



Support & Advocacy Service
for Older People

Assisted Decision Making (Capacity) Act 2015

Nothing about you / without you

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Sage is a Third Age programme in partnership with



Mary Condell
Solicitor
Sage Legal Adviser

mary.condell@sage.thirdageireland.ie

sage@thirdageireland.ie

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Seminar Content

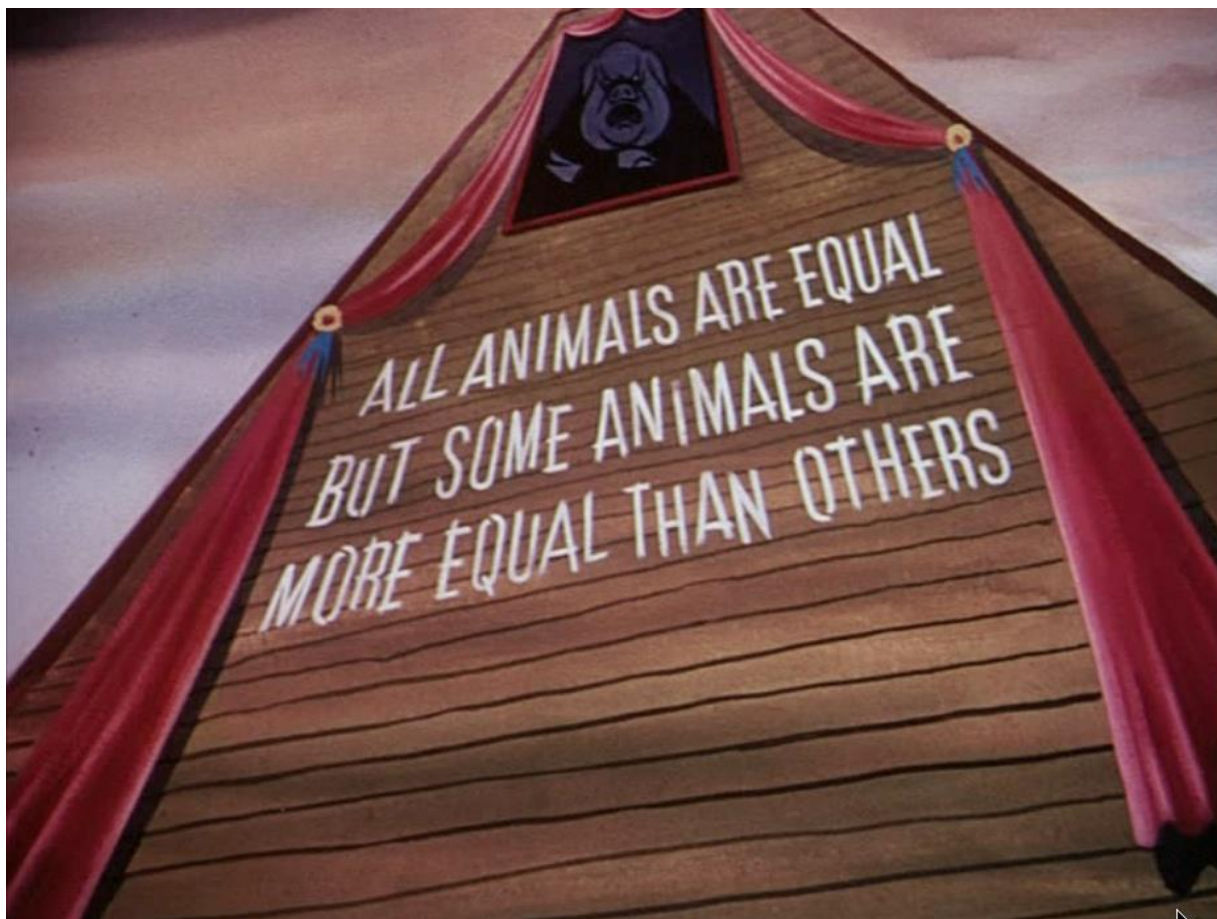
- 1. Human rights origins of new legislation**
- 2. Capacity Models**
- 3. The Present Position – *wards of Court***
- 4. Assisted Decision Making (Capacity) Bill**
 - who is it for
 - what is capacity, what are the statutory “rules” requirements?
 - how is capacity to be assessed, tips on “how to do it”
 - Communication
- 5. The Decision Support Sequence**
 - Planning ahead, Enduring Powers of Attorney and Advanced Healthcare Directives
 - Decision Making Representative, Co-Decision Making Agreement, Decision Making Assistant Agreement, Decision Making Assistant and Co-Decision Maker
- 6. Decision Support Service**
- 7. The Practicalities of Empowerment**

Where the need for the Assisted Decision Making Act comes from.



All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 1: Universal Declaration of Human Rights (1948)



Human Rights Origins

- Universal Declaration of Human Rights (1948)
- UN Universal Declaration on Bioethics and Human Rights (2005)
- UN Convention of the Rights of \Persons with Disabilities (UNCRPD) (2007)

= for ALL human beings

Human Rights Origins

An Internationally Accepted **Right to Self Determine** (to choose)
and
to be treated with **Dignity** and **Respect**

Ireland's Additional Obligations

- Constitution of Ireland
 - *[A]ll citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity.....; it also provides that the State will vindicate the personal rights of citizens (Article 40.1)*
- The European Convention on Human Rights
- Council of Europe *Recommendation (99)4 of the Committee of Ministers to Member States on Principles Concerning the Legal Protection of Incapable Adults* (February 1999)
- Council of Europe *Recommendation on Principles concerning Powers of Attorney and Advance Directives for Incapacity* (September 2009)
- Council of Europe *Recommendation on the Promotion of Human Rights of Older Persons* (2014)

Capacity Models

“Medical Model” v “Rights Model” (social model)




Status Approach – all or nothing medical model (based on cognitive deficit)

Outcome approach – determines capacity by nature of decision made

Functional Approach – time specific and issue specific approach

MINI MENTAL STATE EXAMINATION (MMSE)

Patient's name:
Hospital number:

ONE POINT FOR EACH ANSWER	DATE				
ORIENTATION					
Year Month Day Date Time	___/___/___	___/___/___	___/___/___	___/___/___	___/___/___
Country Town District Hospital Ward	___/___/___	___/___/___	___/___/___	___/___/___	___/___/___
REGISTRATION					
Examiner names 3 objects (eg apple, table, penny) Patient asked to repeat (1 point for each correct). THEN patient is asked the 3 names repeating until correct.	___/3	___/3	___/3	___/3	___/3
ATTENTION AND CALCULATION					
Subtract 7 from 100, then repeat from result. Continue 5 times: 100 93 86 79 65 Alternative: spell "WORLD" backwards - dlrow.	___/5	___/5	___/5	___/5	___/5
RECALL					
Ask for names of 3 objects learned earlier.	___/3	___/3	___/3	___/3	___/3
LANGUAGE					
Name a pencil and watch.	___/2	___/2	___/2	___/2	___/2
Repeat "No ah, anah, or bats".	___/1	___/1	___/1	___/1	___/1
Give a 3-stage command. Score 1 for each stage. Eg. "Place index finger of right hand on your nose and then on your left ear".	___/3	___/3	___/3	___/3	___/3
Ask patient to read and obey a written command on a piece of paper stating "Close your eyes".	___/1	___/1	___/1	___/1	___/1
Ask the patient to write a sentence. Score if it is readable and has a subject and a verb.	___/1	___/1	___/1	___/1	___/1
COPYING					
Ask the patient to copy a pair of intersecting pentagons:					
	___/1	___/1	___/1	___/1	___/1
TOTAL	___/30	___/30	___/30	___/30	___/30

The Present Position

for those unable to make decisions for themselves

Presumption of capacity - at common law

Next-of-kin – no general decision making authority

Power of Attorney – for property/financial matters ceases when “capacity” is lost

Enduring Power of Attorney (EPA)

- when capacity is failing or lost (different to 2015)
- one or more attorneys acting jointly or severally
- can be for personal care and /or financial decisions
- must be registered in Wards of Court office
- does not cover healthcare decisions

The Present Position for those unable to make decisions for themselves

Wards of Court

- Lunacy Regulations (Ireland) Act 1871
- status approach based on medical evidence (of deficit)
- no participation by Ward
- no review

Assisted Decision Making (Capacity) Act 2015



Number 64 of 2015

Assisted Decision-Making (Capacity) Act 2015

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Who is the Assisted Decision Making (Capacity) Act 2015 for ?



Assisted Decision Making (Capacity) Act 2015 is for:

A person who:

- for one reason or another is having difficulty reaching a decision on any particular thing without support or assistance

*“A person whose decision making capacity is being **called into question** or may **shortly be called into question** in respect of **one or more than one matter**”*

- may be able to make some decisions without support but not others

*“A person **who lacks capacity** in respect of one or more than one matter”*

- needs now or may need in the future support with decision making in respect of one or more than one decisions

*“A person who **falls within both of above categories at the same time but in respect of different matters**”*

What is capacity?



What is capacity?

A person shall **be presumed to have capacity** until proven otherwise (now a statutory presumption).

“A person’s capacity shall be assessed on the basis of his/her ability to understand, at the time a decision is to be made, the nature and consequences of the decision in the context of the available choices at that time (issue specific and time specific)”

What is lack of capacity?

“a person **lacks capacity** to make a decision if he/she is **unable to understand information** relevant to it, **retain it for long enough** to make a voluntary choice, **use it or weigh it** as part of the decision making process or **communicate** the decision by whatever means

“a person is **not** to be regarded as unable to understand the information relevant to the decision if he or she is **able to understand an explanation** of it given to him/her in a way **that is appropriate** to his or her circumstances(whether using clear language, visual aids or any other means)” **AND** “**all practical steps** have been taken, without success to help him/her make the decision” (unique tailor made explanation required)

Statutory “Rules” in relation to Capacity



Statutory “Rules” in relation to Capacity

1. The fact that a person **lacks capacity** in respect of a decision on a particular matter at a **particular time** does not prevent him/her from being regarded as having capacity to make decisions on the same matter at **another time** (time specific also includes “place” and circumstances that facilitate concentration etc)
2. The fact that a person **lacks capacity** to make a decision on a **particular matter** does **not prevent** him/her from being regarded as **having capacity** to make decisions **on other matters** (issue specific)
3. An unwise decision **does not** indicate a lack of capacity (outcome approach outlawed)

Statutory “Rules” in relation to capacity

4. A person is not to be regarded as **unable to understand information relevant to a decision** if they are **able to understand an explanation of it given in a manner appropriate to circumstances** (communication must be adapted to suit the persons needs, not the other way around)

