

INFO GUIDE

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Substitute Decision Makers

This Info Guide has been prepared by the Psychiatric Patient Advocate Office in the Ministry of Health for general informational purposes only. It does not contain legal advice. If you have a question, or would like advice about your specific legal situation, you should contact a lawyer.

Who is a Substitute Decision Maker?

- A “health practitioner” under the Health Care Consent Act may include a doctor, a dentist, a chiropractor, a psychologist, a nurse, an occupational therapist and others. For simplicity, in this guide we will use the term "doctor" in place of health practitioner.

How does someone become my Substitute Decision-Maker?

- If a doctor finds you incapable of making your own decisions about any form of treatment, the doctor will look for another person to make decisions for you. This person is called a "substitute decision-maker".
- The doctor refers to a list of people (hierarchy) in the Health Care Consent Act to determine the appropriate Substitute Decision Maker. The Substitute Decision Maker is the highest-ranking person on the list who is available, capable and willing to make treatment decisions for you. A Substitute Decision Maker must be 16 years of age or older unless making a decision for their own child.

- The list is as follows:
 1. Guardian appointed by the court who has the authority to give or refuse consent to the treatment
 2. Attorney for personal care, if the power of attorney confers authority to give or refuse consent to the treatment
 3. Representative appointed by the Consent and Capacity Board who has the authority to give or refuse consent to the treatment
 4. Your spouse, common-law spouse or partner
 5. Your child (if they are over the age of 16) or your parent
 6. Your parent with right of access only
 7. Your brother or sister
 8. Any other relative by blood, marriage or adoption
- If no Substitute Decision Maker is available to make treatment decisions for you, then the Office of the Public Guardian and Trustee will make the decision on your behalf.
- If there are two or more persons (for example two sisters and one brother) of the same rank, they may share the decision-making responsibility or may choose one person to be the Substitute Decision Maker.
- If there is a disagreement among Substitute Decision Makers of equal or the same rank, the Public Guardian and Trustee may be asked to make the decision.

What legislation defines the role of the Substitute Decision Maker?

- The *Health Care Consent Act* sets out the rules that apply to substitute decision-making for treatment decisions. The *Health Care Consent Act* also outlines when individuals may apply to the Consent and Capacity Board, an independent tribunal, on consent and capacity related matters. Applications to the Consent and Capacity Board are discussed in more detail below.

What does it mean to be incapable?

- Under the *Health Care Consent Act*, in order to be capable with respect to consenting to a treatment, admission to a care facility or personal assistance services, you must:
 - be able to understand the information relevant to the decision; **and** or
 - be able to appreciate the reasonably foreseeable consequences of making or not making a decision,

if you do not satisfy either or both parts of this test, you will be found "incapable" for the purposes of that treatment decision.

- You are presumed to be capable unless there is a reason to believe otherwise. You may be capable of consenting to some treatments and incapable of consenting to others. Your capacity also may fluctuate with time.

What information does my Substitute Decision Maker receive before they make a decision?

- Before any treatment begins (except in specific cases of emergency) either you or your Substitute Decision Maker must give "informed consent" to the treatment. Your Substitute Decision Maker is entitled to all of the information that you would be entitled to receive before making a decision about consenting to the treatment.
- "Informed consent" means that the doctor has an obligation to provide information that a "reasonable person" would need to make a decision about treatment, including answers to any questions you or your Substitute Decision Maker may have, regarding:
 - The nature of the treatment;
 - The expected benefits of the treatment;
 - The material risks of the treatment;
 - The material side effects of the treatment;
 - Alternative courses of action; and
 - The likely consequences of not having the treatment.

How will the Substitute Decision Maker make treatment decisions?

- Your Substitute Decision Maker must comply with the rules for decision-making set out in the *Health Care Consent Act*. If your Substitute Decision Maker knows that you, when capable (and after attaining 16 years of age), indicated a wish with regard to the treatment (prior capable wish), then your Substitute Decision Maker must follow that wish.
- If no wish is known, or if it is impossible to comply with your wish, then the Substitute Decision Maker must make decisions in your "best interests". In determining your "best interests", your Substitute Decision Maker must consider:

- Your values and beliefs;
- Any wishes you expressed (which the Substitute Decision Maker is not otherwise required to follow);
- Whether the treatment is likely to improve your condition or well-being, prevent the condition or well-being from deteriorating or reduce the rate or extent of deterioration;
- Whether your condition or well-being is likely to improve, remain the same or deteriorate without the treatment;
- Whether the benefit to you is expected to outweigh the risk of harm; and
- Whether a less restrictive or intrusive treatment would be as beneficial.
- If your doctor thinks your Substitute Decision Maker is not following the decision-making rules set out in the *Health Care Consent Act*, the doctor may apply to the Consent and Capacity Board for a determination of whether the Substitute Decision Maker is complying with the rules. If a Substitute Decision Maker or a doctor is uncertain as to a "prior capable wish" or if the Substitute Decision Maker or doctor wishes to depart from a "prior capable wish," the Substitute Decision Maker or doctor may apply to the Consent and Capacity Board for directions.

What are “prior capable wishes”?

- A prior capable wish is a direction or instruction a person has given relating to the treatment while they are capable and at least 16 years old. The wish may be written in a power of attorney or another document or it may have been expressed verbally. When there is a "prior capable wish," the Substitute Decision Maker must give or refuse consent to the treatment according to the wish unless there is an order from the Consent and Capacity Board allowing them to depart from the wish.

What if my Substitute Decision Maker or doctor isn't sure whether I've made a wish or what my wish means? What if he or she doesn't agree with my wish?

- A Substitute Decision Maker or doctor may apply to the Consent and Capacity Board to ask for "directions" about your wish. For example, if your Substitute Decision Maker or the doctor isn't sure whether you were capable of making a decision when you made your wish or whether your wish applies to your current circumstances, he or she can ask the Consent and Capacity Board to

give directions. Once the Consent and Capacity Board makes a decision, the Substitute Decision Maker must follow the directions given.

- If your doctor or SDM applies to the Consent and Capacity Board for directions, you will be a party to the hearing. You have the right to speak at the hearing to give information to the Consent and Capacity Board. You may hire a lawyer to represent you. For information about the process of Consent and Capacity Board hearings, please look at our info guide called "Your Rights as a Psychiatric Patient" or visit the Consent and Capacity Board website www.ccboard.on.ca

What if I don't agree with my Substitute Decision Maker's decisions about my treatment?

- If you do not believe that your Substitute Decision Maker is making decisions appropriately, there are a number of things you may do. The best action to take depends on your particular circumstances. Below are some different options.
- You may apply to the Consent and Capacity Board to review your doctor's decision that you are incapable of making treatment decisions. If the Consent and Capacity Board decides that you are capable, you will be able to make decisions about your own treatment. You may apply to the Consent and Capacity Board for a review of a finding of incapacity by completing a "Form A", which you may obtain from the Consent and Capacity Board directly (or online) or from your Patient Advocate or Rights Adviser.
- If you are incapable with respect to a proposed treatment, you may apply to the Consent and Capacity Board to have a representative appointed who will make treatment decisions for you. You may ask the Consent and Capacity Board to appoint a person other than your current Substitute Decision Maker. ("Form B")
- If you are capable of making a power of attorney for personal care, you may do so and name a different person to be your "attorney". An attorney takes priority as Substitute Decision Maker over all other persons except a guardian of the person.

Questions?

- If you have questions, contact your local Patient Advocate or Rights Adviser or call the central office of the Psychiatric Patient Advocate Office at 1-800-578-2343.