

Consent, Capacity and Decision Making

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Purpose

Community Living Grimsby, Lincoln, and West Lincoln (the Agency) is committed to promote the decision-making rights of people supported by the agency and to provide supports for decisions-making as necessary. To take direction from people supported whenever possible, and to honour the presumption of capacity recognized that law. To establish a clear protocol that will direct agency staff to seek consent or direction from authorized Substitute Decision Makers (SDM) only if a person supported lacks capacity to make decisions within the agency setting.

Definitions

Decisions within the agency setting: decisions that need to be made in the context of the Agency's provision of services and supports to people with disabilities, including, but not limited to: service agreements, decisions related to the level and type of supports provided by the agency, social outings, meal options, privacy related consent forms. (e.g. disclosure of personal information, social media content), etc.

Areas of decision-making: property (refers to finances generally, including, but not limited to investments, bank accounts, and physical property), and personal care (which includes healthcare decisions, as well as non-healthcare related decisions, like shelter, nutrition, clothing, safety, and hygiene). Decisions within the agency setting may fall under both areas.

Capacity: the ability to understand information, relevant to making a decision and the ability to appreciate the consequences of a decision.

Presumption of capacity: a legal presumption that states that a person who is eighteen (18) years or older is presumed to be capable of entering into a contract, while a person who is sixteen (16) years or older is presumed to be capable of making decisions about their personal care.

Formal finding of incapacity: a determination made by a health professional, capacity assessor, or an evaluator, that a person is not capable of making their own decisions with respect to one or more areas of decision-making (as described in **Appendix B**, and pursuant to the legislation referenced in **Section E**).

Capacity Assessors: professionals who have completed qualifying courses, and who are specifically trained to perform assessments of capacity.

Evaluators: specifically, trained professionals who are permitted to make determination of capacity respecting admission to care, as well as personal assistance devices services that may be required for residence in a care settings.

Substitute decision-maker (SDM): a person who is legally authorized to make decisions on behalf of someone who has been found incapable of making their own decisions.

Decision-Making Supporter: a trusted family member, or friend, who may support someone with making decisions, but who does not have legal decision-making authority.

Power of attorney for personal care (POA for Personal Care): a legal document that allows a person to name one or more SDM of their choice, to make decisions on their behalf, with respect to their personal care (including healthcare, shelter, nutrition, hygiene, clothing, and safety).

Continuing Power of Attorney for Property (POA for property): a legal document that allows a person to name one or more SDM's of their choice to make decisions on their behalf with respect to their property.

Public Guardian and Trustee (PGT): a government office that may act as a guardian (type of SDM), typically for property, but also for personal care as a last resort.

Informed consent to treatment: permission for a specific medical treatment, given voluntarily by a patient, without any misrepresentation or fraud, after having received all the information necessary, to make the decision in question, including: the nature of the treatment; the expected benefits of the treatment; the material risks of the treatment; the material side effects of the treatment; alternative courses of action; and the likely consequences of not having the treatment.

Consent: used generally across various areas of decision-making to indicate agreement or permission that is provided by the person, supported or their SDM, which is given voluntarily (without deception, coercion or undue influence) after consideration of all relevant information.

Guiding Principles

The decision-making rights of the person supported are paramount.

Unless there has been a formal finding of incapacity, staff will rely on the presumption of capacity with respect to any decision facing a person supported.

Staff or the Agency may need to seek consent and direction from an SDM or decision-making supporter with respect to decisions within the agency setting.

The agency will not attempt to communicate the elements of informed consent to treatment to a person supported and or their SDM, leaving this responsibility to the healthcare professionals involved.

Staff or the Agency will not arrange formal capacity assessments, or make referrals to the PGT without seeking legal guidance.

Agency staff will not be directly involved in assisting people supported with the preparation of powers of attorney (POA). Instead, agency staff may connect people supported with a legal professional who can assist in creating these documents.

Procedure

Within the Agency setting

Staff are entitled to rely upon the presumption of capacity with respect to a person supported unless:

- there has been a Formal Finding of Incapacity with respect to the decision or type of decision in question; or
- staff have reasonable grounds to believe that the person supported is incapable of making a particular decision.

If the person supported has been found incapable in the relevant Area of Decision-Making, the Agency should determine whether there is an authorized SDM available. A decision will be sought from the SDM; if unavailable, then from a Decision-Making Supporter (if one exists), as laid out in **Appendix A**.

For personal care decisions, excluding healthcare: staff can take direction from Decision-Making Supporters in order to co-ordinate services and supports based on the expressed wishes and best interests of the person supported.

For agreements, consent forms and other property-related decisions within the Agency setting: The Agency will take direction from Decision-Making Supporters and will explore the use of voluntary and/or informal programs, such as ODSP trusteeship. Agency Leadership shall seek legal advice where necessary.

