

SDM Duties And Responsibilities

What are the general duties and responsibilities that a substitute decision maker takes on when appointed?

In exercising his or her powers, the substitute decision maker is required to:

- comply with the terms and conditions of his or her appointment;
- act diligently and in good faith;
- make reasonable efforts to explain his or her powers and duties to the vulnerable person;
- seek to foster the vulnerable person's independence;
- encourage the vulnerable person to participate in the substitute decision maker's decision;
- choose the least restrictive and least intrusive course of action available in a situation; and
- take into consideration the vulnerable person's wishes, values, beliefs and best interests.

A substitute decision maker must also notify the Commissioner in writing of any change in his or her name, address or phone number, and any change in the name and address of the vulnerable person.

In general, what authority does the substitute decision maker have?

Scope of authority:

A substitute decision maker has the legal authority to make decisions for the vulnerable person in those specific areas in which he or she has been given power by the Commissioner and then only where the vulnerable person is incapable of making the decision.

Effect of decision by SDM:

Any decision made, action taken, consent given or thing done by a substitute decision maker in accordance with the Act with respect to any matter within his or her power is deemed for all purposes to have been decided, taken, given or done by the vulnerable person as though the vulnerable person were a capable adult (section 115 of *the Act*).

Contracts binding:

If a substitute decision maker enters into a contract on behalf of a vulnerable person in accordance with the Act, the contract is binding on the vulnerable person after the appointment expires, is suspended or is terminated, and on the vulnerable person's executors, administrators or heirs after the vulnerable person dies, in the same manner and to the same extent as if the vulnerable person had made the contract and had been an adult capable of making the contract (section 116 of *the Act*).

Incidental powers:

A substitute decision maker may do whatever is necessarily incidental in carrying out any powers granted to him or her (section 117 of *the Act*).

Example 1: Power to sell real estate – a substitute decision maker can sign a real estate listing with an agent.

Example 2: Power to receive and invest money – a substitute decision maker can open and operate a bank account.

Example 3: Power to file tax returns – a substitute decision maker can arrange to have a business such as H&R Block or accountant complete the return.

Completion of transactions entered into by the vulnerable person:

A substitute decision maker has the power to complete a transaction that the vulnerable person entered into before becoming incapable (section 118(1) of *the Act*).

Completion of transactions on death of the vulnerable person:

Where there is no executor or administrator, or the executor or administrator fails to act, a substitute decision maker has the power to complete a transaction that the substitute decision maker entered into before the vulnerable person's death (section 118(2) of *the Act*).

Right to Information

A substitute decision maker has the same right of access to information relating to matters for which he or she has authority as the vulnerable person would have if capable. This includes health care information where the SDM has been granted the power to make health care decisions. The substitute decision maker also has the right to consent to the release of that information to another person.

Right to take possession and control of property

A substitute decision maker for property has the right to take possession and control of the real and personal property under his or her power, and to manage, handle, and administer it to the extent of his or her power.

Immunity

The Act states no proceeding for damages shall be commenced against a substitute decision maker for personal care for anything he or she has done or omitted in good faith in connection with his or her powers and duties under *The Vulnerable Persons Living with a Mental Disability Act*.

What are the specific duties, considerations and limitations related to a Personal Care Appointment?

Best interests regarding health care

When making health care decisions, a substitute decision maker for personal care shall consider the following factors when determining the vulnerable person's best interests:

- whether the vulnerable person's condition or well-being is likely to be improved by the proposed health care;
- whether the vulnerable person's condition or well-being is likely to improve without the proposed health care;
- whether the benefit the vulnerable person is expected to obtain from the proposed health care outweighs the risk of harm to him or her; and
- whether less restrictive or intrusive health care is a reasonable alternative to the proposed health care.