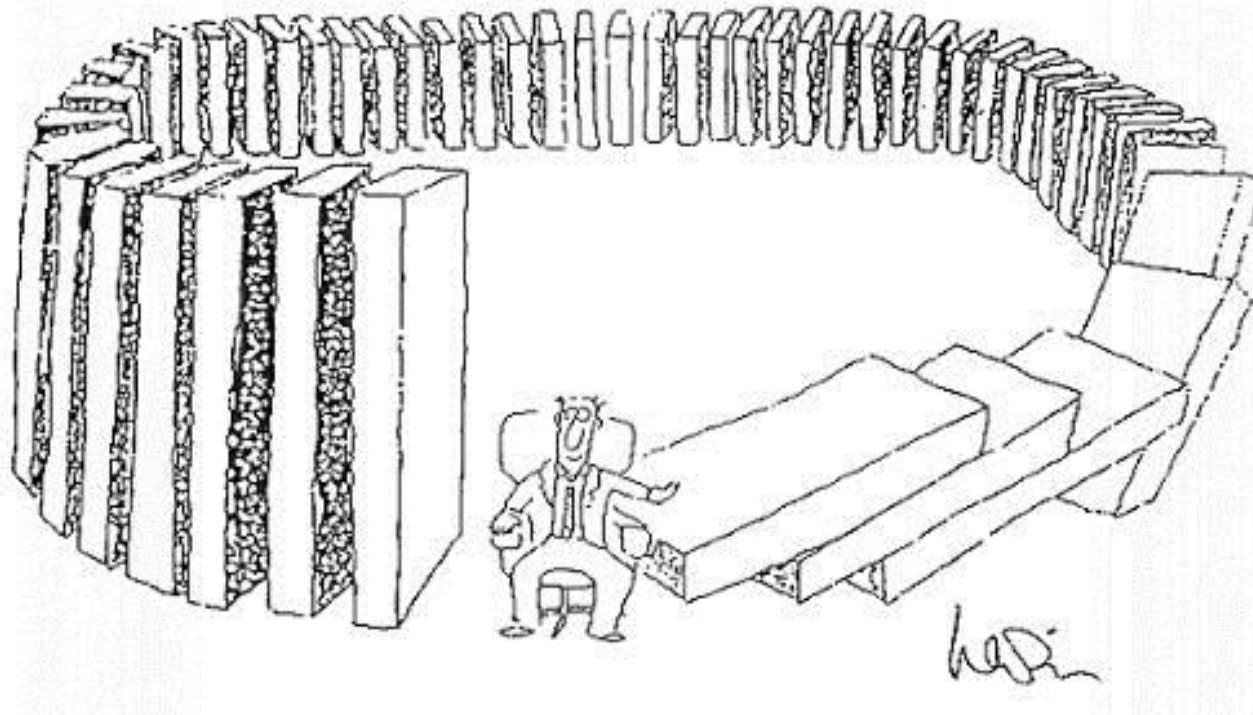
5. The fact that a person is able to **retain information for short period** only does **not prevent** him/her from being regarded as having **capacity** to make the decision (time needed will depend on the complexity of the decision to be made, a further aspect of issue specific)

What information should be given to a person making a decision?

Information relevant to decision includes information about the **reasonably foreseeable consequences**

- of each of the available choices at the time the decision is made (**decision supporter needs to give options**)
- or failing to make the decision (**decision supporter needs to outline consequences of different options**)
- **permit, encourage and facilitate** the relevant person to participate or **to improve** his or her ability to participate as fully as possible (*see Guiding Principles*)

Consequences of these rules for professionals



Consequences of these rules for professionals

- Key **role reversal** for professionals from capacity assessor (**objective judge**) to capacity enhancer (**engager and facilitator**)
- The **onus** of establishing and supporting decision making capacity now lies on the decision supporter (**“Intervenor” or professional advising him/her**) not on the decision maker (**“relevant person”**)
- Key to fulfilling this statutory duty is not just knowing it is the law but knowing “how to do it”!

The “how to do it” of the functional test

COMMUNICATE!

Communication!

5 psychological functions of communication:

- Inform
- Control
- Motivate
- Influence (by subtle use of 7 levers)
- Demonstrate empathy

Communication!

7 psychological levers to exercise influence:

5 positive

Rapport building
Liking
Similarity
Complementarity
Respect
Expertise
Trust

2 negative

Fear
Power

Which ones do you use?

Seek out and work with what lies beneath the surface



The “how to” of this type of communication

Listen - *in order to understand*

(interests and needs, what really matters to the person and what he/she may be willing to do/compromise to achieve these)

AND

Speak - *in order to be understood*

(including reality checking post decision)

**Remember this is a two way process
it is a dialogue**

How do **you** listen?

“TO LISTEN”

Ear

You

Eyes

Undivided
Attention

聽

Heart

The Elements of Communication

- Body Language
- Tone
- Words

“The Mehrabian Formula” when feelings and attitudes are being expressed the split is 55%, 38% and 7%!!!

Active/Holistic Listening

- Requires commitment and discipline
- Is non judgemental
- Does not offer solutions (distinguish from offering options)
- Requires you to remain calm, warm, interested, relaxed and present to the speaker
- Listening does not mean that you agree with the speaker, it means that you are aiming to understand them and communicate that understanding back to them



The Challenge in Supporting Independent Decision Making

- The **right to self determine, to allow choice** means the **decision supporter** asking him/herself the question:

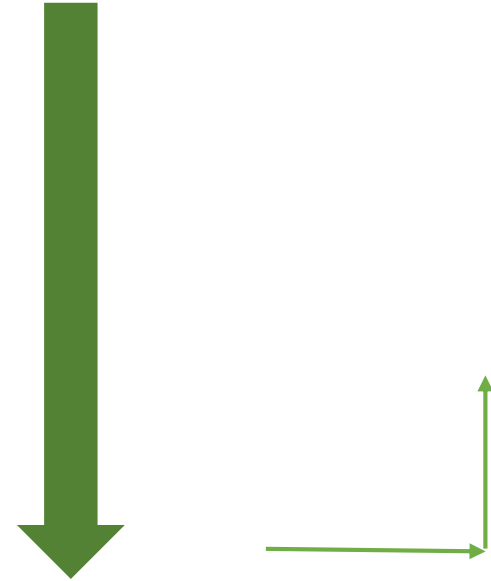
“How can I sit with this person, comprehend their story and context, and support him/her in making this decision without having an attachment to the outcome?”



Stages of the Decision Support Sequence

Hierarchy of Decision Support

- If the person has **planned ahead**
 - **Advanced Healthcare Directive**
 - **Enduring Power of Attorney**
- If the person has **NOT planned ahead**
 - **Decision Representative**
 - **Co-decision-maker**
 - **Decision-making Assistant**



As the higher levels of support take precedence over the lower ones it is necessary to start at the top and work down to eliminate them (in order) **BUT** then start at the lower level of support and work up from there if needs be.

Stages of the Decision Support Sequence

Stage 1 : Presume capacity.

If there is reason for doubt go stage 2

Stages of the Decision Support Sequence

Stage 2 : Facilitate the person's ability to make the decision by initially preparing them.

