

Who Assesses Capacity Under What Circumstances?

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PROPERTY	WHO ASSESSES CAPACITY?
1. CONTRACTS	
To make a contract	Parties to the contract (common law)
2. CONTINUING POWER OF ATTORNEY FOR PROPERTY (CPOAP)	
To make a CPOAP	Person assisting person to make the document
To activate a CPOAP	No assessment required - CPOAP is activated on signature unless it states otherwise
To activate the CPOAP if it contains a clause that it is not to come into effect until incapacity	Person/Professional named in the CPOAP to determine incapacity - If nobody or no class of persons is named, capacity is assessed by a capacity assessor as defined by the <i>Substitute Decisions Act</i> (see definition below)
3. STATUTORY GUARDIANSHIP	
NOTE: The <i>Mental Health Act</i> regime is only used if the patient is an inpatient in a psychiatric facility in order to receive “care, observation, or treatment” for a “psychiatric disorder.” This process does NOT apply to elderly patients in hospitals even if the hospital is defined as a psychiatric facility under the <i>Mental Health Act</i> unless he or she is deemed to be a psychiatric patient for the purpose of care, observation or treatment of a psychiatric disorder.	
Psychiatric Inpatient - For property management on admission as an inpatient for “care, observation or treatment” for a mental health issue	Physician (<i>Mental Health Act</i> , s.54 and <i>Substitute Decisions Act</i> , s.15)
Psychiatric Inpatient - For property management on discharge from a psychiatric facility	Physician (<i>Mental Health Act</i> , s.57)
Person who is any place other than a psychiatric facility (e.g., home, hospital, long-term care facility)	Capacity Assessor (<i>Substitute Decisions Act</i> , s.16)

4. COURT ORDERED GUARDIANSHIP OF PROPERTY	
Summary application (application to court that does not require an appearance before a Judge)	Capacity Assessor and a person who knows the alleged incapable person (<i>Substitute Decisions Act</i>)
Full hearing before a Judge	Capacity Assessors, other health professionals, others that know the alleged incapable person (<i>Substitute Decisions Act</i>)

PERSONAL CARE	WHO ASSESSES CAPACITY?
1. POWER OF ATTORNEY FOR PERSONAL CARE (POAPC)	
To make a POAPC	Person assisting person to make the document (common law)
To activate POAPC for substitute decision-maker (SDM) to make treatment decisions	Health professional proposing treatment (<i>Health Care Consent Act</i>)
To activate POAPC for SDM to make decisions for admission to a long-term care home	Evaluator (see definition below)
To activate POAPC for SDM to make decisions for personal assistance services in a long-term care home	Evaluator
To activate POAPC for non-health care personal decisions where POAPC does not require an assessment before activation	Attorney named in the POAPC
To activate POPAC for non-health care personal care decisions where POAPC specifies a method of assessment	Person/class of persons specified in the document to do the assessment
To activate POAPC where POAPC silent as to method preferred but an assessment is required before activation	Capacity Assessor (see definition below)
2. HEALTH CARE CONSENT	
Treatment	Health practitioner offering the treatment
Admission to a long-term care home	Evaluator
Personal assistance services in a long-term care home	Evaluator

Section 2(1) of the *Health Care Consent Act* states that an

"evaluator" means, in the circumstances prescribed by the regulations,

- (a) a member of the College of Audiologists and Speech-Language Pathologists of Ontario,
- (b) a member of the College of Dietitians of Ontario,
- (c) a member of the College of Nurses of Ontario,
- (d) a member of the College of Occupational Therapists of Ontario,
- (e) a member of the College of Physicians and Surgeons of Ontario,
- (f) a member of the College of Physiotherapists of Ontario,
- (g) a member of the College of Psychologists of Ontario, or
- (h) a member of a category of persons prescribed by the regulations as evaluators;

In addition to the various health practitioners listed in this definition, the *Health Care Consent Act*, Regulation 104/96 states that social workers are also considered to be evaluators. The term "social worker" is defined as a member of the Ontario College of Social Workers and Social Service Workers who holds a certificate of registration for social work.

"Capacity assessor" is defined in the *Substitute Decisions Act*, Regulation 460/05. It states:

- 2 (1) A person is qualified to do assessments of capacity if he or she,
 - (a) satisfies one of the conditions set out in subsection (2);
 - (b) has successfully completed the qualifying course for assessors described in section 4;
 - (c) complies with section 5 (continuing education courses);
 - (d) complies with section 6 (minimum annual number of assessments); and
 - (e) is covered by professional liability insurance of not less than \$1,000,000, in respect of assessments of capacity, or belongs to an association that provides protection against professional liability, in respect of assessments of capacity, in an amount not less than \$1,000,000.
- (2) The following are the conditions mentioned in clause (1) (a):
 - 1. Being a member of the College of Physicians and Surgeons of Ontario.
 - 2. Being a member of the College of Psychologists of Ontario.
 - 3. Being a member of the Ontario College of Social Workers and Social Service Workers and holding a certificate of registration for social work.
 - 4. Being a member of the College of Occupational Therapists of Ontario.
 - 5. Being a member of the College of Nurses of Ontario and holding a general certificate of registration as a registered nurse or an extended certificate of registration as a registered nurse.
- (3) The requirement that the person hold a general certificate of registration as a registered nurse or an extended certificate of registration as a registered nurse, as set out in paragraph 5 of subsection (2), does not apply to a member of the College of Nurses of Ontario who, on November 30, 2005, is qualified to do assessments of capacity under Ontario Regulation 293/96 (Capacity Assessment) made under the Act.
- (4) Clause (1) (b) does not apply to a person who, on November 30, 2005, is qualified to do assessments of capacity under Ontario Regulation 293/96 (Capacity Assessment) made under the Act.