

Capacity and Capacity Assessment – the Legal Framework You need to know

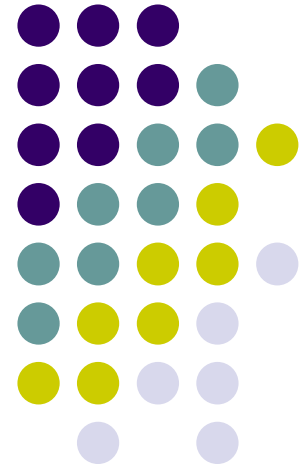
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Disclaimer

- The legal information provided in this education session and on these slides is NOT legal advice
- If you require legal advice you should consult with a lawyer or other appropriate legal professional.



Capacity – Overview

- Duties of Housing providers to accommodate
- What is Mental Capacity in the legal sense – what does Ability to Understand and Ability to Appreciate mean?
- What is a Capacity Assessment? Is a person “capable” if that person has not been “assessed”? When is a “formal” capacity assessment necessary?
- Who Assesses capacity for what purpose?
- Post Assessment – if Senior Incapable- Who is the SDM? SDM for what types of decisions?
- Role of the Ontario Public Guardian and Trustee
- Where to get help for the tenant / to get help with accommodations

When Capacity Issues may arise in Housing



- Signing a lease/ entering into a rental agreement
- While a tenant – paying/not paying rent or fulfilling other obligations as a tenant in respect to documents
- While a tenant – not taking care of self/unit
- While a tenant - refusing services/ help when needed

Duty of Housing Providers to Accommodate



- Ontario Human Rights Code - Excerpts from Policy on Ableism and Discrimination based on Disability (slides 6 – 12)
- “It is not discriminatory to refuse ...housing .. because the person is incapable of fulfilling the essential requirements. However, a person will only be considered incapable if their disability-related needs cannot be accommodated without undue hardship.

Principles of Accommodation



- The duty to accommodate is informed by three principles: respect for dignity, individualization, as well as integration and full participation.
- The duty to accommodate requires that the most appropriate accommodation be determined and provided, unless this causes undue hardship
- Human rights case law makes it clear that the purpose of the Code is to accommodate a person's needs, not their preferences. If there is a choice between two accommodations that respond equally to the person's needs in a dignified way, then the accommodation provider is entitled to select the one that is less expensive or less disruptive to the organization.



Undue Hardship

- The Code prescribes only three considerations when assessing whether an accommodation would cause undue hardship:
 - cost
 - outside sources of funding, if any
 - health and safety requirements, if any.

Accommodations in Housing



- Helping someone fill out application forms (e.g. for social or supportive housing)
- Adjusting tenant selection criteria (such as using a guarantor when other information, such as credit history or rental history, is not available¹⁹³)
- Modifying deadlines (such as deadlines to report income changes in social and supportive housing)
- Modifying ways that information is communicated to tenants
- Establishing a list of contact supports to call in emergency situations
- Working with outside professionals to address someone's needs, if agreed to by the tenant
- Considering someone's disability as a mitigating factor when addressing behaviour that would otherwise warrant imposing sanctions

Requirements of person being accommodated



The person with a disability is required to:

- make accommodation needs known to the best of their ability, preferably in writing, so that the person responsible for accommodation can make the requested accommodation, answer questions or provide information about relevant restrictions or limitations, including information from health care professionals
- take part in discussions about possible accommodation solutions . Although the person seeking accommodation has a duty to assist in securing appropriate accommodation that will meet their needs, they are not responsible for originating a solution
- It is ultimately the accommodation provider's responsibility to implement solutions, with the co-operation of the person seeking accommodation



Medical Information

- Generally, the accommodation provider does not have the right to know a person's confidential medical information, such as the cause of the disability, diagnosis, symptoms or treatment unless these clearly relate to the accommodation being sought, or the person's needs are complex, challenging or unclear and more information is needed.
- In rare situations where a person's accommodation needs are complex, challenging or unclear, the person may be asked to co-operate by providing more information, up to and including a diagnosis. In such situations, the accommodation provider must be able to clearly justify why the information is needed. However, wherever possible, an accommodation provider must make genuine efforts to provide needed accommodations without requiring a person to disclose a diagnosis, or otherwise provide medical information that is not absolutely necessary.



