

Quick Facts About Legal Capacity, Decision-making and Guardianship

Legal Capacity and Decision-making Law in Ontario

Legal capacity, decision-making and guardianship law addresses situations where a decision must be made, but the individual is not able, because of illness or disability, to make that decision independently.

A substitute decision-maker may be appointed where a person does not understand the information relevant to a necessary decision, or is not able to appreciate the consequences of a decision. The role of the substitute decision-maker is to make decisions on behalf of the individual, in accordance with legislated principles and obligations.

Substitute decision-makers can be appointed to make decisions about:

- diet, safety, living arrangements, clothing, hygiene and similar personal matters;
- property and financial decisions, such as banking, investments, buying or selling a house, and similar matters; and
- health, dental and other kinds of treatment decisions.

Substitute decision-makers can be appointed in different ways.

- A person can make a “power of attorney” appointing someone else to make decisions for them.
- The courts or government can appoint a “guardian” to make decisions.
- If a decision about treatment is necessary and there is no power of attorney or guardian to make it, a family member will be automatically appointed to do so.

In Ontario, the central legislation on these issues is found in:

- the *Substitute Decisions Act* which addresses the creation of powers of attorney and the appointment of guardians for decisions related to property and personal care, and
- the *Health Care Consent Act*, which addresses legal capacity and consent related to treatment, admission to long-term care and personal assistance services.

Persons Affected by This Area of the Law

The legislation does not specifically refer to any particular class of persons, but some persons are more likely than others to be found “legally incapable”. This includes, among others:

- persons with dementia or other cognitive disabilities;
- individuals with some mental health disabilities;
- persons with intellectual or developmental disabilities;
- persons with an acquired brain injury; and

- individuals who have significant temporary illnesses or medical conditions.

Older persons and persons with some types of disabilities are often assumed to lack legal capacity, even when they are fully able to make decisions independently.

This legislation affects a wide segment of Ontario's population, and as demographics continue to shift, the proportion of the population affected will likely continue to grow.

Those acting as substitute decision-makers are, in the vast majority of cases, family members or close friends of the person needing assistance with decision-making. In many cases, the person acting as a substitute decision-maker will also be acting as a caregiver.

History of Ontario's Legal Capacity and Decision-making Laws

Ontario's current statutory regime for legal capacity, decision-making and guardianship took shape as a result of a monumental reform effort spanning the late 1980s and early 1990s. Three separate law reform initiatives were undertaken during this time.

1. The Advisory Committee on Substitute Decision Making for Mentally Incapable Persons: In 1984, the Attorney General appointed a committee to "review all aspects of the law governing, and related to, substitute decision making for mentally incapacitated persons and to recommend revision of this law where appropriate".
2. Committee on the Enquiry on Mental Competency: In 1988, the Ministry of Health created an Enquiry on Mental Competency, which was given responsibility for developing a set of recommended standards for determining the mental competence of individuals to make decisions with respect to health care, management of financial affairs and appointment of a substitute decision-maker.
3. Review of Advocacy for Vulnerable Adults: In late 1986, the Attorney General of Ontario announced a Review of Advocacy for Vulnerable Adults, to respond to concerns regarding "an unmet need for non-legal advocacy for vulnerable adults living in institutional care settings and in the community".

In 1991, three new statutes governing legal capacity, decision-making and guardianship were introduced by the Ontario government: the *Consent to Treatment Act*, the *Substitute Decisions Act*, and the *Advocacy Act*. In 1995, the *Advocacy Act* was repealed and the *Consent to Treatment Act* replaced by the current *Health Care Consent Act*.