

# **UNDERSTANDING CAPACITY**

Trends in Care for the Elderly

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# Understanding Capacity: The Law that Guides You and How it Fits Together

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# Understanding Capacity

## Jane Meadus

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  - **Grants/Research Support: None**
  - **Speakers Bureau/Honoraria: None**
  - **Consulting Fees: None**
  - **Other: None**
- ***I do not intend*** to make therapeutic recommendations for medications that have not received regulatory approval (e.g. off label use)

# Understanding Capacity

## Jane Meadus

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**This presentation will not make therapeutic recommendations**

# Understanding Capacity

## Jane Meadus

**Mitigating Potential Conflict of Interest:**

**This presentation will not make therapeutic recommendations**

# Assessment of Capacity

## Jane Meadus

**Goal: To review the role of capacity for decision-making**

**Objectives:**

- 1. Participants will be able to describe an assessment for finance, property and personal care**
- 2. Participants will understand the role of the substitute decision maker**
- 3. Participants will understand how to resolve conflicts in capacity and consent**

# Disclaimer

- This presentation and any material provided for this presentation is not legal advice but is only legal information for educational purposes
- Legal issues are **FACT SPECIFIC** and require factual information in order to provide legal advice to resolve an issue/problem/determine your rights
- If you require legal advice, please consult your own lawyer or legal advisor

# What is Capacity?

- Capacity is a socio-legal construct
- We are talking about “mental” capacity – not “physical” capacity
- Founded in case-law and statute law
- There are basic principles which we can be applied to all types of capacity in Ontario

# Capacity

- **ABILITY** to understand the information that is relevant to the decision to be made
- AND**
- **ABILITY** to appreciate the reasonably foreseeable consequences of a decision or lack of decision

# ***Starson v. Swayze***

***[2003] 1 SCR 722, 2003 SCC 32 (CanLII)***

- Evidence must demonstrate the person's **INABILITY** to understand and appreciate, not the **FAILURE** to do so
- Capable persons are fully entitled to make a decision that others may perceive as foolish

# Legislation Related to Property Decisions

- *Substitute Decisions Act (SDA)*
- *Mental Health Act (MHA)*
- *Powers of Attorney Act (PAA)*
- *Old Age Security Act (ODSA)*
- *Canada Pension Plan (CPP)*
- *Ontario Disability Support Plan (ODSPA)*
- *Ontario Works Act (OWA)*

# Legislation Related to Personal Care Decisions

- *Substitute Decisions Act (SDA)*
- *Mental Health Act (MHA)*
- *Personal Health Information Protection Act (PHIPA)*
- *Child and Family Services Act (CFSA)*
- *Long-Term Care Homes Act (LTCHA)*
- *Mandatory Blood Testing Act (MBTA)*
- *Retirement Homes Act*

# Capacity to Manage Property

# Authority to Make Property Decisions

- A person/agency has to be given authority to Act on behalf of another person
- There is no “presumed” authority
- The person does not have to be incapable for a third party to have authority to act on their behalf
- Authority of the third party and when it takes effect will vary depending on how authority is obtained

# ***Appointment - PAA***

- Allows a competent person to appoint one or more persons to be their attorney for property under general power of attorney for property
- Is valid upon signature
- Does not allow the attorney(s) to continue to act if the person becomes incapable

# Appointment of Attorney - SDA

- Allows a competent person to appoint one or more persons to be their attorney for property under a continuing power of attorney for property (CPOAP)
- May be valid upon signature or valid upon a future act
- Allows the attorney(s) to continue to act even after the person becomes incapable

# Capacity to Give a CPOAP

- A person is capable of giving a CPOAP if they:
  - knows what kind of property they have and its approximate value;
  - is aware of obligations owed to their dependants;
  - knows that the attorney can do anything in respect of property that the person could do if capable, except make a will, subject to any conditions or restrictions contained in the CPOAP he conditions and restrictions set out in the power of attorney;
  - knows that the attorney must account for all their dealings with the person's property;
  - knows that as long as they are capable, they make revoke the CPOPA at any time
  - Understand that unless the attorney manages the property prudently its value may decline; and
  - Understand the possibility that their attorney could misuse the authority given to them.

