

CAPACITY & ASSISTED DECISION-MAKING

Summary

1. Understanding capacity
2. The law as it stands
 - Best interest principle
 - Lunacy/Wardship
 - (Enduring) Power of Attorney
3. The Assisted Decision-Making Act 2015
 - Changes to the law
 - Levels of capacity
 - Changes to Wardships
 - Changes to EPAs

Understanding Capacity

Capacity is...

...the ability to **understand, at the time** the decision is being made, the **nature and consequences** of the decision **in the context** of the available choices.

Capacity is...

- An ability, not a category
- Dynamic not static
- Optimisable
- Decision-specific not general
- Assumed unless proven otherwise

To make an informed decision one must...

- **Have sufficient information** presented
 - Benefits, disadvantages, risks, consequences, alternatives
- **Understand** (and believe) the information presented
- **Retain** the information long enough to make a choice
- **Weigh up** the information
- Be **free of undue influence**
- Be able to **communicate** the decision

We can optimise capacity by...

- Gathering background information
- Correcting deficits
- Creating the right environment
- Good timing & repetition
- Clear & appropriate presentation of information
- Supporting communication

The law as it stands

Based on best interest principle – paternalistic

Principle of beneficence.

*Medical practitioners should **act in the best interests of the patient.***
*...they should **prevent harm, remove harm, and promote good** for the patient.*
*...the relevant harms to be prevented or removed may include **pain and suffering, disease, disability, and death.***
*...the relevant goods to be promoted may include **well-being, health, proper functioning, and life.***

Lunacy Regulations (Ireland) act 1871

- All or nothing - **Ward of Court**
- High Court decides if someone is mentally incapable
- No particular standard of proof
- “...*any person of unsound mind and incapable of managing himself or his affairs*”
Section 2 Lunacy Regulation 1871
- Burden of proof is on the person asserting lack of capacity

Wards of Court

- The person making the application, usually a family member, must swear an affidavit
- Notice of application must be served to the proposed ward
- Can object in writing to the Registrar of Wards
- Opinion of two doctors +/- court appointed doctor
- Once the case is proven, incapacity is assumed and the President of the High Court makes an order taking the person into wardship
- All assets brought under control of the High Court
- **All decisions, including medical treatment,** are made by a Ward of Court Committee/High Court

Marriage of lunatics act 1811

*...if any person who has been or at any time hereafter shall be found a lunatic... **whose person and estate** by virtue of any Act of Parliament now or hereafter shall be **committed to the care and custody of particular trustees,** shall marry before he or she shall be declared of sane mind... **every such marriage** shall be and is hereby declared to be **null and void***

Powers of attorney act 1996

- Allows another specially appointed person (the attorney) to take actions on the donor's behalf
- Specific - limited to a particular purpose, for example, sale of one's house
- General - entitling the attorney to do almost everything that the donor could legally do
- Ceases upon the donor's death or after the specified task is completed
- Invalidated if the donor loses capacity

Enduring powers of attorney regulations 1996

- Allows the attorney to make **financial and personal care decisions** on the donor's behalf once he/she is no longer fully mentally capable of taking decisions
- Donor can specifically exclude any of these powers
- **Doesn't include medical decisions**

Requires:

- **Doctor's statement** verifying donor's capacity at the time that the document was executed
- **Solicitor's statement** that he/she is satisfied donor understood the effect of creating the power of attorney and that donor was not acting under undue influence

Donors cannot nominate:

- People under the age of 18
- Bankrupts
- People convicted of offences involving fraud or dishonesty
- People disqualified under the Companies Acts
- An individual or trust corporation who owns a nursing home in which you live or an employee or agent of the owner, unless that person is also your spouse, civil partner, child or sibling

Once there is reason to believe that donor is or is becoming mentally incapable...

- The future attorney makes an application for registration to the **Registrar of Wards of Court**
- Attorney must have a medical certificate
- Attorney must notify donor and the notice parties
- Within the 5 weeks, the donor or a notice party can object to the Registrar of Wards of Court.

