



Health Care Directives, Substitute Decision Making and Powers of Attorney

Disclaimer

SCPP provides general guidance on provincial legislation. These guidelines are intended to provide an overview with respect to substitute decision-making, health care directives and powers of attorney. It is important to understand the distinction between these various concepts.

If you require more information, we encourage you to **check directly with the applicable legislation** and seek advice from your legal counsel. Specifically with respect to disclosing personal health information, check with your Privacy Officer or refer to the [Office of the Saskatchewan Information and Privacy Commissioner](#).

DEFINITIONS

In this document:

“Capacity” means the ability to:

- a. understand information relevant to a health care decision respecting a proposed treatment;
- b. appreciate the reasonably foreseeable consequences of making or not making a health care decision respecting a proposed treatment; and
- c. communicate a health care decision with respect to a proposed treatment.

“Pharmacy Professional” means licensed pharmacists, licensed pharmacy technicians and pharmacy interns (extended and student).

“SDM” means a substitute decision maker which will be either a proxy named in a health care directive, the nearest relative as contemplated by s. 15 of *The Health Care Directives and Substitute Health Care Decision Makers Act, 2015*, or a personal guardian appointed by a court.

“Proxy” means a person appointed in a health care directive to make health care decisions.

GLOSSARY OF ACRONYMS

HIPA - *The Health Information Protection Act*

HIPR - *The Health Information Protection Regulations, 2023*

PHI – personal health information

POA - power of attorney

The POA Act - *The Powers of Attorney Act, 2002*

SCPP - Saskatchewan College of Pharmacy Professionals

The SDM Act - *The Health Care Directives and Substitute Health Care Decision Makers Act, 2015*

The SDM Regulations - *The Health Care Directives and Substitute Health Care Decision Makers Regulations, 2017*

1) BACKGROUND

In Saskatchewan, health care decisions of individuals who lack the capacity to make their own health care decisions are governed by the SDM Act. Among other things, the SDM Act establishes the requirements for health care directives and the rules for substitute health care decision making.

A power of attorney is a document in which one person (the “grantor”) appoints another person (the “attorney”) to act on his or her behalf with respect to property and/or personal affairs. An attorney appointed **under a POA does not have the power to make health care decisions** on behalf of the grantor **unless** the POA explicitly states that they do. The legislation that governs POAs is the POA Act.

HIPA and HIPR establish the rights of all individuals in Saskatchewan regarding the privacy of their PHI and place obligations on trustees with respect to the collection, use, and disclosure of PHI.

2) HEALTH CARE DIRECTIVES

A health care directive is a document that sets out a person’s health care instructions and/or appoints a proxy. Anyone with capacity who is 16 years or older can make a health care directive. To be valid, a health care directive must be in writing, dated, and signed. A health care directive remains in place until it is revoked (either in writing or verbally), destroyed or replaced with a new health care directive.

A health care directive takes effect when the person who made the directive does not have the capacity to make a health care decision about a proposed treatment and it remains in effect until they recover their capacity to make health care decisions.

A health care directive may provide specific or more general instructions as to the individual's health care wishes. General health care directive provisions serve as guidelines for future decision making, whereas specific health care directive provisions give clear direction as to the individual's wishes for treatment in specific circumstances. A specific directive that clearly anticipates and gives directions for the specific circumstances that exist must be treated as a health care decision made by the individual. A health care directive may also name a proxy to make health care decisions for the individual when they lose the capacity to make their own decisions.

Where an individual requires treatment, but lacks capacity to make the health care decision, the health care provider must first determine whether a health care directive has been validly made and remains in force. If a valid health care directive exists, it will be necessary to determine whether the directive gives specific directions relating to the proposed treatment. For example, if a patient without capacity has a health care directive that clearly states that they wish to receive all future COVID vaccinations for which they become eligible, it should be treated as the patient's health care decision to receive the vaccine.

3) SUBSTITUTE DECISION-MAKING

When a person lacks the capacity to make their own health care decision, the SDM Act authorizes someone else to make the decision on their behalf.

Capacity is time and decision specific

Capacity can be fluid. A person can lack capacity one day (for example as a result of a particular illness) and regain it the next (when the illness has resolved). Capacity is also decision specific, meaning that a person might not have the capacity to decide whether to undergo surgery, but they may have the capacity to decide which dosage form they prefer. It is important to assess the capacity of the patient for each health care decision.

