

Consent, Capacity & Legal Decision Making Law in Ontario

Why are there laws about decision-making?

- All of us have to make certain important decisions, which could be about money, health care, where to live, how to dress and so on.
- Everyone should get to decide these personal issues for themselves if at all possible.
- Most decisions relate to two broad areas of decision-making: property decisions and personal care decisions.

What are property decisions?

- Property decisions have to do with finances – how to spend or invest money; managing real property such as a house; administering funding to support people in community; applying for Ontario Disability Support Program (ODSP) benefits; or managing a Registered Disability Savings Plan (RDSP).

What are personal care decisions?

- Personal care decisions have to do with a person's health care, nutrition, housing, clothing, hygiene, and safety. For example, this may include consenting to a medical procedure or choosing where to live.

What does it mean to be “capable” of managing property?

- This means having the ability to: understand information relevant to the decision; and appreciate the consequences of the decision.
- For instance, if you were thinking about buying a car, you might need to understand whether the price of the car is reasonable and appreciate that you will have to keep the car registered and insured.

What does it mean to be “capable” of making personal care decisions?

- Just like with property, having the ability to: understand information relevant to the decision; and appreciate the consequences of the decision.
- For instance, if the decision concerns medical treatment, you might need to understand the nature of your medical condition and appreciate the risks or side effects of the treatment.

If someone does not trust my judgment, do they get to decide for me?

- No. According to the law, there is a *presumption of capacity*.
- This means it is presumed that all adults can decide for themselves unless there is evidence suggesting otherwise.
- You are not incapable just because someone disagrees with your decision.
- Some decisions are more difficult than others. A person who may not be considered capable of making complex decisions could be capable of making simpler ones, perhaps with some support.

What is substitute decision-making?

- If there is evidence that someone might be incapable, then another person might need to make decisions instead. This person is called a substitute decision-maker.
- One type of a substitute decision-maker is an “attorney,” and another is a “guardian.”
- If an incapable person has no other substitute decision-maker, a government official called the Public Guardian and Trustee can make decisions instead.

What is an attorney?

- An attorney is someone you have chosen to be your substitute decision-maker by signing a power of attorney document – either a Continuing Power of Attorney for Property or a Power of Attorney for Personal Care.
- The law has a test about whether someone is capable of signing this document.

Who should I choose as my attorney?

- The attorney should be someone you know well and trust. You should also let this person know that you have selected him or her.
- If you change your mind, you can “revoke,” or cancel, the Power of Attorney at any time. Then you could give a new Power of Attorney naming a different person.

What is a guardian?

- A guardian is another type of substitute decision-maker. Unlike an attorney, a guardian is usually appointed by a court.
- The individual loses all decision-making rights, and the guardian makes decisions instead.
- There are many concerns about guardianship. For instance, it may violate the legal human rights of the “incapable” person.
- In addition, the process of appointing a guardian is complex, expensive and time-consuming, so this solution should only be used as a last resort.

If the law considers me incapable, do I have to have an attorney or a guardian?

- No. For some decisions, a substitute decision-maker can act without being formally appointed.
- For instance, if you have ODSP income, then another person can apply to become your ODSP trustee and manage that money.
- A parent, spouse or common law partner can be the plan holder for an RDSP.
- A family member can consent to medical treatment, admission to long-term care, and the collection, use or disclosure of personal health information.
- However, family members (even parents) do not have automatic rights to make all decisions for you.

If you think that you or someone in your family may require support when making decisions, it would be a good idea to talk to a lawyer with experience in this area before taking any steps that may impact your or your family member's legal rights.

Additional Resources:

- Community Living Ontario: Inspiring Possibilities Guide – www.planinspiringpossibilities.com
- Canada Charter of Human Rights & Freedoms - <http://laws-lois.justice.gc.ca/eng/Const/page-15.html>
- Ontario Human Rights Code - <https://www.ontario.ca/laws/statute/90h19>
- Substitute Decisions Act - <https://www.ontario.ca/laws/statute/92s30>
- Health Care Consent Act - <https://www.ontario.ca/laws/statute/96h02>
- Office of the Public Guardian & Trustee - <https://www.attorneygeneral.ius.gov.on.ca/english/family/pgt/>
- CLEO – Continuing Power of Attorney for Property - <http://www.cleo.on.ca/en/publications/continuing>
- CLEO – Continuing Power of Attorney for Personal Care - <http://www.cleo.on.ca/en/publications/power>

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