Best Interests

In the event that no prior capable wishes are known or they are impossible to follow, the SDM must consider the best interests of the person. Considering the *best interests* of a person will involve an exploration of his/her values, beliefs and personal goals. SDMs and healthcare providers will have their own values and beliefs about the situation, but it is the person's values that must remain central to the decision-making process.

Best interest can be considered by asking:

- Will the treatment:
  - Improve the person's current condition or well-being?
  - Prevent worsening of the person's condition or well-being?
  - Slow down the process of getting worse?
- Without treatment will the condition get better, worse or stay the same?
- Do the benefits outweigh the risk of harm? (**risks/benefits as the person would consider them)
- Is there a less aggressive option that might be as beneficial to the person?

What if there are concerns that the SDM is not following prior capable wishes or best interests?

The role of the SDM and the principles of substituted decision-making as set out in the HCCA s. 21 should be reviewed with the SDM. A bioethics consult may be beneficial. If there is still concern after that, then an application to the Consent and Capacity Board should be filed.

Making End-Of-Life Decisions for Others

When we ask SDMs to make decisions for others at the end-of-life, the SDM is not only faced with making this difficult decision, but also with saying goodbye to the person.

Anticipatory grief is a common experience for the SDMs of a loved one who requires quality end-of-life care**.** SDMs may experience significant distress in thinking about consenting to a plan that places comfort over life sustaining measures. The SDM may need reassurance that providing consent for comfort rather than disease directed care is not "giving up" on the person. It is not withdrawal of care, but rather a change in the goals of treatment. Transitioning to a primarily palliative approach will ensure that care is directed to what's most important to the person in this last stage of life.

Consenting to Treatment/Treatment Plan

Informed consent must be obtained from the SDM(s) by the healthcare provider who is proposing the treatment or treatment plan.

If there is concern that the person highest on the hierarchy is not capable of making the decision, there is a mechanism to move to the next person.

If there are multiple SDMs at the same level who cannot agree on a decision, the Public Guardian and Trustee can assist with decision-making.

Further Resources:

Advocacy Centre for the Elderly
Ontario Health Care Consent Act, 1996
Ontario Substitute Decisions Act, 1992
TEGH Bioethics online resources and consults

Toronto East General Hospital

Making Decisions for Others:

A Clinician's Guide for **Substitute Decision Making**

June 2015

Making decisions for others can be a challenging and often daunting prospect for Substitute Decision Makers (SDMs). Often when these decisions are around end-of-life care, or initiation or withdrawal of life sustaining treatments, they can be challenging for families, SDMs and the healthcare team. It is important to understand our obligations in these situations. When a person lacks the capacity to make a decision for him/herself, the SDM will make the decision. The rank order of SDMs and the rules for substitute decision-making can be found in the Health Care Consent Act (HCCA, 1996).

Before an SDM can be asked to give consent for treatment or personal care on behalf of a person, it must first be established that the person lacks the capacity to make the decision for her/himself.

How is capacity determined?

As defined in the HCCA, a person is capable of giving or refusing consent if s/he:

1. Understands the information relevant to making the decision about the proposed treatment.
2. Appreciates the reasonably foreseeable consequences of both accepting and declining the proposed treatment.

Capacity is **decision** and **time** specific:

Decision specific: A person may lack the capacity to consent to surgery but retain capacity to make decisions about long term care placement.

Time specific: A person may lack the capacity to make a certain decision today but may regain capacity tomorrow, e.g. delirium, medication side effects or intoxication.

Substitute Decision Maker Hierarchy

In Ontario, every person automatically has an SDM as defined in the HCCA. By default this will be the person's closest living family member(s) unless a Guardian, Attorney for Personal Care or Representative has been formally appointed.

1. Court Appointed Guardian
2. Attorney for Personal Care
3. Representative Appointed by the Consent and Capacity Board
4. Spouse or partner
5. Child or parent
6. Parent with right of access only
7. Brother or sister
8. Any relative
9. Public Guardian and Trustee

Making a Substituted Decision

When an SDM makes a decision on behalf of an incapable person, s/he must imagine how the person would have made the decision for her/himself. The HCCA has two rules for SDMs to follow:

1. Prior Capable Wishes
2. Best Interests

If the person has an Advance Care Plan, it may contain helpful information about both of these.

Prior Capable Wishes

Prior capable wishes are preferences the person expressed in the past that apply to the current situation. They may be part of an advance care plan, and/or part of the Power of Attorney for Personal Care document. In Ontario, all manners of expression of prior capable wishes are considered valid including verbal, video, Braille, etc. The most recent capable wishes are considered, even if they are not written. When making decisions, the SDM must follow wishes whenever possible if they apply to the decision that needs to be made. Some wishes may be impossible to follow.

When considering prior capable wishes the SDM and healthcare provider may ask:

- Are they applicable to the current situation?
- What would _____ have wanted in this situation? Does acting on this prior capable wish reflect _____'s most recent thoughts, values and beliefs on this issue?
- Will the outcome/decision be consistent with what _____ would want in this situation?
- Is the outcome/decision consistent with what _____ values as important in his/her life?
- Is the outcome/decision consistent with _____'s most recent goals for a good life?

What about incapable wishes?

Wishes expressed after the person has lost capacity for a specific decision must be considered as part of the determination of best interests.