



Health Privacy and Consent

Custodians, Individuals, and Substitute Decision-
Makers



Presenter

John T. Clark
Senior Counsel
Miller Canfield LLP

01 **Substitute Decision Makers**

Rights and
Obligations



02 **Personal Health Information**

The Law, Disclosure,
and Consent

03 **Strategies**

Individual, Custodian,
and Substitute
Decision Makers.

01

Substitute Decision Maker (SDM)

Rights and Obligations



PA Care Only Effective If:

- The HCCA applies to the decision and authorizes the attorney to make the decision; or
- The HCCA does not apply to the decision and the attorney has reasonable grounds to believe that the grantor is incapable of making the decision

Presumption of Giving or Refusing Consent

- A person who is 16 years of age or more is presumed to be capable of giving or refusing consent in connection with his or her personal care.
- A person is considered incapable of personal care if:

01 He or she cannot understand information relevant to the type of decision to be made; or

02 He or she is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

An individual may give a written power of attorney for personal care if:

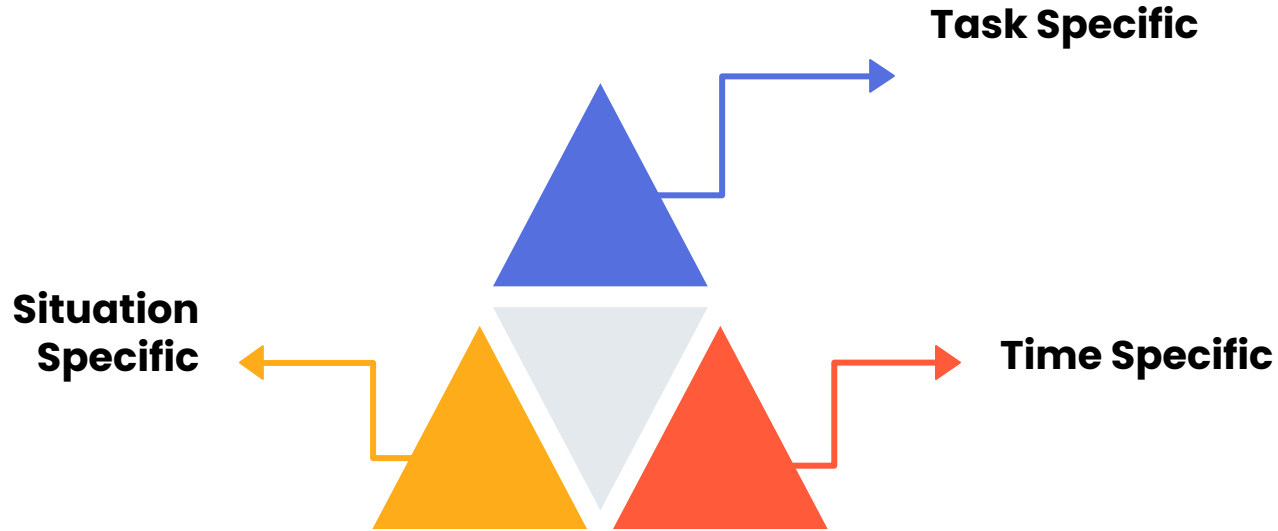


They have the ability to understand if SDM has a genuine concern for the individual's welfare; and



Appreciate that they might need a SDM to make decisions for them.

A determination of capacity to make personal care decisions is:



A physician determines capacity under *HCCA*

“Ulysses Power”

Authorizes the attorney and other persons to use necessary and reasonable force to determine:



Whether the grantor is incapable of making a *HCCA* decision



To confirm whether the grantor is incapable of personal care where a finding of incapacity is required under the PA Care



To obtain an assessment of grantor's capacity by an assessor

• (SDA, s. 50)

“Ulysses Power”

- Necessary and reasonable force to take the grantor to any place for care or treatment and to admit, detain and restrain them there during care or treatment
- Waiving the grantors right to apply to a Consent and Capacity Board Under *HCCA* for a review of a finding of incapacity in connection with a particular decision to which the *HCCA* applies

To be effective:

- The grantor has made statement that he or she understood the effect of the special provisions and the ability to revoke the PA.
- Within 30 days after the PA was executed, an assessor makes a statement that an assessment of capacity was performed after the PA was executed, and
- In the opinion of the assessor, the grantor was capable of personal care and capable of understanding effect of special provisions and revocation ability, and sets out the facts on which their opinion is based

02

Personal Health Information

The Law, Disclosure, and Consent



Use, Collection, and Disclosure of Personal Health Information

INDIVIDUAL &
CONSENT

PHIPA



CCAREGIVER

PERSONAL
HEALTH
INFORMATION
CUSTODIAN

Appropriate Access for Circle of Care

- For Patient Care, Research
- Patient's Personal Use
- Legally Authorized Representative through a properly executed consent




