



# Consent & Capacity



Has COVID-19 changed the way we look at it?



Capacity Assessment & Risk Evaluation  
for Seniors  
Shauna MacEachern, OT Reg. (Ont.)  
Designated Capacity Assessor

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## What is a Designated Capacity Assessor?



A health professional who is qualified and *designated* to determine whether an individual is mentally incapable of certain types of decision-making as described in the Substitute Decisions Act.

In some circumstances, the Substitute Decisions Act gives capacity assessors the exclusive authority to make such determinations.

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## Who can be a Designated Capacity Assessor



The following health professionals are eligible to become capacity assessors:

Doctors  
Registered Nurse or Registered Nurse (Extended Class)  
Psychologists  
Registered Social Workers  
Occupational Therapists

Applicants must successfully complete a training program provided by the Ministry of the Attorney General, maintain a minimum of \$1,000,000 of professional liability insurance, and be a member in good standing with their professional college. To maintain designation, a capacity assessor must complete a minimum of 5 assessments in 2 years and successfully complete and participate in continuing education activities.

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## Are Designated Capacity Assessors working during COVID and/or lockdown?

-Some assessors are offering assessments by videoconference rather than face to face.

-Some assessors will do a face to face visit in urgent situations or where a videoconference will not work

- Some assessors work in hospitals or long term care homes and are putting in extra hours and/or are unable to travel between locations

- It may be harder to find a Designated Capacity Assessor, but assessment by video makes it possible for you to choose someone a distance away

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## Assessments and Evaluations – they are not the same!

A capacity ASSESSMENT is completed by a Designated Capacity Assessor. This is a LEGAL assessment under the Substitute Decisions Act, 1992. It has the potential to change a person's legal rights from that point onward.

A capacity EVALUATION is completed by an evaluator. This is a professional opinion but does not change a person's legal rights moving forward. It is a point in time and is specific to the issues at hand. These often are done under the Health Care Consent Act, 1996

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### When do I need a Legal Capacity Assessment?

A Designated capacity assessor can assess for PGT to become the guardian of property, if there are no POAs and no other alternatives.

A legal assessment is required for family or other support people to apply to the courts for guardianship of property.

A legal assessment will be required if a person has made a power of attorney and specified in the document that his or her incapacity must be proven before the power of attorney can be used. If the individual doesn't say how incapacity is to be proven, a capacity assessor's opinion is required.



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### Examples of Formal Capacity Evaluations

Capacity to grant or revoke a POA (for lawyers)

Capacity to write a will (for lawyers)

Professional opinion regarding a client's ability to manage finances (for banks, insurance)

Professional opinion regarding ability to make personal care decisions (for hospitals or LTC homes)



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### Examples of Capacity Evaluations by Health Care Providers

Capacity to consent to treatment

Capacity to share information

Capacity to consent to support services (PSW...)

Capacity to consent to LTC admission



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### What about capacity for LTC admission



Capacity to consent to admission to a LTC facility is determined by the LHIN.

This assessment is strictly related to LTC and does not apply to other shelter decisions such as the decision to go to a retirement homes or return home.

On occasion a capacity assessor is asked for an independent 3rd party opinion for clients in hospital where there is a disagreement with respect to a person's right to choose whether they leave hospital or stay in hospital.

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### True or False?



If a person has been "assessed" by a health professional as being mentally incapable for some purpose, then he or she is mentally incapable for all purposes.

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### False



Capacity is issue and time specific. It relates to a particular task or decision at hand.

It is not uncommon for someone to be found not capable with respect to finances, but still retains capacity with respect to treatment, admission to long-term care, and to personal assistance services, or even to other personal decisions.

The person may be incapable in respect of one treatment, but still be capable in respect of other treatments (HCCA s.15).

Even if incapable for a treatment at one time, that same patient may become capable again (HCCA s.15). In that case, the patient's decisions in respect to treatment must be followed even if a substitute had previously given or refused consent on behalf of a patient.

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## Read the Act!

