

# CONSENT TO HEALTH CARE, PERSONAL PLANNING, AND ABUSE/NEGLECT/SELF-NEGLECT



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# OBJECTIVES

Participants will be able to:

- understand and work with the legal framework for consent to health care
- understand and work with the enhanced personal planning tools resulting from statutory changes effective September 1, 2011
- understand and work with changes to the *Adult Guardianship Act* regarding abuse, neglect, and self-neglect effective September 1, 2011
- apply this knowledge to their social work practice

# KEY PRINCIPLES

- **Presumption of capability:** adult always presumed to be capable
- **Communication:** more than just forms
- **Autonomy:** adult's right to self-determination,
- **Informed consent:** need for decision maker to be fully informed and understand what his/her choices mean; need for service provider to provide that information

# ***HEALTH CARE PROVIDER: DEFINITION***

A person who is licensed, certified, or registered to provide health care in BC under:

- *Health Professions Act*
- *Social Workers Act*

# ADVANCE CARE PLANNING: DEFINITION

- a process of learning, deciding, talking about, and documenting or otherwise expressing what health care an adult wants or does not want in the future if the adult becomes unable to make or communicate those decisions; may include appointment of a Representative
- based in and must be consistent with consent to health care law

# ADVANCE CARE PLANNING: RATIONALE

- We are living longer with more chronic illness and cognitive loss near end of life.
- Advances in science and medicine are able to extend life and prolong the dying process.
- Death as contemporary taboo; thus, poor communication within families.

# LEGAL FRAMEWORK FOR HEALTH CARE CONSENT: WHO? WHAT? HOW?

- **WHO** consents to health care for me now?
- **WHO** consents to health care if I am not capable?
- If I am no longer capable, on **WHAT** does a my substitute decision maker base consent decisions made on my behalf?
- **HOW** do I express my future wishes for health care?

# WHO CONSENTS?

1. capable adult

then, if adult not capable (ranked order):

2. Committee of Person

3. Representative (legally appointed)

4. Temporary Substitute Decision Maker

5. in emergency, health care provider

# CAPABLE ADULT

**Every capable adult has the right to give, withhold, or revoke consent to health care.**

*- Health Care (Consent) and Care Facility (Admission) Act*

Exceptions:

- involuntary admittance and treatment under the *Mental Health Act*
- treatment for TB and other public health risks

# VALID CONSENT TO HEALTH CARE

1. **informed**: health care provider gives information reasonable person needs to understand proposed treatment and make decision -- risks/benefits, alternatives, etc., sufficient to understand consequences of decision
2. **voluntary**: without coercion or influence
3. **specific**: related to proposed health care
4. given by **capable** adult, able to understand the nature of decision

# PRESUMPTION OF CAPABILITY

- Until contrary is demonstrated, every adult is presumed capable of giving, refusing or revoking consent to health care, and
  - An adult's way of communicating is not grounds for deciding that he or she is incapable of making decisions.
- *Health Care (Consent) and Care Facility (Admission) Act, s. 3*

# CAPABILITY TO GIVE/REFUSE CONSENT TO HEALTH CARE

## *capable*

- understand: able to understand information about treatment offered, incl. risks/benefits
- appreciate: able to apply to own situation
- thus, able to understand consequences of decision
- usually determined by health care provider offering treatment

## *incapable*

- unable to understand consequences of decision
- may be temporary or not
- may be due to:
  - unconsciousness
  - extreme pain
  - alcohol or drugs
  - cognitive loss or dementia

# CONTENT AND DURATION OF CONSENT

- consent to a single major or minor treatment (for each treatment)
- consent to a series or sequence of similar major or minor treatments over a period of time for a particular health problem (for each series of treatments)
- consent to a care plan (for 12 months)

# CARE PLAN

A plan for minor health care that:

- is developed by one or more health care providers
- deals with one or more of adult's health problems and likely problems in future given the adult's current health condition, and
- expires no later than 12 months from date consent for the plan was given

# COMMITTEE OF PERSON

- *Patients Property Act* allows Supreme Court to determine that an adult is incapable of managing affairs and issue court order appointing a person to be Committee of Person
- Committee can be family member, friend, or anyone who applies, or Public Guardian and Trustee
- Last resort, most intrusive, and costly

# REPRESENTATIVE

## *Representation Agreement Act*

- adult appoints someone to make decisions
- need not be family member
- Section 7 Agreement: for routine health and/or financial decisions; cannot refuse health care necessary to preserve life
- Section 9 Agreement: health care decisions only

# CAPABILITY:

## to make Representation Agreements

### Section 9

- Understands the nature of authority being given to Representative and effect of giving authority

### Section 7

Need not be capable of:

- making a contract
- managing his/her own health, personal care, legal affairs, or financial affairs
- capability determined by considering situational factors (see over)

# CAPABILITY CONSIDERATIONS

## For Section 7 Rep. Agreement

- can communicate desire to have someone make, help make, or stop making decisions
- can demonstrate choices/preferences and express feelings of approval/disapproval of others
- is aware that making, changing or revoking agreement means that rep. will make, or stop making, decisions that affect adult
- has relationship of trust with person to be appointed representative

