

The Mental Health Act and the Adult Guardianship and Trusteeship Act: Working Together to Protect the Rights of Albertans

Brenda Lee Doyle and Sandra Harrison

The *Adult Guardianship and Trusteeship Act* (AGTA) was proclaimed in force October 30, 2009, and replaced the 30-year-old *Dependent Adults Act*.¹ Proclamation of the recent amendments to the *Mental Health Act* (MHA) occurred in two phases – September 30, 2009, and January 1, 2010.² Both pieces of legislation are concerned with the rights and welfare of vulnerable adults, but the *Acts* vary in scope and focus. Changes to the MHA were considered as the AGTA was developed, so the two pieces of legislation are compatible. This article briefly outlines the general provisions regarding decision-making and some related issues under the two *Acts*.

The AGTA is relevant to all adult Albertans. It speaks to an individual's ability to make personal and/or financial decisions according to the decisional demands of their life circumstances. The *Act* is grounded in guiding principles focused on a presumption of capacity, autonomy and "best interests" decision making, which includes consideration of the wishes, values and beliefs the adult held while capable.³ It addresses situations where capacity may be an issue for a number of reasons (e.g., developmental delay, brain injury, dementia). The AGTA and accompanying regulations standardize the capacity assessment process and establish clear guidelines for capacity assessors under the Act.⁴ Trustees

act as substitute decision makers for financial matters. Supporters or substitute decision makers may provide assistance or decision making for a range of personal matters. Personal matters are divided into eight groupings (e.g., health, social activities, employment).⁵ The *Act* reflects current knowledge on mental capacity and the different levels of ability people have for making decisions. In keeping with the guiding principle of a least intrusive approach to decision making assistance or authority, a substitute decision maker will only be granted authority in those areas where it is absolutely necessary (e.g., a guardian may be appointed to make health care decisions, but the adult retains autonomy for all other decision making). The AGTA establishes innovative legal mechanisms so Albertans can get the level of decision making assistance appropriate to their needs. The decision making options under the AGTA are outlined below.

Supported Decision Making Authorizations (SDMAs) allow capable adults to authorize someone they trust to help them with decisions.⁶ The authorization allows the "supporter" to access relevant information that might otherwise be protected under privacy laws. The supporter is also able to help the adult think through and communicate decisions. SDMAs will be useful for



capable individuals with communication barriers (e.g. people whose first language is not English, people with mild disabilities).

Co-decision Making Orders (CDMOs) allow adults assessed as significantly impaired to consent to a Court order appointing a trusted person(s) as their co-decision maker.⁷ The order requires the adult to make all or certain personal decisions in partnership with their co-decision maker. This option may be appropriate when the adult has a strong, positive relationship with his/her co-decision maker (e.g., wife acting as a co-decision maker for her brain injured husband). The Public Guardian cannot be a co-decision maker. CDMOs are issued by the Court of Queen's Bench.

Guardianship Orders appoint a guardian to make all or certain personal decisions on behalf of incapable adults, including decisions pertaining to health care.⁸ "Health care" is broadly defined, and includes: any examination, diagnosis, procedure or treatment undertaken to prevent or manage any disease, illness, ailment or health condition; any procedure undertaken for the purpose of an examination or a diagnosis; any medical, surgical, obstetrical or dental treatment; anything done that is ancillary to any examination, diagnosis, procedure or treatment; any procedure undertaken for the purpose of preventing pregnancy, except sterilization that is not medically necessary to protect health; palliative care; and a treatment plan.⁹ Usually a family member or friend acts as the adult's "private" guardian. If no one is able, willing, or suitable, the Public Guardian may act as the adult's guardian. Guardianship Orders are issued by the Court of Queen's Bench.

Specific Decision Making allows certain health care providers to select a nearest relative to make a decision respecting an incapacitated adult's temporary admission to or discharge from a residential facility and all but the following health care.¹⁰ A specific decision maker may not be selected to make and has no authority to make a decision respecting: psychosurgery as defined in the *Mental Health Act*; sterilization that is not medically necessary to protect the adult's health; removal of tissue from the adult's living body for medical education or research purposes; health care that involves participation by the adult in research or experimental activities, if the health care offers little or no potential benefit to the adult; any type of health care that is the subject of a treatment decision for an adult who is a formal patient as

defined in, or who is subject to, a community treatment order under the *Mental Health Act*; and any type of health care where a decision respecting the provision of or withdrawal or withholding of the health care would be likely to result in the imminent death of the adult.¹¹ Specific Decision Making is intended to address situations in which an adult does not have a guardian or personal directive and a time-sensitive decision needs to be made.