Preparing for Decision Making

Make the person aware of:

- his/her **right** to make his/her own choice for him/herself
- your **duty** to ensure that he/she avails of that right
- your **concern** that he/she may be finding that difficult
- that your **role** is to support him/her in whatever way he/she needs to ensure that he/she is facilitated to make the decision for him/herself

Practical Tips for Actively Supporting Decision Making

Use the **ALERT** method for each issue:

ASK – “what is your understanding about.....”

LISTEN – (to words, feelings, and watch body language)

EXPLAIN/INFORM/CLARIFY/QUESTION

RREALITY CHECK – paraphrase, reflect back, summarise,
check understanding & retention

TELL ME - your decision, and about your decision,
how you reached it etc.

If that doesn't provide a decision go to stage 3.

Stages of the Decision Support Sequence

Stage 3 : Find out if the person has “**planned ahead**”.
The two possibilities in the “hierarchy” of Decision Support depend on the nature of the issue

- A. If the issue is a medical or healthcare one ask if there is an **Advanced Healthcare Directive** in place and act /consult with **Designated Healthcare Representative** accordingly. If not a medical/healthcare issue go to B.

- B. If the issue is not a medical or healthcare issue (or if it is a healthcare issue and the Act has commenced) ask if there is a **registered Enduring Power of Attorney** in place which covers the issue and consult with attorney accordingly

Stages of the Decision Support Sequence

If no planning ahead documents are in place for this specific decision go to stage 4.

Stages of the Decision Support Sequence

Stage 4: Find out if there is a **Decision Making Representative** appointed by the Circuit Court in relation to this particular issue and if so consult him/her.

Stages of the Decision Support Sequence

*If there is no **Decision Representative** in place in respect of the particular issue in question go to **Stage 5**.*

Stages of the Decision Support Sequence

Stage 5: Find out if there is already a **Co-Decision-Making Agreement** in place in respect of this particular issue and if so engage the Co-decision maker in the decision making.

Stages of the Decision Support Sequence

*If there is **no Co-decision-making Agreement** in place in respect of the particular decision in question go to **Stage 6**.*

Stages of the Decision Support Sequence

Stage 6: Find out if there is already a **Decision Making Assistance Agreement** in place in respect of this particular issue and if so engage the Assistant in the decision making.

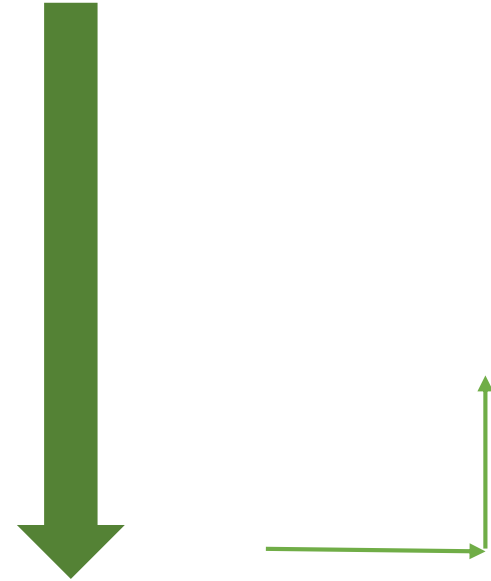
Stages of the Decision Support Sequence

*If there is **no Decision-making Assistance Agreement** in place in respect of the particular decision in question go to **Stage 7**.*

Stages of the Decision Support Sequence

Hierarchy of Decision Support

- If the person has **planned ahead**
 - **Advanced Healthcare Directive**
 - **Enduring Power of Attorney**
- If the person has **NOT planned ahead**
 - **Decision Representative**
 - **Co-decision-maker**
 - **Decision-making Assistant**



As the higher levels of support take precedence over the lower ones it is necessary to start at the top and work down to eliminate them (in order) **BUT** then start at the lower level of support and work up from there if needs be.

Stages of the Decision Support Sequence

Stage 7:

1.If the person has the capacity to appoint a **Decision-making Assistant** or a **Co-decision Maker** in relation to the matter in question ask him/her if he/she wishes to do so and then proceed accordingly.

Decision Making Assistance Agreement

- **What the Appointer has to understand:**
- **one or more particular decisions** have to be made by me
- in order to make that decision myself I require **access to** and an **understanding of** certain information in order to properly consider my options
- my **ability** to do that by/for myself is **questionable or difficult for me** or I realise is likely to become questionable or difficult shortly
- I can **appoint another person** to assist me

Co-decision-making Agreement

- **What the Appointer has to understand:**
- **one or more particular decisions** have to be made by me
- I am **unable**, or will shortly become unable, even with access to information and options, to properly use that information and consider the options on my own **without the input/advice of someone else**
- I can **appoint** another person to help me make that decision by working through information and options with me and then **making it along with me**

Stages of the Decision Support Sequence

Stage 7 continued:

2. If the decision is in respect of an issue which **is significant** in terms of the change it would make to the person's life but **not extremely urgent** then consider asking the **Circuit Court** to make the decision (**OR** ask the **Decision Support Service** for guidance).

Stages of the Decision Support Sequence

Stage 7 continued:

3.If the decision is **extremely urgent**

OR

in respect of an issue which is **not significant** in terms of the change it would make to the person's life then make the decision in accordance with the "**Guiding Principles**" set out in the Act.