# POWER OF ATTORNEY

- not for health and personal care
- for financial and legal decisions only

# TEMPORARY SUBSTITUTE DECISION MAKER (TSDM)

- spouse (incl. common-law & same sex)
- adult child
- parent
- brother or sister
- **grandparent**
- **grandchild**
- another relative by birth or adoption
- **close friend**
- **person immediately related by marriage**
- another person appointed by Office of the Public Guardian and Trustee

# CRITERIA FOR APPOINTMENT OF TSDM

- adult (19 years or older)
- decisionally capable
- have been in contact with adult in last 12 months
- have no known dispute with adult
- be willing and able to comply with duties required by *Health Care (Consent) and Care Facility (Admission) Act* (see slide 31)

# RESTRICTED AUTHORITY OF TSDM

TSDM can refuse consent to health care necessary to preserve life only if there is substantial agreement among the health care providers caring for the adult that

- decision to refuse is medically appropriate and
- person has made decision in accordance with adult's known wishes or values and beliefs when capable

# EMERGENCIES

when adult incapable and substitute  
(Committee, representative or TSDM)  
unavailable...

a health care provider does not have to  
get consent but must provide  
treatment/attempt to preserve the  
patient's life  
**except...**

# EMERGENCIES (continued)

1. must not provide treatment if he/she has reason to believe that adult did not want treatment
2. can override refusal of treatment from TSDM/Representative if believes decision maker has not complied with his/her duties (e.g., not following patient's wishes)

- *Health Care (Consent) and Care Facility (Admission) Act*  
s. 12.1 and 12. 2.

# REVIEW: WHO CONSENTS/ REFUSES CONSENT?

In ranked order:

- capable adult
- Committee of Person
- Representative (legally appointed)
- family/next of kin (TSDM)
- in emergencies, health care provider with restrictions

# ON WHAT IS SUBSTITUTE CONSENT BASED?

Duties of Committees, Reps., or TSDMS:

1. Follow capable adult's expressed wishes or (if no wishes expressed)
2. Make decision based on *best interests* including current wishes, values and beliefs, and consider
  - likely improvement with/without treatment
  - risk and benefits
  - consideration of least restrictive/intrusive treatment

# HOW TO EXPRESS WISHES?

## expressed wishes of adult when capable:

- no requirements in law
- any written or verbal expression including so-called living wills, letters to family, instructions included in Representation Agreement, or documents that were called *advance directives* before new legislation
- used by appropriate decision maker as the basis of giving or refusing consent

# NEW PLANNING TOOL: ADVANCE DIRECTIVE

- when capable, adult creates an advance directive consistent with the requirements of *Health Care (Consent) and Care Facility (Admission) Act*
- advance directive is a document that gives or refuses consent to particular health care treatments in advance
- no decision maker: health care provider uses document as the source of consent

# REQUIREMENTS FOR ADVANCE DIRECTIVE

1. must be completed by capable adult
2. must not contain instructions to do anything prohibited by law or omit to do anything required by law
3. must be in writing and signed and dated by  
(a) the adult in the presence of 2 witnesses,  
and (b) both witnesses in the presence of the  
adult. (only one witness is required if witness  
is a lawyer or notary)

# REQUIREMENTS FOR ADVANCE DIRECTIVE (continued)

4. Must indicate that the adult knows that:
  - person will not be chosen to make decisions
  - health care providers/paramedics must follow instructions (no decision maker)
  - if instructions unclear or not applicable, health care provider not required to follow and will appoint TSDM
  - if Representative or Personal Guardian appointed, advance directive will be used by them (unless Rep. Agreement specifically states otherwise)

# REQUIREMENTS FOR ADVANCE DIRECTIVE (continued)

5. if the adult wants a health care provider to follow his/her instructions refusing health care in an advance directive in spite of changes in medical knowledge, practice or technology, the document must expressly state that the instructions apply regardless of any such change.

# PARAMEDICS ...AND EXPRESSED WISHES AND ADVANCE DIRECTIVES

- **Expressed Wishes:** Paramedic not required to withhold resuscitation even if adult has expressed wish not to be revived (in document or family requests); will only withhold if there is a physician's No CPR Order (or MedicAlert).
- **Advance Directive:** Paramedic who has reasonable grounds for believing adult has made advance directive, as defined in *Health Care (Consent) and Care Facility (Admission) Act*, that refuses consent to emergency procedure, must not perform that procedure.

