

Office of the Public Guardian and Trustee

Making Substitute Health Care Decisions

**THE ROLE OF THE OFFICE OF THE PUBLIC
GUARDIAN AND TRUSTEE**

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Making Substitute Health Care Decisions

QUESTIONS AND ANSWERS

1. What is the Office of the Public Guardian and Trustee's (OPGT) role in making health care decisions?

Under Ontario law, consent is required for most health care services and facility admissions, unless it is an emergency. Capable people make their own decisions, but if a person is not mentally capable, a health practitioner or Community Care Access Centre must turn to a substitute—usually a relative—for a decision. A person who has been appointed the guardian or attorney for personal care has first priority.

If there is no such appointment, which is usually the case, then the health practitioner determines if there are relatives that are willing, capable and available to make the decision. People who are not relatives, such as close friends, may apply to the Consent and Capacity Board, an independent body, to be appointed for this purpose. If none of the above alternatives apply, then the OPGT must make the decision on the incapable person's behalf. The office's Treatment Decisions Unit handles this work.

2. What is the purpose of the OPGT's role in making substitute health care decisions?

The OPGT's role is to serve people who are incapable of making their own health-related decisions. The OPGT provides these people the benefit of informed decision-making about these matters if there is no one else who is available to do this for them.

3. Does the law require the OPGT to provide this service?

Yes, for most health care services. The *Health Care Consent Act*, which is administered by the Ministry of Health:

- requires consent for treatment or admission to long-term care homes, except in an emergency
- says who can give or refuse consent if the person is incapable
- sets out the rules for making these decisions for an incapable person
- requires the Office of the Public Guardian and Trustee to make these decisions as a last resort when there is no alternative.

4. What is “treatment”?

Most things that are done for a “health-related purpose” are included in the definition of “treatment” in the *Health Care Consent Act*. If something is a “treatment” it means that the rules in the *Health Care Consent Act* apply, including the rule that consent is required from the patient or by someone else on the patient's behalf.

Some of the things that are not included in the definition are:

- assessment of a person's capacity
- examination to determine a person's general condition
- personal assistance services such as feeding or bathing
- treatments that, in the opinion of the health care practitioner, pose little or no risk to the person

5. What are “long-term care homes”?

Long-term care homes are commonly referred to as “nursing homes” or “homes for the aged”. These facilities are regulated by the government based on the *Long Term Care Homes Act*. All applications and admissions to these facilities are handled through agencies called Community Care Access Centres (“CCAC”).

6. What are “retirement homes”?

“Retirement homes” are residential complexes that are primarily for those 65 years of age and older where two or more care services, such as assistance with bathing and meals, are provided. The Retirement Home Regulatory Authority licenses and monitors these homes.

Rules about admission to retirement homes are in the *Retirement Homes Act*.

7. When is a person considered to be “mentally incapable” of making decisions about health, personal assistance services, or admission to long-term care?

A person is incapable of making a decision covered by the *Health Care Consent Act* if they cannot understand the relevant information or appreciate what could happen as a result of making, or not making, the decision.

8. Who makes decisions about personal assistance services such as help with bathing and feeding, provided in many facilities?

If a resident of a long-term care home or a retirement home cannot give or refuse consent, the same people who can make treatment decisions are authorized to do so. The OPGT is the substitute decision maker of last resort for these decisions as well.

9. Are children under a certain age automatically considered incapable?

No. There is no specific “age of consent”. Minors of the same age can have very different levels of mental capacity. Health practitioners therefore assess each situation on an individual basis.

10. Who decides whether a person is mentally incapable?

The health practitioner who is proposing the treatment makes this determination. The law says that people are presumed to be capable of making health care decisions. A health practitioner may rely on that presumption unless it is not reasonable to do so in the circumstances.

In the case of admission to long-term care and personal assistance services, an “evaluator” makes this determination. Many health professionals (e.g. doctors, nurses, physiotherapists, occupational therapists, speech language pathologists, psychologists and social workers) are authorized to act as evaluators. [Note: an “evaluator” is not the same thing as a “capacity assessor”. A capacity assessor is a health professional who has been trained and certified to assess other types of capacity, such as capacity to manage property. These subjects are covered in the *Substitute Decisions Act*.]

11. Can a person challenge the finding of incapacity?

Yes. The person can apply to an independent body called the Consent and Capacity Board for a hearing to review this finding. Information about the Consent and Capacity Board and how to apply is available at www.ccboard.on.ca or by calling Service Ontario Info-Line at 416-314-5518 or 1-800-268-1154 Toll Free in Ontario. TTY: 1-800-387-5559.

12. How does the person know about this right?

The law requires that the person be informed of the right to apply for a review of the finding of incapacity. Health practitioners and the CCAC must make sure this happens.

