



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Legal Capacity, Decision-making and Guardianship: Final Report

Backgrounder #1

Powers of Attorney

1. What Does the LCO's *Legal Capacity, Decision-making and Guardianship: Final Report* Say About Powers of Attorney?

Powers of Attorney (POAs) are powerful and widely used legal documents that allow a person to appoint someone else to make decisions regarding the person's property or health and personal care. POAs are used in many situations, including where a person is unable to make decisions independently, such as during an acute illness or due to advanced dementia. The person giving the authority to make decisions is called the "grantor". The person appointed to make decisions is called the "attorney".

The LCO learned that POAs have many important benefits but that they are also often poorly understood or misused, resulting in financial abuse, confusion about who has decision-making authority, and a lack of transparency and accountability about their use.

The LCO's *Legal Capacity, Decision-making and Guardianship: Final Report* makes several recommendations to improve the system for creating, using and monitoring POAs in Ontario. The LCO's recommendations would retain the benefits of POAs while also:

- Improving the use and understanding of POAs in Ontario;
- Making it easier to deter and/or detect abuse or misuse of POAs; and,
- Providing more clarity and certainty for families, institutions, health care providers, professionals, and others who rely on POAs.

2. What Did the LCO Learn?

Powers of Attorneys are powerful and widely used legal documents that allow the grantor to choose a substitute decision-maker regarding their a) person's property or b) health and personal care decisions.

A lot of people or organizations rely on POAs to help them understand who is the correct decision-maker for important decisions. Individuals, families, health care professionals, financial institutions, legal professionals, government agencies and many others take instruction from POAs to determine who has the legal authority to make decisions for an individual in circumstances when the grantor is incapable of making decisions for themselves, or unable to make decisions in circumstances such as travelling.

In Ontario, any capable adult can make a POA and a lawyer's assistance is not required. There is no mandatory or required form for creating POAs in Ontario, although currently the Ministry of Attorney General provides free basic precedent kits.

The LCO learned that:

- POAs are important legal tools that give capable adults substantial control over who can make decisions on their behalf if the individual becomes incapable;
- That POAs should remain simple, flexible and accessible to people ;
- The role of an attorney is often very challenging. Family members and friends who often act as attorneys are frequently in difficult circumstances. The requirements for acting as an attorney should not be too onerous;
- The LCO heard many concerns about the misuse or abuse of POAs. *Misuse* of POAs occurs when persons appointed as attorneys do not understand their roles and responsibilities and act to the detriment of the grantor. *Abuse* of POAs occurs if persons appointed as attorneys take advantage of the POA for personal benefit. Both misuse and abuse can have serious consequences for the grantor. The LCO heard many concerns about financial abuse of older persons through POAs;
- POAs are rarely subject to outside scrutiny. In Ontario, there is no registry, monitoring system or regular external accounting requirements for attorneys appointed under these documents.

3. The LCO's Recommendations

Chapter Six of the LCO's *Final Report* includes recommendations to:

- Improve understanding by requiring attorneys to sign a Statement of Commitment acknowledging their responsibilities under the law;
- Require attorneys to deliver Notices of Attorney Acting to certain individuals when they begin to exercise their powers: this makes it easier to hold attorneys accountable for their actions; and

- Create a new optional role of “Monitor”: a person creating a POA could chose to appoint a Monitor who would have a legal right to visit with them, review their accounts and check that the attorney is fulfilling his or her responsibilities.

More information about the LCO’s *Legal Capacity, Decision-Making and Guardianship: Final Report* is available at <http://www.lco-cdo.org/>.