

Legal Issues on Consent and Counselling of Minors

The following was written by articling student, Jamie LaRose, and lawyer, Darcia Schirr, K.C. of McKercher LLP in March 2023 to provide information on consent when counselling minors. Please note the information provided in this document is general in nature and may not be applicable in specific cases. Members should consult with their own legal counsel regarding how the law may apply to their specific situation.

I. Introduction

Social workers may encounter minors in different workplace settings such as education, health, and justice. Increasingly, as social workers provide counselling services to minors in these settings, situations may arise where social workers are working with minors without formal parental consent, or where minors are requesting services on their own behalf. This raises issues such as when can social workers provide counselling services to minors; who can give consent for these services; how should requests from minors for services be handled; and what rights do minors have to privacy and confidentiality. The purpose of this document is to provide some general legal information to social workers on these issues.

II. Who can consent to counselling services?

Before counselling services are provided, consent must be obtained from either the client or someone who has the authority to give consent on behalf of the client. In Saskatchewan the age of majority is 18 years old.¹ In most cases this is the age at which a person becomes capable of giving consent on their own behalf.

When a client is a minor, it is important to obtain consent from the correct individual or individuals. In some cases, this will be the biological parents, but it will not always be. Therefore, before providing any services, a social worker should consider who is consenting to counselling services and whether they have the authority to do so. The person who has the right to give consent on behalf of a minor will usually be called the “legal decision-maker”.²

A legal decision-maker has decision-making responsibility. This means they are responsible for making significant decisions about a minor’s personal well-being having regard to the minor’s age and stage of development. Significant decisions include those with respect to health; education; culture, language, religion, and spirituality; and significant extracurricular activities.³

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

² *The Children’s Law Act*, 2020, SS 2020, c 2 [The Children’s Law Act] defines “legal decision-maker” in section 2(1) as “the person having lawful decision-making responsibility with respect to a child”.

³ *Ibid*, section 2(1) “decision-making responsibility”.

A. Legal decision-makers

A legal-decisionmaker can be a birth parent, an adoptive parent, a step-parent, the Minister of Social Services, or a legal decision-maker appointed under an agreement.

(i) Parent

The Children's Law Act defines a parent as either: (a) a parent of a child, whether the child is born within or outside marriage; or (b) a parent of a child by adoption.⁴

Absent a court order or an agreement stating otherwise, the parents of a minor are automatically considered joint legal decision-makers for the minor. This means that each parent has equal powers, and responsibilities with respect to that minor.⁵

(ii) Birth parent

Section 2(1) of *The Children's Law Act* defines a parent as "a parent of a child, whether the child is born within or outside marriage".⁶ As mentioned above, this means that birth parents are automatically the joint legal decision-makers of the child. However, if the parents of a minor have never cohabitated after the birth of the minor, the parent that lives with the minor is the sole-decision-maker.⁷ In that case, only the parent the child lives with has the sole right to give consent to counselling services. In all other situations where both birth parents are legal decision-makers, social workers will need to obtain consent from both of the parents, unless a court order or agreement states otherwise.

There may be other circumstances in which the birth parents are not the legal decision-maker of the minor and the social worker will need to determine who the legal decision-maker is and obtain consent from them.

(iii) Adoptive parent

Section 2(1) of *The Children's Law Act* also defines a parent as "a parent of a child by adoption".⁸ This means that adoptive parents have the same powers and responsibilities with respect to a

⁴ *Ibid*, Section 2(1) "parent". The definition includes individuals who are recognized as a parent or declared to be a parent pursuant section 60 or 61; 62,63,64 or 65; or 70, 71, 75 or 76 of *The Children's Law Act*.

⁵ *Ibid* at section 3(1).

⁶ *Ibid* at section 2(1).

⁷ *Ibid* at section 3(2).

