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The Assisted Decision-Making (Capacity) Act, 2015

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CHAPTER FOUR

THE ASSISTED DECISION-MAKING (CAPACITY) ACT 2015

The Assisted Decision–Making Capacity Act 2015, first published in July 2013, substantially assists vulnerable people in our society with decision-making and will also give them much needed legal protection from abuse or exploitation or fraud. The Act was signed by the President on December 30th 2015. However, various parts of the Act will only come into operation, on a phased basis, in late 2016 or 2017.

Until now, people with an intellectual disability, or Dementia, or who had reduced mental capacity, did not have clear rights to make decisions. The law on deciding who has decision-making capacity had been very inadequate and the arrangements for supported and substitute decision-making had been practically non-existent.

In practice, decisions for such persons (called “the relevant person”) were made by relations, carers or by service providers. There was no formal system for assessment of the capacity of these persons to make decisions for themselves. Relatives, carers and service providers effectively made the decisions which were needed. These ranged from decisions about where a person is to live, what he/she is to wear, to decisions about medical treatment and social relationships including intimate relationships. The majority of decisions made are necessary and appropriate but there is always the danger that they may infringe the rights of the relevant person.

If the relevant person does not have the legal capacity to make specific decisions or to make general decisions then some form of assisted or substitute decision making mechanism is needed.

The new legislation aims to assist relevant persons who have reduced decision-making capacity to manage their affairs. The applicable test is whether the relevant person has decision making capacity and this test is not a question of mental capacity. A relevant person is:

- A) A person whose decision-making capacity is in question or may shortly be in question in respect of one or more than one matter
- B) A person who lacks capacity in respect of one or more than one matter
- C) A person whose capacity is in question or may shortly be in question in respect of one or more than one matter and who lacks capacity in respect of one or more than one matter at the same time but in respect of different matters.

The Act introduces a system for support in decision-making, giving these persons greater autonomy in any decisions concerning their lives. The Act is drafted on the basis that a person’s capacity is to be construed functionally and certain principles must be followed.

1. Principles under Act:

A) A relevant person's capacity shall be assessed on the basis of his or her ability to understand the nature and consequences of a decision to be made by him or her in the context of the available choices at the time the decision is made.

NOTE: The test is time specific and issue specific.

B) A person lacks capacity if he or she is unable:-

(i) To understand the information relevant to the decision,

(ii) To retain that information, long enough to make a voluntary choice,

(iii) To use or weigh that information as part of the process of making the decision, or

(iv) To communicate his or her decision by any means.

C) A person is not to be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it given to him or her in a way that is appropriate to his or her circumstances.

D) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him or her from being regarded as having the capacity to make the decision.

E) The fact that a person lacks capacity in respect of a decision on a particular matter at a particular time does not prevent him or her from being regarded as having capacity to make decisions on the same matter at another time (i.e. a person's decision making capacity is to be construed functionally).

F) The fact that a person lacks capacity in respect of a decision on a particular matter does not prevent him or her from being regarded as having capacity to make decisions on other matters (issue specific).

NOTE: These principles are legally binding since December 30th 2015.

The new legislation, in effect, enables specific individuals (called "interveners") to support the relevant person while enabling that person to have their voice heard and to have their wishes followed where possible. However, in summary, the Act provides for the appointment of different types of interveners to assist the relevant person in making decisions regarding that person's personal welfare or property and affairs, or both. These interveners can assist the relevant person where that person has a limited or fluctuating capacity, or is in a permanent state of health where their capacity is in question. Interveners will be supervised by an office called The Decision Support Service, which will have a director and staff.

2. Guiding Principles where the Relevant Person needs an intervention regarding Decision Making:

A) The principles apply to every intervention under the Act.

B) There is a presumption of capacity for all relevant persons unless it is proven this is not the case.

C) A relevant person is not deemed unable to make a decision unless all practicable steps have been taken without success to help him or her do so.

