



**Managing Consent & Capacity Issues in
Wills & Estates Practice**

March 27, 2018

**Understanding the Health Care Consent
Act: Informed Consent and advance
care planning**

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INFORMED CONSENT, CAPACITY, SUBSTITUTE CONSENT under the HCCA

- What is “Informed Consent?”
- Define “Capacity?”
- Determining patient capacity
- What is an “SDM?”
- Who is/are the SDM(s)?
- Difficult Decisions....

INFORMED CONSENT

- Required for all treatments, except in emergency situations where it cannot be obtained in time.
- Comes from the capable patient or correct SDM for an incapable patient.

- HCCA s. 11: Consent must:
 - Relate to the treatment
 - Be informed
 - Given voluntarily
 - Without misrepresentation or fraud

INFORMED CONSENT

- HCCA S. 11(2)
- Consent is “informed” if:
 - The person received the information a reasonable person in the same circumstances requires to make a decision;
 - Information covers:
 - The nature of the treatment;
 - The expected benefits of the treatment;
 - The material risks of the treatment;
 - The material side effects of the treatment;
 - Alternate treatments or courses of action
 - Likely consequences of not having the treatment

Capable Persons Make Their Own Decisions So, Define “Capacity?”

- HCCA s. 4
- Capacity is always presumed
- Capacity is issue specific
- Capacity is time specific
- Capacity requires both:
 - The ability to understand relevant information
 - The ability to appreciate the reasonably foreseeable consequences of giving or refusing consent to treatment
- See *Starson v. Swayze*, [2003] 1 S.C.R. 722

Who Assesses Capacity to Make a Treatment Decision?

- HCCA s. 10(1):
- “A health practitioner who proposes a treatment... shall not administer the treatment... unless
 - He or she is of the opinion that the person is capable with respect to the treatment ... or ...
 - He or she is of the opinion that the person is incapable....

Who Assesses Capacity to Make a Treatment Decision?

- THE HEALTH PRACTITIONER PROPOSING THE TREATMENT IS RESPONSIBLE FOR OBTAINING INFORMED CONSENT
- FROM THE RIGHT PERSON [capable patient or correct SDM]
- *You want a psychiatrist explaining the risks and benefits of brain surgery to you?*

Who Assesses Capacity to Make an Admission Decision?

- HCCA also governs admission to “Care Facilities”
- Care Facilities – not retirement homes....
- Capacity to consent to admission to a care facility may be assessed by almost any health practitioner....
- [presuming the Health Practitioner knows how to lawfully assess capacity!]

WHO IS THE CORRECT SDM? [HCCA S. 20]

- Guardian of the person;
- Attorney for Personal Care;
- Representative appointed by the Consent and Capacity Board;
- Spouse or partner;
- Child or parent;
- Parent with only a right of access;
- Person's sibling;
- "any other relative"

WHO IS THE CORRECT SDM? [HCCA S. 20]

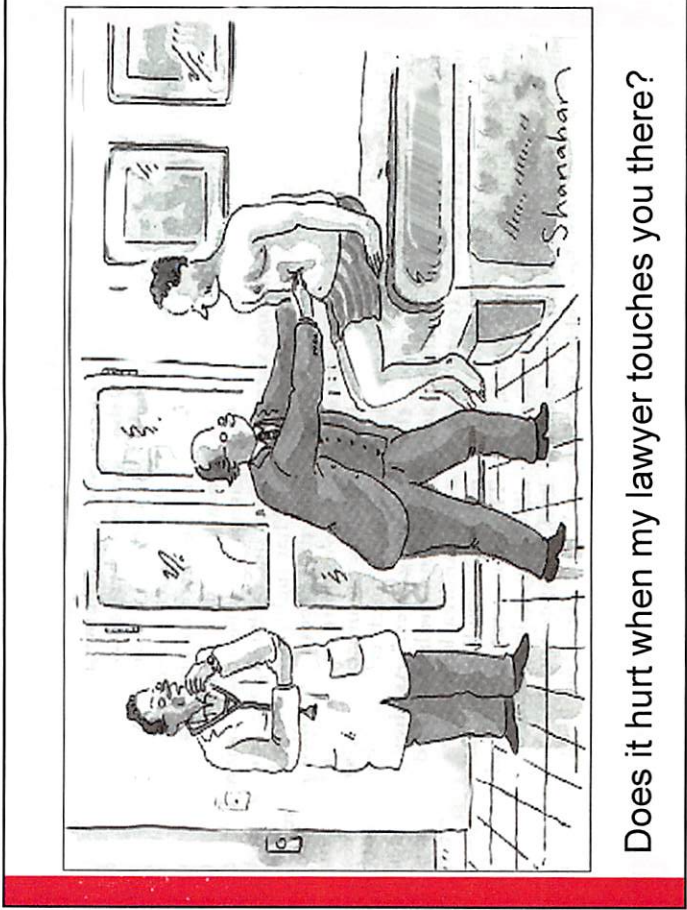
- SDM must be willing, available, capable
- Note definitions of "spouse," "partner," "relative," "available."
- And over the age of 16, unless the parent of the incapable person
- AND, IN THE EVENT OF CONFLICT between the highest ranking SDMS, decision goes to Public Guardian and Trustee [HCCA s. 20(6)]
 - Which sometimes results in either guardianship or CCB applications.

DIFFICULT SDMs: WHEN ALL ELSE FAILS

- What is “All Else?”
- HCCA s. 37, “Application to determine compliance with s. 21”
 - A Consent and Capacity Board Hearing
 - S. 21 sets out the principles for substitute consent

OTHER CCB APPLICATIONS:

- To review a finding of incapacity to make treatment decisions [under HCCA]
- To Review of finding of incapacity to manage property [under MHA, SDA]
- For “Directions” if a wish is unclear
- To depart from wishes
- To appoint a “Representative”



Does it hurt when my lawyer touches you there?