13. If a person cannot make a decision about one type of treatment does that mean the person can't make a decision about any other type of treatment that may be proposed?

No. A person may be capable of making a decision about one treatment but not another. A person may be capable of making a decision about a treatment at one time but be incapable of making the same decision at a different time. It all depends on the complexity of the particular treatment and the person's level of capacity at the time.

14. Who is authorized to make decisions when a person is mentally incapable?

Substitute decision-makers are ranked in a hierarchy. The health practitioner—or the CCAC staff, in the case of admission to long-term care—goes down the list until a substitute who is available, capable and willing to make the incapable person's decision is found. The order is:

1. A guardian appointed by the court if the court order authorizes the guardian to make health care decisions
2. A person with a "power of attorney for personal care" authorizing them to make health care decisions
3. A representative appointed by the Consent and Capacity Board (any person may apply to the board to be appointed as the substitute decision maker)
4. A spouse or partner
5. A child or parent (custodial parent if the patient is a minor)
6. A parent who has access rights (if the patient is a minor)
7. A brother or sister
8. Any other relative
9. The OPGT.

15. Who is responsible for locating the right substitute decision-maker?

The health practitioner who is proposing the treatment or the CCAC handling the admission to a long-term care facility or the evaluator who is proposing the personal assistance service is responsible.

16. What happens if there is more than one equally ranked person authorized to make a substitute decision and they cannot agree?

There are two options in this situation. One of the equally ranked decision makers, or another person, may apply to the Consent and Capacity Board to be given the right to make decisions. Alternatively, the OPGT will make the decision if all other efforts to resolve the conflict fail.

17. What happens in an emergency?

Treatment may be given without consent in an emergency, unless the practitioner is aware of instructions to the contrary that the patient gave while capable or if there is a substitute present at the time.

An emergency is defined as a situation in which the person for whom treatment is proposed is apparently experiencing severe suffering or is at risk, if the treatment is not administered promptly, of sustaining serious bodily harm.

Similar provisions enable the Community Care Access Centre to admit a person to long-term care without consent in a crisis.

18. What if a person regains their capacity during a course of treatment?

If this happens, the person then has the right to choose whether to continue the treatment or withdraw consent.

19. What principles does the OPGT follow in making a decision about treatment, long-term care admission or personal assistance service?

The OPGT abides by the rules governing all substitutes that are set out in the *Health Care Consent Act*.

If the person has, while capable, expressed wishes about the matter then the OPGT must follow these wishes if possible. These may have been expressed orally or in writing. The term “advance directive” is often used to refer to the wishes a person expresses while capable.

If there do not appear to be any such wishes, the decision is made in the person's best interests. In determining what is in the person's best interests, the OPGT – like all substitutes – must take into consideration:

- the values and beliefs the person held while capable
- the person's current wishes, if these can be ascertained
- the potential benefits of the treatment, admission or service
- whether the benefits outweigh the risks
- whether there is a less restrictive or less intrusive option

20. Are there any circumstances in which a person's “capable wishes” would not be followed?

If it would be impossible, in the circumstances, to follow a person's prior capable wishes, then the substitute is not bound by them. In any other situation, the Consent and Capacity Board's permission must be obtained before a substitute decision maker can depart from such wishes. No one is allowed to “change” a person's prior capable wishes or make them on the person's behalf. A substitute decision maker cannot, for example, make an “advance directive” on behalf of an incapable person.

21. Will the OPGT make a substitute decision in advance of a health problem arising for an incapable person?

No. The law does not allow a substitute to make an “advance directive” on an incapable person’s behalf. A substitute can only make a treatment decision after a specific health problem has arisen and a particular treatment has been proposed.

However, decisions may be made about a “plan of treatment”. This means that if a health practitioner is proposing a specific treatment and anticipates, based on the person’s current health condition and the nature of the proposed treatment, that other health problems are likely to arise, the OPGT may make a decision about these other issues in advance as part of the overall plan of treatment.

22. What information is the OPGT entitled to obtain before making a decision?

The OPGT – like all substitutes – is entitled to obtain all the information needed to comply with its’ legal duty to make an informed decision. This includes information about the:

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

23. What is the process for obtaining a treatment decision from the OPGT?

When a health practitioner calls the OPGT’s Treatment Decisions Unit, staff will ask for confirmation that the patient is incapable with respect to the treatment and that there are no other substitute decision makers available to make the decision. Once this issue is settled, staff will ask for detailed information about the proposed treatment – so that an informed decision can be made on the incapable person’s

behalf. Staff will need to speak directly to the health practitioner who is proposing the treatment if other members of the health team, such as the nurses, cannot provide sufficient information. In many cases OPGT staff will visit the patient.

