A Practical Guide to Capacity and Consent Law of Ontario for Health Practitioners Working with People with Alzheimer Disease

The
Dementia Network
of Ottawa

A practical guide to capacity and consent law of Ontario for health practitioners working with people with Alzheimer Disease

Dear Colleague:

A Practical Guide to capacity and consent law of Ontario for health practitioners working with people with Alzheimer Disease is an initiative developed by the members of the Dementia Network of Ottawa, the Geriatric Psychiatry Program of the Royal Ottawa Hospital and the Geriatric Psychiatry Community Services of Ottawa.

The medical community in our region has identified capacity issues as an area requiring greater attention to better meet the needs of clients with dementia. In response, a mini task force was set up to address these specific issues. This document is aimed principally for primary care physicians, however, other health practitioners working with this population may also find it useful. Please note that some of the materials in this guide pertain only to the region of Ottawa.

This guide provides a very general overview of the law and suggested practice for health practitioners in dealing with issues of incapacity to consent to treatment, admission to a long term care facility or manage property. It is not a legal opinion nor does it constitute legal advice. It does not include every detail contained in the law or the specific legal provisions that may apply in a particular case. For specific information about the law, please refer to the applicable statutes and consult your lawyer.

You are welcome to reprint or photocopy any part of this document.

We hope you will find this information of benefit and we welcome your feedback.

Thank you,

Michèle Tremblay, M.D. FRCPC
Chair, Mini Task Force on Capacity Issues
The Dementia Network of Ottawa
(613) 722-6521 x 6905
mtrembla@rohcg.on.ca

Members of the Mini Task Force on Capacity Issues for the Dementia Network of Ottawa:

Michèle Tremblay, FRCPC: Director of the Inpatient Geriatric Unit, Royal Ottawa Hospital
Linda Gobessi, MD, FRCPC: Geriatric Psychiatry Community Services of Ottawa
Trudy Spinks LL.B, Deputy Public Guardian and Trustee/Client Services
Sanjay Srivistava LL.B, Regional Vice-Chair, Ontario Consent and Capacity Board
Clarissa Bush PhD, C Psych, Memory Disorder Clinic, SCOHS
Lyla Graham MD, CCFP, Family Physician, Ottawa, Ontario
Ian Richardson, MD, CCFP, Family Physician, Ottawa, Ontario

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The Alzheimer Society of Ottawa
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Dementia Network of Ottawa

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Introduction

Progressive dementias, like Alzheimer Disease, ultimately interfere with decision making abilities involved in all aspects of life. As there is no uniformity in the illness's progression, specific capacities will be lost at different periods during the course of each person's disease. Each of these unique capacities requires distinct abilities and skills, and must be assessed independently. Health practitioners may encounter individuals needing assessment of capacity to make a will, to marry, to drive, to consent to treatment, to consent to admission to a care facility, etc. Some of these assessments require special knowledge and understanding of the provincial legislation to manage and protect the incapable individual.

This document is an initiative developed by the Dementia Network of Ottawa; it reviews the assessment and management of persons suffering from dementia as they lose their ability to make treatment decisions, to make decisions regarding placement in a care facility and to handle their own financial affairs. The assessment of driving in this population has previously been covered in the document "The Driving and Dementia Toolkit" which is available at www.rgapottawa.com.

Legislation under the Health Care Consent Act (HCCA) also exists to enable the authorization of personal assistance services for an individual living in a long term care facility. As the use of this legislation seldom causes difficulties for health practitioners, it is not covered in this document. All of the Ontario Acts are available at www.e-laws.gov.on.ca.

Although the law views one as either capable or incapable with respect to a specific task, it is important to note that the level of capacity may fluctuate. In some individuals this fluctuation may be marked and capacity may need to be assessed more than once. The ultimate aim is to preserve the person's autonomy as long as possible while ensuring that his or her vulnerability is protected. Removing one's decision making capacity has significant repercussions for the person as well as for his/her caregivers. In general, the Ontario legislation encourages that the least restrictive approach be taken.

Capacity to Consent to Treatment

Why is capacity to consent to a treatment an important issue for health practitioners working with people with Alzheimer Disease?

In Ontario, the Health Care Consent Act (HCCA) governs health practitioners. This legislation states that for a treatment to be administered to a person, informed consent is required, either from the patient if mentally capable, or, if not, from a legally authorized substitute decision maker (SDM). The only exception to this rule involves emergency care. Due to the progressive cognitive deterioration caused by Alzheimer Disease, people suffering from this illness are likely, at some point, to become incapable of making decisions regarding their treatment.

What is the legal definition of capacity to consent to treatment?

Health Care Consent Act (HCCA) section 4(1)

A person is capable of consenting to a treatment if the person is able to

a) "understand" the information that is relevant to making a decision about the treatment, and
b) "appreciate" the reasonably foreseeable consequences of a decision or lack of decision.

A person is presumed to be capable with respect to treatment unless reasonable grounds to suspect incapacity exist.

How does Alzheimer Disease affect capacity to consent to treatment?

To consent to a treatment, one must be able to "understand" and "appreciate". To understand, the person needs to have the cognitive ability to remember the general information given regarding the proposed treatment. To appreciate, he or she needs the ability to weigh the information in the context of his or her life circumstances. In addition to memory, this requires the ability to reason and to make decisions. All of these abilities may be impaired in people with Alzheimer Disease.

What can be done for someone who is likely to become incapable?

It is advisable to have a discussion with all patients in your practice, but particularly someone with a diagnosis of early dementia, about the importance of making a Power of Attorney for Personal Care under the Substitute Decisions Act (SDA). A discussion about the choice of attorney or attorneys can prevent misunderstandings or complications in the future. In the event that the person chooses not to sign a Power of Attorney for Personal Care, the physician can review who would be the substitute decision maker (SDM) under the Health Care Consent Act (HCCA). (Refer to page 5, "Who may act as a substitute decision maker (SDM)?")

Who is capable of giving a Power of Attorney for Personal Care?

A person is capable of giving a Power of Attorney for Personal Care if he or she,

a) has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and
b) appreciates that the person may need to have the proposed attorney make decisions for the person

A person who is capable of giving a Power of Attorney for Personal Care is also capable of revoking it.

When does the Attorney for Personal Care make treatment decisions?

Only when the person becomes incapable with respect to the proposed treatment.

Who assesses capacity to consent to treatment?

It is the health practitioner proposing the treatment who must assess whether the individual is capable of giving consent. A "health practitioner" is a member of one of the regulated health professions including members of the College of Physicians and Surgeons of Ontario. A person is presumed to be capable with respect to treatment unless "reasonable grounds" to suspect incapacity exist. Incapacity may be suspected on the basis of direct observation of the person (e.g., the person is confused, disoriented, depressed, psychotic, extremely anxious, unable to make a decision, intoxicated, etc.) or from information obtained from family or other caregivers.

What is treatment?

"Treatment" means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic, or other health-related purpose and includes a course of treatment or plan of treatment. Given how broadly "treatment" is defined it is fair to say that this legislation governs most interventions with patients. Nevertheless, treatment does not include assessment of a person's capacity, the assessment or examination of a person to determine the general nature of the person's condition, the taking of a person's health history, communication of an assessment or diagnosis, treatment that in the circumstances poses little or no risk of harm and the use of physical restraints (this is regulated by common law and the Patient Restraints Minimization Act).