Health and Safety (Risk)

- Where a person's conduct is objectively disruptive due to disability and causes a risk, employers, housing providers and service providers must consider a range of strategies to address the behaviour.
- Strategies will include assessing, and where necessary, reassessing and modifying any accommodations that are already in place for the person, and/or providing or arranging for additional supports.
- Even where behaviour is correctly assessed to pose a risk, organizations should apply a proportionate response. If a real risk exists, the least intrusive means to address the risk must be used.
- High probability of substantial harm to anyone will constitute an undue hardship. In some cases, it may be undue hardship to attempt to mitigate risk, such as where the risk is imminent and severe.

Mental Capacity- why its Important



- Determines WHO is a “legal” decision maker for a particular purpose/decision
- No contracts/ agreements unless person has ability to understand / ability to appreciate info relevant to making a decision
- Other service providers may not be able to assist unless they know who is the decision maker for a particular purpose

Capacity – who is decision maker ?



- Capacity – two streams – Property and Personal care
- Property – anything related to financial decision making and financial management
- Personal care – decisions about WHERE to live (shelter), health care, nutrition, safety, hygiene, clothing



Property Decision makers

- Property
 - person if capable for that purpose;
 - Person's SDM (someone has to DO something to become SDM)
 - Attorney in a POA Property
 - Trustee under social Benefits or Federal Pensions
 - Statutory Guardian (created post assessment by a Capacity Assessor)
 - Court Ordered Guardian of Property
 - OPGT (under Notice of Continuance in Mental Health Act, or because Statutory Guardian or Court ordered Guardian under SDA)

Personal Care Decision Makers



- Person for self if capable
- SDM for Health Care (Hierarchy list in Health Care Consent Act) – ONLY treatment decisions and decisions about admission to LTC- Many of these SDMs are AUTOMATIC- nothing needs to be done post determination of incapacity for SDM to act
- Court Ordered Guardian of the Person



What is a Mental Capacity

- Mental Capacity is a socio-legal construct and its meaning varies over time and across jurisdictions
- “Social legal construct “means that the definition of mental capacity is a result of our understanding of capacity and is a **LEGAL DEFINITION** not a clinical definition – The law does reflect the learnings from clinical practice but the law defines what capacity is or is not for decision making
- “Over time” means that the law on mental capacity has changed a **GREAT DEAL** since the 1970s ...
- **NEED to look at PRESENT ONTARIO legislation**

Definition of Incapacity To Manage Property



- **Substitute Decisions Act s.6**

incapable of managing property if the person is **not able to understand** information that is relevant to making a decision in the management of his or her property, or is **not able to appreciate** the reasonably foreseeable consequences of a decision or lack of decision.

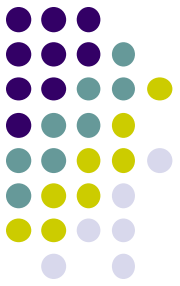
Definition of Incapacity For Personal Care



- **SDA s. 45**

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 or lack of decision.

Definition Of Capacity In Respect To Treatment, Admission To Care Facilities, And Personal Assistance Services



- **Health Care Consent Act s.4**
Able to understand the information that is relevant to making a decision about the treatment, admission, or personal assistance service as the case may be and **able to appreciate** the reasonable foreseeable consequences of a decision or lack of decision.

Mental Capacity for Decision Making



- Mental Capacity is issue specific – can be capable for some decisions and not capable for others
 - Person can lack capacity to manage property/ money YET still be capable of preparing a Power of attorney for Property
 - Person may lack capacity to make health care decisions but be capable of agreeing to services to provide for his or her care needs
- Capacity may fluctuate – may be capable at some times and not at others – capacity may need to be reassessed at time of decision even if previously assessed as incapable or capable

Mental Capacity for Decision Making



- Mental capacity for DECISION MAKING is **NOT** a **diagnosis** – person can be diagnosed as having have Alzheimer's and still be capable – Capacity to make decisions may become more of an issue at that point but the person may remain capable for some or all purposes for some time
- A person can be eccentric and still capable
- A person may have physical disabilities/ Communication disabilities and still be capable for decision making

Presumption of Capacity - SDA



2. (1) A person who is eighteen years of age or more is presumed to be capable of entering into a contract.

(2) A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care.

Exception

(3) A person is entitled to rely upon the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving or refusing consent, as the case may be.



Presumption of Capacity-HCCA

- **Health Care Consent Act s. 4 (2)(3)**

(2) A person is presumed to be capable with respect to treatment, admission to a care facility and personal assistance services.

