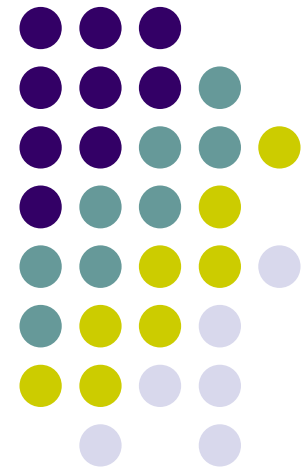


# Capacity Assessments

## - The Older Population

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# Faculty/Presenter Disclosure



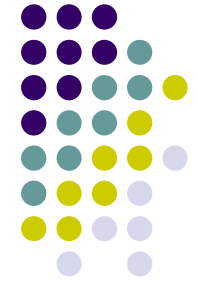
- **Faculty: Judith Wahl, B.A., LL.B.**
- **Relationships with commercial interests:**  
None

# Disclosure of Commercial Support

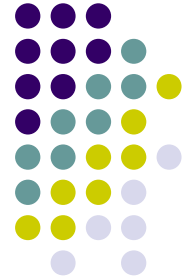


- This program has received financial support from – NONE - in the form of NONE
- This program has received in-kind support from NONE in the form of NONE
- Potential for conflict(s) of interest:
- NONE

# Mitigating Potential Bias



- NONE



# Disclaimer

- The legal information provided in this education session and on these slides is NOT legal advice
- If you require legal advice you should consult with a lawyer or other appropriate legal professional.

# Capacity Assessment and Older Adults – Goals and Objectives



- To understand when Capacity is most often at issue for older adults and assessments required or needed
- What is Mental Capacity in the “legal sense”
- What is a Capacity Assessment – what does Ability to Understand and Ability to Appreciate mean?
- The Process of assessment – things to remember when assessing capacity in older adults and what to do post assessment
- Who Assesses capacity for what purpose?
- Post Assessment – if Senior Incapable- Who is the SDM?

# When Capacity is most often at issue for seniors and Capacity assessments of some type relevant



- Health care (See Health Care Consent Act)
  - Capacity to make a treatment decision or decision about plan of care/treatment
  - Capacity to make decision about admission to long term care home
- Property (See Substitute Decisions Act)
  - Capacity to prepare a POA property
  - Capacity to manage property/ money
    - Capacity to manage Old Age Security Pension/ Canada Pension ( see OAS and CPP legislation)
  - Capacity to prepare a will (testamentary capacity) ( see also common law)
- Personal care (other than Health Care) (see Substitute Decisions Act)
  - Capacity to make decisions about where to live (shelter) including decisions about moving into a retirement home
  - Capacity to make decisions about risk / safety



# Physician's Role in Capacity Assessment - Treatment



- **Health care (see Health care Consent Act)**
  - **Capacity to make a treatment decision or decision about plan of care/treatment**

**Physician's Role - Physician has a REQUIRED role / DUTY to assess Capacity**

Physician offering Treatment Or Physician as part of a team offering treatments is RESPONSIBLE for the assessment of capacity of the patient

- **WHY? – because Physician must get an informed consent before treatment from Patient IF Patient is mentally capable or from Patient's SDM if Patient not mentally capable**

.

# Note to all Health Professionals



- This Duty to assess capacity is the duty of all Health Professionals of any type when offering treatment to a patient although these slides reference Physicians

# Physician's Role in Capacity Assessment

## – Treatment

### Legal Authority



- **HCCA s. 10 - No treatment without consent**

10. (1) A health practitioner who proposes a treatment for a person shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless,

- (a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or
- (b) he or she is of the opinion that the person is incapable with respect to the treatment, and the person's substitute decision-maker has given consent on the person's behalf in accordance with this Act.

# Physician's Role in Capacity Assessment

## – Treatment

### Legal Authority



- **Plan of treatment**

**13.** If a plan of treatment is to be proposed for a person, one health practitioner may, on behalf of all the health practitioners involved in the plan of treatment,

- (a) propose the plan of treatment;
- (b) determine the person's capacity with respect to the treatments referred to in the plan of treatment; and
- (c) obtain a consent or refusal of consent in accordance with this Act,
  - (i) from the person, concerning the treatments with respect to which the person is found to be capable, and
  - (ii) from the person's substitute decision-maker, concerning the treatments with respect to which the person is found to be incapable..