When can physical restraints be used?

The Patient Restraints Minimization Act was introduced in 2001. It mandates hospitals and facilities to minimize the use of restraints including use of monitoring devices and confinement. Each hospital and facility establishes its own policies. The Mental Health Act continues to govern the use of restraints in psychiatric facilities. However, neither act affects the common law duty of a caregiver to restrain or confine a capable or incapable person when immediate action is necessary to prevent serious bodily harm to the person or others.

What is "emergency" treatment?

According to the Health Care Consent Act (HCCA), there is an "emergency" if the person for whom the treatment is proposed is apparently experiencing severe suffering or is at risk, if the treatment is not administered promptly, of sustaining serious bodily harm. It falls to the health practitioner to decide whether there is an "emergency." Please note that an examination or diagnostic procedure that constitutes "treatment" may be conducted by a health practitioner without consent if the examination or diagnostic procedure is reasonably necessary in order to determine whether there is an emergency and in the opinion of the health practitioner, the person is incapable with respect to the examination or diagnostic procedure.

What elements are required to obtain consent to treatment?

Consent must relate to the treatment, must be informed, must be given voluntarily and must not be obtained through misrepresentation or fraud. The health practitioner must have reviewed with the person the nature of the treatment, expected benefits, material risks and side effects, alternative courses of action and likely consequences of not having the treatment. Consent to treatment is informed, provided the person received information that a reasonable person in the same circumstances would require in order to make a decision about the treatment and the person received responses to his or her requests for additional information.

How does one assess capacity to consent to treatment?

The health practitioner focuses on the person's specific capacity in relationship to the proposed treatment. The person must be able to "understand" the information that is relevant to making a decision about the treatment and "appreciate" the reasonably foreseeable consequences of a decision or lack of decision.

- Does the person understand the condition for which the specific treatment is being proposed?
- Is the person able to explain the nature of the treatment and understand relevant information?
- Is the person aware of the possible outcomes of treatment, alternatives or lack of treatment?
- Are the person's expectations realistic?
- Is the person able to make a decision and communicate a choice?
- Is the person able to manipulate the information rationally?

What happens if the person is found incapable of consenting to the proposed treatment?

The person must be advised of his or her legal rights, unless the situation constitutes an emergency. In doing so, the health practitioner is expected to follow the guidelines developed by his or her own professional body relating to advising the incapable person of their rights. In order to assist physicians, the College of Physicians and Surgeons of Ontario has developed guidelines for informing incapable patients of their rights. These guidelines are to aid physicians in discussions with incapable patients when the emergency provisions of the Health Care Consent Act (HCCA) do not apply.

- 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 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.

The information provided to the patient according to the guidelines and the person's response to the finding of incapacity should be documented in the person's chart.

Identify the substitute decision maker (SDM) and provide the SDM all the information required to make the decision.

If the person does not contest the finding of incapacity or request another SDM, treat the person, in accordance with the decision made by the SDM.

Is the person contesting the finding of incapacity or requesting another substitute decision maker (SDM)/representative?

The person should proceed to make an application to the Consent and Capacity Board. The physician advises the person on how to proceed. Do not initiate any non emergency treatment until the Consent and Capacity Board has rendered a decision, or 48 hours have elapsed and no formal application to the Board has been made. It is rare for a person suffering from Alzheimer Disease to contest the finding of incapacity. It is even less common for the person to contest the decision of the Board. However, if someone does, it is advisable to review section 18 and 19 of the Health Care Consent Act.

How does a person make an application to the Consent and Capacity Board?

The person may contact the Consent and Capacity Board Office at 151 Bloor Street West, 10th Floor, Toronto, Ontario, M5S 2T5. Phone: (416) 924-4961 or 1-800-461-2036, Fax: (416) 924-8873. The Board's website is available at: www.ccboard.on.ca.

How does a health practitioner prepare for a Board hearing?

Prepare a summary of the person's history, his or her illness(es), and the treatment you are proposing. It is highly recommended not to be too specific, e.g., pharmacological treatment of _____ illness. If the Board upholds your decision of incapacity and the first treatment does not work or has too many side effects, you can modify the treatment without having to have another hearing. Outline the reasons the person is incapable of consenting to the treatment. The diagnosis of Alzheimer Disease by itself cannot justify a finding of incapacity. Refer to the formal definition of capacity to consent to treatment to assist you. If needed, you may ask witnesses including family members, other caregivers, or health practitioners to testify at the hearing.

Where will the hearing be held?

The hearing may take place in the health practitioner's office or in the person's residence if he or she is in an institution. The parties will receive a notice from the Board with the time and place of the hearing. Hearings are usually held within one week of application.

What is the Consent and Capacity Board?

The Consent and Capacity Board is an independent quasi-judicial tribunal created by the provincial government. It conducts hearings under the Health Care Consent Act, the Mental Health Act and the Substitute Decisions Act. Board members are either lawyers, psychiatrists, or members of the general public. Hearings may include between one to five members.

Who may act as a substitute decision maker (SDM)?

The health practitioner must obtain consent from the highest ranked eligible person identified in the hierarchy listed in Section 20(1) of the Health Care Consent Act (HCCA).

1. Guardian of the person (under the Substitute Decisions Act (SDA))
2. Power of Attorney for Personal Care
3. Representative appointed by the Consent and Capacity Board
4. Spouse/partner:

Spouse: married or are living in a conjugal relationship outside marriage and have either cohabited for at least one year or are together parents of a child or have entered in a cohabitation agreement under The Family Law Act.

Partner:
(a) a person of the same sex with whom the person is living in a conjugal relationship outside marriage, if the two persons,
  (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, or,
(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.

5. Child/parent
6. Parent with only right of access
7. Brother/sister
8. Any other relative (related by blood, marriage or adoption)

The substitute decision maker (SDM) must be capable with respect to the treatment, be at least 16 years of age, be available and be willing to assume the responsibility of giving or refusing consent and not be prohibited by court order or separation agreement from having access to the incapable person or giving or refusing consent on behalf of the incapable person. Health practitioners are permitted to rely on assertions from persons that they are the substitute decision maker.

If there is no guardian, attorney or board appointed representative in existence the health practitioner should contact, in descending order of priority the categories of people noted above. In this instance, it is possible for a person who is lower ranked to make the decision if he or she is present or has been contacted and asserts that a higher ranked person would not object to him or her making the decision. If no one is available, a treatment consultant from the Public Guardian and Trustee (PGT) must make the decision.

How does a substitute decision maker (SDM) make decisions for an incapable person?

The SDM who is giving or refusing consent is expected to make decisions based on the incapable person's known wishes, which the incapable person expressed when he or she was 16 or more years of age and capable. If such wishes are not known or are impossible to comply with, the SDM makes the decision in the incapable person's best interests. Section 21(2) of the Health Care Consent Act expands further on the concept of best interests.

When and how does one involve the Public Guardian and Trustee (PGT)?