Staff also collect information about the incapable person's values and beliefs, if available.

Once OPGT staff believe they have enough information to make an informed decision, the health practitioner, or another member of the patient's health care team will be verbally advised of the decision. This will be followed by a letter.

24. What is the process for obtaining a decision about admission to long-term care from the OPGT?

Decisions regarding admission to a long-term care home are made almost the same way as treatment decisions. CCAC staff usually communicate with the OPGT by telephone or by fax. They are asked to confirm that the person has been found incapable of making the decision about admission and that there is no higher ranked substitute available. They will be asked to explain why admission to long-term care is being proposed and for details about the alternatives that have been considered. Relevant personal information such as marital status, religion, language and cultural preferences will be requested so that the OPGT can make a decision that is sensitive to the needs of the particular individual. OPGT staff will visit the person for whom admission is proposed.

25. What is the process for obtaining a decision about a personal assistance service from the OPGT?

Decisions regarding a personal assistance service are also made almost the same way as treatment decisions. The evaluator proposing the personal assistance service communicates with the OPGT by telephone or fax. They will be asked to confirm that the person has been found incapable of making the decision about the personal assistance service and that there is no higher ranked substitute available.

They will be asked to explain why the personal assistance service is being proposed and for details about the alternatives, if any, that have been considered. Once OPGT staff believe they have enough information to make an informed decision, the evaluator will be verbally advised of the decision. This will be followed by a letter.

26. How does the health practitioner contact the OPGT?

The health practitioner calls the Treatment Decisions Unit in their area of the province. Treatment Decisions Consultants (TDC) work in each of the OPGT's regional offices, including London, Hamilton, Toronto and Ottawa. Northern Ontario is serviced through the Ottawa office.

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| <p>Greater Toronto Area</p> <p>Call: 416-314-2788 Toll-free: 1-800-387-2127 TTY: 416-314-2687 Fax: 416-314-2637</p> | <p>Hamilton Region</p> <p>Call: 905-546-8300 Toll-free: 1-800-891-0502 Fax: 905-546-8331</p> |
| <p>Ottawa Region and Northern Ontario</p> <p>Call: 613-241-1202 Toll-free: 1-800-891-0506 Fax: 613-241-1567</p> | <p>London Region</p> <p>Call: 519-660-3140 Toll-free: 1-800-891-0504 Fax: 519-660-3148</p> |

27. How long does it take for the OPGT to make a decision?

This depends on the nature and complexity of the proposed treatment and the speed with which the practitioner is able to provide all the information needed.

These are critically important decisions. The OPGT takes its responsibility to the incapable person very seriously. Some decisions can be made within a few hours. Others may, of necessity, take a number of days.

28. What hours does the program operate?

The program operates from 8:30 am to 5:00 pm Monday to Friday, and 8:45 am to 1:30 pm on weekends and holidays.

29. How can I get more information?

You can access the OPGT's website at:

www.attorneygeneral.jus.gov.on.ca/english/family/pgt/

You can obtain a copy of the *Health Care Consent Act* online at

www.ontario.ca/laws

To request an information session from an OPGT staff contact the Treatment Decisions Unit of the OPGT office closest to you.

Please be advised that the OPGT cannot give individuals, professionals, facilities or organizations legal advice about specific cases or their own legal obligations. These questions should be directed to a lawyer. The Law Society Referral Service (LSRS) can put you in touch with a lawyer for a half- hour at no charge. Information about how to be referred to a lawyer through the LSRS is available at www.lsr.info. A request to the LSRS may be made by completing the online request form at www.lawsocietyreferralservice.ca. A crisis line is available Monday to Friday, 9:00 am to 5:00 pm.

The crisis line is intended for people who are unable to use the online service, such as those without access to the internet. The phone number for the crisis line is 416-947-5255 (toll free 1-855-947- 5255).

Alternatively, you may contact JusticeNet which is a not-for-profit service promoting increased access to justice for low and moderate-income Canadians. The lawyers in the program offer their skills at a reduced fee to clients of limited means, based on a sliding scale that takes into account both income and number of individuals supported. They can be contacted at: Toll Free: 1-866-919-3219 or by e- mail at info@justicenet.ca.

This brochure provides a very general overview of the mandate and operation of the Office of the Public Guardian and Trustee in relation to substitute decision making for health care. It does not include all of the details of the law, policies, procedures or exceptions that may apply in a particular case. For information about the law please refer to the applicable statutes and contact your lawyer.

Alternate formats of this brochure are available upon request. Please contact 416-314-2803 or toll free 1-800-366-0335.

Ministry of the Attorney General
Making Substitute Health Care
Decisions ISBN 0-7794-3015-8

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Reprinted in 2016
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