OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE

POWERS OF ATTORNEY AND “LIVING WILLS”

Questions and Answers

The Office of the Public Guardian and Trustee
Powers of Attorney and "Living Wills"
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THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE

Powers of Attorney and "Living Wills"

Some Questions and Answers

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SECTION 1

GENERAL INFORMATION

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1. What is a Power of Attorney?

A Power of Attorney is a legal document that gives someone else the right to act on your behalf.

2. Are there different kinds of Power of Attorney?

Yes. In Ontario there are three kinds of Power of Attorney:

- A Continuing Power of Attorney for Property (CPOA) covers your financial affairs and allows the person you name to act for you even if you become mentally incapable.
- A non-continuing Power of Attorney for Property covers your financial affairs but can't be used if you become mentally incapable. You might give this Power of Attorney, for example, if you need someone to look after your financial transactions while you're away from home for an extended period of time.
- A Power of Attorney for Personal Care (POAPC) covers your personal decisions, such as housing and health care.

3. Does the law require everyone to have a Power of Attorney?

No. Making a Power of Attorney is voluntary. No one can be forced to make one.

4. What does the term "attorney" mean?

The term "attorney" refers to the person or persons you have chosen to act on your behalf. He or she does not have to be a lawyer.

5. What does the term “mentally incapable” mean?

It means different things for different types of decisions and actions. For example, the level of mental capacity a person needs in order to make a valid power of attorney is different from the capacity needed to make personal care or financial decisions. The definitions are provided below under the topic headings.

6. What is a “living will”?

The expression “living will” is sometimes used to refer to a document in which you write down what you want to happen if you become ill and can’t communicate your wishes about treatment. It is quite common, for example, for people to write a “living will” saying that they do not want to be kept alive on artificial life supports if they have no hope of recovery. The term “advance directive” is also frequently used to refer to such a document. Some people use the phrase “proxy directive” to describe a document that combines a Power of Attorney and a “living will”.

To find out more about living wills and related matters you may wish to refer to the various materials that are available in bookstores and libraries on the subject.

7. Is a “living will” the same thing as a “Power of Attorney”?

No. A Power of Attorney is a legal document in which you name a specific person to act on your behalf. You can, however, write your treatment wishes (your “living will” or “advance directive”) as part of your Power of Attorney document so that you can be sure your attorney is aware of them. A “living will” just addresses your treatment and personal care wishes and does not need to name anyone or be written in any specific way.

8. Is a Power of Attorney or “living will” the same thing as a “Last Will and Testament”?

No. Your Last Will and Testament covers the distribution of your property after you die and only takes effect upon your death. A Power of Attorney and a “living will” only apply while you are alive and cease to be effective upon your death.

9. Do I have to register my Power of Attorney or “living will” with the government?

No. There is no requirement that these documents be registered. The government does not keep a registry. It makes sense, however, to make sure that the people in your life who need to know about these documents – especially your attorney – have a copy or know where to get one if needed.

10. Is a Power of Attorney or "living will" effective outside of Ontario?

It depends on the law of the particular place where you want to use the Power of Attorney. If you are going to move, or be out of the province for some time, you may want to check with a local lawyer to see if you need to make new documents.

11. If I don't make a Power of Attorney or a "living will", will the government automatically step in if I can't manage my own affairs?

No. In these circumstances a family member has the right to make your health care decisions or apply to become your "guardian" of property. Alternatively, someone else – such as a close friend - could apply to act for you in these matters. The government, through the Office of the Public Guardian and Trustee (OPGT), acts only in situations where no other suitable person is available, able and willing.

For more information about applications for guardianship please see the brochure entitled "Becoming a Guardian of Property".

12. Do I have to use a lawyer to make my Powers of Attorney or "living will"?

The law does not require you to use a lawyer's services. However, you may wish to consider hiring a lawyer, especially if your affairs are complicated.

13. Where can I get Power of Attorney and "living will" forms?

Your lawyer can draft Powers of Attorney and/or a "living will" for you. Alternatively, some bookstores sell forms and there are also some forms on the Internet.

