CAPACITY and AUTHORITY OF DECISION MAKERS

Summary of Who Determines Capacity in Various Circumstances under the *Substitute Decisions Act*, *Health Care Consent Act*, and *Mental Health Act* and Extent of the Authority of the Substitute Decision Maker

A. PROPERTY

1. Definition of Incapacity to Manage Property

Substitute Decisions Act, section 6
A person is 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.

Property decisions include decisions in respect of money; banking; purchase and sale of goods; purchase and sale of land; contracts for services, goods and land; decisions in respect of estates, including that of making a will.

2. Definition of Capacity to Give a Continuing Power of Attorney for Property

Substitute Decisions Act, section 8

(1) A person is capable of giving a continuing power of attorney for property if he or she,

- *(a) knows what kind of property he or she has and its approximate value;*
- *(b) is aware of obligations owed to his or her dependents;*
- *(c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;*
- *(d) knows that the attorney must account for his or her dealings with the person's property;*
- *(e) knows that he or she may, if capable, revoke the continuing power of attorney;*
- *(f) appreciates that unless the attorney manages the property prudently*

its value may decline; and

(g) appreciates the possibility that the attorney could misuse the authority given to him or her.

(2) A person is capable of revoking a continuing power of attorney if he or she is capable of giving one.

This definition of capacity to give a continuing power of attorney for property is specific to these types of powers of attorney. There is a different definition of capacity to give a power of attorney for personal care.

When determining whether a client is capable of giving a continuing power of attorney for property, it is important to put this definition in the context of the client. Has the client managed his or her own money in the immediate time before meeting with you to prepare the power of attorney? Is the reason that he or she is vague about what property he or she has and its value because he or she has been living in an institution and has had limited access to his or her funds? Have others been managing his or her assets and only recently the client has regained control of his or her funds? Has he or she been unable to get a report from the person managing his or her funds as to what funds/property are still left?

Is your client an older woman or older man whose spouse has recently died? Was the spouse the primary money manager in the household, and now the surviving spouse must manage the family assets, with having only limited previous experience in dealing with the estate? In our work at the Advocacy Centre for the Elderly, we have met some elderly women and men who have never managed their own finances, even to the point of never having written a cheque without direction from someone else. This does not diminish their capacity to manage property. It just means that they need to be taught how to manage a bank account.

Does your client have a developmental disability, was never taught money management skills, but now must cope with his or her own money management as he or she is now living in the community or living away from parents who previously did this task?

Lack of experience or skill or detailed knowledge of assets does NOT mean that the person is not mentally capable of managing property or of making a continuing power of attorney for property. The client may need information about his or her assets BEFORE

signing a power of attorney for property, but do not confuse lack of knowledge and experience with incapacity.

Likewise, just because a client has delusions, or has been diagnosed with a particular mental illness or disorder does NOT mean that he or she lacks capacity to manage property or to make a continuing power of attorney for property. Capacity is TASK or ISSUE SPECIFIC. Incapacity in one area does NOT necessarily mean incapacity for other purposes. Look at the specific instructions that the client is giving to you and the work for which you are being retained. Is the client capable for that purpose and capable of giving you instructions to do that particular task?

Who assesses capacity to give a Continuing Power of Attorney for Property? See Below.

3. CONTINUING POWER OF ATTORNEY FOR PROPERTY - "Assessment" of Capacity to Give a Continuing Power of Attorney for Property

There is no statutory reference in the *Substitute Decisions Act* as to who assesses the capacity of a person to give a Continuing Power of Attorney for Property. Section 9 of the *Substitute Decisions Act* states that a Continuing Power of Attorney for Property is valid if the grantor, at the time of executing it, was capable of giving it, even if he or she was not capable of managing property. By practice, a lawyer or anyone else assisting the grantor in preparing a Continuing Power of Attorney for Property should be satisfied that the grantor is mentally capable for this purpose.

Detailed notes of why the lawyer or person assisting the grantor in entering the power of attorney should be maintained in the client file. The notes should outline who was present when the power of attorney was executed, and why the lawyer/person assisting believed that the grantor was mentally capable for this purpose. The notes should follow the definition of capacity to give a continuing power of attorney for property as set out in the *Substitute Decisions Act*.

Although the two witnesses to the continuing power of attorney for property no longer have to state that they have no reason to believe that the grantor was not capable of entering into the power of attorney for property before they sign as witnesses, it is good practice for the witnesses to be able to make such a statement. If the validity of the continuing power of attorney for property is ever questioned on the basis of capacity of the grantor, the

witnesses should be able to give evidence of why they thought the grantor had capacity for this purpose. The more likely that the Power of attorney may be challenged, the more reason to get affidavits of execution from the witnesses or to document why the witnesses believe the grantor to be capable for this purpose.

In the situation where it is likely that the capacity of the grantor may be challenged, it is advisable to consider getting a defense assessment before the continuing power of attorney is executed. This defense assessment is intended to be used as evidence in the event of a challenge to the documents validity, therefore it is important to consider what type of challenge may take place in the future and what would be the best evidence to defend against it. If the client has had a longstanding relationship with a general medical practitioner, although that GP is not a particular expert in mental status assessment, an assessment by that doctor may carry more weight and be more convincing than other assessments to the possible challengers. If a court application is anticipated, it may be prudent to get an assessment by a psychiatrist or psychologist with particular credentials and experience in mental status assessment. In some areas of the province, the best evidence available may be from other health practitioners, such as nurses or other health professional who have received the training as capacity assessors (see below for definition) .