If there is no sustitute decision maker (SDM), health practitioners contact the office of the PGT and speak to a treatment decision consultant. Provide information regarding the proposed treatment to the consultant. If the treatment is medication, the consultant will request the name(s) of the medication(s) and the dosage range. You must obtain approval to use prn's. The PGT will want to confirm that no other SDM is available if the person is unknown to them. The consultant usually gives a decision regarding treatment within a few hours to a few days. The PGT will fax a confirmation form to be completed by you. Until you obtain consent, you may use "emergency treatment" if the situation constitutes an emergency.

Office of the Public Guardian and Trustee

Phone: (613) 241-1202 or 1-800-891-0506 Monday to Friday 8am-6pm
1-800-387-2127 Saturday/Sunday/holidays 8am-6pm
Fax: (613) 241-1567

How does one arrange for a second opinion regarding capacity to consent to a specific treatment in a person with Alzheimer Disease?

- For an inpatient on a medical or surgical floor, request a consultation from the psychiatric service or the neuropsychology service, if available, or another health care practitioner.

- For an outpatient, you may request a consultation from the
  Geriatric Psychiatry Community Services of Ottawa
  75 Bruyère Street, Room 106Y, Ottawa, ON K1N 5C8
  Phone: (613) 562-9777 Fax: (613) 562-0259

  or

  Royal Ottawa Hospital Geriatric Psychiatry Services
  1145 Carling Avenue, Ottawa, ON K1Z 7K3
  Phone: (613) 722-6521 ext. 6507 Fax: (613) 798-2999

  or

  a psychiatrist in private practice

- For a patient living in a nursing home, you may refer to the outreach geriatric psychiatry services providing care in the facility.

What does a health practitioner do if he or she believes the substitute decision maker (SDM) is not acting in the best interests of the incapable person?

The health practitioner can review the situation with the SDM and ensure that he or she has all the relevant information. If the practitioner continues to believe the SDM is not respecting the person's prior wishes or acting in the best interests of the incapable person, he or she can request a hearing with the Consent and Capacity Board which is authorized to override the decision.

What happens if two equally ranked substitute decision makers (SDMs) disagree?

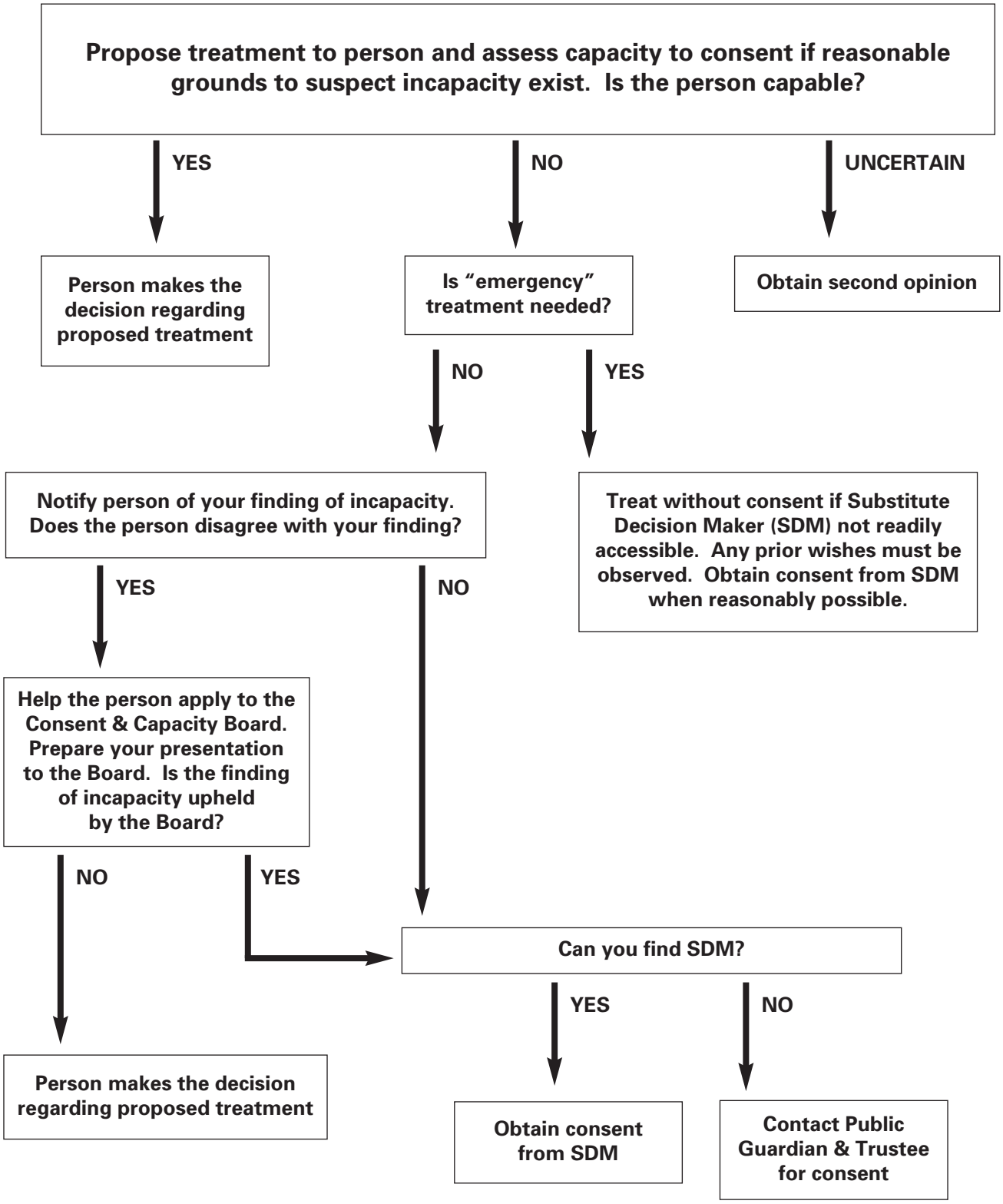
The health practitioner may try and resolve the disagreement, but if this is unsuccessful, he or she may contact the Public Guardian Trustee (PGT). Alternatively, one or more of the equally ranked substitute decision makers may apply to the Consent and Capacity Board to be appointed as representative and thus acquire the sole right to make the decision.

What do you do if you judge that the substitute decision maker (SDM) is incapable of making a treatment decision?

The legislation states that the SDM must be capable, however, it does not specify what action to take if you believe the SDM is not capable. This is important as someone with Alzheimer Disease may have a SDM who also suffers from a dementing illness. It is advisable to document the reason for your finding the SDM incapable and inform the SDM of your opinion in writing and suggest that the person undergo an independent assessment. The next ranked person becomes the SDM.

What if hospitalization is required for the treatment?

A substitute decision maker who consents to a treatment on an incapable person's behalf may consent to the incapable person's admission to a hospital or psychiatric facility for the purpose of the treatment. If the incapable person objects to being admitted to a psychiatric facility the Mental Health Act needs to be followed.


