

## What if there is no appropriate SDM?

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

## What if there is conflict among SDMs of the same ranking?

If two or more persons of equal ranking (e.g., an adult child and a parent) disagree about whether to give or refuse consent, the Public Guardian and Trustee may be asked to make the decision.

Prior to contacting the Public Guardian and Trustee, efforts should be made to resolve the conflict. This may include an ethics consultation.

Alternatively, in some cases, one of the persons may apply to the Consent and Capacity Board to be appointed the incapable person's legally appointed substitute decision-maker ("Representative"). Ask the healthcare team if you have questions about this option.

### On-line resources include:

#### Consent and Capacity Board

<http://www.ccboard.on.ca/>

#### Office of the Public Guardian and Trustee

<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/>

#### Substitute Decisions Act

<https://www.ontario.ca/laws/statute/92s30>

#### Health Care Consent Act

<https://www.ontario.ca/laws/statute/96h02>

For more information or to request an ethics consult, speak with a healthcare provider or contact the Centre for Clinical Ethics, within Unity Health Toronto, at 416-530-6750.

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# Substitute Decision- Making

A quick guide\* for  
healthcare consumers &  
and healthcare providers

\*This guide provides general information about the current law in this subject area. However, legal information is not the same as legal advice, where legal advice is the application of law to an individual's specific circumstances. Although we have tried to make sure that the information in this guide is accurate and useful, we recommend that you consult a lawyer if you want professional legal advice in this subject area that is appropriate to your particular situation.

## Substitute Decision-Making

*48 year old Misty Goldstein has been living with her current partner for 8 months. She has a 24 year old-child from a previous relationship, parents, and three siblings. She is experiencing a relapse of her schizophrenia and is unable to make treatment decisions.*

*Unconscious due to a recent traumatic injury, 16 year old John Lee is unable to participate in decisions about his treatment and care. His parents speak little English, but his 2 siblings are fluent.*

*68 year old Fred Stewart has been in a nursing home for many years and is now suffering from advanced dementia. He has limited insight into his needs. His only regular visitor is his sister. He also has two sons. There has been no contact between father and sons in more than 20 years.*

In each of the above situations, the individual is not capable of making most, if not all, treatment decisions. In other words, the individual is unable to understand the nature of the proposed treatment, appreciate its foreseeable consequences, or communicate a decision.

The purpose of this document is to provide information to healthcare consumers and providers by addressing some frequently asked questions related to substitute decision-making.

## Who is the appropriate substitute decision-maker? (SDM)

When an individual has been assessed as not capable of making a treatment decision, a person to make decisions on behalf of the individual must be identified.

According to the *Health Care Consent Act 1996*, persons who may give or refuse consent in descending order of authority include the incapable person's:

1. Guardian;
2. Attorney for Personal Care;
3. A Representative appointed by the Consent and Capacity Board;
4. Spouse or Partner;
5. Child (>16 years) or Parent or Children's Aid Society (if applicable);
6. Parent with only right of access;
7. Brother or sister; or
8. Any other relative.

## What other requirements for being an SDM must be met?

The SDM(s) identified above must also meet the following criteria:

- (a) Capable to make treatment decision;
- (b) At least 16 years of age;
- (c) Not prohibited by court order or separation agreement;
- (d) Is available; and
- (e) Is willing to assume the responsibility of giving or refusing consent.

## What are the principles for giving and refusing consent?

The SDM must give or refuse consent in accordance with the following principles:

1. Previously expressed capable wishes of the individual (aged 16 or over) that are applicable to the situation; or
2. If no previously expressed capable wishes as described above, then best interests of the individual.

## What does "best interests" mean?

In determining what is in the best interests of the individual, the following should be taken into consideration:

- (a) values and beliefs the individual held when capable;
- (b) expressed wishes other than those that meet the age, capability, and applicability criteria (above); and
- (c) the following factors:
  1. will the treatment likely improve the individual's condition, prevent deterioration, or decrease rate of deterioration;
  2. whether the individual's condition is likely to improve, remain the same or deteriorate without the treatment;
  3. whether the expected benefit of the treatment outweighs the risk of harm; and
  4. whether a less restrictive or less intrusive treatment would be as beneficial as the proposed treatment.