“Issue specific” - matching the level of decision support to the person’s need for support

- **The level of support necessary should reflect the relevant person’s need for support in respect of each separate individual decision:**
- I may not need any support in deciding where I want to live and with funding it
- I may realise my healthcare needs are such that I need to live in a nursing home but need assistance in finding the right one for me and in filling out the Fair Deal application Form (Decision Making Assistant)
- An Post have told me that the term of my investment in An Post Bonds is up and I need help to decide what to do about reinvesting it (Co-Decision Maker)
- Some property needs to be sold to pay for my care but I have no understanding of this or of the value of property (Decision Making Representative)

Decisions in accordance with the “Guiding Principles”

Decision Supporters must act in accordance with the “Guiding Principles” (*Rules*)

- Designated Healthcare Representatives
- Attorneys under Enduring Powers of Attorney
- Decision Making Representatives
- Co-Decision Makers
- Healthcare professional
- Special and General Visitors
- Decision Supporters (*see stage 2*)

Decisions in accordance with the “Guiding Principles” (*Rules*)

The **Decision Supporters** shall:

- **permit, encourage and facilitate** the person **to participate** or **to improve** his or her **ability to participate as fully as possible**
- if making a decision for the person take into account the person’s own known **past and present will and preferences** **so that the decision is as close as possible to the decision** the person might have made for him/herself in so far as that is possible

Decisions in accordance with the “Guiding Principles” (*Rules*)

- If making a decision for the person they **take into account**
 - His/her **beliefs and values**
 - any other factors which he/she **would be likely to consider** if able to do so
 - consider the **views of others** he/she names as people to be **consulted**
 - act at all times in **good faith and for his/her benefit**
 - consider **all other circumstances** which it would be reasonable to regard as relevant
 - Consider the **views of any carer/ person** with a genuine interest in his/her welfare/healthcare professionals
 - Consider the **likelihood of his/her recovering** the ability to make the decision for him/herself against the urgency of the matter to be decided

Decisions in accordance with the “Guiding Principles” *(Rules)*

- All **decisions (interventions)** taken concerning the life or affairs of a person by a Decision Supporter shall:
 - be the decision that **least restricts** that person’s rights and freedom
 - be the decision that is **most respectful** of that person’s **dignity, bodily integrity, privacy, and continued right to have autonomy and control over his/her financial affairs and property**
 - be a decision **that is proportionate to the significance and urgency** of the matter needing to be decided upon
 - **be in place for as short a time as possible** taking into account the particular circumstances of the matter needing to be decided

IT IS STILL ALL ABOUT HUMAN RIGHTS!



Planning Ahead

Advanced Healthcare Directives

- **A written document** - signed in the presence of two witnesses (*at least one of whom is not an immediate family member*)
- made by a person (*aged 18 or over*)
- in **advance** and while he/she **has the ability** to do so
- sets out the person's **will and preferences** concerning **medical or healthcare treatment decisions**
- which may arise in the **future** at a time when he/she may **not have the ability** to make those decisions for him/herself

Planning Ahead

Advanced Healthcare Directives

Purpose of AHDs:

- To allow people **control** over future healthcare treatment even at a time when he/she does not have capacity to make choices
- To enable people to be **treated according to their will and preferences, beliefs and values**, expressed in advance at all times
- To provide healthcare professionals with **important information** about patients and their **choices** in relation to treatment

Planning Ahead

Advanced Healthcare Directives

AHDs can include:

The appointment of a **Designated Healthcare Representative**
to make healthcare decisions for the person at a time in the future when he/she is unable to make them for him/herself and to interpret the provisions of the AHD

Treatment refusal

even where that refusal may at the time of its implementation appear to be unwise or not based on sound medical principles, or even where the treatment refusal may result in death

or

for religious reasons, even where this may result in death

Treatment request

which is not legally binding but is to be taken into consideration by healthcare professionals who must record his/her reasons for not complying with it

Planning Ahead

Advanced healthcare Directives

ADHs are **not** applicable to:

Refusal of life sustaining treatment unless there is a specific statement otherwise in the document along with an acknowledgement that the maker understands that this refusal may result in his/her death

Refusal of basic care

that includes but is not limited to warmth, shelter, oral nutrition and/or hydration and hygiene, **(artificial nutrition and hydration come within the definition of medical treatment)**

A person **involuntarily detained under the Mental Health Acts** for a mental disorder and who has lost capacity, unless the treatment refusal is unrelated to the treatment of the mental disorder

Planning Ahead

Advanced healthcare Directives

Who is a Designated Healthcare Representative:

- Must be **over 18**
- Have **signed the AHD** at the time it is created
- **Acts as agent** for the person (*directive maker*) when exercising powers given to him/her
- Make and keep a **record in writing of decisions made**
- can be **complained about to the Decision Support Service** who can investigate and if necessary refer the matter to the Circuit Court or High Court if the issue is life sustaining treatment

Planning Ahead

Advanced healthcare Directives

Codes of Practice

Register

Offence to force someone to sign an Advanced Healthcare Directive **or to forge** one

Ambiguity to be **interpreted in favour of the preservation of the life.**

Failure to comply with a valid and applicable AHD - **civil and criminal liability** unless healthcare professional **acted in good faith** and in accordance with what he/she reasonably believed at the time to be the **will and preferences of the patient as expressed in the AHD.**

The introduction of AHDs has **no effect on the existing criminal law in relation to euthanasia or assisted suicide**

Planning Ahead

Enduring Powers of Attorney

What it is:

A document (in set format) with statement by the donor
(*giver of authority/power*) to the effect

- that power to be effective at any subsequent time when he/she lacks capacity either to manage
- personal welfare and/or
- property and affairs
- and appointing one or more persons as attorneys to do so in **accordance with donor's own will and preferences, beliefs and values**, expressed in advance to attorney/s

Planning Ahead

Enduring Powers of Attorney

Becomes effective

- When the donor has **lost** the ability to make such decisions for him/herself

AND

- the EPA has been **registered**

Planning Ahead

Enduring Powers of Attorney

Powers that can be given to attorneys in EPAs:

Personal Welfare Decisions - *(whether under 1996 or 2015 Act)*

- accommodation eg: at home or a nursing home
- education or training
- social activities
- decisions on any social services
- healthcare decisions *(under 2015 Act)* subject to the following:
 - cannot include power to refuse life-sustaining treatment
 - an Advanced Healthcare Directive **takes precedence** over an **EPA** in respect of matters covered in the Advanced Healthcare Directive

Property and affairs - *(whether under 1996 or 2015 Act)*

- legal and financial matters
- provide for needs of dependants
- protecting or advancing the interests of the relevant person

Planning Ahead

Enduring Powers of Attorney

Regulations will provide form of EPA but the **Act states** that:

- **one or more than one attorneys** may be appointed
- the signature of the donor must be **witnessed by 2 people** one of whom must not be an immediate family member
- a **legal practitioner** must certify that the donor understood the effect of making the EPA and has no reason to believe that the document is being executed as a result of fraud or undue pressure
- a **medical practitioner and another healthcare professional**, must state that in his or her opinion the donor had capacity, as may have been given, to understand the effect of creating the EPA
- **notice must be served on certain people** at the time of signing of the EPA including spouse, co-habitant, children over 18, other decision supporters

Planning Ahead

Enduring Powers of Attorney



Legal Aid can be provided for persons who wish to sign an EPA and who qualify under the relevant means test

Planning Ahead

Enduring Powers of Attorney

Restraint (Deprivation of liberty)

Attorney/s authorised to make personal welfare decisions **cannot restrain or authorise anyone else to restrain** the donor

unless

necessary to prevent imminent risk of serious harm to the donor or another and the restraint is proportionate to that seriousness

Restraint includes:

- using or threatening to use **force** to persuade the donor to do something which he/she is resisting
- Intentionally **restricting the donor's freedom** of movement or behaviour
- **Medication** which is not necessary for a medically identified condition
(*chemical restraint*)

Planning Ahead

Enduring Powers of Attorney

EPA Registration:

- EPAs are **not effective** until registered
- Medical and another healthcare professional's opinion required re **loss** of capacity
- Any of the “notice parties” **or** a person with an interest or expertise in the welfare of the donor can **object** to the registration that:
 - **EPA is not valid** or
 - donor has **not lost capacity** and/or
 - **attorney/s is/are unsuitable** person/s and/or
 - **fraud or coercion** was used to get the donor to sign it

Planning Ahead

Enduring Powers of Attorney

Attorneys must:

- Act in accordance **with Guiding Principles**
- within 3 months file a **statement** of the donor's assets, liabilities, income and expenditure
- keep proper **accounts and financial records** of the donor's affairs and the other actions performed by the attorney (including each "restraint")
- file an **annual Report** about what and how the attorney/s performed their duties as attorney/s

Planning Ahead

Enduring Powers of Attorney

Complaints

Any person may make a complaint to Director ***whether an EPA was created under the 1996 Act or the 2015 Act:***

- **attorney is acting outside the terms** of the EPA
 - **attorney is unable to perform** the duties/obligations of an attorney
 - **fraud or coercion** was used to get the donor to appoint the attorney
- It is **offence to force** someone to sign an EPA or make a statement known to be false **punishable by fines and/or imprisonment**

EPA 2015 Act

- Functional assessment of capacity
- Guiding Principles apply
- Personal welfare including healthcare
- Court – Circuit Court
- Attorney - ‘suitable person’
- Detailed ‘ineligible’ list
- Execution: Statements by Donor, lawyer, doctor, healthcare professional and attorney
- Statements by attorney
 - *understands implications of undertaking to be an attorney + has read + understands information in EPA*
 - *understands + undertakes to act in accordance with functions set out*
 - *understands + undertakes to act in accordance with Guiding Principles*
 - *understands the requirements in relation to registration*
- Come into force:
 - When donor lacks capacity
 - Instrument has been registered

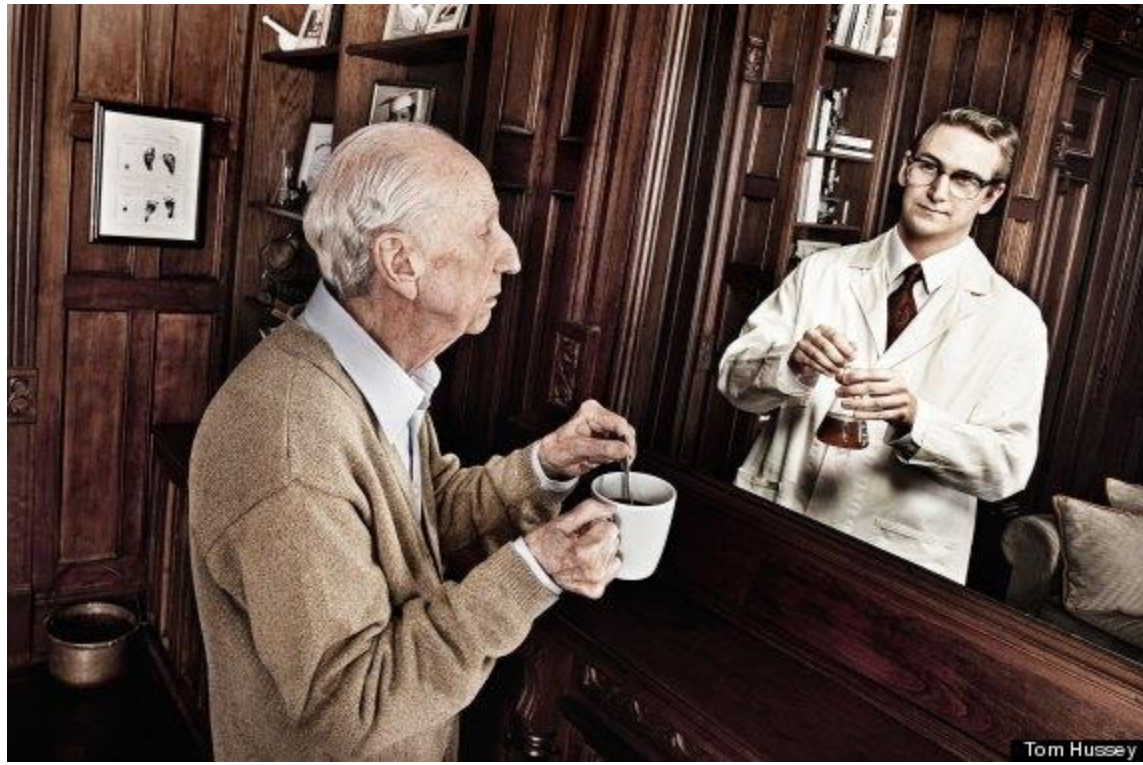
EPA 1996 Act

Mental incapacity
Best Interest
Personal care – no healthcare
Court – High Court
N/A
Limited ‘ineligible’ list
Execution: Statements by Donor, lawyer, doctor and attorney
Statements by attorney

