

CAN I VISIT MOM?

ISSUES RELATED TO ACCESSING RESIDENTS IN A LONG-TERM CARE HOME

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Living in a long-term care home can be a lonely and isolating experience, cut off from the outside world. One of the most important ways that a resident's day can be brightened up is by having a visitor. Unfortunately, residents may encounter issues in having visitors, and visitors may encounter problems when attempting to visit residents.

RESTRICTION BY HOME

The *Long-Term Care Homes Act (LTCHA)* has as its fundamental principle that a long-term care home is, "primarily the home of its residents".¹ As such, residents do not lose any rights that they might otherwise have in living on their own, including the right to have visitors of their choosing.

The Residents' Bill of Rights enshrines this right, providing that:

14. Every resident has the right to communicate in confidence, receive visitors of his or her choice and consult in private with any person without interference.²

If residents want to have visitors, they may do so. Homes are not entitled to interfere with a resident's visitors, including preventing them from visiting, restricting hours, or restricting place of visits. While the home may not interfere, the resident and their visitor should also be cognizant of other residents, so if visiting late at night, other sleeping residents should not be disturbed.

On occasion, the staff at a home may become unhappy with visitors. This often occurs when a visitor complains about care issues, is loud, visits at unusual times, or is otherwise seen as "difficult". Even in these situations, the law is on the resident's side: the home cannot interfere.

Trespass to Property Act

One way that homes will deal with these issues is by issuing a "Trespass Notice" to visitors, indicating that if the visitor returns, police will be called. It is our opinion that the home has no authority to issue such a notice. The *Trespass to Property Act (TPA)* says that it can only be used if the person is not "acting under a right or authority conferred by law".³ As visitors are acting under a right conferred by law, that being the *LTCHA*, the home has no authority to use the *TPA* to prevent visitors from attending. Further, challenging these notices is problematic. In order to do so, the person must: breach the notice; be given a ticket by police; and then request a trial, which can take many months to be heard. In the interim, visits may be difficult, if not impossible, which causes further stress and is unfair to the resident and their visitor.

Criminal Code

If the home believes that the visitor is acting in an illegal manner, police can be called. It would then be up to the police and the Crown to determine whether the person can be charged, and for the courts to determine guilt and possibly restrict the person's access to the home within that context. In most cases,

¹ *Long-Term Care Homes Act, 2007*, S.O. 2007, c. 8, s. 1

² *Ibid.*, s. 3

³ *Trespass to Property Act*, R.S.O. 1990, c. T.21, s. 2(1)
A finding of guilt brings a maximum fine of \$2,000.

however, the type of complaints that the home staff has about visitors, such as being interfering, loud, or swearing, are not criminal in nature and would not warrant any type of police involvement.

Restrictions on Visits

Homes are also not entitled to restrict visiting hours or dictate where visits will take place. Visitors cannot be restricted to lobbies or “supervised” areas as this is also interference. Visits to rooms, for example, can be very important when the person is the resident’s substitute decision-maker. It is important for substitute decision-makers to have access to residents in all areas, as they are the voice of the resident and instruct care when necessary. In other cases, the resident may want the visitor to come to their room as it is more comfortable for them, or it is difficult for them to visit in other areas.



Restrictions on Outings/Leaves of Absence

As discussed in our previous article, “Detention in Long-Term Care”⁴ homes also do not have authority to prevent residents from leaving the home for a visit, either for a few hours or longer.

ACE had a recent case in which a resident who wished to visit her daughter over the Christmas holidays was barred from leaving by the long-term care home as they did not believe it to be in her “best interest”. (There was no issue of capacity.) ACE quickly intervened and with the assistance of the Ministry of Health and Long-Term Care, the resident was able to spend Christmas with her family. The home owes residents a duty of care, which may be used in some circumstances where there is a serious safety issue related to an incapable resident. Nevertheless, for the most part, the home has no legal authority to prevent such outings.