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### SDA = Substitute Decisions Act

The SDA establishes the legal criteria determining when a person has the ability to make decisions that are fundamental to his/her well-being.

**Capacity** - the ability to make these types of decisions

**Consent** - giving permission or agreement for a decision

**Informed Consent** - permission granted with full knowledge of the possible risks and benefits.

<https://www.ontario.ca/laws/statute/92s30>

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### HCCA = Health Care Consent Act

An Ontario law that has to do with the capacity to consent to treatment.

The HCCA states that a person has the right to consent to or refuse treatment if they have mental capacity.

<https://www.ontario.ca/laws/statute/96h02>

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## Definition of Capacity under the SDA



A capable person must have the ability to UNDERSTAND information relevant for making decisions, and in addition, show the ability to APPRECIATE the consequences of a decision or a lack of a decision.

The clinician must distinguish between decisions that are poorly informed, foolish, risky or socially deviant; as opposed to decisions that are the product of an impaired decision-making process.

People have the right to make "bad decisions".

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## Presumption of Capacity



In every case, there is a presumption of capacity and in every case the health care provider must have a clear rationale for finding an individual incapable and seeking a decision from a POA or SDM.

Routine screening cannot and should not be used for determining capacity. It is incorrect to assume that all intellectually disabled persons must be incapable by virtue of their disability. It is also incorrect to assume a client is incapable by virtue of a score such as the MOCA or MMSE

***There is NO standardized test for capacity.***

It is incorrect to assume that a diagnosis of a severe psychiatric disorder like schizophrenia or a neurological deficit from stroke or ABI renders the person unable to meet his or her personal care or financial needs.

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*Understand &  
Appreciate - the key  
components of capacity*



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### Threats to Decision making



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|-----------------------|-----------------------|
| Impaired memory       | Impulsivity           |
| Limited insight       | Disorientation        |
| Poor problem solving  | Disorganized thinking |
| Limited cognition     | Delusions             |
| Limited communication | Concrete thinking     |

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### Understand - what to look for



- working knowledge of his or her financial, health or personal care status
- awareness of any pressing issues that call for decision-making
- sufficient intellectual and cognitive ability to process and assimilate information about the available options for responding to the demands they face.
- The ability to follow an intellectual conversation or problem-solve around these facts.

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### Appreciate - what to look for



- The ability to rationally manipulate this information and appraise it in a reality-grounded fashion.
- Focus on the reasoning process behind the individual's decisions, and in addition, explores weights that the person attaches to one outcome or another.
- Foolishness, riskiness or social deviance may be grounds to examine "appreciation" more closely, but do not substitute for incapacity.
- The clinician is not judging whether or not the person's decisions or actions appear reasonable, but whether they are reasoned.

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### Definitions you need to know



**Power of Attorney (POA)** - a legal document that can give one person rights to make decisions for another. Only for the living

**Attorney** - the person or people designated in a POA to make decisions

**Guardian** - A person lawfully invested with the power, and charged with the obligation, of taking care of and managing the property and rights of a person who, because of age, understanding, or self-control, is considered incapable of administering his or her own affairs.

**Executor** - The person named in a will who is responsible to gather up the estate assets, pays the deceased's debts, and divides what remains of the deceased's estate among the beneficiaries.

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### Heirarchy of Decision Makers

**Guardian**

Client

POA

Highest ranked SDM

None of the Above



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### Guardian of the Person



A guardian of the person can only be appointed by a judge and only in the case of severe incapacity. There has to be a family member or friend willing and able to be the guardian of the person.

If a person does not have family or friends who can act as a POA or SDM or apply for guardianship then the PGT Treatment Decisions Unit will make treatment decisions.

**A client under guardianship has no legal rights to make those decisions.**

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## Guardian of Property



A Guardian of Property will be appointed if a person is found incapable of managing property by a Designated Capacity Assessor.

The Ontario Public Guardian and Trustee (PGT) will be the financial guardian for incapable people who do not have viable alternatives.

Family or close friends can apply to the PGT to assume guardianship

A judge can appoint a guardian following an application to the court for guardianship.

