

**Substitute Decision Makers****Powers of attorney and advanced care planning:  
Substitute decision making**By **Susannah Roth and Margaret O'Sullivan**

Susannah Roth

(August 20, 2019, 9:35 AM EDT) -- Our last four articles in this series reviewed important legal issues relating to powers of attorney for personal care. This fifth article reviews the importance of having a substitute decision maker and what happens if you do not appoint one in a power of attorney.

If you are incapable, your substitute decision maker (SDM) may give or refuse consent on your behalf. In making that decision, your SDM must act in accordance with any prior wishes that you expressed while capable, such as those expressed in a letter of wishes to your attorney for personal care or those expressed orally to your SDM or other person. Your wishes speak to your SDM and not to your health care practitioners.

If your SDM is unaware of any relevant wishes, he or she must act in accordance with your best interests. In determining your best interests, your SDM must consider the following:

- Your values and beliefs while you were capable;
- Any wishes you express while incapable;
- Whether treatment is likely to: improve your condition or well-being, prevent your condition or well-being from deteriorating, or slow the rate that your condition or well-being is likely to deteriorate;
- Whether your condition or well-being is likely to improve, remain the same, or deteriorate without the treatment;
- Whether the expected benefit outweighs the possible harm; and
- Whether a less restrictive or intrusive treatment would be as beneficial as the proposed treatment.



Margaret O'Sullivan

With respect to health care decisions, your SDM will be the highest-ranking person in the following list that is capable of acting, at least 16 years old, available and willing to act as your SDM:

1. Guardian of the person — a person appointed by a court to make personal care decisions on your behalf.
2. Attorney for personal care — a person appointed by you in your power of attorney for personal care.
3. Representative appointed by the Consent and Capacity Board (CCB) — a person appointed by the CCB to make a specific health care decision.
4. Spouse or partner — spouse includes common law spouses and partner includes persons who have lived together for at least one year and have a close personal relationship that is of primary importance in both persons' lives.
5. Child or parent, other than a parent with right of access only.

6. Parent with right of access only.
7. Brother or sister.
8. Any other relative — a relative includes any person related by blood, marriage or adoption.

Despite the above hierarchy, a person described above who is present or has otherwise been contacted may give or refuse consent if he or she believes that no other higher or equally ranked person exists or, if that person exists and is not described in 1 to 3 above, would not object to him or her making the decision. Equally ranked persons must act together or may appoint one of themselves to act as your SDM. If they are unable to agree on a decision, the Public Guardian and Trustee will be required to make that decision on your behalf, resulting in unnecessary delay and possibly arguments among family members during an already stressful time. Having the Public Guardian and Trustee make your decisions will not be ideal, since their representative does not know you and may not be able to determine your wishes.

This result can be avoided by appointing an attorney for personal care. If you fail to appoint an attorney, a person who you might not otherwise want to act on your behalf may become your SDM and your wishes may not be known to that person. Either may result in decisions being made not in accordance with your values and beliefs. In those circumstances, even though you are incapable, you may apply to the CCB to have an alternative person be your SDM or an alternative person could apply to the CCB to be appointed.

This is the fifth article in a series. Read part one: Powers of attorney and advanced care planning: Disability; part two: Powers of attorney and advanced care planning: Property; part three: Powers of attorney and advanced care planning: Revocation and alternatives; and part four: Powers of attorney and advanced care planning: Personal care.

Our next article will continue the importance of having a substitute decision maker and the role of health care consent.

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