

**Practice Guidelines**  
**for**  
**Determining**  
**Incapability to Consent to**  
**Live in a Care Facility**  
**and**  
**Personal Assistance Services**  
  
**Under the**  
***Care Consent Act***

**Yukon Health and Social Services**  
**May, 2005**

# Practice Guidelines for Determining

- Incapability to Consent to Admission to a Care Facility;  
and
- Incapability to Consent to Personal Assistance Services

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# Practice Guidelines for Determining Incapacity to Consent to Care Facility Admission and Personal Assistance Services

## 1. Purpose of the Practice Guidelines

In the past, if a person was not mentally capable of consenting to live in a care facility, the family was forced to go to the Supreme Court for a guardianship order granting them the authority to make the decision for the adult. Now, under the *Care Consent Act*, a substitute decision-maker can be appointed without going to court. Care providers are responsible for determining whether an adult is able to consent. Care providers are also responsible for choosing a substitute decision-maker if the adult is not capable of consenting. This same process is in place for health care decisions.

Prior to consent being obtained for any social or health service, it is assumed that the care provider has considered the **least intrusive, most effective** type of care. Once the care provider (or team) has assessed the individual to determine the most appropriate type(s) of care that can be offered, the care provider must obtain a valid consent before providing the care. A critical part of obtaining a valid consent is determining whether a person is **mentally capable to consent**.

These guidelines describe the process of determining whether:

1. An adult (19 years of age and older) is incapable of consenting to live in a care facility; and/or
2. An adult is incapable of consenting to a personal assistance service.

The guidelines elaborate on the basic framework for determining incapacity found in the *Care Consent Act* (Yukon). They reflect best practices for obtaining a valid consent and assessing incapacity.

Care providers are not “required” to follow these guidelines, but they may wish to do so to reduce potential liability. In addition, the decision of a care provider that a person is not capable of making their own care decision can be challenged. Anyone can apply to the **Capability and Consent Board** to have the decision reviewed. If a matter is referred to the Board, care providers will be called upon to explain their determination of incapability.

**Adults (19 years and older) are presumed capable until the contrary is demonstrated.** Therefore, it is not necessary to do an assessment of a adult’s capability to consent to care in every situation. However, where

there is a known risk factor for impaired decision-making (see page 10-11), a more careful assessment should be undertaken. For assessment to consent to reside in a care facility, the number of people with known risk factors for impaired decision-making may be quite high. For consent to Home Care, a lower percentage of clients may require a more careful assessment. In cases where there is a known risk factor for impaired decision-making, these guidelines and the worksheets may be useful to care providers.

### **When is guardianship appropriate?**

Assessing an adult's incapability to consent to a care decision is a far less intrusive assessment than an incapability assessment for guardianship. It is a decision-specific assessment. The Yukon legislation has been set up so that individuals can obtain necessary health and personal care services without long delays while the courts deal with the question of whether a person is incapable.

A person who is incapable of making a decision regarding their personal care or health care may not need a court-ordered guardian. Incapability assessments for consent to care are done for **each** care decision, so the amount of autonomy the adult loses if they are found to be incapable of making their own decision is very restricted. In addition, decisions of the care provider can be reviewed by the Capability and Consent Board, providing an additional protection for the adult.

For guardianship applications, the court provides oversight to ensure that an adult's rights to make their own decisions are not taken away without sufficient cause. In some cases where there is an ongoing need to have a decision-maker make decisions for the adult in a number of domains (e.g. financial, health, personal care) it may be more appropriate to have the courts appoint a guardian.