- D) A relevant person is not considered unable to make a decision merely because of a risk that it is an unwise decision.
- E) No intervention is to take place unless necessary.
- F) Any intervention will be the least restrictive of the relevant person's rights and freedom of action and have due regard to his or her dignity, bodily integrity, privacy and autonomy and control over his or her financial affairs and property.
- G) The relevant person has to be permitted, encouraged and facilitated to participate in the decision process and the past and present will and preferences of that person shall be taken into account.
- H) The interveners must also act, at all times, in good faith and for the benefit of the relevant person.
- I) No intervention should be taken if the matter is not urgent and the relevant person is likely to recover capacity shortly.

3. Definitions:

Interveners may be involved in decisions relating to the personal welfare or property and affairs, or both, of the relevant person.

"Personal Welfare", in relation to a relevant person, means one or more of the following matters:

- (a) Accommodation, including whether or not the relevant person should live in a designated centre;
- (b) Participation by the relevant person in employment, education or training;
- (c) Participation by the relevant person in social activities;
- (d) Decisions on any social services provided or to be provided to the relevant person;
- (e) Healthcare;
- (f) Other matters relating to the relevant person's well-being;

"Property and Affairs", in relation to a relevant person, means one or more of the following matters:

- (a) The custody, control and management of some or all of the relevant person's property or property rights;
- (b) The sale, exchange, mortgaging, charging, gift or other disposition of the relevant person's property;
- (c) The acquisition of property by the relevant person, or on his or her behalf;
- (d) The carrying on, on behalf of the relevant person, of any profession, trade or business which may lawfully be carried on by a person other than the relevant person;
- (e) The making of a decision which will have the effect of dissolving a partnership in which the relevant person is a partner;

- (f) The carrying out of any contract entered into by the relevant person;
- (g) The discharge of the relevant person's debts, tax and duty liabilities and obligations or other obligations;
- (h) The execution or exercise of any of the powers or discretions vested in the relevant person as a tenant for life;
- (i) Providing, to the extent that the relevant person might have been expected to do so, for the needs of a decision-making assistant, a co-decision-maker, an attorney, a designated healthcare representative or a decision-making representative for the relevant person or of other persons;
- (j) The conduct of proceedings before any court or tribunal, whether in the name of the relevant person or on his or her behalf;
- (k) Making an application for housing, social welfare or other benefits or otherwise protecting or advancing the interests of the relevant person in relation to those matters.

Who Assesses Capacity?

In line with the functional assessment test, it is time specific and issue specific and only undertaken when it is necessary to assess. The test will also depend on particular decision to be made e.g. examples of who assess capacity are as follows:-

- 1) Medical treatment – healthcare professional
- 2) Legal transaction – solicitor
- 3) Tax returns – accountant
- 4) Financial Transaction – Bank staff
- 5) Day to day – carer

4. The following are the main interveners under the Act:

A) Decision-Making Assistant

The Act provides a statutory framework for formal agreements to be made by persons who consider that their capacity is in question, or may shortly be in question, to appoint a trusted person to act as their decision-making assistant. In this situation, the decision-making authority remains with the appointer who will be actively assisted, typically by family members, relatives and carers, in accessing information, in understanding the information, in making and expressing decisions and in implementing decisions. The assistant must ascertain the will and preferences of the appointer and endeavour to ensure that the appointer's decisions are implemented. The appointment of a decision-making assistant shall be made in a decision-making assistant agreement and notice of this agreement must be given to the Director of the Decision Support Service (called "the Director"). The functions of the Decision-Making Assistant are:

- (a) To advise the Appointer by explaining the information and considerations relating to the decision.

- (b) To ascertain the will and preferences of the Appointer.
- (c) To assist the Appointer obtaining any information or personal records that are required in relation to the relevant decision.
- (d) To assist the Appointer to make and express a relevant decision.
- (e) To endeavour to ensure that the Appointer's relevant decisions are implemented.

NOTE: A Decision-Making Assistant shall not make a decision on behalf of the Appointer. The Director supervises Decision-Making Assistants.

