



<b>POLICY</b>	<b>CLIENT CONSENT AND CAPACITY</b>
<b>SECTION</b>	<b>ORGANIZATIONAL STANDARDS</b>
<b>ESTABLISHED LAST REVISED</b>	<b>April 2008 April 2011</b>

## **POLICY**

Brain Injury Services respects the right of each individual to make decisions about his or her property (finances) and personal care. Brain Injury Services presumes that each individual client has the capacity to make these choices unless he or she is unable to understand the information that is relevant to making a decision and is unable to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

Capacity is task and time specific, meaning that a client may be incapable at one time and capable at another.

Consent must be informed, voluntary and without misrepresentation or fraud.

A review of capacity may be requested by staff if the client exhibits any of the following:

- confused or delusional thinking
- inability to make a settled choice about treatment
- severe pain or acute fear or anxiety
- cognitive impairment resulting from drug or alcohol use
- severe depression
- concerning behaviour or communication

## **PROCEDURE**

1. On admission to Brain Injury Services the individual and/or family will provide original documentation that confirms evidence of any decision making authority assigned or ordered by the individual or the court. A copy of the document will be placed on the client's file.

2. In situations in which staff question the individual's capacity to make an informed decision related to property and/or personal care and no Continuing Power of Attorney has been assigned and no next of kin is on record, staff must bring their concerns to the attention of the case facilitator and program manager. This will be documented on the clients file.
3. If the capacity of the individual continues to be questioned, following discussion with the case facilitator and program manager, a regulated health care professional e.g. family physician, psychiatrist, social worker, occupational therapist, physiotherapist or psychologist would be consulted regarding the individual's capacity to make an informed choice. All results of the consultation will be documented on the clients file.

### **Incapacity to Manage Property or Finances**

Incapacity to manage property is defined by the inability to understand information relevant to making a decision in the management of property (finances), or the inability to appreciate the reasonably foreseeable consequences of a decision or the lack of decision.

When a decision about property or finances is required:

- If a Continuing Power of Attorney for Property (CPOAP) is identified, decisions are *always* directed to the CPOAP regardless of whether or not staff feels the client is able to understand the decision at hand.
- If a statutory guardian has been appointed through the Office of the Public Guardian and Trustee (PGT), that guardian must be consulted for any financial decisions.
- If there is no CPOAP or guardian and a decision regarding finances must be made, staff will contact the client's next of kin to obtain their consent, and will document this on file.
- Staff may request in writing, to the client's family, a capacity assessment to determine the client's competence to make decisions regarding property. All costs for a capacity assessment are the responsibility of the individual being assessed and the family.
- If there is no next of kin and the client is identified as being incapable of providing consent by a regulated health care professional, the agency may request a capacity assessment and be responsible for the costs.
- If the person is found to be incapable of handling finances the PGT will automatically become the client's guardian until a family member applies to the PGT to take over this responsibility.

- The family is required to inform the agency of the outcome of the capacity assessment and provide the opportunity to view original documentation of the capacity assessment and place a copy on the clients file.

## **Personal Care Decisions**

Incapacity to make personal care decisions is defined as the inability to understand information that is relevant to making a decision concerning health care, nutrition, shelter, clothing, hygiene, or safety, or the inability to appreciate the reasonably foreseeable consequences of a decision or lack of decision in these matters.

When a decision about personal care is required:

- If there is a power of attorney for personal care identified staff *are not necessarily obligated to obtain consent from this person*. If staff believes that the client is able to understand the decision that needs to be made and the potential consequences of that decision, the client is able to consent to that particular personal care decision. Staff must document the discussion with client about the details of the decision, the risks and benefits involved, and the consequences.
- If staff believes that the client is not able to comprehend the decision and or the implications of that decision, then consent would be obtained from the identified power of attorney for personal care.
- If the client has a court-appointed guardian for personal care, staff must be aware of what the guardianship covers. Not all guardianships are exhaustive meaning that they cover any and all decisions regarding that client's personal care.
- If there is no power of attorney or guardian identified, and staff believes the client incapable of making the personal care decision, the client's next of kin must be contacted to provide consent.
- Staff may request in writing, to the client's family, a capacity assessment to determine the client's competence to make decisions regarding personal care. All costs for a capacity assessment are the responsibility of the individual being assessed and the family.
- If there is no next of kin and the client is identified as being incapable of providing consent by a regulated health care professional, the agency may request a capacity assessment and be responsible for the costs.
- If a person is deemed incompetent or incapable of making personal care decisions the court may appoint a guardian of the person until a suitable substitute (family member or loved one) can be found. A copy of this document would be placed on the client's file.

