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Ethics FAQ  **Identifying the Substitute Decision Maker**



This **Ethics Frequently Asked Question (FAQ)** guide has been prepared in collaboratione between **Regional Ethics Network** and Hamilton Health Sciences’ **Office of Clinical & Organizational Ethics** for the purpose of educating staff, physicians and learners. *It does not constitute legal advice.* For more information about the Regional Ethics Network, and other FAQs please visit our [website](http://regionalethicsnetwork.com/wp/). If you have questions about this topic as it applies to a specific case, you may contact **Regional Ethicsit** for support (Monday-Friday, 8am-5pm) or email [regionalethics@HHSC.CA](http://regionalethicsnetwork.com/wp/wp-content/uploads/2016/12/regionalethics@HHSC.CA)

**Example Scenario:**

Mr. Rouse is a 86 year old gentleman admitted to hospital from a long term care facility with a stroke and underlining history of dementia. His wife is currently living at home receiving daily homecare for a recent diagnosis of CHF and diabetes. Mr. Rouse has three children, one lives locally and the other two live out of province. The physician has attempted to discuss goals of care with Mr. Rouse, however, the physician deemed him incapable to make this decision. Who should be making this decision on Mr. Rouse’s behalf?

**How do we know if a person is capable to make his or her own health care decision?**

Under Ontario law (the Health Care Consent Act, 1996), *there is a presumption that patients are capable*. Informed and capable patients are legally and ethically entitled to accept or refuse treatments offered by the healthcare team, even if treatment refusal is potentially harmful. A capable person must have the ability to understand:

* The nature of the treatment being proposed
* The expected benefits to the patient
* The material risks and side effects
* The likely consequences of having or not having the treatment

When a patient’s capacity is in question, the health care professional (HCP) must first assess whether the patient is capable of making this treatment decision. Barriers to communication should be identified and addressed to provide the patient with every opportunity to participate in decision-making. This may include consultation with a Speech Language Pathologist (SLP), utilization of medical interpretation and/or adjustment of patient’s medication.

**Who determines if a patient is capable of making medical decisions?**  
The person proposing the treatment or care plan is the person who is responsible for assessing whether a patient is capable of making this treatment decision. Only after a finding of incapacity, can a HCP turn to a Substitute Decision Maker for direction. The finding of incapacity should be documented in the patient’s health record, and the patient should be informed of this finding.

How do we determine who is the Substitute Decision Maker (SDM)?

The Health Care Consent Act provides a ranked list of people who can be the patient’s SDM. The person who is *highest on the list, who is capable, willing and available to act as SDM* should be approached for healthcare decisions:

* the incapable patient’s ***guardian***, if he/she has authority to give/refuse consent for treatment; i.e. court appointed individual or agency (PG&T)
* the incapable patient’s ***attorney for personal care* (POA)**, if he/she has authority to give/refuse consent for treatment;
* the incapable patient’s ***representative appointed by the Consent and Capacity Board*** if he/she has authority to give/refuse consent for treatment;
* the incapable ***patient’s spouse or partner***;
* the incapable patient’s ***child or parent*** *(*or Children’s Aid Society or other lawfully entitled person able to give or refuse consent for treatment in place of the parent. Note: If the Children’s Aid Society or other person has this authority, the parent is not included in this ranking.)
* the incapable patient’s***parent who has only a right of access***;
* the incapable patient’s ***brother or sister***;
* ***any other relative***of the incapable patient.

The Office of the Public Guardian & Trustee addresses situations where there is no willing and available SDM, or there are 2 or more equally ranking SDMs who disagree regarding a decision for a patient.

**What is the difference between a SDM and Power of attorney for personal care POA?**

A POA is a person identified by the patient, in writing, as their decision maker for personal care, should they become incapable. If there is no a court appointed SDM, and the patient has not identified a POA, then an SDM is determined using the ranking order above.

**What are the requirements to be an SDM?**

**To provide consent on behalf of an incapable patient, the SDM must be:**

* capable with respect to the treatment proposed (NOTE: The SDM/POA must meet the same test of capacity as the patient)
* at least 16 years old, unless he/she is the incapable patient’s parent
* not prohibited by court order or separation agreement from having access to the patient or decision-making power on behalf of the patient
* willing and available to assume responsibility for giving/refusing consent. (NOTE: Meaning of “available” : 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. 1996, c. 2, Sched. A, s. 20 (11).)

For More Information:

* For information on the Health Care Consent Act of Ontario and the Substitute Decisions Act of Ontario, visit the Consent and Capacity Board website : [www.ccboard.on.ca](http://www.ccboard.on.ca)
* [insert local sources/policies/guidelines here]