



Health care consent laws are changing

# What you need to know

ADVANCE DIRECTIVES GAIN LEGAL STATUS SEPTEMBER 1, 2011

# Health care consent laws are changing

On September 1, 2011 changes to the Health Care (Consent) and Care Facility (Admission) Act and other acts (the Representation Agreement Act, Mental Health Act, Power of Attorney Act, Adult Guardianship Act) come into effect. The changes affect all health care providers. Patients may hear about the changes and ask how they are affected.

## SUMMARY OF CHANGES TO THE ACT

- Advance directives gain legal status.
- Health organizations, physicians, nurse practitioners, nurses, and all other regulated health care professionals in BC, plus emergency medical assistants, are legally bound by an adult's instructions in their advance directive made while capable (includes both consent and refusal).
- The list of people eligible to be chosen as temporary substitute decision makers is broadened.
- The rules are tightened as to who can be named as a representative, and a capable adult may name their representative without having to visit a lawyer or notary public.
- A process is set out for making an application to court to resolve health care consent disputes.

## What is an advance directive?

An advance directive provides written consent to (or refusal of) health care to a health care provider in advance of a decision being required about that care. Advance directives must be written, signed by a capable adult, and be witnessed by two witnesses or one witness who is a lawyer or notary public in good standing with the Society of Notaries Public. 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.

The BC Ministry of Health has developed an advance directive form for individuals to use when undertaking advance care planning, but using the form is optional. When an advance directive is in place, a temporary substitute decision-maker is not required unless an exception applies (see page 4, “When should an advance directive not be followed?”).

If there is a legal representative, decisions must be based on the instructions in the advance directive. An adult may also provide, in a representation agreement, that a health care provider may act in accordance with instructions in the adult’s advance directive without the consent of the adult’s representative. If a personal guardian has been appointed by the courts, he or she may withdraw consent given by an adult when capable or by way of an advance directive, or by a representative or temporary substitute decision-maker. The advance directive document is not binding on the decisions of a personal guardian.

The advance directive 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.

## How is an advance directive different from advance care planning?

Advance care planning is the process whereby a capable adult discusses their beliefs, values, wishes, or instructions for future health care with trusted family and health care providers. Advance care planning may lead to a written *advance care plan*. An advance care plan is a written summary of the discussion about the individual’s values and instructions. The advance care plan is to be used by a substitute decision-maker to make health care decisions for the adult when incapable—this may include consent to or refusal of treatment. The decisions are to be based on a health care provider’s offer of medically appropriate care.

An advance directive does not have to be included in the advance care plan. If it is, health care providers are legally bound by consent refusals in the advance directive. There are four options for advance care plans and “who decides,” as follows:

1. Adult decides in advance what should be done by using an advance directive; this is legally binding unless an exception applies.
2. Representative decides using the advance care plan and advance directive if one exists.
3. Representative decides based on their knowledge of the adult’s beliefs, values, and wishes.
4. Temporary substitute decision-maker decides.

## When should an advance directive not be followed?

There are a number of situations in which an advance directive should not be followed, including:

- If it deals with health care on the prescribed Health Care List:
  - a. Abortion unless recommended in writing by the treating physician and at least one other health care provider who has examined the adult for whom it is proposed.
  - b. Electroconvulsive therapy unless recommended in writing by the treating physician and at least one other health care provider who has examined the adult for whom it is proposed.
  - c. Psychosurgery.
  - d. Removal of tissue from a living human body for implantation in another human body or for medical education or research.
  - e. Experimental health care involving a foreseeable risk to the adult for whom the health care is proposed that is not outweighed by the expected therapeutic benefit.
  - f. Participation in a health care or medical research program that has not been approved by a committee referred to in section 2 of the HCCCFAA.
  - g. Any treatment, procedure, or therapy that involves using aversive stimuli to induce a change in behavior.
- 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.
- 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.
- If it was not made voluntarily.
- If it was obtained by fraud or misrepresentation.
- If the adult was not capable of making a decision about whether to give or refuse consent to the health care that the advance directive addresses.