Exception

(3) A person is entitled to rely on the presumption of capacity with respect to another person **unless he or she has reasonable grounds to believe that the other person is incapable with respect to the treatment, the admission or the personal assistance service, as the case may be.**

NO AGE FOR CONSENT TO HEALTH CARE– can be of very advanced age and still capable

Presumption of Capacity



- BUT presumption of capacity doesn't mean you ignore indicators/ behaviours that may be signs that person lacks capacity
- Presumption doesn't mean person is capable just because they seem to agree with what YOU think they should do or what you are asking
- Presumption of capacity doesn't mean that person is capable because they are not at risk of harm
- In many circumstances you may still need to question (and then assess the capacity) because you need the consent / agreement of a CAPABLE person to do something



Who Assesses Capacity?

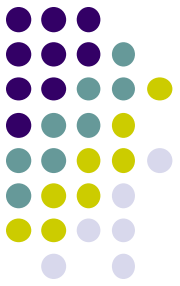
- Sometimes defined by Statute
 - “Capacity Assessors” to trigger a statutory Guardianship for property
 - “Health practitioners” for treatment
 - “Evaluators” for Capacity for Admission
- Sometimes in common law (i.e. contracts)
- Sometimes a variety of persons can provide OPINIONS OR EVIDENCE as to incapacity
- See Chart - *Who Assesses Capacity Under What Circumstances* on ACE website www.ancelaw.ca



Capacity Assessments

- Assessment / evaluation of capacity refers to a “legal” assessment not a clinical assessment
- Clinical assessments underlie diagnosis, treatment recommendations and identify or mobilize social supports
- **Capacity assessments for decision making (Legal assessments) remove from the person the right to make autonomous decisions in specified areas – assessment is only for purpose of WHO decides for a particular decision or purpose**

“Formal” and “informal” assessments



- Some assessments are more “formal” such as assessment of capacity for treatment or admission to a Long term care home or an assessment by a designated Capacity Assessor about finances to trigger a Statutory Guardianship

BUT many “assessments” are less “formal” but are still important

What is an Assessment of Mental Capacity?



- Mental Capacity/ Incapacity for decision making is NOT the score on the MMSE, MOCA, ACE or any other capacity test used for clinical purposes
- **In assessing capacity, must use definition of capacity in the legislation and do analysis of person's decision making abilities based on that definition**
- These types of test may help you assess the “ability to understand” and the “ability to appreciate” but the scores alone are NOT definitive or determinative of capacity

What is an Assessment of Mental Capacity?



- **Capacity assessment is not a “risk assessment”** – a person can make a decision to live at risk if he or she is mentally capable and has the ability to understand and ability to appreciate that risk BUT if person **incapable** of a decision they don't have the “right to risk”
- Capacity assessment is an assessment of mental ability to understand and mental ability to appreciate and is **not an assessment of the functional ability** of a senior or an assessment of that senior to live safely at home, free from risk.
- **If the senior is mentally capable**, assistance should be provided to help that person address risk rather than removing from him/ her their authority to make decisions for themselves.

What is an Assessment of Mental Capacity?



- Capacity assessment is **not an assessment of “Best Interests”** – capacity assessments should not be used as a tool to address social / family problems such as:
 - Alcohol abuse (senior can be capable and an alcoholic)
 - Depression (senior can be depressed and capable)
 - As a means of moving a senior into a long term care home or assisted living (senior can be capable and not want to move to LT care home)
 - As a means of “managing” family conflicts over money (senior giving money to a particular adult child or some other person instead of dividing it amongst all the adult children etc.) – senior can be making a CAPABLE decision to favour one child
 - As a means of managing conflict between adult children who are all seeking to “control” the senior (e.g. adult child blocking access by other family members to the senior) - senior if capable is entitled to decide who visits

Is there a Grey zone of capacity?



- No
- Persons determining whether a person is capable or not must **DECIDE** whether the person is capable or not for a particular decision – yes or no- and be able to justify / explain that finding by analysis of the ability to understand and ability to appreciate



Consent vs. “Wishes”

- Determining WHO is the DECISION MAKER is Fundamental
- If person is mentally incapable to make a decision, you MUST turn to their SDM



Wishes Vs. Capacity

- In getting consent or agreement, “wishes” (preferences) of the person expressed WHEN CAPABLE must be considered and followed if possible by the SDM,

HOWEVER if person receiving the service/ treatment is incapable, it is the SDM that must consider, interpret, determine if the previous wish is “possible” and apply the previous capable wishes in making a decision and providing a consent not the service provider

The Capacity Assessment – How do you assess “Ability to Understand” and “Ability to Appreciate”?