The decision of whether guardianship is more appropriate than appointing a substitute decision-maker for a care decision will have to be made on a case-by-case basis. Here are some general guidelines to consider:

- The care provider should proceed with an assessment of the adult's incapability to consent to the care decision if:
  - the adult requires timely admission to a care facility or home care services and appears to be incapable of giving or refusing consent;
  - or
  - the adult does not appear to need a guardian for financial decisions (e.g. the adult has an Enduring Power of Attorney or the finances are being handled informally by a spouse or another relative)

- If the results of the incapability assessment for consent to care are inconclusive, the care provider should seek assistance from another care provider. If there are still doubts about the adult's incapability:
  - presume capability and respect the decision of the adult; or
  - consider recommending that the person's family obtain guardianship (or if no family, the Public Guardian and Trustee) – as part of this application process, an in-depth assessment will be done by a private professional
- If the adult will likely need a court-appointed guardian to look after their finances, and there is a family member or friend willing to act as the legal guardian, the care provider should encourage the potential guardian to make an application for guardianship. The prospective guardian may want to apply to become the adult's guardian for financial and personal decisions if it appears that the adult will need a longer-term consistent decision-maker in all areas of their life.
- If the adult will likely need someone to manage their finances and there are no family members or friends willing or able to act as guardian, the care provider should refer the matter to the Public Guardian and Trustee (Yukon Justice).
- If the adult only needs someone to make personal and health care decisions and there is a family member or close friend willing to act as the substitute decision-maker (but they are not willing to become a legally-appointed guardian), the matter should not be referred to the Public Guardian and Trustee. It is better to have family or friends making decisions for the adult than a public official who does not know the adult.
- If the adult only requires someone to manage their finances on a short-term basis (60 days) and informal methods will not suffice, consider asking the adult's health care provider to assess whether the adult should have a temporary Certificate of Need for Financial Protection. (See *Practice Guidelines for Determining Incapability to Consent to Health Care and Need for Financial Protection.*)

### **Worksheets**

The practice guidelines in this paper deal with assessing incapability to consent to a care decision. In addition to the guidelines, worksheets have been developed to assist care providers in carrying out the assessments. These can be found as **Attachment A**. The worksheets include a quick checklist and sample questions.

Additional information has also been provided at the end of these guidelines. **Attachment B** outlines factors that affect decision-making and

ways to enhance communication with people who may have difficulty communicating.

**Attachment C** is a sheet that can be given to individuals and/or family members or friends as appropriate to inform them of their right to have a decision regarding incapability to consent to care reviewed by the Capability and Consent Board.

**These Guidelines and forms are also available on the Health and Social Services website, [www.hss.gov.yk.ca](http://www.hss.gov.yk.ca). Information and forms for the Capability and Consent Board can be found at [www.yukoncapabilityandconsentboard.ca](http://www.yukoncapabilityandconsentboard.ca).**

## 2. Who Will Use the Guidelines

These guidelines are intended to be used by **care providers** in two instances:

1. In obtaining a valid consent to admission to a care facility; and/or
2. In obtaining a valid consent to personal assistance services.

Under the *Care Consent Act* a **care provider** includes:

- Health care providers providing health care;
- The persons given responsibility by Health and Social Services for arranging for the admission of people to live in the care facility; and
- The persons given responsibility by Health and Social Services for arranging for the provision of the personal assistance service.

These guidelines apply to the last two categories of care providers listed above. Separate guidelines have been developed for assessing incapability to consent to health care.

The following are designated as **care facilities** under the *Care Consent Act*:

- (a) all continuing care facilities operated by Health and Social Services (including Copper Ridge Place, Macaulay Lodge and McDonald Home for Seniors);
- (b) all residential facilities for adults with disabilities contracted by Health and Social Services, including approved homes and group homes; and
- (c) all residential facilities for adults with disabilities whose placement is approved by Health and Social Services (e.g. those placements paid by Indian and Northern Affairs Canada)

Under the *Care Consent Act* a **personal assistance service** means:

Assistance with or supervision of hygiene, washing, dressing, grooming, eating, drinking, elimination, ambulation, positioning or any other routine activity of daily living, and includes a group of personal assistance services or a plan setting out personal assistance services to be provided to an adult:

- (a) in a care facility designated by the *Care Consent Act*; and
- (b) by the Home Care program delivered by Health and Social Services.

The Act defines **care** as:

- (a) health care,
- (b) admission to live in a care facility, and
- (c) personal assistance services.

Admission to live in a care facility is interpreted to include short-term admissions (e.g. “respite”) and longer-term admissions.

The Act defines **health care** as:

Anything done for a therapeutic, preventive, palliative, diagnostic, cosmetic, or other health-related purpose, and includes a course of health care (e.g. a series of dialysis treatments).

