

Consent and Treatment of Children and Adolescents in Separation and Divorce

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The Plan

1. What is informed consent?
2. Is the patient capable?
3. Who makes the decision when the parents are separated or divorced?
4. What if the parents disagree with the patient?
5. What if the parents disagree with each other?
6. What if you disagree with the parents?
7. What happens if I proceed without the parents' consent?
8. Who is entitled to information?
9. What should I do in clinical practice?

What is informed consent?

- ▶ With few exceptions (example, emergency situations), all treatments require informed consent
- ▶ If the patient is capable, the patient makes the decision
- ▶ If the patient lacks capacity, the decision will be made by the patient's substitute decision maker

What is informed consent?

- ▶ It should be thought of as a process of continued dialogue
- ▶ Consent to treatment or refusal of treatment is informed if the patient “receives” information on the:
 - ▶ nature, expected benefits, material risks & side effects of the treatment
 - ▶ Alternative courses of action and likely consequences of not having treatment

What is informed consent?

- ▶ Informed Consent is not a signature on a consent form

Is the patient capable?

- ▶ In Ontario, there is no age of capacity. Capacity is not dependent on age.
- ▶ Patients are presumed to be capable

Health Care Consent Act, s. 4

Is the patient capable?

- ▶ A patient is capable with respect to a treatment if she or he has
 1. The ability to understand information that is relevant to making the decision about the treatment; and
 2. The ability to appreciate reasonably foreseeable consequences of a decision or lack of a decision

Health Care Consent Act, s. 4

Is the patient capable?

- ▶ A patient may be capable with respect to one treatment but incapable with respect to another
- ▶ A patient can disagree with the health care team and still be capable

Who makes the decision when the parents are separated or divorced?

- ▶ Many believe that the age of majority is the age of consent to medical treatment
- ▶ In Ontario, capacity is not dependent on age
- ▶ Minors have always been able to consent to medical treatment provided they were “mature minors”

Booth v. Toronto General Hospital, (1910), 17 O.W.R. 118 (K.B.)

Who makes the decision when the parents are separated or divorced?

- ▶ What is a mature minor?
- ▶ “one with the capacity to understand the nature and consequences of medical treatment”

C. v. Wren, [1987] 2 W.W.R. 669

- ▶ The “mature minor” is essentially the capable patient

Who makes the decision when the parents are separated or divorced?

- ▶ But practically speaking, what factors should you consider when determining whether or not the minor patient is capable?
 - ▶ Age
 - ▶ Level of maturity
 - ▶ Nature and extent of the minor's dependence on his or her parents
 - ▶ The complexity of the treatment

C. v. Wren, [1987] 2 W.W.R. 669

What happens if the parents disagree with the patient?

- ▶ No parental consent is required if the minor is capable (a “mature minor”)
- ▶ Parents cannot overrule the decision made by a mature minor child

What happens if the parents disagree with the patient?

- ▶ Ms. K attends your office with her son Jack
- ▶ Jack complains of a severe toothache and he is visibly in severe distress
- ▶ X-rays reveal decay down to the root
- ▶ You recommend appropriate treatment but Ms. K tells you that she wants to wait and think about it

What happens if the parents disagree with each other?

- ▶ Jack wants you to treat him now
- ▶ They have insurance to cover the cost of the procedures
- ▶ What do you do?

What happens if the parents disagree with each other?

- ▶ If the patient isn't capable and the parents are separated, you should obtain consent from the parent with custody
- ▶ Custody refers to the full bundle of rights and responsibilities of a parent towards a child—not about the residential schedule

What happens if the parents disagree with each other?

- ▶ When parents separate and the child lives with one of them with the consent, implied consent or acquiescence of the other, the right of the other to exercise the entitlement to custody and the incidents of custody is suspended until a separation agreement or order otherwise provides.

Children's law Reform Act, s. 20(4)

What happens if the parents disagree with each other?

- ▶ Practically speaking, you may have no way of knowing if the patient lives with the parent in your office as a result of consent, implied consent or acquiescence.
- ▶ In these circumstances, confirm with the parent who brings the child that there is consent to treatment by both parents and make a note in your file

What happens if the parents disagree with each other?

- ▶ You determine that Jack isn't capable of making a treatment decision
- ▶ He tells you that he's just visiting with his mother and it's his dad who "calls the shots"
- ▶ Jack gives you his father's number
- ▶ What do you do?

What if you disagree with the parents?