Propose treatment to person and assess capacity to consent if reasonable grounds to suspect incapacity exist. Is the person capable?
YES
NO
UNCERTAIN
Person makes the decision regarding proposed treatment
Is "emergency" treatment needed?
Obtain second opinion
NO
YES
Notify person of your finding of incapacity. Does the person disagree with your finding?
Treat without consent if Substitute Decision Maker (SDM) not readily accessible. Any prior wishes must be observed. Obtain consent from SDM when reasonably possible.
YES
NO
Help the person apply to the Consent & Capacity Board. Prepare your presentation to the Board. Is the finding of incapacity upheld by the Board?
NO
YES
Can you find SDM?
YES
NO
Person makes the decision regarding proposed treatment
Obtain consent from SDM
Contact Public Guardian & Trustee for consent

Capacity to Consent to Admission to a Care Facility

Why is capacity to consent to admission to a care facility an important issue for health practitioners working with people with Alzheimer Disease?

Alzheimer Disease alters memory, reasoning, planning, and judgement. People suffering from this illness will ultimately require assistance with their basic activities of daily living. When placement into a long term care facility is essential for the well being of the person with dementia, he or she may not be able to recognize the need for such action. Legislation in Ontario obliges one to obtain consent before admission to a care facility such as a nursing home. If a person is found incapable to consent, the consent of a substitute decision maker must be sought unless a "crisis" is present.

What is the legal definition?

Health Care Consent Act (HCCA) section 4(1)

A person is capable to consent to admission to a care facility if the person is able to
a) "understand" the information that is relevant to making a decision about the admission, and
b) "appreciate" the reasonably foreseeable consequences of a decision or lack of decision.

A person is presumed to be capable with respect to admission to a care facility unless "reasonable grounds" to suspect incapacity exist.

What is a "care facility"?

It includes long term care facilities (nursing homes or Homes for the Aged), but does not include retirement homes or boarding homes. At the present time, there is no legislation governing admission to the latter two facilities.

Who assesses capacity to consent to admission to a care facility?

Legally a person who is allowed to assess capacity to consent to admission to a care facility is called an evaluator. Evaluators are members of one of the following Colleges:

- College of Audiologists and Speech-Language Pathologists of Ontario
- College of Nurses of Ontario
- College of Occupational Therapists of Ontario
- College of Physicians and Surgeons of Ontario
- College of Physiotherapists of Ontario
- College of Psychologists of Ontario
- Ontario College of Certified Social Workers and Social Service Workers

The Community Care Access Centre (CCAC) has staff specially trained to be evaluators. The evaluator who assesses capacity to consent to admission to a long term care facility in the community is usually the Case Manager (CM) and in the hospital, the Discharge Planner (DP). Although physicians can assess this specific capacity, it is easiest to refer the person to the case manager or discharge planner.

A person is presumed to be capable with respect to admission to a care facility unless "reasonable grounds" to suspect incapacity exist. Incapacity may be suspected on the basis of direct observation of the person or from information obtained from family or other caregivers.

How is admission to a long term care facility arranged?

The health practitioner contacts the Community Care Access Centre (CCAC) and outlines the medical diagnosis, reasons for admission, and any concerns regarding the person's capacity to consent to admission. The treating physician will be required to fill out a Medical Assessment Form and send it to the CCAC after a Functional Assessment and Capacity Evaluation have been completed.

Ottawa Community Care Access Centre
100-4200 Labelle Street, Ottawa, ON K1J 1J8
Phone: (613) 745-5525 Fax: (613) 745-6984 Web: www.ottawa.ccac-ont.ca

How does one assess capacity to consent to admission to a care facility?

Capacity to consent to admission requires the ability to "understand" information that is relevant to making a decision about the admission and "appreciate" the reasonably foreseeable consequences of a decision or lack of decision. Understanding refers to the ability to remember the information. Appreciating refers to the ability to weigh the information in the context of one's life circumstances.

A thorough assessment requires the evaluator to assemble as much information about the person as is available. This includes a review of the person's medical history, current physical and mental health, information about the person's prior functioning, limitations, values, beliefs, interests, and information from collateral sources.

It is expected that an assessment aimed at determining a cause for the current limitations necessitating admission to a care facility has already been completed. Consideration for admission to a long term care facility should only be considered after medical and psychiatric conditions are optimally treated.

- Is the person aware of the problems that prompted the recommendation for admission?
- Is the person able to explain how admission to a long term care facility may address these problems?
- Is the person able to explain what may happen if he or she chooses not to live in a long term care facility?
- Does the person recognize the risks associated with his or her current living situation?
- Is the person able to discuss alternative ways he or she may manage independently?
- Does the person understand the role other people such as family or other caregivers are playing in providing for his or her needs?

What happens if the person is found incapable to consent to admission to a care facility?

The evaluator must notify the person of the finding of incapacity in a manner that is appropriate to the circumstances. Inform the person that a substitute decision maker (SDM) will make a decision on his or her behalf and that the person has a right to review the finding of incapacity or to request another SDM to be appointed by applying to the Consent and Capacity Board. Evaluators are expected to assist the person in exercising these options.

Document in the person's chart the reasons for the finding of incapacity, the information provided to the person and his or her response.

Fill out necessary documents obtained from the Community Care Access Centre (CCAC). The CCAC must identify the SDM and provide the SDM all the information required in order to make the decision.

Is the person contesting the finding of incapacity or requesting another substitute decision maker (SDM)/representative?

The person should proceed to make an application to the Consent and Capacity Board. The evaluator advises the person on how to proceed. Any non crisis admission cannot be initiated until the Consent and Capacity Board has rendered a decision, or 48 hours have elapsed and no formal application to the Board has been made. If the person contests the Board's decision, it is advisable that the evaluator consult section 46 of the Health Care Consent Act.

How does a person make an application to the Consent and Capacity Board?

The person may contact the Consent and Capacity Board Office at 151 Bloor Street West, 10th Floor, Toronto, Ontario, M5S 2T5. Phone: (416) 924-4961 or 1-800-461-2036, Fax: (416) 924-8873. The Board's website is available at www.ccboard.on.ca.

What is a "crisis" admission?

The Health Care Consent Act (HCCA) does not define the circumstances that constitute a crisis, but it does state that a "crisis" relates to the condition of the person who is to be admitted to the care facility. In the event of a "crisis," the person responsible for authorizing admissions to the care facility can place a person without consent if, in his or her opinion, the incapable person requires immediate admission. In other words, the Community Care Access Centre (CCAC) determines the need for a crisis admission. Reasonable efforts must then be made to contact a substitute decision maker (SDM). Following admission, the person will have the right to contest the finding of incapacity by applying to the Consent and Capacity Board.

Who may act as a substitute decision maker (SDM)?

The Community Care Access Centre (CCAC) must obtain consent from the highest ranked eligible individual identified in the hierarchy listed in section 20(1) of the Health Care Consent Act (HCCA).

1. Guardian of the person (under the Substitute Decisions Act (SDA))
2. Power of Attorney for Personal Care
3. Representative appointed by the Consent and Capacity Board
4. Spouse/partner:

   Spouse: married or are living in a conjugal relationship outside marriage and have either cohabited for at least one year or are together parents of a child or have entered in a cohabitation agreement under The Family Law Act.

   Partner:

   (a) a person of the same sex with whom the person is living in a conjugal relationship outside marriage, if the two persons,

   (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, or

(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.

5. Child/parent
6. Parent with only right of access
7. Brother/sister
8. Any other relative (related by blood, marriage or adoption)

The SDM must be capable with respect to the admission, be at least 16 years of age, be available and be willing to assume the responsibility of giving or refusing consent and not be prohibited by court order or separation agreement from having access to the incapable person or giving or refusing consent on behalf of the incapable person.