# Who Determines Capacity to Give a CPOAP

- Legislation is silent on this
- May be the lawyer drafting
- Some people wish to get an opinion as to capacity from Capacity Assessor, physician, or other party with expertise
- They are only opinions and not final
- Would be up to the Court if the validity of the CPOPA was challenged on the basis that the person was incapable when they signed
- Persons witnessing a CPOAP should not do so if they don't believe that the person is capable

# Capacity Under CPOAP

- A person who is capable of giving a CPOAP is capable of revoking it any time
- A person may be capable of granting a CPOAP even if they are incapable of managing property

# Authority of Attorney - SDA

- Attorney(s) may be able to manage money either:
  - Both while the person is capable and incapable,
  - OR**
  - Only when the person becomes incapable

# Valid Upon Signature

- If the CPOAP is valid upon signature, it does not require any assessment to use and does not require an assessment to use after the person becomes incapable
- While capable, both the person and their attorney have authority to manage the property

# Incapacity - CPOAP

- If the CPOAP states it is only to be used during incapacity, incapacity may be determined:
  - (1) In a manner specified in the CPOAP
    - This could be to a specific person, i.e. My Aunt Martha
    - This could be to a class of person, i.e. My Family Doctor
  - (2) If none specified – then either:
    - (a) Capacity Assessor as defined in the *SDA*, or
    - (b) Under the *MHA* Assessment is mandatory assessment by the physician

# Right of Review of Finding of Incapacity under a CPOAP

- When patient in the community, there is no right of review except to court
- Where a certificate of incapacity or a certificate of continuance under the *MHA* is issued
  - Must be seen by a Rights Adviser
  - Entitled to review of finding of capacity to the Consent and Capacity Board (CCB)

# Statutory Guardianship

- Two ways that this can be created
  - *Mental Health Act*
  - *Substitute Decisions Act*

# Finding of Incapacity- MHA

- Under MHA – mandatory examination by physician of psychiatric in-patient to determine capacity to manage property UNLESS:
  - the person already has a guardian of property, or
  - there is a CPOAP that provides for the management of ALL of the patient's property already
- No definition of incapacity – by analogy to *SDA* and case-law

# Certificate of Incapacity & Notice of Continuance under MHA

- If physician finds patient not capable of managing property - completes certificate of incapacity, submits it to the PGT who then becomes Statutory Guardian
- After issuing certificate of incapacity, physician may reassess at any time and cancel the certificate
- 21 days prior to discharge, physician must reassess patient and if they are still incapable, attending physician completes notice of continuance and Statutory Guardianship continues
- CANNOT assess under the *MHA* unless person is actually a psychiatric patient under the *MHA* – cannot be used as a “one-off”

# Finding of Incapacity - SDA

- Only by a Capacity Assessor authorized under the SDA
- Person to be assessed must be advised of:
  - The purpose of the assessment
  - The significance of a finding of capacity or incapacity and
  - The person's right to refuse the assessment
- If found incapable, issues certificate of incapacity and PGT becomes Statutory Guardian

# Capacity Assessor

- Completed specialized training with the Ministry of the Attorney General
- Maintains a minimum \$1,000,000 professional liability insurance
- Member of good standing with their professional college
- Designated by the government to do assessments of capacity
- Charge a fee based on their experience, expertise
- Most common assessments – re capacity to manage property under SDA
- Often requested to do assessments over which they have no authority and may only give an opinion

# Notification and Appeal

- Under *MHA*, the person must be:
  - given a notice of the finding of incapacity (both initial and subsequent)
  - Be visited by a rights adviser who advises the patient of their right to apply to the CCB
- Under *SDA*, the person must be:
  - given a copy of the certificate of Incapacity
  - PGT must notify the person that:
    - They are the statutory guardian and
    - The person has a right to apply to the CCB