- *understands the duties + obligations of an attorney*

Come into force

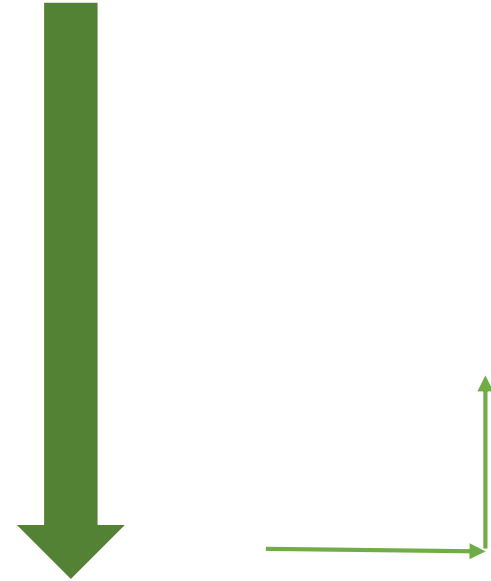
When donor is or is becoming mentally incapable and as soon as practicable the attorney makes an application for registration



Stages of the Decision Support Sequence

Hierarchy of Decision Support

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Decision Making Assistance Agreement

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- I can **appoint another person** to assist me

Decision-Making Assistance Agreements

- **Appointment in writing** – signed by the person (over 18) creating it, witnessed by someone other than the assistant decision maker
- of **named other person to assist and support** with decisions concerning certain specified personal welfare matters or certain specified property.
- **No** registration procedure
- Assistant Decision Makers **do not make decisions jointly or otherwise** on behalf of the appointer

Decision-Making Assistance Agreements

Role of Decision Making Assistants:

- to **assist** in **obtaining/explaining information** in relation to a particular matter
- **ascertain** the **will and preferences** of the appointer on the matter
- **assist** the **appointer** to make and express and implement the decision

Decision-Making Assistance Agreements

Complaints:

- acting **outside the scope** of the Agreement
 - **unable to perform** functions
 - **fraud or coercion** was used to get the appointer to sign the Agreement
-
- The Director has **power to investigate**
 - Following such investigations the Director shall make an application to **Circuit Court** for a decision

Co-decision-making Agreement

- **What the Appointer has to understand:**
- **one or more particular decisions** have to be made by me
- I am **unable**, or will shortly become unable, even with access to information and options, to properly use that information and consider the options on my own **without the input/advice of someone else**
- I can **appoint** another person to help me make that decision by working through information and options with me and then **making it along with me**

Co-Decision-Making Agreements

Co-Decision-Making Agreement is

- **Appointment in writing** - signed by the person (over 18) creating it in the presence of 2 witnesses (*not the co-decision-maker and at least one is neither an immediate family member of the appointer or the co-decision-maker*)
- Appointing **one or more named persons** with whom he/she will make **joint decisions** about certain specified matters (*personal welfare or property or affairs*)
- **both must agree on each decision** which is to be in accordance with the wishes of the appointer **UNLESS** that decision will result in serious harm to the appointer or someone else.

Co-Decision-Making Agreements

- **Not effective until registered**
- **Notice must be served on certain people** at the time of registration including spouse, co-habitant, children over 18, other decision supporters
- **Objections to registration** possible:
 - it is not valid
 - appointer lacked capacity to sign it
 - Appointer has capacity to make the decision
 - co-decision-maker is unsuitable
 - fraud or coercion was used to get the appointer to sign

Co-Decision-Making Agreements

Who is suitable for appointment?

- **Relative or friend** whom the appointing person has known over a sufficient period of time that a **relationship of trust exists**.
- **Objections** can be made to the person appointed.

Role of the Co-decision-maker

- To **advise** the appointer by obtaining and explaining relevant information
- Find out the **appointer's will and preferences** in relation to the matter and **assist with communicating** that
- **Discuss the options** with the appointer and **likely outcomes**
- **Make the decision jointly with the appointer**
- Make efforts to ensure the decision is **implemented**
- **Submit a Report** on performance as a co-decision-maker detailing all transactions relating to the appointer's finances and costs and expenses paid to and claimed by the co-decision-maker

Co-Decision-Making Agreements

Complaints:

- **acting outside the scope** of the Agreement
 - **unsuitable**
 - **not acting in accordance with will and preference** of the appointer
 - appointer did **not have capacity to sign** the Agreement
 - appointer **has capacity to make the decision** in question for him/herself
 - appointer **no longer has capacity to work** with the co-decision-maker
 - co-decision-maker **not acting in accordance with will and preference** of the appointer
 - **fraud or coercion** was used to get the appointer to sign the Agreement
-
- The Director has **power to investigate** the and make an application to Circuit Court for decision
-
- It is an **offence** to force someone to sign a Co-decision-making Agreement or make a statement known to be false punishable by fines and/or imprisonment

Decision Making Representative

Decision Making Representative is

- Appointed by **order of the Circuit Court** for the purposes of **making one or more specified decisions** in relation to a person's personal welfare (including healthcare) or his/her property and affairs.
- Alternatively **appointed generally** to make all decisions on behalf of a person.

