Consent and Capacity Legislation in Ontario

The Substitute Decision Act (1992) and the Health Care Consent act (1996) establish the legal standards for the following:

- Making a power of attorney for personal care
- Determining whether a person is capable to provide consent to treatment
- That treatment may not be provided without consent
- The selection of a substitute decision maker and the principles for substitute decision making (if patient is incapable)

The Substitute Decisions Act 1992 establishes a statutory regime whereby capable individuals can make a power of attorney for personal are and/or property (in the event they become incapable). It also provides that a court may appoint a guardian for personal care for an incapable person where a power f attorney was not made while the person was capable. As well, it establishes the duties of the Office of the Public Guardian and Trustee (which administers the Act)

The Heath Care Consent Act (1996) codifies the principles of assessing capacity for decision-making and the common law requirements for informed consent. It also confirms that treatment cannot be provided without an appropriate consent and establishes a regime for substitute decision-making on behalf of incapable individuals (including a hierarchy of substitute decision makers and rules to follow when acting as a substitute decisions maker)

Under the Heath Care Consent Act, a health practitioner who proposes a treatment for a person shall only administer treatment if he or she is of the opinion that:

1. The person is capable with respect to the treatment, and that the person has given appropriate consent; or
2. The person is incapable with respect to the treatment, and the person's Substitute Decision Maker has given consent on the person's behalf.

Consent to treatment is only valid when all of the following conditions are present:

1. The consent must be related to the treatment
2. The consent must be informed
3. The consent must be given voluntarily
4. The consent must not be obtained through misrepresentation or fraud

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www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_96h02.htm#BK

Informed Consent

In order for consent to be "informed, certain information must be provided:

- The nature of the treatment
- The expected benefits
- The risks
- The side effects
- Alternative courses of action
- The likely consequences of not having the treatment

The person that provided the consent or the patient's substitute decision maker if the person is incapable may withdraw at consent anytime.
A person may not provide consent to a treatment unless they are capable with respect to that treatment. Under the Heath Care Consent Act, there is a two-pronged test to determine whether a person is capable with respect to treatment:

1. They are able to understand the information that is relevant to making a decision about the treatment and
2. They are able to appreciate the reasonable foreseeable consequences of a decision or lack of decision

A person may be incapable with respect to some treatments and capable with respect to others. If a person's capacity returns, their decision to give or refuse treatment governs.

CONSENT PROCESS FOR INCAPABLE PATIENTS

Advising a Patient of a Finding of Incapacity

When a person is found to be incapable, he or she has a right to be informed of that determination. The health care practitioner must make an attempt to:

- tell the person about his or her determination
- tell the incapable patient that a substitute decision maker will assist them to understand the proposed treatment and will be responsible for making the final decision. (The governing body of a health practitioner's profession may have more specific or stringent requirements.)

- if the patient disagrees with the finding of incapacity, or disagrees with the involvement of the present substitute decision maker, the health practitioner must advise the patient of his or her options. These include the finding of another substitute of the same or more senior rank, and or applying to the Consent and Capacity Board for a review of the finding of incapacity [HCCA, June 1996, Section 32(1)]. This conversation must be documented in the patient's health record. If the patient is a psychiatric patient under the Mental Health Act, a Rights Advisor is accessible www.ccboard.on.ca

Exceptions to Notification of Incapacity

(a) where the criteria for emergency treatment without consent exist
(b) where the patient has a court appointed guardian of the person, if the guardian has authority to give or refuse consent to the treatment;
(c) where the patient has granted a Power of Attorney for Personal Care, if the Power of Attorney contains a provision waiving the person's rights to apply for the review.

If the health practitioner is informed that the incapable person, or another person intends to apply or has applied to the Consent and Capacity Board then the health practitioner shall not begin treatment or allow it to begin until:

(a) 48 hours have elapsed since the health practitioner was first informed of the intended application to appeal the findings of incapacity without an application being made.
(b) The application to the Consent and Capacity Board has been withdrawn.
(c) The Board has rendered a decision in the matter and the parties do not intend to appeal. [HCCA, June 1996, Section 18(3)]

Responsibility of Rights Advisor

Under the Mental Health Act a psychiatric patient must have independent rights advice. Please refer to 83-ADM on Rights Advice.

