

The Alzheimer Society of Ireland
Elder Mediation
World Summit & Symposium

Mediation and Legal Issues Explored

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www.lawreform.ie

Overview

- Commission work:
 - CP Alternative Dispute Resolution (Mediation)
 - Vulnerable Adults and the Law (Capacity)
- Scheme of the Mental Capacity Bill 2008
- Mediation in the context of Capacity

Mediation

- Some provisional recommendations:
 - ADR provides a suitable means for resolving disputes in appropriate circumstances
 - Key principles be put on a statutory footing
 - ADR is a broad spectrum of structured processes
 - Mediation should be defined in legislation
 - Should be defined as facilitative, consensual and confidential process
 - Participation should be voluntary

Capacity to Mediate

- Person must understand process and understand and consent to the outcomes reached
- Self determination is key to mediation
- Is there a distinction between capacity and competencies?
- Does the mediator have a role in determining capacity?
- What is the status of a mediated agreement where there is an issue of lack of capacity?

Scheme of the Mental Capacity Bill 2008

Guiding Principles

- Presumption of capacity
- Law on capacity should be enabling not restrictive – no intervention unless necessary
- Not treated as unable to make decision unless all practical steps to assist
- Any act or decision - least restrictive of the person's rights and freedom of action.

Scheme of the Mental Capacity Bill 2008

Guiding Principles *continued*

- Due regard to right to dignity, bodily integrity, privacy and autonomy
- Account must be taken of person's past and present wishes where ascertainable
- Account taken of views of other persons with interest in welfare where known
- Any act or decision must be made in the best interests of the person

Formulation the Capacity Test

- Capacity Models
 - Status
 - Outcome
 - Functional - time specific and issue specific assessment of a person's decision-making ability

Definition of Capacity – Scheme of Bill

- Capacity means the ability to understand the nature + consequences of a decision in the context of available choices at the **time the decision** is to be made
- A person lacks capacity to make a decision if unable
 - to understand the information relevant to decision
 - to retain that information
 - to use or weigh that information
 - to communicate decision

Definition of Capacity – Scheme of Bill

- A person is not to be regarded as unable to understand **information relevant to decision** if is able to understand an explanation of it given in a way that is appropriate to his/her circumstances
- Retention for a short period only not indication of incapacity
- Information relevant to decision includes information about foreseeable consequences
- Test – balance of probabilities

Scheme of the Mental Capacity Bill 2008

Best Interests

- Encourage the person to participate, or improve his/her ability to participate
- Consider as far as is reasonably ascertainable
 - past and present wishes and feelings
 - beliefs and values
 - other factors
- Must take into account views
 - anyone named by person to be consulted
 - anyone caring/interested in welfare

Scheme of the Mental Capacity Bill 2008

Assisted and Substituted Decision Making

- Enduring Power of Attorney (attorney becomes agent of person who lacks capacity) – decisions include welfare decisions
- Personal Guardian (agent for person who lacks capacity)
- Informal decision making – personal care, health care or treatment
- Certain decisions outside scope of above

Conclusion

The background is a solid purple color with a pattern of concentric, overlapping circles in a lighter shade of purple, creating a ripple effect.

Thank you

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