

The Psychological Association of Manitoba Practice Guideline for Providers of Psychological Services

Minors' Consent to Psychological Treatment And Primary Care and Control

A. Introduction

The Psychological Association of Manitoba (“PAM”) recognizes that client autonomy and respect for personal dignity are central to the psychologist-client relationship. In exercising their autonomy, every client has the legal right to consent to, or refuse, psychological treatment. PAM also recognizes that children should not be automatically deprived of their right to make decisions affecting their psychological treatment. Instead, children are entitled to a degree of decision-making autonomy that is reflective of their evolving intelligence and understanding.

- **Psychologists must obtain adequate informed consent from the client, or an individual or agency with legal authority to consent on the client's behalf, prior to providing psychological services to the client.^{1 2}**

PAM recognizes that some persons may not have the legal capacity to consent to psychological treatment. Where the person would benefit from psychological treatment, and where the psychologist wishes to provide that treatment, consent must be obtained from an alternative source. This Practice Guideline attempts to identify those individuals and agencies which most often will be called upon to act as substitute decision-makers to provide or withdraw consent to psychological treatment on behalf of a *minor* who lacks legal capacity.

- **As a general guideline, psychologists can presume that persons who are at least 16 years of age or older have the *legal* capacity to consent to psychological treatment.³ Similarly, psychologists can presume that persons who are under 16 years of age do not have this capacity.⁴**

¹ There are four pre-requisites to a valid consent at law: 1) it must be voluntary; 2) the patient must have legal and mental capacity; 3) it must be specific to both the treatment and the person administering it; and 4) it must be informed, in that the patient must understand the nature of the procedure, the benefits, the risks and any alternative treatments.

² *PAM Code of Conduct*, Part 4.0.

³ The law in Manitoba presumes that persons who are at least 16 years of age or older have the legal capacity to make their own health care decisions and that those under 16 years of age do not. Both of

B. Who may consent or refuse psychological treatment on behalf of a minor?

(i) The “Mature Minor”

PAM recognizes that the test of capacity to consent to psychological treatment is not necessarily age-dependent. Where a child, *regardless of his or her age*, has sufficient intelligence and understanding of the nature and consequences of the proposed psychological treatment, he or she is deemed to be a “mature minor” and is capable of consenting to such treatment.

- **In all cases where a psychologist is planning to provide psychological services to a minor client, it is the responsibility of the psychologist to conduct an individual assessment of the minor’s physical, emotional and intellectual development and understanding. Psychologists are advised to make detailed notes of these assessments.**
- **If the psychologist is satisfied that the minor is mature enough to understand the nature and consequences of the proposed psychological treatment, *consent from the minor’s parents will not be sufficient.*⁵ Consent must be obtained from the “mature minor”.**
- **If, following the individual assessment of the minor, the psychologist concludes that the child does not have sufficient intelligence and understanding of the proposed treatment to meet the requirements of a “mature minor”, the child shall be considered an “immature minor”. In those cases, consent must be obtained from a substitute decision maker prior to the psychologist providing psychological services.**

these presumptions are rebuttable where there is evidence to the contrary (see *The Health Care Directives Act*, C.C.S.M. c. H27, s.4).

⁴ However, psychologists must recognize that some persons under 16 years of age may be mature enough to consent on their own behalf. An individual assessment as to whether a person under 16 years of age is a “mature minor” is required.

⁵ The parental right to determine whether a minor child will receive psychological treatment terminates when the child achieves a sufficient understanding and intelligence to provide an informed consent.

(ii) Parents

PAM recognizes that parents have a duty to care for their child and that with this duty comes sufficient control or authority to permit them to make decisions which are in the best interests of the child, including the decision to consult a psychologist.

- **In treatment situations involving “immature minors”, consent must be obtained from at least one of the minor’s parents. To avoid potential disagreements between parents of the minor, PAM encourages the psychologist to obtain the consent of *both parents* prior to providing psychological services to a minor.⁶**
- **Where the parents of a minor never cohabited after the birth of their child, consent must be obtained from the parent with whom the minor resides.⁷**
- **Where the parents of a minor are separated, the psychologist must obtain the consent of the parent to whom that authority has been designated under the separation agreement. If no separation agreement exists, both parents have equal rights to consent or withdraw treatment on behalf of the minor. As above, PAM suggests that the consent of both parents be obtained.**
- **Where the parents of a minor are divorced, the psychologist must obtain the consent of the parent to whom that authority has been designated by court order.**

⁶ The law considers parental rights, including the right to consent to treatment on behalf of a child, to be “joint rights”. This means that both parents have an equal right to consent to or refuse psychological treatment on behalf of their child. To avoid scenarios where Parent A consents to their child receiving psychological treatment and Parent B disagrees and withdraws their consent, the psychologist should obtain the consent of both parents at the initial consultation.

⁷ *The Family Maintenance Act*, C.C.S.M. c. F20, s.39(1).

(iii) Guardian

A court may have appointed an individual to be the guardian of a minor under *The Child and Family Services Act* (Manitoba). In this situation, consent must be obtained from the guardian prior to providing psychological treatment to the minor.