⁸ *Ibid* at section 2(1).

minor as birth parents do. An adoptive parent is a person who adopts a minor pursuant to *The Adoption Act*.⁹ Section 15(1)(a) of *The Adoption Act* states:

[A]ny existing right of a birth parent to have or exercise decision-making responsibility or parenting time with respect to a child is terminated when the child is placed for adoption by a birth parent, an agency or the director;¹⁰

This means that an adoptive parent's rights can trump the rights of a birth parent. However, this is not necessarily always the case; for example, when a step-parent adopts a minor, the birth parent's rights are only terminated if a court orders so.¹¹ Since an adoptive parent has the same powers and responsibilities as a birth parent, a social worker must obtain the consent of an adoptive parent before providing counselling to a minor.

(iv) Step-parent

A step-parent may or may not be a legal decision-maker of a minor. A step-parent may become a legal decision-maker of a minor by court order, legal agreement, or by other factors or considerations based on the relationship with the minor. If a step-parent is a legal decision-maker, then they will have the same powers and responsibilities as any other legal decision-maker with regards to consent for counselling services.

(v) Children in the care of the Minister of Social Services

When a minor is apprehended, the Minister of Social Services is given all the powers and responsibilities of a parent.¹² Section 55(1)(a) of *The Child and Family Services Act* states:

Subject to subsection (2), if 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;¹³

⁹ *The Adoption Act*, 1998, S.S. 1998, c. A-5.2 [*The Adoption Act*], s.2.

¹⁰ *Ibid* at s. 15(1)(a).

¹¹ *Ibid* at s. 15(3).

¹² *The Child and Family Services Act*, S.S. 1989-90, c. C-7.2, [*The Child and Family Services Act*], s.52(1).

¹³ *Ibid* at s. 55(1)(a).

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

(vi) Legal decision-maker by agreement

The Children's Law Act allows parents to enter into an agreement to assign legal decision-making to only one of the parents or to another person. Section 3(3) states:

- The parents of a child may enter into an agreement that may:
- (a) vary their status as joint legal decision-makers for the child;
 - (b) specify the powers and responsibilities of each parent with respect to the child;
 - (c) ...
 - (d) authorize one of the parents to appoint, by written instrument, one or more other persons as the child's legal decision-maker 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 decision-making responsibility with respect to the child after the death of either parent.

If such an agreement is in place, it overrides the automatic legal decision-making of birth parents and adoptive parents. This means that the person named in the agreement is the legal decision-maker for the minor and has all the powers and responsibilities that a parent normally has. Therefore, consent should be obtained from the legal decision-maker assigned under the agreement before providing counselling services to a minor.

B. When should a social worker request a copy of a court order or agreement?

When a social worker becomes aware of circumstances that indicate an adult accompanying a minor does not or may not have legal decision-making authority, the social worker should make further inquiries before providing counselling services. This includes documenting any discussions, requesting a copy of any court order or agreement related to legal decision-making authority, and keeping a copy of any applicable court order or agreement on file.

The following chart may be useful to social workers for determining when they should make further inquiries:

Status of Adult	Legal Decision-Maker?	Further Inquiry Required?
Birth Parent	Presumptively, the birth parents are joint-decision maker unless the birth parents did not cohabit after the birth of the minor or if a court order or agreement states otherwise.	Generally, there is no need to obtain a court order or agreement unless the social worker has concerns about potential familial conflict, is aware that the parents have separated/divorced or any other circumstances that result in the birth parent no longer having legal decision-making.
Adoptive Parent	Legal decision-maker by court order	The social worker should make reasonable efforts to obtain a copy of the court order.
Step-parent	Legal decision-maker by court order or agreement	The social worker should make reasonable efforts to obtain a copy of the court order or agreement.
Divorced or Separated Parent	Legal decision-maker unless court order or agreement states otherwise	The social worker should make reasonable efforts to obtain a copy of the court order or agreement.
Non-parent including family member, friend, agent on behalf of the Ministry of Social Services	Legal decision-maker by court order or agreement	The social worker should make reasonable efforts to obtain a copy of the court order or agreement.