Purchase of Necessities and Reimbursement

Subject to any limitation contained in the appointment, a substitute decision maker for personal care may purchase necessities for the vulnerable person (such as essential food, medication or medical supplies, appropriate clothing or footwear) without the vulnerable person's consent or the consent of his or her substitute decision maker for property or committee, if any. When such purchases are made by the substitute decision maker for personal care, the vulnerable person is liable to pay for them or reimburse the substitute decision maker for personal care for any money spent. Alternatively, if there is a substitute decision maker for property, or a committee of the person's estate, that person must, out of the estate, pay for the necessities or reimburse the substitute decision maker for personal care for any money spent.

A substitute decision maker for personal care is not entitled to receive compensation or remuneration for acting as a substitute decision maker.

Additional measures to be taken where a SDM has the power to decide where a Vulnerable Person lives

There may be situations where additional measures need to be taken by a substitute decision maker for personal care when exercising his or her authority in the area of deciding where, with

whom and under what conditions the vulnerable person should live. The situations where additional actions need to be taken are outlined in the circumstances below.

Temporary Placement in Developmental Centre for Respite Care/Purposes

There may be situations where a substitute decision maker for personal care who has the power to decide where a vulnerable person should live decides that a vulnerable person needs to be temporarily placed in a developmental centre for respite purposes. On application, the Commissioner may approve the temporary placement if:

- the purpose of the placement is to provide respite care to the vulnerable person;
- the vulnerable person requires a level of care that is not readily available outside a developmental centre; and
- there is a developmental centre willing to accept the vulnerable person.

The total duration of a single respite placement or cumulative respite placements by a substitute decision maker in a developmental centre cannot exceed three weeks in a year. The Commissioner will notify the applicant and the vulnerable person of a decision regarding the temporary placement of the vulnerable person in a developmental centre.

The application form and the information necessary when applying for the temporary placement of a vulnerable person in a developmental centre for respite care are:

1. [Application for Temporary Placement of a Vulnerable Person in a Developmental Centre for Respite Care](#) (PDF 244KB)
2. [Protection of Privacy](#) (PDF 32KB)

Admission to a Developmental Centre

There may be situations where a substitute decision maker with the power to decide where a vulnerable person should live determines that it is necessary for a vulnerable person to reside in a developmental centre. The substitute decision maker cannot place the vulnerable person in a developmental centre without first obtaining the approval of the Manitoba Court of Queen's Bench.

To seek the approval of the court, the substitute decision maker must file a *Notice of Application* with the Manitoba Court of Queen's Bench. Typically the substitute decision maker would hire a lawyer to file and serve the *Notice of Application* and supporting affidavits. This notice must be served on the vulnerable person, any currently appointed substitute decision maker for the vulnerable person, the vulnerable person's committee (if any) and the vulnerable person's nearest relative. The Commissioner must also be provided with a copy.

For the court to issue an Order approving the placement of a vulnerable person in a developmental centre, the court must be satisfied that:

- the applicant (substitute decision maker) has made reasonable efforts to find an alternative placement for the vulnerable person and no suitable alternative placement is available;
- it is in the best interests of the vulnerable person to be placed in a developmental centre; and
- there is a developmental centre willing to accept the vulnerable person.

Where the court grants the applicant an Order, the applicant must provide a copy of the Order to the Commissioner.

Continuation of Placement in a Developmental Centre

In situations where a substitute decision maker for personal care who has the power to decide where a vulnerable person should live, the Commissioner may approve the **continuation of the placement** of a vulnerable person in a developmental centre if the Commissioner determines:

- the vulnerable person, as an adult or a child, resided in the developmental centre immediately prior to the proclamation of *the Act* (October 4, 1996); and
- the above criteria (as considered by the Courts) for placement in a developmental centre are met.

To continue a placement, a substitute decision maker for personal care must apply to the Commissioner within 60 days of being notified of his or her appointment as substitute decision maker. The Commissioner will give notice of his or her decision regarding the application to the vulnerable person, the applicant, any other currently appointed substitute decision maker, the vulnerable person's committee (if any), the vulnerable person's nearest relative and any other person the Commissioner considers appropriate. If the Commissioner does not approve the application to continue the placement, the vulnerable person may leave the developmental centre.

