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Substitute Decision-Makers

Making decisions for other people

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In Ontario, people can make their own decisions about health care and treatment when they are capable of doing so.

If a person is not capable of making a care decision, the responsibility is given to another person.

What does it mean to be *incapable*?

If a person is **incapable**, they are **not able to**:

1. **Understand** all of the information that they need to be able to make a decision,
- AND/OR**
2. **Appreciate** the likely results of making the decision (that is, how the decision might help or harm them, what will likely happen if they decide to have it or not have it).

A person is assumed to be capable unless there is a reason to believe otherwise. A person may be capable of making a decision about some treatments, but incapable of making a decision about others (for example, a person may be capable of making a decision about medicine to take, but not capable of making a decision about surgery). A person's capacity may also change with time.

What is a Substitute Decision-Maker (SDM)?

A substitute decision-maker is someone who makes decisions about the treatment and care for a person who is incapable.

What is the SDM's role?

The SDM of a *capable* person:

- Talks with them to understand their values, beliefs, and what is important to them. The SDM makes sure they have all the information needed to make the best decision for that person if they ever have to.
- Supports them. It can be very helpful to the person to have the SDM with them to listen to the health information that is being provided and to ask questions.

English: This information is important! If you have trouble reading this, ask someone to help you.

Italian: Queste informazioni sono importanti! Se ha difficoltà a leggere questo, chiedi aiuto a qualcuno.

Spanish: ¡Esta información es importante! Si tiene dificultad en leer esto, pida que alguien le ayude.

What is the SDM's role? (continued)

The SDM of a person *incapable* of making a particular healthcare decision:

- Will be asked to make that healthcare decision, such as accepting or refusing a treatment or intervention, for that person.
- Makes a decision based on the way the person would have made the decision. This may be different from the way they would make the decision for themselves or for the incapable person.

How do we determine who is/are the legal SDM(s)?

Healthcare providers rely on a list of people in the *Health Care Consent Act, 1996*, to determine who is the legal Substitute Decision-Maker.

The following is the *Health Care Consent Act* of Ontario's list of people that can be considered Substitute Decision-Makers, in order of priority:

1. A guardian with the authority to give or refuse consent to treatment.
2. An attorney for personal care with the authority to give or refuse consent to treatment.
3. A representative appointed by the Consent and Capacity Board.
4. A spouse or partner.
5. A child (16 years of age or older) or parent or a Children's Aid Society (if applicable).
6. A parent who has only a right of access.
7. A brother or sister.
8. Any other relative (related by blood, marriage or adoption).
9. The Public Guardian and Trustee is the decision-maker of last resort if no other person is capable, available, or willing to give or refuse consent.



If your loved one has completed a Power of Attorney for Personal Care form appointing you as their attorney for personal care, you or your loved one must provide a copy of this form to the healthcare staff. We will use this form to help determine the legal SDM.

There may be more than one SDM responsible for making decisions. For example, if there are 3 siblings, they have equal decision-making authority.

How do I become an SDM for my loved one?

To be an SDM for your loved one, you must meet all of the following criteria. You must:

- Be willing to accept the role of an SDM.
- Be available when decisions need to be made.
- Be capable of providing consent.
- Be 16 years of age or older.
- Not have a court order or separation agreement prohibiting you from being their SDM.

When will I be asked to make healthcare decisions as an SDM?

We will ask you only when your loved one does not have the capacity to make a specific healthcare decision.

If your loved one becomes capable, they will again make their own healthcare decision.

What kinds of healthcare decisions might I have to make as an SDM?

As an SDM, you might have to make decisions about:

- Treatment and care
- Diagnostic procedures
- Placement or transfer to other health care facilities
- End of life wishes.

What information will I receive before I have to make a decision for my loved one?

An SDM is entitled to all the information that the patient is entitled to before making any decisions.

What is informed consent?

Before any medical treatment can begin (except in specific cases of emergency), the patient or SDM must give **informed consent**. Informed consent means the doctor must give you all the information that a “reasonable person” needs to make a decision about treatment, including:

- What the treatment is about
- Benefits of the treatment
- Risks of the treatment
- Side effects of the treatment
- Other possible options or courses of action
- What may happen as a result of not having the treatment.

How do I make healthcare decisions?

Making healthcare decisions for other people can be challenging, especially when you have to do this during a difficult time. It might help to know that there are rules in the *Health Care Consent Act* that give you instructions on how to make these decision.

You must consider the person’s:

1. **Prior Capable Wishes**
2. **Best Interests**

Remember!

If the person is still capable and you are preparing for your future role as an SDM, now is a good time to talk to them about their values, beliefs, and wishes.

If the person has had an advance care planning conversation, you may have discussed some of their prior capable wishes. You may also have discussed their values and beliefs that will help you think about best interest.

The person can help you understand how you should make decisions for them in the future. Talk with them while they are still capable, if possible.

What are “prior capable wishes”?

A “**prior capable wish**” is a direction or instruction a person gave about the treatment while capable and at least 16 years old. The wish may be:

- Written in a power of attorney document
- Written in another document, such as a living will or advance directive
- Said verbally.

When there is a prior capable wish, the SDM must make decisions according to that wish, unless he or she has an order from the Consent and Capacity Board (CCB) to depart from that wish.

If the SDM or the doctor is not sure of or wants to depart from the patient’s “prior capable wishes,” the SDM or doctor may apply to the CCB for direction.

When thinking about your loved one’s prior capable wishes:

- Think of anything they may have said that applies to the decision you have to make.
- It could have been something they said, wrote down, or recorded on a video.
- Whatever information is the most recent is the most important, even if it is not written down.

What are “best interests”?

To determine your loved one’s best interests, consider:

- Their values and beliefs
- If the treatment is likely to improve their condition or prevent the condition from getting worse
- If the benefit to them outweighs the risk of harm
- If a less restrictive or intrusive treatment would be as helpful.

If the doctor thinks the SDM is not acting in the best interests of the patient, the doctor can apply to the Consent and Capacity Board (CCB). The CCB can make a ruling that requires the SDM to comply with the *Health Care Consent Act*.

What happens if there is more than one SDM and there is disagreement?

If there is disagreement about treatment decisions, our staff will help you resolve them. If there is still no agreement, there are two choices:

1. A public official in the Office of the Public Guardian and Trustee will make the decision.
2. The Consent and Capacity Board appoints one person to make the decision. That person may or may not be one of the prior SDMs.

For more information, please contact:

Rosanna Macri MRT(T), BSc, MHSc
Ethicist

Humber River Hospital

Tel: (416) 242-1000 ext. 82808

Email: rmacri@hrh.ca

Web: www.hrh.ca/ethics

This information is based on the Health Care Consent Act, 1996. To view this act, go to www.e-laws.gov.on.ca under Consolidated Law (includes Historical Versions) Statutes and Associated Regulations. The purpose of this guide is to address frequently asked questions about substitute decision-making. Although this document contains legal information, it should not be construed as legal advice.