

Substitute Decision Making



When a Person is no longer able to make treatment decisions, someone else must make them. In this guide we talk about who, how and what is the role of a Substitute Decision-Maker (SDM).

Who Makes Treatment Decisions?

A Person who is mentally capable will be asked to decide about the specific treatment decision. A Person is mentally capable when they are evaluated to be ‘able to understand the information about the treatment and able to appreciate the effects of treatment or non-treatment.’

If the Person is not mentally capable, then members of the health care team will look for a Substitute Decision Maker (SDM) by following the Health Care Consent Act.

Who May Act As Substitute Decision-Maker?

The health care team will look for the first Person on the Hierarchy who is willing and capable to act as SDM. See the diagram* which is based on the Health Care Consent Act.

The SDM must be:

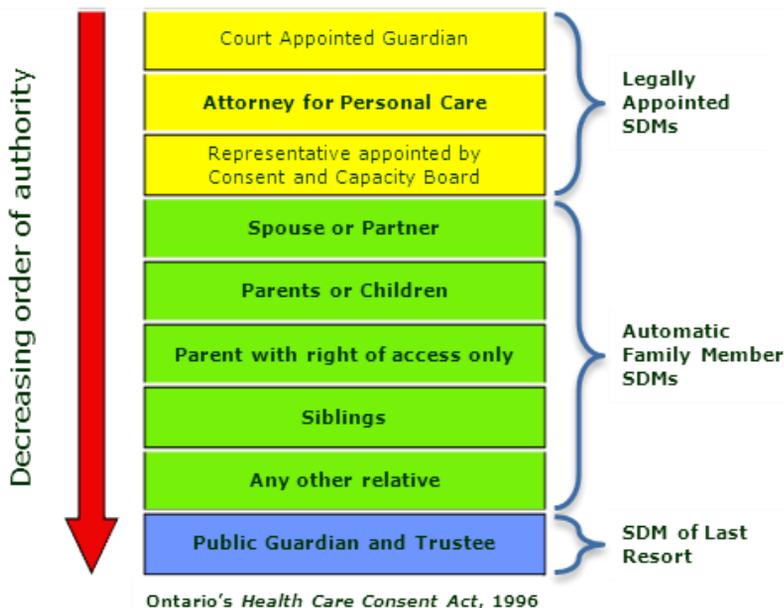
- ❖ 16 years or older
- ❖ willing to take on the role
- ❖ available to connect with health care providers (in person, by phone, e-mail or fax) within a reasonable amount of time
- ❖ mentally capable to make decisions about treatment.

If an appropriate SDM cannot be found, the Public Guardian and Trustee will make the decision to consent to, or refuse, the treatment.

POA is the informal name for someone who is the “Attorney for Personal Care” and holds a **Power Of Attorney** document (thus “POA”). Here the name “Attorney” does not mean a lawyer.

This Person does not need to be a family member.

Substitute Decision-Maker Hierarchy



*Thank you to Drs. Nadia Incardona and Jeff Myers of Michael Garron Hospital for sharing this diagram.

Who Assesses Mental Capacity?

The health professional who proposes the treatment or service assesses mental capacity for treatment decisions.

When a Person needs help to make a treatment decision:

Unconscious due to a recent traumatic injury, 26-year-old Jim is unable to take part in decisions about his care. His parents state they are not willing to make decisions for Jim (mainly because they live so far away). Jim has two brothers. Jim's girlfriend, Rose, arrives with a Power of Attorney for Personal Care document which says she is Jim's chosen Substitute Decision-Maker. Rose will make treatment decisions for Jim.

Hospital staff informally call Rose the "POA", or the Person with the Power Of Attorney.

How Does an Substitute Decision-Maker Make Decisions?

An SDM must first think about the Person's prior wishes, which were made while mentally capable. These prior wishes may be spoken or written. The SDM must follow them as much as possible. If the SDM does not know of any prior wishes, or the prior wish cannot be followed, then the SDM must think about what is in the Person's best interests according to the Person's values and beliefs.

Remember, as SDM, you are not making a decision that you feel you would make for yourself.

How Does the Substitute Decision-Maker Decide What Is Best For the Person?

'Best interests' requires the SDM to think about the values and beliefs the Person held while mentally capable. The SDM must also think about what will improve or change the Person's condition for the better.

What If Prior Wishes of the Person Do Not Match Current Wishes?

The most recent wishes of the Person take over from earlier wishes.

If, for example, the Person had said "I want everything done to stay alive" and more recently "My life has no more meaning for me and I just want to die peacefully" then the SDM must consider this second wish.

What Information Will the Substitute Decision-Maker Think About?

The healthcare team will give the SDM the same information as they would to the Person about:

- What the treatment is meant to do
- Likely benefits
- Possible harms and side effects
- Other options
- What could happen if there is no further treatment

What Happens If There Are Disagreements Between Substitute Decision-Makers?

At times there are several SDMs of equal rank and they disagree. For example, a Person has no partner and four children. Then the health care team looks to all four children for a joint decision. If all four children do not agree, options include:

- The Person may be able to appoint one or more of the children under a Power of Attorney document
- Ask for help from spiritual care, social work, ethics, patient relations, etc.
- Apply to the Consent and Capacity Board to appoint one or more family members to be representatives
- Have the public official from the Office of the Public Guardian and Trustee make decisions.

What If the Substitute Decision-Maker Is Not Doing Their Job?

Sometimes family members or health care team members think the SDM is not making a decision based on the Person's wishes or in the Person's best interests. The health care team will try to help with discussions. Also, anyone may ask for help from the Consent and Capacity Board.

Questions? Talk to your health care team members about this complex topic. Find a sample Power of Attorney Kit at the Ministry of Attorney General here:

<https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/poakit.php>

This guide provides general information about the current law in this subject area. We recommend you consult a lawyer if you want professional legal advice to meet your specific needs in this subject area.

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