Who you use to perform the assessment is a matter of judgment. It is helpful if when you request such an assessment that you detail in a letter to the health professional performing the assessment why you are requesting such an assessment, the legal definition of capacity to give a continuing power of attorney for property and that you are looking for an opinion of your clients capacity in relation to that definition, not for other purposes. In this way, the assessment will be specific to the purpose and will not be a far ranging assessment that may contain damaging information about your clients delusions or other mental health problems that may not relate to his or her capacity to give a continuing power of attorney for property.

Remember that such assessments should not be done as a matter of course. They are not covered by OHIP, your client would have to pay for them, and the assessment process is, in and of itself, invasive.

It goes without saying that, of course, your client must consent to this defense assessment.

If the person who grants the continuing power of attorney was not capable at the document was executed, the power of attorney and everything done under it is void ab initio, not merely voidable. The responsibility falls upon third parties who are dealing with the attorney to make their own inquiries, and to satisfy themselves that the donor of the power had the necessary capacity when the power was granted and that the appointment has not been subsequently been terminated.

There is some protection for innocent third parties. Section 13 *, Substitute Decisions Act*, states that if a continuing power of attorney is terminated or becomes invalid, any subsequent exercise of the power by the attorney is nevertheless valid as between the grantor and the grantor's estate and any person, including the attorney, who acted in good faith and without knowledge of the termination or invalidity.

Therefore it is important to give notice to all parties who may rely upon the power of attorney including the attorney, banks, and other institutions that may be in control of the grantor's assets, that a power of attorney has been revoked or that a Guardian of Property or Statutory Guardian may have superceded the attorney's authority. If a bank etc then continues to take direction from the original attorney, the bank may be held liable for any assets lost/transferred after the notice was given.

4. CONTINUING POWER OF ATTORNEY FOR PROPERTY - Assessment of Capacity to Manage Property to Activate a Continuing Power of Attorney for Property if it Contains a Clause That It Does Not Come Into Effect Until the Grantor Becomes Incapable of Managing Property.

A Continuing Power of Attorney for Property may be drafted to include a clause that states that the attorney does not get authority to manage the grantor's property until an assessment of capacity is performed and the grantor is found incapable of managing property.

(a) Method of Assessment Specified in the Continuing Power of Attorney for Property

If such a clause appears in the Continuing Power of Attorney for Property of a grantor who is **not** an in-patient in a psychiatric facility, section 7(7) and section 9(3) of the *Substitute*

Decisions Act state that the assessment of the capacity of the grantor to manage property **must be by the method specified in the Continuing Power of Attorney for Property**. This can be an assessment by anyone that the grantor specifies, be it a health professional, someone the grantor trusts, or anyone else that the grantor wants. The person, type of professional, or class of persons the grantor names in the document to assess the grantor's capacity to manage property does not need to have special training in doing assessments or any professional qualifications. The person named to do the assessment does not need to be a health professional.

Who the grantor chooses to list in the document is his or her choice although it may be advisable to list at least one health professional or class of health professionals as the third party who must determine whether the power of attorney has been properly activated. The reasoning behind this advice is from the fact that a third party may refuse to accept some assessments as adequate proof of incapacity despite the fact the power of attorney documents specifies that such an assessment is acceptable. As the goal of the client is to create a document that can be used only after incapacity, it is important to consider what advice you give that client on both how to create a trigger that is satisfactory but also how to ensure that the document will be accepted after that trigger is activated. In some cases, it may be advisable to name two assessors, one being the client's first preference (a non-professional) as well as a class of professional.

(b) Method of Assessment Not Specified in the Continuing Power of Attorney for Property

If such a clause appears in the Continuing Power of Attorney for Property but no method of performing the assessment is specified in the document, section 9(3) of the *Substitute Decisions Act* states that the assessment of the capacity of the grantor to manage property must be performed by a "**capacity assessor**" as defined by the *Substitute Decisions Act*, Regulation 293/96. This regulation states:

(1) A person is qualified to do assessments of capacity if he or she,

(a) satisfies one of the conditions set out in section (1.1);

(b) has successfully completed a training course for assessors given or approved by the Attorney-General, as described in section 3 or *given by the Attorney-General under Ontario Regulation 29/95 before this regulation came into force; and*

(c)is covered by professional liability insurance of not less than a $1,000,000.

(1.1) The following are the conditions mentioned in clause 1(a)

1 Being a member of the College of Physicians and Surgeons of Ontario.

2. Being a member of the College of Psychologists of Ontario

3.Being a member of the College of Social Workers and Social Service Workers and holding a certificate of registration for social work

4. Being a member of the College of Occupational Therapists of Ontario.

5. Being a member of the College of Nurses of Ontario.

(1.2) Until June 30, 2000, being a member of the Ontario College of Certified Social Workers also satisfies the condition set out in paragraph 3 of subsection (1.1).

Authority of an Attorney in a Continuing Power of Attorney for Property

The attorney named in a continuing power of attorney has the duties and authority as set out in section 38 of the *Substitute Decisions Act*. These are substantially the same as for a Guardian of Property. Section 38 makes reference to most of the sections that refer to the duties etc of court-appointed Guardians of Property with the necessary modifications to the sections.