Decision Making Representative

Court will consider **suitability** of the person taking into account:

- The **known will and preference** of the person for whom the appointment is being made
- Desirability of **preserving existing family/other relationships**
- **Compatibility** between person and his/her decision-making-representative
- **Conflict of interests**
- Any **professional/financial expertise** needed to manage the person's affairs
- Court can if no suitable person is available choose a decision-making-representative from a **panel**
- Court can **limit the time** of an appointment

Decision Making Representative

Restrictions on decision-making-representative

- They cannot refuse life-sustaining treatment
- They cannot restrain (deprivation of liberty)

Register of Decision-making-representatives

- The Director of the Decision Support Service will maintain a register

Decision Making Representative

Decision Making Representative must:

- within 3 months file a **statement** of the person's assets, liabilities, income and expenditure if applicable to the appointment
- keep proper **accounts and financial records** of the person's affairs and the other actions performed
- file an **annual Report** about what and how the duties of the appointment were performed

Complaints about the Decision Making Representative:

- Can be **made to the Director of the Decision Support Service** who can investigate before referring the matter to the Circuit Court

Decision Support Service

Director of Decision Support Service to be appointed by the **Mental Health Commission**

Director's Functions

- Promote **public awareness** of the Act and matters relating to the exercise of capacity
- Promote **public confidence** in the processes set out in the Act.
- Provide **information and guidance**
- **Supervise**
- **Identify** and **make recommendations for change** in practices in organisations and bodies in order to facilitate persons exercising his/her right to make decisions
- Establish a **website**

Registers and Codes of Practice

The Director shall establish and maintain a Register of:

- Co-Decision Making Agreements
- Decision Making Representation Orders
- Enduring Powers of Attorney
- Advance Healthcare Directives

The Director may:

- Prepare and publish codes of practice
- Request another body to prepare a code of practice
- Approve a code of practice prepared by another body
- Codes of practice can be for the guidance of persons acting as advocates or for the guidance of others (including healthcare, social care, legal and financial professionals) acting on behalf of persons to whom the Act refers

Investigations by Director of DSS

Director may

- **investigate on own initiative** or **in response** to a complaint
- **summon witnesses**
- **examine** them on oath
- Require the witness to **produce any document** under his/her power or control
- By notice in writing require any person to **provide such written information** as the Director considers necessary
- **seek resolution of complaints** in such a manner (including by informal means) as Director considers appropriate and reasonable
- **investigate complaints** even though complainant may be entitled to bring court proceedings
- **A person can be found guilty of offences if he/she fails to comply or hinders/obstructs the Director in the performance of functions**



Review of Wards of Court

- **“Wardship court”** is High Court or Circuit Court exercising its jurisdiction under Part 6 of Act, but in relation to someone who is an existing ward of court the court who ordered it (High Court)
- **Review** is on **application to wardship court** at any time after coming into force of 2015 Act or at latest 3 years from commencement
- **Application** commenced either by:
 - Ward
 - Relative or friend with whom ward has relationship of trust
 - Any person who has sufficient interest or expertise in ward’s welfare

Review of Wards of Court

- Possible declarations following review:
 - **1. Ward does not lack capacity**
 - **Consequences:**
 - the court shall immediately **discharge** ward from wardship
 - shall order **property to be returned** to him/her
 - give such **directions** as it thinks appropriate having regard both to the discharge and the circumstances of the former ward

Review of Wards of Court

- **2.** Court can make **one or more** of the following declarations
- **A.** Ward **lacks capacity unless the assistance of a suitable person as co-decision-maker** is made available to make one or more decisions
 - **Consequences:**
 - the court shall on the registration of a co-decision-making agreement, discharge the ward from wardship
 - shall order property to be returned to him/her and
 - give such directions as it thinks appropriate having regard both to the discharge and the circumstances of the former ward

Review of Wards of Court

- **B. Ward lacks capacity even with the assistance of a suitable person as co-decision-maker**
 - **Consequences**
 - Court shall make such orders as it considers appropriate under Part 5 (Decision Making Representative Orders)
 - Order that the property of the former ward be returned to him/her upon the appointment of a decision-making representative in respect of the former ward
- The jurisdiction of the wardship court shall continue to apply meanwhile pending above declarations.

Review of Wards of Court

- **Wards of Court in “approved centres”**
- People who are wards of court and in approved centres do not currently come within the review provisions of the Mental Health Act 2001 and so are still under the Mental Health Treatment Act 1945)
- **2015 Act provides for them:**
- Mental Health Commission shall establish a panel of suitable consultant psychiatrists willing and able to carry out independent medical examinations
- Where an issue arises as to whether a person who lacks capacity is suffering from a mental disorder, the procedures provided for under the Mental Health Act 2001 shall be followed as respects any proposal to detain that person
- Review of Detention Orders



The Practicalities of Empowerment

Ensure:

- that the **will and preferences, beliefs and values of the person with limited or reducing decision making capacity** are learnt from the relevant person him/herself, in advance if possible or as necessary, or from his/her family members
- that it is that **will and those preferences, beliefs and values that prevail** at times when the relevant person him/herself cannot give guidance

The Practicalities of Empowerment contd.

Educate :

- all, including the general public, in the **rights based approach** and bring about a cultural change throughout society
- all in **good communication skills** so that they can each “facilitate the competencies” at all times
- **all in the law** so that the person who has the legal right to make decisions does so

The Practicalities of Empowerment contd.

Be aware:

- of how easy it is to **unduly influence** the person with limited competency into making a certain decision by giving just one option or phrasing questions in such a way that there is only one answer.
- of the potential **undue influence** of others and protect a vulnerable person from it.

The Practicalities of Empowerment contd.

Improve:

- your own **self awareness** and the ability to alter or temper your behaviour accordingly
- your ability to **consciously slow the decision making process down**, to reduce concepts and explanations to simple straight forward and easily understood language
- your ability to **give options** and to use analogies or storytelling to explain and differentiate between those options

The Practicalities of Empowerment contd.

Improve:

- your own and others' awareness of **personal prejudices against mental illness or incapacity**
- your own and others' awareness of **personal assumptions or prejudices regarding the capacity and rights of older people**
- your own and others' awareness of the **role of support persons, advocates or specialist advisors**, including the ability to work with them if necessary

The Practicalities of Empowerment contd.

Acquire

Endless **patience, understanding** and **empathy**

Know

It is your **statutory duty** to protect the human rights of all human beings no matter what their vulnerability

Challenge

wherever necessary

Call

a Sage advocate to assist if necessary!

The Practicalities of Empowerment contd.

Don't forget on behalf of vulnerable people
the Sage mantra

**Nothing about me / without
me!**

Nothing about you / without you

www.thirdageireland.ie/sage

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Support & Advocacy Service
for Older People