- ▶ In the event of an emergency and the parents refuse to consent to treatment of their child who is not capable of consenting either because of immaturity or because of his or her mental or physical condition at the time, Ontario has legislation permitting the removal of a child from the parental authority if the parents refuse to provide medical care

Child and Family Services Act, R.S.O. 1990, c. C.11, s. 57(1)2

What if you disagree with the parents?

- ▶ As a professional, if you have reasonable grounds to suspect the patient requires medical treatment to cure, prevent or alleviate physical harm or suffering and the child's parent does not provide, or refuses or is unavailable or unable to consent to the treatment, you have a duty to report your suspicion and the information supporting your suspicion to the Children's Aid Society

Child and Family Services Act, R.S.O. 1990, c. C.11, s. 72(1)5

What if you disagree with the parents?

- ▶ You call Jack's father who confirms that he has custody of his son
- ▶ He also says that he has spoken with his wife and disagrees with your treatment recommendation
- ▶ He has decided to treat Jack with vitamins and a herbal remedy

What could happen if I proceed without consent?

- ▶ If you do not have consent to treatment, you may expose yourself to a claim of battery
- ▶ Battery is the intentional infliction of unlawful force on another person
- ▶ You will bear the onus of proving that there was consent

Toews (Guardian ad litem of) v. Weisner, 2001 BCSC 15

- ▶ You may also expose yourself to professional discipline

Who is entitled to information?

- ▶ Dentists are health information custodians
- ▶ You are prohibited from disclosing a patient's personal health information unless
 - ▶ you have the patient's consent and the disclosure to the best of your knowledge is necessary for a lawful purpose; or
 - ▶ the disclosure is permitted or required by the *Personal Health Information Protection Act*

Personal Health Information Protection Act, 2004, S.O. 2004, c. 3,
Sched. A, s. 29

Who is entitled to information?

- ▶ The consent must meet the following conditions:
 - ▶ It must be the patient's consent
 - ▶ It must be knowledgeable
 - ▶ It must relate to the information, and
 - ▶ It must not be obtained through deception or coercion

Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, Sched. A, s. 18

Who is entitled to information?

- ▶ The consent must be express if you are making the disclosure to a person who is not a health information custodian (e.g. doctor, nurse)
- ▶ If the patient is able to (1) understand the information that is relevant to deciding whether to consent to disclosure and (2) appreciate the reasonably foreseeable consequences of giving, not giving, withholding or withdrawing the consent, then the patient is capable of consenting to the disclosure
- ▶ Patients are presumed to be capable

Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, Sched. A, ss. 18 and 21

Who is entitled to information?

- ▶ A patient may be capable of consenting to the disclosure of some personal health information but incapable of consenting to the disclosure of others
- ▶ A patient may be capable of consent to the disclosure of personal health information at one time but incapable at another

Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, Sched. A, s. 21

Who is entitled to information?

- ▶ If the patient is less than 16 years of age, a parent may give, withhold or withdraw consent to the disclosure of personal health information about the patient, unless the information relates to treatment about which the patient has made a decision on his or her own in accordance with the *Health Care Consent Act*
- ▶ In other words, if the patient who is less than 16 years of age is capable of consenting to the treatment, then you have to obtain his or her consent to disclose the personal health information to his or her parent

Personal Health Information Protection Act, 2004, S.O. 2004, c. 3,
Sched. A, s. 23(1) 2

What Should I do in Clinical Practice?

- ▶ Ask patient about his/her situation, history and concerns (wishes, opinion of best interests)
- ▶ Provide information in language patient can understand (both vocabulary, preferred language)

What Should I do in Clinical Practice?

- ▶ Ask your patient to describe the procedure and its risks in his/her own words
- ▶ Provide them with written information concerning the treatment (brochure, letter)
- ▶ Obtain written consent for disclosure of personal health information

What Should I do in Clinical Practice?

- ▶ Provide your patient with multiple occasions to ask questions
- ▶ Give patient enough time to consider his/her options

What Should I do in Clinical Practice?

- ▶ Obtain a second opinion if patient requests one
- ▶ Make clinical notes each time that you have discussions with patient concerning informed consent
- ▶ On intake as about the family's status

What Should I do in Clinical Practice?

- ▶ Consider asking the parents to undertake to advise you of any change in the family's status in the future
- ▶ Alternatively, consider asking about changes in the family's status at subsequent visits
- ▶ If child is capable and gives consent, you could insist on getting the parents' "agreement" but not "consent"

What Should I do in Clinical Practice?

- ▶ If you request a copy of the parents' separation agreement, you will have to read it and satisfy yourself of who has custody
- ▶ We do not recommend requesting the agreement, but we do recommend asking who has custody and making a note in your file