# Physician's Role in Capacity Assessment- Admission to LTC



- Health care
  - **Capacity to make decision about admission to long term care home**

Physicians are “Evaluators”. Evaluators are required to assess capacity of a person in respect to a decision for admission to a LTC home. In practice, because the CCAC is the gatekeeper to applications to LTC, CCACs usually rely on own case managers who are “evaluators” to do this assessment BUT because Physicians are evaluators, the assessment may be done by a physician.

- Person cannot be admitted to LTC home unless person gives consent . If Person not capable as determined by an “Evaluator”, then CCAC which is gatekeeper to LTC home applications must turn to incapable person’s SDM to make decision about admission

# Physician's Role in Capacity Assessment

## – Admission

### Legal Authority



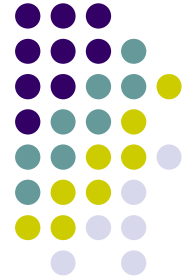
- **HCCA S. 2(1)**  
“evaluator” means, in the circumstances prescribed by the regulations,  
...  
(e) a member of the College of Physicians and Surgeons of Ontario,  
**(other health professionals are also evaluators)**
- **Consent on incapable person's behalf**  
40. (1) If a person's consent to his or her admission to a care facility is required by law and the person is found by an evaluator to be incapable with respect to the admission, consent may be given or refused on the person's behalf by his or her substitute decision-maker in accordance with this Act.

# Physician's Role in Capacity Assessment - Property



- **Property (See Substitute Decisions Act)**
  - Capacity to prepare a POA property
  - Capacity to manage property/ money
    - Capacity to manage Old Age Security Pension/ Canada Pension ( see OAS and CPP legislation)
  - Capacity to prepare a will (testamentary capacity) ( see also common law)
- **Physician's role in all of the above** – May be asked to give an OPINION about Capacity but no REQUIRED role or duty to assess capacity
- A Physician may be in good position to provide the opinion because of knowledge of the patient's health and history

# Physician's Role in Capacity Assessment – Personal Care



- **Personal care (other than Health Care) (see Substitute Decisions Act)**
  - Capacity to make decisions about where to live (shelter) including decisions about moving into a retirement home
  - Capacity to make decisions about risk / safety
- **Physician's role in all of the above** – May be asked to give an **OPINION** about Capacity but no **REQUIRED** role or duty to assess capacity – Physician may be in good position to provide the opinion because of knowledge of the patient's health and history



# What is a Mental Capacity Assessment and Purpose of Capacity Assessments



- Mental Capacity is a socio-legal construct and its meaning varies over time and across jurisdictions  
- **NEED to look at ONTARIO legislation**
- Assessment / evaluation of capacity refers to a “legal” assessment not a clinical assessment
- Clinical assessments underlie diagnosis, treatment recommendations and identify or mobilize social supports
- **Capacity assessments for decision making (Legal assessments) remove from the person the right to make autonomous decisions in specified areas – assessment is only for purpose of WHO decides for a particular decision or purpose**

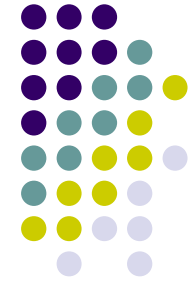
# Definition of Incapacity To Manage Property



- **SDA s.6**

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.

# Definition of Incapacity For Personal Care



- **SDA 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.

# Definition Of Capacity In Respect To Treatment, Admission To Care Facilities, And Personal Assistance Services



- **HCCA 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 reasonable foreseeable consequences of a decision or lack of decision.

# Mental Capacity for Decision Making



- Mental Capacity is issue specific – can be capable for some decisions and not capable for others
  - Person can lack capacity to make decision about admission into LTC Home but still capable for some or all treatment decisions
  - Person can be capable for some treatment decisions and not others
  - Person can lack capacity to manage property/ money YET still be capable of preparing a Power of attorney for Property
- Capacity can fluctuate – can be capable at some times and not at others – capacity may need to be reassessed at time of decision even if previously assessed as incapable or capable



# Presumption of Capacity

- **Health Care Consent Act s. 4 (2)(3)**

(2) A person is presumed to be capable with respect to treatment, admission to a care facility and personal assistance services.

