

The following was written by Darcia Schirr, Q.C. to provide information on consent when counselling with minors. Please note, this is general information – members should consult with their own legal counsel regarding specific case situations.

Legal Issues on Consent and Counselling of Minors

THE LAW IN SASKATCHEWAN

Age of Majority

The age of majority in Saskatchewan is 18 years old.¹ This is important because it is the age at which (in most cases) a person becomes capable of giving consent on his own behalf.

Who Can Give Consent?

In order to provide counselling services, consent must be obtained from either the client or someone who has the authority and capacity to give consent on behalf of the client. In Saskatchewan, the age of majority is 18 years old. This means that, in many cases, in order to provide counselling services to a client under the age of 18, parental consent must be obtained.² However, it will not always be the birth parents whose consent is necessary. It is important to obtain consent from the correct individuals, and sometimes the birth parents will not have the authority or right to consent on behalf of the minor client. It is important to determine who has the right to give consent on behalf of the minor. The person who has the right to give consent on behalf of a minor will usually be called the “legal custodian”.

LEGAL CUSTODIANS AND CONSENT

In Saskatchewan, legal custodians can give consent on behalf of a minor. However, the legal custodian is not necessarily always the parent of the minor. A legal custodian can be a birth parent, an adoptive parent, a step-parent, the Minister, a foster parent, or a legal custodian appointed under an agreement.

PARENT

The Children’s Law Act defines a parent as either “(a) the father or mother of a child, whether born within or outside the marriage; or (b) the father or mother of a child by adoption.”³

¹ *The Age of Majority Act*, R.S.S. 1978, c. A-6, s. 2(1).

² Jeffery Wilson, *Wilson on Children and the Law*, (Toronto: LexisNexis Canada, 1994) at 5.21: “The requisite consent of the child has been, under common law, the consent of the child’s parent, since anyone under the age of majority is presumed to be incapable of knowing the nature and consequences of the treatment. Such consent must also be specific as to acknowledging the particular terms and consequences of the treatment.”

³ *The Children’s Law Act*, 1997, S.S. 1997, c. C-8.2, s. 2(1).

According to s. 3(1) of *The Children's Law Act*, parents are automatically considered joint legal custodians of a child. This means that each parent has equal rights, powers, and duties with respect to that child.⁴ However, s. 3(2) of *The Children's Law Act* says:

[W]here the parents of a child have never cohabited after the birth of the child, the parent with whom the child resides is sole legal custodian of the child."⁵

This means that if the birth parents of the child did not cohabit after the child was born, the parent that the child lives with has the sole right to give consent.

Both birth parents and adoptive parents are automatically legal custodians.

Birth Parent

Section 2(1) of *The Children's Law Act* defines a parent as "(a) the father or mother of a child, whether born within or outside the marriage..."⁶ This means that birth parents automatically become the legal custodians of the child.

Because birth parents are automatically the joint legal custodians of a child, it will usually be necessary to obtain consent for counselling from the birth parents. However, in certain circumstances, the birth parents will not be the legal custodians of the minor. In that case, the social worker will need to determine who is the legal custodian of the minor and obtain consent from him or her.

Adoptive Parent

While birth parents are automatically legal custodians, adoptive parents are also automatic legal custodians. Section 2(1) of *The Children's Law Act* defines "parent" as (a) the father or mother of a child, whether born within or outside the marriage; or (b) the father or mother of a child by adoption." This means that an adoptive parent has the same rights and responsibilities as a birth parent. An adoptive parent is a person who adopts a child pursuant to *The Adoption Act*.⁷ Section 15(1)(a) of *The Adoption Act* says:

[A]ny existing right of a birth parent to have or exercise access to or custody of a child is terminated when the child is placed for adoption by a birth parent, an agency or the director;⁸

This means that an adoptive parent's rights can trump the rights of a birth parent. However, this is not necessarily always the case; when a step-parent adopts a

⁴ *Ibid* at s. 3(1).

⁵ *Ibid* at s. 3(2).

⁶ *Ibid* at s. 2(1).