By application of this statute and by Rule 7 (Rules of the court), attorneys may sue and be sued on behalf of the grantor of a continuing power of attorney for property who is incapable. Note that if the litigation is not in respect of property or property management, it is the guardian of personal care or the attorney named in a power of attorney for personal care who would have this authority to act as litigation guardian for an incapable person.

An attorney may be excluded from acting as litigation guardian if the power of attorney document so states.

All powers of attorney are to receive a strict interpretation and the authority is never extended beyond that which is expressly given, or absolutely necessary for carrying the authority into effect. By statute, however, an enduring power of attorney may confer on the attorney the power to do anything on behalf of the donor that the donor my lawfully do by attorney. The donor must restrict the powers of attorney if he or she does not want the attorney to have such broad powers. In Ontario, a continuing power of attorney may authorize the attorney, on the grantors behalf, to do anything in respect of property that the

grantor could do if capable, except make a will.(CED -AGENCY - section 88)

A power of attorney authorizing the attorney to draw, accept, make, sign, endorse, negotiate, pledge, retire, pay or satisfy any bills of exchange, promissory notes, cheques, drafts, orders for payment or delivery of money, securities, goods, warehouse receipts, etc does not authorize the borrowing of money(CED -Agency- section 89)

When an attorney or agent does anything beyond the scope of his or her power, it is void as between the third party and the principal. **A third party who deals with the attorney is bound to inspect the power, and is held to understand its legal effect**. CED-AGENCY Section 95

5. STATUTORY GUARDIANSHIP

(a) In-Patient in Psychiatric Facility

The capacity of a person to manage property, if that person is an in-patient in a psychiatric facility, as defined in Schedule 1 to the *Mental Health Act*, must **be assessed by a physician on admission to the psychiatric facility**. If found incapable to manage property, a certificate of incapacity is issued by the physician and transmitted by the officer in charge to the Public Guardian and Trustee who becomes the person's Statutory Guardian. (*Substitute Decisions Act*, section 15 and *Mental Health Act*, section 54). The physician must advise the patient of the fact that a certificate of incapacity was issued and shall promptly notify a rights advisor. The **rights advisor** shall meet with the patient and explain the significance of the certificate and the patient's right to have the finding of incapacity to manage property reviewed by the Consent and Capacity Board. If the patient's so requests, the rights advisor shall assist the patient in making the application to the Board. (*Mental Health Act*, section 59)

The physician does not have to assess the person's capacity to manage property on admission to the psychiatric facility if the person's property is under guardianship undert the Substitute Decisions Act or the physician believes on reasonable grounds that the patient has a continuing power of attorney for property that provides for the management of the person's property. (s.54(6)

At any time while an in-patient in a psychiatric facility, the capacity of a person to manage

property may be assessed by **the patient's attending physician** (*Mental Health Act*, section 54(2))

If a certificate of incapacity to manage property has been issued for an in-patient, **the patient's attending physician** may cancel the certificate after assessing the patient for capacity to manage property. The physician must complete and transmit a notice of cancellation to the Public Guardian and Trustee. The Statutory Guardianship ends on notification of the Public Guardian and Trustee. (*Mental Health Act*, section 56).

Within 21 days before discharge from a psychiatric facility, the capacity of an in-patient to manage property must **be assessed by the patient's attending physician**. If the patient is assessed as incapable of managing property, the physician shall issue a Notice of Continuance and the officer in charge shall transmit that Notice to the Public Guardian and Trustee. (*Mental Health Act*, section 57). The physician must advise the patient of the fact that a notice of continuance was issued and shall promptly notify a rights advisor. The rights advisor shall meet with the patient and explain the significance of the certificate and the patient's right to have the finding of incapacity to manage property reviewed by the Consent and Capacity Board. If the patient so requests, the rights advisor shall assist the patient in making the application to the Board. (*Mental Health Act*, section 59).

If in this assessment before discharge, the physician finds the patient capable of managing property, the physician shall cancel the certificate of incapacity and the officer in charge shall transmit the notice to the Public Guardian and Trustee. The Statutory Guardianship ends when the Public Guardian and Trustee receives the notice of cancellation OR the Public Guardian and Trustee receives notice that the patient was discharged from the psychiatric facility and no Notice of Continuance was issued. (*Substitute Decisions Act*, section 20)

A Statutory Guardian (either Public Guardian and Trustee or person who has replaced the Public Guardian and Trustee as Statutory Guardian) must assist in arranging an assessment of person's capacity to manage property if the incapable person so requests, if the person was discharged from the psychiatric facility, a notice of continuance was

issued, and six months have elapsed since the Notice of Continuance was issued. (*Substitute Decisions Act*, section 20.1)

(b) Person in the Community, in a Care (Retirement) Home, in a Long-Term Care Facility, in a Hospital

The capacity of a person to manage property, if the person is NOT an in-patient in a psychiatric facility (ie. is in the community, in a care (retirement) home, in a hospital, or in a long-term care facility) **may be performed on the request of any person by a capacity assessor as defined by the *Substitute Decisions Act***, Regulation 293/96 (*Substitute Decisions Act*, section 16). The **capacity assessor** must ensure that copies of the certificate of incapacity are given to the person assessed and to the Public Guardian and Trustee. The Public Guardian and Trustee must advise the person found incapable that the Public Guardian and Trustee is the person's Statutory Guardian and that the person is entitled to apply to the Consent and Capacity Board for a review of the finding of incapacity. (*Substitute Decision Act*, section 16)