- A decisional Test: does the person's decisional ability match the demands on them for decision that need to be made
- Understand 1st - Factual knowledge base
and 2nd - Understanding of options
- Appreciate 3rd - Appraisal of Outcome
4th - Justification of Choice

Must pass all bases to be found capable

Before Doing a Capacity Assessment



- What do you need to know about THIS person before you do assessment?
 - Assessment for what purpose? For what decision?
 - PERHAPS- Information about background, relationships, family, health condition, culture, religion, options in respect to the decision about which person is being assessed, what this person knows or doesn't know, communication barriers if any (use of hearing aids, aphasia etc.)
 - What you need to know before assessment depends on type of decision you are assessing whether the person is capable of making
 - Also “formal” assessment should not take place if person is high on drugs or alcohol, in a delirium , etc.



Understand - 1st Base

- Factual knowledge: preservation of old skills & knowledge
- Has the person had learning opportunities to acquire the relevant facts about decision to be made and related matters
- Has the person been given updated information relevant to the decision to be made

Before doing a Capacity Assessment this may mean then



- If assessment to manage property or to give a POA property – because part of the “factual knowledge” would be knowledge of the person property/ income etc.– has the senior been managing their own finances, paying bills, and would he or she actually have present knowledge of this? If not – unfair to assess this capacity unless person has had opportunity to be informed...
- If assessment about capacity to make treatment decision – has the senior been given information about their present health care needs/ health condition? If not unfair to conclude the person lacks capacity just because of lack of knowledge / information

Understanding Options - 2nd Base



- Able to comprehend information about options, risks to make an informed choice
- Able to attend to relevant stimuli, understand at conceptual level and retain essential information long enough to reach a decision
- Able to remember prior choices and express them in a predictable and consistent manner over time
- Able to problem solve around personal issues-probe specific example



Appreciate - 3rd Base

- Able to appraise potential outcomes of a decision
- Focus on reasoning process, explore the personal weights, values attached to each outcome
- Acknowledges personal limitations/show insight
- Decision-making is reality-based, not being affected by delusions (fixed false beliefs) or skewed by emotional states (depression, hopelessness causing an undervaluing of survival issues)



Appreciate - 4th Base

Justification of choice:

- Shows evidence of rational (based in reality) manipulation of information - a "reasoned choice", not necessarily a reasonable choice
- Grounded in personal beliefs and values consistent with previous actions, expressed wishes, cultural or religious beliefs

When doing a Capacity Assessment - PROCESS



- When assessing capacity you need to

“PROBE and VERIFY”

Re Koch 33 O.R. (3d) 485 [1997] O.J. No. 1487
Ontario Court (General Division),
Quinn J.,
March 26, 1997

Facts- Woman with MS was separated from her husband. After the two failed to negotiate a separation agreement the husband made a complaint about his wife's capacity, which triggered the mechanisms of the Health Care Consent Act, 1996 ("HCCA") and the Substitute Decisions Act, 1992 ("SDA"). The appellant appeals from the Consent and Capacity Board's findings that she was incapable of managing her affairs and incapable of consenting to placement in a care facility. Talosi and Higgins are the names of the capacity assessor and the evaluator.

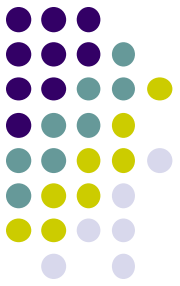
Excerpt - Re Koch 33 O.R. (3d) 485 [1997] O.J. No. 1487



- **NOTES** – “From the outset, the assessor/evaluator must **maintain meticulous files.**”
- **PROBE** - “In my view, it was **not sufficient** for Talosi and Higgins **merely to record information provided by the appellant and then form an opinion.**”

“In some instances the appellant **should have been PROBED to determine the thought process by which she arrived at an answer or statement.** Until her thought process is known, it is neither fair nor reasonable to impugn the appellant's mental capacity.”
- **VERIFY** - “By not exploring the process by which the appellant arrived at her decisions, answers and statements, Talosi and Higgins have assumed, quite unfairly, the absence of logic. In doing so, they greatly impaired their ability to assess and evaluate the appellant's cognitive abilities. ““In some instances, **verification** should have been sought.”

Challenges in Process of Assessment of Capacity



- The over helpful family
- How to assess “appreciation” (judgment)
- People “accommodating” for deficits in ways that may mask lack of ability to understand or lack of ability to appreciate
- Your own questioning style – need person to explain rather than just respond
- TIME
- Etc. etc. etc.