Express Consent

- Must Relate to Information
- Without Deception or Coercion
- Must be Knowledgeable
- Individual Must Have Capacity

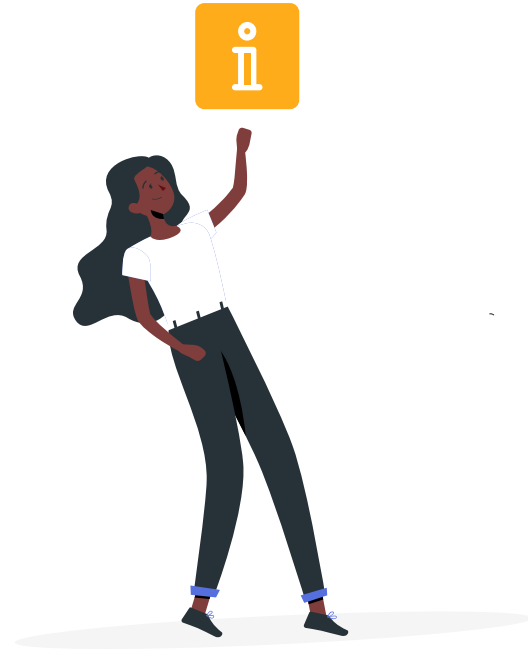


If Individual is Incapable of Consent

- 
- 01** Individual's guardian of the person or guardian of property
 - 02** Individual's attorney for personal care or attorney for property
 - 03** Individual's representative appointed by the Consent and Capacity Board
 - 04** Individual's spouse or partner
 - 05** Individual's child or parent
 - 06** Individual's parent (with only a right of access)
 - 07** A brother or sister
 - 08** Any other relative

Protecting Health Information

- Safeguard Policies
- Proper Disposal
- Challenging Custodian's Compliance



Challenging Custodian's Compliance

- Complaint to the Information and Privacy Commissioner for bad faith and/or unreasonable conduct
- Commissioner conducts review
- Sue for damages for actual harm or wilful or reckless conduct



HDGH Privacy Principles

| | | | |
|-----------|--|-----------|-------------------------------|
| 01 | Accountability | 06 | Ensuring Safeguards |
| 02 | Identifying Purposes for Collection | 07 | Transparency |
| 03 | Consent | 08 | Individual Access |
| 04 | Limiting Collection, Use, Disclosure, and Retention | 09 | Challenging Compliance |
| 05 | Ensuring Accuracy | | |

03

Strategies

Individual, Custodian, and
Substitute Decision Maker



Duties of a Substitute Decision Maker

| | | | |
|----|---|----|--|
| 01 | Diligence & Good Faith. Adhere to <i>HCCA</i> | 06 | Keep Records of Decisions |
| 02 | Explain role to individual | 07 | Foster regular personal contact between individual and their supportive circle of care |
| 03 | Make decisions related to individual's wishes or instructions | 08 | Consult with individual and individual's circle of care. |
| 04 | Make decisions related to best interests | 09 | Seek least restrictive course of action |
| 05 | Encourage individual to participate and foster independence | 10 | Adhere to <i>SDA</i> restrictions regarding confinement, restraint, monitoring devices, and electric shock |

Strategies

- Understand Service Providers' Privacy Policies and Procedures
- Being Proactive with Consent
- Following Duties under Health Care Consent Act and Ethical Decision-Making