C. What if two joint legal decision-makers do not agree on consent?

A difficult situation arises when there are two joint legal decision-makers who do not agree on consent or treatment. This often arises in situations where divorced parents of a minor have joint legal decision-making.

A court can give one joint legal decision-maker the right to give consent for counselling services for a minor when the other legal decision-maker objects, but a court will only do so in consideration of the best interests of the child.¹⁴ In many cases, the court will order that the joint decision-makers make the decision together.¹⁵ 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 decision-maker who is considering the best interests of the child.

In considering the best interest of the child, the court will look at various factors that are set out in section 10 of *The Children's Law Act*.¹⁶ One of those factors is the minor's wishes, having regard to the age and level of the minor's development. Therefore, the older and more mature the minor is, the more weight a court may place on the minor's views. While the minor's wishes are a factor the court will consider, they are not determinative. The court must determine what is in the best interests of the child and that can differ from the minor's wishes.

While the court can give one joint legal decision-maker 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. Since joint legal decision-makers have equal powers and responsibilities, and in the 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 decision-maker objects to that treatment.

D. What if one or more of the legal decision-makers cannot be located?

When there are more than one legal decision-maker, social workers need to obtain consent for counselling services from each of the legal decision-makers. Therefore, social workers should take all reasonable steps necessary to obtain consent from each of the legal decision-makers and document any discussions with the legal decision-maker(s).

III. When can a minor consent to counselling services?

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

¹⁴ *Theriault v. Theriault*, 2008 NSSC 227 and *V.F. v. M.F.1*, 2007 CanLII 3881 (ONSC).

¹⁵ *Melin v. Melin*, 2009 ABQB 549.

¹⁶ *Supra* note 2 at s. 4. See also *supra* note 12 at s. 4 for the best interests of the child factors under *The Child and Family Services Act*.

services provided by social workers are governed by the general principles of consent.¹⁷ This means that if a minor 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 decision-maker. This is true regardless of the workplace setting in which counselling services are provided.

A. Mature Minor Doctrine in Canada

Although in many cases a parent or legal decision-maker 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 treatment. ... At common law, where a minor is mature, no parental consent is required.¹⁸

This passage was cited with approval by the Saskatchewan Court of Queen’s Bench (as it then was) in *Re D. (T.T.)* and represents the law in Saskatchewan.¹⁹ This means that if a minor is a mature minor, the consent of the legal decision-maker is not necessary.

(i) Who is considered a mature minor?

A mature minor is usually someone who is between 16 and 18 years of age. There is however no minimum age at which a minor becomes capable of consenting to health care decisions since capacity to consent will vary based on the individual and the complexity of the decision.²⁰ To be considered a mature minor, the minor must be capable of “independently understanding the

¹⁷ Jeffery Wilson, *Wilson on Children and the Law*, (Toronto: LexisNexis Canada, 2022) at 5.120: “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 counsellor who provided 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*.”

¹⁸ *Walker (Litigation Guardian of) v. Region 2 Hospital Corp.*, 1994 CanLII 4470 (NBCA) at para. 26.

¹⁹ *Re D. (T.T.)*, 1999 CanLII 12540 (SKQB) at para. 5.

²⁰ College of Physicians and Surgeons of Saskatchewan, *Policy- Informed Consent and Determining Capacity to Consent* (2022), at pg. 6.

nature and consequences of medical treatment”.²¹ To determine whether a minor can understand the nature and consequences of medical treatment, the court will consider:

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.²²

The Supreme Court of Canada in *A.C. v. Manitoba (Child and Family Services)*, stated that when the nature of the decision is more serious and its potential impact on the life and health of the minor is more severe, there should be greater scrutiny of the minor’s wishes and ability to exercise consent. This is because there is still an overarching responsibility to protect minors from harm even though the mature minor doctrine accepts that minor’s wishes should be granted deference relative to their maturity.²³

If a minor is capable of understanding the nature and consequences of the treatment, they can give consent for themselves and the consent of the legal decision-maker is not necessary.