Who Assesses Capacity?

- Sometimes defined by Statute
 - “Capacity Assessors” to trigger a statutory Guardianship for property
 - “Health practitioners” for treatment
 - “Evaluators” for Capacity for Admission
- Sometimes in common law (i.e. contracts)
- Sometimes a variety of persons can provide OPINIONS OR EVIDENCE as to incapacity
- See Chart - *Who Assesses Capacity Under What Circumstances* on ACE website www.ancelaw.ca

Capacity Assessors vs Health Practitioners

– Who assesses When?



- **“Capacity Assessors” as defined by the SDA do not do all capacity assessments!!!!**
- Health practitioners have a DUTY to do the assessment of capacity for treatment decision making
- Health practitioners that are Evaluators **MUST** do the capacity assessments for admission to long term care decisions

Definition Of Capacity Assessor



- **SDA s. 1(1)**

“assessor” means a member of a class of persons who are designated by the regulations as being qualified to do assessments of capacity.

Capacity Assessors

O.Reg.460/05



- **s.2 (1)**

A person is qualified to do assessments if he or she,

a) satisfies one of the conditions set out in ss.(2)
(member of particular health College) ;

b) has successfully completed the qualifying course described in s.4

c) complies with s.5 (continuing education)

d) complies with s.6 (minimum annual number of assessments)

e) is covered by professional liability insurance of not less than \$1,000,000...

Capacity Assessors

O.Reg.460/05



- **s.2 (2)**
is a member of one of the following Colleges
 - a) College of Physicians & Surgeons of Ontario
 - b) College of Psychologists of Ontario
 - c) Ontario College of Social Workers & Social Service Workers and holds a certificate of registration for social work
 - d) College of Occupational Therapists of Ontario
 - e) College of Nurses of Ontario

Note that you are NOT automatically a “Capacity Assessor” just because you are a member of one of these Colleges . You must also meet the qualifications on previous slide



Capacity Assessors

- When are they used?
 - No POA Property and person may be incapable to manage property – Capacity assessor used and that may trigger statutory Guardianship
 - To activate POA Property ONLY if required by POA document or if POA document states that not in effect until capacity determined and document not state who does this assessment
 - To give OPINIONS about capacity to manage property or to make personal care decisions but opinions do not automatically trigger anything specific happening

Admission to LTC Homes



- Capacity assessment must be done by an “Evaluator” as defined in HCCA



Definition of Evaluator

■ HCCA s. 2(1)

“evaluator” means, in the circumstances prescribed by the regulations,

- (a) a member of the College of Audiologists and Speech-Language Pathologists of Ontario,
- (b) a member of the College of Dietitians of Ontario,
- (c) a member of the College of Nurses of Ontario,
- (d) a member of the College of Occupational Therapists of Ontario,
- (e) a member of the College of Physicians and Surgeons of Ontario,
- (f) a member of the College of Physiotherapists of Ontario,
- (g) a member of the College of Psychologists of Ontario, or
- (h) a member of a category of persons prescribed by the regulations as evaluators;

Prescribed by Regulations - social workers (Member of the Ontario College of Social Workers and Social Service Workers who holds a certificate of registration for social work)

NOTE – you AUTOMATICALLY are an EVALUATOR if you are a member of one of these Colleges. NO OTHER QUALIFICATIONS to be an Evaluator.

Evaluators and Capacity Assessors - Not the same



Of the matters that go to the Consent and Capacity Board

- Health practitioners assess capacity for Treatment decisions
 - Evaluators (who are PARTICULAR Health practitioners) do the Capacity for Admission to LTC homes
 - “Capacity Assessors” do Property SDA s16 assessments to trigger Statutory Guardianships
 - Physicians do Mental Health Act s54 assessments to trigger Statutory Guardianships
-
- Training requirements – none for Evaluators; Capacity Assessor have to take required course
 - Fees – Evaluators cannot charge for evaluations whereas Capacity assessors charge fees and so on.....

