

Tip Sheet # 2

HIERARCHY of Substitute Decision Makers (SDMs) in the Health Care Consent Act

Requirement for an Informed Consent¹

- Before providing any treatment to a Patient, **HEALTH PRACTITIONERS²** have the legal and ethical **duty to obtain INFORMED CONSENT³ from a Patient**, if the Patient is **MENTALLY CAPABLE** to make the decision about the particular treatment being offered⁴.
- **The Health practitioner** proposing the treatment to the Patient is **responsible for determining whether the patient is mentally capable to consent to the treatment offered⁵**. If a Plan of Treatment⁶ is proposed to the Patient, one Health practitioner on behalf of all the Health practitioners involved in the plan may determine the Patient's capacity with respect to the treatments referred to in the plan⁷.
- If the Health practitioner is of the opinion that the Patient is not mentally capable to consent to the particular treatment⁸, then the **Health practitioner must turn to the Patient's SUBSTITUTE DECISION MAKER (SDM)** who gives or refuses the informed consent on behalf of the Patient.
- In an **EMERGENCY**, if the Patient is mentally incapable or unable to communicate with the Health practitioner and a delay to obtain informed consent would put the Patient at risk⁹, **Health Practitioners do not need consent in order to treat** but they must **follow any known WISHES** of the Patient in respect to treatment.
- Health Practitioners may also encourage Patients to engage in Advance Care Planning which is done by discussing with the Patient who would be their automatic SDM (see next page) and their right to choose someone to act as SDM which is done by preparing a Power of Attorney for Personal Care. Advance Care Planning also involves the Patient **communicating** any wishes they may have about future care and expressing their values, beliefs, and approach to quality of life **to his or her future SDM. Health Practitioners do not take direction from the Patient's advance care planning wishes.** These are directions to the SDM although the Health practitioner should encourage the Patient to do this with their future SDM.

Who is a Patient's Substitute Decision Maker for Health Care?

Patients need to know who is their future SDM.

- A Patient needs to understand who would be his/her Substitute Decision Maker for Health Care **if he/she became mentally incapable** to make health decisions.
- Every Patient in Ontario **AUTOMATICALLY** has a person who will have legal authority to act as his/her SDM if they become incapable.
- The *Health Care Consent Act* states that a **Patient's SDM will be the person or persons who are highest ranking on the HIERARCHY of SDMs** listed in that legislation **who meet the REQUIREMENTS** to be an SDM.
- A Patient may do Advance Care Planning and may express wishes about future care¹⁰ and may decide who he/she may want as his/her future SDM. This is done either by:
 - the **Patient confirming that he or she knows who is his/her automatic future Substitute Decision Maker in the hierarchy list**¹¹ that is in the *Health Care Consent Act* and that he or she is satisfied that that person should so act as SDM when the Patient is incapable OR
 - the **Patient choosing someone else to act as SDM by preparing a Power of Attorney for Personal Care**¹². This can include persons who would otherwise be on the hierarchy or those who are not, as long as they meet the requirements of an Attorney set out in the *Substitute Decisions Act*. To appoint someone as an Attorney, the Patient must sign a POAPC document that meets the legal requirements¹³ and cannot just orally appoint someone to be his or her Attorney.

Why Health Practitioners need to know who is the Patient's SDM?

- **Health Practitioners need to know who is the Patient's SDM** because Health Practitioners must get an informed consent before providing care to Patients, except in an emergency.
- That **consent must come from the patient, if mentally capable** with respect to the particular treatment proposed **or from the Patient's SDM** if the Health practitioner determines that the **Patient is not mentally capable** to provide consent.

