

Identifying Your Substitute Decision-Maker: The Health Care Consent Act Hierarchy¹

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In Ontario, the legislation that governs who can make decisions with respect to treatment, admission to care facilities [long-term care homes] (“admission”), and personal assistance services in a long-term care home or retirement home (“personal assistance services”), on behalf of a person who has been found incapable of making that decision is the *Health Care Consent Act* (“HCCA”).²

CAPACITY

Capacity is a legal concept. A person is capable with respect to treatment, admission or a personal assistance service if the person has the ability to understand the information that is relevant to making the decision and the person has the ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.³ There is a presumption of capacity, meaning every person is presumed to be capable of making their own personal care decisions, including with respect to treatment, admission, and personal assistance services.⁴ Capacity is not based upon age or disability.⁵ Nor is it based on how one communicates, whether it is by sign language, electronically, or in another language. If there is a barrier to communication, it is up to the person obtaining consent to resolve this, for example by hiring an interpreter (using family members or friends to interpret should be avoided).

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¹ This paper does not discuss the broader decision-making authority of guardians and attorneys for personal care set out in the Substitute Decisions Act, 1992, S.O. 1992 c. 30 (SDA).

² *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sch. A, s. 1(b).

³ HCCA s. 4(1).

⁴ HCCA s. 4(2).

⁵ Ontario does not have an age for consent: young persons are capable of making their own treatment decisions if they are able to understand and appreciate the decision, no matter the age.

Capacity under the *HCCA* is determined by the person as set out in the Act. For treatment, it is the health practitioner who proposes the treatment,⁶ for admission⁷ and personal assistance services⁸ it is an evaluator as defined under the *HCCA*.⁹ The health practitioner or evaluator must determine the person's capacity prior to proceeding with the treatment or admission, and cannot administer the treatment unless they believe that the person is capable with respect to the treatment and the person has given consent.¹⁰ If the health practitioner believes that the person is incapable with respect to the treatment, the health practitioner cannot administer the treatment unless the person's substitute decision-maker (SDM) has given consent on the person's behalf.¹¹ Exceptions are made in emergency/crisis situations for both treatment¹² and admission.¹³ Personal assistance services may be provided without informed consent, although should be consented to within the plan of care. However, when an issue arises over the provision of those services, Part IV of the *HCCA* applies.

In Ontario we do not have "global incapacity". Capacity is issue and time specific. A person may be incapable with respect to some things and capable with respect to others.¹⁴ Capacity can change over time, with a person being incapable at one point, then capable at another.¹⁵ Even within, for example, treatments, a person can be capable of some treatments and incapable of others.

If a person is found to be incapable of making a decision under the *HCCA*, they must be advised of this finding¹⁶ and have the right to apply to the Consent and Capacity Board (CCB) to challenge the determination of incapacity.¹⁷

⁶ *HCCA* s. 10(1).

⁷ *HCCA* s. 40(1).

⁸ *HCCA* s. 57(1).

⁹ *HCCA* s. 2(1) "evaluator".

¹⁰ *HCCA* s. 10(1)(a).

¹¹ *HCCA* s. 10(1)(b).

¹² *HCCA* s. 25-27.

¹³ *HCCA* s. 47.

¹⁴ *HCCA* s. 15(1).

¹⁵ *HCCA* s. 15(2).

¹⁶ *HCCA* s 17, 47.1, 62.1.

¹⁷ *HCCA* s. 32, 50, 65.

CONSENT

Informed consent must be obtained prior to treatment or admission, except in specific emergency situations as identified previously.¹⁸

The person **always** makes their own decision unless they have been determined to be incapable by the appropriate individual pursuant to the *HCCA*. For example, the fact that someone has made a power of attorney for personal care **does not** immediately authorize the individual named as the attorney to make decisions on behalf of the person. The attorney for personal care only gets to make decisions if the person is found incapable of doing so.

THE HCCA HIERARCHY

Once a person has been found incapable, and any CCB hearings have been dealt with, informed consent must be obtained from the appropriate SDM.

