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# Health Care Providers Guide To Consent to Health Care

*Disclaimer: The following is for informational purposes only and does not constitute legal advice. Health care providers should seek legal advice in any situation in which they are uncertain about how to proceed.*



# What's New?

- September 1, 2011 brings changes:
  - Advance directives gain legal status
  - Emergency medical assistants are bound by consent refusals in an advance directive
  - The list of people eligible to be appointed as temporary substitute decision makers is broadened
  - The rules are tightened about who can be named as a representative
  - A process is set out for making an application to court to resolve health care consent disputes



# Advance Directives

- Must be signed by the adult when capable and be witnessed by two witnesses or one witness who is a notary public or lawyer
  - A witness cannot be a person who provides personal care, health care or financial services to the adult for compensation, nor the spouse, child, parent, employee or agent of such a person
- Must state that the adult knows that:
  - a health care provider may not provide to the adult any health care for which the adult refuses consent in the advance directive; and
  - a person may not be chosen to make decisions on behalf of the adult in respect of any health care for which the adult has given or refused consent in the advance directive



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# When should an advance directive not be followed?

- If it deals with health care on the prescribed list
- If it does not deal with the health care decision at issue
- If it is so unclear that it cannot be determined if the adult has given or refused consent to the health care
- If it is in conflict with the patient's known wishes, values or beliefs, or
- If it was made prior to changes in medical knowledge, practice or technology that might substantially benefit the adult, unless it expressly states that it applies regardless of changes in medical knowledge, practice or technology



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# Emergency Medical Assistants

- As of September 1, 2011, emergency medical assistants who have reasonable grounds to believe a person has made an advance directive must not perform an emergency procedure if the advance directive refuses consent to that procedure



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# New TSDMs

Those now eligible to be appointed by a health care provider to act as a TSDM for an incapable adult are, in priority order:

- The adult's spouse
- The adult's child
- The adult's parent
- The adult's brother or sister
- The adult's grandparent - New
- The adult's grandchild - New
- Anyone else related by birth or adoption to the adult
- A close friend of the adult - New
- A person immediately related to the adult by marriage – New



# New TSDMs

- The other qualifications necessary to be a TSDM remain the same, i.e., a person must:
  - Be at least 19 years of age
  - Have been in contact with the adult during the preceding 12 months
  - Have no dispute with the adult
  - Be capable of giving, refusing or revoking substitute consent, and
  - Be willing to comply with the duties of a TSDM
- End of life decisions:
  - TSDMs can decide to refuse consent to health care necessary to preserve life but only if there is substantial agreement among the health care providers caring for the adult that the decision to refuse consent is medically appropriate
  - Since September 1, 2011, if the adult's wishes, or values and beliefs are not known, an end of life decision can be based on what is in the "best interests" of the adult



# Representatives

An adult can no longer name as a representative:

- a person who provides personal care or health care services to the adult for compensation (unless that person is the adult's spouse, parent or child), or
- a person who is an employee of a facility in which the adult resides (unless that person is the adult's spouse, parent or child)

In addition:

- an adult cannot be required to have a Representation Agreement as a condition of receiving a good or service
- some changes have been made to the form and content of Representation Agreements





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# Court Applications

Anyone can bring an application to court to void an advance directive on the basis that fraud, undue pressure or some other form of abuse or neglect was used to induce an adult to make the advance directive, or to change or revoke a previous advance directive.

For other types of court orders, only the following people can apply:

- A health care provider responsible for the care of an adult who is incapable of giving or refusing consent to health care;
- An adult's representative or personal guardian;
- A person chosen under the *HCCCFAA* to give or refuse substitute consent to health care or admission to a care facility on behalf of an adult who is incapable;
- An adult who is assessed as incapable of giving or refusing consent to health care or admission to a care facility.



# Court Orders

The court has wide discretion to protect the interests of people who are incapable, but has in addition been given specific authority to make the following orders:

- Order the adult to submit to one or more assessments of incapability;
- Give directions respecting:
  - the interpretation of a provision of an advance directive, or any other health care instruction or wish, made or expressed by an adult when capable, or
  - who should be chosen to provide substitute consent under the *HCCCFAA* for an incapable adult
- Confirm, reverse or vary a decision by:
  - an adult's representative or personal guardian, or
  - person chosen to provide substitute consent under the *HCCCFAA* to give or refuse consent to health care or admission to a care facility
- Make any decision that a person chosen to provide substitute consent under the *HCCCFAA* could make



# Basics of Consent

The general rule is that consent is required for all types of health care\* provided to adults with two exceptions:

- preliminary examination, treatment or diagnosis; and
- urgent or emergency health care

\*

Care and treatment related to involuntary admission to a psychiatric facility and non-therapeutic sterilizations are excluded from the meaning of health care



# Preliminary Exam, Treatment or Diagnosis

Triage or other preliminary examination, treatment or diagnosis can proceed without informed consent if:

- Consent can be implied by adult coming to a place where health care is provided
- A spouse, near relative or close friend (usually accompanying the adult) indicates the adult should be provided with health care
- But - health care providers must stop or withdraw treatment if consent is subsequently withdrawn or refused



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# Emergency Care Situations

Consent rules do not apply to urgent or emergency health care situations if:

- It is necessary to provide the health care without delay in order to preserve the person's life, to prevent serious physical or mental harm or to alleviate severe pain
- The adult is apparently impaired by drugs or alcohol or is unconscious or semi-conscious for any reason or is, in the health care provider's opinion, otherwise incapable of giving or refusing consent
- The adult does not have a personal guardian or representative who is authorized to consent to the health care, is capable of doing so and is available
- The adult has not made an advance directive containing instructions that clearly apply to the presenting health need and the range of treatment choices,
- The health care provider does not have reasonable grounds for believing the adult has expressed a prior capable wish to refuse the health care, and
- Where practicable, a second health care provider confirms the first health care provider's opinion about the need for the health care and the incapability



# Consent Rights

The rights associated with giving and refusing consent to health care include the following:

- the right to give consent or to refuse consent on any grounds, including moral or religious grounds, even if the refusal will result in death
- the right to select a particular form of available health care on any grounds, including moral or religious grounds
- the right to revoke consent
- the right to expect that a decision to give, refuse or revoke consent will be respected, and
- the right to be involved to the greatest degree possible in all case planning and decision making



# Presumption of Capability

- For each decision requiring consent, an adult is presumed to be capable until the contrary is demonstrated
- A decision about incapability is based on whether the adult:
  - understands the information being given about his or her health condition
  - understands the nature of the proposed health care including the risks, benefits and alternatives, and
  - understands that the information applies to his her own situation
- An adult's way of communicating is not, by itself, grounds for deciding that he or she is incapable of understanding and giving informed consent



# Substitute Consent

Outside of triage and emergency situations, the hierarchy of substitute decision makers – as of September 1, 2011 – is as follows:

- Personal guardians (Committee of the Person)
- Representatives (unless there is also an advance directive that states that the consent of the adult's representative is not required)
- Advance directives
- Temporary substitute decision makers





# Advance Directives made outside BC

- The HCCCFAA currently does not recognize advance directives made outside BC unless they meet all the requirements of an advance directive made in BC (this is not widely expected)
- Advance directives from other jurisdictions are still useful as an expression of an adult's wishes for the purpose of informing the decisions of substitute decision makers
- Health care providers should continue to appoint a TSDM where an adult has an extra-jurisdictional advance directive which is not valid as an Advance Directive in BC and has no Representative or Personal Guardian



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