Consent on an Incapable Person's Behalf

The individuals who may be substitute decision makers are listed in Appendix D. In most cases, the closest family member serves as substitute decision maker. The substitute decision maker should be the highest person on the list who is at least age 16, capable, available, willing to act and is not prohibited by a court order or separation agreement from having access to the incapable person or giving or refusing consent on his or her behalf [HCCA, June 1996, Section 20(2)]. However, a lower-listed relative may act if he or she believes a higher listed relative (who is not specially appointed) would not object. A person who is capable to consent to a treatment may express wishes with respect to that treatment in the event that he or she becomes incapable. If the person becomes incapable, the wish so expressed when capable and attaining 16 years of age, will be binding on the person's substitute decision maker [HCCA, June 1996, Section 21(1)]. The expressed wish may be in oral, written or other form and may be contained in a Power of Attorney for Personal Care.

If the substitute decision maker does not know of a wish applicable to the circumstances expressed while the person was capable and after attaining 16 years of age, or, if it is impossible to comply with the wish, the person shall act in the incapable person's best interests.

Best Interests

When deciding what is in the best interests of the incapable person, the substitute decision maker

shall take into consideration the following principles:

(a) the values and beliefs which the substitute decision maker knows the incapable person held when capable and believes he or she would still act on if capable.
(b) any wishes expressed by the incapable person with respect to the treatment that are not binding as a prior capable wish; and
(c) the following factors **(factors to consider in determining best interests)**
   1. Whether the treatment is likely to:
      i. improve the incapable person's condition or well being,
      ii. prevent the incapable person's condition or well-being from deteriorating, or
      iii. reduce the extent to which, or the rate at which, the incapable person's condition or well being is likely to deteriorate.
   2. Whether the incapable person's condition or well being is likely to improve, remain the same or deteriorate without the treatment.
   3. Whether the benefit the incapable person is expected to obtain from the treatment outweighs the risks of harm to him or her,
   4. Whether a less restrictive or less intrusive treatment would be as beneficial as the treatment that is proposed.

Section 37 of the Act provides that if the health practitioner believes that the substitute decision maker did not comply with these principles, he/she may apply to the Board to determine whether there has been compliance by the substitute decision maker. [HCCA, June 1996, Section 37(1)]

If none of the substitute decision makers are capable, available and/or willing to act the Public Guardian and Trustee shall make the decision to give or refuse consent [HCCA, June 1996, Section 20(5)]. ↓ phone # 1-800-366-0335.

Return of Capacity

If, after consent to a treatment is given or refused on an incapable person's behalf, the person becomes capable with respect to the treatment in the opinion of the health practitioner, the person's own decision to give or refuse consent to the treatment governs [HCCA, June 1996, Section 16].

Telephone Consent from the Substitute Decision Maker

The telephone consent is not to be used for the convenience of the family or hospital. Under unusual circumstances, where the family is at some distance, it is permissible to obtain telephone consent by the following method.

(a) A telephone with conference call feature should be used if available, so that the health practitioner, the substitute decision maker and the witness can engage in three-way dialogue.
(b) The substitute decision maker is telephoned by the health practitioner and made aware that another person is listening and acting as a witness
(c) The substitute decision maker is asked to state their identity and relationship to the patient. The information in Appendix C is shared with the substitute decision maker.
(d) If the substitute decision maker agrees to act in that capacity, the health practitioner explains the nature of the proposed treatment, expected benefits, material risks and side effects and health consequences of not having the treatment. Questions from the substitute decision maker are answered.

APPENDIX D: -- Hierarchy of Substitute Decision Makers

The Health Care Consent Act, June 1996, p.10 of 51, divides substitute decision makers into five (5) categories. If a person is incapable with respect to a treatment, consent may be given or refused on his or her behalf by a person described in one of the following ways. In order of highest to lowest priority, they are:

1. Court appointed guardian, if the guardian has authority to give or refuse consent to the proposed treatment;

2. Person who has been authorized as an attorney for personal care, if the Power of Attorney confers authority to give or refuse consent to the proposed treatment;

3. Representative appointed by the Consent and Capacity Board, if the representative has authority to give or refuse consent to the proposed treatment;

4. Family members given authority by the Health Care Consent Act, 1996

    - Spouse, partner or relative in the following order:

        i) Spouse or partner
        ii) Child if 16 or over, custodial parent (who can be less than 16 years of age if the decision is being made for the substitute's own child), a Children's Aid Society, or other person lawfully entitled to give or refuse consent to the treatment in the place of the parent
        iii) Parent who has only a right of access
        iv) Brother or sister
        v) Other relative

5. Public Guardian and Trustee - used as a last resort in the absence of any higher ranked substitute, or in the event two or more equally ranked substitutes cannot agree.