If no one is available, a treatment consultant from the Public Guardian and Trustee must make the decision.

How does a substitute decision maker (SDM) make decisions for an incapable person?

The substitute decision maker who is giving or refusing consent is expected to make decisions based on the incapable person's known wishes, which the incapable person expressed when he or she was 16 or more years of age and capable. If such wishes are not known or are impossible to comply with, the SDM makes the decision in the incapable person's best interests. Section 21(2) of the Health Care Consent Act (HCCA) expands further on the concept of best interests.

When and how does one involve the Public Guardian and Trustee (PGT)?

If there is no substitute decision maker (SDM), health practitioners contact the office of Public Guardian and Trustee (PGT) and speak to a treatment decision consultant. .

Office of the Public Guardian and Trustee
Phone: (613) 241-1202 or 1-800-891-0506 Monday to Friday 8am-6pm
1-800-387-2127 Saturday/Sunday/holidays 8am-6pm
Fax: (613) 241-1567

How does a health practitioner prepare for a Board hearing?

Prepare a short summary of the problems prompting consideration of admission to a care facility. Outline the reasons the person is incapable to consent to admission. The diagnosis of Alzheimer Disease by itself cannot justify a finding of incapacity. Refer to the formal definition of capacity to consent to admission to assist you. Explain why admission to a care facility is the least restrictive option available. If needed, you may ask witnesses including family members, other caregivers, or health practitioners to testify at the hearing.

Because the person responsible for authorizing admissions to the care facility must be a party at the hearing, a member of the Community Care Access Centre (CCAC) will be present, even if the evaluator is not from the CCAC.

How does one arrange for a second opinion regarding capacity to consent to admission to a care facility?

- For an inpatient on a medical or surgical floor, obtain a second opinion from another qualified evaluator.

- For an outpatient, you may request a consultation from the

  Geriatric Psychiatry Community Services of Ottawa
  75 Bruyère Street, Room 106Y, Ottawa, ON K1N 5C8
  Phone: (613) 562-9777 Fax: (613) 562-0259

  or

  Royal Ottawa Hospital Geriatric Psychiatry Services
  1145 Carling Avenue, Ottawa, ON K1Z 7K4
  Phone: (613) 722-6521 ext. 6507 Fax: (613) 798-2999

- For a patient already living in a nursing home, you may refer to the outreach geriatric psychiatry services providing care in the facility.

What happens if a person who is incapable to consent to admission to a long term care facility refuses to leave their home when a bed is available?

The Health Care Consent Act (HCCA) offers no provision to force people against their will into a care facility. The least restrictive approach should be followed, but on occasion, the Mental Health Act (MHA) may need to be invoked. In other words, a physician may need to certify the person and have them hospitalized. The person still needs to meet all requirements of the MHA including having been seen by the physician within the last seven days. This is best done in conjunction with a geriatric psychiatry consultation and a discussion with an in-patient psychiatrist. If the Community Care Access Centre (CCAC) is involved, they should be included in the plans as they are aware of how to access rapid services if required. Every effort should be made to keep the bed for the person in the care facility as the admission to the psychiatric hospital may be short.

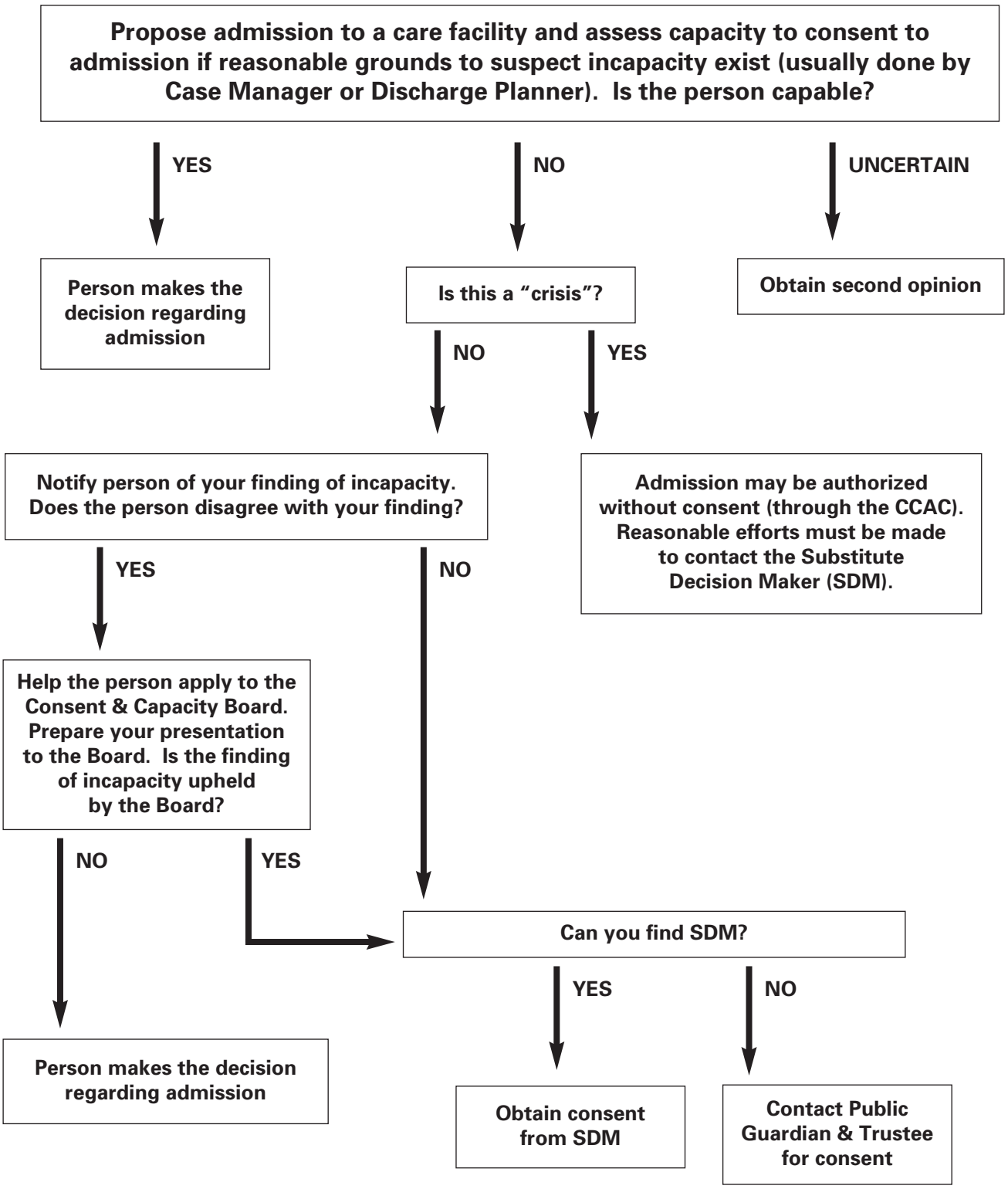
What if the Substitute Decision Maker (SDM) refuses admission to a care facility and it is your opinion that the person is at risk in the community?

