

Powers of Attorney FAQ

1. In legal terms what is meant by “quality of life”?

The phrase “quality of life” should have the same meaning when used in a power of attorney as it does in any other context. The Concise Oxford Dictionary defines “quality” as: degree of excellence; relative nature or kind of character; of good, high, poor, etc. Life is defined as a state of functional activity.

If there is no reasonable expectation for a substantial improvement in what the attorney believes the grantor would consider a very poor degree of “functional activity”, and where such degree of functional activity is as a result of an injury, disease or illness suffered by the grantor, then the attorney must take this into account when he or she decides whether to consent to a certain course of treatment on behalf of the grantor.

2. When is a relationship considered common-law?

The Act uses the term “spouse” and defines it as being “a person of the opposite sex”

a. to whom the person is married, or

b. with whom the person is living in a conjugal relationship outside of marriage if the two persons,

i. have cohabited for at least one year,

ii. are together the parents of a child, or

iii. have together entered into a cohabitation agreement under section 53 of the Family Law Act.

The definition of “spouse” in this Act is not affected by Bill 5, the province’s response to the Supreme Court of Canada decision in *M. v. H.*

3. How do we register the Power of Attorney?

There is no longer any requirement to register the power of attorney document.

4. What kind of questions determine legal capability?

There are two different tests for capacity which affect the validity of a power of attorney for personal care and its use.

Test One: This test deals with whether the grantor is capable of giving the power of attorney. Section 47(1) states that a person is capable of giving a power of attorney for personal care if he or she (a) has the ability to understand whether the proposed attorney has a genuine concern for the person’s welfare; and (b) appreciates that the person may need to have the proposed attorney make decisions for the person.

Test Two: This test determines whether a person is actually capable (or incapable) of personal care. Section 45 states that 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 reasonably foreseeable consequences of a decision of lack of decision.

If the first test is satisfied, the power of attorney is valid (if, of course, it has been signed and witnessed properly). If the second test is met, then the power of attorney may be used (subject to other requirements).

5. Can you arbitrarily change your P of A? Whom must you notify?

A power of attorney can be arbitrarily changed simply by executing a new one, so long as the grantor is capable

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in accordance with the first capacity test above at the time the new power of attorney is executed. The new power of attorney revokes the old one. Although there is no requirement for notification, the former attorney should be notified.

6. Can you leave oral instructions for your P of A, for example, videotape or cassette?

Section 66 of the Act requires the attorney to ascertain the wishes or instructions made by the grantor while capable. A later wish or instruction prevails over an earlier one. Section 66(4) requires the attorney to take into consideration the values and beliefs of the grantor. There is nothing in the Act preventing the grantor from expressing these wishes or beliefs orally or using other media.

7. How do you word health care instructions - CPR, coma, life support?

The Act does not contain any requirement regarding the wording of such instructions. It appears to be a matter of personal preference. If such health care instructions are to be put into written form, then they should be as clear as possible to the attorney, or in the alternative, give sufficient discretion to the attorney so that he or she can feel comfortable making the decision. A frequently used form is found at the end of this text.

8. What are "heroic measures"?

This phrase refers to artificial means or procedures for prolonging life where the patient would otherwise not survive.

9. Should you authorize your P of A to be paid expenses?

The Act states that a power of attorney under a continuing power of attorney may take annual compensation from the property in accordance with the prescribed fee scale. The compensation may be taken monthly, quarterly or annually.

The power of attorney may take an amount of compensation greater than the prescribed fee scale allows,
a. in the case where the Public Guardian and Trustee (PGT) is not the attorney, if consent in writing is given by the PGT and by the incapable person's guardian of the person or attorney under a power of attorney for personal care, if any; or

b. in the case where the PGT is the attorney, if the court approves.

With regards to compensation for attorneys for personal care, section 90 of the Act states that the Lieutenant Governor in Council may make regulations prescribing circumstances in which a person's attorney under a power of attorney for personal care may be compensated from the person's property for services performed as attorney, and prescribing the amount of compensation or a method for determining the amount of the compensation.

For additional information on this subject, please contact Michael J. White

10. Instructions to my Personal Care Attorney

The following are my specific instructions to my attorney with respect to decisions concerning my personal care:

a If at any time I should sustain an injury, disease or illness which results in severe physical or mental disability from which there is no reasonable expectation of either a substantial recovery or a substantial im-

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provement in the quality of life from that then being experienced by me as a result of such disability, for even a limited period of time, I direct that I be allowed to die and not be kept alive by medications, artificial means or “heroic measures”, and I direct that any such medications, means or measures that would keep me alive in those circumstances be withheld or withdrawn. I do, however, ask that medication be mercifully administered to me or medical or surgical procedures be taken to alleviate suffering even though this may shorten my remaining life. If a Donor wishes to make a donation to charity, a Charitable Remainder Trust (“CRT”) is a very tax effective method of accomplishing the desired result.

b Measures of life support in the face of impending death that are especially abhorrent to me include:

- i Prolonged electrical or mechanical resuscitation of my heart when it has stopped beating.
- ii Prolonged nasogastric tube feedings when I am paralyzed and no longer able to swallow.
- iii Mechanical respiration by machine when my brain can no longer sustain my own breathing.