Substitute decision-making in Advance Care Planning

‘Next of kin’, ‘Person Responsible’ and ‘Enduring Guardian’ – who has the power?

Who is the ‘Person Responsible’?
There is an automatic delegation process for substitute decision making that applies to all adults in NSW. It is known as the Person Responsible process. If an adult lacks capacity to make decisions about their medical treatment, then their Person Responsible has authority to make those decisions on their behalf. A Person Responsible does not have to be appointed or chosen by the person who lacks capacity.

TABLE: How to identify the Person Responsible

An appointed guardian (including an enduring guardian) with the function of consenting to medical and dental treatment.
If there is no one in this category:

A spouse or de facto spouse (including same sex partners) who has a close and ongoing relationship with the patient.
If there is no one in this category:

The patient’s carer, the person who usually organises their care or the person who usually organised their care before they went into residential care. This person must be an unpaid carer (the carer pension does not count as payment).
If there is no one in this category:

A close friend or relative.
If there is no one in this category:

The health professional proposing the treatment can make an application for consent to the Guardianship Division of the NCAT. This is not necessary to provide treatment which is urgent (ie required to save a person’s life or prevent serious damage to their health or relieve significant pain or distress).
Then who is a ‘Next of Kin’ and how is that different?
Many people mistakenly think that a person’s ‘next of kin’ can give substitute consent for their medical treatment. However, in NSW under the Guardianship Act, it is the Person Responsible who makes decisions on behalf of a person who has lost capacity.

What about an ‘Enduring Guardian?’
An adult can appoint an Enduring Guardian to make personal and lifestyle decisions on their behalf if they lose capacity to make such decisions. If a person appoints an Enduring Guardian with authority to make medical treatment decisions on their behalf then that person automatically becomes the first in the hierarchy of Person Responsible. However, unlike a Person Responsible, an Enduring Guardian also has the authority to make substitute decisions about a range of personal/lifestyle areas, not just medical treatment decisions.

The Guardianship Act 1987
The Guardianship Act provides a way for substitute decisions to be made for adults in NSW who lack capacity, including mental illness. It establishes the ‘Person Responsible’ process for medical consent and enables guardians to be appointed to make medical and/or other decisions, such as decisions about accommodation and services. Under the Guardianship Act 1987, substitute decisions about medical treatment can be made by:
- A Person Responsible; or
- The Guardianship Division (The Guardianship Division is a Division of the NSW Civil and Administrative Tribunal (NCAT) and was known as the Guardianship Tribunal before 1 January 2014).

The role of the Guardianship Division of NCAT to appoint guardians /consent to medical treatment
Sometimes a person may have no-one in their lives who fits the Person Responsible criteria. They may choose not to appoint an Enduring Guardian or may already lack the capacity required to do so. In these situations it is important to understand how the Guardianship Division of the New South Wales Civil and Administrative Tribunal (NCAT) plays a role.
The Guardianship Division can appoint a guardian to make a range of personal/lifestyle decisions, such as where to live or what services to receive, as well as the authority to make medical treatment decisions. The Guardianship Division can also consent to medical treatments for adults who lack capacity to consent to such treatments. These options are set out in the Guardianship Act 1987.

Things to Remember:
- A health professional who wants to provide medical treatment to a patient needs to find out who is their Person Responsible so they can ask them for consent for the treatment.
- A Person Responsible is the ‘automatic’ substitute decision maker set out under the Guardianship Act. The Act sets out the hierarchy for the Person Responsible. This is an automatic system which applies when a person lacks capacity to make medical treatment decisions.
- The person who is highest on the hierarchy is the Person Responsible and must consent to a proposed non-urgent treatment before it can be given. eg, an enduring guardian ‘outranks’ a person’s spouse and must be asked for consent.
- Many people mistakenly think that a person’s ‘next of kin’ can give substitute consent for their medical treatment and are not aware of the Person Responsible process.