# Replacement of PGT as Statutory Guardian

- PGT can be replaced as Statutory Guardian by:
  - Incapable person's spouse/partner
  - Relative of incapable person
  - Attorney under CPOAP if made before certificate of incapacity was issued and does not give authority over all of person's property
  - Trust corporation under *Loan and Trust Corporations Act* if the incapable person has spouse/partner, requires their consent in writing

# Court Appointed Guardian of Property

- Application and process is pursuant to the requirements set out in the *SDA*
- Two streams
  - Summarily (“over the counter”)
  - Court Application

# Proceeding by Summary Disposition

- Opinions with respect to incapacity
  - Require two opinions with respect to the person's incapacity to manage property
    - One must be completed by a capacity assessor
    - One must be completed by a capacity assessor or person who has known the allegedly incapable person and been in personal contact with them during the last 12 months before the notice of Application was issued
  - Must use Form 8 – Statement to Appoint a Guardian of Property by Summary Disposition under Section 72

# Proceedings Going to Trial

- Would require evidence of incapacity
- SDA is silent as to who is to provide the evidence – no requirement as to who it would be
- Often see capacity assessors or other medical personnel who have expertise in the area of capacity

# Third Party Managing OAS on Behalf of an Incapable Person

- Under section 24(1) of Old Age Security Regulations
  - Benefits can be administered by a third party, either:
    - By a person/agency that the Minister is satisfied is authorized pursuant to any law of Canada or a province to manage the affairs of the beneficiary; or
    - If the Minister is not satisfied that any person/agency is so authorized, the Minister can appoint a person/agency for this purpose and they must enter into an agreement with the Minister

# How to Obtain Authority?

- Person or agency must provide satisfactory evidence of incapacity to the Minister
  - Could be through a finding of incapacity under the *SDA* or *MHA*
- OR
- Certificate of Incapability must be completed by:
  - Medical Professional – Physician Registered Nurse, Nurse Practitioner, Psychologist or Psychiatrist, OR
  - Non-Medical Professional – Social Worker, Lawyer, or Member of the Clergy

# Appeals

- No direct appeal of finding of incapability
- Can there be a request for reconsideration of the Minister or an Appeal thereafter to the Social Security Tribunal if the Minister's decision is unsatisfactory?
  - s. 28.1 A person who is dissatisfied with a decision or determination made under this Act that **no benefit may be paid to the person**, or respecting the amount of a benefit that may be paid to the person, may, within ninety days after the day on which the person is notified in writing of the decision or determination, or within any longer period that the Minister may, either before or after the expiration of those ninety days, allow, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision or determination.

# Agreements

- Trustee must sign an Agreement to Administer benefits under OASA
- Different forms for Agency/Institution or Individual Trustee
- Trustees must maintain records of monies received and spent
- Minister may require an accounting and trustee must provide

# Third Party Managing CPP on Behalf of an Incapable Person

- Under section 55(1) of Canada Pension Plan Regulations
  - Benefits can be administered by a third party, by:
    - Either by a person/agency that the Minister is satisfied is authorized by or pursuant to a law of Canada or a province to manage the affairs of the person OR
    - If it appears to the Minister that there is no other person/agency so authorized, the Minister can approve a person/agency for this purpose and they must enter into an agreement with the Minister

# How to Obtain Authority?

- Minister must be satisfied, by medical certificates or other documentary evidence presented to the Minister or as required, that the person is incapable of managing their own affairs
  - Could be through a finding of incapacity under the *SDA* or *MHA* OR
  - Certificate of Incapability must be completed by:
    - Medical professional – Physician Registered Nurse, Nurse Practitioner, Psychologist or Psychiatrist, OR
    - Non-Medical Professional – Social Worker, Lawyer, or Member of the Clergy

# Appeals

- No direct appeal of finding of incapability
- Legislation appears much narrower than OAS and does not seem to have any ability to follow normal reconsideration or appeal process
- Likely only avenue would be court challenge

# Appointment of Person to Act for Recipient under ODSPA

- ODSPA s. 12 allows the Director to appoint a person to act for a recipient if:
  - There is no guardian of property or trustee for the recipient AND
  - Director satisfied the recipient is using or is likely to use his/her income support in a way that is NOT for the benefit of a member of the benefit unit