Section 20(1) of the *HCCA* includes the list or “hierarchy” of persons who may give or refuse consent on behalf of a person who has been found incapable with respect to treatment, admission or personal assistance service. These persons are referred to generally as SDMs. The hierarchy is as follows:

1. The incapable person’s guardian of the person if the guardian has authority to give or refuse consent to the issue;
2. The incapable person’s attorney for personal care if the power of attorney confers authority to give or refuse consent to the issue;
3. The incapable person’s representative appointed by the CCB if the representative has authority to give or refuse consent to the issue;
4. The incapable person’s spouse or partner;
5. A child or parent of the incapable person, or a children’s aid society or other person who is lawfully entitled to give or refuse consent to the treatment in

¹⁸ For a more comprehensive discussion of informed consent as it relates to treatment, see “Making Treatment Decisions”, Graham Webb, 2006 available online at: <https://www.acelaw.ca/health-care-consent-advance-care-planning-resources/>

the place of the parent. This paragraph does not include a parent who has only a right of access. If a children's aid society or other person is lawfully entitled to give or refuse consent to the treatment in the place of the parent, this paragraph does not include the parent;¹⁹

6. A parent of the incapable person who has only a right of access;
7. A brother or sister of the incapable person;
8. Any other relative of the incapable person.

Guardian of the Person

At the top of the hierarchy is a guardian of the person, which is appointed by the Court. Becoming someone's guardian of the person requires an application to the Ontario Superior Court of Justice. Guardianships can be full, meaning the guardian has authority over all aspects of the incapable person's personal care pursuant to the *SDA*, or can be partial, meaning the guardian has authority to make decisions in only specified areas. If a person claims to be a court-appointed guardian, it is important to see the guardianship order before accepting that they have authority. Information about all guardianships in Ontario are kept in a register by the Office of the Public Guardian and Trustee (PGT) and is available to the public by contacting their office.

Attorney for Personal Care

If the incapable person does not have a guardian of the person, the next SDM in the hierarchy is an attorney for personal care. Anyone 16 years of age or older, who is capable of doing so, can appoint someone to make decisions about their personal care, including health care, by making a legal document called a "Power of Attorney for Personal Care". The person(s) appointed is called the "attorney for personal care". More than one person can be appointed. If more than one person is appointed, the document should indicate whether they must act "jointly", meaning that decisions must be made together, or "jointly and severally", meaning that decisions can be made together or separately. If the document does not say anything, they must act jointly. Powers of attorney can also name alternates, who would step in if the

¹⁹ This paper will not discuss the issue of children's aid societies and parents with a right of access with respect to consent to treatment.

primary attorney(s) are no longer available, resign, or are incapable of making the decision themselves. There are specific rules regarding how to make powers of attorney for personal care set out in the *SDA*. As previously stated, your attorney for personal care can only make a decision for you if you are found to be incapable of making that particular decision.²⁰

It is important to see the power of attorney for personal care to ensure that the attorney has the legal authority to be making the specific decision that they are being asked to make on behalf of the incapable person.

Personal Representative Appointed by the CCB

A person who is 16 years old or older and who has been found to be incapable with respect to a proposed treatment, admission, or personal assistance service, can apply to the CCB to have a representative appointed to give or refuse consent or to make the decision, as applicable, on his or her behalf.²¹ Similarly, a person who is 16 years old or older may apply to the CCB to have himself or herself appointed as the representative of a person who has been found to be incapable with respect to a proposed treatment, admission, or personal assistance service, to give or refuse consent, or to make a decision, as applicable, on his or her behalf.²²

At the hearing, the CCB will confirm that the person has actually been found incapable of making the decision, and then may appoint a person to make that decision. The personal representative only has authority to consent to specific decisions as ordered by the CCB and therefore the order should be reviewed prior to accepting consent from a personal representative.

Spouse or Partner

If an incapable person has no guardian of the person, attorney for personal care or personal representative, the incapable person's spouse or partner may give or refuse consent on the incapable person's behalf.

²⁰ For more information about powers of attorney for personal care please see *Power of Attorney for Personal Care*, CLEO 2023 available at: <https://www.cleo.on.ca/en/publications/power> and *Tip Sheet: Preparing Your Power of Attorney for Personal Care*, CLEO 2024 available at: <https://stepstojustice.ca/wp-content/uploads/Tip-sheet-Preparing-your-Power-of-Attorney-for-Personal-Care-EN.pdf>

²¹ HCCA s. 33(1), s. 51(1), s. 66(1).