## Triage: do we need to obtain consent?

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.

However, health care providers must stop or withdraw treatment if consent is subsequently withdrawn or refused.

## Emergency: do we need to obtain consent?

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

- 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 semiconscious 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 ("committee of the person") or representative who is authorized to consent to the health care, is capable of doing so and is available.
- Where practicable, a second health care provider confirms the first health care provider's opinion about the need for the health care and the patient's incapability.

In an urgent or emergency situation where these circumstances are not present, it is necessary to obtain consent, and, if possible, a health care provider should try to obtain consent even in the above circumstances.

If a health care provider has reasonable grounds for believing that the adult, when capable, expressed a wish or instruction to refuse consent to the health care that is relevant to the emergency circumstances, the health care provider must not provide the health care. In addition, if the adult has an advance directive containing instructions that clearly apply to the presenting health need and the range of treatment choices, these instructions must be followed.

If treatment is started without consent, and the adult or the adult's substitute decision-maker (personal guardian or representative) subsequently refuses treatment, treatment must be withdrawn. If the health care provider is of the opinion that a personal guardian or representative has not complied with their statutory duties to consent to or refuse consent to health care as directed by the adult when capable, the health care provider may provide the health care without delay in order to preserve the adult's life, to prevent serious physical or mental harm, or to alleviate severe pain.

## What is the hierarchy of substitute consent?

Outside of triage and emergency situations, the hierarchy of substitute decision-makers is as follows:

**PERSONAL GUARDIANS** (committee of the person)—A personal guardian is the highest-ranking substitute decision-maker and, unless restricted by the court order making the appointment, can give, refuse, or withdraw consent to any health care to which the adult could give or refuse consent while capable, except nontherapeutic sterilization. A personal guardian may withdraw consent given by an adult when capable or by way of an advance directive, or by a representative or temporary substitute decision-maker. The advance directive document is not binding on the decisions of a personal guardian.

**REPRESENTATIVES**—named by an adult under a representation agreement to make or help make decisions on behalf of the adult at a time when the adult becomes incapable of making decisions independently. There are restrictions on who can be appointed as a representative. Representatives must act within the authority given to them in the representation agreement. If there is also an advance directive that relates to a matter over which the adult's representative has authority, the representative must treat instructions of the adult in the advance directive as the adult's wishes expressed while capable.

**ADVANCE DIRECTIVES**—An advance directive provides consent to or refusal of health care by the capable adult to a health care provider.

**TEMPORARY SUBSTITUTE DECISION-MAKERS**—if the adult has not done any advance care planning, no one has been appointed personal guardian by the court, and the adult has not named a representative for health care decision-making, health care providers will continue the practice of appointing a temporary substitute decision-maker.

## Are advance directives made outside BC valid?

The new HCCCFA Act does not recognize advance directives made outside BC unless they meet all the requirements of an advance directive made in BC (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 choose a temporary substitute decision-maker in cases where an adult has a non-BC advance directive and has no named representative or court-appointed personal guardian.

## For more information

HEALTH CARE PROVIDERS' GUIDE TO CONSENT TO HEALTH CARE—  
MINISTRY OF HEALTH, JULY 2011

Detailed information on advance directives and advance care plans, decision support flow charts, case scenarios, scope and duties of personal guardians and representatives, representation agreements, changes to the list of people eligible to be appointed temporary substitute decision-maker.

[www.health.gov.bc.ca/library/publications/year/2011/health-care-providers'-guide-to-consent-to-health-care.pdf](http://www.health.gov.bc.ca/library/publications/year/2011/health-care-providers'-guide-to-consent-to-health-care.pdf)

### BCMA RESOURCES

A number of documents and resources are available from the BC Medical Association.

[www.bcma.org/news/advance-directives](http://www.bcma.org/news/advance-directives)

*This information is based on the Health Care Providers Guide to Consent to Health Care—July 2011, developed by the BC Ministry of Health. It is provided 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.*



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