Health Practitioner Role in Capacity Assessment - Treatment



- Health care (see Health Care Consent Act)
 - Capacity to make a treatment decision or decision about plan of care/treatment

Health Practitioner's Role – ALL Health Practitioners have a REQUIRED role / DUTY to assess Capacity

Health Practitioner **offering treatment** or Health Practitioner as part of a team offering treatments is **RESPONSIBLE** for the assessment of capacity of the patient

- **WHY? – because Health Practitioner must get an informed consent before treatment**
 - from Patient IF Patient is mentally capable or
 - from Patient's SDM if Patient not mentally capable

Health Practitioner's Role in Capacity Assessment

– Treatment

Legal Authority



- **HCCA s. 10 - No treatment without consent**

10. (1) A health practitioner who proposes a treatment for a person shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless,

- (a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or
- (b) he or she is of the opinion that the person is incapable with respect to the treatment, and the person's substitute decision-maker has given consent on the person's behalf in accordance with this Act.

Health Practitioner's Role in Capacity Assessment

- Property



- **Property (See Substitute Decisions Act)**
 - Capacity to prepare a POA property
 - Capacity to manage property/ money
 - Capacity to manage Old Age Security Pension/ Canada Pension (see OAS and CPP legislation)
 - Capacity to prepare a will (testamentary capacity) (see also common law)
- **Health practitioner's role in all of the above** – May be asked to give an OPINION about Capacity but no REQUIRED role or duty to assess capacity
- A Health Care Practitioner may be in good position to provide the opinion because of knowledge of the patient's health and history

Health Practitioner's Role in Capacity Assessment

– Personal Care



- **Personal care (other than Health Care) (see Substitute Decisions Act)**
 - Capacity to make decisions about where to live (shelter) including decisions about moving into a retirement home
 - Capacity to make decisions about risk / safety
- **Health Practitioner's role in all of the above –**
May be asked to give an **OPINION** about Capacity but no **REQUIRED** role or duty to assess capacity –
Health Care Practitioner may be in good position to provide the opinion because of knowledge of the patient's health and history

Property – POA Property and document specifies who does Capacity assessment



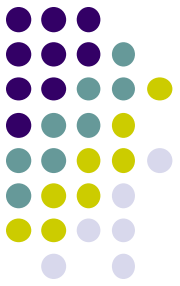
- “Capacity Assessors” as defined in SDA are not always required to be used as assessors of capacity to manage property
- For POA property to come into effect, assessments of incapacity NOT always required
- POA for Property come into effect ON SIGNATURE before incapacity unless the document states that it is triggered only on incapacity

Property- when POA property and document does specifies who assesses capacity



- If person created a POA Property
 - and specifies in POA that POA Not in effect until grantor incapable
 - AND specifies Who must do assessment of capacity then that person or persons so specified must do assessment for that purpose
 - Grantor of POA can specify ANYONE they want to do assessment even if person named not a health professional
 - Can also specify a “class” of people -“any doctor, or nurse, or ??? Rather than a specific person

Property- when POA property but document does not specify who assesses capacity



- If person created POA Property
 - And specifies that it shall not come into effect until incapacity determined
 - but doesn't name WHO should do assessment
 - Then LEGISLATION requires it must be “Capacity Assessor” as defined by the SDA

Validity of POA depends on Capacity at time signed it



- For a POA of either type to be **VALID**, the person signing it (the grantor) must be **CAPABLE** at the time of signature
- IF you believe based on your knowledge of this person or other evidence brought to your attention that person was not capable at time of signature, then POA document is **NOT VALID** to appoint the attorney and may be rejected, putting the person claiming its valid to **PROVE** that the person was capable when he or she signed it

Property – No POA Property



- If person NOT prepared POA property
 - And now it is believed that person may be incapable to manage property and needs SDM to do that, then Capacity Assessor as defined in SDA may be asked to do capacity assessment to trigger a STATUTORY GUARDIANSHIP (someone to make property decisions for incapable person)
 - OPGT will be required to step in as Statutory Guardian when receive assessment of incapacity from Capacity assessor
 - Family and others may apply to replace OPGT

Capacity to Manage Property- When Mental Health Applies



- 54. (1) Forthwith on a patient's admission to a psychiatric facility, a physician shall examine him or her to determine whether the patient is capable of managing property.

Exception

- (6) This section does not apply if,
 - (a) the patient's property is under guardianship under the *Substitute Decisions Act, 1992*; or
 - (b) the physician believes on reasonable grounds that the patient has a continuing power of attorney under that Act that provides for the management of the patient's property.
- "psychiatric facility" means a facility for the observation, care and treatment of persons suffering from mental disorder, and designated as such by the Minister
- Patient must be INPATIENT (in facility for care, observation, treatment of a mental disorder) and must be in a "psychiatric facility"



- May a person refuse a capacity assessment and what is done if they refuse an assessment?