The OPGT provides forms for both power of attorney for property and personal care. You may request these by calling 416-314-2800 or toll-free at 1-800-366-0335 or TTY: 416-314-2687. Access them on-line at http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf

Obtaining legal advice in creating these documents is something you should seriously consider.

Note: The Ontario Government's 1994 Power of Attorney Kit is still valid for use today.

14. Does the government also provide a “Will Kit” or similar forms that I can use to make my Last Will and Testament?

No. It is difficult to make one form that would adequately cover the many diverse situations that people may want to reflect in their Wills and provide all the information that people need to plan properly. We recommend that you hire a lawyer to assist you in making your Will.

15. Is my Power of Attorney (POA) valid?

If the document is properly completed, signed and witnessed, and the grantor had the legal capacity to grant the POA there are no further steps that need to be taken in order for it to be legally binding. Please note the POA must be witnessed by two individuals who are eligible to serve as a witness. Some people, for example, the grantor’s spouse and children, are not allowed to serve as a witness. Please see the OPGT’s POA Kit for complete instructions.

Neither the Attorney General’s office nor the Office of the Public Guardian and Trustee keep a record of Power of Attorney documents, so there is no need to submit one in order for it to be legally binding. It is also not necessary to have a lawyer review the documents, although this may be helpful to ensure they are executed properly.

A POA does not need to be notarized in order to be valid.

16. If there is more than one Power of Attorney, which one is valid?

Only the most recent Power of Attorney is valid unless you state, in that document, that you intend to have more than one Attorney.

17. What if someone refuses to accept my Power of Attorney (POA)?

It may have been that, despite your best intentions, the document was not executed properly. For instance, although it is signed and witnessed, it may be that one of the witness signatures is not valid owing to the witnesses relationship to the grantor or because the witness is also the appointed attorney. It is also possible that the grantor lacked the capacity to make a POA.

If the POA is executed properly, there may be some policy reason that an institution in Ontario has not accepted it. In order to protect from fraud, many institutions establish policies around the acceptance of POA’s. You should discuss this with them.

Please Note: Powers of Attorney are governed provincially, rather than federally, so each province has its own requirements. If you are trying to use a POA from Ontario, in another province, you may run into difficulty. However, it may be possible to have the POA validated by another province; you should seek legal advice with respect to this issue.

18. Can a Power of Attorney be challenged?

Yes, but only a court has the final say.

19. Will the OPGT agree to be appointed in a Power of Attorney?

The OPGT rarely consents to act under a Power of Attorney. The OPGT's mandate is to act as guardian for *mentally incapable* adults who have no one else available, willing and suitable to act on their behalf.

20. Will the OPGT help me fill out my Powers of Attorney or provide me with legal advice?

No. The OPGT cannot provide private legal services to individuals or assist you in completing the forms. Any questions about your personal situation should be directed to a lawyer.

21. Is a power of attorney document a public record?

There is no official register of power of attorney documents.

22. Where can I obtain more information?

You can access the OPGT's website at:
www.attorneygeneral.jus.gov.on.ca/english/family/PGT/

You can obtain a copy of the *Substitute Decisions Act* online at www.e-laws.gov.on.ca or by mail or phone at:

Publications Ontario
50 Grosvenor Street
Toronto, ON
M7A 1N8

1-800-668-9938 Toll Free in Ontario or (416) 326-5300
TTY: 416-325-3408 or Toll Free in Ontario 1-800-268-7095

Alternatively, you can access the statute electronically, online at:
www.e-laws.gov.on.ca Choose “statutes” and then “S” for the title of the Act.

Information about how to apply to the Consent and Capacity Board can be obtained from the Board’s website at: www.ccboard.on.ca or by calling the Ministry of Health Information Line at: 416-314-5518 or 1-800-268-1154 Toll Free in Ontario. TTY: 1-800-387-5559.

Please be advised that the OPGT cannot give individuals, professionals, facilities or organizations legal advice about specific cases or their own legal obligations. These questions should be directed to a lawyer. The Law Society of Upper Canada has a Lawyer Referral Service which will put you in touch with a lawyer for a half-hour telephone consultation at no charge to help determine your rights and options. For more information about this service, please contact the Law Society of Upper Canada at 1-800-268-8326.