Ministerial Regulations for Decision-Making Assistants:

The Minister shall make regulations as respects decision-making assistance agreements, including:-

- (a) Prescribing the form of a decision-making assistance agreement;
- (b) Prescribing procedures and requirements relating to the execution, variation and revocation of a decision-making assistance agreement;
- (c) Prescribing information to be included in or annexed to a decision-making assistance agreement for the purpose of ensuring that any document purporting to create a decision-making assistance agreement incorporates adequate information as to the effect of making or accepting the appointment;
- (d) Providing for the inclusion in a decision-making assistance agreement of the following statements:
 - (i) By the appointer, that he or she has read and understands the information as to the effect of making the appointment or that such information has been explained to the appointer, by a person other than the proposed decision-making assistant; and
 - (ii) By the decision-making assistant, that he or she understands and undertakes to act in accordance with the functions of a decision-making assistant, including the duty to act in accordance with the guiding principles;
- (e) Specifying the personal welfare or property and affairs, or both, which may be specified in a decision-making assistance agreement;
- (f) Providing for the attestation of the signatures of the appointer and decision-making assistant by a person other than the appointer or the proposed decision-making assistant; and
- (g) The giving by the appointer of notice of the execution, variation or revocation of a decision-making assistance agreement to the director and any other specified persons.

B) Co-Decision Maker:

A person (called “The Appointer”) who considers that his or her capacity is or will shortly, be, in question, may appoint a suitable person to make joint decisions with them on matters related to his or her personal welfare and/or property and financial affairs. A suitable person is a relative or friend of the Appointer who has had such personal contact with the Appointer over such period of time that a relationship of trust exists between them and is able to perform the functions agreed. The appointment of a co-decision maker must be made in a co-decision making agreement and must be registered with the Decision Support Service. The principles applying are:

- A Doctor and a Health Care Professional decides on whether or not the person has capacity to enter into a Co-Decision Making Agreement
- The Appointer appoints the Co-Decision Maker
- The Director has to approve the Co-Decision Making Agreement and be satisfied that it reflects the will and preferences of the Appointer
- The Co-Decision Maker has to ascertain the will and preferences of the Appointer and assist the Appointer to make the relevant decision.
- He/she has to report to the Director who will supervise Co-Decision Makers.

Regulations for Co-Decision Makers:

The Minister, shall prescribe by regulations the following matters:-

- (a) The form of a co-decision-making agreement;
- (b) The form of an application to register a co-decision-making agreement and varied co-decision-making agreement;
- (c) The form of notice under an application to register a co-decision-making agreement and varied co-decision-making agreement;
- (d) The form of an objection to the registration of a co-decision-making agreement and varied co-decision-making agreement;
- (e) The form of a report to be submitted by a co-decision-maker to the Director;
- (f) The form of the revocation of a co-decision-maker agreement;
- (g) The form of references as to the personal character of a co-decision-maker;
- (h) The bodies or classes of persons who may inspect the Register and receive an authenticated copy of a co-decision-making agreement.

C) Decision-Making Representatives:

Thirdly, if the relevant person is unable to appoint a decision-making assistant or co-decision maker, then the Circuit Court can appoint a decision-making representative. In appointing a decision-making representative, the Court may appoint one or more nominees to be the decision-making representative for the relevant person. In making an Order under this legislation the Court may make provision for such

matters as it considers appropriate, including setting out conditions covering the role of the decision-making representative. Before appointing a decision-making representative, the Court must be satisfied that the proposed decision-making representative is a suitable person to act as a decision making representative for the relevant person and to carry out the necessary tasks and duties associated with being a decision-making representative. The principles applying are:-

- The representative is appointed by the Court where the Court is satisfied that the relevant person lacks capacity even if a co-decision maker was made available to them
- The Court can direct the decisions which the Representative can make regarding the property and affairs or personal welfare of the relevant person
- The Court can appoint, if necessary, a decision making representative from a panel maintained by the Decision Support Service
- The Representative will be supervised by the Decision Support Service.