Under the *Care Consent Act*, one care provider can obtain consent to a **care plan** on behalf of all the care providers involved in the plan. A care plan deals with one or more health problems that a person has and provides for the provision of various care. A care facility or the Home Care Program may develop a care plan for an individual that includes consent to health care and personal care services. One care provider can obtain consent for the entire plan on behalf of the team.

### 3. Application of Guidelines

These guidelines fall out of the *Care Consent Act*, which deals with consent for health care and other care decisions. Separate guidelines have been developed by the Department of Justice to guide the assessment of incapability for the purposes of a guardianship application under the *Adult Protection and Decision-Making Act*.

The *Care Consent Act*, and therefore these guidelines, **DO NOT** apply to:

- the admission of a person under 19 years to live in a care facility
- the provision of personal assistance services to a person under the age of 19 years

- the psychiatric assessment, care and treatment of an individual permitted under the *Mental Health Act*, sections 5-18 18 (i.e. involuntary assessment, examination and admission to a hospital but not ongoing treatment)
- the provision of treatment under the *Public Health and Safety Act* (e.g. for control of communicable diseases).
- treatment and transportation being provided by emergency medical services (i.e. ambulance attendants).
- organ tissues and transplants – these are governed by the *Human Tissue Gift Act*.

An **assessment of incapability to consent to care is NOT required** when a legal guardian has been appointed by the Yukon Supreme Court to make all personal care decisions for the adult.

#### 4. Guiding Principles

The following principles guide the process of determining incapability:

- All adults (19 years and older) are presumed capable of making their own health care decisions until the contrary is demonstrated. The assessment focuses on whether a person is incapable of making a particular decision, not whether a person is capable.
- A capable person has the right to give, refuse or revoke consent to health care on any grounds, including moral or religious grounds.
- A person's way of communicating with others is not grounds for deciding that they are incapable of making a decision.
- Care providers have a duty to communicate with the person in a manner appropriate to the person's skills and abilities.
- The process is concerned solely with determining whether a person is incapable of making a specific care decision – it is not a global assessment.
- Incapability is dependent on the complexity of the decision to be made and the person's decision-making abilities. A person can be capable of making some decisions (e.g. consent to personal care) and not capable of making other decisions (e.g. consent to live in a care facility).

- The process should recognize and employ ways to enhance decisional capacity (e.g. for people who have fluctuating lucidity or for people who require support to understand information). Factors that can diminish decisional capacity include environmental factors, medication effects, psychological disorders, sensory deficits and physiological dysfunction. (**See Attachment B for more detail.**)
- The process must consider and respect the values, beliefs, wishes and cultural norms and traditions of the person.
- Assessing incapability requires a judgement. Care providers need to be sensitive to the influence their own values and beliefs can have on their judgement.

## 5. Elements of Consent

The care providers given responsibility by Health and Social Services for arranging for the admission of people to live in the care facility; and for arranging for the provision of the personal assistance service are responsible for obtaining a valid consent to the specific care before it is provided.

A **valid consent** must meet the following test:

- i) The consent must relate to the proposed care.
- ii) The consent must be given voluntarily.
- iii) The consent must not be obtained by fraud or misrepresentation.
- iv) The person must be capable of making a decision about whether to give or refuse consent to the proposed care.
- v) The person must be given the information a reasonable person would require to understand the proposed care and to make a decision, including information about:
  - The reasons why the care is proposed;
  - The nature of the proposed care;
  - The risks and benefits of receiving and not receiving the proposed care that a reasonable person would expect to be told about, and
  - Alternative courses of care.
- vi) The person must have an opportunity to ask questions and receive answers about the proposed care and the alternatives.

## 6. The Legal Test of Incapability

The *Care Consent Act* sets out the test for incapability. The care provider proposing the care is responsible for assessing whether a person is incapable to give, refuse or revoke consent to the care.

The determination of whether a person is incapable to consent to care is a **legal** assessment (i.e. whether the person has the legal right to make their own decision). This is different than a **clinical** assessment where the care provider is assessing the personal care needs and options. However, care providers use their **clinical skills** (e.g. interviewing techniques) in the legal assessment of whether a person is incapable to consent.