Alternatively, you may contact JusticeNet which is a not-for-profit service promoting increased access to justice for low and moderate-income Canadians. The lawyers in the program offer their skills at a reduced fee to clients of limited means, based on a sliding scale that takes into account both income and number of individuals supported. They can be contacted at: Toll Free: 1-866-919-3219 or by e-mail at www.justicenet.ca.

SECTION 2

CONTINUING POWER OF ATTORNEY FOR PROPERTY

23. Do I have to use a specific form to make my Continuing Power of Attorney for Property ("CPOA")?

No. A special form is *not* required. But to be valid, the document must:

- Be *called* a Continuing Power of Attorney for Property or say that it allows your attorney to continue acting for you if you become mentally incapable;
- Name one or more persons to act as your attorney for property;
- Be signed by you and dated; and
- Be signed by two witnesses who saw you sign the document.

24. I made my CPOA before 1995 and it only has one witness. Does this make it invalid?

No. Although the law was changed in 1995 to require two witnesses, the new law accepts CPOAs that were made under the "old" law with only one witness.

25. Can anyone be a witness to my CPOA?

No. There are some restrictions. The following people *cannot* act as witnesses:

- your spouse, partner, child, or someone you treat as a child;
- your attorney or your attorney's spouse or partner;
- anyone under the age of 18;
- anyone who has a "Guardian of Property" (for example, someone appointed by a court because they are mentally incapable of managing their property); or
- anyone who has a "Guardian of Person" (someone appointed by a court to make personal care decisions for them because they are not mentally capable of making their own decisions).

Note: A person is your “spouse” if:

- you are married to them;
- you have lived together common-law for at least a year; or
- you have had a child together.

A person of either sex is your “partner” if you have lived with them for at least a year and you have a close personal relationship of primary importance to both of you.

26. If a witness to a Power of Attorney dies, does the power of attorney become invalid?

No. The subsequent death of a witness does not affect the validity of the power of attorney.

27. Who is allowed to make a CPOA?

Anyone who is 18 years of age or older and who has the necessary level of mental capacity can make a CPOA.

28. What level of mental capacity is needed to make a CPOA?

Mental capacity, in this situation, means that you:

- know what property you have and its approximate value;
- are aware of your obligations to the people who depend on you financially;
- know what you are giving your attorney the authority to do;
- know that your attorney is required to account for the decisions he or she makes about your property;
- know that, as long as you are mentally capable, you can revoke (cancel) this Power of Attorney;
- understand that if your attorney does not manage your property well its value may decrease; and
- understand that there is always a chance that your attorney could misuse his or her authority.

29. Who can I appoint as my attorney for property?

The law allows you to appoint anyone you choose as long as he or she is 18 years of age or more. You can name someone who lives outside the province. You can also name more than one person.

30. Should I appoint the same person that I appoint as my Estate Trustee (Executor) in my Will?

Your CPOA is only effective during your lifetime and has nothing to do with your Will. There is no law preventing you from naming the same person.

31. What should I think about in choosing an attorney for property?

This is a very important decision and needs a lot of careful thought. Remember, your attorney will have full access to your money and other property.

Consider whether the person is willing to take on this job, if needed. There is a lot of work involved and the law expects your attorney to meet very high standards. Consider whether the person is trustworthy, responsible and good at handling finances. Will he or she make sure you have all the things you need? Will your privacy be respected? Can you trust the person not to misuse your money? These are some of the things you should consider before you decide.

32. I want to name a specific family member but I'm worried that this will cause conflict. Is there anything I can do to prevent this?

There are a number of options that may help, depending on your situation and personal preferences.

Conflict may often be avoided by telling your family in advance and explaining the reasons for your choice. Sometimes conflict is created because the rest of the family doesn't know what your attorney is doing with your money. To avoid this, some people name more than one family member and require that all decisions and transactions be approved by both of them. This can reduce distrust but it can also create conflict if they disagree about decisions. Other people simply choose to specify in their CPOA that all the family must be kept informed about decisions and provided with full information. Another way to avoid family conflict is to name someone else, such as a close friend, a trust company or lawyer.

33. Is there anything I can do in advance to reduce the likelihood that my CPOA will be challenged?

If you anticipate that someone may challenge your CPOA by saying, for example, that you aren't mentally capable, it would be advisable to consult with a lawyer. You may also want to ask your doctor for a medical report confirming your capacity.