If a person supported has not been found incapable, but Agency staff have concerns with the capacity of that person to make a decision within the Agency Setting, staff should communicate their concerns to the Executive Director or their designate.

Before reaching the conclusion that a person supported is incapable of making a particular decision, the Agency should offer appropriate supports and/or accommodations to allow the person supported to exercise their decision-making rights. The Agency should also provide the person supported with the information relevant to the decision in question in a format and manner that the individual person supported can understand.

If the Agency still has concerns about the capacity of a person supported to sign service agreements, consent forms or otherwise to direct their supports, legal advice should be sought by Agency Leadership.

Healthcare Decisions

Whenever there is a health care decision facing a person supported, it is the role of the health professional who is proposing a treatment to evaluate whether their patient is capable of providing Informed Consent to Treatment.

Agency staff will not attempt to obtain Informed Consent to Treatment from the person supported and/or the SDM (including but not limited to the PGT) on behalf of a health professional. The elements of Informed Consent to Treatment cannot and should not be delegated to the Agency.

If the health professional determines that their patient lacks capacity to consent to the proposed treatment, then that professional is to seek Informed Consent to Treatment from the SDM (refer to the Health Care Consent Act and **Appendix C**).

Agency staff may assist a health professional to identify the SDM and provide the health professional with the SDM's contact information, subject to applicable privacy laws.

Agency staff cannot provide Informed Consent to Treatment on behalf of a person supported or otherwise act as an SDM.

Property Decisions and involving the PGT

Whenever possible, the Agency should avoid becoming directly involved in the finances of a person supported.

If concerns about someone's capacity to contract or manage property are raised by a third-party, including a bank or other financial institution, staff will seek guidance from Agency Leadership, up to and including the Executive Director.

Any formal capacity assessment for a person supported or making any referrals to PGT is to include Agency Leadership, as these actions may result in the deprivation of decision-making rights for the person supported.

The Agency Leadership may refer a person supported for legal advice whenever their decision-making rights may be impacted.

