

# Justice & Health Partnership Workshop Series: Powers of Attorney and Wills

Presented by the Community Advocacy & Legal Centre



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# CALC: Who Are We?



- ☞ We are a non-profit community legal clinic and provide **FREE(!)** legal advice, assistance and representation to people living on a low income.
- ☞ We provide service to Hastings County, Lennox & Addington County, Prince Edward County + Tyendinaga Mohawk Territory.
- ☞ Our main office is in Belleville, but we have satellite offices in Trenton, Madoc, Marmora, Tweed, Bancroft, Picton, Napanee and Amherstview.
- ☞ We are funded primarily by Legal Aid Ontario (LAO).

# How Can CALC Help?

☞ We provide legal services in the following areas:



Tenant Rights



Consumer &  
Debt Law



Income Security  
(OW, ODSP, CPP)



Employment  
and WSIB



Human Rights  
and Education



Seniors Issues  
(incl. Powers of  
Attorney and Wills)

☞ We also do Public Legal Education, Law Reform and Systemic Advocacy.

☞ We do not practice long or short term disability law, immigration law, family law, criminal law, real estate, or estates law.

# Getting Help from CALC

- ∞ Clients can call us directly, or come in-person to our Belleville office (satellites are by appointment only)
- ∞ Clients will speak to an intake worker, who will gather some basic information about their situation and give some legal information
- ∞ Clients will then be set up for a telephone or in-person appointment with a legal worker for legal advice – the wait time varies by area of law



# Getting Help from CALC

## Service Provider Hotline:

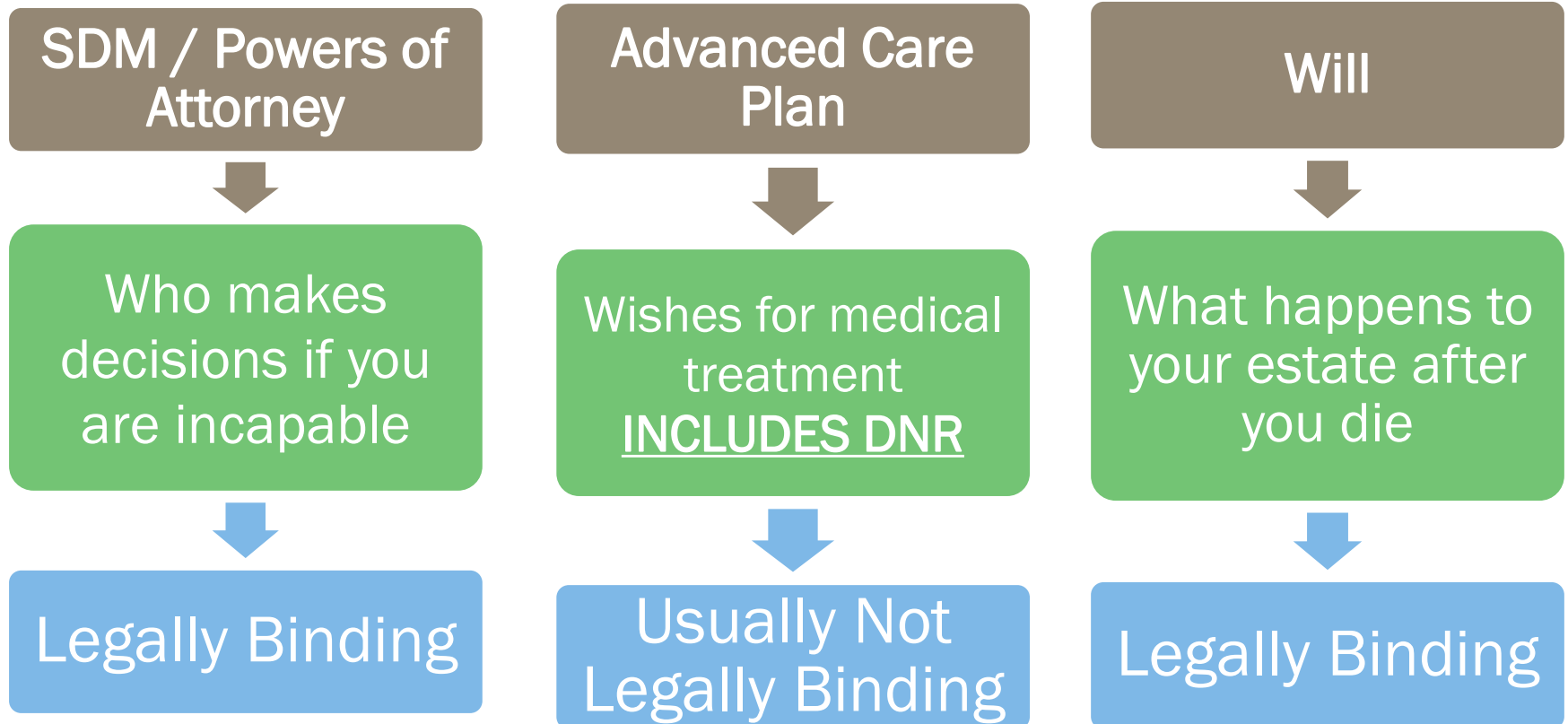
- ☞ If you call us for help and identify as a healthcare professional, you will immediately be put through to the on-duty lawyer.
- ☞ If you are calling and have the client with you, the lawyer can give advice to your client right away.
- ☞ If the line is busy and you have to leave a voicemail, we will get back to you the same day – please feel free to give direction for best time to call you back.