The Act requires that the care provider base the **determination of incapability** on **whether or not the person demonstrates that he or she understands:**

- the information given by the care provider about the proposed care (see section 5. (v) above); and
- that the information given applies to the person's situation.

In other words, does the adult **understand and appreciate** the consequences of their decision?

## 7. Assessing Incapability to Consent to Care

Care providers assume that an adult is capable of giving, refusing or revoking consent to health care unless they see evidence to the contrary. Care providers should be aware of factors that can affect a person's decision-making ability and take steps to enhance decisional capacity. A listing of some of these factors and ways to enhance communication is included as **Attachment B** to these guidelines.

### Before Assessing Incapability

- Consider and clarify as necessary the motives of the person requesting the evaluation. (Motives can sometimes be inappropriate, improper or questionable.)
- Seek out information about the client's problems, issues and condition from all relevant sources so that you are aware of factors that may be affecting their decision-making ability. (See **Attachment B** for more information.)
- Identify and address any barriers to communication (e.g. hearing or visual impairment, language barrier, environment, etc.).

- Be aware that the backgrounds of both the person and the care provider (e.g. language, culture, familiarity) will affect how information is given and understood.
- Be aware of **scenarios which should trigger a more careful assessment** of incapability to consent. These threats to decision-making include:
  - An abrupt change in mental status that could be caused by hypoxia, infection, medication, metabolic disturbances, an acute neurologic or psychiatric process, or other medical problem. If there appears to be a medical problem causing confusion, etc., help the person obtain medical help before assessing whether the person is capable of providing consent to care.
  - Refusal of care and not willing to discuss the reasons or when the reasons for the refusal are not clear or when the refusal is based on misinformation or irrational beliefs.
  - Consent to care too hastily, especially risky or intrusive care, without careful consideration of the risks and benefits.
  - A known risk factor for impaired decision-making, such as a chronic neurologic or psychiatric condition, a significant cultural or language barrier, an education level concern, an acknowledged fear or discomfort with institutional care settings, anxiety, unmanaged pain, or people who are at an advanced age (i.e. adults older than 85 years).
- Given the threats to decision-making present for the individual, think about how you will focus the assessment, for example:
  - if the individual suffers from memory loss or has a cognitive disability, their ability to “understand” information may be impaired
  - if the person is delusional, or depressive their ability to realistically appraise the consequences of their choices may be impaired.
- Assess whether the individual has the knowledge and life experience necessary to make a capable decision. This is an important issue to consider for **young adults with cognitive disabilities**. It may be that a young adult has not had the life experience to enable them to assess the risks and benefits of different choices. If they have lived a sheltered life, they may not have had the opportunity to make choices, and experience the natural consequences of a “good” or “bad” choice. For this reason, they may not be able to appraise the consequences of living in a care facility (e.g. group home or approved home) or on their own. In this situation:

- Provide information to the adult to assist them to understand the choices, risks and benefits;
- Assess their ability to make their own decision AT THIS TIME;
- As their case manager, consider ways to enhance and develop the individual's decision-making abilities (e.g. experiences making independent decisions) as part of their case plan;
- Reassess the individual's ability to make their own decision to consent to care (especially consent to reside in a care facility) when there is a trigger such as:
  - the individual expresses a desire to reside somewhere else;
  - a different placement is being considered;
  - the person's case plan is being reviewed; or
  - the adult's decision-making skills and/or maturity appear to have changed.
- Enlist the help of others to assist the person to understand and communicate where appropriate (e.g. a family member or a translator). A support person can clarify questions and information as necessary, but is not there to answer for the person or to act as the person's substitute decision-maker.
- Explain the purpose of the conversation (i.e. to obtain consent) to the individual. If there is reason to doubt the person's capability to make the care decision, explain the purpose of the incapability assessment and consequences of a finding of incapability (i.e. appointment of a substitute decision-maker to give or refuse consent).

### **Refusal to Participate**

If an adult refuses to participate in the assessment, they should be informed that the assessment will proceed based on input from other sources only. Encourage the adult to participate at any stage while the assessment is underway.