The following people may be authorized to make the health care decision for a patient who lacks capacity:

a) Proxy

A proxy is a person appointed in a health care directive to make health care decisions. If the health care directive does not give specific directions relating to the proposed treatment, then the proxy is authorized to make the health care decision. The proxy must act according to the wishes expressed by the patient while the patient had capacity, including any general provisions contained in their health care directive. If the patient's

wishes are unknown, the proxy must act according to what they believe to be in the best interests of the patient.

b) Personal guardian

If no proxy has been appointed, a personal guardian appointed by a court pursuant to *The Adult Guardianship and Co-decision-making Act* may be authorized to make the health care decision (s. 23(3) of the SDM Act). The pharmacy professional should review the court order to determine if the personal guardian has been given health care decision-making responsibilities.

c) Nearest relative

If there is no proxy and no personal guardian, the health care decision will fall to the "nearest relative" who is willing, available and has the capacity to make a health care decision.

According to s. 15 of the SDM Act, the nearest relative is the first person described in the following list:

- i) the patient's spouse (or person with whom they are cohabiting as a spouse in a relationship of some permanence);
- ii) their adult child;
- iii) their parent or legal custodian;
- iv) their adult brother or sister;
- v) their grandparent;
- vi) their adult grandchild;
- vii) their adult uncle or aunt; and
- viii) an adult nephew or niece.

In other words, to determine who is authorized to make a health care decision on behalf of a patient, start at the beginning of the list with the spouse (or the person they cohabit with as a spouse). If there is no spouse, or the spouse is not available, willing or lacks capacity, the decision maker will be their adult child if they have one. If no adult child, then parent, etc.

It is important to note a few points relating to the determination of the "nearest relative":

- 1. Preference for eldest.** Where two or more relatives fall within the same category, then the eldest is the decision maker. For example, if a patient has no spouse (or someone with whom they cohabit as a spouse) but they have three adult children, the eldest of those children would be the decision maker.
- 2. Adoptive relationships.** For the purpose of determining a "nearest relative", someone who is related through an adoptive relationship is treated as if they were a blood relative.

3. **Preference for whole blood relatives.** Where two or more relatives fall within the same category (for example, both are adult brothers, but one brother only has one parent in common with the patient), then the decision of the whole blood relative (the brother who shares two parents with the patient) is preferred.
4. **Children.** If the patient requiring a health care decision is a child, the child's legal decision-maker as defined in *The Children's Law Act, 2020* (which used to be known as legal custodian) is preferred over a parent who does not have decision-making responsibility. For more information on legal decision-making related to children see: [Disclosure of the Personal Health Information of Minors to Parents/Legal Custodians](#).

d) Treatment Providers

If an individual **who requires treatment** has no proxy, personal guardian, or nearest relative (or the nearest relative cannot be found after a reasonable attempt), a treatment provider may provide the treatment if they believe it is needed and another treatment provider agrees in writing that the proposed treatment is needed (s.16(4) and (5) of the SDM Act).

e) Caregiver

Where no proxy, nearest relative, or personal guardian is readily available to make a health care decision for an individual who lacks capacity, the SDM Act allows the person's "caregiver"¹ to make health care decisions with respect to "**day-to-day treatment**". "Day-to-day treatment" means physician's visits, routine procedures conducted in a physician's office, routine laboratory tests, foot care, basic eye exams, physiotherapy, speech language therapy, basic dental care, wound care, swallowing assessments, and hearing tests (s. 3.2 of the SDM Regulations)

Appendix A is a summary of the steps to consider when faced with a patient who requires treatment but lacks the capacity to make a health care decision.

4) POWERS OF ATTORNEY

The POA Act governs powers of attorney in Saskatchewan. A power of attorney is a document through which one person (the "grantor") gives another person (the "attorney") powers to act on the grantor's behalf and in the grantor's name with respect to certain matters. The grantor may

¹ "caregiver" includes a proprietor of an approved private-services home pursuant to *The Private-Service Homes Regulations*, an operator of an approved home pursuant to *The Mental Health Services Regulations*, a foster parent immediately prior to the patient becoming an adult, a personal attorney as defined in the POA Act, and a person authorized in writing by the proxy, personal guardian, or nearest relative to make day-to-day decisions for the adult. (section 4 of *The Health Care Directives and Substitute Health Care Decision Makers Regulations* (the "SDM Regulations").

appoint the attorney to act with respect to either personal affairs or property and financial affairs, or both.

An attorney under a power of attorney does *not* have the authority to make health care decisions for the grantor (s. 23(5) of The SDM Act) unless the document explicitly states otherwise. Only the grantor's SDM is authorized to make their health care decisions if they lose capacity to do so.

Occasionally, a POA document will contain clauses which speak to health care and clearly authorize the attorney to make health care decisions on behalf of a grantor. In that case, the document may also qualify as a health care directive, meaning that one document appoints both an attorney and a proxy. However, these provisions must be explicit and clearly reflect the grantor's wishes to make the attorney their health care decision-maker. If no such explicit provisions exist, the attorney **cannot** make health care decisions and cannot consent to or refuse treatment on behalf of a grantor.

Whenever any document is presented, it is critical to review the document to determine what authority has been given (even in situations where the person presenting it is convinced that they have the authority to make health care decisions).