The High Court has a supervisory role

The court can order cancellation of the power where it is satisfied that:

- Donor is mentally capable and likely to remain so
- The attorney is unsuitable
- Fraud or undue pressure was used to induce donor to create the power

Otherwise attorney can basically do what they like without any real oversight

Assisted decision-making (capacity) act 2015

Gives effect to:

- The UN Convention on the Rights of Persons with Disabilities
- The Hague Convention on the International Protection of Adults
- Moves away from:
 - ‘best interest’ principle to principle of ‘expressed wishes and desires’
 - legal idea of a ‘state’ of capacity (all or nothing) to ‘functional’ capacity (specific to time and decision)

Repeals/replaces...

- Lunacy regulations (Ireland) Act 1871
- Marriage of Lunatics Act 1811
- Enduring Powers of Attorney Regulations 1996

Amends...

- Civil Legal Aid Act 1995

Changes jurisdiction from the High Court to the local Circuit Court EXCEPT in cases relating to:

- Organ donation
- End of life
- Sterilisation
- The unborn child

Creates the Decision-making support service, with oversight by a Director

Levels of support with decision-making

1. Assisted-decision making
2. Co-decision making
3. Decision-making representative

1. Assistant decision-maker (ADM)

- Nominated to DSS by relevant person (appointer)
- Assists appointer to obtain relevant information
- Explains the relevant information and the considerations relating to relevant decision
- Ascertains appointer’s will and preference and assist the appointer to communicate them
- Assists to **make** and **express** decision
- Ensure decision implemented
- No reporting requirements but supervised by Director DSS

2. Co-decision maker (CDM)

When?

- When a person's (>18) capacity is in question or will shortly come into question

How?

- Personal appointment (in writing) or court-appointed

For what?

- Personal welfare and/or property and affairs. General or specific authority.

Who?

- A "suitable" person. Can be more than one person but NOT in the same agreement. Same exclusions as assistant.

- Makes decision **jointly** with the person
- Performs all the duties of an ADM
- AND...**
- Discusses known alternatives and likely outcome with the person
- Entitled to reasonable costs and expenses but not remuneration
- Must notify Director of change in capacity of the person
- Submits report (approved by appointer) yearly to Director

3. Decision-making representative (DMR)

When?

- When a person (>18) does not have capacity to decide

How?

- Court-appointed

Who?

- Any person with bona fide interest in welfare of person can apply to court, giving notice

For what?

- Personal welfare and/or property and affairs. (General or specific authority)

Oversight:

- Court shall have regard to: person's preference, relationship, preserving existing family relationships, compatibility, ability to perform functions
- Where no person willing to act – court asks Director to nominate 2+ persons from panel
- Court can appoint more than one Rep
- Remuneration and expenses – reimbursed out of person's assets
- Duties imposed and conditions attached by court
- Power conferred by court – "as limited in scope and duration as is necessary"
- Reports to Director of Decision Support Service

*'In exercising his or her functions as specified in the decision-making representation order, a decision-making representative shall, **insofar as this is possible, ascertain the will and preferences** of the relevant person on a matter the subject of, or to be the subject of, a relevant decision and assist the relevant person with communicating such will and preferences.'*

- A DMR **cannot** be given power to **prohibit a particular person** from having contact with relevant person
- **Shall not refuse consent** to the carrying out or continuation of **life-sustaining treatment** or consent to the withdrawal of life-sustaining treatment for the relevant person
- **Shall not** do an act that is intended to **restrain** the relevant person unless exceptional emergency circumstances
- Is subject to complaints to Director

Changes to existing wardships

All 1871 wardships will be reviewed within 3 years

1. If they have capacity - released from wardship and property returned
2. If limited capacity - CDM appointed and their property released from the courts
3. If no capacity - DMR appointed and their property released

Changes to existing Enduring Powers of Attorney

- Attorney must submit to DSS Director:
- **Schedule of donor's assets, liabilities** + projected statement of income and expenditure
- **Proper accounts and financial records** of property + affairs
- **Annual report** of performance of functions as attorney, including details of **costs, expenses and remuneration** paid to and claimed by the attorney
- If donor was restrained, **details of each restraint** with date and place
- If attorney fails to submit a report, Director can apply to court

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