



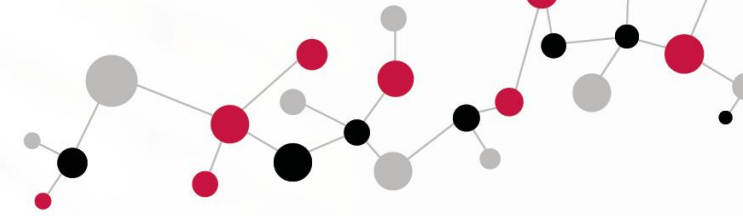
Capacity Matters & Estate Planning

**RISTEÁRD
PIERSE**

abm financial advisers



Overview



Decision-making capacity issues can effect everyone



Adults lacking capacity: Regime until ADMCA 2015 commenced



New regime for support of Adults in decision-making where capacity concerns arise



Functional test for capacity



Codes of practice



Application for guiding principles



Process for assessing capacity



Purpose of making a will



Roles of Executors, Guardians and Trustees

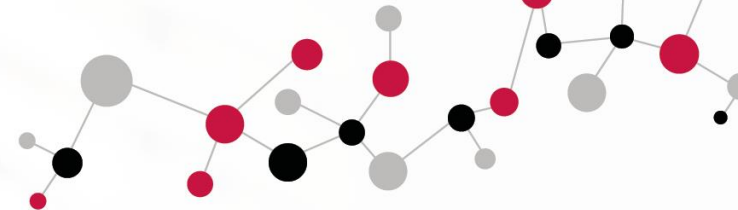
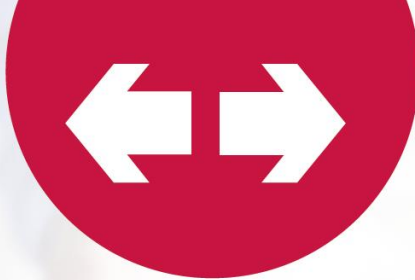


Purpose of Discretionary Trust



Tax Implications

Decision-making capacity issues can effect everyone



Department estimates that over 200,000 living in Ireland have decision-making capacity issues. Estimate based on the number of adults with diagnoses of:

- intellectual disability
- acquired brain injury
- enduring mental health difficulties, and
- age-related cognitive impairment.

Any of us could experience difficulties with our decision-making capacity in the future due to illness or injury.

Lunacy Regulation (Ireland) Act 871: - person admitted to wardship declared to be 'of unsound mind and incapable of managing his person or property'. Wardship order 'has real consequences. It can deprive a person of the power to make many choices which are fundamental and integral to day-to-day life. Orders can be over-broad in their effect and disproportionate in their scope.' - per Supreme Court in *Am v HSE* 2019 IESC 3

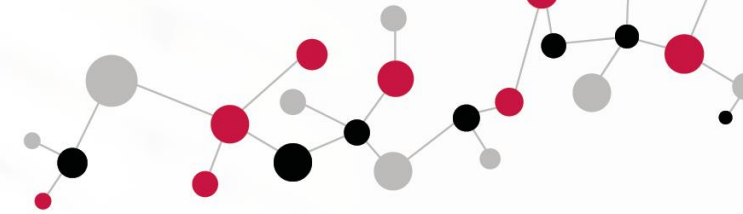
Adults lacking capacity: Regime until ADMCA 2015 commenced

Wards of Court - Office of WoC & Committee;
High Court President - based on the Lunacy Regulation
(Ireland) Act 1871 and HC jurisdiction (Order 67 SC rules)

Enduring Power of Attorney (if made) registered
with Office of WoC by Attorney(s) only when donor
becomes mentally incapable of managing his/her affairs;
then Attorney(s) can deal with same

Care Representative - appointed by Circuit Court to apply
for a loan in relation to the Nursing Home Support Scheme
(Fair Deal) on behalf of persons lacking capacity (and who
have no EPA Attorney)

Otherwise, NOTHING (incl. no healthcare directives)



Grey areas evolved: joint accounts, property lettings etc.
managed by family, trusted friends, agents etc; also,
the unfounded idea that 'next of kin' enjoys same
status as a substitute decision-maker and can consent
in medical matters.