A Statutory Guardian (either the Public Guardian and Trustee or the person who has replaced the Public Guardian and Trustee as Statutory Guardian) must assist in arranging an assessment of the person's capacity to manage property if the incapable person so requests and if six months have elapsed since the Statutory Guardianship was created. (*Substitute Decisions Act*, section 20.1)

Authority of a Statutory Guardian

A statutory guardian is a guardian of property and as such has the power to do on the incapable person's behalf anything in respect of property that the person could do if capable except make a will. (SDA section 31). A statutory Guardian may act as litigation guardian for any proceedings in court taken or defended by the incapable person in respect to that person's property. The Statutory Guardian must also comply with sections 32- 37 of the SDA .

6. COURT-ORDERED GUARDIANSHIP OF PROPERTY

(a) Summary Disposition

The Court makes a determination of the subject's capacity to manage property, based on the evidence presented. If the applicant for the Guardianship Order wishes the Court to deal with the application by way of Summary Disposition, the application must be accompanied by two statements in the form prescribed by the Regulations. **One statement must be by a capacity assessor**. The second statement **may be by an assessor or by any person who knows the alleged incapable person and who has been in personal contact with that person in the last twelve months.** (*Substitute Decisions Act*, sections 72 and 77)

If a moving party wishes to bring a motion to terminate a Guardianship of Property and have it dealt with by way of Summary Disposition, the application must be accompanied by two statements in the form prescribed by the Regulations. One statement must be by a capacity assessor. The second statement may be by an assessor or by any person who knows the alleged incapable person and who has been in personal contact with that person in the last twelve months. (*Substitute Decisions Act*, sections 73 and 77)

(b) Application for Appointment as Guardian of Property

The Court makes a determination of the subject's capacity to manage property, based on the evidence presented. The evidence may be **assessments of capacity to manage property by capacity assessors or by health professionals**. The application may also include **evidence by others who can make observations on the subject's capacity to manage property**. (*Substitute Decisions Act*, section 22 and 25)

Authority of a Court-Ordered Guardian of Property

Court-ordered Guardians for Property have the power to do on behalf of the incapable person anything in respect of property that the person could do if capable, except make a will.(SDA section 31). A court-ordered Guardian may act as litigation guardian for any proceedings in court taken or defended by the incapable person in respect to that person's property. The Guardian of Property must also comply with sections 32- 37 of the SDA .

B. PERSONAL CARE

1. Definition of Incapacity for Personal Care

***Substitute Decisions Act*,** section 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.

2. Definition of Capacity to Give a Power of Attorney for Personal Care

***Substitute Decisions Act*,** section 47

(1) A person is capable of giving a power of attorney for personal care if the person,

- *(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.*

(3) A person is capable of revoking a power of attorney for personal care if he or she is capable of giving one.

(4) Instructions contained in a power of attorney for personal care with respect to a decision the attorney is authorized to make are valid if, at the time the power of attorney was executed, the grantor had the capacity to make the decision.

C. PERSONAL CARE DECISIONS - "Assessment" of Capacity to Make Personal Care Decisions OTHER THAN Health Treatment, Admission to a Long-term Care Facility, and Personal Assistance Services in a Long-term Care Facility

There is no statutory reference in the *Substitute Decisions Act* as to who assesses capacity for personal care in general. By common law, if there is no Guardian of the Person, **the person who determines capacity is the person interacting with the alleged incapable person ie. case manager, homemaker, social worker, long-term care facility staff, legal advisor etc**. There is a presumption of capacity in section 2- SDA and third parties may rely on this presumption unless they have reasonable grounds to believe that the person is incapable of decisions in respect to personal care. If there is such evidence, they should be turning to the person's appropriate substitute decision maker for such decisions.

4. POWER OF ATTORNEY FOR PERSONAL CARE -"Assessment" of Capacity to Give a Power of Attorney for Personal Care

There is no statutory reference in the *Substitute Decisions Act* as to who assesses capacity to give a Power of Attorney for Personal Care. By practice, **the lawyer or any person assisting a grantor in preparing a Power of Attorney for Personal Care should be satisfied that the grantor is mentally capable of giving a Power of Attorney for Personal Care** as defined in *Substitute Decisions Act*, section 47.

Note that the capacity to give a power of attorney for personal care is “lower” than to give a continuing power of attorney for property. See comments above under Continuing Power of attorney for property in respect to witnesses knowledge of the grantor’s capacity and the considerations of whether to obtain defense assessments.