⁷ *The Adoption Act, 1998*, S.S. 1998, c. A-5.2, s. 2.

⁸ *Ibid* at s. 15(1)(a).

child, the birth parent's rights are only terminated if a court orders so.⁹ Because an adoptive parent has the same rights and responsibilities as a birth parent, a social worker must obtain the consent of an adoptive parent for counselling of a minor client.

Step-Parent

A step-parent may or may not be a legal custodian of a child. A step-parent may become a legal custodian of a child by court order, legal agreement, or by other factors or considerations based on the relationship with the child. If a step-parent is a legal custodian, then he or she will have the same rights and responsibilities as any other legal custodian with regards to consent.

Foster Care

When a child is apprehended, the Minister is given all of the rights and responsibilities of a parent.¹⁰

Section 55(1)(a) of *The Child and Family Services Act* says:

Subject to subsection (2), where residential services are provided pursuant to this Act, the minister:

- (a) shall, subject to the terms and conditions of any agreement for residential services, be responsible for the expenses of sheltering, supporting, educating, caring and providing appropriate counselling and rehabilitative services for the child;¹¹

The Minister is responsible for providing counselling to minors in foster care. When a minor is in foster care, consent for counselling should be obtained from the Minister through the social worker at the Ministry of Social Services.

Custodian By Agreement

The Children's Law Act allows parents to enter into an agreement to assign custody to one of the parents or to another person. Section 3(3) says:

The parents of a child may enter into an agreement that may:

- (a) vary their status as joint legal custodians of the child;
- (b) specify the rights, powers and duties of each parent with respect to the child;
- (c) provide for access to the child by either parent or any other person;

⁹ *Ibid* at s. 15(3).

¹⁰ *The Child and Family Services Act*, S.S. 1989-90, c. C-7.2, s. 52(1).

¹¹ *Ibid* at s. 55(1)(a).

- (d) authorize one of the parents to appoint, by written instrument, one or more other persons as legal custodian of the child and guardian of the property of the child for:
 - (i) any time specified in the instrument during the child's minority; or
 - (ii) the duration of the child's minority; and
- (e) provide for the custody of the child and guardianship of the property of the child after the death of either parent.¹²

If such an agreement is in place, it overrules the automatic guardianship of birth parents and adoptive parents. This means that the person named in the agreement is the legal custodian of the minor and has all of the rights and responsibilities that a parent normally has. In this situation, consent should be obtained from the legal custodian assigned under the agreement before providing counselling services to a minor client.

WHAT IF TWO JOINT LEGAL CUSTODIANS DO NOT AGREE ON CONSENT?

A difficult situation arises when there are two joint legal custodians who do not agree on consent or treatment. This often comes up in situations where divorced parents of a minor have joint legal custody.

A court has the power to give one joint legal custodian the right to give consent for counselling for a minor when the other objects, but it will only do so in consideration of the best interests of the child.¹³ In many cases, the court will order that the joint legal custodians make the decision together.¹⁴ If a decision cannot be reached, the court will consider the best interests of the child, and give the decision-making power to the joint legal custodian who is considering the best interests of the child.

In considering the best interests of the child, the court will look at various factors that are set out in s. 4 of *The Child and Family Services Act*.¹⁵

¹² *Supra* note 3 at s. 3(3).

¹³ *Theriault v. Theriault*, 2008 NSSC 227 and *V.F. v. M.F. 1*, 2007 CanLII 3881 (ONSC).

¹⁴ *Melin v. Melin*, 2009 ABQB 549.

¹⁵ *Supra* note 10 at s. 4.

Although the court has the power to give one joint legal custodian the right to give sole consent for a minor, a social worker should not make this determination. The decision should be left to the court. Because joint legal custodians have equal rights and responsibilities, and in absence of a court order, it would be imprudent and improper for a social worker to provide counselling services to a minor when one joint legal custodian objects to that treatment.

CAN CONSENT TO COUNSELLING BE OBTAINED DIRECTLY FROM A MINOR CLIENT?