## **Exception**

(3) A person is entitled to rely on the presumption of capacity with respect to another person **unless he or she has reasonable grounds to believe that the other person is incapable with respect to the treatment, the admission or the personal assistance service, as the case may be.**

**NO AGE FOR CONSENT TO HEALTH CARE– can be of very advanced age and still capable**

# Presumption of Capacity



- People of advanced age should be presumed to be capable unless there is evidence otherwise
- Seniors who live in long term care homes or in complex continuing care or in retirement homes should be presumed to be capable unless there is evidence otherwise
- **A senior may have named a relative to be his/her attorney in a POA for Personal care (POAPC) BUT because a POAPC does NOT come into effect until the grantor (the senior) is incapable for some type of personal care (decisions about health care, nutrition, safety, hygiene, shelter, clothing), the SENIOR continues to be his or her own decision maker despite having done this advance planning**

# Presumption of Capacity



- BUT presumption of capacity doesn't mean you ignore indicators/ behaviours that may be signs that person lacks capacity
- Presumption doesn't mean person is capable just because they seem to agree with what YOU think they should do or what you are asking
- Presumption of capacity doesn't mean that person is capable because they are not at risk of harm
- In many circumstances you may still need to question (and then assess the capacity) because you need the consent / agreement of a CAPABLE person to do something ( eg. to treat, to refuse treatment , to engage in intimate sexual behaviours, to leave the premises of a long term care home in which the person lives, etc)



# Mental Capacity for Decision Making



- Mental capacity for DECISION MAKING is **NOT a diagnosis** – person can be diagnosed as having have Alzheimer's and still be capable – Capacity to make decisions may become more of an issue at that point but the person may remain capable for some or all purposes for some time
- A person can be eccentric and still capable
- A person may have physical disabilities/ Communication disabilities and still be capable for decision making

# What is an Assessment of Mental Capacity?



- Mental Capacity/ Incapacity for decision making is NOT the score on the MMSE, MOCA, ACE or any other capacity test used for clinical purposes
- **In assessing capacity, must use definition of capacity in the legislation and do analysis of person's decision making abilities based on that definition**
- These types of test may help you assess the “ability to understand” and the “ability to appreciate” but the scores alone are NOT definitive or determinative of capacity

# What is an Assessment of Mental Capacity?



- **Capacity assessment is not a “risk assessment”** – a person can make a decision to live at risk if he or she is mentally capable and has the ability to understand and ability to appreciate that risk
- Capacity assessment is an assessment of mental ability to understand and mental ability to appreciate and is **not an assessment of the functional ability** of a senior or an assessment of that senior to live safely at home, free from risk.
- If the senior is mentally capable, assistance should be provided to help that person address risk rather than removing from him/ her their authority to make decisions for themselves.

# What is an Assessment of Mental Capacity?



- Capacity assessment is **not an assessment of “Best Interests”** – capacity assessments should not be used as a tool to address social / family problems such as:
  - Alcohol abuse (senior can be capable and an alcoholic)
  - Depression (senior can be depressed and capable)
  - As a means of moving a senior into a long term care home or assisted living (senior can be capable and not want to move to LT care home)
  - As a means of “managing” family conflicts over money (senior giving money to a particular adult child or some other person instead of dividing it amongst all the adult children etc) – senior can be making a CAPABLE decision to favour one child
  - As a means of managing conflict between adult children who are all seeking to “control” the senior ( e.g. adult child blocking access by other family members to the senior) - senior if capable is entitled to decide who visits

# The Capacity Assessment – How do you assess “Ability to Understand” and “Ability to Appreciate”?



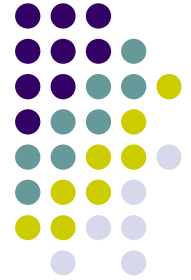
- A decisional Test: does the person’s decisional ability match the demands on them for decision that need to be made
- Understand 1st - Factual knowledge base  
*and* 2nd - Understanding of options
- Appreciate 3rd - Appraisal of Outcome  
4th - Justification of Choice