Right to Refuse A Capacity Assessment by a Capacity Assessor (as defined under SDA)



- **SDA s. 78**

- (1) An assessor shall not perform an assessment of a person's capacity if the person refuses to be assessed.
- (2) Before performing an assessment of capacity, the assessor shall explain to the person to be assessed,
 - (a) the purpose of the assessment
 - (b) the significance and effect of a finding of capacity or incapacity; and
 - (c) the person's right to refuse to be assessed.

Cont'd

Right to Refuse a Capacity Assessment by a Capacity Assessor



- (3) Subsections (1) and (2) do not apply to an assessment if,
 - (a) the assessment was ordered by the court under section 79; or
 - (b) a power of attorney for personal care contains a provision that authorizes the use of force to permit the assessment and the provision is effective under subsection 50(1).

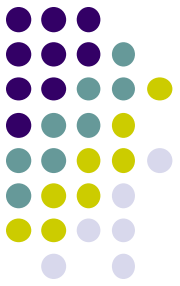
If persons refuses assessment by a Capacity Assessor then..



- Then assessment can't be done and person seeking to determine if a person is capable/incapable must do something else
- What that something else depends on the situation
 - May be a court order for an assessment
 - May be presenting OTHER evidence to prove incapacity in a court hearing for Guardianship of Property etc. .

Remember Capacity assessors formally assess in only a few circumstances

Capacity Assessment for Treatment by Health Practitioners- No consent to assess capacity required



- Health Practitioner does not need to get a formal “consent” to the assessment of capacity if determining if a patient is capable or not to consent to a treatment

No “consent” to assess capacity required for...



- Service providers seeking consent from someone to provide a service (form of contract)
- Anyone doing an evaluation of capacity for admission to LTC home
- Lawyers determining if client capable to instruct
- Health practitioners determining whether an SDM for an incapable patient is capable themselves to act as SDM

Post assessment and finding of incapacity



- Two key issues
- Who is the SDM
- How the person found incapable may challenge the finding of incapacity

Post Assessment of Incapacity

– Who is the SDM?



- Not necessarily the senior's primary caregiver
- For treatment – not just an attorney in a POAPC



SDA – Who are the SDMs?

- **Someone always must DO something before a SDM is created under Substitute Decisions Act**
- **Property**
 - Attorney in a POA Property (Person must prepare this when capable for this purpose)
 - Statutory Guardian (created after assessment by a Capacity Assessor as defined in SDA)
 - Guardian of Property (court order)
- **Personal Care**
 - Attorney in a POA Personal Care (Person must prepare this when capable for this purpose)
 - Guardian of the Person (court order)

Other SDMs for Property



- Trustee under OAS/CPP/Welfare legislation
 - Person who wants to become the trustee must DO something (get opinions, do paperwork, file at appropriate government office) to become the trustee



Health Care SDMs

- For Treatment and admission to LTC homes everyone has an AUTOMATIC SDM even if he/ she has not prepared a POA Personal Care
- This is NOT necessarily “next of kin”
- This is the person highest ranking in the HCCA Hierarchy that also meets the requirements to be an SDM

HCCA - List Of SDMs Who May Give or Refuse Consent to treatment/ Admission to long term care

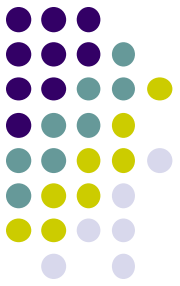


■ HCCA s. 20

1. Guardian of person with authority for treatment.
2. Attorney in attorney for personal care with authority for treatment.
3. Representative appointed by CCB.
4. Spouse or partner.
5. A child or parent of the incapable person, or a children's aid society or other person who is lawfully entitled to give or refuse consent to the treatment in the place of the parent. This paragraph does not include a parent who has only a right of access. If a children's aid society or other person is lawfully entitled to give or refuse consent to the treatment in the place of the parent, this paragraph does not include the parent.
6. Parent with right of access only.
7. Brother or sister.
8. Any other relative
9. OPGT

Requirements for SDM

HCCA s.20



SDM in list may give or refuse consent only if he or she is:

- i) capable with respect to treatment,
- ii) 16 unless parent of incapable person,
- iii) no court order or separation agreement prohibiting access to incapable person or giving or refusing consent on his or her behalf,
- iv) is available, and
- v) willing to assume responsibility of giving or refusing consent.