5. POWER OF ATTORNEY FOR PERSONAL CARE - Assessment of Capacity to Make Personal Care decisions to Activate a Power of Attorney for Personal Care

A Power of Attorney for Personal Care does not come into effect until the grantor is not mentally capable for personal care

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(a) Where the *Health Care Consent Act* applies to the decision (decision for treatment, admission into a long-term care facility , or personal assistance services in a long-term care facility) and that act authorizes the attorney to make the decision, **the assessment of capacity for treatment is performed by the health practitioner who proposes the treatment** (*Substitute Decisions Act*, section 49(1)(a) and *Health Care Consent Act*, section 10); or by an evaluator, for decisions in respect to admission and personal assistance services (*Substitute Decisions Act*, section 49(1)(a) and *Health Care Consent Act*, section 40 and 57)

(b) Where the *Health Care Consent Act* does not apply to the decision, and there is no requirement in the Power of Attorney for Personal Care that incapacity for personal care be confirmed before the Power of Attorney for Personal Care comes into effect, **the "assessment" of capacity for personal care is performed by the named attorney (***Substitute Decisions*

Act, section 49(1)(b))

(c) Where the *Health Care Consent Act* does not apply to the decision, and there is a requirement in the Power of Attorney for Personal Care that the incapacity for personal care be confirmed before the Power of Attorney for Personal Care comes into effect**, the assessment of incapacity is by the method specified in the Power of Attorney for Personal Care** (*Substitute Decisions Act*, section 49(2)). The grantor may specify that this assessment be performed by **a health professional, by someone that the grantor trusts, or by any other person the grantor wants**. The grantor does not need to specify a health professional or any person with special training in assessment.

If confirmation of incapacity is required and no method is specified in the Power of Attorney for Personal Care, the assessment must be performed by a "capacity assessor" as defined in the *Substitute Decisions Act*, Regulation 293/96. (*Substitute Decisions Act*, section 49(2))

Authority and Duties of the Attorney in a Power of Attorney for Personal Care

An Attorney derives his or her authority from the power of attorney document (see section 46 and 49 *SDA)* . Conditions and restrictions may be included in the power of attorney for personal care to restrict or limit the attorney's authority. By Rule 7, the attorney for personal care may be the litigation guardian in matters not related to property unless the power of attorney documents prohibits the attorney from so acting. An attorney in a power of attorney for personal care has the same duties as a court-ordered Guardian of the Person as set out in section 66-*SD*A except those subsections referred to in section 67-*SDA*.

6. COURT-ORDERED GUARDIANSHIP OF THE PERSON

(a) Summary Disposition

The Court makes a determination of the subject's capacity to manage property, based on the evidence presented. If the applicant for the Guardianship Order wishes the Court to deal with the application by way of Summary Disposition, the application must be accompanied by two statements in the form prescribed by the Regulations. One statement must be by a **capacity assessor**. The second statement may be by an a**ssessor** or by **any person who knows the alleged incapable person and who has been in personal contact with that person in the last twelve months.** (*Substitute Decisions Act*, sections 74 and 77)

If a moving party wishes to bring a motion to terminate a Guardianship of the Person and have it dealt with by way of Summary Disposition, the application must be accompanied by two statements in the form prescribed by the Regulations. One statement must be by a capacity assessor. The second statement may be by an assessor or by any person who knows the alleged incapable person and who has been in personal contact with that person in the last twelve months. (*Substitute Decisions Act*, sections 75 and 77)

(b) Application for Appointment as Guardian of the Person

The Court makes a determination of the subject's capacity for personal care, based on the evidence presented. The evidence may be assessments of capacity for personal care by **capacity assessors or by health professionals**. The application may also include **evidence by others who can make observations on the subject's capacity for personal care**. (*Substitute Decisions Act*, sections 55 and 58)

Duties and Authority of A Court-Ordered Guardian of the Person

The authority of a court -ordered Guardian of the Person is derived from the court order. The Court may make an order for full guardianship or partial guardianship of the person. The powers of the Guardian that the Court may give the Guardian are as set out in sections 59 and 60 of the SDA. The duties of the Guardian of the person whether partial or full are as set out in section 66 of the SDA. The Guardian of the person may act as Litigation Guardian for an incapable person in any matters not in respect of property.

C. HEALTH CARE CONSENT

1. Definition of Capacity with Respect to a Treatment, Admission to a Long-Term Care Facility or to a Personal Assistance Service in a Long-Term Care Facility

Health Care Consent Act, section 4.
A person is capable with respect to a treatment, admission to a care facility, or a personal assistance service if the person is 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 reasonably foreseeable consequences of a decision or lack of decision.

2. Assessment of Capacity with respect to Treatment

The assessment of capacity with respect to treatment is performed by the **health practitioner who proposes the treatment**. (*Health Care Consent Act*, section 10).

A "health practitioner" means,

(a) a member of the College of Audiologists and Speech-Language Pathologists of Ontario,
(b) a member of the College of Chiropodists of Ontario, including a member who is a podiatrist,
(c) a member of the College of Chiropractors of Ontario,
(d) a member of the College of Dental Hygienists of Ontario,
(e) a member of the Royal College of Dental Surgeons of Ontario,
(f) a member of the College of Denturists of Ontario,
(g) a member of the College of Dietitians of Ontario,
(h) a member of the College of Massage Therapists of Ontario,
(i) a member of the College of Medical Laboratory Technologists of Ontario,
(j) a member of the College of Medical Radiation Technologists of Ontario,
(k) a member of the College of Midwives of Ontario,
(l) a member of the College of Nurses of Ontario,
(m) a member of the College of Occupational Therapists of Ontario,
(n) a member of the College of Optometrists of Ontario,

(o) a member of the College of Physicians and Surgeons of Ontario,
(p) a member of the College of Physiotherapists of Ontario,
(q) a member of the College of Psychologists of Ontario,
(r) a member of the College of Respiratory Therapists of Ontario,
(s) a naturopath registered as a drugless therapist under the Drugless Practitioners Act, or
(t) a member of a category of persons prescribed by the regulations as health practitioners.
(*Health Care Consent Act*, section 2(1))

3. Assessment of Capacity with respect to Admission to a Long-term Care Facility.

The assessment of capacity with respect to admission to a long-term care facility is performed by an **"evaluator**" as defined in the *Health Care Consent Act*, section 2. (*Health Care Consent Act*, section 40).