Must pass all bases to be found capable

# Before Doing a Capacity Assessment



- What do you need to know about THIS person before you do assessment?
  - Assessment for what purpose? For what decision?
  - PERHAPS- Information about background, relationships, family, health condition, culture, religion, options in respect to the decision about which person is being assessed, what this person knows or doesn't know, communication barriers if any (use of hearing aids, aphasia etc)
  - What you need to know before assessment depends on type of decision you are assessing whether the person is capable of making



# Understand - 1st Base

- Factual knowledge: preservation of old skills & knowledge
- Has the person had learning opportunities to acquire the relevant facts about decision to be made and related matters
- Has the person been given updated information relevant to the decision to be made such as medical status, new risks or limits in ADL functions, information about treatment options?

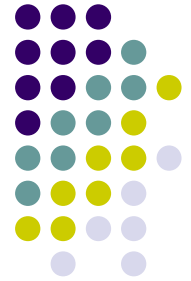
## Before doing a Capacity Assessment this may mean then .....



- If assessment to manage property or to give a POA property – because part of the “factual knowledge” would be knowledge of the person property/ income etc– has the senior been managing their own finances, paying bills, and would he or she actually have present knowledge of this? If not – unfair to assess this capacity unless person has had opportunity to be informed...
- If assessment about capacity to make treatment decision – has the senior been given information about their present health care needs/ health condition? If not unfair to conclude the person lacks capacity just because of lack of knowledge / information



# Understanding Options - 2nd Base



- Able to comprehend information about options, risks to make an informed choice
- Able to attend to relevant stimuli, understand at conceptual level and 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- probe specific example



# Appreciate - 3rd Base

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

# Appreciate - 4th 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

# When doing a Capacity Assessment - PROCESS



- When assessing capacity you need to

## “PROBE and VERIFY”

**Re Koch** 33 O.R. (3d) 485 [1997] O.J. No. 1487  
**Ontario Court (General Division),  
Quinn J.,  
March 26, 1997**

Facts- Woman with MS was separated from her husband. After the two failed to negotiate a separation agreement the husband made a complaint about his wife's capacity, which triggered the mechanisms of the Health Care Consent Act, 1996 ("HCCA") and the Substitute Decisions Act, 1992 ("SDA"). The appellant appeals from the Consent and Capacity Board's findings that she was incapable of managing her affairs and incapable of consenting to placement in a care facility. Talosi and Higgins are the names of the capacity assessor and the evaluator.

# Excerpt - Re Koch 33 O.R. (3d) 485 [1997] O.J. No. 1487



- **NOTES** – “From the outset, the assessor/evaluator must **maintain meticulous files.**”
- **PROBE** - “In my view, it was **not sufficient** for Talosi and Higgins **merely to record information provided by the appellant and then form an opinion.**”

“In some instances the appellant **should have been PROBED to determine the thought process by which she arrived at an answer or statement.** Until her thought process is known, it is neither fair nor reasonable to impugn the appellant's mental capacity.”

- **VERIFY** - “By not exploring the process by which the appellant arrived at her decisions, answers and statements, Talosi and Higgins have assumed, quite unfairly, the absence of logic. In doing so, they greatly impaired their ability to assess and evaluate the appellant's cognitive abilities. ““In some instances, **verification** should have been sought.””

# Challenges in Process of Assessment of Capacity



- The over helpful family
- How to assess “appreciation” (judgment)
- People “accommodating” for deficits in ways that may mask lack of ability to understand or lack of ability to appreciate
- Your own questioning style – need person to explain rather than just respond
- TIME
- Etc etc etc

# Post Assessment if Senior found Incapable for Treatment Decisions



- **If Senior is assessed as incapable for Treatment**

17. A health practitioner shall, in the circumstances and manner specified in guidelines established by the governing body of the health practitioner's profession, provide to persons found by the health practitioner to be incapable with respect to treatment such information about the consequences of the findings as is specified in the guidelines.