### **Determining Understanding**

The care provider can offer the information about the person's needs and the proposed care in one of two ways:

1. Each piece of information is given to the adult separately. Immediately following each piece of information, the care provider discusses it with the adult to determine whether the person understands what has been said.

OR

2. All the information is given at once. The care provider discusses all the information with the adult, again to determine whether the adult understands.

Care providers should present information about all the options in a neutral fashion. It is particularly important when presenting information about consequences, that a person does not feel threatened or coerced into a decision. Do not agree or disagree with the person's responses to the questions. Document the person's answers and your assessment of the person's ability to understand and appreciate his/her circumstances and needs.

Here are some **sample questions** for care providers to use in determining whether a person demonstrates that they understand the information provided and that it applies to their situation. These sample questions are repeated on the Worksheet provided as a quick reference tool for care providers in **Attachment A**.

#### 1. **Determining understanding of adult's problems, and proposed options for care:**

- What is your understanding of your condition, problems, needs?
- Are you experiencing any problems right now living at home? (e.g. finances, environment, meals, housework, family)
- What do you think of your family's concerns about you?
- Have you been able to care for yourself lately as well as you would like to? What has happened? What has changed?
- What do you like/dislike about the way you live now? What other options do you have?
- What is your understanding of the **benefits** of the proposed care? What could the care providers help you with?
- What are the **down sides** of the proposed care? What are you worried will happen if you accept the care?
- What are the **pros and cons** of alternative options?
- What would happen if you did nothing? How would you manage? How would you deal with (specific needs)?

If a person is not able to understand the information and options (e.g. insufficient memory to remember information long enough to analyze choices) then there is **no need to go on with the rest of the assessment**.

Incapability to consent to care can be determined solely on the inability to understand the information presented. However, if a person does not understand the information because of a lack of knowledge, the information should be provided and the person given a chance to demonstrate that they understand the information.

**2. Determining whether the person appreciates how the information applies to their own situation:**

- Tell me what you really believe about your problems/condition/needs.
- Why do you think that we have recommended the proposed care for you?
- Do you think that the proposed care is the best thing for you? Why or why not?
- What do you think will actually happen to you if you accept this care? If you don't accept it?
- What will happen to others if you accept this care? If you don't accept it? (e.g. impact on family, friends, dependents)

**3. Determining the ability to reason with information in a manner that is supported by the facts and the person's own values:**

- What factors/issues are most important to you in deciding whether to accept this care? What are you thinking about as you consider your decision?
- How are you balancing the pluses and minuses of the options?
- What do you think will happen to you now?

When deciding whether an adult is incapable of making the care decision, the care provider must keep in mind that:

- The person's choice does not have to be what the care provider would consider "reasonable". The adult's choice must be "**reasoned**" meaning that it is consistent with the person's own belief system, and has some logical consistency grounded in the person's own values and beliefs.
- The presence of a mental illness, intellectual disability, physical illness, cognitive impairment or speech or language impairment does not mean that a person is incapable of making the decision.
- A person has the right to **voluntarily incur risk** if he or she understands the consequences of making a decision not to receive the care (as long as the risk to others is at a tolerable level).
- A determination of incapability must be done for each specific care decision regardless of any previous determination of incapability or the person's ability to make other types of decisions (e.g. financial, health care). Consent, however, can be given for a group of health and personal care decisions in a **care plan**. If consent is given for a long-term care plan, the care provider should reassess the person's capability to consent when clinically indicated. Generally, if the adult

regains mental capability, their ability to consent to their own care should be reassessed.

If the care provider is unable to reach a justifiable determination of incapability, continue to assume decisional capability and consider calling in a consultant (e.g. a health care provider) to assist with the determination.

## 8. Documentation and Notification

In cases where the adult is presumed to be capable and there is no reason to question this presumption, documentation of the assessment or presumption is not necessary.

A finding of incapability to consent to care should be documented as per the normal practices of the agency (e.g. noted in the client's file). If the assessment is straight-forward (e.g. client has advanced dementia and cannot remember from moment to moment), a brief summary of the assessment of the client's ability to understand and appreciate the decision should be noted.