Finally, Trusteeship Orders appoint a trustee to make financial and property decisions on behalf of incapable adults.¹² Unless otherwise specified, a trusteeship order applies to all of the adult's real and personal property

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in Alberta.¹³ Usually a family member or friend acts as the adult's "private" trustee. If no one is able, willing, or suitable, the Public Trustee may act as the adult's trustee.¹⁴ Trusteeship Orders are issued by the Court of Queen's Bench.

The substitute decision making provisions of the MHA are narrower in application; they apply only with respect to formal patients (i.e., patients involuntarily admitted to and detained within designated psychiatric facilities) and, now, persons subject to community treatment orders (CTOs).¹⁵

Under the MHA, a person may be admitted to and detained in a designated facility if a physician is of the opinion the person is: (a) suffering from a mental disorder; (b) likely to cause harm to themselves or others, or is likely to suffer substantial mental or physical deterioration or serious physical impairment; and (c) unsuitable for admission other than as a formal patient.¹⁶ The person can only be detained for a maximum of 24 hours unless a second physician concurs with the admitting



physician. If two physicians agree, then the person may be detained for a maximum of one month.¹⁷ The person's status is evaluated again at the end of this time. The physicians involved must complete "certificates" documenting their opinions. When a person is admitted to and detained in hospital under these circumstances, he or she is considered a "formal patient."

Amendments to the MHA allow for CTOs.¹⁸ CTOs are orders issued by psychiatrists or specially designated physicians, plus one additional physician. They are intended and designed for a unique and small number of patients with serious and persistent mental disorders

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who have demonstrated that without treatment and intensive supports in the community, they relapse and require hospitalization, or those individuals who pose a risk to public safety if intensive case management is not provided.¹⁹

Physicians treating formal patients and persons subject to CTOs must also determine those persons' competence to make treatment decisions for themselves. Where competence to consent to treatment is absent, section 28 applies. Under subsection 28(1), the following may provide substitute consent: an agent under a personal directive; a guardian; a nearest relative, where the formal patient or person subject to a CTO does not have an agent or guardian or the agent or guardian is unavailable or unwilling to make treatment decisions; or the Public Guardian, as a last resort. The refusal of treatment by substitute decision makers may be overridden, however.²⁰ Under subsection 29(3), a review panel may order a treatment be administered, notwithstanding the objection of a formal patient or his

or her substitute decision maker, if it is satisfied such treatment is in the formal patient's best interests.

"Treatment decisions" under the MHA are decisions related to the mental disorder – the decision to provide or withhold consent to the administration of antipsychotic medications, for example. As Peter J. Carver has suggested:

Statutory provisions that authorize treatment of involuntary patients without consent apply to treatment directed at mental disorder or its symptoms...Should this limit not be expressly stated in the statute, it should follow from the fact that both detention and non-consensual treatment are premised on the existence of mental disorder and the need to facilitate its treatment.²¹

The AGTA regulations make it clear that a specific decision maker under that *Act* may not make a decision respecting "any type of health care that is the subject of a treatment decision for an adult who is a formal patient as defined in, or who is subject to, a community treatment order under the *Mental Health Act*."²² Between these two ends of the spectrum, a number of considerations are applicable as to which substitute decision-making framework applies; these fall outside the scope of this article.

The MHA and the AGTA include a number of rights and protections for patients subject to the Acts. For example, a person who is subject to two admission or renewal certificates or a CTO under the MHA may apply to the Review Panel for cancellation of the certificates or CTO.²³ The MHA requires that the province appoint a Mental Health Patient Advocate under Order in Council to protect patient rights and investigate complaints.²⁴ The Patient Advocate is not part of a provincial health authority, hospital, clinic or treatment team, but acts independently and reports directly to the Minister of Health and Wellness. The amended MHA and related regulations not only affirm but expand the powers of the Advocate to conduct investigations for those persons subject to one or two admission or renewal certificates, or a CTO.²⁵