First, in order to be eligible, the legislation stipulates that the Substitute Decision Maker needs to be capable. However, it does not stipulate what action to take if you believe the Substitute Decision Maker is not capable. This is important as someone with Alzheimer's Disease may have a Substitute Decision Maker who also suffers from a dementing illness. It is advisable to document the reason for your finding the Substitute Decision Maker incapable and inform the Substitute Decision Maker of your opinion in writing and suggest that the person undergo an independent assessment. The next ranked person becomes the Substitute Decision Maker.

If there are no reasonable grounds to question the Substitute Decision Maker's capacity, review whether he or she is making the decision according to the two principles in the Health Care Consent Act (HCCA). First, the SDM must respect any prior wishes and if none present, follow the best interest principle. If the evaluator believes the above is not respected, he or she can request a Consent and Capacity Board hearing to determine compliance with section 42.

Also, the Substitute Decision Act states that the PGT has a duty to investigate if there is any allegation that a person is incapable of personal care and that serious adverse effects are occurring or may occur as a result (section 62). Serious adverse effects are serious illness or injury, or deprivation of liberty, or personal security. The Public Guardian and Trustee may then apply to court to be appointed temporary guardian of the person.

To make such an allegation, the health practitioner must contact the Office of the Public Guardian and Trustee Guardianship Investigations at 1-800-366-0335. Note, investigations by necessity, can be very intrusive, therefore criteria are strictly applied.


Propose admission to a care facility and assess capacity to consent to admission if reasonable grounds to suspect incapacity exist (usually done by Case Manager or Discharge Planner). Is the person capable?
YES
NO
UNCERTAIN
Person makes the decision regarding admission
Is this a "crisis"?
Obtain second opinion
NO
YES
Notify person of your finding of incapacity. Does the person disagree with your finding?
Admission may be authorized without consent (through the CCAC). Reasonable efforts must be made to contact the Substitute Decision Maker (SDM).
YES
NO
Help the person apply to the Consent & Capacity Board. Prepare your presentation to the Board. Is the finding of incapacity upheld by the Board?
NO
YES
Can you find SDM?
YES
NO
Person makes the decision regarding admission
Obtain consent from SDM
Contact Public Guardian & Trustee for consent

Capacity to Make Decisions Regarding Property

Why is capacity to make decisions regarding property an important issue for health practitioners working with people with Alzheimer Disease?

Managing one's property involves a complex set of abilities. Even prior to the onset of Alzheimer Disease such abilities vary enormously across individuals. Therefore, the assessment of capacity to make decisions regarding property is often reserved for practitioners with special training. In Ontario, under the Substitute Decisions Act, formal assessments are done only by capacity assessors. Because of the type of cognitive changes specific to Alzheimer Disease, impairment in financial management is a frequent occurrence even in individuals in the mild stages of the illness. As a health practitioner, you are likely to be the first person informed of financial concerns by the caregiver. If the individual has a valid Continuing Power of Attorney for Property, the attorney can usually take over the tasks the person is unable to handle without any assessment of capacity being required. The aim is to maximize independence while preventing economic consequences of incapacity and possible financial abuse.

What is the legal definition?

Substitute Decisions Act (SDA) section 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.

What can be done for someone who is likely to become incapable?

People of all ages, but particularly someone with a progressive dementia need to be aware of the potential advantages of making a Continuing Power of Attorney for Property (POA/PP) and a Power of Attorney for Personal Care. Reminding and encouraging individuals to make a power of attorney (POA) is a regular task for the committed health practitioner, particularly those working with the elderly. The person can be referred to a lawyer or other legal advisor to assist the person in the preparation of the appropriate documents. Alternatively, brochures and POA forms can be obtained from the Office of the Public Guardian and Trustee (PGT) at no cost.

What is a Continuing Power of Attorney for Property (POA/PP)?

A Continuing POA/PP is a document in which one person appoints another or others (the "attorney" or "attorneys") to make decisions regarding his or her property. The POA/PP must specify that it is "continuing" or that the authority given may be exercised during the grantor's incapacity to manage property. Depending on what the grantor of the Continuing POA/PP says in the document, a Continuing POA/PP may be effective when it is signed, or it may contain a postponed effectiveness clause. Such clauses may stipulate that the Continuing POA/PP becomes effective on a date specified or when a specific contingency happens, e.g., a POA may become effective only if a person becomes incapable of managing property.

When should a capacity assessment be recommended?

If you suspect the person may be incapable of managing property based on direct observation of the person or from information obtained from family or other caregivers, it may be appropriate to recommend a capacity assessment.

A) First, inquire whether there is a Continuing Power of Attorney for Property (POA/PP). If so, follow these decision guidelines:

i) If the person has a Continuing POA/PP, with no postponed effectiveness clause, i.e. it is valid upon signature, the health practitioner who has assessed the person and is at ease in giving an opinion regarding the person's financial capacity may recommend limiting the financial activity of the person suffering from Alzheimer Disease to protect him or her and encourage the attorney to act. No formal assessment or declaration of incapacity is required. If the person or attorney or health practitioner wants a second opinion regarding the financial capacity of the person this can be arranged electively with someone who has this special expertise but it need not be a capacity assessor. If the person refuses the action of the attorney, the attorney may consult a lawyer as a formal guardianship through the Substitute Decision Act (SDA) may be required.

ii) If the person has a Continuing POA/PP with a postponed effectiveness clause, the health practitioner can recommend the person or the attorney arrange for the required specific assessment to be completed. Though these types of clauses are unusual since a POA/PP is usually valid once it is granted, they must be respected. Some POA/PPs specify who is to make the assessment. If the POA/PP provides that it comes into effect only when the grantor becomes incapable but does not provide a method for determining whether the situation has arisen the capacity assessment must be conducted by a capacity assessor under the SDA providing that the grantor does not object. Be careful when requesting the assessment to be clear that it is for the purpose of activating a POA/PP and not to create a guardianship (section16). If the grantor objects to the attorney acting it is advisable for the attorney to see a lawyer as formal guardianship through the SDA may be required.

B) If there is no Continuing POA/PP, follow these guidelines:

i) If the person has no POA/PP, a capacity assessment may be recommended unless the person remains capable to give a POA/PP, (see page 20, "How does someone appoint a Power of Attorney for Property (POA/PP)?). The threshold for capacity to give a POA/PP is not as high as the threshold for capacity to manage one's own property. Thus it is possible that a person who is incapable of managing his or her own property may still be capable of signing a POA/PP. This is a far less restrictive alternative, and should be considered before proceeding with a capacity assessment.

ii) If there is no POA/PP and the person is incapable or unwilling to give one, you can recommend to the person and their family or caregiver that guardianship may be necessary in order to prevent or limit mismanagement. The family or caregiver can either hire a lawyer to seek guardianship or they can request a capacity assessment from a capacity assessor under section 16 of the SDA.

Who are capacity assessors?

Under the Substitute Decisions Act (SDA), various health practitioners, after specific training, serve as capacity assessors. They may be psychologists, social workers or physicians, etc. (Note, under the Mental Health Act, psychiatrists assess capacity to make decisions regarding property, but this only pertains to inpatients in a Schedule 1 psychiatric facility who are receiving care, treatment or observation for a mental disorder). Physicians who are not capacity assessors (other then those serving inpatients of psychiatric facilities) may give an opinion regarding capacity to manage property, but this is not a formal capacity assessment under the SDA which can activate a POA/PP or create a guardianship of property (section 16).