## **Definitions pertaining to this policy:**

**The Health Care Consent Act, 1996 (HCCA)** – Applies to treatment provided in all health care settings by health care professionals.

This act includes provisions regarding the capacity to make decisions with respect to long term care admission and related provisions for obtaining consent for personal assistance services defined as ambulation, nutrition, grooming and hygiene decisions about medical treatment, admission to care facilities, and services provided in those facilities among others.

It contains a complete description of the common law requirements for obtaining informed consent. It also includes principles of assessing capacity which have been developed in Ontario. In addition it establishes a statutory regime for substitute decision making on behalf of incapable individuals. This Act also establishes a hierarchy of substitute decision makers (SDM) and provides rules for SDM's consenting to or refusing treatment on behalf of incapable individuals.

**Substitute Decisions Act, 1992 (SDA)** – proclaimed in force on April 3, 1995, significantly affected the law of capacity in a number of areas by creating:

- A definition for capacity to manage property;
- A definition for capacity to make personal care decisions;
- Powers of attorney for personal care;
- Definitions for capacity to make powers of attorney for personal care and property;
- Statutory guardians of property;
- Court appointed guardians of property;
- Court appointed guardians of the person;
- Duties of the Public Guardian and Trustee to investigate and act when incapacity may result in serious adverse effects for an incapable person or his or her property.

The substitute decision act contains three significant presumptions of capacity:

- A person eighteen years of age or more is capable of entering into a contract.
- A person sixteen years of age or more is capable of giving or refusing consent in connection to his or her own personal care.
- A person is deemed capable to retain and instruct counsel in circumstances where their capacity is in issue in a proceeding under the Act and the Public Guardian and Trustee is ordered by the court to arrange legal representation for the individual.

The Act is divided into four sections :

- Property (includes finances)

- The Person
- Procedure in Guardianship Applications
- Miscellaneous

This Act governs what may happen when an individual lacks the capacity to make informed decisions in the four areas listed above. A key feature of the Act is that an individual can legally designate someone they trust to make decisions for them prior to being deemed incapable.

**Office of the Public Guardian and Trustee (PGT)** - This office has a number of functions including: appointing private individuals as statutory guardians of property; Investigating reports of serious abuse or neglect of incapable persons; acting as a last resort decision-maker for medical treatment and related decisions for incapable people under the *Health Care Consent Act*, (1996) keeping a register of who in Ontario has a guardian of property or for personal care. The Public Guardian and Trustee may also be appointed by the court as the guardian of an incapable person. The court can only do this, however, if there is no one else willing, suitable, and available to take on the responsibility.

**Continuing Power of Attorney for Property** - This is a written legal authorization in which a person specifies the decision-maker of his or her choice for matters relating to property or finances. The power of attorney must be made before the person becomes incapable. No additional procedures are necessary to activate the power of attorney unless the individual making the document states them in the power of attorney.

**Power of Attorney for Personal Care** - Like the continuing power of attorney for property, this written legal document must be made before the person becomes incapable. The power of attorney designates a personal care decision-maker called an "attorney." The document may also give specific instructions to the decision-maker. A power of attorney for personal care authorizes the attorney to make decisions about treatment; admission to a long-term care facility; or personal assistance services provided within such a facility if the *Health Care Consent Act*, 1996 allows the attorney to make the decision; or about other personal care if the attorney has reasonable grounds to believe that the grantor is incapable of making the decision. The attorney may also make decisions if the power of attorney document does not state any additional procedures that must be followed to confirm incapacity before the attorney may act.

**Statutory Guardianship** - Statutory guardianship means that a guardian is appointed to manage property without going to court. This often occurs when a person is deemed incompetent and has not identified a power of attorney prior to becoming so. When this occurs the PGT becomes the statutory guardian for the individual.

**Court-Ordered Guardianship** - Sometimes, the court will play a role in deciding guardianship. For example, an application to the court for the appointment of a

guardian might be sought in situations in which neither a power of attorney or a statutory guardianship is available or appropriate. These situations could include the following: a person believed to be incapable and in need of guardianship refuses to be assessed; an applicant who wishes to take over after the Public Guardian and Trustee has become statutory guardian is not the person's attorney and is also not their spouse, partner, relative or a trust corporation; and there are grounds to believe there has been mismanagement by the attorney or by the statutory guardian.