34. If I appoint more than one attorney will they have to do everything together?

Yes, unless you say in the CPOA that they can act "jointly and severally". If you include this phrase, either of your attorneys will be able to act alone on your behalf. If one is away or sick, for example, the other would still be able to sign cheques and give instructions on your behalf.

35. What should I do with my CPOA after I have completed it?

It depends on your situation. Many people choose to put it in a safe place that their attorney knows about and can access quickly if needed. Others choose to leave it with a trusted third party such as their lawyer, with specific instructions about when to release it.

If you do this, however, it is important to remember that it may be many years, if ever, before your CPOA is needed and the person you have left it with may have moved away or may have died in the mean time.

It is strongly recommended that you go to your bank and make sure they put a copy of your Power of Attorney on file and confirm the arrangement. You should also send a copy to any other financial institutions that you deal with.

You should review your CPOA every few years, just as you would your Will as circumstances can change.

36. Can my bank refuse to recognize my CPOA?

As long as your CPOA appears to be properly completed and witnessed, and the bank has no reason to suspect that it is invalid, it should be recognized. But it is wise to give your bank a copy of your CPOA so that they will have it on file.

37. What if my bank insists that I make my Power of Attorney on its own form?

You should think carefully before you sign these forms. The bank's form will likely only cover your bank accounts and investments with that institution and not any of your other assets. Signing it could also cause the Power of Attorney you have drafted to be revoked, leaving you with no one able to handle your other affairs if needed.

If the bank refuses your Power of Attorney you may wish to raise this issue with supervisors at the bank's head office, or consult a lawyer.

38. When will my CPOA take effect?

Your attorney will be able to use the CPOA as soon as it is signed and witnessed, unless you say otherwise in the document. You might, for example, want to say that the power of attorney can only come into effect once you have been determined to be incapable of managing your property. If you do this, it is wise to say how your incapacity will be determined. A letter from your doctor might be sufficient, for example. But think carefully before you set these types of conditions as they may result in complications and delays if the need to use the document arises. You may instead wish to simply have an unwritten agreement with your attorney that he or she will use it only if you can't look after these matters yourself and trust that your attorney will make the right decision at the time.

39. What does "incapable of managing property" mean?

It means that a person can't understand information about his or her property or finances, or is unable to appreciate what could happen as a result of making a certain decision (or not making a decision) about these issues.

40. What powers will my attorney have?

Unless you restrict your attorney's powers, he or she will be able to do almost anything that you can do concerning your finances. Your attorney can sign documents, start or defend a lawsuit, sell property, make investments and purchase things for you. Your attorney cannot, however, make a Will or give a new CPOA on your behalf.

Think carefully before restricting your attorney's powers. If you become incapacitated, and there are some assets that your attorney can't look after, you may need to have a guardian appointed. If no one comes forward to apply to be your guardian, the OPGT may be required to act for you.

41. Is my attorney entitled to be paid?

Yes. Your attorney is entitled to take payment from your funds at a rate specified by law unless you say otherwise in your CPOA.

If you want to set the amount yourself, or you don't want your attorney to be paid at all, write this in the document.

If your CPOA is silent on the matter of payment your attorney will be entitled to:

- 3% of money received;
- 3% of money paid out on the incapable person's behalf; and
- 3/5 of 1% of the average annual value of the person's assets.

42. Is my attorney required to keep my financial information confidential?

Yes, your privacy must be respected unless:

- you specifically authorize your attorney to disclose information by writing this in your CPOA; or
- your attorney needs to disclose information to carry out his or her duties or to abide by the law.

43. Is my attorney required to report to me?

It's up to you. Your attorney is required to provide you with a full accounting whenever you ask for one.

44. What if I, or someone else, discover that my attorney is mismanaging or stealing my money?

You may elect to revoke your Power of Attorney, demand a full accounting and consider making a claim for any lost funds. If the matter involves theft, a report to the police should be considered.