In situations where the assessment of incapability to consent is more complex (including findings of capability or incapability), care should be taken to document all stages of the process including:

- Information provided to the person
- Any problems encountered in communicating with the person
- Steps taken to overcome communication problems
- The adult's demonstrated understanding of the information and that the information pertains to the person
- Determination of incapability and reasons for judgement.

Ensure that the process and results of the assessment are well documented with factual details of what the person said or did in response to certain questions. This is particularly important for a finding of incapability because the individual or any other person can apply to have the finding of incapability (or a finding of capability) reviewed by the **Capability and Consent Board**.

Worksheets can be kept (e.g. on the person's file or in the care provider's files) as further substantiation of the assessment. However, it is not necessary to use the worksheets – they are simply a tool to assist the care provider.

The care provider should tell the adult and any support person who is accompanying the adult the result of the assessment of incapability. This

may include explaining the reasons for the determination and answering the person's questions using language that the person will understand.

The care provider is not legally obligated to tell people that they have the right to have the determination of incapability reviewed by the Capability and Consent Board. However, the client should be advised of this right unless there are reasons for not sharing this information with the client (e.g. insufficient comprehension skills). If the information is not provided to the client, provide it to a family member or friend. (See the handout on "Rights" found in Attachment C).

## 9. Substitute Consent for an Incapable Person

If the person is incapable of making the care decision, a care provider should choose a substitute decision-maker to make the decision. The substitute decision-maker should be chosen from the following list in **ranked order**:

1. **Guardian** of the person if they have authority to give or refuse consent to the care (the child's legal guardian or a court-appointed guardian for an incapable adult)
2. **Proxy** authorized by the patient's Advance Directive<sup>1</sup>
3. **Spouse** of the person (including common-law and same-sex couples who have lived together for 12 months continuously)
4. **Child** of the person
5. **Parent** of the person
6. **Grandparent** of the person
7. **Brother or sister** of the person
8. **Any other relative** of the person
9. **Close friend** of the person<sup>2</sup>
10. **Last resort decision-maker**: the care provider who obtains consent to the care plus one health care provider can give substitute consent

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<sup>1</sup> **Advance Directives** are recognized in the *Care Consent Act*. A person 16 years or older can make a directive appointing a proxy (substitute decision-maker) for care decisions if they are capable of understanding the nature and effect of the directive. A directive may also contain the person's wishes or instructions about their care. A directive takes effect when a person is not capable of making their own care decision.

<sup>2</sup> A **close friend** is an adult who maintains a long-term close personal relationship through frequent personal contact and a personal interest in the adult's welfare. A close friend does not include a person who receives pay for providing care or other services to the adult.

to admission to a care facility or to personal assistance services. Three health care providers are required to give substitute consent to major health care<sup>3</sup>.

The process of obtaining a valid consent from a substitute decision-maker is the same as outlined previously – they must also be capable of consenting to the care. In addition, substitute decision-makers must be:

- 19 years of age or older unless they are the spouse of the person
- willing and able to act as a substitute decision-maker
- available
- been in contact with the person in the past 12 months
- willing to comply with the **duties of a substitute decision-maker**:
  - follow the wishes of the person made while still capable and after obtaining the age of 16 (unless the wish is impossible to comply with or if the substitute decision-maker believes that the person would no longer want to comply with the wish because of changes in care or medical technology);
  - if the person's wishes are not known, make a decision based on the person's values and beliefs;
  - if the person's values and beliefs are not known, make a decision in the best interests of the person.

(Note that if a substitute decision-maker does not comply with these duties, their decision for major health care or admission to a care facility can be reviewed by the Capability and Consent Board upon request.)

A care provider is only required to make a reasonable effort given the circumstances to search for a substitute decision-maker. A care provider can rely on the information they are given to determine if someone is eligible to be a substitute decision-maker. In other words, a care provider does not have to check the information given to them to make sure it is correct.