It may be possible to obtain consent directly from a minor client in certain situations. The law of consent in Canada has developed a doctrine called the “mature minor doctrine”. This doctrine has developed in the medical consent context, but the principles may still be applicable. Although social workers do not qualify under provincial legislation as health care providers, counselling services provided by social workers are governed by the general principles of consent.¹⁶ This means that if a minor client meets the criteria for a “mature minor”, a social worker may provide counselling services with the direct consent of the minor, and without the consent of the legal custodians.

Mature Minor Doctrine in Canada

Although in many cases a parent or legal custodian must give consent for treatment of a minor, in some instances, it is possible to obtain consent directly from the minor. In Canada, this is known as the “mature minor doctrine”. In *Walker (Litigation Guardian of) v. Region 2 Hospital Corp.*, the New Brunswick Court of Appeal explained the mature minor doctrine and what it means for consent:

In Canada, the common law recognizes the doctrine of a mature minor, namely, one who is capable of understanding the nature and consequences of the proposed treatment. Accordingly, a minor, if mature, does have the legal capacity to consent to his or her own medical

¹⁶ *Supra* note 2 at 5.23: “Many other persons, besides doctors, are involved in attempting to help or serve children as clients. These persons may work outside of the parameters of the *Child and Family Services Act* and its definition of a “service provider”. There is currently no specific legislation responsive to their services. The street counselor who provides counselling or refuge to beaten or exploited children works, vis-à-vis the child, under the general principles of consent discussed above and, vis-à-vis the child’s parents, within the limits imposed by the *Criminal Code*.”

treatment. ...At common law, where a minor is mature, no parental consent is required.¹⁷

This passage was cited with approval by the Saskatchewan Court of Queen's Bench in the 1999 case, *Re D. (T.T.)*, and represents the law in Saskatchewan.¹⁸ This means that if a minor is mature minor, the consent of the legal custodian is not necessary.

A mature minor is usually someone who is between 16 and 18 years of age that is capable of "independently understanding the nature and consequences of medical treatment".¹⁹ In order to determine whether or not a minor can understand these things, the court will consider the following:

1. The child's age and maturity;
2. The nature and extent of the child's dependency upon her guardians in respect of taking care of herself, making her own decisions, not necessarily requiring living apart and economic self-sufficiency, but those circumstances would likely be sufficient to enable the child to speak independent of her parents so long as the child *qua* patient – like any other patient – fully appreciates and understands the consent to specific treatment;
3. The complexity of the treatment.²⁰

In other words, if a minor is capable of understanding the nature and consequences of the treatment, he can give consent for himself. If a minor client meets the criteria for a mature minor, the consent of the legal custodian is not necessary.

Because a mature minor can give consent for himself, confidentiality issues may arise. Therefore, when obtaining consent directly from a minor, a social worker should have regard to both the CASW Guidelines for Ethical Practice and the SASW Standards of Ethical Practice.

CASW Guidelines for Ethical Practice

The CASW Guidelines for Ethical Practice deals with consent of minor clients in section 1.3.3:

- 1.3.3. Social workers who have children as clients determine the child's capacity to consent and explain to the child (where appropriate), and to the child's parents/guardians (where appropriate) the nature of the social

¹⁷ *Walker (Litigation Guardian of) v. Region 2 Hospital Corp.*, 1994 CanLII 4470 (NBCA) at pg. 487.

¹⁸ *Re D. (T.T.)*, 1999 CanLII 12540 (SKQB) at para. 5.

¹⁹ *Supra* note 2 at 5.21.

²⁰ *Supra* note 2 at 5.21 and *supra* note 18.

worker's relationship to the child and others involved in the child's care (see section 1.5.5. regarding confidentiality).²¹

According to this section, a social worker has a duty to determine the child's capacity to consent and only has to explain it to a parent where appropriate.