If someone else has evidence suggesting mismanagement or theft, and believes that you are mentally incapable, they may wish to ask the court to review the accounts and records your attorney is required to keep. This process is called a "passing of accounts". They may also wish to report the matter to the OPGT. The OPGT investigates allegations involving a mentally incapable person who is believed to be at serious financial risk.

45. If I change my mind, how can I cancel my CPOA?

To cancel your CPOA you must state in writing that you are "revoking" it. There is no special form for this statement, which is referred to as a "revocation", but it must be signed and witnessed by two people, the same way as your Power of Attorney.

You are considered capable of revoking your CPOA if you have the capacity to make one. This is addressed in question 25.

46. What should I do once I've cancelled my CPOA?

Give the revocation statement to your attorney. You should also tell everyone who is involved with your income or property – such as your bank and pension sources - about the revocation. Send them a copy. If you own a home or other real estate you may wish to consider having a lawyer register notice of the revocation on title to prevent any unauthorized dealings. It is also a good idea to get the original CPOA back from your attorney and destroy it.

47. What happens if the person I appoint as my attorney cannot act for me for some reason?

You can avoid this problem by naming one or more people as your "substitute" attorney. The substitute can act if your attorney dies, is unable to assume the role for some other reason, or chooses not to act on your behalf.

Alternatively, if you have not named a substitute you should consider making a new CPOA.

48. What happens if I don't make a CPOA and I become unable to manage my own finances?

It depends on the situation.

If you have no assets and get only pension income from the government, a family member or friend may be able to ask the pension source, e.g. Ontario Disability Support Program, Canada Pension Plan, for permission to manage this income on your behalf.

If your finances are more extensive, a family member or friend could apply to be your guardian. For more information about such applications, please see the brochure entitled "Becoming a Guardian of Property".

The OPGT may act as your guardian if there is no one else willing, able and suitable to take on this role. The OPGT's appointment as guardian may be mandatory in certain situations. In these cases, family members may still apply to act as the guardian in place of the OPGT.

SECTION 3

POWER OF ATTORNEY FOR PERSONAL CARE

49. Do I have to use a specific form to make my Power of Attorney for Personal Care ("POAPC")?

No. A special form is *not* required. But to be valid, the document must:

- Name one or more persons to act as your attorney for personal care in the event that you become mentally incapable;
- Be signed by you and dated; and
- Be signed by two witnesses who saw you sign the document.

50. Can anyone witness my POAPC?

No. There are some restrictions. The following people *cannot* be witnesses:

- your spouse, partner, child, or someone you treat as a child;
- your attorney or your attorney's spouse or partner;
- anyone under the age of 18;
- anyone who has a "Guardian of Property" (for example, someone appointed by a court to make decisions for a person who is mentally incapable of managing his or her property); or
- anyone who has a "Guardian of Person" (someone appointed by a court to make personal care decisions for a person who is not mentally capable of making his or her own decisions).

Note: A person is your "spouse" if:

- you are married to them;
- you have lived together common-law for at least a year; or
- you have had a child together.

A person of either sex is your “partner” if you have shared a place to live with them for at least a year and you have a close personal relationship of primary importance to both of you.

51. Who can make a Power of Attorney for Personal Care (POAPC)?

Anyone who is 16 years of age or older and who is mentally capable of making a POAPC can do so.

52. What level of mental capacity is needed to make a valid POAPC?

In this situation mental capacity means that you:

- understand whether the person you name as your attorney is truly concerned with your well-being, and
- understand that you may need this person to make decisions for you.

53. What types of decisions will my attorney for personal care be allowed to make?

Unless you restrict your attorney’s powers, he or she will be able to make almost any decision of a personal nature that you could normally make yourself.. Decisions about medical treatment, housing, food, hygiene, clothing and safety are examples of “personal care” decisions.

54. Who can I appoint as my attorney for personal care?

The person you appoint must be at least 16 years of age and mentally capable. You can name someone who lives outside Ontario. You *cannot* name someone who you pay to provide services to you, unless that person is a relative.

Give your choice very careful consideration. If the need arises, your attorney will be making profoundly important decisions about your health and quality of life.

55. Can I name more than one person as my attorney?

Yes. If you do this all attorneys will have to agree on every decision that is made for you, unless you write in your power of attorney that they can act “jointly and severally”. If you include this phrase, any one of your attorneys will be able to make decisions on their own if the other is unavailable for some reason. But think carefully before naming multiple attorneys – it can make things more complicated if difficult decisions need to be made quickly.