The application form and the information necessary when applying for the continuation of placement of a vulnerable person in a developmental centre are:

1. [Continuation of Placement in a Developmental Centre](#) (PDF 232KB)
2. [Protection of Privacy](#) (PDF 32KB)

Leaving a Developmental Centre

A substitute decision maker for personal care with placement powers may consent to a vulnerable person leaving a developmental centre and residing elsewhere. The substitute

decision maker may return the vulnerable person to the developmental centre within six months of leaving the developmental centre without the approval of the court. However, if the vulnerable person, with the consent of his or her substitute decision maker, leaves the developmental centre and resides elsewhere for six months or more, the substitute decision maker cannot return the vulnerable person to the developmental centre without the approval of the court.

It should be noted that a vulnerable person may decide to leave a developmental centre on his or her own if there is no substitute decision maker appointed to decide where that vulnerable person should live.

Apprehension Order

There may be situations where a vulnerable person refuses to live in accordance with the substitute decision maker's decision. In these circumstances, the substitute decision maker may apply to a justice of the peace or a provincial judge for an Order to apprehend the vulnerable person and return that person to live where, with whom and under which conditions the substitute decision maker has decided.

To apply for an "Application and Order for Apprehension", please contact your nearest Provincial Court Office.

Where a substitute decision maker is granted an Apprehension Order, he or she must provide a copy of the Order to the Commissioner.

Any person named in an order may request the assistance of a peace officer in apprehending the vulnerable person. The peace officer is required under *The Vulnerable Persons Living with a Mental Disability Act* to provide such assistance.

Limitations

There are some limitations on the powers of a substitute decision maker for personal care. The limitations are:

- unless a substitute decision maker for personal care is authorized by the Commissioner, he or she cannot:
 - change arrangements regarding custody of or access to a child; or
 - commence divorce proceedings on behalf of a vulnerable person.
- except for the Public Trustee, a substitute decision maker for personal care cannot settle a claim or legal proceeding (ex: finalize a personal injury claim) on behalf of a vulnerable person, whether or not legal proceedings have been commenced without first obtaining court approval.

- a substitute decision maker for personal care cannot give consent on a vulnerable person's behalf to:
 - medical treatment for the primary purpose of research;
 - sterilization that is not medically necessary for the protection of the vulnerable person's health;
 - the removal of tissue for transplant or medical education or research;
 - voluntary admissions to a psychiatric facility;
 - the adoption or guardianship of a child; or
 - participation in an activity or project whose primary purpose is research.
- a substitute decision maker for personal care does not have the power to give, refuse or withdraw consent to health care if the vulnerable person, when capable, made a valid health care directive appointing a proxy to exercise the power or expressing a decision respecting the proposed health care.
- where a vulnerable person is a patient in a psychiatric facility, *The Mental Health Act*, rather than *The Vulnerable Persons Living with a Mental Disability Act* applies; therefore a substitute decision maker's authority may be limited during admission.
- a substitute decision maker for personal care with the power to decide where the vulnerable person should live will have this power suspended during the period of an emergency intervention taken under Part 3 of *the Act*.

What are the specific duties, considerations and limitations related to a Property Appointment?

In addition to the general duties in exercising his or her powers, a substitute decision maker for property shall do the following:

- act diligently and in good faith as a fiduciary;
- exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs (where not receiving compensation);
- keep a record of all transactions involving the vulnerable person's property; and
- provide regular written reports to the Commissioner detailing his or her management of the vulnerable person's property. This includes filing an opening inventory, an annual accounting, and in some cases, meeting bond and surety requirements as required by the Commissioner (see below).

Required expenditures:

Subject to any terms and conditions of the appointment, a substitute decision maker for property shall make expenditures from the vulnerable person's property that are:

- reasonably necessary for the vulnerable person's own support, education and care;
- reasonably necessary for the support, education and care of the vulnerable person's dependents; and
- that are necessary to satisfy the vulnerable person's other legal obligations.