Section 1.5.5 of the CASW Guidelines for Ethical Practice says:

1.5.5. When social workers provide services to children, they outline for the child and the child's parents (where appropriate) their practices with respect to confidentiality and children. Social workers may wish to reserve the right to disclose some information provided by a young child to parents when such disclosure is in the best interests of the child. This should be declared prior to the first session with a child (see section 1.3.3. regarding consent and capacity).²²

Social workers have a duty of confidentiality to all clients. However, according to this section, social workers may disclose some confidential information to parents when it is appropriate to do so. When it is not in the best interests of the child to disclose to the parents, the duty of confidentiality should prevail.

SASW Standards of Ethical Practice

When obtaining consent, it is important to ensure that the consent is informed. This means that the client must have an understanding of the nature and consequences of the counselling. The SASW Standards of Ethical Practice deals with informed consent in section C.5:

C.5 Informed Consent

(a) It is the responsibility of a social worker to obtain informed consent from a client before providing professional services to the client:

1. Best practice wherever reasonably possible and appropriate is to have written informed consent.
2. Verbal informed consent may be obtained and noted where written consent is not reasonably possible or appropriate.
3. Consent is considered to be implied if the client is returning voluntarily for ongoing services; attending a drop-in service program; accessing crisis, emergency, information or referral services.²³

²¹ Canadian Association of Social Workers, *Guidelines for Ethical Practice 2005*.

²² *Ibid.*

²³ Saskatchewan Association of Social Workers, *Standards of Practice for Registered Social Workers in Saskatchewan*.

When dealing with minor clients, informed consent has an important interplay with confidentiality. Section D.6(k) of the SASW Standards of Ethical Practice deals with the social worker's duty of confidentiality to a minor client:

Social workers shall inform a client who is below the age of majority, or who has a legal guardian, of the limit the law imposes on the right of confidentiality with respect to their communications with social workers.²⁴

A social worker should always inform minor clients of the limits on confidentiality. Some of these limits are outlined in *The Child and Family Services Act*. Section 12 of *The Child and Family Services Act* says that any person who has reason to believe that a child is in need of protection must report that information. Section 11 defines a child in need of protection:

A child is in need of protection where:

- (a) as a result of action or omission by the child's parent:
 - (i) the child has suffered or is likely to suffer physical harm;
 - (ii) the child has suffered or is likely to suffer a serious impairment of mental or emotional functioning;
 - (iii) the child has been or is likely to be exposed to harmful interaction for a sexual purpose, including involvement in prostitution and including conduct that may amount to an offence within the meaning of the *Criminal Code*;
 - (iv) medical, surgical or other recognized remedial care or treatment that is considered essential by a duly qualified medical practitioner has not been or is not likely to be provided to the child;
 - (v) the child's development is likely to be seriously impaired by failure to remedy a mental, emotional or developmental condition; or
 - (vi) the child has been exposed to domestic violence or severe domestic disharmony that is likely to result in physical or emotional harm to the child;

- (b) there is no adult person who is able and willing to provide for the child's needs, and physical or emotional harm to the child has occurred or is likely to occur; or

- (c) the child is less than 12 years of age and:
 - (i) there are reasonable and probable ground to believe that:
 - (A) the child has committed an act that, if the child were 12 years of age or more, would constitute an offence under the *Criminal Code*, the *Narcotic Control Act*

²⁴ *Ibid.*

- (Canada) or Part III or Part IV of the *Food and Drug Act* (Canada); and
(B) family services are necessary to prevent a recurrence; and
(ii) the child's parent is unable or unwilling to provide for the child's needs.²⁵

Outside of these parameters, when the minor is a mature minor, releasing confidential information to a legal custodian may violate the duty of confidentiality.

CONCLUSION

When dealing with minor clients, it is important to determine who can give consent to counselling on behalf of the minor. The individuals who have this authority are called "legal custodians". A social worker should seek the consent of a legal custodian before providing counselling services to a minor. If there are two joint legal custodians who cannot agree, the social worker should defer to the court's decision. In some cases, social workers may be able to obtain consent directly from a minor. In order to do so, however, the minor must meet the criteria of a "mature minor".

²⁵ *Supra* note 10 at s. 11.