
Capacity Assessments and Powers of Attorney

A presentation by

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THE AGENDA

(I hope I have the right stuff!)

1. Share stuff
2. Pause
3. Talk about stuff
4. Share more stuff
5. Summarize stuff
6. Consider questions about stuff

N.B. Interrupt my stuff with your stuff and you will get more stuff in return.

The Substitute Decision's Act (SDA)

- Came into effect in 1995
 - Why a new legislated process??
 - The office of the Provincial Guardian and Trustee represents and protects the personal and property interests of incapable people
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Main Initiatives under the S.D.A.

- Identified a standard assessment protocol (bias reduction) to bring order to legislated disorder
(Note: Interdisciplinary study group unable to determine a “Test for Competence”)
 - Established a process for training of assessors
 - Established a methodology of assessor reliability (yearly training) and quality control (yearly file review)
 - Prescribed a minimum number of assessments per year to maintain standing
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Capacity Assessor's Qualifications

- Capacity assessors are designated by the Attorney General of Ontario
 - Must be a member of a legislated professional college of Ontario
 - Must successfully complete a training program approved by the Attorney General
 - Must carry a minimum of one million dollar of professional liability insurance
 - Must attend yearly training and meet file audit requirements
- N.B.: independent of government (i.e. prof. practice)
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Legal/Ethical Presumptions

- Mental Capacity seen as a ***cognitive function***
 - Presumption of capacity (the default)
 - Incapacity must be of ***a nature*** and of ***a degree*** sufficient to interfere with the ability to manage property or meet essential personal care needs
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Key Tenets

- Right to self-determination
 - Presumption of capacity
 - “Decisional” capacity
 - Incapacity is domain-specific
 - Guardianship a momentous legal event (legislated removal of a legislated right identified in the Canadian Bill of Rights)
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Rights Advice/Right of Refusal

- Assessor ***must*** explain:
 - The purpose of the assessment
 - Significance/effect of a finding of capacity/incapacity
 - The right of refusal.....unless assessment is court ordered by an application to the Ontario Court
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2 Types of Assessments (Needs Activated)

The 2 areas of major concern which provided the unmet needs to be satisfied:

- Assessment of capacity to manage Property
- Assessment of capacity to manage Personal Care: Health Care, Nutrition, Shelter, Clothing, Hygiene or Safety.

*N.B.: A last resort where a person needs someone else to make decisions on his/her behalf on a **long term basis**.*

Reasons for Assessment

- To fulfill the requirement for statutory guardianship
 - To activate/revoke a power of attorney for property
 - To activate/revoke power of attorney for personal care
 - To terminate statutory guardianship
 - To activate/terminate a Court Ordered Guardian of property or person
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Process in Assessment

- Form 4- Request for assessment
 - Contract for service
 - Capacity assessment interview
 - Consent to review medical charts/records (PHIPPA)
 - Corroborating information
 - Completion of prescribed forms
 - Notification of finding
 - Attendance at Consent & Capacity Board- if decision challenged (post 6 months)
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Reference Standard

- Does a person have sufficient ***cognitive ability*** to meet some ***minimally acceptable*** level of financial or personal care management? (i.e.. How much is enough?)
 - ***Not*** is a person capable of making fully informed choices nor capable of objective cost-benefit analysis of the decision to be made (consistent with socio-cultural norms)
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S.D.A. Definition of Mental Capacity

- 2 part definition to be satisfied:
 1. Person must have the ***ABILITY TO UNDERSTAND*** relevant information, AND
 2. Demonstrate the ***ABILITY TO APPRECIATE*** the consequences of a decision or lack of a decision
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Operationalizing “U & A”

Understand

- Refers to a person’s **COGNITIVE ABILITIES** to factually understand and retain information
 - Demonstrate understanding through some **ACT OF COMMUNICATION**, the ability to express oneself (verbally or through symbols or gestures or whatever)
 - Understanding of options
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Operationalizing “U & A”

Appreciate

- Refers to the evaluative nature of decision making (***REASONING PROCESS***)
 - Application of the facts to one’s personal situation (***PERSONAL MEANING***)
 - A reasoning process devoid of distortions
 - Must be reasonably grounded
 - Realistic appraisal of outcome
 - Justification of choice
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Incapacity

- Failure on **ANY** of the 4 criteria:
 1. Factual knowledge base
 2. Understanding of options
 3. Realistic Appraisal of outcome
 4. Justification of choice
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#1: Factual Knowledge Base

- Able to provide an approximate accounting of the situation in question (P or P.C.)
 - Able to identify those essential personal care/financial tasks and commitments he/she is called upon to perform
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#2: Understanding of Options

- Able to comprehend information about options and attending risks/benefits
 - Ability to understand information/ideas at a conceptual level and to retain the essential information long enough to come to a decision
 - Able to remember choices and to express choices in a stable consistent manner
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#3: Realistic Appraisal of Outcome

- Realistic estimation of foreseeable consequences (vs. lack of insight)
 - Assignment of personal meaning or significance to any one outcome (vs. pathologic distortion of circumstances)
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#4: Justification of Choice

- Not looking at the “wisdom” of the reasons....looking at the process.
 - Stupidity not = incompetence
 - Decision-making clearly a reasoned one (logically consistent....a chain of well reasoned steps)
 - Reasoning predicted on premises that are known to be true or grounded in reality
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Mental Incapacity to Manage Property

“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”. (SDA, s.6)

Mental Incapacity to Manage Personal Care

“ A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning 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” (SDA, s.45)

Typical Assessment

- Majority of requests to conduct assessments of capacity concern the management of Property under s.16 (statutory guardianship)
 - Statutory guardianship: Ontario will do it for you
 - No distinction between ability to manage simple versus complex estates. Cannot have partial capacity with respect to managing Property
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Right of Refusal

- A person retains the right to refuse the assessment or withdraw his or her participation at any point in the process.
 - Court ordered assessment are excepted (the Court says “you shall”.)
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Rights Advice Obligation of the Capacity Assessor

1. To fully explain to the person the purpose of a capacity assessment and the assessor's role
 2. The significance and the effect of a finding of capacity or incapacity
 3. Right to refuse to be assessed
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A finding of Incapacity will mean one of the following:

- The PGT becomes the statutory guardian
 - A power of attorney for Personal Care is in effect
 - A power of attorney for Property is in effect
 - Support for an application to court for guardianship of the person or of property
 - Statutory guardianship cannot be terminated without a finding of capacity
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A finding of Capacity will mean:

- The PGT will not become the statutory guardian
 - The power of attorney will not be in effect
 - The statutory guardianship will be terminated upon notice to the guardian
 - The court appointed guardian of property or person may be terminated
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Optional Rights Information

- Six months after a finding of incapacity, an individual is entitled to apply to the Consent and Capacity Board for a review of the finding (the right of appeal)
 - An interesting legal process
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The What, Who and When of Capacity Assessment (3 Ws)

- ***What:***

An assessment of ability to make decisions about Property and Personal Care as detailed in ***The Substitute Decisions Act, 1992***

3 Ws cont.

Who:

- Assessment conducted by specifically trained and qualified capacity assessors.

In most situations the designated capacity assessor is the *only* professional authorized by law to make the determination

3 Ws cont.

When indicated:

- A person has no valid P.O.A. and may not be capable of making decisions about property or personal care.
 - Where a P.O.A. does exist and specifies an assessment occur for the P.O.A. to be activated.
 - Where there is no stipulation in a P.O.A. as to how it comes into effect.
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Questions & Comments

Thank You!

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