**A client under guardianship has no legal rights to make those decisions.**

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## Chat Question –

What types of legal decision making authority can be given by a POA?

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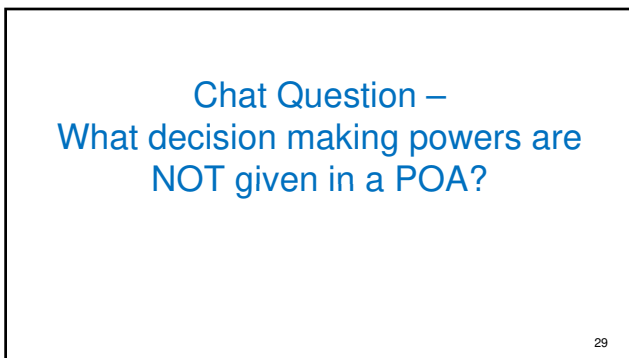
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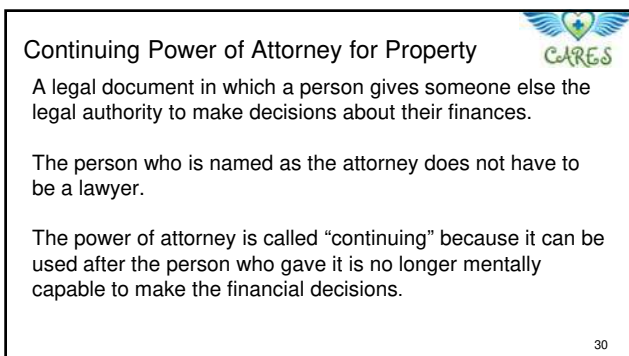
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## Power of Attorney for Personal Care



A legal document in which one person gives another person the authority to make personal care decisions on their behalf **if** they become mentally incapable.

POA for Personal care covers Health, Shelter, Safety, Hygiene, Clothing and Nutrition

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## Make sure you understand your job as POA

- A POA is required to follow prior expressed wishes to maximum extent possible
  - A POA is required to maximally involve the patient in decision making
  - A POA is required to keep records and documentation of all decisions made and/or money coming or going
  - A POA is required to put the patient's best interest first – ALWAYS!
  - A POA is required to support and encourage contact with support people
  - A POA is required to explain their role and any decisions made to the patient
- ... There are many more rules. Make sure you know the job description before you take on the job!

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Is the POA active?

Are there any restrictions?

If there is more than one attorney must they act jointly or severally?



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### Is the POA effective today?



An attorney has legal authority as soon as the POA **is signed and witnessed** unless it is specified otherwise in the form.

Check if the document states that it is only to come into effect on a certain date or when they are found incapable.

If the POA comes in effect later, are there specific directions about how mental incapacity is to be decided?

- a letter from a doctor or another trusted person which states they are no longer mentally capable.
- If it is not specified how mental capacity is to be reviewed, or the specified person is unable or unwilling to assess, then a Designated Capacity Assessor is needed to judge capacity.

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### Effectiveness of POA for Personal Care



No matter what authority is given in a POA-PC the attorney **is only allowed to make decisions about those aspects of personal care that the person cannot make themselves.**

For clarity!!

**The POA-PC is only allowed to make decisions about those aspects of personal care that a person cannot make for him or herself.**

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"Don't worry - the Power of Dad still trumps the Power of Attorney."

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### Instructions, Conditions and Restrictions - oh my!

Are there different POAs for different types of decisions?

Are there limitations or instructions in the POA?

Does the POA require certain people be consulted?

***The law requires that instructions in a POA must be followed by an attorney, unless it is impossible for him or her to do so.***



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### "Jointly" or "Jointly and Severally"?

Sometimes a POA will appoint two attorneys.



Joint attorneys must act together. They must both agree before any action can be taken, and they must both take the same action at the same time. If one is absent, no action can be taken.

Joint and several attorneys can act together or individually. Either one can take an action without consulting the other. If one is absent, the other can still act.

But what if they don't agree???

