

MAKING HEALTH CARE DECISIONS (for Parents & Legal Guardians)

1. Under Ontario Law **everyone is presumed to have capacity** to make health care decisions for themselves **no matter what their age**.
2. Being capable means understanding the proposed treatment, the consequences of consenting to it, and the consequences of not consenting to it. The decision must be made freely without pressure. A person can have capacity to make some decisions, and not other more complex decisions.
3. Under Ontario law the health care practitioner providing the treatment determines if the person has capacity, regardless of age. The person assessed can challenge the finding of no capacity.
4. If a child has **capacity** to make a health care decision, they also have a legal right to **privacy** with respect to the personal health information pertaining to that treatment. They also have a right to **privacy** if they are 12 years or over and receiving **counselling**. Their consent is required before health care providers can release any of this health information, even to parents & legal guardians, except when required by law (e.g. court order, or requirement to report to Children's Aid Society if under 16 and in need of protection).
5. If a child does not have capacity the parent or legal guardian will be asked to make health care decisions for them, no matter what their age, unless they are married, or if they appointed someone else under a Power of Attorney (POA). They can only appoint someone under a POA if they are 16 or older and have capacity to understand the POA. Making healthcare decisions for someone else is called being a Substitute Decision Maker (SDM).
6. Laws govern how Substitute Decision Makers make health care decisions; the SDM is legally obligated to make the decision **solely in the best interest of the child*** (see back) unless the now incapable child, when over 16 years and capable, made their wishes known.
7. Many factors go into making a best interest healthcare decision for a child, however the health and well-being of the child, including quality of life, is the primary consideration.
8. Both parents are equal decision makers unless a court order grants custody to one parent.
9. Where the child is incapable and there is no parent, or a parent cannot be found, the law (*Health Care Consent Act*) lists other relatives in order of who can make the decision. You cannot appoint someone else (even a step-parent) to take your place as SDM without a court order.
10. If the parent or legal guardians does not make a decision in the best interest of the child which might result in harm or blocks treatment that would improve well-being, the health care provider is required by law to contact the Children's Aid Society if the child is under 16 years, or if over 16 years, they may have to start a legal process to have another substitute decision maker named.

Statutory (Legal) Principles for Substitute Decision Makers

Health Care Consent Act, 1996, S.O. 1996, c. 2, Sched. A

Best interests

(2) In deciding what the incapable person's best interests are, the person who gives or refuses consent on his or her behalf shall take into consideration,

- (a) the values and beliefs that the person knows the incapable person held when capable and believes he or she would still act on if capable; (note ***if expressed those wishes after 16 years of age 1996, c. 2, Sched. A, s. 21 (1).***)
- (b) any wishes expressed by the incapable person with respect to the treatment that are not required to be followed under paragraph 1 of subsection (1); and
- (c) **the following factors:**
 - 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 risk 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. 1996, c. 2, Sched. A, s. 21 (2).**