

## Health Care Consent

How decisions are made if you are incapable

*“To make sure my wishes are honoured and to make things clear for my family, I need to plan before a health crisis occurs.”*



The Health Care Consent and Care Facility Admission Act outlines the requirements for health care consent. This law came into effect in February 2000 and describes the rights of patients, as well as how decisions are made if a patient is determined incapable. It applies to British Columbians who are 19 years or older.

### Who gives consent for health care?

A health care provider must first try to get consent from you (the patient/client). You are presumed capable. The law says the health care provider must communicate with you in a way that is appropriate to your skills and abilities. You may get help from family or friends to assist with the communication in order for you to demonstrate an understanding of the factors required for informed consent. See the Nidus fact sheet on *Health Care Consent: Your Rights and the Law*.

### What happens if I am incapable of consent?

If the health care provider determines you are incapable of informed consent, then they must get consent from one of the authorities below, in this order:

1. A **committee of person** (a person who applies to Court to be appointed as your guardian for health and personal care decisions). This action is rare due to the cost and length of time it takes and its effect on removing your civil rights. See *Adult Guardianship*.
2. Your **representative** (the person you choose and authorize in a Representation Agreement to help you). See the Nidus fact sheets on *Representation Agreements*.
3. An **Advance Directive** (a document with instructions about health care). The health care provider will only follow this if it clearly relates to the health care decision at hand and if the provider has no reason to believe you have changed your mind since making it. See the Nidus fact sheet on *Advance Directive*.

For example, Albert is a widower with three adult children. He recently needed surgery to insert a pacemaker. Unfortunately, he developed a blood clot during surgery and had a stroke. When his son Patrick stopped in to see his father, he learned his father had a stroke. Patrick found his dad confused and groggy. The hospital resident doctor came by to talk to Albert about his condition and to get consent for medication and some tests. Albert's speech was unclear and he did not seem to understand when Patrick asked if he wanted a glass of water. Patrick knew his dad did not respond well to anaesthetic or to painkillers. Patrick asked the doctor questions about his dad, and the doctor asked if Albert had a Representation Agreement. Patrick wasn't sure. He said his sister might know. The doctor said he would come back to get consent.

If Albert does not have a Representation Agreement in place, the health care provider can check if he has made an Advance Directive that applies to the specific situation. If not, the health care provider will select someone to be Albert's **temporary substitute decision maker (TSDM)** according to a list outlined in the law. This is the 'default scheme' for health care decision making when adults have not made their own arrangements.

### What are the qualifications of a Temporary Substitute Decision Maker?

To qualify as a TSDM, a person on the numbered list on the next page must meet all of the following requirements:

- be at least 19 years of age,
- have been in contact with you during the previous 12 months,
- have no dispute with you,
- be capable of giving, refusing or revoking consent on your behalf, and
- be willing to carry out the duties of a TSDM (see page 2).

### Who can be selected as a TSDM?

The health care provider must select someone who meets the qualifications of a TSDM from this list, in order of:

- 1) Your spouse—includes same sex and common law marriage-like relationships. There is no minimum time you must have lived together.

If there is no spouse who qualifies, the provider will continue down the list to find one of the following who is related to you by birth or adoption:

- 2) An adult child;
- 3) A parent;
- 4) A sibling;
- 5) A grandparent;
- 6) A grandchild;
- 7) Other relative.

If no one related by birth or adoption is available or qualified, the provider will look for:

- 8) A close friend (defined as an adult who has a long-term, close personal relationship involving frequent personal contact with you, but who does not receive compensation for providing personal care or health care to you);
- 9) A person who is immediately related by marriage (for example, an in-law).

Albert has three adult children who could be selected to be his TSDM – Patrick, Ashley or Paul. If Albert did not name a representative(s) in a Representation Agreement, the doctor could select Patrick as TSDM to give or refuse consent for the medication and tests right now. Because the authority of a TSDM is ‘temporary,’ the doctor might select Ashley as TSDM at another time.

### What if there are problems selecting a TSDM?

There is no appeal procedure if someone disputes who is selected as TSDM. For example, Paul may argue that he knows Albert’s wishes better than Patrick or Ashley. In the case of a dispute among people at the same level on the TSDM list, a health care provider will contact the Public Guardian and Trustee (PGT—a government official).

The law says that if no one from the TSDM list is available or considered qualified, or if there is a dispute, the PGT can authorize who will be the TSDM or the PGT staff will be the decision-maker.

### What are the duties of a TSDM?

The duties of a TSDM are listed in Section 19 of the Health Care Consent Act.

1. Your TSDM must first consult with you as much as possible. If the TSDM was authorized by the PGT, the TSDM must also consult with any near relative or close friend of yours who asks to assist.

2. The TSDM must carry out any instructions or wishes you expressed (verbally or in writing) when you were capable.
3. If your instructions or wishes are not known, the TSDM must decide in your best interests and when doing so must consider:
  - Your current wishes, known beliefs and values,
  - Whether your condition or well-being may be improved by the proposed health care,
  - Whether your condition or well-being may be improved if the proposed health care is not provided,
  - Whether the expected benefit of the proposed treatment outweighs the risk of harm to you, and
  - Whether a less restrictive or less intrusive form of health care would be of as much benefit to you.

### What are the limits of a TSDM?

A TSDM only has authority to make certain health care decisions. For example, the TSDM can only refuse consent for life support if the majority of the medical team agrees it is medically appropriate.

The TSDM is also limited by the ‘temporary’ nature of their authority. A TSDM is only selected when the health care provider determines the adult is incapable and a decision needs to be made. A TSDM’s authority only lasts for that specific decision.

A TSDM also does not have legal authority to make **personal care** decisions. Personal care covers decisions about living arrangements, diet, grooming, personal safety and support services. A Representation Agreement is the only way to give someone legal authority for personal care matters.

Due to his stroke, Albert may need assistance with personal care decisions as well as health care decisions. He may also need someone to help with his financial affairs, such as paying bills.

Adults who need help today with managing their own affairs, may make a Representation Agreement with Section 7 standard powers. See the Nidus fact sheet on *Section 7 Agreements*.

### How can I choose who will speak on my behalf?

The real question is—who would Albert want to give or refuse health care consent on his behalf if he is incapable? Perhaps he would want his good friend Cynthia along with one or more of his children. The only way for Albert to authorize the person or people he wants, is to make a Representation Agreement. Making his wishes clear is helpful to him, the doctors, his family and friends. Learn about *Representation Agreements*.