Capacity assessors are required to validate a POA/PP with a postponed effectiveness clause when the POA/PP does not specify who needs to make the assessment. They also assess financial capacity at the request of a person or their caregivers when the person has no POA/PP.

How to find a capacity assessor?

The Capacity Assessment Office has a list of the assessors available in each region. They can be reached at 1-800-366-0335 or at www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity.asp Generally the person who requests the assessment pays for it. The cost is something to be discussed with the assessor. Reimbursement for the cost of the assessment by the capacity assessor should be provided to the guardian if the incapable person has the funds available.

When can a capacity assessment by a capacity assessor be done?

Under the Substitute Decisions Act (SDA), before beginning a capacity assessment, the capacity assessor must inform the person of the purpose of the assessment and his or her right to refuse. A capacity assessment may then proceed provided the person does not express objection. The assessment, under section 16, is prohibited by law if either the person objects to it or has a known POA/PP.

What is done when a person objects to the assessment by a capacity assessor?

If the person objects to the assessment by a capacity assessor the family or caregiver have to consult a lawyer to obtain guardianship for property. The court may then force the person to have a formal capacity assessment.

What happens if a person without a Continuing Power of Attorney for Property (POA/PP) is found incapable by a capacity assessor under section 16 of the Substitute Decisions Act (SDA)?

The Public Guardian and Trustee (PGT) becomes the statutory guardian if the person is found to be incapable to make decisions regarding property. The PGT must advise the person of his or her right to apply to the Consent and Capacity Board. The health practitioner is unlikely to be needed at the Board hearing. The capacity assessor would, however, be required to present at the hearing; he or she may ask the health practitioner to be a witness. The incapable person's spouse or partner, or other relative can apply to the PGT to replace the PGT as an incapable person's statutory guardian of property. A cost is associated with such request.

What information needs to be reviewed in order to give an opinion about a person's capacity to make decisions regarding property?

This assessment focuses on the person's cognitive and reasoning abilities in relation to his or her property. Physicians can assist by ensuring that all treatable causes of cognitive or emotional impairment have been addressed.

Information should be gathered from the person and his or her family or other caregivers.

- Is the person aware of the nature of his or her assets, liabilities, income, expenses, and responsibilities towards his or her dependents?
- Does the person have difficulties with orientation, memory or calculations that interfere with financial management?
- What are the specific cognitive deficits which make it difficult for the person to manage his or her affairs?
- Does the person have a realistic appreciation of his or her strengths or weaknesses in this area?
- Are there any delusions or hallucinations which are interfering with or influencing how the person manages his or her property?
- Has the person demonstrated the ability to make reasonable decisions with respect to his or her financial affairs and can he or she be expected to do so in the foreseeable future?

What can a health practitioner do if he or she disagrees with the capacity assessor's decision?

a) If the assessment is to activate a Continuing Power of Attorney for Property (POA/PP) under a postponed effectiveness clause, the health practitioner can recommend to the family that they hire another assessor for a second opinion.

b) If the assessment is completed under section 16 of the Substitute Decisions Act (SDA) and the capacity assessor finds the person incapable, the person may apply to the Consent and Capacity Board for a review of the assessor's finding of incapacity. As the health practitioner, you may encourage the person to do this if you think the person is capable. Alternatively, if the person is found to be capable and the health practitioner disagrees he or she can suggest that the family or caregiver hire another capacity assessor for a second opinion.

Note that a court application for guardianship may be brought with evidence of incapacity from one or more physicians and that for a court application, a capacity assessor's opinion is not mandatory.

How does someone appoint a Power of Attorney for Property (POA/PP)?

The person may consult a lawyer, buy a form at a stationary store and follow the instructions, or request a Power of Attorney booklet from the Office of the Public Guardian and Trustee. One must be 18 years of age or over and capable to make a POA/PP.

Who is capable of giving a Continuing Power of Attorney for Property (POA/PP)?

A person is capable of giving a continuing POA/PP if he or she,

a) knows what kind of property he or she has and its approximate value;
b) is aware of obligations owed to his or her dependents;

c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
d) knows that the attorney must account for his or her dealings with the person's property;
e) knows that he or she may, if capable, revoke the continuing power of attorney;
f) appreciates that unless the attorney manages the property prudently its value may decline; and
g) appreciates the possibility that the attorney could misuse the authority given to him or her

Who is capable of revoking a Power of Attorney for Property?

A person is capable of revoking a continuing power of attorney if he or she is capable of giving one.

What can a Power of Attorney for Property do?

The continuing power of attorney may authorize the person named as attorney to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will.

What is a bank Power of Attorney?

A bank power of attorney allows the attorney access to one or more bank accounts, but it is not the same as a power of attorney for property which allows the attorney to act on the behalf of all aspects of the grantor's properties. Individuals may get these mixed up.

What does one do if a bank is refusing to act on a Continuing Power of Attorney for Property without a postponed effectiveness clause or a validated continuing Power of Attorney for Property with a postponed effectiveness clause?

Frequently the attorney is requested to obtain a letter from a physician before the bank will let him or her act. No legislation exists for the bank to demand this; however, bank managers are not always familiar with legal terms in a POA/PP and may need clarification regarding when the attorney may act. If requested by the attorney, a letter may be written to the bank confirming the person's incapacity provided that he or she is incapable based on your assessment. In some cases, the attorney will have to seek assistance from his or her lawyer.

What if prompt action is required to prevent "serious adverse effects"?