# Compensation

- Director can authorize compensation for expenses incurred and services provided while acting for a recipient for the following bodies:
  - Office of the Public Guardian and Trustee
  - An organization or agency under contract to the Ministry of Community and Social Services to act on behalf of persons

# Participation of Recipient and Review

- If feasible the consent of the recipient shall be obtained to the appointment
- If the recipient requests:
  - they should be given an opportunity to suggest someone else to act for them or
  - to make submissions as to why an appointment should not be made or should be discontinued.
- Director to periodically inquire into the need to continue the appointment
- May revoke the appointment as a result of a review

# Appointment of Person to Act for Recipient under OWA

- OWA s. 17 allows an administrator to appoint a person to act for a recipient 18 years of age or older if:
  - There is no guardian of property or trustee for the recipient  
AND
  - Administrator satisfied the recipient is using or is likely to use his/her assistance in a way that is NOT for the benefit of a member of the benefit unit
- Must appoint a person to act for a recipient who is under the age of 18 if there is no guardian of property or trustee for the recipient

# Compensation

- Administrator can authorize compensation for expenses incurred and services provided while acting for a recipient for the following bodies:
  - Office of the Public Guardian and Trustee
  - An organization or agency under contract to the Ministry of Community and Social Services to act on behalf of persons

# Review or Appeal

- No Review or Appeal seems to be required
- However it is not in the areas that are “prohibited”

# **Capacity to Make Personal Care Decisions**

# Personal Decisions

- Many areas where we deal with decisions in our personal life
- When we talk about “personal care” decisions we are talking specifically about those under the *SDA* or the *HCCA*
- Just because they are not governed by one of those two acts – DOES NOT mean no consent is required
- These “non-SDA/HCCA” issues can be very complex regarding who makes a finding of capacity, is there any right to challenge, what is the authority, etc.

# Personal Care - SDA

- Personal Care in SDA covers health care, nutrition, shelter, clothing, hygiene or safety
- allows the creation of
  - Power of attorney for personal care
  - Guardianship of the person
- If you have one of these, and if the person is incapable to make a decision in one of the areas – then the SDA authorizes you to make the decision

# What is governed by *HCCA*

- Decisions governed by the *HCCA*\* are:
  - Treatment as defined under the *HCCA*
  - Admission into a long-term care home
  - Personal assistance services in a long-term care or retirement home
- If the decision is under one of these headings, one looks to the *HCCA*

\*Unproclaimed amendments to the *HCCA*, *LTCHA* and *RHA* relating to “confining in a care facility” will be discussed in separate section below

# ***HCCA***

- Defines capacity
- Sets out the hierarchy of substitute decisions-makers (SDMs)
- Sets out requirements for SDMs
- Sets out appeals to the CCB

# Authority to Make Personal Care Decisions

- Personal care decisions can **ONLY** be made on behalf of another person if that person is mentally incapable
- Authority may derive from
  - relationship as defined under legislation
  - legal appointments

# Non HCCA/SDA Decisions

- Physicians often asked to determine capacity about non-HCCA/SDA issues
- “Capacity” to drink alcohol
- Capacity to marry
- Capacity to have sex
- Must think about whether you have the authority? What is the test? Even if you make a determination – what is the intended outcome? Your opinion may be of no legal weight!

# Consent to Treatment under the *HCCA*

# Consents Relate to Treatments Being Proposed

- Consent to treatment must be to a specific treatment or plan of treatment
- You cannot get consent to a treatment in the future **UNLESS** it is part of a plan of treatment
- Even then, it must be based upon present health situation
- You must always obtain informed consent, except in emergencies

# Consent

- No treatment without informed consent except in emergencies
- Must have consent to treatment from a capable patient or, if incapable, their substitute decision-maker
- Treatment without obtaining consent in accordance with the law is professional misconduct
- Also a tort – can be sued