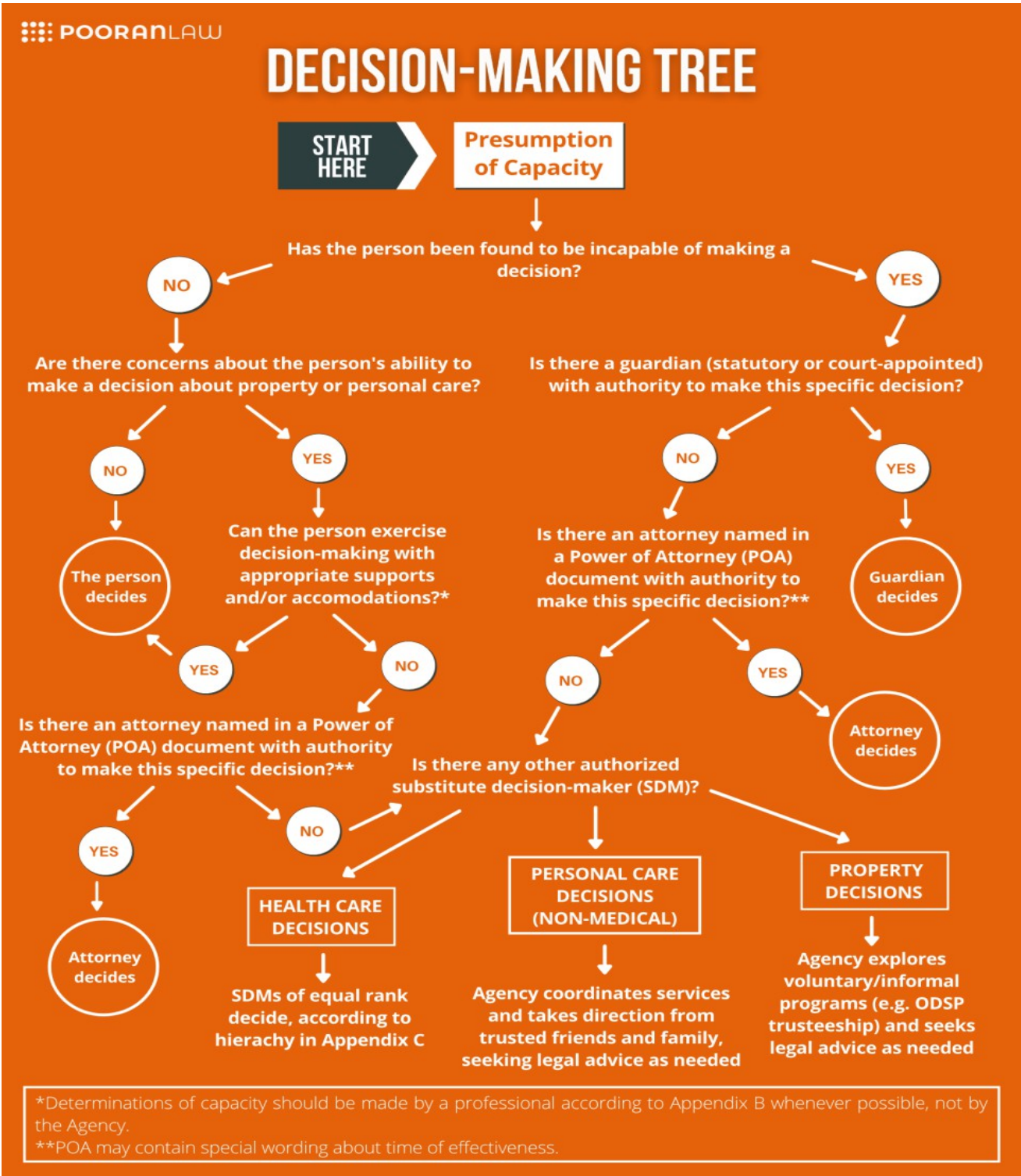
Record Keeping

The Agency will document the name and contact information of any known SDM(s) or Decision-Making Supporters in Sharevision.

Documentation confirming the authority of the SDM will be added to the file of the person supported, as follows:

- **Guardianship:** A copy of the guardianship order or certificate of statutory guardianship should be requested to confirm the authority of the guardian to make the decision, or category of decisions, in question.
- **Powers of Attorney:** A copy of the POA for Personal Care and/or the POA for Property should be requested from the person supported and/or the named attorney to confirm the authority of the attorney to make the decision in question and the date of effectiveness of the document.
- **Representatives:** a copy of the Order from the Consent and Capacity Board should be requested from the Representative.

Appendix A



Appendix B Who Determines Capacity?

	Circumstance	Who Determines Capacity?
Power of Attorney for Personal Care (“POAPC”)	To make a POAPC	Person helping to make the document (usually a lawyer)
	To activate POAPC for the purpose of treatment decisions	Health professional who is proposing treatment
	To activate POAPC for the purpose of admission to LTC	Evaluator ²
	To activate POAPC for the purpose of personal assistance services in LTC	Evaluator
	To activate POAPC for any other personal care decisions (where <i>HCCA</i> does not apply) and where document is silent about capacity assessments	Person(s) named as attorney(s) in the document
	To activate POAPC for any other personal care decisions (where <i>HCCA</i> does not apply) and where document specifies manner of assessment	Person or class of professionals named in the document
	To activate POAPC for any other personal care decisions (where <i>HCCA</i> does not apply) and where document requires assessment but does not specify manner of assessment.	Capacity assessor
Court-appointed Guardianship	To make personal care decisions without the need for a Guardian of the person appointed by the court	Capacity assessor(s), possibly in addition to other health professionals and/or personal references
Health Care Consent	To consent to a specific treatment	Health professional who is proposing treatment
	To consent to admission to LTC	Evaluator
	To consent to personal assistance services in LTC	Evaluator
Day to Day Personal Care	To make personal care decisions that are non- medical in nature	Service provider coordinating services (informal assessment – no statutory mandate)

	Circumstance	Who determines capacity?
Contracts	To enter into a contract or agreement	Parties to the contract or agreement
Continuing Power of Attorney for Property ("CPOAP")	To make a CPOAP	Person helping to make the document (usually alawyer)
	To activate CPOAP	N/A; activated immediately upon signing <i>unless</i> document states otherwise
	To activate CPOAP if there is a clause specifying effective only during periods of incapacity	Person or professional named in the document. If no one or class of professional is specified, designated capacity assessor determines capacity.
Statutory Guardianship (usually PGT)	To manage property, upon admission to a psychiatric facility as an in-patient	Physician
	To manage property, for anyone else other than psychiatric inpatients (e.g. home, LTC, hospital)	Capacity assessor ¹
Court-appointed Guardianship	To make property-related decisions without the need for a Guardian of property appointed by the court	Capacity assessor(s), possibly in addition to other health professionals and/or personal references

Appendix C Hierarchy of Substitute Decision Makers (SDM)

This chart only applies to health care decisions and presumes that the individual has already been found incapable of consenting to their own healthcare decisions.

Court-appointed Guardian of Person	Legally-appointed SDMs
Attorney for Personal Care (named in Power of Attorney document)	
Representative appointed by the Consent & Capacity Board	
Spouse or Partner	Automatic Family Member SDMs
Parents or Children	
Parent with right of access only	
Siblings	
Any other relative	
Ontario Public Guardian & Trustee	SDM of last resort