Suitability of Decision Making Representative:

When considering the suitability of a person to be a decision-making representative for a relevant person, the court shall have regard to the following:

- (a) the known will and preferences of the relevant person;
- (b) the desirability of preserving existing relationships within the family of the relevant person;
- (c) the relationship (if any) between the relevant person and the proposed representative;
- (d) the compatibility of the proposed representative and the relevant person;
- (e) whether the proposed representative will be able to perform the functions to be vested in him or her;
- (f) any conflict of interest.

Reports by Decision-Making Representative:

1. A Decision-making representative shall, within 12 months after the making of the decision-making representative order appointing him or her, and thereafter at intervals of not more than 12 months, prepare and submit to the Director a report in writing as to the performance of his or her functions as such decision-making representative during the relevant period.
2. The court may direct that a report be submitted to the Director within such shorter period or within such shorter intervals than those specified.
3. Every such report submitted to the Director shall be in such form as may be prescribed by regulations made by the Minister and shall include details of all transactions relating to the relevant person's finances which are within the scope of the decision-making representation order and details of all costs, expenses and

remuneration claimed by or paid to the decision-making representative during the relevant period.

D) Attorney under Enduring Powers of Attorney:

The Act re-enacts the provisions of the Powers of Attorney Act 1996 but requires attorneys to comply with the new guiding principles. A personal welfare decision now extends to giving or refusing treatment by a person providing health care for the donor, other than refusing life sustaining treatment.

E) Designated Healthcare Representative under Advance Healthcare Directives:

The Act provides for advance healthcare directives. In order to make an advance healthcare directive a person has to be an adult that is over 18 years of age and must have capacity. In order for a refusal of treatment in an advance healthcare directive to be considered legally binding, the person must lack capacity to consent to the treatment at the time in question. The treatment being refused must be clearly identified and the specific situations in which the treatment refusal is intended to apply must also be clearly outlined. The provisions will also enable a person to outline specific treatment requests in his or her directive.

The provisions introduce a mechanism through which an adult with capacity may nominate in his or her directive a representative, who is aware of his or her will and preference, to be involved in the healthcare decision making process on his or her behalf if he or she was subsequently to lose capacity. This nominee is known as the designated healthcare representative. Advance care directives represent an important tool by which people can exercise their autonomy in terms of their healthcare and treatment.

5. Decision Support Service:

The director and staff of the decision support service will be employed by the Mental Health Commission. The functions of the director of the decision support service will be to promote public awareness of the legislation and to provide advice and guidance to public and private sector bodies in this regard. The director will supervise Decision-Making Assistants, Co-Decision Makers, Decision-Making Representatives, attorneys appointed under enduring powers of attorney and designated healthcare representatives (called "Interveners") in the exercise of their duties and responsibilities. He or she will have the power to deal with complaints against these interveners.

The director will prepare and issue codes of practice for persons concerned with the capacity of others, in particular, for the guidance of decision-making assistants, co-decision-makers, decision making representatives, attorneys and healthcare professionals. Codes of practice are envisaged as a key tool in promoting organisational practice that supports vulnerable people and safeguards their rights more effectively.

6. Functions of Director:

The Director shall have, in addition to the functions assigned to him or her by any other provisions of this Act, the following functions:

- (a) To promote public awareness of this Act and matters (including the United Nations Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006) relating to the exercise of their capacity by persons who require or may shortly require assistance in exercising their capacity;
- (b) To promote public confidence in the process of dealing with matters which affect persons who require or may shortly require assistance in exercising their capacity;
- (c) To provide information to relevant persons in relation to their options under this Act for exercising their capacity;
- (d) To provide information to decision-making assistants, co-decision makers, decision-making representatives, designated healthcare representatives and attorneys in relation to the performance of their functions under this Act;
- (e) To supervise, in accordance with the provisions of this Act, compliance by decision-making assistants, co-decision makers, decision-making representatives and attorneys in the performance of their functions under this Act;
- (f) To provide information in relation to the management of property and financial affairs to relevant persons and to decision-making assistants, co-decision makers, decision-making representatives and attorneys;
- (g) To provide information and guidance to organisations and bodies in the State in relation to their interaction with relevant persons;
- (h) To provide information and guidance to organisations and bodies in the State in relation to their interaction with decision-making assistants, co-decision-makers, decision-making representatives, attorneys and designated healthcare representatives;
- (i) To identify and made recommendations for change of practices in organisations and bodies in which the practices may prevent a relevant person from exercising his or her capacity under this Act;
- (j) To establish a website on the internet or provide, or arrange for the provision of, other electronic means by which to disseminate information to members of the public relevant to the performance of the Director's functions and which will, in the opinion of the Director, assist members of the public to understand the operation of this Act and the Director's role in relation thereto;
- (k) To make recommendations to the Minister on any matter relating to the operation of this Act.
- (l) The director shall draw up procedures in relation to the making and investigating of complaints as he or she considers appropriate and shall cause the procedures to be published.
- (m) Appoint a court friend to assist the relevant person in relation to a court application regarding a Decision-Making Representative.