- **For Physicians - See CPSO Policy on Consent to Treatment and Materials in Dialogue**

## **CPSO Dialogue July 2007 Excerpt**

### **Determining capacity to consent**

### **Guiding physicians through capacity and consent to treatment law**



“The physician must tell the incapable patient that a substitute decision-maker will assist the patient in understanding the proposed treatment and will be responsible for making the final decision.

The physician should involve the incapable patient, to the greatest extent possible, in discussions with the substitute decision-maker.

If the patient disagrees with the need for a substitute decision maker because of the finding of incapacity, or disagrees with the involvement of the present substitute, the physician must advise the patient of his or her options.

These include the finding of another substitute of the same or more senior rank, and/or applying to the Consent and Capacity Board for a review of the finding of incapacity.

Physicians are expected to assist patients if they express a wish to exercise these options”



# Post other types of assessments of capacity



- If determined incapable either the law ( in SDA or HCCA) or basic principles of fairness require that the senior be told that he / she found incapable so that he/she has the opportunity to challenge that determination at the Consent and Capacity Board



# Who Assesses Capacity?

- Sometimes defined by Statute
  - “Capacity Assessors” to trigger a statutory Guardianship for property
  - “Health practitioners” for treatment
  - “Evaluators” for Capacity for Admission
- Sometimes in common law (ie contracts)
- Sometimes a variety of persons can provide **OPINIONS OR EVIDENCE** as to incapacity
- See Chart - *Who Assesses Capacity Under What Circumstances* in included materials)



- “Capacity Assessors” as defined by the SDA do not do all capacity assessments!!!!

# Definition Of Capacity Assessor



- **SDA s. 1(1)**

“assessor” means a member of a class of persons who are designated by the regulations as being qualified to do assessments of capacity.

# Capacity Assessors

## O.Reg.460/05



- **s.2 (1)**

A person is qualified to do assessments if he or she,

- a) satisfies one of the conditions set out in ss.(2) (member of particular health College) ;
- b) has successfully completed the qualifying course described in s.4**
- c) complies with s.5 (continuing education)
- d) complies with s.6 (minimum annual number of assessments)
- e) is covered by professional liability insurance of not less than \$1,000,000...

# Capacity Assessors

## O.Reg.460/05



- **s.2 (2)**  
is a member of one of the following Colleges
  - a) College of Physicians & Surgeons of Ontario
  - b) College of Psychologists of Ontario
  - c) Ontario College of Social Workers & Social Service Workers and holds a certificate of registration for social work
  - d) College of Occupational Therapists of Ontario
  - e) College of Nurses of Ontario

Note that you are NOT automatically a “Capacity Assessor” just because you are a member of one of these Colleges . You must also meet the qualifications on slide 48.

# Admission to LTC Homes



- Capacity assessment must be done by an “Evaluator” as defined in HCCA

# Definition of Evaluator



## ■ HCCA s. 2(1)

“evaluator” means, in the circumstances prescribed by the regulations,

- (a) a member of the College of Audiologists and Speech-Language Pathologists of Ontario,
- (b) a member of the College of Dietitians of Ontario,
- (c) a member of the College of Nurses of Ontario,
- (d) a member of the College of Occupational Therapists of Ontario,
- (e) a member of the College of Physicians and Surgeons of Ontario,
- (f) a member of the College of Physiotherapists of Ontario,
- (g) a member of the College of Psychologists of Ontario, or
- (h) a member of a category of persons prescribed by the regulations as evaluators;

Prescribed by Regulations - social workers (Member of the Ontario College of Social Workers and Social Service Workers who holds a certificate of registration for social work)

**NOTE – you AUTOMATICALLY an EVALUATOR if you are a member of one of these Colleges. NO OTHER QUALIFICATIONS to be an Evaluator.**



# Evaluators and Capacity Assessors - Not the same



Of the matters that go to the Consent and Capacity Board

- Health practitioners assess capacity for Treatment decisions
- Evaluators ( who do INCLUDE Physicians) do the Capacity for Admission to LTC homes
- “Capacity Assessors” do Property SDA s16 assessments to trigger Statutory Guardianships
  
- Training requirements – none for evaluators; Capacity Assessor have to take required course
  
- Fees – Evaluators cannot charge for evaluations whereas Capacity assessors charge fees  
and so on.....

