

Wills & Estates
Winter Term 2025

Lecture Notes No. 1

II. SUBSTITUTE DECISION-MAKING

Useful web resources:

Please review the [Substitute Decisions Act, 1992, SO 1992, c 30](#) (and the [MAG Guide to the SDA](#)) and also spend a few minutes browsing the web pages of the [Consent and Capacity Board](#), the [Ontario Public Guardian and Trustee with respect to its guardian services](#), and the provincial government respecting [Capacity and Capacity Assessment](#).

- A “substitute decision-maker” is of three types: an “Attorney” under a “Continuing Power of Attorney”, a court-appointed Guardian, or a “Statutory Guardian”.
- All persons who have attained age 18 are presumed capable of contracting and, thus, managing their own property; SDA, s.2(1). This aligns with the age of majority in Ontario and the ability to contract as a matter of common law; [Age of Majority and Accountability Act, RSO 1990, c A.7](#)) are presumed to be mentally capable of managing their property.
- By virtue of the presumption of capacity and the common law, all persons who have attained age 18 and have not been found to be mentally incapable of managing their property may appoint an agent. A “power of attorney” is a legal instrument that sets up an agency. It is important to distinguish this use of a power of attorney from a “Continuing Power of Attorney for Property management” used to deal with the property of a person who is mentally incapable. The former does not attract fiduciary duties necessarily; the latter is decidedly one that imports fiduciary duties (principally the duty to account).
- All persons who are capable of appreciating the consequences may make decisions respecting their own health care.
- In the case of a power of attorney in respect of personal care, the powers is *only* exercisable where the donor is mentally incapable of making such decisions for himself or herself.
- The *Substitute Decisions Act 1992* sits alongside the [Mental Health Act, RSO 1990, c M.7](#) and the [Health Care Consent Act, 1996, SO 1996, c 2](#). All deal, in part, with when one person may make decisions for another who is incapable of doing so.
- Please note that where a person has been found to be mentally incapable of managing his or her property, that person requires a “[Litigation Guardian](#)” in legal proceedings, with a duly appointed substitute decision-maker being the presumptive Litigation Guardian.

- Note the conventional acronyms:
 - Continuing Power of Attorney for Property = **CPOAP**
 - Continuing Power of Attorney for Personal Care = **CPOAPC**

- MAG makes available a do-it-yourself [POA kit](#) with forms.