

CONSENT, CAPACITY AND SUBSTITUTE DECISION-MAKING: THE BASICS

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There are three Ontario statutes that are relevant to a discussion of these issues: the *Substitute Decisions Act*, the *Health Care Consent Act* and the *Mental Health Act*. If you have access to the internet, copies of all three acts may be found on the Government of Ontario's e-laws website at www.e-laws.gov.on.ca. Look for the reference to "Current Consolidated Law" on the home page of that website and follow the links from there.

How Does the Legislation Impact All of Us?

The legislation deals with DECISION-MAKING, specifically:

- a) when you make decisions for yourself;
- b) when someone else may make decisions on your behalf if you become mentally incapable;
- c) how you can choose someone to be your decision-maker should you become mentally incapable;
- d) who makes a decision for you should you become mentally incapable of decision-making;
- e) how you can challenge a finding by a health professional that you are mentally incapable of decision-making; and
- f) who assesses your capacity under what circumstances.

Basic Principles

You have the right to make decisions for yourself, as long as you are **mentally capable** of making decisions.

In making decisions for yourself, you may take many factors into consideration. You may consult with family and friends. You may choose to do what your family thinks is best. You may have beliefs that "direct" you to make a certain decision in a particular way. For example, if a person was a Jehovah's Witness, he or she would commonly refuse any blood transfusions even if that blood transfusion would assist in treatment or save his or her life, as it is part of that religious faith to believe that it is inappropriate to have blood transfusions.

How you make decisions is up to you. Health providers need to get your consent before they give you treatment.

If you are not mentally capable of making a particular decision, then someone else, a person known as your **substitute decision-maker (SDM)**, would be entitled to make these decisions for you.

What Does it Mean to be Mentally Incapable?

"Mental capacity" is a legal construct, not a clinical condition. The definition of mental capacity varies from jurisdiction to jurisdiction (province to province, state to state, country to country). Mental capacity means the ability to **"understand" and "appreciate"**. In other words, mental capacity is the ability to make decisions. It is NOT a clinical condition or diagnosis. It is a LEGAL assessment of the person based on this definition and not an assessment done by means of any particular test such as the Mini Mental Status Examination. It is an assessment of the person's ability to understand information and appreciate the decisions that must be made based on the "evidence" garnered through observation and questioning.

Mental capacity in law is ISSUE or TASK specific. A person is "incapable" in respect of a particular type of decision - broadly in respect to personal care or property and more specifically in respect to the types of property decisions (such as making a will, managing money, investing, etc) and the types of personal care decisions (treatment, admission to LTCF, shelter, hygiene, nutrition, safety etc). The idea is that people should NOT be labelled as globally incapable and their specific capacities to understand and appreciate should be respected so that the abilities of a person are recognized instead of labelling them by their inabilities.

Possible Substitute Decision-Makers for Incapable Persons

1. For **property/financial decisions**, your SDM is:
 - a) Someone you choose (your "attorney") by preparing a **Continuing Power of Attorney for Property**
 - b) If you have not prepared a Continuing Power of Attorney, then your SDM may be someone who has become your **Statutory Guardian of Property**. This would happen if you are assessed by a person who is known as a **Capacity Assessor** and you are found incapable of managing property. The Office of the Public Guardian and Trustee of Ontario (PGT) would then become your Statutory Guardian. However, a family member can become your Statutory Guardian for Property after applying and being accepted by the PGT to do so.
 - c) Someone appointed by the Superior Court of Ontario. That person would be called your **Guardian of Property**.

- d) A **Trustee**. If your only income and assets are from government pensions (Old Age Security or the Canada Pension Plan) or social assistance (Ontario Works or Ontario Disability Support Program), another person can apply to the appropriate authority (either Human Resources and Skills Development Canada or the social assistance office) to be appointed your Trustee to manage these benefits. The process to apply is set out in the applicable legislation (*Old Age Security Act, Canada Pension Plan Act, Ontario Works Act or Ontario Disability Support Program Act*).
2. If you become mentally incapable for **personal care decisions** (decisions about health treatment, shelter, clothing, nutrition, hygiene and safety), your SDM is:
 - a) Someone you choose (your "attorney") by preparing a **Power of Attorney for Personal Care**.
 - b) Someone appointed by the Superior Court of Ontario. This person would be called your **Guardian of the Person**.
3. If the decision that is needed is a **health decision** (about treatment, admission to a long-term care home or decisions about personal assistance services), your SDM would be the **highest ranking person in your life on the list of SDMs set out in the *Health Care Consent Act***.

Please note that there are QUALIFICATIONS that a person must meet before he or she is recognized as your SDM. The SDM must be CAPABLE, AVAILABLE and WILLING to act. If the SDM highest in priority in this list does not meet all these qualifications, then the health professional may turn to the next highest-ranking SDM that meets these qualifications.

Specific Legal References

Presumption of Capacity

Health Care Consent Act, s.4

- A person is presumed to be capable for treatment, admission to care facilities and personal assistance services
- EXCEPTION – A person is entitled to rely on this presumption unless he or she has reasonable grounds to believe the other person is incapable in respect to treatment, admission to care facilities or personal assistance services as the case may be

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 reasonably foreseeable consequences of a decision or lack of decision.

Capacity for Health Care Decisions

Health Care Consent Act, s.15

- A person may be capable in respect to some treatments and incapable in respect to others
- A person may be incapable with respect to treatment at one time but capable at another time

Incapacity to Manage Property

Substitute Decisions Act, s. 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.

Incapacity for Personal Care

Substitute Decisions Act, 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.

NOTE: You can be "mentally ill" and yet still be "mentally capable". Mental illness is a clinical condition for which a person may receive "care, observation, and treatment". However, if a person is "mentally capable" it has been determined through a LEGAL ANALYSIS that the person is able to understand and appreciate the information relevant to making a decision and is therefore his or her own decision-maker. If the person is not mentally capable, the person's SDM is required to make decisions for that person.

Who Assesses Capacity?

Capacity assessments are carried out by different types of people depending on the circumstances. It is a common misconception that capacity assessment must be done by a physician or a "capacity assessor". In some circumstances, there is no need for any type of formal capacity assessment by a professional before determining that a person is not mentally capable. Sometimes a statute specifies who must determine capacity. Sometimes a document such as a power of attorney specifies who must determine capacity. Please refer to ACE's website to see our chart that lists who is required to assess capacity under different circumstances.

Before Health Treatment Takes place Consent to Treatment is Required

Consent to Treatment Required

Health Care Consent Act, s.10

No treatment unless:

- a) Health practitioner of opinion person capable in respect to treatment and person has consented, or
- b) Health practitioner of opinion that person incapable in respect to treatment and SDM gives consent.
- c) If Consent and Capacity Board or court finds person capable although Health practitioner was of opinion person not capable, Health practitioner 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 the proposed treatment
2. Must be informed consent
3. Must be given voluntarily
4. Must not have been obtained through misrepresentation or fraud

What is Informed Consent?

Health Care Consent Act, s.11

- The person received the following information about the proposed treatment that a reasonable person would require to make such a decision: nature, expected benefits, material risks, material side effects, alternative courses of action, and likely consequences of not receiving treatment
- The person received responses to further questions that he or she may have about these matters