



## POLICY

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### Determining Capacity to Consent

<b>STATUS:</b>	APPROVED
<b>Approved by Council:</b>	June 2011
<b>Amended:</b>	n/a
<b>To be reviewed:</b>	June 2016

This policy is intended to guide physicians in Saskatchewan when determining if their patients have capacity to consent to treatment. It is also intended to guide physicians in addressing situations where patients do not have capacity to consent to treatment. Finally, it is intended to facilitate communication between physicians, patients and their families relating to medical treatment.

It is based upon the principle that patients who have the capacity to consent will exercise their autonomy by making informed decisions about their health care.

### DEFINITIONS:

**Capable:** To be capable implies that the person is able to understand information that is relevant to making decisions and is also able to appreciate the reasonably foreseeable consequences of either making or not making a decision.

**Capacity:** A person has capacity if that person is capable of consenting to treatment.

**Incapable:** To be incapable implies that the person is unable to appreciate information that is relevant to making decisions or is unable to appreciate the reasonably foreseeable consequences of either making or not making a decision.

**Treatment** is anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment plan

**Substitute Decision-maker** is a person who has the legal authority to make decisions on behalf of an incapable person

**HCDSHCDMA** - *The Health Care Directives and Substitute Health Care Decision Makers Act* - The legislation in Saskatchewan that addresses capacity to consent to medical procedures and the authority for persons other than the patients to make health care decisions for the patient in certain circumstances.

**Health Care Directive** – A written document signed by a patient under the authority of *The Health Care Directives and Substitute Health Care Decision Makers Act*. Such a document may provide directions respecting the care to be provided if a patient does not have capacity, may appoint a substitute decision maker to make a health care decision on behalf of a patient who does not have capacity, or both.

## PROCEDURES FOR ASSESSING CAPACITY:

Determining capacity is the responsibility of the physician who will provide the treatment. The following steps, should be followed:

- Step 1:** Consider whether in the context of a particular clinical situation a patient is capable of providing informed consent. For example, is there:
- evidence of confused or delusional thinking;
  - an appearance of an inability to make a settled choice about treatment;
  - severe pain or acute fear or anxiety;
  - the appearance of severe depression, the appearance of impairment by alcohol or drugs;
  - any other observations which give rise or a concern about the person’s behaviour or communication;
  - evidence of significant intellectual disability;
  - evidence of impairment of executive function, or mild cognitive impairment; or,
  - evidence the person is unduly under the influence of another person.
- Step 2:** In order for a patient to have the capacity to make a decision respecting a proposed treatment, the patient must be able to understand the information that is relevant to making the decision, including:
- the conditions for which the treatment is proposed; and,
  - the nature of the proposed treatment; and
  - the risks and benefits of the treatment; and,
  - the alternatives to the treatment, including the alternative of not having the treatment.
- Step 3:** If the person does not understand the information, he or she is not capable of giving consent. If the person is able to understand the information, you must go on to assess whether the person is able to appreciate the reasonably foreseeable consequences of a decision. You must be of the opinion that:
- the person is able to acknowledge that the condition for which treatment is recommended may affect him or her; and,
  - the person is able to assess how the proposed treatment or lack of treatment could affect the person’s life or quality of life; and
  - the person’s choice of treatment is not substantially based on a mental disorder such as mania, depression or delusional disorder.
- Step 4:** If the physician decides the person is not capable of giving consent, he or she must advise the patient of this finding and its consequences, and identify the appropriate substitute decision-maker authorized by the HCDSHCDM.

## ADVANCE HEALTH CARE DIRECTIVE

If a patient who lacks capacity to make a health care decision has a valid health care directive that clearly anticipates and gives directions relating to treatment for the specific circumstances that exist, that direction prevails over the instructions of any person who would otherwise be entitled to make a health care decision on the patient's behalf. The physician has a legal and ethical obligation to follow the directions in such an advance health care directive.

If the patient has a health care directive, but that directive does not provide clear instructions respecting the treatment to be provided, and the health care directive appoints a person as a Substitute Decision-Maker to make health care decisions on the patient's behalf, then the Substitute Decision-Maker can provide consent on the patient's behalf.

## Substitute Decision-makers

If a patient does not have a health care directive, the *HCDSHCDM* sets out the following hierarchy of individuals who may give or refuse consent on behalf of a patient who lacks capacity:

1. the spouse or person with whom the person requiring treatment cohabits and has cohabited as a spouse (which includes a same-sex spouse) in a relationship of some permanence;
2. an adult son or daughter;
3. a parent or legal custodian;
4. an adult brother or sister;
5. a grandparent;
6. an adult grandchild;
7. an adult uncle or aunt;
8. an adult nephew or niece.

## Priority of Decision-making Between Substitute Decision-makers

1. If the patient is a child, the decision of the patient's legal custodian takes precedence over a health care decision of a non-custodial parent.
2. If there are two or more individuals in the class of individuals which is to make the health care decision on behalf of a patient, the decision of the eldest takes precedence over the decisions of other persons in that class. (If, for example, the closest relatives are children of the patient, the decision of the oldest child will prevail).
3. Where there is no nearest relative or where the physician or institution has been unable to find the nearest relative, a physician may provide necessary treatment if:
  - (a) the physician believes that the proposed treatment is needed; and
  - (b) another treatment provider agrees in writing that the proposed treatment is needed.

## GUIDELINES:

1. Ideally, where appropriate, the physician should try to obtain consensus among involved family members to assist in maintaining relationships within the family.
2. The highest-ranking person on this list, who is available, capable (similar decision-making as described above) and willing, is the substitute decision-maker for the incapable person.
3. The physician must provide the substitute decision-maker with the information that would otherwise have been given to the patient to enable him or her to make an informed decision as to consent.
4. The physician should advise the substitute decision maker of that person's obligation to act:
  - (a) according to the wishes expressed by the person making the directive prior to that person's incapacity to make a health care decision, if the substitute decision-maker has knowledge of the person's wishes; or
  - (b) according to what the substitute decision-maker believes to be in the best interests of the person making the directive, if the proxy has no knowledge of the person's wishes.
5. A physician should consider whether the substitute decision-maker is complying with the principles set out in the *HCDSHCDMA*. If a provider is of the view that the substitute decision-maker is not acting in accordance with the *HCDSHCDMA*, the physician should take appropriate steps to try to obtain compliance with the principles of *HCDSHCDMA*

## Minors

The *HCDSHCDMA* does not identify an age at which minors become capable of consenting to health care because the capacity to exercise independent judgment for health care decisions varies according to the individual and the complexity of the decision at hand. Providers must make a determination of capacity to consent for a child just as they would for an adult. The decision of a child who is capable of consenting to health care prevails over a conflicting decision of his or her parents.

While a parent or other custodian is able to make a health care decision on behalf of a minor who does not have the capacity to make his or her own health care decision, if that child is under the age of 16, and the physician believes that essential medical, surgical or other recognized remedial care or treatment has not been or is not likely to be provided to the child, *The Child and Family Services Act* requires the physician to make a report to a member of the Department of Social Services or the police.

## ADDITIONAL INFORMATION

This document contains a summary of some of the more important provisions of *HCDSHCDMA*. *The full text of the Act is available from the Queen's Printer of Saskatchewan at <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/H0-001.pdf>. The full text of the regulations are available at <http://www.qp.gov.sk.ca/documents/English/Regulations/Regulations/H0-001R1.pdf>*