

# Ethical Issues within Capacity Assessment



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# Objectives

- ❖ Capacity: Guiding Principles and Definitions
- ❖ Best Practice & Key Concepts
- ❖ Ethical Concepts
- ❖ Adult's Rights
- ❖ The Acts & Capacity
- ❖ Capacity Assessment Stages

# Capacity: Guiding Principles

- ❖ All adults presumed capable of making their own decisions until contrary demonstrated
- ❖ Taking away a person's right to liberty and freedom is a very serious step

# Respect for Autonomy

A finding of incapacity:

“remains one of the most significant mechanisms in our society for the removal of a person’s fundamental rights and freedoms”

(Pepper-Smith et al, 1996, p. 3)



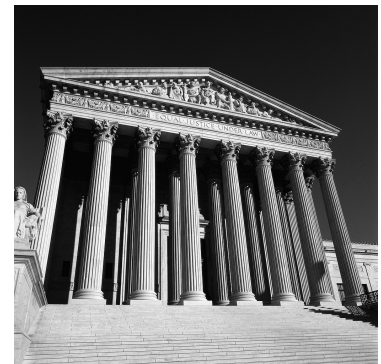
# What is capacity?

- ❖ An adult who is repeatedly or continuously unable to care for himself or herself **AND** is unable to make reasonable judgements in respect of matters relating to his or her person

# Capacity: Guiding Principles

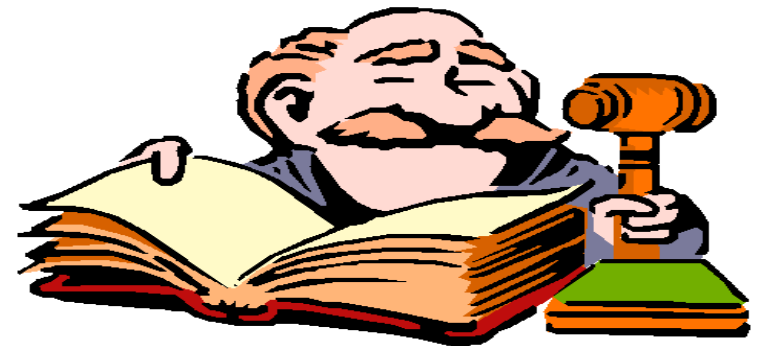
The Court must be satisfied that a guardianship order would:

- ❖ Be in the adult's best interests, AND
- ❖ Result in **substantial benefit** to the adult



# Capacity: Guiding Principles

- ❖ Capacity is **not** a medical diagnosis
- ❖ Health care providers can provide a **clinical opinion** on capacity
- ❖ The final legal decision made by the Court - based on evidence



# Capacity: Guiding Principles

- ❖ Socio-cultural construct
- ❖ It refers to a person's ability to manage the decisional demands of their environment





# Capacity: Guiding Principles

## ❖ Capacity - on a continuum

Capable



Incapable

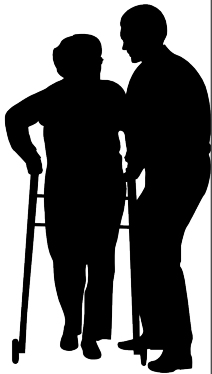
# Capacity: Guiding Principles

- ❖ A risky decision is not necessarily an incapable decision
- ❖ Stockbrokers, soldiers, medical professionals and patients make them every day.



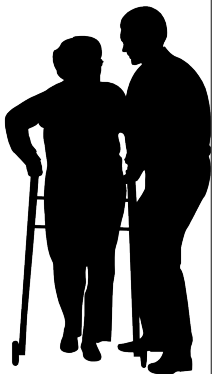
# Capacity: Key Concepts

- ❖ Global vs. domain and/or decision specific
- ❖ Capacity is rarely a global or an “all or nothing” determination



# Capacity: Key Concepts

- ❖ Decision-making capacity may be domain specific (i.e., may have capacity with regard to health care but not financial matters)
- ❖ The complexity of the specific decision in an area of decision-making has to be considered



# Capacity: Key Concepts

- ❖ Multi-factorial and focused on the functional ability of the individual
- ❖ For example: a diagnosis of dementia does not mean incapacity in all areas of decision-making
- ❖ Capacity assessment takes into account culture, wishes, beliefs and values



# Capacity: Key Concepts

- ❖ Capacity assessment is a process for determining whether there is sufficient evidence to declare a person incapable of managing their affairs
- ❖ The emphasis is on the quality of the decision-making process, not the actual course of action in which a person engages

# Capacity: Key Concepts

- ❖ A capable decision-maker:
  - ❖ is aware of available choices
  - ❖ understands the reasonably foreseeable effects or consequences of the choices
  - ❖ makes a choice after they weigh the relative benefits and disadvantages of the choices



# Capacity: Ethical Concepts

- ❖ Know your own risk tolerance and own values
- ❖ Libertarian versus protectionist stance
- ❖ A determination of incapacity may do nothing to fix “the problem” (concept of “substantial benefit”)
- ❖ Incapable adults can still articulate preferences and make some choices



# Capacity: Adult's Rights

- ❖ A capacity assessment may be conducted only if need has been established
- ❖ An adult has the right to refuse to undergo or continue with an assessment (informed consent versus assent)

# Capacity: Adult's Rights

- ❖ An adult has the right to have a person present to assist the adult in feeling comfortable and relaxed
- ❖ An adult has the right to have the assistance of an interpreter or the use of a device to assist the adult to communicate in order for the adult to be able to fully demonstrate his or her capacity

# Capacity: Adult's Rights

- ❖ An adult shall be given the opportunity to undergo a capacity assessment at a time when and under circumstances in which the adult will likely be able to demonstrate their capacity
- ❖ Assessor needs to make reasonable efforts to obtain any information that is relevant to the assessment

# The Acts & Capacity

## **Personal Directives Act**

❖ Proclaimed June 30, 2008

## **Enduring Power of Attorney**

## **Adult Guardianship & Trusteeship Act**

❖ Proclaimed: October 30, 2009

# Capacity Assessment: Two Stages

- ❖ **Pre-assessment process**
- ❖ **Capacity interview**

# Identifying Domains

| <b>Domains of Decision-Making*</b> |   |
|------------------------------------|---|
| Health care                        | Participation in social activities      |
| Accommodation                      | Participation in educational activities |
| With whom to live & associate      | Participation in employment activities  |
| Legal matters                      | Financial and Estate                    |

# Reasons to Resort to a Capacity Interview

- ❖ Risk to patient / others too high
- ❖ Other, less intrusive methods, have failed
- ❖ Appointment of an alternative decision-maker may solve the problem
- ❖ Problem persists or becomes worse
- ❖ Evidence of impaired decision-making – cognitive change?

# Contact Information

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