B. How should requests from minors be handled?

If a minor requests counselling services, a social worker should first determine whether they are a mature minor who is capable of understanding the nature and consequences of the treatment. The *CASW Guidelines for Ethical Practice* deals with consent of minors in section 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 worker’s relationship to the child and others involved in the child’s care (see section 1.5.5. regarding confidentiality).²⁴

A social worker, therefore, has a duty to determine the minor’s capacity to consent and explain to the minor the nature of the social worker’s relationship to them. When obtaining consent, the social worker must ensure that the consent is informed. This means that the minor must

²¹ *Supra*, note 2 at 5.102.

²² *Supra*, note 17 at 102 and *supra* note 19.

²³ *A.C. v. Manitoba (Child and Family Services)*, 2009 SCC 30 at para. 22-23.

²⁴ Canadian Association of Social Workers, *Guidelines for Ethical Practice 2005*, section 1.3.3.

understand the foreseeable risks and benefits associated with accessing the services. All discussions and assessments about informed consent should be documented in the minor's file. This includes written and verbal informed consent and limits to confidentiality or the release of client information.

The SASW *Standards of Practice* deals with informed consent in section C.4:

- (b) 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.²⁵

It is possible that a minor could be considered a mature minor with respect to some health care decisions, but not all. Therefore, a social worker should assess the minor's capability to understand the nature and consequences of counselling whenever new services are provided, even if a minor was previously determined to be a mature minor.

If the minor is not capable of understanding the nature and consequences of accessing counselling services, then the social worker should determine who the legal decision-maker is and seek their consent. The minor's consent would not be sufficient. When deciding whether to provide consent the legal decision-maker should consider the minor's best interests which includes the minor's wishes.

IV. What rights do minors have with respect to counselling services?

A. The United Nations Convention on the Rights of the Child, 1989 (the "UNCRC")²⁶

The UNCRC is one of the most widely ratified instruments of international law. It recognizes and sets out the minimum civil, political, economic, social, health, and cultural rights of children. Most notably, it recognizes that when decisions are made that affect the lives of children, the best

²⁵ Saskatchewan Association of Social Workers, *Standards of Practice for Registered Social Workers in Saskatchewan* (2020) at section c.4.

²⁶ *Convention on the Rights of the Child*, U.N. Doc. A/RES/44/25, in force September 2, 1990, signed by Canada on May 28, 1990, ratified by Canada on December 13, 1991.

interests of the child should be the primary consideration.²⁷ In addition, children have the right to have their views heard on matters affecting them in accordance with their age and maturity.²⁸

Canada ratified the UNCRC in 1991, but it is not directly binding on Canadian courts. To be binding, it needs to be incorporated into Canadian law.²⁹ While the UNCRC has not been incorporated into Canadian law, it has been widely applied by Canadian courts when interpreting Canadian laws affecting the rights and interests of children.³⁰ It is therefore a useful interpretive tool and Canadian laws are presumed to comply with the UNCRC unless Canadian laws state otherwise.³¹

B. Privacy and Confidentiality

Social workers have a duty of confidentiality to all clients. In general, social workers should obtain informed consent from a client before providing any information about the client to a third party. This includes explaining clearly who the information will be shared with, what information will be shared, why that information is being shared, whether the client has a right to request that identifying information be excluded, and any other information that a reasonable person would want to know in the circumstances.³²

In addition, the Health Information Protection Act (“HIPA”) governs the protection of personal health information.³³ It applies to individuals and organizations that are part of Saskatchewan’s health system and who have custody or control of personal health information. While HIPA may not apply to social workers given the definition of “trustee”³⁴, HIPA does include several rights for individuals which social workers may respect. These include the right to consent to the use and disclosure of information, the right to access records, the right to be informed about uses of information and disclosures without consent, and the right to designate a person to make decisions about one’s health information.³⁵ Section 56(c) of HIPA recognizes that a minor may exercise these rights if they understand the nature of these rights and the consequences of

²⁷ *Ibid*, at Article 3.