The Hierarchy of SDMs in the Health Care Consent Act

The Hierarchy

- The following is the Hierarchy of SDMs in the Health Care Consent Act, s.21:
 1. **Guardian of the Person** with authority for Health Decisions
 2. **Attorney for personal care** with authority for Health Decisions
 3. **Representative** appointed by the Consent and Capacity Board
 4. **Spouse or partner**
 5. **Child or Parent** or CAS (person with right of custody)
 6. **Parent with right of access**
 7. **Brother or sister**
 8. Any other **relative**
 9. **Office of the Public Guardian and Trustee**

How to Use the Hierarchy

- Health Practitioners should **start at the top of the Hierarchy** and work their way down, making inquiries to ensure they are speaking with the right person or persons. If the SDM is a Guardian of the Person, an attorney named in a POA Personal care or a Representative appointed by the Consent and Capacity Board, the SDM should be able to provide a document that proves this.
- **A Patient's SDM** is the person or persons in that particular Patient's life who are the **highest ranking in the hierarchy that meet the "requirements"** (as set out below) to act as SDM.
- If the **highest ranking person** in the Patient's life does **not meet the requirements**, the Health practitioner **must turn to the NEXT highest ranking SDM** that meets the requirements. Health practitioners must decide if the SDM is "mentally capable" to make the treatment decisions and meets all the other requirements to be an SDM. .
- **Even if a person is highest ranking, he/ she may refuse to act as SDM** for the Patient. If that happens, then the Health practitioner may turn to the next highest ranking SDM that meets the requirements.
- If there is **more than one person at any level** in the hierarchy who meet the requirements to be SDM, **then all those people are entitled to act as SDM** for the Patient. They may all decide together or they may decide amongst themselves as to which of them will act as the SDM. The Health practitioner cannot choose which of the equal ranking SDMs may act

- **A Patient, if mentally incapable, ALWAYS has an SDM** even if he or she hasn't prepared a POAPC and doesn't have any family to act as SDM. The Public Guardian and Trustee is the Patient's SDM if there is no one higher on the hierarchy list that meets the requirements to be SDM. **Documents that purport to override this default to the PGT as last resort substitute decision maker are neither valid nor legally enforceable.**
- If equal ranking SDMs cannot agree on a decision for the Patient, the Health practitioner **MUST** turn to the Public Guardian and Trustee (PGT) for the decision for the Patient and the PGT¹⁴ is required to make this decision.

REQUIREMENTS for the SDM - HCCA s.20

The SDM in the list may give or refuse consent for treatment, admission to a long-term care facility, or personal assistance services in a long-term care facility only if he or she is:

- i) **capable** with respect to treatment proposed,
 - ii) **16 years old**, unless he or she is the parent of the incapable person,
 - iii) there is **no court order or separation agreement** prohibiting access to the incapable person or giving or refusing consent on his or her behalf,
 - iv) is **available**, and
 - v) is **willing** to assume the responsibility of giving or refusing consent.
- The **Health practitioner is responsible for determining if the highest ranking SDM meets these requirements.** The health professional proposing the treatment therefore is responsible to form an opinion about the capacity of the SDM to make the decision about the treatment for the Patient.
 - The **Health practitioner is entitled to ask the SDM questions** about themselves - questions to determine capacity, questions about their family relationship (whether daughter, son, spouse, and status of relationship with spouse such as whether they are living together, whether they may be separated etc.) and any other questions that would assist the Health practitioner in satisfying themselves that the SDM does meet the requirements to act as an SDM.
 - **Health practitioners may request to see documents** that the SDM believes gives him/her decision making authority such as the Court order for Guardianship or the Power of Attorney for Personal Care, if any.
 - If the Health practitioner has reason to believe **that a Power of Attorney for Personal Care document is not valid** – for example, the Health practitioner knows that the patient had advanced dementia and is likely not to have capacity to understand and appreciate what a POAPC is or to understand what he or she

might be signing if presented with such a document, and suddenly the Health practitioner is presented with a new, recently signed POAPC that supposedly gives authority to a new SDM that was not previously involved in the Patient's life – then the **Health practitioner will have reason to question the validity** of the new POAPC and should make further inquiries as to whether the named attorney has proper authority to act as SDM .