### **Can a substitute decision-maker make financial decisions?**

Note that a substitute decision-maker chosen from the list above **cannot make financial decisions** for the individual. If a person needs someone to manage their financial affairs for them because they are incapable of making their own financial decisions, there are four options:

- **Informal measures** (e.g. family takes care of the financial issues while the person is incapable of managing);
- **Enduring Power of Attorney** made while the adult was still capable, comes into effect once the person becomes incapable of managing their financial affairs;

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<sup>3</sup> Note that all decisions for admission to a care facility and major health care by last resort substitute decision-makers are automatically reviewed by the **Capability and Consent Board**. If the Board is satisfied with a paper review, a hearing will not be held.

- A **financial guardian** is appointed through an order of the Yukon Supreme Court (temporary order or longer-term order); or
- A **Certificate of Need for Financial Protection** is completed by a health care provider and sent to the Public Guardian and Trustee to manage the person's financial affairs for up to 60 days. (See *Practice Guidelines for Determining Incapability to Consent to Health Care and Need for Financial Protection.*)

## Worksheet #1

### Determining Incapability to Consent to Care

**Name of Person (Client):** \_\_\_\_\_

#### **Care Provider's Checklist**

(See the Practice Guidelines for Determining Incapability to Consent to Care for more information)

- Assessed communication needs.
- Addressed any barriers to communication.
- Assessed factors that may affect decisional capacity (e.g. medication, environment, language, culture, fluctuating lucidity).
- Took steps to address and enhance decisional capacity.
- Explained to person reason for conversation (i.e. to obtain a valid consent or to determine capability to consent).
- Advised person of possible consequences of a finding of incapability (i.e. substitute decision-maker will be chosen to make decision).
- Ensured the person was given the information necessary to make an informed decision in a way appropriate to the person's skills and abilities.
- Conducted interview using probing questions.
- Documented steps taken, interview and conclusions.
- Advised person of outcome of assessment interview.
- Where appropriate, advised person, family or friend of right to apply to the Capability and Consent Board for a review of the finding of incapability.

**Name of Care Provider** \_\_\_\_\_

**Date** \_\_\_\_\_

# Worksheet #1

## Determining Incapability to Consent to Care

**Name of Adult:** \_\_\_\_\_  
**Date of Birth:** \_\_\_\_\_ **Health Care Number:** \_\_\_\_\_

(Record observations, including exact responses of the person)

### 1. Able to understand health problem and proposed options for care

**(Sample questions:** What is your understanding of your condition, problems, needs? • Are you experiencing any problems right now living at home? (e.g. finances, environment, meals, housework, family) • Have you been able to care for yourself lately as well as you would like to? What has happened? What has changed? • What do you think of your family's concerns about you? • What do you like/dislike about the way you live now? What other options do you have? • What is your understanding of the **benefits** of the proposed care? What could the care providers help you with? • What are the down sides of the proposed care? What are you worried will happen if you accept the care? • What are the **pros and cons** of alternative options? • What would happen if you did nothing? How would you manage? How would you deal with (specific needs)?)

**Observations:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Able to understand condition/problem?*  Yes  No  
*Able to understand proposed options for care?*  Yes  No

### 2. Able to appreciate how the information applies to their own situation

**(Sample questions:** Tell me what you really believe about your problems/condition/needs? • Why do you think we have recommended the proposed care for you? • Do you think that the proposed care is the best thing for you? • Why or why not? • What do you think will actually happen to you if you accept this care? If you don't accept it?) • What will happen to others if you accept this care? If you don't accept it? (e.g. impact on family, friends, dependents) )

**Observations:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Able to appreciate that information applies to them?*  Yes  No

**3. Able to reason with information in a manner that is supported by the facts and the person's own values**

(Sample questions: What factors/issues are most important to you in deciding about your care? • What are you thinking about as you consider your decision? • How are you balancing the pluses and minuses of the options? • What do you think will happen to you now?)