²⁸ *Ibid*, at Article 12

²⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 69.

³⁰ *Supra*, note 17 at 1.10.

³¹ *R. v. Hape*, 2007 SCC 26 (CanLII), at para. 53.

³² *Supra*, note 25 at c.5

³³ *The Health Information Protection Act*, SS 1999, c H-0.021

³⁴ *Ibid*, at section 2(t).

³⁵ *Ibid*, at Part II.

exercising them. Therefore, if a minor is deemed a mature minor, then they will likely be able to choose when their personal information is disclosed and to whom.³⁶

Although, social workers may still disclose some confidential information to legal decision-makers when it is appropriate to do so. Section 1.5.5. of the *CASW Guidelines for Ethical Practice* states:

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).³⁷

As mentioned, there is an overarching responsibility to protect minors from harm and this may override a minor's right to privacy or expectations of confidentiality. It may therefore be in the best interests of the child for the social worker to disclose confidential information, for example, in court proceedings.

Social workers should inform minors of any limits the law imposes on the right of confidentiality with respect to their communications with the social worker.³⁸ Some of the limits of confidentiality are outlined in *The Child and Family Services Act*. Section 12 of *The Child and Family Services Act* states that any person who has reason to believe that a child is in need of protection must report that information. Section 11 of *The Child and Family Services Act* defines a child in need of protection. It includes a child who requires medical, surgical, or other recognized remedial care or treatment that a qualified medical professional determined to be essential and has not or is not likely to receive that care or treatment as a result of the legal-decision maker's action or omission³⁹.

A child in need of protection may therefore include a child who is in need of medical care and the legal decision-maker refuses. This may include situations in which the legal-decision makers are opposed to the recommended treatment on a religious, ethical, cultural, or medical grounds. Such situations can be difficult and require balancing various factors and rights.

³⁶ *Ibid*, at section 56(c). HIPA does not apply to personal health information obtained for the purposes of *The Adoption Act* and *The Child and Family Services Act*, see section 4(4) of HIPA.

³⁷ Canadian Association of Social Workers, *Guidelines for Ethical Practice 2005*, section 1.5.5.

³⁸ *Supra*, note 25 at D.6.

³⁹ *Supra*, note 12 at section 11(iv).

For example, in *Hamilton Health Sciences Corp. v. D.H.* the Ontario Court of Justice had to determine whether a child was in need of protection because her family refused to consent to chemotherapy treatment that would likely save the child's life.⁴⁰ The family instead pursued traditional medicine. The court held that "the right to use traditional medicines must remain consistent with the principle that the best interests of the child remain paramount."⁴¹ If such a situation arises, the social worker should seek legal advice.

V. Conclusion

When dealing with minors, 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 decision-makers". A social worker should seek the consent of a legal decision-maker before providing counselling services to a minor, regardless of the workplace setting. If there are two joint legal decision-makers 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, however, to do so, the minor must meet the criteria of a "mature minor".

This continues to be an evolving issue as Canadian courts, politicians, and society continue to explore how to give weight to the views or decisions of children on their own medical treatment, while also balancing the need to protect them from harm. Recently, Canadian politicians have begun to debate whether Medical Assistance in Dying ("MAID") laws should be extended to mature minors. Currently, the law is limited to competent adults 18 years or older, but there has been debate about whether minors as young as 12 years old should be presumed capable of making decisions related to their health.⁴² This continues to be debated and it is unclear whether the law will be amended and what limitations may be put in place.

⁴⁰ *Hamilton Health Sciences Corp. v. D.H.*, 2014 ONCJ 603

⁴¹ *Hamilton Health Services Corp. v. D.H.*, 2015 ONCJ 229 at para. 83a.

⁴² Special Joint Committee on Medical Assistance in Dying, "Report 2-Medical Assistance in Dying in Canada: Choices for Canadians", February 15, 2023 accessed at <https://parl.ca/DocumentViewer/en/44-1/AMAD/report-2/>.