7. Codes of Practice:

The Director may:

- (a) Prepare and publish a code of practice,
 - (b) Request another body to prepare a code of practice, or
 - (c) Approve a code of practice prepared by another body,
- for the purposes of one or more of the following:
- (i) the guidance of persons, including healthcare professionals, assessing whether a person lacks capacity in relation to any matter;
 - (ii) the guidance of decision-making assistants;
 - (iii) the guidance of co-decision-makers;
 - (iv) the guidance of decision-making representatives;
 - (v) the guidance of attorneys
 - (vi) the guidance of special visitors (specialised doctors/healthcare professionals)
 - (vii) the guidance of general visitors (professional persons who can assist director)
 - (viii) the guidance of court friends (assist relevant persons in Court)
 - (ix) the guidance of healthcare professionals regarding the circumstances in which urgent treatment may be carried out without the consent of a relevant person and what type of treatment may be provided;
 - (x) the guidance of persons acting as advocates on behalf of relevant persons;
 - (xi) the guidance of other persons (including healthcare, social care, legal and financial professionals) acting on behalf of the relevant persons;
 - (xii) with respect to such other matters concerned with this Act as the director thinks appropriate.

8. Court Applications

The Circuit Court has the power to make:

- A) A declaration as to whether a person has capacity or not
- B) A declaration as to the lawfulness of an intervention proposed to be made in respect of relevant person
- C) An Interim Order
 - (i) In relation to a matter in which the court has jurisdiction
 - (ii) Where the court has reason to believe that the relevant person lacks capacity and
 - (iii) Where in the opinion of the court, it is in the interest of the relevant person to make an order without delay

- D) An order to review declarations made involving capacity for a person (Court must review capacity orders made every year, or within 3 years if relevant person is unlikely to recover capacity)
- E) An order requesting a report from an appropriate expert

9. Wards of Court

The Act will abolish the legislation relating to Wards of Court. Existing Wards of Court will be brought under the jurisdiction of the Act, within 3 years of the commencement of this part of the Act.

10. Legal Aid

The Act provides for the provision of legal aid for those making an application under the Act. It is envisaged that a specialised panel of solicitors will be established for the purposes of acting in respect of matters arising under the Act. However, where a legal aid certificate has been granted to an applicant who is a relevant person who does not satisfy the criteria in respect of financial eligibility, the Legal Aid Board may seek to recover some or all of the costs of providing the legal aid to the relevant person

CONCLUSION:

What is very welcome about the Act is that it moves away from the paternalistic way of looking after what we decide are people's "best interests" and recognises it is a person's right to make decisions about their own lives, enabling and supporting them in that decision making. Under the Act, capacity is always presumed unless the contrary can be shown.

A worrying provision in the Act is Section 6. This states that expenses incurred by the legislation have to be sanctioned by the Minister for Public Enterprise and Reform. I hope this provision will not be used as an excuse to ensure that there are proper resources given to the Decision Support Service.

Minister Alan Shatter said (when introducing this Bill in 2013):

"This reform of the law is long overdue and is a major step towards the ratification by Ireland of the UN Convention on the Rights of Persons with Disabilities".

December 30th 2015 was an historic day for thousands of Irish people and their families.