Guide to POA for Personal Care

### Resources and Supports

**Contact your local community legal clinic** 

Find your local clinic or call 1-800-668-8258

**Advocacy North for Elders and Seniors (Northern Ontario only)** 

**Advocacy Centre for the Elderly (ACE)** (for low-income seniors)

**ARCH Disability Law Centre** (specializes in disability rights law)

Pro Bono Ontario hotline: 1-855-255-7256

For support creating **Powers of Attorney** you can call Monday to Friday mornings, from 9:00 AM to 1:00 PM

# Provincial Supports and Services

#### **Advocacy Centre for the Elderly**

1-855-598-2656

www.advocacycentreelderly.org

#### **Law Society Referral Service**

www.lsuc.on.ca/lsrs/

#### **South Asian Legal Clinic**

416-487-6371

https://salc.on.ca

## Office of the Public Guardian and Trustee

1-800-366-0335

www.attorneygeneral.jus.gov.on.ca

# Support for Seniors

- ✓ Support
- ✓ Information
- ✓ Referral



## 1-866-299-1011



24/7, 365 days of the year



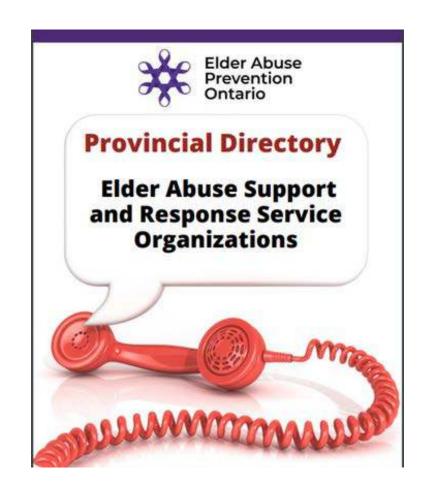
live counsellors, over 200 languages

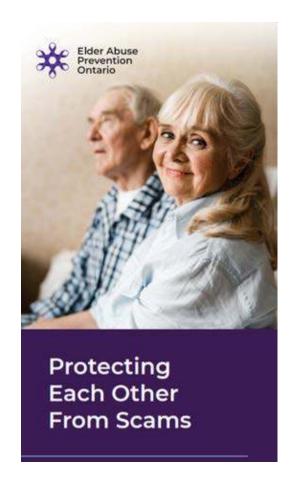


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