In making expenditures from a vulnerable person's property the following rules apply:

- the substitute decision maker must take into account the value of the property, the accustomed standard of living of the vulnerable person and his/her dependents and the nature of other legal obligations;
- expenditures for the vulnerable person's dependents may be made only if the property is and will remain more than sufficient to provide for the expenditures of the vulnerable person; and
- expenditures for the vulnerable person's other obligations may be made only if the property is and will remain more than sufficient to provide for the vulnerable person and his or her dependents.

Opening Inventory – Real and Personal Property Inventory on Appointment:

Where appointed by the Commissioner, a substitute decision maker for property has six months to take control of the individual's property. Within that six month period (or sooner if requested by the Commissioner) the substitute decision maker must file a complete inventory and account of the vulnerable person's property, debts and liabilities.

Accounting:

The substitute decision maker is required to file, on an annual basis, a sworn affidavit and accounting of the vulnerable person's property. The accounting will need to include the particulars of the property including:

- the opening inventory which sets out the assets and their value;
- a statement of money received including when it was received, the amount, the source and the reason;
- a statement of money spent including the amount, when it was spent, who received it and why;

- a statement of assets sold, realized or acquired, the amount, date of sale or acquisition, and amount of any gain or loss; and
- a reconciliation and closing inventory for all assets; their value on the opening and closing dates; the costs of all assets; and a record of all gains, losses, sales acquisitions and disbursements.

Accounting on the death of a sole substitute decision maker

On the death of the substitute decision maker, his or her executor or administrator must comply with the accounting requirements.

Accounting on the death of a joint substitute decision maker

On the death of a joint substitute decision maker, the surviving substitute decision maker may exercise all the powers that had been granted jointly.

Accounting on the death of the vulnerable person

The substitute decision maker must provide a final accounting and deliver any property to the executor or administrator of the estate of the vulnerable person.

Accounting on the expiration or termination of the substitute decision maker

The substitute decision maker must provide a final accounting and deliver any property to the vulnerable person or the replacement substitute decision maker (if one has been appointed).

Bonds and Sureties:

Where a bond has been requested by the commissioner, the substitute decision maker for property must submit the bond with or without sureties in accordance with the Guidelines, Policies and Procedures on Bonds and Sureties for Substitute Decision Makers for Property.

The purpose of the bond is to provide assurance to the commissioner that the substitute decision maker will properly administer the person's financial affairs. If the vulnerable person's financial affairs are mismanaged, the Vulnerable Person's Commissioner may look to the substitute decision maker, the sureties and/or the surety company to compensate the vulnerable person.

Where a bond is required, the substitute decision maker's authority does not begin until the bond is approved by the Vulnerable Person's Commissioner.

Limitations on Powers

A substitute decision maker for property, unless he or she is the Public Trustee, may not settle a claim or proceeding (ex: finalize a claim relating to property damages) on behalf of a vulnerable person, whether or not legal proceedings have been commenced, without the approval of the court.

Can a substitute decision maker receive compensation for services?

Yes, in some circumstances and subject to the prior approval of the Commissioner, a substitute decision maker for property may receive compensation from the property of the vulnerable person. A request to do so must be submitted to the Commissioner including the amount of compensation.

A SDM who receives compensation for managing the property shall exercise the degree of care, diligence and skill that a person in the business of managing the property of others is required to exercise.

Where the Public Trustee is the substitute decision maker, they receive compensation for their services from the vulnerable person's property (refer to the Public Trustee's "A Client Guide to The Public Trustee's Client Administration Section").

Can a substitute decision maker be held liable for decisions made or actions taken?

Yes, a substitute decision maker for property is liable for damages that result from a breach of his or her duty under *the Act*. However, if determined by a court that the substitute decision maker nevertheless acted honestly, reasonably and diligently, they may be relieved from all or part of the liability.