

### **WHAT IS DECISIONAL MENTAL CAPACITY?**

- Legal definition, NOT a clinical definition
- Different legal definition in different jurisdictions (i.e. different provinces, different countries)
- Assessment of capacity for treatment refers to a LEGAL assessment, NOT a clinical assessment
- Not tested by the Mini-Mental Status Test (MMSE)
- Clinical assessments underlie diagnosis, treatment recommendations and identify or mobilize social supports
- Legal assessments remove from the person the RIGHT to make autonomous decisions in specified areas
- Legal assessments look at decisional ability to make a particular decision (i.e. capacity with respect to a particular treatment; capacity with respect to property; capacity with respect to admission to long-term care; capacity to make personal care decisions about such things as activities of daily living and shelter)

### **LEGAL DEFINITION OF CAPACITY IN RESPECT TO TREATMENT, ADMISSION TO CARE FACILITIES AND PERSONAL ASSISTANCE SERVICES**

#### ***Health Care Consent Act, s.4***

#### **Two step definition:**

1. Able to understand the information that is relevant to making a decision about the treatment, admission, or personal assistance services, as the case may be; and
2. Able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision

### **PRESUMPTION OF DECISIONAL CAPACITY**

#### ***Health Care Consent Act, s.4***

Person presumed to be capable for treatment, admission to care facilities and personal assistance services.

#### **EXCEPTION**

Person entitled to rely on presumption **UNLESS** he or she has reasonable grounds to believe the other person is incapable with respect to treatment, admission to care facilities or personal assistance services, as the case may be.

#### ***Health Care Consent Act, s.15***

- **May be capable in respect to some treatments and incapable in respect to others**
- **May be incapable with respect to treatment at one time and capable at another**

### **ASSESSMENT OF DECISIONAL CAPACITY\***

*Credit to workshop slides by Dr. Janet Munson*

Need to assess:

1. Ability to *understand* (factual knowledge + problem-solving ability)
2. Ability to *appreciate* (realistic appraisal of outcome + justification of choice)

#### **UNDERSTAND – 1<sup>ST</sup> BASE**

- Factual knowledge: preservation of old skills and knowledge
- Has the person had learning opportunities to acquire the relevant facts?
- Updated information respecting medical status, new risks or limits in activities of daily living (ADL) functions?
- Does the person understand what treatment is being offered? (e.g. what it is, risks, side-effects, benefits, other options)

#### **UNDERSTANDING OPTIONS – 2<sup>ND</sup> BASE**

- Able to comprehend information about options and risks in order to make an informed choice
- Able to attend to relevant stimuli, understand at conceptual level & 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

#### **APPRECIATE – 3<sup>RD</sup> BASE**

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

#### **APPRECIATE – 4<sup>TH</sup> 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

## CONSENT TO TREATMENT - SUMMARY - *Health Care Consent Act - Ontario*

### **NO TREATMENT WITHOUT CONSENT**

#### ***Health Care Consent Act, s.10***

No treatment unless:

- Health Practitioner (HP) is of the opinion that the person is CAPABLE in respect to treatment and person has consented, or
- HP of opinion that the person is INCAPABLE in respect to treatment and substitute decision-maker (SDM) gives consent, or
- If the Consent and Capacity Board or a court finds the person capable, although the HP was of the opinion that the person was not capable, HP shall not treat and shall ensure treatment not administered unless person gives consent

### **WHAT IS VALID CONSENT?**

#### ***Health Care Consent Act, s.11(1)***

- Must relate to TREATMENT,
- Must be INFORMED (see box on "Informed Consent"),
- Must be given VOLUNTARILY, and
- Must not have been obtained through MISREPRESENTATION or FRAUD

### **WHAT IS CAPACITY FOR TREATMENT AND HOW DO YOU ASSESS THIS CAPACITY?** See reverse

### **WHO ASSESSES CAPACITY RESPECTING TREATMENT?**

- The health practitioner offering the treatment
- (HCCA, s.10)
- Capacity Assessors as defined by the *Substitute Decisions Act* **DO NOT** do this type of assessment

### **PROCESS FOR OBTAINING CONSENT TO TREAT A CAPABLE PERSON**

If the health practitioner believes a person is capable in respect to the treatment offered:

- HP obtains informed consent → treats
- Patient refuses consent → HP does NOT treat

### **HIERARCHY OF SUBSTITUTE DECISION-MAKERS (SDMs) WHO MAY GIVE OR REFUSE CONSENT – HCCA, s.20**

- Guardian of person with authority for treatment
  - Attorney in attorney for personal care with authority for treatment
  - Representative appointed by Consent and Capacity Board
  - Spouse or partner
  - Child or parent, or children's aid society (CAS) or other person lawfully entitled to give or refuse consent to treatment in place of parent. Does not include parent with a right of access only. If CAS or person is acting in place of parent, this section does not include the parent.
  - Parent with right of access only
  - Brother or sister
  - Any other relative
- If **NO PERSON** meets these requirements, then the **Office of the Public Guardian and Trustee (PGT)** becomes the SDM
  - If there is **CONFLICT** between persons in the same category claiming to be the SDM and they cannot agree, the PGT shall act as the SDM

### **RANKING - List of SDMs is a Hierarchy**

- Person ranked lower on list may give consent only if no person higher meets requirements.
- Exception - Family member present or contacted may consent if he or she believes:
  - No person higher or in same paragraph exists OR
  - If person higher exists, person is not guardian of person, power of attorney of personal care, Board appointed representative with authority to consent and would not object to him or her making the decision

### **WHAT IS INFORMED CONSENT?**

#### ***Health Care Consent Act, ss.11(2) and (3)***

The capable person or SDM (if incapable) must receive information about:

- Nature of the treatment,
- Expected benefits of the treatment,
- Material risks of the treatment,
- Material side effects of the treatment,
- Alternative courses of action, and
- Likely consequences of not receiving treatment

Consent is informed if the person or SDM received information that a reasonable person in the same circumstances would require to make a decisions about treatment. The person or SDM is entitled to receive responses to any **further questions** about the treatment.

### **PROCESS FOR OBTAINING CONSENT TO TREATMENT - INCAPABLE PERSON – Health Care Consent Act, s.18**

If the health practitioner is of the opinion that the person is incapable respecting the proposed treatment and no application to the Consent & Capacity Board has been made:

- Health practitioner must follow their own College guidelines about "rights information," and
- Health practitioner must turn to the highest ranking SDM in the list for consent or refusal of consent

If the health practitioner is told that:

- The person intends to apply or has applied to CCB for a review of the finding of incapacity, or
- The person intends to apply or has applied to CCB for the appointment of a representative, or
- Another person intends to apply or has applied to the CCB to be appointed as a representative,

the health practitioner shall NOT treat and shall ensure treatment does not begin:

- Until 48 hours has elapsed since first informed on intended application to CCB and application not started,
- Until the application to CCB is withdrawn,
- Until CCB renders a decision if none of the parties is informed of an intention to appeal, or
- If the health practitioner is advised of intention to appeal, until a period for commencing appeal has elapsed without an appeal being commenced (7 days after Board hearing) or until appeal finally disposed of.

### **REQUIREMENTS FOR SDM**

#### ***Health Care Consent Act, s.20(2)***

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

- Capable with respect to treatment,
- 16 unless parent of incapable person,
- No court order or separation agreement prohibiting access to incapable person or giving or refusing consent on his or her behalf,
- Available, and
- Willing to assume responsibility of giving or refusing consent.