An "evaluator" means, "in the circumstances prescribed by the regulations, a person described in clause (a), (l), (m), (o), (p) or (q) of the definition of "health practitioner"... or a member of a category of persons prescribed by the regulations as evaluators." (*Health Care Consent Act*, section 2(1) (See section 1 above for definition of "health practitioner"). In addition to the various health practitioners listed in this definition, social workers are added by Regulation 104/96 as amended by O.Reg. 264/00 under the *Health Care Consent Act* as evaluators. The term "social worker" is defined as a member of the Ontario College of Social Workers and Social Service Workers who holds a certificate of registration for social work. .

4. Assessment of Capacity with respect to Personal Assistance Services in a Long-term Care Facility

The assessment of capacity with respect to personal assistance services in a long-term care facility is performed by an "**evaluator**" as defined in section 2 of the *Health Care Consent Act*. (*Health Care Consent Act*, section 57) (See section 3 above for definition of "evaluator")

Who Assesses Capacity Under What Circumstances

PROPERTY	Who Assesses Capacity
A. Contracts	
To make a contract	Parties to the contract (Common Law)
B. Continuing Power of Attorney for Property	
To make a CPOAP	Person assisting person to make the document
To activate a CPOAP	No assessment required - CPOAP is activated on signature unless it states otherwise
To activate the CPOAP it contains a clause that it is not to come into effect until incapacity	Person/Professional named in the CPOAP to determine incapacity - If no one or no class of persons is named in the CPOAP to determine capacity, then it would be done by a CAPACITY ASSESSOR as defined by the Substitute Decisions Act
C. Statutory Guardianship	
Psychiatric Inpatient - For property management on admission as an inpatient for **Care, Observation or Treatment** for a mental health problem	Physician (Mental Health Act and s.15 Substitute Decisions Act)
Psychiatric Inpatient - For property management on discharge from the psychiatric facility	Physician (Mental Health Act)
Person who is any place other than a psychiatric facility (own home, hospital, longterm care facility) NOTE - for the Mental Health Act process to be used the patient must be an inpatient in a psychiatric facility and must be in the facility for care , observation, or treatment of the psychiatric disorder.	Capacity Assessor (s.16 Substitute Decisions Act)

Capacity Assessment and SD Authority - Feb 2001
Advocacy Centre for the Elderly

This process does NOT apply to elderly patients in hospitals even if the hospital is defined as a "psychiatric facility" under the Mental Health Act unless that elderly patient is in that hospital for CARE , OBSERVATION or TREATMENT of a psychiatric disorder.	
D. Court Ordered Guardianship of Property	
Summary Application (application to court that does not require an appearance before a Judge)	Capacity Assessor and a Person Who knows the Alleged Incapable Person (Substitute Decisions Act)
Full hearing before a Judge	Capacity Assessors, Other Health Professionals, Others that know the Alleged Incapable Person (Substitute Decisions Act)

PERSONAL CARE	**Who Assesses Capacity**
A. Power of attorney for Personal Care	
To make a POAPC	Person assisting person to make Document (Common Law)
To activate POAPC for SDM to make treatment decisions	Health Professional Proposing Treatment (Health Care Consent Act)
To activate POAPC for SDM to make decisions for admission to a LTCF	Evaluator (see definition below)
To activate POAPC for SDM to make decisions for personal assistance services in a LTCF	Evaluator
To activate POAPC for non health care personal decisions where POAPC does not require an assessment before activation	Attorney named in the POAPC
To activate POPAC for non health care personal care decisions where POAPC specifies a method of assessment	Person/class of persons specified in the document to do the assessment
To activate POAPC where POAPC silent as to	Capacity Assessor (see definition below)

method preferred but does require an assessment before activation	
B. Health Care Consent	
Treatment	Health Practitioner offering the treatment
Admission to LTCF	Evaluator
Personal assistance services in a LTCF	Evaluator

An **"evaluator"** means, *"in the circumstances prescribed by the regulations, a person described in clause (a), (l), (m), (o), (p) or (q) of the definition of "health practitioner"... or a member of a category of persons prescribed by the regulations as evaluators."* (*Health Care Consent Act*, section 2(1)) .

These health practitioners are:
(a) a member of the College of Audiologists and Speech-Language Pathologists of Ontario
(b) a member of the College of Nurses of Ontario
(c) a member of the College of Occupational Therapists of Ontario
(d) a member of the College of Physicians and Surgeons of Ontario
(e) a member of the College of Physiotherapists of Ontario
(f) a member of the College of Psychologists of Ontario

In addition to the various health practitioners listed in this definition, social workers are added by Regulation 104/96 as amended by O.Reg. 264/00 under the *Health Care Consent Act* as evaluators. The term "social worker" is defined as a member of the Ontario College of Social Workers and Social Service Workers who holds a certificate of registration for social work. .