Definitions

- “Guardian” - means person that has an order of Guardianship from a court
- “Representative” means person appointed by the Consent and Capacity Board as a result of an application to the CCB by person that lacks capacity for treatment decision making or by another person that applies to be appointed the “representative”



Definition Of Spouse

- **HCCA S.20**

(7) Subject to subsection (8), two persons are spouses for the purpose of this section if,

- (a) they are married to each other; or
- (b) they are living in a conjugal relationship outside marriage and,
 - (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*.

Not spouse

(8) Two persons are not spouses for the purpose of this section if they are living separate and apart as a result of a breakdown of their relationship.



Definition of Partner and Relative

- **Meaning of partner**

HCCA s. 20 [\(9\)](#) For the purpose of this section,

“partner” means,

(a) Repealed

(b) either of two persons who have lived together for at least one year and have a close personal relationship that is of primary importance in both persons’ lives.

- **Meaning of “relative”**

HCCA s.20 [\(10\)](#) Two persons are relatives for the purpose of this section if they are related by blood, marriage or adoption.

Ranking



Person lower on list may give consent only if no person higher that meets requirements.

So YOU need to know who is the highest ranking person(s) on list in each patient's life to figure out who is the RIGHT SDM

EXCEPTION

Family member present or contacted may consent or refuse consent if he or she believes:

a) no person higher or in same paragraph exists,

OR

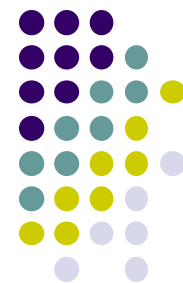
b) if person higher exists, person is not guardian of person, POAPC, Board appointed representative with authority to consent and would not object to him or her making the decision.



Public Guardian and Trustee

- **HCCA s. 20(5) & (6)**
 - If no person meets requirement, then the PGT **shall** make the decision to give or refuse consent
 - If conflict between two or more equally ranked persons who meet the requirements cannot agree and if their claims rank ahead of all others, the PGT **shall** make that decision in their stead.
 - call the Treatment Decisions Unit at the OPGT

Can someone apply to Court to be authorized to make Decisions for the incapable person?



- Yes – someone, usually a close family member may apply to court to be named the incapable person’s “Guardian of the Person”
- This is fairly rare as the main personal care decisions are health decisions so the person highest on the list of SDMs will make the personal decisions for the person if incapable

Role of the OPGT



- As property decision maker – Only act if required by statute after getting authority through a capacity assessment by capacity assessor, assessment by Physician under MHA if person a psychiatric inpatient (and by Notice of Continuance)
- As treatment decision maker – automatic under HCCA hierarchy and if dispute between equal ranking health SDMs
- If person incapable and at risk of harm and needs SDM – AFTER investigation and court order obtained
- Limitations on OPGT role – ROLE limited by state and policy

OPGT and SERIOUS ADVERSE EFFECTS



SDA **s. 27 – Property**

- PGT shall investigate any allegation that a person is incapable of managing property and that serious adverse effects are occurring or may occur as a result
- Loss of a significant part of a person's property or a person's failure to provide necessities of life for himself or for dependants are serious adverse effects for the purpose of this section

OPGT and SERIOUS ADVERSE EFFECTS



S. 62 – Person

- the PGT shall investigate any allegations that a person is incapable of personal care and that serious adverse effects are occurring or may occur as a result
- serious illness or injury or deprivation of liberty or personal security are serious adverse effects for the purpose of this section

What a person may do if found incapable ..

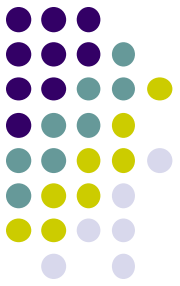


- What a person may do when found incapable **DEPENDS** on what type of assessment was done , for what purpose, who did it etc. .
- If found incapable for treatment decisions or admission to Long term care under HCCA – formal application for review of finding of incapacity to Consent and Capacity Board (CCB)
- If found incapable by a Capacity Assessor under s. 16 of Substitute Decision Act (incapable to manage property) - formal application to review finding of incapacity to CCB
- If found incapable to manage property or to make personal care decision by court in a guardianship[p application, person would have to **APPEAL** decision to a higher court

What a person may do if found incapable ..



- If person found incapable by a service provider to be able to consent to a service, no “formal” process – may present other evidence of capacity , challenge how incapacity determination was made, complaint to appropriate bodies (management of person who found person incapable)



Services available

- What is available to help in accommodations?
- CCAC
- Health services
- Social services
- Family
- Legal services .. Etc .



THANK YOU!

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