Inclusion Ireland, 2013 'Who decides and How' document
highlighted how, even though family members and
carers have no legal authority to make decisions for
persons with intellectual disabilities, the absence of any
formal system of decision-making (outside of wardship)
left families and caring services in a kind of limbo where
decisions needed to be made but no-one had authority
to make them.

New regime for support of adults in decision making where capacity concerns arise



Decision-Making Assistants (DMAs)

- agreement notified to DSS

Co-Decision-Makers (CDMs)

- agreement registered with DSS

Decision-Making Representatives (DMRs)

appointed by Circuit Court

EPA Attorney(s)

- new form of EPA registered from creation with DSS

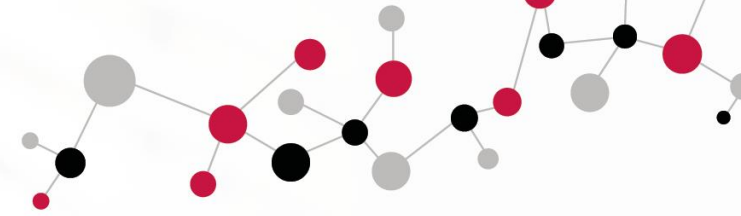
Designated Healthcare representatives (DHRs)

- per Advance Healthcare Directives (AHD), may be subject to complaints/investigation process of Director of DSS and applications may be made to the Circuit Court

{Note: DSS will maintain Registers of EPAs, CDM agreements & DMR Ct orders; there is no requirement to register a DMA agreement or an AHD}



Functional test for capacity



An adult is presumed to have capacity.

Where capacity is questioned, then the functional test is applied to assess ability to make a specific decision at a specific time.

A person has capacity if they can:

- **Understand** information relevant to the decision,
- **Remember/retain** the information long enough to make a choice,
- Use or **weigh up** the information to make a decision, and
- **Communicate** their decision (this may be with assistance).

Codes of Practice



- On supporting decision-making and assessing capacity
- For Decision-Making Assistants
- For Co-Decision-Makers
- For Decision-Making Representatives
- For EPA Attorneys
- For Designated Healthcare Representatives
- For special visitors

- For general visitors
- For court friends
- For independent advocates
- For legal practitioners
- For financial professionals and financial service providers
- For healthcare professionals
- On advance healthcare directives for healthcare professionals



Code of practice on supporting decision-making and assessing capacity: application of guiding principles



1. Presume capacity
2. Support a relevant person to make a decision
3. Unwise decisions are not evidence (as such) that person lacks capacity

4. Do not intervene unless necessary
5. then only minimal intervention
6. Give effect to Will and Preferences
7. Consider the views of others
8. Consider the urgency of situation
9. Use relevant information only

A relevant person is a person whose decision-making capacity is in question or may shortly be in question in respect of one or more matter(s).

The first three principles are utilised when assessing capacity.

Principles 4, 5, 6, 7, 8, and 9 apply when intervention(s) are being considered.

Everyone engaged with a relevant person in relation to decision-making should follow good practice in applying and promoting these guiding principles.

Code on supporting decision-making and supporting capacity: Process for assessing capacity



Functional (not medical) assessment, so general standardised 'blanket' assessments of a person's cognition or intelligence ought not to be used.

Act in good faith, focused on will and preference of the person.

Prepare: understand decision to be made; what are support needs of person; formulate queries about basic facts, understanding of context and circumstances, will and preference, awareness of needs, options, risks...

Inform the person that there is a concern about capacity, describe what is involved in assessment process, why it is beneficial for them to participate; **seek consent** - explain that they have the right to refuse or to stop at any stage (if refusal, then various steps... ultimately application to Court if needed...)

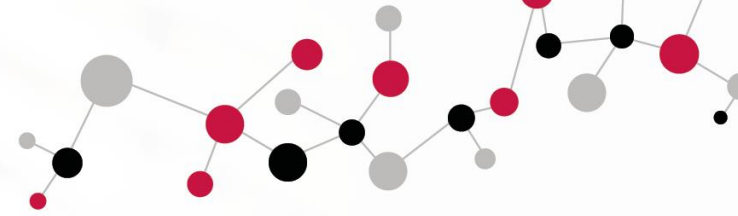
Undertake the four-part assessment of abilities to:

1. Understand information
2. Ability to retain information for sufficient periods
3. Weigh up information
4. Communicate their decision
(perhaps with assistance of carer or SLT...)