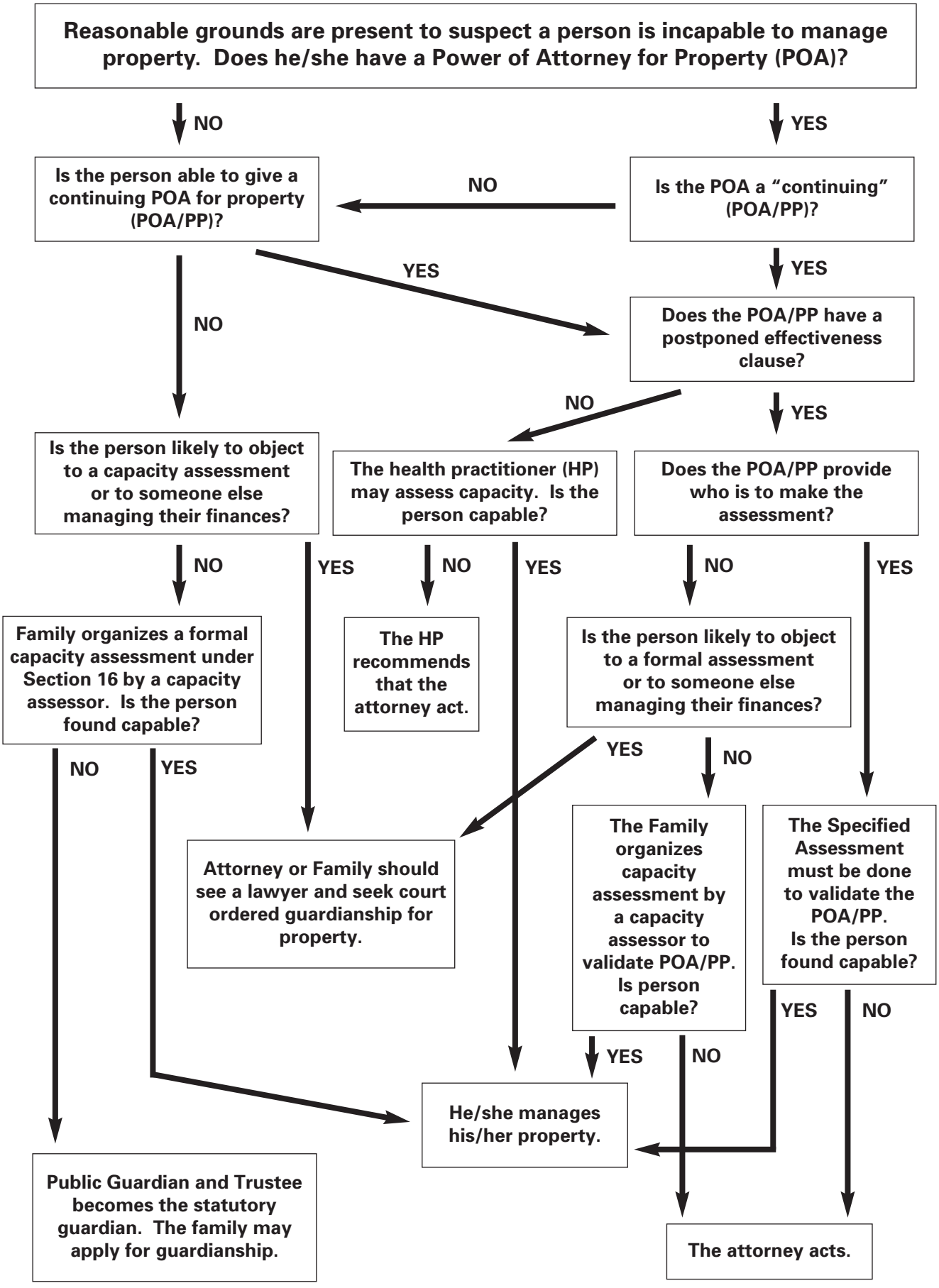
If, following an investigation, the Public Guardian and Trustee has reasonable grounds to believe that a person is incapable of managing property and that prompt action is required to prevent "serious adverse effects," the Public Guardian and Trustee shall apply to the court for an order appointing him or her as temporary guardian of property. Under the Substitute Decisions Act (SDA) (section 27) , loss of a significant part of a person's property, or a person's failure to provide necessities of life for self or dependents, are considered serious adverse effects.

To make an allegation that a person is incapable, that they are at risk of suffering serious personal or financial harm and that prompt action is needed to prevent the harm from occurring or continuing to occur, call the Office of the Public Guardian and Trustee Guardianship Investigations at 1-800-366-0355.

Note, investigations**,** by necessity can be very intrusive, therefore, the criteria are strictly applied.

What if one suspects that the Attorney for Property under a POA/PP is not acting in the best interest of the person or is misusing it?

The Office of the Public Guardian and Trustee has no special mechanism to deal with such concerns unless the criteria for "serious adverse effects" are met. Anyone, family or friends, who has concerns that do not meet these criteria, may apply to court to have the attorney's accounts reviewed by a judge. If a POA/PP is misused, only a court can override it and appoint a guardian of property in his or her place.


Reasonable grounds are present to suspect a person is incapable to manage property. Does he/she have a Power of Attorney for Property (POA)?
NO
YES
Is the person able to give a continuing POA for property (POA/PP)?
NO
Is the POA a "continuing" (POA/PP)?
YES
YES
NO
Does the POA/PP have a postponed effectiveness clause?
NO
YES
Is the person likely to object to a capacity assessment or to someone else managing their finances?
The health practitioner (HP) may assess capacity. Is the person capable?
Does the POA/PP provide who is to make the assessment?
NO
YES
NO
YES
NO
YES
Family organizes a formal capacity assessment under Section 16 by a capacity assessor. Is the person found capable?
The HP recommends that the attorney act.
Is the person likely to object to a formal assessment or to someone else managing their finances?
NO
YES
YES
NO
Attorney or Family should see a lawyer and seek court ordered guardianship for property.
The Family organizes capacity assessment by a capacity assessor to validate POA/PP. Is person capable?
The Specified Assessment must be done to validate the POA/PP. Is the person found capable?
YES
NO
YES
NO
YES
NO
He/she manages his/her property.
Public Guardian and Trustee becomes the statutory guardian. The family may apply for guardianship.
The attorney acts.

Resources

Alzheimer Society of Ottawa
1750 Russell Road
Suite 1742
Ottawa, ON
K1G 5Z6
Phone: (613) 523-4004
Fax: (613)523-8522
e-mail: asoc@alzheimerott.org
Web: www.alzheimerottawa.org

Capacity Assessment Office
595 Bay Street, suite 800
Toronto, ON
M5G 2M6
Phone: 1-800-366-0335
Fax: (416) 327-6724
Web: www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity.asp

Community Care Access Centre
100-4200 Labelle Street
Ottawa, ON
K1J 1J8
Phone: (613) 745-5525 or 1-800-538-0520
Fax: (613) 745-6984
Web: www.ottawa.ccac-ont.ca

Consent and Capacity Board
151 Bloor Street West, 10th Floor
Toronto, ON
M5S 2T5
Phone: (416) 924-4961 or 1-800-461-2036
Fax: (416) 924-8873
Web: www.ccboard.on.ca

Geriatric Psychiatry Community Services of Ottawa
75 Bruyere Street, Room 106Y
Ottawa, ON
K1N 5C8
Phone: (613) 562-9777
Fax: (613) 562-0259

Law Society of Upper Canada
130 Queen Street West
Toronto, ON
M5H 2N6
Phone: (416) 947-3300 or 1-800-668-7380
Fax: (416) 947-5263
Web: www.lawsociety@lsuc.on.ca

Lawyer Referral Service (LRS)
Phone: 1-900-565-4577
(there is a $6 charge for each call)
Web: www.lawrefer@lsuc.on.ca

Legal Aid Ontario
73Albert Street
Ottawa, ON
K1P 1E3
Phone: (613) 238-7931 or 1-800-668-8258
Fax: (613) 238-3410
Web: www.legalaid.on.ca

Office of the Public Guardian and Trustee
244 Rideau Street, 3rd Floor
Ottawa, ON
K1N 5Y3
Phone: (613) 241-1202 or 1-800-891-0506
Fax: (613) 241-1567
Web: www.attorneygeneral.jus.gov.on.ca

Publications Ontario
(Copy of Ontario legislation)
Phone: 1-800-668-9938
Web: www.e-laws.gov.on.ca

Royal Ottawa Hospital Geriatric Psychiatry Services
1145Carling Avenue
Ottawa, ON
K1Z 7K4
Phone: (613) 722-6521 ext. 6507
Fax: (613) 798-2999

Regional Geriatric Assessment Program
1503 Carling Ave.
Ottawa, ON
K1Y 4E9
Phone: (613) 761-4568
Fax: (613) 761-5334
Web: www.rgaottawa.com