

Question: Maria has had a fall, and is in Emergency Department, very confused. Her neighbour called the ambulance when she discovered her. The treating team think Maria has a broken hip (Fractured Neck of Femur or #NOF), and plan to operate in about 1 week. They believe Maria has children but do not have their contact details.

1. Could Maria make the decision herself?

CAN MARIA VALIDLY CONSENT TO HEALTH CARE?

Valid consent requires:¹

1. Patient has capacity to make decision about the issue;
2. The consent is voluntarily given; and
3. Communication between the health practitioner and the patient is transparent; and
4. The communication is given to the patient in a language and manner that the patient understands.

WHAT IS CAPACITY?

General test for capacity is when a person can:²

1. Understand the nature and effect of decision about a matter; and
2. Freely and voluntarily make decisions about the matter; and
3. Communicate their decision in some way.

WHO CAN ASSESS THE PATIENTS CAPACITY?

Capacity assessment can be carried out by the following: ³

- Family member, friend, colleague; or
- Health professional; or
- Social worker, support worker or advocate; or
- Person who works in law, including JP; or
- Worker in a financial institution; or
- Aged care Assessment Team worker

If Maria is assessed as not having capacity for this healthcare decision, then another must make the decisions for her regarding the operation.

¹ Kerridge, I, Lowe, I and McPhee, J, *Ethics and law for the health professions*, (2005), 2nd edition, The Federation Press, Sydney pp 215 to 236

² *Powers of Attorney Act 1998* (Qld) Schedule 3; *The Guardianship and Administration Act 2000* (Qld) Schedule 4.

³ *Queensland Capacity Assessment Guidelines 2020*

WHAT HAPPENS IF IT IS ASSESSED THAT MARIA DOES NOT HAVE CAPACITY FOR THIS HEALTHCARE DECISION?

When is Maria's consent not needed when she lacks capacity?

1. If it is urgent health care.⁴
2. Health care without significant risk for the adult patient who lacks capacity to consent.⁵
3. Minor, uncontroverial healthcare.⁶

Based on the facts, these options are not applicable.

WHO CAN CONSENT FOR ADULT PATIENTS WHO HAVE IMPAIRED CAPACITY?

The following is the order of hierarchy for substitute decision makers:

1. A prior advanced health directive made by the adult prior to losing capacity should be sought first.
2. A guardian/s appointed by QCAT if an order is made.
*Who can be a guardian?
Family members, close friends, professionals or anyone who has a genuine interest in the welfare of an adult with impaired capacity can apply for a guardian to be appointed. The appointee must be over 18 years and not a paid carer. If no one is willing to accept the guardianship, QCAT may appoint the Public Guardian to act for the adult about health making decisions.⁷ If no guardian, the enduring documents is the next applicable.
The children of Maria or the Neighbour may make an application to QCAT to be the appointed guardian.
3. Enduring power of attorney for this health matter.⁸ These documents should be found in the patient's clinical records at the hospital (see below). If no enduring documents, then statutory health attorney is next applicable.
4. Statutory health attorney.
*Who is a statutory health attorney? The following is the hierarchy for statutory health attorney.
 - A spouse of the adult
 - A person who is 18 year or older who has the care of the adult and is not a paid carer
 - A person is who 18 years or older who is a close friend or relation of the adult or not a paid carer
 - **The children of Maria and the neighbour may be considered statutory health attorneys in this instance.**

⁴ *Guardianship and Administration Act 2000* (Qld) s 63

⁵ *Ibid* s5

⁶ *Ibid* s 64

⁷ 'Who can Apply for the Appointment of a Guardian', *Guardship for Adults* (Web Page)

<<https://www.qcat.qld.gov.au/matter-types/guardianship-for-adults-matters/who-can-apply-for-the-appointment-of-a-guardian>>

⁸ *Power of Attorney Act 1998* (Qld) s 32

Note: Consent Documentation

In compliance with the *Public Records Act 2002*, all signed consent forms and any supplementary documents are to be filled in the patient's clinical record at the facility where the healthcare is provided.