The AGTA also provides several protective measures, including a rigorous complaints and investigations process. Most guardianship, co-decision-making, and trusteeship arrangements work well; however, if

problems exist, any interested person may make a written complaint. A complaint may be made if a co-decision maker or a substitute decision maker has failed or is failing to follow the Court order or to comply with his or her duties, and this failure is likely to cause physical, mental, or financial harm to the assisted or represented adult.²⁶ If a complaint meets the AGTA investigation criteria, the complaint will be referred for investigation.²⁷ The investigation process includes notification and interviews with all relevant parties and a review of all relevant information.²⁸ Investigators can make recommendations to resolve the situation, including referrals to mediation services, if appropriate.²⁹ If the investigation concludes that a represented adult is at risk of serious harm, recommendation might be made that the Public Guardian apply to Court for a temporary protection order.³⁰ Finally, both guardianship and trusteeship orders are reviewable by the Court at the instance of the represented adult and any interested person, as well as the guardian or trustee.³¹

For further information about the AGTA, readers are invited to visit www.seniors.ab.ca or to contact the Office of the Public Guardian at 1-877-427-4525. Additional information about the MHA is available at www.mhpa.ab.ca or by calling the Mental Health Patient Advocate at 780 422-1812 or, if outside of Edmonton, toll free through the Government Rite Line at 310-000.

Brenda Lee Doyle, Provincial Director, Office of the Public Guardian for Alberta. Sandra Harrison, former Mental Health Patient Advocate for the Province of Alberta. The authors would like to thank Karin Kellogg, Project Manager, Health Law Institute, University of Alberta, for her editing of an earlier draft of this paper and an anonymous reviewer for his comments.

Endnotes

- 1 S.A. 2008, c. A-4.2, repealing R.S.A. 2000, c. D-11 [AGTA].
- 2 A. Gaz. 2009.I.1062 (ss. 1, 3, 5-7, 9(a), 9(c), 10, 12, 14); A. Gaz. 2009.I.1304 (ss. 2, 4, 8, 9(b), 11, 13, 15-25).
- 3 *Supra* note 1, s. 2.
- 4 *Supra* note 1, s. 102; *Adult Guardianship and Trusteeship Regulation*, Alta. Reg. 219/2009, ss. 3-10 [AGTA Reg.].
- 5 AGTA, *ibid.*, s. 1(bb).
- 6 *Ibid.*, s. 4.
- 7 *Ibid.*, s. 13.
- 8 *Ibid.*, ss. 26, 33.
- 9 *Ibid.*, s. 1(r).
- 10 *Ibid.*, s. 87.
- 11 *Ibid.*, s. 88(2); AGTA Reg., *supra* note 4, s. 23.
- 12 AGTA, *ibid.*, s. 46.
- 13 *Ibid.*, s. 55.
- 14 *Ibid.*, s. 50.
- 15 R.S.A. 2000, c. M-13, s. 28.
- 16 *Ibid.*, s. 2.
- 17 *Ibid.*, s. 7.
- 18 R.S.A. 2000, c. M-13, ss. 9.1-9.7, as am. by *Mental Health Amendment Act, 2007*, S.A. 2007, c. 35, s. 8.
- 19 "Mental Health Amendment Act – A Summary of Changes," online: Alberta Health Services <<http://www.albertahealthservices.ca/788.asp>>.
- 20 *Supra* note 18, s. 29(1)-(2).
- 21 "Mental Health Law in Canada" in Jocelyn Downie, Timothy Caulfield & Colleen Flood, eds., *Canadian Health Law and Policy*, 3rd ed. (Markham: LexisNexis Canada, 2007) 399 at 420.
- 22 AGTA Reg., *supra* note 4, s. 23(a).
- 23 *Supra* note 18, s. 38.
- 24 *Ibid.*, s. 45(1).
- 25 R.S.A. 2000, c. M-13, s. 45(1), as am. by *Mental Health Amendment Act, 2007*, S.A. 2007, c. 35, s. 21; *Patient Advocate Regulation*, Alta. Reg. 148/2004.
- 26 *Supra* note 1, s. 75(1).
- 27 *Ibid.*, s. 76(1)(b).
- 28 *Ibid.*, s. 76(4)-(5).
- 29 *Ibid.*, s. 77(1).
- 30 *Ibid.*, s. 77(1)(c)(i). Alternatively, an investigator might recommend that the Public Guardian apply for a guardianship order, and that the Public Trustee apply for a trusteeship order.
- 31 *Ibid.*, ss. 40, 70.

