



# SUBSTITUTE DECISION MAKING

A quick guide\* for patients,  
families and healthcare  
team members

*“48 year old Misty 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 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 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 any, treatment decisions. In other words, the individual is unable to understand the nature of the proposed treatment, appreciate its likely consequences, or communicate a decision.

The purpose of this document is to provide

information to patients, families and healthcare team members 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, someone else must be chosen to make decisions for the individual. 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 be:

- a. Capable to make treatment decision;
- b. At least 16 years of age;
- c. Not prohibited by court order or separation agreement;
- d. available; and
- e. 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 INTEREST' 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. wishes expressed by an individual who was less than 16, or otherwise incapable
- C. the following factors:
  1. whether the treatment will 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.

### WHAT IF THERE IS NO APPROPRIATE SDM?

Health Care Consent Act  
[www.ontario.ca/laws/statute/96h02](http://www.ontario.ca/laws/statute/96h02)

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, one of the persons may apply to become the person's legally appointed substitute decision-maker.

### ONLINE RESOURCES INCLUDE:

Consent and Capacity Board  
[www.ccboard.on.ca/](http://www.ccboard.on.ca/)

Office of the Public Guardian and Trustee [www.attorneygeneral.jus.gov.on.ca/english/family/pgt/](http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/)

Substitute Decisions Act  
[www.ontario.ca/laws/statute/92s30](http://www.ontario.ca/laws/statute/92s30)

St. Joseph's Health System is a member of the Centre for Clinical Ethics at St. Michael's Hospital in Toronto.



\*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.