- If the highest ranking person in the Patient's life does not meet the requirements to be the SDM, the Health practitioner must turn to the **NEXT highest ranking SDM** that meets the requirements

Ranking

- A Person **lower on the Hierarchy may give consent only if there is no person higher** on the list that meets the requirements.¹⁵
- **EXCEPTION:** A family member present or contacted may consent or refuse consent if he or she believes:
 - no person higher or with the same ranking exists,**Or**
 - if a person higher on the list exists, that person is not a guardian of the person, attorney for personal care, or Board appointed representative with authority to consent AND that person would not object to him or her making the decision.¹⁶

Definition of AVAILABLE¹⁷

A person is **available** if it is possible, within a time that is reasonable in the circumstances, to communicate with the person and obtain a consent or refusal. This means that they can be contacted by telephone, email, fax, or other means.

How to Identify the SDMs in the Hierarchy

1. Guardian of person with authority for treatment

This person is someone who has **an order from the Superior Court of Ontario naming him/her the GUARDIAN of the PERSON** for the incapable person. This is NOT the Guardian for Property of an incapable person and is NOT the Statutory Guardian of the incapable person, who only has authority over the person's money/property. The same person may be appointed by the Court to be Guardian of

the Person and Guardian for Property or this same person may be the Statutory Guardian for the person but unless a person is the GUARDIAN OF THE PERSON they do not fall into this category of decision maker.

This person should be able to produce a court order (a document) confirming his or her authority as Guardian of the Person and the scope of that authority (Appointed by process described in Section 55-61 of the *Substitute Decisions Act*). It is important to review the document to ensure that the Guardian of the Person has authority over this specific decision and that the order does not include any limitations.

2. **Attorney for personal care with authority for health care (Power of Attorney for Personal Care)**

This person is the **ATTORNEY** as named in a **POWER OF ATTORNEY for PERSONAL CARE**. This person **must be able to produce, when requested, a Power of Attorney for Personal Care (a document)** that has been properly signed, and witnessed, and that is otherwise valid, as proof of his or her authority and scope of authority. This is NOT a person who is named as the incapable person's attorney for Property in a Continuing Power of Attorney for Property. It is important to review the document to ensure that the Power of Attorney gives authority over the specific decision and that there are no limitations to their authority.

This person ONLY gets authority to act as SDM for health treatment, admission to a long-term care facility or personal assistance services in a long-term care facility if the person who is the grantor of the Power of Attorney for Personal Care has been found by the Health practitioner or evaluator as defined in the Health Care Consent Act,¹⁸ to be mentally **incapable for treatment, admission, or personal assistance services** as the case may be, and requires such a decision to be made on his or her behalf.

3. **Representative appointed by CCB**

This person is someone who has been **appointed by the Consent and Capacity Board to make the decision CURRENTLY required by the incapable person** for treatment, admission to a long-term care facility, or personal assistance services in a long-term care facility. The Board may also authorize the Representative to make a wider range of decisions for the incapable person related to treatment, admission to a long-term care facility, or personal assistance services.

This application may be made by a person (a friend or family member of the incapable person) who is at least 16 and who is mentally capable with respect to the required

decision. The Board will only consider this appointment **if a finding of incapacity has been made and confirmed by the Board, the incapable person does not object to the appointment, and the appointment is in the best interests of the person.**

This application may also be made by the person who has been found incapable for a particular health purpose (treatment, admission, personal assistance services).¹⁹

An application cannot be made if the person has a guardian or attorney for personal care who has authority to make the decision.

4. Spouse or partner

Two persons are “**spouses**” if they are

(a) **married** to each other; or

(b) **living in a conjugal relationship** outside marriage and,

(i) have cohabited for **at least one year**,

(ii) are together the parents of a child, or

(iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*.²⁰

They can be spouses if they are both of the same sex or the opposite sex

They are **not spouses if they are not yet divorced, but are living separate and apart within the meaning of the *Divorce Act (Canada)***. They do not need a formal written separation agreement to be considered separated and therefore “not spouses”.