²² HCCA s. 33(2), s. 51(2), s. 66(2).

Spouse

For the purposes of the *HCCA*, two persons are spouses if they are married to each other **or** if they are living in a conjugal relationship outside marriage and have cohabited for at least one year, are together the parents of a child, or have together entered into a cohabitation agreement under section 53 of the *Family Law Act*.²³ Two persons **are not** considered spouses if they are living separate and apart as a result of a breakdown of their relationship.²⁴ Persons living separate and apart due to other reasons, for example because one is in hospital or a long-term care home, would still be considered spouses.

Partner

The meaning of “partner” under the *HCCA* is either of two persons who have lived together for at least one year and have a close personal relationship that is of primary importance in both persons’ lives.²⁵ This personal relationship can be of any type, and could be a parent and adult child who live together, two siblings who live together, friends who live together, etc.

For example, a parent with four children may become incapable, but has lived with an adult child for 10 years, and that adult child has provided ongoing care and support to their parent, such that they are the most important person in each other’s lives. That adult child would outrank the other children as SDM, as they would meet the definition of “partner”.

Child or Parent

If the incapable person does not have any of the above, then a child or parent of the incapable person may give or refuse consent. This includes a children’s aid society or other person who is lawfully entitled to give or refuse consent to the treatment in the place of the parent. A parent at this stage of the hierarchy does not include a parent who has only a right of access to the incapable person.

Where there are both adult children and parents available to make decisions on behalf of the incapable person, they are equal in the hierarchy.

²³ *HCCA* s. 20(7).

²⁴ *HCCA* s. 20(8).

²⁵ *HCCA* s. 20(9).

There is no difference between biological children/parents versus adopted: they rank equally. However, step-child/parent relationships are undefined, and it will depend on the facts of the case whether they would be included in this category. For example, a step-parent who raised the child from infancy might be considered a parent for the purpose of the hierarchy, where a later-in-life marriage after the child has left the home may not confer that relationship.

Parent with Only a Right of Access

If there is no child or parent, as described above, the next family member who could give or refuse consent is a parent of the incapable person who has **only a right of access** to that person.

Brother or Sister

Next on the hierarchy is the incapable person's brother or sister. Again, biological and adopted siblings are equal, while step-siblings may depend on the situation.

Other Relatives

If the incapable person does not have a brother or sister, any other relative the incapable person has may give or refuse consent on their behalf. This includes a person related by marriage or adoption.

Public Guardian and Trustee

The PGT is the decision-maker of last resort.

If two or more persons are on the same level of the hierarchy, meet the requirements and they are the highest on the hierarchy, they are all equal decision-makers. If even one of them disagrees about whether to give or refuse consent, the PGT will make the decision instead.²⁶ The PGT will often try to mediate between the SDMs before taking over as SDM of last resort.

If there is no one else in the hierarchy who meets the requirements for giving or refusing consent on behalf of the incapable person, the PGT acts as SDM of last resort.²⁷

²⁶ HCCA s. 20(6).

²⁷ HCCA s. 20(5).

REQUIREMENTS TO BE A SUBSTITUTE DECISION-MAKER

Substitute decision-makers must meet the following requirements under section 20(2) of the *HCCA* in order to give or refuse consent on behalf of an incapable person:

- a) are capable themselves with respect to the treatment;
- b) are at least 16 years old, unless they are the incapable person's parent;
- c) are not prohibited by court order or separation agreement from having access to the incapable person or giving or refusing consent on his or her behalf;
- d) are available, meaning that it is possible, within a time that is reasonable in the circumstances, to communicate with the person and obtain a consent or refusal;²⁸ and
- e) are willing to assume the responsibility of giving or refusing consent.²⁹

A person who is ranked lower on the hierarchy cannot give or refuse consent if someone who is ranked higher on the hierarchy meets the above requirements (e.g., a sibling cannot give or refuse consent if the incapable person has a parent who meets the requirements).³⁰

There is an exception to this where the potential SDM is present or has otherwise been contacted when the decision needs to be made, which would most often be when the issue is treatment being required in a timely manner. That person may be able to make the decision, as long as the higher ranking person is not a guardian or attorney for personal care or a personal representative, and the higher ranking person would not object to them making the decision.³¹ While it is possible for this to occur, it is not recommended except in very limited situations.