- **Where a minor has a court-appointed legal guardian, the consent of the guardian must be obtained prior to providing psychological treatment to the minor.**

(iv) Child and Family Services agency

In certain situations, a psychologist must obtain the consent of a Child and Family Services (“CFS”) agency before providing psychological treatment to a minor. Where a minor under the age of 16 has been apprehended under *The Child and Family Services Act* (Manitoba) because he or she is in need of protection, a CFS agency has the authority to consent to medical *assessments* on behalf of the minor where consent from the minor’s parents would otherwise be required.

Where a CFS agency is the legal guardian of a minor, either by court order or where the parents of a child have voluntarily surrendered guardianship, the CFS agency will have care and control of the minor and will act on the minor’s behalf. Prior to providing psychological treatment to a minor who is under the care of a CFS agency, the psychologist must obtain the consent of the CFS agency.

- **Psychologists may provide psychological assessments to minors under the age of 16 without the consent of the minor’s parents if the minor was apprehended under *The Child and Family Services Act* and a CFS agency consents to the assessment.**
- **Where a CFS agency has been appointed as the minor’s guardian, the psychologist must obtain the consent of the CFS agency prior to providing psychological treatment to the minor.**

(v) Justice of the Court of Queen's Bench

In the context of a family proceeding,⁸ a judge of the Court of Queen's Bench has the ability to order a psychological assessment of a child on its own initiative or in response to an application by a party to the proceeding. In these situations, the psychologist is acting for the benefit of the Court for the purposes of providing relevant evidence.

PAM recognizes that, where family proceedings are ongoing, problems may arise which are directly related to the issue of a minor's consent to psychological treatment. For example, Parent A may want a psychological assessment of their child for the purposes of "arming" themselves with evidence for a family proceeding to the disadvantage of Parent B. In this scenario, where there is no separation agreement, even though Parent A consents to the assessment, Parent B retains their parental rights to withdraw consent. In these situations, psychologists should avoid providing psychological treatment to a minor unless *both* parents provide their consent or there is a court order.

- **Where the psychologist has knowledge of or suspects there to be a marital dispute between the parents of a minor, the psychologist should obtain the consent of both parents or avoid providing treatment unless pursuant to a court order.**

⁸ Section 41 of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, defines "family proceeding" to include, among other things, a proceeding for the determination or variation of the custody, access or guardianship of the person of an infant.

(vi) Proxy

In very rare situations, a person appointed as a “proxy” may have to provide his or her consent to psychological treatment on behalf of a mature minor. This situation would arise where a mature minor has appointed a person to act as their proxy under a health care directive. The proxy’s authority to make health care decisions on behalf of the mature minor is effective once the minor loses capacity with respect to a proposed treatment or the ability to communicate.⁹ The proxy, acting in accordance with the mature minor’s wishes, may consent to or refuse treatment on their behalf. It would be unusual for a psychologist to encounter this type of situation, given the unlikelihood that a person under 16 years of age would make a health care directive. Nonetheless, psychologists should be aware of this possibility.

- **Psychologists should inquire as to whether a minor has appointed a proxy to make health care decisions on their behalf. If the proxy’s authority is effective, the psychologist must obtain the consent of the proxy prior to providing psychological treatment.**

Issue of Primary Care and Control:

To begin, it is important for the practitioner to see the document (usually a court order or separation agreement) that purports to grant authority to one parent or the other. From there, parental authority can be roughly categorized as follows:

1. Joint custody to both parents: where the court orders (or the parties agree) on joint custody, both parents share in the care and control of the child. Care and control includes providing for the day-to-day necessities of life, and decision-making authority about larger issues, such as education, religion, health treatment and other important areas of life. In such cases, both parents should be consulted about psychological treatment;

⁹ *The Health Care Directives Act*, C.C.S.M. c. H27, s.6(1).

2. Primary care and control to one parent: where the court orders (or the parties agree) that one parent shall have primary care and control of the child, that parent has the right and duty to provide for the day-to-day necessities of life, and has the right and duty to make decisions about larger issues, such as education, religion, health treatment and other important areas of life, unless the order (or agreement) provides otherwise. Subject to what follows (pt. 3), where one parent has been granted primary care and control, that parent may make decisions on psychological treatment without consulting the other parent;
3. Final-decision making authority: in some cases, the court will order that one parent shall have primary care and control of the child, but that final-decision making authority in respect of larger issues shall be shared, or shall be given to the other parent. If the parent seeking psychological treatment for the child has final decision-making authority, that parent may make decisions on psychological treatment without consulting the other parent. If final decision-making authority is to be shared, then both parents must be consulted.

Thus, it is important that the practitioner review the order or agreement that purports to grant authority over a child, to see how the issue of decision-making authority has been dealt with.

This Practice Guideline should be read in conjunction with the provisions of The Psychological Association of Manitoba's existing Practice Guidelines, Code of Conduct and By-Laws so far as they relate to the issue of informed consent to psychological treatment.