Two people are “**partners**” **if they have lived together for at least one year and have a close personal relationship that is of primary importance in both persons’ lives**²¹. This can include friends who have lived together for at least one year (a non-sexual relationship) and “have a close personal relationship that is of primary importance” in both their lives. However, just because they are roommates or housemates, they may not be partners because they may not have a close personal relationship that is of “primary importance” in both their lives. Relatives living together, for example a parent and adult child, may meet this definition if they are living together and have a close personal relationship that is of primary importance in both their lives

5. Child or parent or Children's Aid Authority (CAS) or other person lawfully entitled to give or refuse consent to treatment in place of parent – does not include parent with right of access only - if CAS or person in place of parent, does not include parent. For the Child to act as SDM, he/ she must be at least 16 years of age.

6. Parent with right of access only.

7. Brother or sister

8. Any other relative. People who do not meet the above definitions but are related by **blood, marriage or adoption**, are relatives²²

The Public Guardian and Trustee is the Patient's SDM if there is no one higher on the hierarchy list that meets the requirements to be SDM. **Documents that purport to override this default to the PGT as last resort substitute decision maker are neither valid nor legally enforceable.**

ENDNOTES

¹ This Tip Sheet 2 is second in a series on Health Care Consent and Advance Care Planning. Please see Tip Sheet 1 for more information on Health Care Consent and Advance Care Planning- the Basics available on the ACE website at www.ancelaw.ca

² *Health Care Consent Act*, s.2. Definition of Health Practitioner

³ *Health Care Consent Act*, s.11 (2) Definition of informed consent. See also s.11(1) Definition of Consent

⁴ *Health Care Consent Act*, s.10 and s.17 Requirement to obtain consent before treatment and requirement for rights information if Health Practitioner of opinion that Patient is not mentally capable to give or refuse consent

⁵ *Health Care Consent Act*, s.10 (1) Requirement to obtain consent before treatment

⁶ *Health Care Consent Act*, s. 2(1) and s.13 Definition of Plan of Treatment

⁷ *Health Care Consent Act*, s.2 (1) and s.13 Plan of Treatment.

⁸ *Health Care Consent Act*, s. 4 and s.15 Capacity defined and Capacity depends on Treatment and time

⁹ *Health Care Consent Act*, s.25 Definition of emergency

¹⁰ See Tip Sheet 1 Health Care Consent and Advance Care Planning –the Basics

¹¹ *Health Care Consent Act*, s.20 Hierarchy of SDMs

¹² *Substitute Decisions Act*, s.46 and HCCA, s.20 Definition of POAPC and ranking of attorney in POAPC on HCCA Hierarchy

¹³ *Substitute Decisions Act*, s. 44 and 46.

¹⁴ *Health Care Consent Act*, s.20(6) Requirement for PGT to act as SDM if conflict between equal ranking SDMs

¹⁵ *Health Care Consent Act*, s.20(3) How Hierarchy operates

¹⁶ *Health Care Consent Act*, s.20(4) Ranking

¹⁷ *Health Care Consent Act*, s.20(4) Definition of Available

¹⁸ *Health Care Consent Act*, s. 2(1). Definition of Evaluator

¹⁹ SEE Consent and Capacity Board information Sheets - "Application to have a Representative Appointed" and "Applying to the Board to be Appointed a Representative" available on the Consent and Capacity Board website. See also sections *Health Care Consent Act* s.33, s.51, and s.66.

²⁰ See *Health Care Consent Act*, s.20(7) (8) Definition of Spouse

²¹ *Health Care Consent Act*, s.20(9) Definition of Partner

²² *Health Care Consent Act*, s.20(10) Definition of Relative