## Other options:

- ☞ Referral form - we will call your client directly.
- ☞ Email - [calc@lao.on.ca](mailto:calc@lao.on.ca)

# The Legal Landscape – POA/Wills

There are three pieces to consider:



# Powers of Attorney

Does my client need a POA if they have a Will?

- ✎ Yes. Wills and POAs do different things.
- ✎ A Will deals with your estate after you die.
- ✎ A POA says who makes decisions while you are still alive, but no longer able to make decisions yourself (i.e., in a coma, advanced dementia).

# Powers of Attorney

## What is a Power of Attorney (POA)?

- ∞ A POA is a legal document that gives someone else the right to make decisions on your behalf.
- ∞ In Ontario there are two types of POA:
  - **Property** = money/house/things
  - **Personal Care** = medical treatment, admission to long term care, food, hygiene, clothing, safety, shelter...

## What is a Substitute Decision Maker (SDM)?

- ∞ A SDM is the person who will make decisions about your medical treatment if you are incapable and you do not have a POA.

# Substitute Decision Makers

## SDM hierarchy for health care decisions:

- ∞ 1. Guardian appointed by the court
- ∞ 2. Attorney for personal care
- ∞ 3. Representative appointed by the Consent and Capacity Board
- ∞ 4. Spouse, common-law spouse or partner
- ∞ 5. Child (over the age of 16) **AND/OR** Parent with Custody Rights
- ∞ 6. Parent with Access Rights only
- ∞ 7. Brother or sister
- ∞ 8. Any other relative by blood, marriage or adoption
- ∞ 9. The Office of the Public Guardian and Trustee (OPGT)–they are SDM of last resort if there is no other person to act.

(Health Care Consent Act, 1996)

# Powers of Attorney

## What does the term “attorney” in POA mean?

- ✎ The term “attorney” refers to the person you’ve chosen to act on your behalf. It does not mean lawyer.
- ✎ Usually it is a family member or close friend.
- ✎ You can have more than one person as your Attorney. You can also name a back-up (substitute).

# Powers of Attorney

## Who is capable of completing a POA?

- ∞ Anyone over the age of 18 ( age of 16 for Personal Care) who has the necessary mental capacity can do a POA.

## What does “mental capacity” to make a POA mean?

- ∞ The test for mental capacity is set out in the *Substitute Decisions Act*. It is slightly different for Property and Personal Care.
- ∞ If you lack mental capacity, you cannot execute a POA.

# Powers of Attorney

## Who decides whether your client has mental capacity to do a POA?

- ∞ If a lawyer is doing the POA, they will decide if your client has the necessary capacity.
  - Some lawyers may request a capacity assessment or a doctor's note before they will do the POA. This is especially likely if they have a concern about capacity.
- ∞ Some people do their own POA. If your client is doing their own POA, then they are essentially assessing their own capacity.

# Powers of Attorney

If someone does not have a POA for Care:

- ✎ They would make decisions for themselves until they were no longer mentally capable.
- ✎ When no longer mentally capable, their SDM appointed via the hierarchy could make decisions **about medical care, admission to long term care, and personal assistance services received in long term care.**
- ✎ It is important to note that non-POA SDM's do not have legal authority to make other types of personal care decisions (i.e., nutrition, clothing, hygiene, shelter). To gain legal authority, they would need to apply to court.

# Powers of Attorney

## What happens if there's multiple people in the SDM class?

- ∞ All people in the same class rank equally – however, to act, must be mentally capable, over 16 yo, willing, “available”
  - “available” means it is possible, within a time that is reasonable in the circumstances, to communicate with the person and obtain a consent or refusal.
- ∞ They all share decision-making responsibility equally.
- ∞ They may choose to appoint one SDM amongst them.

# Powers of Attorney

## What happens if the SDMs cannot agree?

- ⌘ If there is a disagreement among SDMs that cannot be resolved, the OPGT will have to step in to make the decision.
- ⌘ Alternatively, one of the SDMs could apply to court or the Consent and Capacity Board for better standing in the hierarchy.

# Powers of Attorney

Does the POA have to respect my client's wishes for their medical care?

- ∞ A POA (or SDM) must follow the wishes of the incapable person.
- ∞ If the wishes are unknown, or it is impossible to comply, then the POA must act in the person's best interests.
- ∞ “best interests” means considering the following factors:
  - The values, beliefs of the incapable person;
  - Whether the treatment is likely to improve the person's well-being, prevent it from deteriorating, or slow the rate of deterioration;
  - What will happen without the treatment;
  - Whether the expected benefit outweighs the risk of harm;
  - Whether less restrictive or less intrusive treatment would be as beneficial as the one that is proposed.