5) DISCLOSURE OF PHI

a) To an SDM

Pharmacy professionals and trustees are authorized by s. 21 of the SDM Act and by s. 27(4)(d) of HIPA to disclose (without consent) the PHI of an individual to an SDM where the information is **necessary to enable that person to make an informed health care decision on behalf of the subject individual**.

Furthermore, section 56(e) of HIPA provides that any right or power conferred on an individual under HIPA may be exercised by a person who is entitled, pursuant to the SDM Act, to make a health care decision on behalf of the individual, where that individual does not have the capacity to give consent.

The data minimization principle applies and the least amount of PHI required to enable the SDM to make the health care decision should be released. See [Patient Confidentiality and the Collection, Use and Disclosure of Personal Health Information](#).

Note

A health care directive only takes effect if the patient does not have the capacity to make their own health care decision. Therefore, a proxy named in a health care directive is only entitled to access the patient's PHI if the patient lacks capacity and the proxy requires the information to make a health care decision. If your patient has capacity, seek their consent before releasing their PHI to their proxy (or anyone else).

b) To a POA

- i) There is **no specific provision of HIPA**, or in the POA Act, that authorizes the release of PHI to an attorney under a power of attorney. Therefore, be cautious whenever an attorney requests information. If the patient has capacity, **get the patient's consent** before releasing PHI to their attorney.
- ii) If the patient lacks capacity to consent to disclosure, review the power of attorney document to determine what the attorney has been authorized to do. Section 15 of HIPA allows an individual to designate another person to exercise any of their rights or powers with respect to their PHI, meaning they can delegate their right to access their PHI. Depending on how it is worded, a POA may qualify as a delegation under s.15.
- iii) Always ask the attorney why the information is being requested. Any disclosure must relate to matters the attorney is authorized to deal with under the POA. For example, if the POA gives the attorney the authority to handle financial matters on behalf of the grantor, the PHI released must be limited to information required to manage the grantor's financial affairs (eg. to file a tax return, or apply for a benefit, etc.)

For more information on disclosure of PHI, please see [Patient Confidentiality and the Collection, Use and Disclosure of Personal Health Information](#).

Attached as Appendix B is a form that may be used when considering whether to disclose PHI to an SDM or attorney under a POA.

APPENDIX A: STEPS TO CONSIDER WHEN A PATIENT LACKS CAPACITY TO MAKE A HEALTH CARE DECISION

1. Does the patient have a health care directive?
2. If the patient has a health care directive, review the directive and determine:
 - a) Does the directive meet the formal requirements of the SDM Act (is it in writing, dated and signed)?
 - b) Has the directive been revoked, replaced or destroyed?
3. If a valid health care directive exists, does it clearly anticipate and give directions relating to treatment for the specific circumstances that exist?
4. If the individual has not made a valid health care directive, or has not made a specific directive for the circumstances that exist, consider:
 - a. Has the individual appointed a proxy or has a personal guardian been appointed? If both exist, the decision of the proxy is preferred to the decision of a personal guardian?
 - b. Is the proxy or personal guardian willing, available, and do they have the capacity to make the health care decision?
 - c. If there is no proxy or personal guardian (or none that is willing, available or has capacity), determine who is the patient's nearest relative.
 - d. If no nearest relative or is willing, available or capable of making the decision, or no nearest relative can be found, a pharmacy professional may provide treatment that is reasonably necessary and in the best interests of the individual if the pharmacy professional believes the treatment to be necessary and another treatment provider agrees in writing that treatment is necessary.
 - e. If the decision involves a day-to-day treatment (see definition above), and no proxy, nearest relative, or personal guardian is available, a caregiver (see definition above) may make the health care decision on behalf of the patient regarding the day-to-day treatment.

**APPENDIX B: REQUEST TO RELEASE PERSONAL HEALTH INFORMATION TO
SUBSTITUTE DECISION MAKER/ ATTORNEY UNDER A POWER OF ATTORNEY**

I, _____ (please print), certify that I am
the

- proxy
- nearest relative
- personal guardian
- caregiver
- power of attorney

of/for _____ (the “**Patient**”).

If nearest relative or caregiver, indicate your relationship to the Patient:

Specific Information Requested:

Purpose for Requesting the Information:

To verify my identity:

- I have produced a piece of government-issued identification for review by the recipient of this request form.

To verify my authority to request personal health information, I have attached the following to this request form:

- Copy of health care directive appointing me as proxy (must be attached for proxies).
- Copy of order appointing me as personal guardian (must be attached for personal guardians).
- Copy of power of attorney (must be attached for attorneys under a Power of Attorney).

I understand that _____ **[Insert name of pharmacy]**
is relying on this request form to release personal health information to me about the Patient, as authorized under *The Health Information Protection Act* and/or *The Health Care Directives and Substitute Decision Makers Act*.

Signature

Date