RESTRICTION BY FAMILY, ATTORNEY FOR PERSONAL CARE OR SUBSTITUTE DECISION-MAKER

At times, a family member, attorney for personal care or substitute decision-maker may attempt to restrict a resident’s visitors or ability to go on outings with certain people. It is not uncommon for family members to tell the home that they should not allow another family member to visit, or that a friend should not be allowed to take Mom out to lunch.

In most cases, the person who purports to be giving instructions will not actually have any authority to do so. First, capacity to consent to a visitor is a very low capacity: if someone wants another person to visit, they may only need to know that they like the person and want them to visit. Second, even if the person is “incapable”, it does not necessarily authorize a third party, such as an attorney for personal care, to give or refuse consent on their behalf.⁵

⁴ Jane Meadus, *ACE Newsletter*, Vol. 12, No. 2, Fall/Winter 2015, at page 16

⁵ Court appointed guardians of the person may have wider areas of authority depending upon what is ordered by the court. However, given the rarity of these

Attorneys for personal care only have such authority as is granted by law. "Personal care" decisions are defined under the *Substitute Decisions Act, 1992*, as decisions relating to "health care, nutrition, shelter, clothing, hygiene or safety", and it is only in these areas that an attorney for personal care will have authority.⁶ "Visitors" or "outings" are not specified areas, and decisions can only be made by attorneys if the issue relates to one of the specified areas, which is generally "safety". If it can be shown that visitors or outings are unsafe, then they may have authority to make decisions on the person's behalf.

In cases where there are no attorneys or guardians of the person, there is no one with authority to make even these decisions on behalf of the resident. A substitute decision-maker under the *Health Care Consent Act, 1996*, for example, could not make decisions regarding visitors. Homes would therefore have to rely on other legal authority to deal with visitors where the safety of the resident was involved. They would have to go before a justice of the peace and lay an information under s. 810 of the *Criminal Code* to obtain a peace bond. Homes would need to seek legal advice before doing so.

An example of a case where a long-term care home was found to be non-compliant with the *LTCHA* by taking instructions from a substitute decision-maker was highlighted in an inspection report in May 2015. The resident's spouse, who was initially referred to as the "POA",⁷ instructed the administration that the resident's children, from whom she had been estranged, were not to be advised of her whereabouts, could not take her on a leave of absence, and that the POA was to be notified if anyone came to visit. Staff were notified of same. There was no evidence that any discussion had ever been held with the

guardianships and their complexity, they will not be discussed in the context of this article.

⁶ *Substitute Decisions Act, 1992*, S.O. 1992, s. 45

⁷ It was discovered later that the spouse was not the attorney for personal care and would only be the substitute decision-maker for treatment decisions if the resident was incapable.

resident or if she agreed with the visitor restrictions. A Compliance Order was issued stating as follows:

The licensee shall ensure that the right of the residents, including resident #500 to communicate in confidence, receive visitors of his or her choice and consult in private with any person without interference are fully respected and promoted.

The home shall review with resident #500 the visitor restrictions put in place by their SDM to determine whether or not these restrictions are acceptable to them.⁸

It is clear that the Ministry of Health and Long-Term Care took this matter seriously by issuing a compliance order once the inspection found this breach.

In our opinion, it would have likely have made little difference whether the spouse was acting as an attorney for personal care or as the substitute decision-maker. As there was no evidence that the resident was incapable of making the decision to have visitors, they would not have had any authority to make this decision on the resident's behalf.

CONCLUSION

In general, residents are entitled to visitors or to go on outings without interference by the long-term care home or their families or substitute decision-makers. Only in very limited circumstances where there are either criminal or serious safety issues involved can these parties interfere. Even then, the parties are limited in their legal ability to prevent same, and should seek legal advice when they believe that such restrictions are warranted.

⁸ Inspection No. 2015_323130_0004, Log No. H-001830-15, Resident Quality Inspection of Grace Villa Limited, London, May 14, 2015, Order No. 1, online: <http://publicreporting.ltchomes.net/en-ca/File.aspx?RecID=12499&FacilityID=20214>