56. What should I do with my POAPC after I have completed it?

Most people choose to give it to their attorney or put it in a safe place that their attorney knows about and can access quickly, if needed. Others choose to leave it with a trusted third party such as their lawyer, with specific instructions about when to release it. If you do this, however, it is important to remember that it may be many years, if ever, before your POAPC is needed. The person you have left it with may have moved away or even died.

It is strongly recommended that you tell your doctor and other health care providers about the Power of Attorney and how to reach your attorney if needed.

You should review your POAPC every few years, just as you would your Will as circumstances can change.

57. When will my Power of Attorney for Personal Care come into effect?

Unlike a Power of Attorney for Property, a POAPC may only be used during a time that you are mentally incapable of making your own personal care decisions. It is up to your attorney to decide whether you are mentally incapable, with a few exceptions. If the decision is about medical treatment or admission to a long-term care facility, a health professional must determine whether you are incapable of such decisions before your attorney may act. In addition, you can say in your POAPC that your attorney is required to get independent evidence of your incapacity - a letter from your doctor, for example – before he or she may act on your behalf.

You should also know that your attorney will only be able to make those personal care decisions that you cannot make yourself. You might, for example, be incapable of making a serious health care decision but still be able to make your own choices about routine day-to-day matters.

58. What does “incapable of making personal care decisions” mean?

It means that a person can’t understand the information that is relevant to the particular personal care decision or can’t appreciate what could happen as a result of making a certain decision (or not making a decision) about the matter.

59. How will my attorney make decisions for me?

If you have written a “living will” or “advance directive” that applies to the situation, your attorney is legally obliged to follow your wishes, if possible. If you told people, while you were capable, what you want, your attorney must try to follow your wishes, even though they are not written down.

If you have not provided these types of instructions then your attorney will decide what he or she believes is in your best interests in the circumstances.

60. What if my attorney makes decisions that are not in accordance with my wishes or my best interests?

Your health care providers or the long-term care authorities can apply to a tribunal called the Consent and Capacity Board if they believe that your health or long term care decisions are not being made properly by your attorney. The Board will review the situation and can direct your attorney to make the proper decision.

The court has the authority to remove your attorney and appoint a guardian in his or her place.

If the OPGT receives notice that you are incapable and suffering serious harm as a result of your attorney's decisions, it will make inquiries and may ask a judge to remove your attorney if this is the only way to protect you.

61. Is my attorney required to keep my personal information confidential?

Yes, your privacy must be respected unless:

- you specifically authorize your attorney to disclose information by saying so in your POAPC; or
- your attorney needs to disclose this information to carry out his or her duties or to abide by the law.

62. If I change my mind, how can I cancel my POAPC?

To cancel your POAPC you must state in writing that you are "revoking" it. There is no special form for this statement, which is referred to as a "revocation", but you it must be signed and witnessed by two people, the same way as your Power of Attorney.

You are considered capable of revoking your POAPC if you have the capacity to make one. This is addressed in question 49.

63. What should I do once I've cancelled my POAPC?

Give the statement to your attorney. Give a copy to any of the health care providers or caregivers who are aware of the power of attorney. It is also a good idea to get the original POAPC back from your attorney and destroy it, if possible.

64. What happens if the person I appoint as my attorney cannot act for me for some reason?

You can avoid this problem by naming one or more people as your "substitute" attorney. The substitute can act if your attorney is unable to assume the role or chooses not to.

65. What happens if I don't make a Power of Attorney for Personal Care?

If you become incapable of making decisions about medical care or about admission to a long term care facility, a family member would automatically have the right to make these decisions for you unless someone else is appointed by the Consent and Capacity Board to be your representative. If there is no family member or representative who is available capable or willing, the OPGT is required to make these decisions on your behalf.

In a limited number of situations where the situation is very complicated or there is a dispute, the court may appoint a "Guardian of the Person" who will have exclusive authority to make your personal care decisions.

Alternate formats of this brochure are available upon request. Please contact 416-314-2803 or toll free 1-800-366-0335.

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