# Powers of Attorney

## If someone does not have a POA for Property:

- ∞ There is no SDM hierarchy for property decisions.
- ∞ If not mentally capable, the OPGT would have to make decisions about property. Usually this requires a capacity assessment.
- ∞ A relative would need to apply to the OPGT to gain authority.
  - If application is successful, relative would be appointed “statutory guardian for property”.
  - It must be a relative. Friends cannot apply.
  - This can be a lengthy process, requires families to produce financial management plan and other documentation.
  - There is a fee (\$382) to apply.

# Powers of Attorney

## When does a POA become effective?

- ∞ It depends on what the POA says.
- ∞ If the POA document doesn't say anything about when it is effective, that means it becomes effective RIGHT AWAY.\*
  - \* EXCEPT for decisions about medical treatment – the healthcare provider recommending treatment must assess capacity.

# Powers of Attorney

## Who decides if it is time to act as POA?

- ∞ If the **POA document doesn't say anything** about when it takes effect, the person who is appointed as attorney essentially decides when it is time to act. This should be done in consultation with the person who created the document.
- ∞ If the **POA appoints someone to decide** when it is time to act (ie. family doctor must say they are incapable), then that person must give their “ok” before it can be used.
- ∞ If the **appointed person won't say, or can't say**, then a capacity assessment will be needed before the document can be used.

# Powers of Attorney

## How can my clients get POAs done?

- ☞ They can go see a lawyer. They will usually charge \$50 - \$75. If your client is low income, they may be eligible for a free POA through CALC.
- ☞ They can call Pro Bono Ontario. This is a telephone hotline service available to people who are low to mid income earners. Lawyers that assist with Powers of Attorney are available Monday and Wednesday mornings from 9:30 AM to 11:30 AM. Clients can call toll free at 1-855-255-7256.
- ☞ They can do it themselves. The Ministry of the Attorney General has a “POA Kit”. They can call and request one: **1-800-891-0506**. The kits are also available online.

# Powers of Attorney

## How often should POAs be updated?

- ✎ Clients should be encouraged to review their POA every few years to make sure it still reflects their wishes – but there is no “expiry” to a POA.
  
- ✎ They may need to make changes if:
  - They or their attorney has changed their legal name;
  - Their attorney becomes unable to act;
  - Their attorney becomes unsuitable;
  - They or their attorney has moved out of the province or country.

# Wills

## What is a Will?

- ∞ A Will is a legal document that sets out what happens to your estate after you die.

## What is an Estate?

- ∞ Your estate is your money, investments, and anything you own, like your house, belongings, car, and pets.

## What is an Executor?

- ∞ An Executor (sometimes called an Estate Trustee) manages your estate after you die. They do this by following the instructions in your Will. Usually your executor is a family member or close friend.

# Wills

To do a Will, you have to have “mental capacity”. What does “mental capacity” to make a Will mean?

- ☞ Generally you have to know:
  - What a Will is;
  - What you have (your property);
  - Who is in your life (your family and friends who might expect to inherit something from you).
  
- ☞ If you do not have capacity, you cannot make a Will.
  
- ☞ If there is doubt as to whether you had capacity when you did the Will, it could be contested. It is better to do a Will early, when there are no concerns about capacity.

# Wills

## Who decides whether someone has the mental capacity to do a Will?

- ✎ The lawyer doing the Will would assess capacity.
  - Some lawyers may request a capacity assessment or a doctor's note confirming capacity before they will do a Will. This is especially likely if the lawyer has a concern about capacity.

# Wills

## What happens if you die without a Will?

- ∞ A family member or friend would have to apply to Court to be appointed as Executor.
  
- ∞ Your estate will be dealt with like this if you do not have a Will:
  - Your legal spouse gets the first \$200,000 from your estate.
  - If you do not have a spouse, your estate goes equally to your children (or next closest class of relatives, if you have no children either).
  - If you have no relatives at all, your estate would go to the government.

**NOTE: without a Will, a common-law spouse will not inherit.**

# Wills

## How can my clients get their Will done?

- ☞ They can go see a lawyer. Many lawyers will charge between \$250 - \$750, though it could be more if your client has a lot of assets or very complex wishes.
- ☞ If your client is a low income senior (60+), they may be eligible for a free Will through CALC. Note there is a long wait list for this service at the present time.
- ☞ Your client could do a Will themselves but we DO NOT RECOMMEND USING A WILL KIT. We strongly recommend clients speak to a lawyer rather than try to do it themselves.

# Wills

## How often should Wills be updated?

- ∞ Your client should be encouraged to review their Will every few years to make sure it still reflects their wishes – but there is no “expiry” to a Will.
  
- ∞ They may need to make changes if:
  - They or their executor has changed their legal name;
  - Their executor becomes unable to act or unsuitable;
  - They have changed their mind about certain beneficiaries;
  - Their children are now adults;
  - They or their executor has moved out of the province or country.

# Powers of Attorney and Wills

**QUESTIONS?**

# Contact Us

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