Health practitioners and persons obtaining consent for admission or personal assistance services cannot “cherry pick” SDMs. If there is more than one person on

²⁸ *HCCA* s. 20(11).

²⁹ A guardian of the person would have to go back to court to be removed as guardian if they no longer wished to act.

³⁰ *HCCA* s. 20(3).

³¹ *HCCA* s. 20(4).

the hierarchy, they are obligated to ensure that all of them agree. If the SDMs themselves decide to appoint one person as their spokesperson, they could rely on that, with the caveat that if one of the SDMs changes their mind then all SDMS must agree. Health practitioners and persons obtaining consent for admission or personal assistance services cannot require multiple SDMs to appoint a spokesperson.

ISSUES REGARDING SDMS

Replacing SDM

Sometimes there may be disagreements between SDMs of equal rank, or someone lower on the hierarchy may not believe that the current SDM is acting appropriately. In other situations a friend of the incapable person may be unhappy with what the SDM is doing. There are several ways to replace an SDM:

1. If the SDM is either the guardian or attorney for personal care, the person who is challenging their authority will have to go to court. We recommend that you seek legal advice.
2. If the SDM is the personal representative appointed by the CCB, it may require a court application, and we recommend seeking legal advice.
3. If the SDM is not a guardian or attorney for personal care and is SDM by virtue of their place on the hierarchy, an application can be made to the CCB to be appointed as the personal representative. This involves a hearing and the parties to the hearing may wish to seek legal advice.

Incapacity of SDM

If the health practitioner offering the treatment or person obtaining consent for admission or personal assistance services believes that the SDM is themselves not competent, there is no requirement for them to complete a capacity evaluation. They should advise the person that they do not believe that they meet the criteria as an SDM because they do not believe they are capable themselves of making that decision, and that they will be going to the next SDM(s) on the hierarchy for consent. If the allegedly incapable SDM does not agree that they are incapable of making the decision, they can apply to the CCB to be appointed as personal representative, as long as the person replacing them is not a guardian or attorney for personal care.

During that process, the CCB will determine whether they meet the criteria for being a personal representative, including being capable of making the decision.

SDM Not Complying with HCCA

If the health practitioner offering the treatment or person obtaining consent for admission or personal assistance services believes that the SDM is not complying with the requirements of substitute decision-making, they can apply to the CCB to determine whether the SDM is in compliance with the *HCCA*. If they are not, the CCB will order the person to comply by making a specific decision within a certain time. If the person does not do so, then the next person on the hierarchy becomes the SDM, and must also comply with the CCB order.

“Removing” SDM

Health practitioners and persons obtaining consent cannot simply “remove” the SDM because they disagree with the SDM’s decision, the SDM is not complying with an arbitrary rule, or because they do not like the decision the person is making. SDMs are often told that their “POA” will be “taken away” and the PGT will make the decision in these cases.³²

TAKEAWAY

It is important to determine who your SDM will be if you ever become incapable, as they could be called upon to make life and death decisions, determine where you live, etc. That person(s) should be someone you trust to make the decision you would make in the same situation. If you are not satisfied with the person(s) who would automatically make decisions for you pursuant to the *HCCA* hierarchy, you should consider making a Power of Attorney for Personal Care so that you can appoint the person(s) whom you trust to make those decisions on your behalf. Although you can make Powers of Attorney without a lawyer, as they are very powerful documents, we recommend that you seek legal advice before doing so.

³² The exception to this is in the context of admission to a long-term care home from hospital, where the Ontario Health atHome placement co-ordinator can make applications for long-term care and choose homes in certain situations without the consent of the person or their SDM. For further information see *Discharge from Hospital to Long-Term Care in the Wake of Bill 7: Important Information You Need to Know*, Advocacy Centre for the Elderly, 2024, <https://www.aclew.ca/legal-topic/hospitals/>