# Plan of Treatment

- Developed by one or more health practitioners
- Deals with one or more health problems the person has or is likely to have in the future given their current health condition
- Provides for the administration to the person of various treatments or courses of treatment, as well as the withholding or withdrawal of treatment in light of the person's current health condition

# Plan of Treatment

- On behalf of the team, one HP can:
  - propose the plan of treatment
  - Determine whether the patient is capable of consenting to the treatments
  - Obtain consent or refusal from either the patient or their SDM if they are incapable

# Informed Consent

- Consent must be informed
- Elements of Consent are that the consent must:
  - Relate to treatment
  - Be informed
  - Be given voluntarily
  - Not be obtained through misrepresentation or fraud

# Informed Consent Required

- If incapable, informed consent must be obtained from the substitute decision-maker
- Treatment without obtaining consent in accordance with the law is professional misconduct
- Also a tort – can be sued

# Informed Consent

- Consent is informed if patient/SDM receives information about the following that a reasonable person would require in similar circumstances to make the decision
  - The nature of the treatment
  - The expected benefits of the treatment
  - The material risks of the treatment
  - The material side effects of the treatment
  - Alternative courses of action.
  - The likely consequences of not having the treatment.
  - What the admission entails
- The patient/SDM is entitled to receive responses to requests for additional information

# Withdrawal of Consent

- Consent must be obtained for withdrawal of treatment (*Cuthbertson v. Rasouli*, SCC)

# Presumption of Capacity

- A person is presumed to be capable
- Unless the HP has reasonable grounds to believe that the person is not capable
- Capacity is NOT related to age, disability, ability to communicate, etc.

# Capacity

- Capacity is a two-part test
- A person is capable with respect to a treatment if the person is:
  - **Able** to understand the information that is relevant to making the treatment decision, and;
  - **Able** to appreciate the reasonably foreseeable consequences of a decision or lack of decision

# Capacity & Setting

- Capacity is issue specific
- Presumption that consent to treatment continues in a different setting if no significant change expected in the expected benefits, material risks, material side effects expected

# Finding of Incapacity: Treatment

- Up to HP proposing the treatment to determine capacity
- Must ensure that treatment is not commenced until informed consent is obtained, except in an emergency situation

# Rights Information

- If a person is found incapable with respect to treatment, rights information must be provided for findings of incapacity under the *HCCA* as follows:
  - By the health practitioner per their College
  - If the treatment is of in-patient in psychiatric facility where a notice must be provided and a rights adviser must meet with the patient per *MHA*

# Information about Incapacity (HCCA s. 17; CPSO Consent to Treatment Policy 3-15)

- If the HP determines that the person is incapable, they must
  - Advise the person that they have been found incapable
  - That their SDM will make the decision for them
  - If they disagree, the patient can either
    - apply to the CCB for a review of the finding, or
    - apply to the CCB for the appointment of a representative
  - Must assist the patient in exercising these options

# Who is the SDM?

- Get consent from SDM **ONLY** if you have found the person to be incapable of making that decision
- HCCA contains a “hierarchy” of substitute decision-makers
- Generally you must get consent from the highest ranking person on that list

# Hierarchy

- Guardian of person with authority for treatment
- Attorney in attorney for personal care with authority for treatment.
- Representative appointed by CCB.
- Spouse or partner
- Child or parent or Children's Aid
- Parent with right of access only
- Brother or sister
- Any other relative.

*HCCA* s.20

# Spouse

- They must either be
  - married to each other; or
  - living in a conjugal relationship outside marriage and,
    - have lived together for at least one year, or
    - Have a child together or
    - Have a cohabitation agreement under the *Family Law Act*
- They are not spouses if they are living separate and apart as a result of a breakdown of their relationship

# Partner and Relative

- **PARTNER**

- Two people who have lived together for at least one year and have a relationship where they are the person of primary importance to the other
  - Is not required to be a sexual relationship
  - Could make someone who would otherwise be in a different category (i.e. child) - higher

- **RELATIVE**

- Is any other related by blood, marriage or adoption

# Requirements for SDM

- SDM may give or refuse consent only if he or she meets the following requirements:
  - Is themselves capable with respect to the treatment being proposed
  - Age 16 unless they are the parent of the incapable person
  - There is no court order or separation agreement which either prohibits access or ability to consent on behalf of the incapable person
  - They must be is available, and
  - They must be willing to assume the responsibility

# Available

- A person is available if it is possible to communicate with them in a reasonable time depending on the circumstance, to obtain a consent or refusal
- Can be in person, via telephone, via email, etc.