Check the POA for instruction on how to resolve conflicts. If there are no instructions and the conflict cannot be resolved the matter may be decided by the courts.

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Did I happen to mention ....

***The POA-PC is only allowed to make decisions about those aspects of personal care that a person cannot make for him or herself.***

Someone has to decide IF the client is unable to make a decision.



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**Effects of COVID on Capacity to make decisions –  
Feb 2020 to Feb 2021**

Jack has moderate dementia but has walked to Tim Horton's three days a week for coffee and socialization for years.

Chat Question - What areas of capacity needed to be considered in 2020?

Chat Question - What areas of capacity need to be considered in 2021?

Chat Question - Who is responsible to make the decision?

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**Effects of COVID on Capacity to make decisions –  
Feb 2020 to Feb 2021**

Eileen has moderate aphasia from a stroke but she is bright and alert and highly social. She has 4 kids and they don't get along. They have a visiting schedule where each visits a specific day in order not to interfere with the others.

Chat Question - What areas of capacity needed to be considered in 2020?

Chat Question - What areas of capacity need to be considered in 2021?

Chat Question - Who is responsible to make the decision?

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**Effects of COVID on Capacity to make decisions –  
Feb 2020 to Feb 2021**

Joan is pleasantly confused and was recently diagnosed with mild dementia. Her POA, Sally, has told the LTC home that she cannot receive calls, visits or go on outings with her son George.

Chat Question - What areas of capacity needed to be considered in 2020?

Chat Question - What areas of capacity need to be considered in 2021?

Chat Question - Who is responsible to make the decision?

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### What has changed during COVID?

While the Substitute Decisions Act and the Health Care Consent Act remain fully in force, COVID has caused some priorities to shift.

- LTC homes with 2 designated caregivers – The choice of WHO is designated should always be made by the client, if capable
- Restrictions on outings – Outings now come with a higher level of risk to personal health and safety which may cause those normally capable to decide about outings to be no longer able to understand the risks
- Routines have been disrupted which can make some people less capable because they cannot problem solve or learn new routines
- Those with cognitive impairment are less able to adapt to technology or changing protocols

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### Responsibilities to the client during COVID?



Healthcare providers must seek consent from the authorized and appropriate decision maker.

If a client is incapable of a decision the Healthcare provider must advise the client of why you believe they are incapable and document this clearly.

If a client disagrees with a finding of incapacity or the actions of their POA/SDM the healthcare provider should ensure they have information about how to appeal.

If a healthcare worker suspects abuse or neglect of a client in LTC or retirement this is a mandatory report.

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## Conclusions



COVID-19 has added some new complexities and some new considerations when we look at consent and capacity. More than ever seniors and adults with disabilities who had only mild capacity issues may now be struggling and not able to recognize or adjust to the "New Normal."

Now more than ever we must be alert to protecting and advocating for the rights of vulnerable people to make their own choices, but at the same time be alert to the more complex world we live in and the added potential for mismanagement with new and unfamiliar situations

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## Where to learn more

The Health Care Consent Act and the Substitute Decisions Act - Who Decides What When?  
<http://www.advocacycentreelderly.org/appimages/file/eamanualsec4c.pdf>

Powers of Attorney - Government of Ontario  
<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poa.pdf>

Health Care Consent Act - Briefing note  
<http://www.collegept.org/Assets/registrants/guideenglish/briefing%20notes/eBNhealthCareConsentAct.pdf>

Guidelines for conducting assessments of Capacity.

<https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-06/guide-0505.pdf>

Guide to the Substitute Decisions Act.

<https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/pgtsda.pdf>

The Capacity Assessment Office: Questions and Answers

<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.php#eligible>



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Please visit me at <https://cares-ot.ca> to provide feedback or leave a review.



For more information or to arrange for an assessment or request a consultation, please visit my webpage.

You can also follow me on:

Facebook - <https://www.facebook.com/ShauanaMacEachern.OT>

LinkedIn - <https://www.linkedin.com/in/shaunamaceachern/>

Google - <https://g.page/Capacity-assessment?gm>

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