



Adult Capacity and Decision Making

NSHA Legal Services

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Disclaimer

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Legislative Changes

- ***Adult Capacity and Decision-making Act*** came into force on December 27, 2017.
- ***Incompetent Persons Act*** was repealed.
- ***Personal Directives Act*** still applicable.



Incompetent Persons Act (repealed)

- Guardianship orders made under the *Incompetent Persons Act* continue as representation orders
- Guardians become representatives, and have the same duties and responsibilities as new representatives under the *Adult Capacity and Decision-making Act*

Purpose of Adult Capacity Decision-Making Act

- Incompetent Persons Act was found to be too broad
- Recognizes that adults may not be able to make some decisions because of a learning disability, mental health problems, brain injury, or for other reasons
- Allows the court to appoint a representative for an adult who does not have capacity to make their own decisions.
- Recognizes that capacity is nuanced, and can vary for different decisions



Capacity

- All adults are presumed to have capacity, unless evidence proves that this is not the case
- Capacity is the ability, **with or without support**:
 - to understand the information that is relevant to the making of a personal care decision; and
 - to appreciate the reasonably foreseeable consequences of a decision or lack of decision.



Capacity Assessment

Capacity Assessment under the Adult Capacity Decision making Act is only for the purpose of an application to the court for the appointment of a representative.



Capacity Assessment Reports

- Currently can be completed by a physician or registered psychologist
- Also after receiving specific training and designated as an assessor:
 - nurse practitioners or registered nurses;
 - occupational therapists; and
 - social workers
- Training program to be developed in 2018 (government training program)



Representatives are appointed by the Court

- Any person can apply to be appointed as the “representative” of an adult.
- Distinct from Personal Directives or EPOAs, which do not need court approval
- The court will take into account:
 - Adult’s capacity
 - Other options for decision making
 - The need for representation



Representatives

- The representative must be at least 19 years old and know the adult well
- Usually a family member, but not a requirement
- A representative may only do the things described in the representation order and in the court-approved representation plan
- A representative must:
 - always act in the adult's best interests
 - make decisions in the least restrictive and least intrusive way
 - tell the adult about any decision they need to make or have made on the adult’s behalf
 - follow the wishes of the adult whenever possible



Representative Orders

- Court discretion is very broad – can grant authority to representative for decisions on:
 - Living conditions
 - Personal and health care
 - Financial matters
 - “Other” matters
- The order should not relate to any matter covered under a Personal Directive or EPOA
- Order may set time limits on decision making and may require re-assessments at certain intervals



Limits on Representatives

- Initial court hurdles
- A representative cannot:
 - make or change a will
 - commence divorce proceedings
 - change custody or parenting arrangements
 - consent to removal of tissue, while alive
 - consent to treatment using aversive stimuli
- The representative should not make any decision for which the representative knows, or has reasonable grounds to believe, that the adult has capacity



Possibility for Review

- Notice of any application must be sent to the adult's family (spouse, parents, children and siblings) as well as any delegates or attorneys appointed under a Personal Directive or EPOA
- Any person - including the adult - can complain to the Office of the Public Trustee if they don't like the decisions the representative makes



A few notes on Personal Directives

- Personal Directives are made in anticipation of future lack of capacity
 - Contrast to the new Act which applies after potential loss of capacity
- An individual with capacity can:
 - Appoint a delegate
 - Document wishes or instructions
 - Name someone to be consulted if capacity is being assessed



In practice:

If you have a client without capacity for personal care decisions:

- If a Personal Directive exists, the delegate would make the decisions authorized under the Act.
- If no Personal Directive exists, and there is a representation order, review the order to confirm the authority of the representative
- If no Personal Directive exists to make personal care decisions and no representative order, the SSDM can make decisions around health care, placement in a continuing-care home and home-care services.



Other Legislation

Involuntary Psychiatric Treatment Act

- The Involuntary Psychiatric Treatment Act (IPTA) also requires a capacity assessment – but such assessments are limited to a psychiatrist (not changing); and only for the purposes of IPTA

Hospitals Act

- Capacity assessments under Hospitals Act are to be done by a psychiatrist or physician (not changing)



Questions?