# Ranking of SDMs

- Consent is obtained from the highest person on the list that meets the requirements
- If there is a guardian of the person, attorney for personal care, or Board appointed representative – who have authority for that decision – you must obtain consent from them if they meet the requirements
- The exception is where the SDM is a family member- if there is a family member present or contacted, and they believe that there either there is
  - No one higher or on the same level of the list OR
  - If someone higher or on the same level exists, they would not object to their making the decision

# Where SDMs Disagree

- When there are equally ranked SDMs, you must obtain consent from all parties
- If one disagrees, then you must turn to the PGT
- The incapable person, or any other person, can apply to the CCB for someone to be the Board Appointed Representative
  - Cannot do this if there is an attorney for personal care or guardian of personal who has authority to make that decision
- Where its an attorney or guardian, they have to go to court to resolve between the parties

# Public Guardian and Trustee

- Public Guardian and Trustee makes treatment decisions in the following situations
  - If they are the Guardian of the Person appointed by the Court
  - If they have been named as attorney for personal care (rare)
  - SDM of last resort
  - Where there is conflict between SDMs of the same ranking

# Principles for Giving and Refusing Consent

- Known competent wishes
- Best Interest test as set out in *HCCA* s. 21(2)
- Up to the HP getting consent to ensure that the SDM knows these rules (*M(A) v. Benes*, 46 O.R. (3d) 271)
- SDM cannot “advance plan” – can only make a required decision based on facts

# Applications to CCB

- Review of finding of incapacity
- Appointment of representative\*
- Directions\*
- Depart from Wishes\*
- Determine SDM's compliance with the Act\*

\*Includes deemed application to review finding of incapacity

# Authority under the *SDA*

# Appointment of Attorney for Personal Care

- Under s. 46 of the *SDA*
  - Allows a competent person to appoint one or more person(s) to be their attorney for personal care under a power of attorney for personal care
  - Authorizes a person to make decisions only when person found incapable regarding that specific decision

**NO AUTHORITY UNTIL PERSON IS FOUND  
INCAPABLE OF MAKING THE SPECIFIC DECISION**

# Authority of *POAPC*

- POAPC gives the attorney(s) authority to make a decision
  - if the person is determined to be incapable of making that decision AND
  - it comes under one of the following areas:
    - Health care
    - Nutrition
    - Shelter
    - Clothing
    - Hygiene
    - Safety
- If it does not come within one of these defined areas, the attorney has no authority to make the decision

# When POAPC in Effect

- If the HCCA applies, the method set out in the *HCCA* applies
- Where the HCCA does not apply to the decision:
  - If confirmation required in the POAPC:
    - by the method set out in the POAPC, OR
    - If method not specified, by a Capacity Assessor
  - if confirmation not required, then by the attorney

# Appeals

- No appeals to the CCB are available for determinations of incapacity in areas that are not governed by *HCCA* where there is a power of attorney for personal care – would have to apply to Court

# Court Appointed Guardian of the Person

- Application and process is pursuant to the requirements set out in the *SDA*
- Two streams
  - Summarily (“over the counter”)
  - Court Application

# Proceeding by Summary Disposition

- Opinions with respect to incapacity
  - Require two statements each made by a capacity assessor

# Proceedings Going to Trial

- Application may be accompanied by one or more statements made by someone who knows the allegedly incapable person and has been in personal contact with them in the 12 months before the notice of application was issued
- Must use Form 6 - Optional Statement to Appoint a Guardian of the Person under Subsection 71 (1)

# Advocacy Centre for the Elderly

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