Then determine whether person lacks capacity or has capacity to make decision.

If relevant person disputes the outcome of assessment s/he should be offered the option of a second assessment. If after second assessment, s/he continues to dispute the outcome, s/he should be informed of possibility of Court referral.

Purpose of making a will



What is a Will?

A Will is a legal document that allows you to set out who you wish to leave your possessions and assets to after you die.



Your Estate

All of the property that a person owns or controls - includes houses, cars, bank accounts, shares, cash, furniture etc.

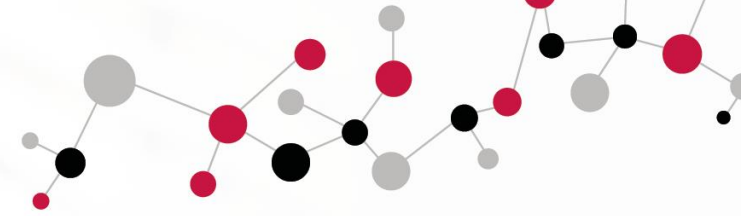


A Trust

A Will allows you to create a Trust which facilitates the transfer of your assets to a family member or relative if you need to make provision into the future for a child who lacks capacity and who may be unable to manage their affairs.



Roles of Executors, Guardians and Trustees



Executor(s)

This is the person you have chosen to administer your estate in accordance with your wishes as set out in your Will.



Guardian(s)

You can choose who you would like to act as the guardian of your children.

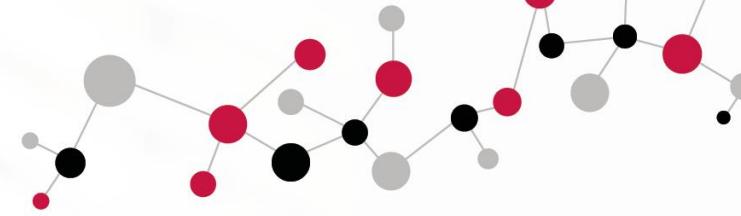


Trustee(s)

You can choose who you would like to act as trustee. This person will hold your assets on trust for the benefit of your child/children, to be distributed at their discretion.



Purpose of Discretionary Trust



A Trust is an arrangement where property/cash are set aside in your Will for the benefit of your child with a disability.

Purpose of a discretionary trust is to keep assets in a form that will be available to your son or daughter but will not disqualify them from government benefits.

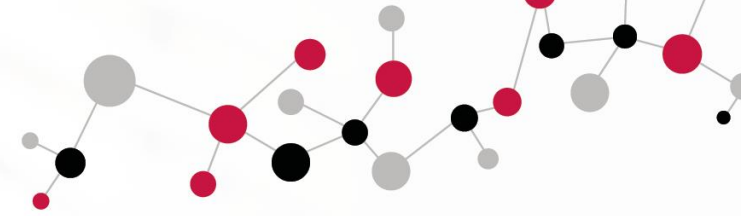
The legal title to your property passes to the Trustees. This means that the assets are not taken into account for the means test.

The property is held by your Discretionary Trustees and is **used for the benefit of your child** (Beneficiary) at the discretion of your trustees.

A benefit received from a parent or relative under their Will and **not** left on trust may result in them having too much income under the means test.



Tax implications



Revenue grant an exemption from Discretionary Trust Tax where the discretionary trust is set up exclusively for an incapacitated person (this can include an institution caring for the child).

An incapacitated person for Revenue is one who is *“because of age or improvidence, or of physical, mental or legal incapacity, incapable of managing that individual or those individuals’ affairs.”*

If you have minor children and/or an incapacitated child, there will be separate Trusts in your Will. One for your minor children and one for your incapacitated child to avail of the exemption.

Trustees should not be overly generous with the trust fund at any one time as they **may render the beneficiary liable for income tax.**

Tax advice should always be sought by a Trustee.

Tax returns may have to be filed by/ on behalf of both the Trustees and the Beneficiary(ies) of the Trust.





THANK YOU