**Observations:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Able to reason with information?  Yes  No

<p><b>SUMMARY OPINION</b></p> <p><input type="checkbox"/> Capable <input type="checkbox"/> Incomplete (e.g. requires further assessment)</p> <p><input type="checkbox"/> Incapable</p> <p><b>Reasons:</b> _____</p> <p>_____</p> <p>_____</p> <p>_____</p>
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<p><b>RIGHTS INFORMATION – Provide to person, family or friend</b></p> <p>Person, family or friend informed of results of assessment: <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Person, family or friend informed of right to have decision regarding their incapability to consent reviewed by the Capability and Consent Board (CCB) and provided information (e.g. Rights Info Sheet): <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>Comment _____</p>
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<p><b>CARE PROVIDER INFORMATION</b></p> <p>Name : _____ Profession: _____</p> <p>Address: _____ Phone: _____</p> <p>Fax: _____ Email: _____</p> <p>Signature: _____ Date: _____</p>
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## **Factors Affecting Decision-Making Ability and Ways to Enhance Communication**

One of the principles outlined in Section 4 of these guidelines states that:

- The process should recognize and employ ways to enhance decisional capacity.

There are many environmental, sensory, psychological and physiological factors that can affect decision-making ability. Some factors can be addressed in order to minimize the effect they have on the person. For example, confusion due to medication can be treated by a change or adjustment to the medication. Some factors cannot be altered and care providers should be aware of the impact particular factors (e.g. lack of memory) can have on decision-making ability. In all situations, the care provider should attempt to enhance decisional capacity.

**Idiosyncratic or eccentric beliefs are not, in and of themselves, indicators of incapability to give, refuse or revoke health care.**

The following factors, while not an all-inclusive list, should be considered in assessing incapability:

### **1. Cognitive**

- memory (e.g. ability to remember information long enough to make a decision)
- attention (e.g. ability to concentrate on the information being provided)
- reasoning (e.g. consistent with person's values and beliefs)
- judgement and insight (e.g. ability to appreciate consequences of choices)
- communication disorders (e.g. aphasia) where it is not possible to communicate at a level to ascertain a valid consent

### **2. Mental Health/Psychiatric/Neurological**

- delirium (i.e. fluctuating attention and cognitive functioning associated with altered psychomotor activity and disturbed sleep-wake cycle)
- depression or mania which may include firm, fixed and false beliefs maintained despite evidence to the contrary
- delusions
- hallucinations
- phobias, panic, anxiety or obsessions
- inability to control one's actions (e.g. lack of impulse control, executive functioning)
- recent loss, grief, anxiety

### **3. Physiological dysfunction, sensory deficits, medication effects**

- confusion caused by hypoxia, infection, medication, or metabolic disturbances
- pain, trauma
- hearing loss
- speech and language disorders
- visual limitations

**4. Environmental factors**

- unfamiliar surroundings
- language used (e.g. complexity, unfamiliar terms, etc.)
- amount of time given to respond
- room lighting
- cultural and language issues
- psychological response (e.g. stress) triggered by an environmental factor such as the first time out of their community or even the mannerisms or look of the assessor

### **Ways to Enhance Communication**

Communication may be enhanced by the use of support materials, communication techniques and environmental adaptations such as:

- communication aids (e.g. Bliss Boards, Pic symbols, voice prostheses)
- hearing devices (e.g. hearing aids, pocket talkers)
- interpreter assistance for the deaf and hard of hearing and for non-English speaking adults
- visual materials to supplement information presented verbally (e.g. illustrations, written materials, videotapes)
- using clear language
- eliminating jargon or technical terms
- presenting manageable amounts of information
- using eye-blink, movement responses (e.g. nodding head) or facilitated communication
- using examples and making reference to issues/events from the adult's life
- providing opportunities for feedback and clarification by repeating or paraphrasing what the adult has said
- matching verbal and nonverbal cues
- providing full explanation, avoiding the need for inferences
- providing adequate privacy and time
- ensuring safety and comfort

## RIGHTS INFORMATION SHEET

If you disagree with the decision made by the care provider about your capability to make your own decision to: *(check all that apply)*

- live in a care facility or
- consent to personal care services,

you or anyone else with a substantial interest in the matter have the right to ask the **Capability and Consent Board** to review that finding.

To apply for a review, contact the Capability and Consent Board at **633-7614** to request an application form or print off a copy of “**Form 6(CCA)** -- Application to the Capability and Consent Board for Matters under the *Care Consent Act*” from the Board’s website ([www.yukoncapabilityandconsentboard.ca](http://www.yukoncapabilityandconsentboard.ca)).