# PROTECTION FROM LIABILITY

- s. 33 protects health care providers and decision makers from liability, if they have “acted in good faith and used reasonable care,” in carrying out duties and requirements under the HCCCFAA
- also protects health care providers who act in good faith on the basis of information given them by others that later proves to be false (e.g., TSDM who lies about relationship)

# NEW PROCESS TO RESOLVE CONSENT DISPUTES

- health care providers, Representatives, Committees of Person, TSDMs, or adult assessed as incapable may ask court to:
  - reassess capability
  - give direction re interpretation of advance directive
  - decide who is TSDM
  - confirm, reverse, vary decision of substitute
  - consent/refuse consent to health care on behalf of incapable adult
- anyone may ask court to void an advance directive if fraud, pressure, etc. is suspected

# FINANCIAL DECISIONS: WHO?

## 1. Capable adult

If adult not capable:

## 2. Committee of Estate (*Patients Property Act*)

## 3. Power of Attorney (*Power of Attorney Act*)

## 4. Representative Section 7 (*Representation Agreement Act*)

# COMMITTEE OF ESTATE

## 1. Certificate of Incapability

- adult found incapable of managing his/her legal and financial affairs “due to mental infirmity arising from disease, age” etc.
- removes the adult’s right to make decisions and appoints the PGT as Committee of Estate.

## 2. Court Order

- Supreme Court issues order appointing Committee of Estate and deeming adult incapable of managing affairs

# POWER OF ATTORNEY

- document assigns power to make financial and legal decisions to another adult
- does not allow health care decisions
- *enduring* power of attorney means the document and its effect continue after adult has lost capability

# **PART 3 ADULT GUARDIANSHIP ACT:**

## **Objectives**

- protect vulnerable adults who may be abused, neglected, or self-neglecting and who may be incapable of making a decision to accept or refuse services

### but also

- protect autonomy and the right to self-determination
- adults assumed capable unless proven otherwise

# PART 3 *ADULT GUARDIANSHIP ACT*

Designated agencies must:

- receive reports and must report abuse
- look into all situations of suspected abuse, neglect and self neglect of vulnerable adults
- include the adult as much as possible
- involve supportive family and friends
- prepare plan to provide services that is least intrusive
- legal tools are a last resort

# ADULT GUARDIANSHIP ACT AND CONSENT TO HEALTH CARE

- adult retains right to consent or refuse consent to health care unless:
  - health services are court ordered or
  - it is an emergency
- when designated agency offers adult a support and assistance plan, staff must ensure that they seek valid consent for any health services that are part of the plan consistent with requirements of *Health Care (Consent) and Care Facility (Admission) Act*.

# CHANGES TO PART 3 *ADULT GUARDIANSHIP ACT*

- clarifies protection of those reporting suspected abuse, neglect, or self-neglect to designated agency
- court orders for support and assistance extended from 6 months to 1 year (with 1 year renewal)
- assessment report not required if court order only for restraining order
- restraining order extended from 30 days to 90 days
- restraining orders remove requirement to serve abuser on reasonable grounds
- outcome of investigation: “assist adult to obtain representative” is repealed

# CHANGES TO LEGISLATION

Effective September 1, 2011

- s. 9 Rep. Agreements for health/personal care only and no longer require legal certificate; s. 7 agreements continue for health and finances
- addition of possible TSDMs
- new planning tool: advance directive
- new process to resolve consent disputes
- capability to make Enduring POA defined
- changes to abuse/neglect provisions

# STATUTORY RESPONSIBILITIES OF HEALTH CARE PROVIDERS

- assume all adults are capable of giving or refusing consent
- provide information re treatment/service offered and seek valid consent from adult
- if adult incapable, seek consent from appropriate substitute
- interpret/respond to legal agreements (POAs, pre-expressed wishes, advance directives, representation agreements)
- as employees of a designated agency, respond to reports of abuse, neglect, or self-neglect

# RESOURCES 1

- VIHA: Patient Care Policy 9.1.2 and [http://www.viha.ca/advance\\_directives/](http://www.viha.ca/advance_directives/)
- BC legislation: <http://www.qp.gov.bc.ca/statreg>
- Office of the Public Guardian and Trustee: <http://www.trustee.bc.ca/>
- Nidus Personal Planning Resource Centre: <http://www.rarc.ca/textual/home.htm>
- Forms: Ministries of Attorney General and Health: <http://www.ag.gov.bc.ca/incapacity-planning> and [http://www.health.gov.bc.ca/hcc/advance-care\\_planning.html](http://www.health.gov.bc.ca/hcc/advance-care_planning.html)

# RESOURCES 2

- Public Guardian and Trustee, *It's Your Choice*:  
[http://www.trustee.bc.ca/pdfs/Adult%20Guardianship/It's\\_Your\\_Choice-Personal\\_Planning\\_Tools\\_a.pdf](http://www.trustee.bc.ca/pdfs/Adult%20Guardianship/It's_Your_Choice-Personal_Planning_Tools_a.pdf)
- Public Guardian and Trustee, *Consent To Health Care*:  
[http://www.trustee.bc.ca/pdfs/Adult%20Guardianship/Consent\\_to\\_Health\\_Care\\_Sept\\_2011\\_FINAL.pdf](http://www.trustee.bc.ca/pdfs/Adult%20Guardianship/Consent_to_Health_Care_Sept_2011_FINAL.pdf)
- Ministry of Health, Health Care Providers' Guide To Consent To Health Care:  
<http://www.health.gov.bc.ca/library/publications/year/2011/health-care-providers'-guide-to-consent-to-health-care.pdf>