

**LIST OF SUBSTITUTE DECISION MAKERS WHO MAY
GIVE OR REFUSE CONSENT IN RESPECT TO HEALTH CARE MATTERS
IF A PERSON IS NOT MENTALLY CAPABLE**

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Introduction

Attorneys named in Powers of Attorney for Personal Care are only one kind of substitute decision-maker (SDM). A person ALWAYS has an SDM for health care even if he/she has never executed a Power of Attorney for Personal Care. The following is the list of SDMS for health care (treatment, admission to a long-term care home and personal assistance services in a long-term care home) in order of priority based on section 20(1) of the *Health Care Consent Act*:

1. Guardian of person with authority for treatment

This person would be someone who has applied to court to become the Guardian of the Person for the incapable person.

This is NOT the same thing as the Guardian for Property of an incapable person or the Statutory Guardian of the incapable person. 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 produce a court order (a document) confirming his or her authority as Guardian of the Person and the scope of that authority.

2. Attorney in the Power of Attorney for Personal Care with authority for treatment

This person is the Attorney as named in a Power of Attorney for Personal Care only. This person should be able to produce 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, as well as the scope of this 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.

The Attorney for Personal Care ONLY gets authority to act as a SDM for health treatment, admission to a long-term care home or personal assistance services in a long-term care home if the person who is the grantor of the Power of

Attorney for Personal Care has become 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 the Consent and Capacity Board

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 home or personal assistance services in a long-term care home. 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 home or personal assistance services.

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

The Board will only consider this appointment if a relevant finding of incapacity has been made and the incapable person does not object. This application may also be made by the person who has been found incapable for a particular health purpose (treatment, admission, personal assistance services).

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, or
 - ii) are the parents of a child together, or
 - iii) have together entered into a cohabitation agreement under s.53 of the *Family Law Act*.

Two persons are not spouses if they are living separate and apart as a result of a breakdown of their relationship.

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 person's lives. This can include same-sex partners, as well as friends who have lived together for at least one year in a non-sexual relationship and “have a close personal relationship that is of primary importance” in both their lives.

5. Child or parent or Children's Aid Society or other person lawfully entitled to give or refuse consent to treatment in place of the incapable person's parent

This does not include a parent who only has a right of access.

If a Children's Aid Society or other person is entitled to give or refuse consent in place of the parent, this does not include the parent.

6. A parent who only has a right of access

7. Brother or sister

8. Any other relative

People are relatives if they are related by blood, marriage or adoption.

* **If no person meets the requirement to be a SDM, then the Office of the Public Guardian and Trustee is the incapable person's decision-maker. Documents that purport to override this default to the Public Guardian and Trustee as a last resort SDM are not appropriate and not legally enforceable.**

* If there is a conflict between persons in the same category and they cannot agree and claim to be SDM above others, the Public Guardian and Trustee **SHALL** act as the decision-maker. The Public Guardian and Trustee does not choose between the battling decision-makers but "shall make the decision in their stead."

Requirements for the SDM – HCCA, s.20(2)

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

- i) Capable with respect to treatment,
- ii) 16 years of age unless he or she is the parent of incapable person,
- iii) Not prohibited by a court order or separation agreement to have access to the incapable person or to give or refuse consent on his or her behalf,
- iv) Available, and
- v) Willing to assume the responsibility of giving or refusing consent.

Ranking – HCCA, s.20(3)

A person lower on list may give consent only if no person higher on the list meets the requirements.

Exception – HCCA, s.20(4)

A family member who is present or has been contacted may consent or refuse consent if he or she believes:

- a) No person higher or in the same paragraph exists,

OR

- b) If a person who is higher exists, the person is not a guardian of the person, an attorney for a Power of Attorney for Personal Care, or a Board appointed representative with authority to consent, and would not object to him or her making the decision.

Definition of Available – HCCA, s.20(11)

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.

Principles for Giving or Refusing Consent as SDM – HCCA, s.21

- * Wishes
- * Best Interests

Wishes – HCCA, s.5

While capable, a person may express wishes in respect to treatment, admission to long-term homes and personal assistance services.

Wishes may be expressed in many ways. For example, wished may be expressed in a Power of Attorney for Personal Care, in a form prescribed by the regulations, in any other written form, orally or in any other manner.

Later wishes expressed while capable prevail over earlier wishes.

Definition of Best Interests – HCCA, s.21(2)

The SDM must consider:

- a) The values and beliefs that the SDM knows that the incapable person held when capable and believes that he or she would still act on;
- b) Any wishes expressed by the incapable person with respect to treatment, admission, personal assistance services that are not required to be followed (i.e. those wishes expressed AFTER the person became incapable);
- c) Whether the treatment is likely to:
 - i) improve the persons condition or well-being,
 - ii) prevent the person's condition or well-being from deteriorating, or
 - iii) reduce the extent or rate of deterioration of the persons condition or well-being;
- d) Whether the incapable person's condition or well-being is likely to improve or remain the same or deteriorate without the treatment;
- e) If the benefits of treatment outweigh the risk of harm; and
- f) Whether a less restrictive or less intrusive treatment would be as beneficial as the treatment proposed.