# Property – POA Property and document specifies who does Capacity assessment



- “Capacity Assessors” as defined in SDA are not always required to be used as assessors of capacity to manage property
- For POA property to come into effect, assessments of incapacity NOT always required
- POA for Property come into effect ON SIGNATURE before incapacity unless the document states that it is triggered only on incapacity

# Property- when POA property and document does specifies who assesses capacity



- If person created a POA Property
  - and specifies in POA that POA Not in effect until grantor incapable
  - AND specifies Who must do assessment of capacity then that person or persons so specified must do assessment for that purpose
  - Grantor of POA can specify ANYONE they want to do assessment even if person named not a health professional
  - Can also specify a “class” of people -“any doctor, or nurse, or ??? Rather than a specific person

# Property- when POA property but document does not specify who assesses capacity



- If person created POA Property
  - And specifies that it shall not come into effect until incapacity determined
  - but doesn't name WHO should do assessment
  - Then LEGISLATION requires it must be "Capacity Assessor" as defined by the SDA

# Property – No POA Property



- If person NOT prepared POA property
  - And now it is believed that person may be incapable to manage property and needs SDM to do that, then Capacity Assessor as defined in SDA may be asked to do capacity assessment to trigger a STATUTORY GUARDIANSHIP (someone to make property decisions for incapable person)
  - OPGT will be required to step in as Statutory Guardian when receive assessment of incapacity from Capacity assessor
  - Family and others may apply to replace OPGT

# Right to Refuse A Capacity Assessment by a Capacity Assessor ( as defined under SDA)



- **SDA s. 78**

- (1) An assessor shall not perform an assessment of a person's capacity if the person refuses to be assessed.
- (2) Before performing an assessment of capacity, the assessor shall explain to the person to be assessed,
  - (a) the purpose of the assessment
  - (b) the significance and effect of a finding of capacity or incapacity; and
  - (c) the person's right to refuse to be assessed.

***Cont'd***

# Right to Refuse a Capacity Assessment by a Capacity Assessor



- (3) Subsections (1) and (2) do not apply to an assessment if,
  - (a) the assessment was ordered by the court under section 79; or
  - (b) a power of attorney for personal care contains a provision that authorizes the use of force to permit the assessment and the provision is effective under subsection 50(1).

# Capacity Assessment for Treatment by Physicians



- You as a physician do not need to get a formal consent to the assessment of capacity if you are determining if a patient is capable or not to consent to a treatment
- You need to form an opinion about every patient's capacity **BEFORE** you treat because you can't treat (except in an emergency) without consent from a capable patient or the incapable patient's SDM



# Post Assessment of Incapacity

## – Who is the SDM?



- Not necessarily the senior's primary caregiver
- For treatment – not just an attorney in a POAPC



# SDA – Who are the SDMs?

- **Someone always must DO something before a SDM is created under SDA**
- Property
  - Attorney in a POA Property ( Person must prepare this when capable for this purpose)
  - Statutory Guardian (created after assessment by a Capacity Assessor as defined in SDA)
  - Guardian of Property (court order)
- Personal Care
  - Attorney in a POA Personal Care (Person must prepare this when capable for this purpose)
  - Guardian of the Person (court order)

# Other SDMs for Property



- Trustee under OAS/CPP/Welfare legislation
  - Person who wants to become the trustee must DO something (get opinions, do paperwork, file at appropriate government office) to become the trustee

# HCCA - List Of SDMs Who May Give or Refuse Consent to treatment/ Admission to long term care



## ■ HCCA s. 20

1. Guardian of person with authority for treatment.
2. Attorney in attorney for personal care with authority for treatment.
3. Representative appointed by CCB.
4. Spouse or partner.
5. A child or parent of the incapable person, or a children's aid society or other person who is lawfully entitled to give or refuse consent to the treatment in the place of the parent. This paragraph does not include a parent who has only a right of access. If a children's aid society or other person is lawfully entitled to give or refuse consent to the treatment in the place of the parent, this paragraph does not include the parent.
6. Parent with right of access only.
7. Brother or sister.
8. Any other relative
9. OPGT

# Requirements for SDM

## HCCA s.20



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

- i) capable with respect to treatment,
- ii) 16 unless parent of incapable person,
- iii) no court order or separation agreement prohibiting access to incapable person or giving or refusing consent on his or her behalf,
- iv) is available, and
- v) willing to assume responsibility of giving or refusing consent.