Understand Privacy Policies and Procedures



Facilitate the best care for the individual and set expectations



Stay informed about right of access, consent, and obligations



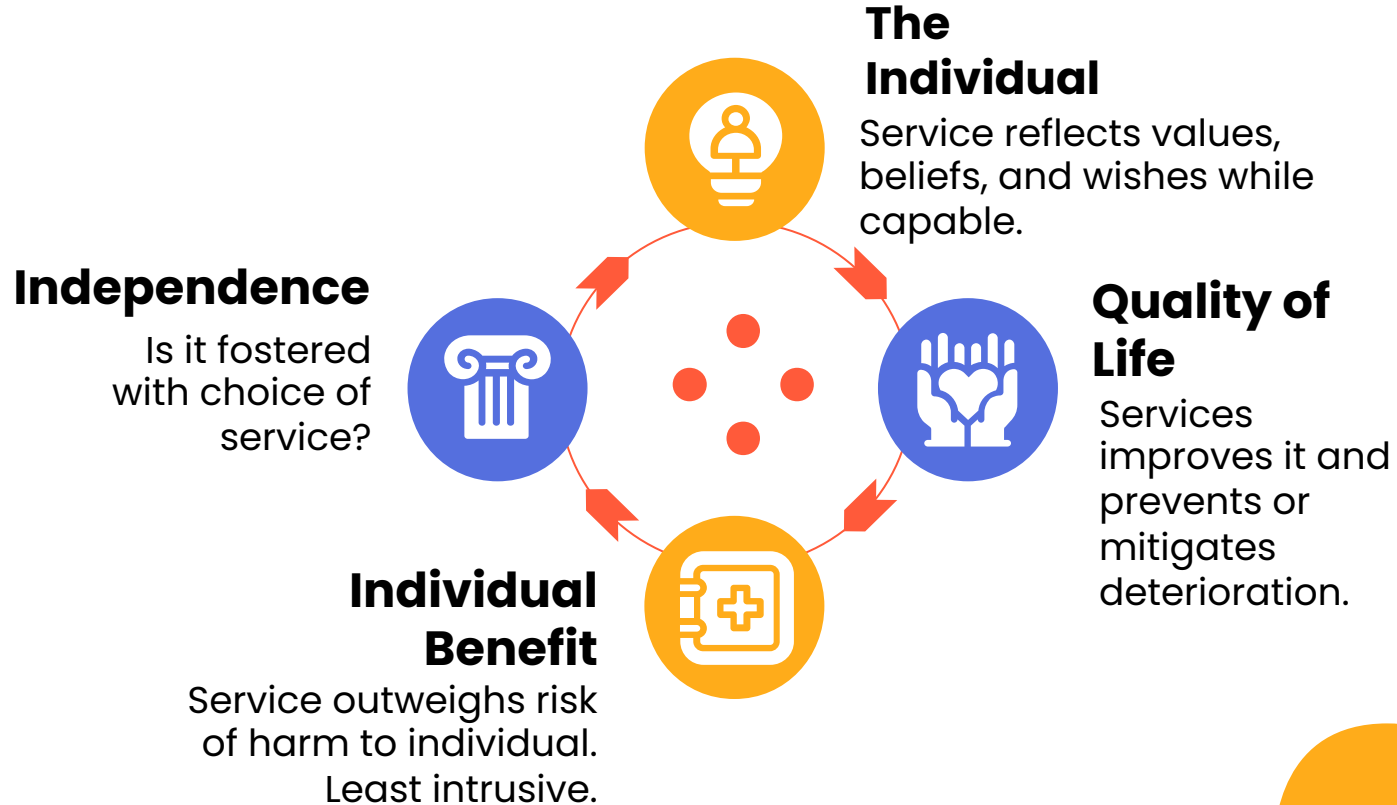
Protect health privacy. Hold Custodian accountable

Being Proactive about Consent

- Consult individual on values and wishes to reduce ambiguity
- Identify and prepare substitute decision makers.
- Written consent to accommodate disclosure to caregivers



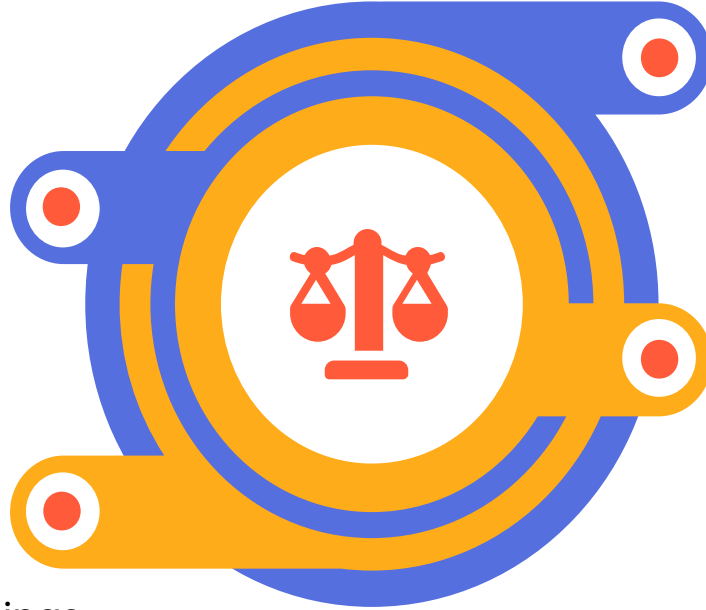
Things to Consider When Making Decisions





● ●
**Principle Based
Framework for Ethical
Decision Making (YODA)**

YOU



OBSERVE

- 1) Identify Problem,
- 2) Acknowledge Feelings,
- 3) Gather Facts

DELIBERATE

- 1) Consider Alternatives,
- 2) Examine Values,
- 3) Evaluate Alternatives.

ACT

- 1) Articulate Decision,
- 2) Implement Plan,
- 3) Evaluate Alternatives.



Conclusion





Thanks!

Do you have any questions?

CREDITS:

This presentation template was created by **Slidesgo**, including icons by **Flaticon**, infographics & images by **Freepik** and illustrations by **Stories**

WITH ASSISTANCE FROM:

Spencer Hsu, Student-at-Law, Miller Canfield LLP.