"**capacity assessor**" is defined in the *Substitute Decisions Act*, Regulation 293/96. This regulation states:

(1) A person is qualified to do assessments of capacity if he or she,
- (a) satisfies one of the conditions set out in section (1.1);
- (b) has successfully completed a training course for assessors given or approved by the Attorney-General, as described in section 3 or given by the Attorney-General under Ontario Regulation 29/95 before this regulation came into force; and
- (c) is covered by professional liability insurance of not less than a $1,000,000.

(1.1) The following are the conditions mentioned in clause 1(a)

1. Being a member of the College of Physicians and Surgeons of Ontario.
2. Being a member of the College of Psychologists of Ontario
3. Being a member of the College of Social Workers and Social Service Workers and
4. holding a certificate of registration for social work
5. Being a member of the College of Occupational Therapists of Ontario.
6. Being a member of the College of Nurses of Ontario.

Options for Advance Care Planning

There are several different ways a person may do advance care planning. The Health Care Consent Act (HCCA) makes it clear that a person may express "wishes" about future health care in a power of attorney for personal care, in any other written form, orally, or in any other manner (ie., through alternative means of communication such as a Bliss Board). (HCCA s.5) Later wishes expressed while capable prevail over earlier wishes. That would mean, for example, that even if wishes have been expressed in a written form, that later oral wishes may override those earlier written wishes.

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1. WISHES EXPRESSED ORALLY

- some people may not want to write down any wishes but want to express these wishes orally
- wishes about future health care may be expressed orally and are just as valid as wishes written in an advance directive form
- must be mentally capable about matter expressing wishes for wishes to be enforceable
- written wishes may be changed by wishes expressed orally if the person is mentally capable
- oral wishes may be recorded in the person's medical chart or plan of treatment

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2. WRITTEN DOCUMENTS

(a) Power of Attorney for Personal Care (POAPC)

What is it?

- document in which a person (the grantor) names an SDM (an attorney)for personal care decisions may also include wishes about personal care (advance directive portion);

- may also include description of personal values and beliefs to guide SDM in decision making;
- personal care includes decisions about health care, nutrition, hygiene, shelter, safety and clothing

Who can make POAPC?

- only the person may make a POAPC for self. SDMs cannot create POAPCs for an incapable person

Who can be appointed attorney?

- "attorney" does not need to be a lawyer; persons who provide health care to grantor for compensation or residential, social, training or support services to grantor for compensation cannot act as attorneys unless he/she is spouse, partner, relative of grantor;

- Can name more than one person as SDM (attorney) – if more than one named, they must act "jointly" and make decisions together unless document states that may act "jointly or severally". If joint and several, they may act together or separately

Capacity

- person must be mentally capable to execute POAPC and must have attained 16 years of age; to express wishes about future care, must be mentally capable for the matters on which he/she expresses wishes;

- Capacity to do a POAPC is specifically defined in the legislation as the "ability to understand whether the proposed attorney has a genuine concern for the person's welfare and appreciates that the person may need to have the proposed attorney make decisions for this person"

Form of POAPC

- No particular form needs to be used to create a POAPC as long as it meets formal Requirements. Formal requirements for a POAPC:
  (a)must be in writing
  (b)must be signed by the person in the presence of two witnesses
  (c)two witnesses must sign the POAPC as witnesses

* Even if document called an advance directive, if it meets these formal requirements and names a SDM, then the document may be a POAPC

When POAPC in Effect

- POAPC comes into effect when the grantor is not mentally capable for personal care decisions
- Attorney determines when grantor is not capable for personal care decisions not covered by HCCA, unless document states otherwise
- Grantor may require that capacity to make personal care decisions be determined by a particular person or class of persons (ie physicians, nurses, social workers etc)before POAPC comes into effect
- Person or class of persons chosen to determine capacity need not be health professionals – may be anyone the person selects
- For treatment decisions, Health professional offering treatment determines capacity ; if person found incapable for treatment and that person has POAPC, POAPC is activated by this finding of incapacity
- Wishes expressed in POAPC must be honoured by SDM; must also be honoured by health practitioner in an emergency if known

When POAPC Ends - POAPC ends or is terminated:

(a) when the attorney dies, becomes incapable for personal care or resigns unless the document provides for a substitute attorney or there are more than one attorney named originally and that attorney can still act;

(b) when the court appoints a Guardian of the Person for the person
(c) when the person signs a second POAPC unless the person states in the document that he or she wants multiple powers of attorney
(d) when the POAPC is revoked by the person

Portability

- power of attorney law is different from province to province
- if a person has a power of attorney that was prepared in another jurisdiction (another province or country), it may not be valid to appoint an SDM in Ontario
- it MAY be valid if at the time it was prepared and signed, it complied with the law in the place it was executed AND the grantor who signed the power of attorney was either DOMICILED or HABITUALLY RESIDENT in that place. The terms "domiciled" and "habitually resident" have specific legal meaning.
- it is advisable to get a legal opinion on the validity of a foreign or out-of-province power of attorney before assuming it is valid
- wishes expressed in an out-of-province POA, even if the POA is not recognized in Ontario as "valid", must still be considered by the SDM highest ranking for the person from the list in the Ontario Health Care Consent Act
- it is recommended that the person, if capable, create a new Ontario POAPC to avoid any confusion

(b) Advance Directives and Living Wills

What are ADs and Living Wills?