# Definitions

- “Guardian” - means person that has an order of Guardianship from a court
- “Representative” means person appointed by the Consent and Capacity Board as a result of an application to the CCB by person that lacks capacity for treatment decision making or by another person that applies to be appointed the “representative”



# Definition Of Spouse

- **HCCA S.20**

(7) Subject to subsection (8), two persons are spouses for the purpose of this section if,

- (a) they are married to each other; or
- (b) they are living in a conjugal relationship outside marriage and,
  - (i) have cohabited for at least one year,
  - (ii) are together the parents of a child, or
  - (iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*.

## **Not spouse**

(8) Two persons are not spouses for the purpose of this section if they are living separate and apart as a result of a breakdown of their relationship.

# Definition of Partner and Relative



- **Meaning of partner**  
HCCA s. 20 [\(9\)](#) For the purpose of this section, “partner” means,
  - (a) Repealed
  - (b) either of two persons who have lived together for at least one year and have a close personal relationship that is of primary importance in both persons’ lives.
- **Meaning of “relative”**  
HCCA s.20 [\(10\)](#) Two persons are relatives for the purpose of this section if they are related by blood, marriage or adoption.





## Definition of “available”

- HCCA s 20 (11)

For the purpose of clause (2) (d), a person is available if it is possible, within a time that is reasonable in the circumstances, to communicate with the person and obtain a consent or refusal.

# Ranking



**Person lower on list may give consent only if no person higher that meets requirements.**

**So need to know who is the highest ranking person(s) on list in each patient's life to figure out who is the RIGHT SDM**

## EXCEPTION

Family member present or contacted may consent or refuse consent if he or she believes:

- a) no person higher or in same paragraph exists,
- OR
- b) if person higher exists, person is not guardian of person, POAPC, Board appointed representative with authority to consent and would not object to him or her making the decision.

# Public Guardian and Trustee



- **HCCA s. 20(5) & (6)**
  - If no person meets requirement, then the PGT shall make the decision to give or refuse consent
  - If conflict between two or more equally ranked persons who meet the requirements cannot agree and if their claims rank ahead of all others, the PGT **shall** make that decision in their stead.

# List of SDMs for Health Care- What if more than 1 SDM on same ranking?



- If a person has more than one person in the same category that is available to act for him or her as SDM, then all of them must act together and agree or they may pick, amongst themselves, one of the group to act for the incapable person
- Eg. if incapable person has three children all three may act for person or they must choose which one will act for the person – THEY must agree in some way as to what the decision is for the person and how many of them are “active” in the decision making

# Can someone apply to Court to be authorized to make Decisions for the incapable person?



- Yes – someone, usually a close family member may apply to court to be named the incapable person’s “Guardian of the Person”
- This is fairly rare as the main personal care decisions are health decisions so the person highest on the list of SDMs will make the personal decisions for the person if incapable



## “Pearls of Wisdom” about SDMs

- The SDM can make decision ONLY if resident/patient is **not capable**
- The family member or friend of the resident/patient that had been the primary caregiver is NOT necessarily the resident's/patient's SDM
- The SDM must be highest ranking **in the list** who is meets requirements to be SDM such as being WILLING, AVAILABLE, CAPABLE
- If highest ranking person on lists doesn't meet requirements GO TO THE NEXT PERSON on list

# “Pearls of Wisdom” about SDMs



- Person incapable for treatment – if has no one on SDM list , then its PGT that steps in . Everyone in Ontario always has an SDM for health care
- Family fighting over treatment decisions – who actually has authority to act as SDM? Caregiver child does not get advantage if multiple children – all equally rank. No hierarchy in HCCA for EQUALLY RANKING SDMs
- Fighting equally ranked SDMs
  - If can't settle who will act or what decision together will make then SDM is PGT
  - One of fighting family can apply to CCB to be appointed Representative or to court to be appointed Guardian of the Person
  - Is patient still mentally capable to execute POAPC even if incapable for treatment?



# THANK YOU!

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