- documents in which a person may express his or her wishes about future care
- terms “advance directive” (AD) and “living will” are not specifically defined in the Health Care Consent Act or Substitute Decisions Act or any other piece of Ontario legislation

- commonly differentiated from POAPCs as being documents in which the person does NOT name a substitute but only expresses wishes about care. Many documents "labeled" as "advance directives or living wills" are in fact POAPCs as the documents DO name an SDM, are signed and witnessed and meet the formal standards of POAPCs
- if the AD meets these requirements the document should be treated as a POAPC despite the name
- if AD or living will names an SDM but does **not** meet the formal standards of a POAPC, then that named SDM is NOT the substitute

Who can Make an AD?

- Only a person may prepare an AD/living will on behalf of him/herself when capable; SDM cannot sign an AD or living will for an incapable person; SDMs can only give or refuse consent to treatments or make personal care decisions for an incapable person

Capacity

- person who makes AD must be capable for matters about which he/she expresses wishes

Form of AD

- not prescribed in legislation therefore no particular form
- May be "medical" in format, communicating wishes about specific treatments or procedures: if such forms are used then person should receive information about these treatments and procedures and understand the risks/benefits/alternatives before signing AD; medical ADs most useful when person has a defined condition or knows details of illness and can express an "informed" wish about future treatments and care
- May be more oriented to recording values, beliefs, interests instead of specific treatment wishes in order to guide future SDM in making decisions for person; this type of AD useful as many decisions that need to be made for an incapable person cannot be anticipated because health/illness changes over time

When AD in Effect

- In effect when person incapable for treatment/health care
- Wishes expressed in an AD or living will must be honoured by the proper SDM
- Wishes must be honoured by a Health Practitioner in an emergency situation if he or she is aware of these wishes and has no reason to believe that these wishes have changed

When AD ends

- can revoke/change AD by oral statements, by communicating his or her wishes by alternative means, or by making a new statement of wishes in writing
- no requirement to execute a "revocation"; good idea for person to tear up the old AD and prepare a new written one if he or she wants to in order to make his or her wishes clear but not a necessary step to change his or her wishes

(c) Levels of Care Forms (LoC)

What is a Level of Care form?

- a form of Advance Directive; statement about levels of care may be included as part of a more detailed AD or part of a POAPC
- usually sets out a number of "levels of care" from no intervention through to extensive treatment and intervention, from no hospitalization (a wish to remain at the long-term care facility no matter what are the specific health needs of the resident) through to a request for transfer from the long-term care facility to a hospital for treatment if care needs exceed that which can be delivered in present setting
- problem with a Levels of Care form is that the levels outlined are arbitrary
- person signing the form should be advised that his/her choices for future care are not limited to the three or four levels outlined

- form is a good starting point for discussions about possible options and the range of options for care but should not be used as a complete definition of the person's choices for future care

Who can sign a LoC form?

- expression of wishes for future care therefore only capable person can sign one not person's SDM
- sometimes used improperly as consent forms- LoC forms lack specificity necessary for a consent

Capacity

- person who makes a LoC form must be capable for matters about which he/she expresses wishes

Form of LoC form

- not in legislation therefore no particular form or signing requirements

When in Effect

- In effect when incapable for treatment/health care
- Wishes expressed in a LoC form must be honoured by the proper SDM
- Wishes must be honoured by a Health Practitioner in an emergency situation if he or she is aware of these wishes and has no reason to believe that these wishes have changed
- because of lack of specificity may be problematic to interpret

Long-Term Care Facilities In Ontario: The Advocate's Manual (2nd edition)

The *Advocacy Centre for the Elderly (ACE)* is proud to introduce the 2nd edition of a comprehensive information resource for residents of long-term care facilities, their families and advocates, and for anyone working with residents of long-term care facilities in Ontario.

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- The principles of advocacy
- Long-term care facilities (LTCFs) in Ontario: their nature and the legal structure that governs them
- Who is eligible for admission to a LTCF and how the admission process works
- The role of Community Care Access Centres in the admission process and in providing in-home services
- What it costs to live in a LTCF and how to apply for rate reductions
- The rights of LTCF residents: the Residents' Bill of Rights, the plan of care, the types of care, residents' councils, leaves of absence, visitors, etc.
- The use of restraints in LTCFs and the *Charter of Rights and Freedoms*

- How to make complaints and resolve problems that arise in a LTCF
- The *Substitute Decisions Act* and the *Health Care Consent Act* analyzed, with special emphasis on the relevance to residents of LTCFs, and reference to important recent decisions by the Courts and the Consent and Capacity Board

- Powers of Attorney for Property, Powers of Attorney for Personal Care, living wills, guardianship, advance directives

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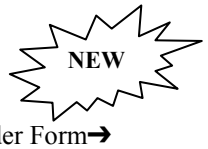
- Retirement homes (care homes) compared and contrasted with LTCFs
- The rights of tenants in retirement homes and other care homes
- Problems associated with transfers from hospitals to LTCFs
- The rights of recipients of in-home services from Community Care Access Centres



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