

# *Specific Health Care Decisions under Alberta's Adult Guardianship and Trusteeship Act*

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## **Introduction**

Proclaimed in force October 30, 2009, Alberta's *Adult Guardianship and Trusteeship Act* repeals the province's thirty-year-old *Dependent Adults Act*, refitting the law respecting personal as well as property wardship.<sup>1</sup> Guiding principles are entrenched, protective measures are fortified, and decision making options are augmented.<sup>2</sup> Numbered among the latter now is that of the next of kin to consent to the health care of an incapacitated adult. In this article, I depict previous relevant Alberta law, then detail the so-called specific decisions provisions under the new *Adult Guardianship and Trusteeship Act*. Their implementation, I conclude, better protects both health care providers and patients – one or two shortcomings notwithstanding.

## **Previous Alberta Law**

Prior to October 30, 2009, prior to proclamation of the *Adult Guardianship and Trusteeship Act*, such consent was as ineffective as it was unnecessary. Without more – without either a guardianship order or a personal directive – not even the nearest relative could validly consent on behalf of an adult.<sup>3</sup>

On the other hand, the need for such was waived. According to subsection 29(1) of Alberta's *Dependent Adults Act*:

Where an adult person

- (a) is, in the written opinion of 2 physicians, in need of an examination or medical, surgical or obstetrical treatment or is, in the written opinion of 2 dentists, in need of dental treatment,
- (b) is incapable by reason of mental or physical disability of understanding and consenting to the examination or medical, surgical, obstetrical or dental treatment needed, and
- (c) has not previously withheld consent to the examination or medical, surgical, obstetrical or dental treatment needed, to the knowledge of either of the physicians or the dentists referred to in clause (a), a physician or dentist may, *without the consent of any person*, examine the person, prescribe treatment for the person and provide the person with the medical, surgical or obstetrical treatment or with the dental treatment, as the case may be, in the manner and to the extent that is reasonably necessary and in the best interests of the person examined or treated, in the same way that the physician or dentist could have acted if the person had been an adult of full legal capacity who consented to the examination or treatment.<sup>4</sup>



Superfluous then, but revealing, was the advice the College of Physicians and Surgeons of Alberta offered its members in 2002: “From a practical standpoint, physicians should consult with the family of the individual and receive their approval prior to performing the treatment under consideration.”<sup>5</sup>

## Adult Guardianship and Trusteeship Act

Part 3, Division 1, of Alberta’s new *Adult Guardianship and Trusteeship Act*, “Specific Decisions,” both sanctions such advice and allays the anxiety underpinning it.<sup>6</sup>

A health care provider – a medical practitioner, a nurse practitioner, a dentist – who has determined an adult lacks capacity to make a decision respecting either health care or temporary admission to or discharge from a residential facility may turn to another, to the first in a ranked list of “nearest relatives”:

- 1(x)
  - (i) spouse or interdependent partner;
  - (ii) adult son or daughter;
  - (iii) father or mother;
  - (iv) adult brother or sister;
  - (v) grandfather or grandmother;
  - (vi) adult grandson or granddaughter;
  - (vii) adult uncle or aunt;
  - (viii) adult nephew or niece.<sup>7</sup>

Those of the whole blood, and the elder or eldest of two or more in the same category, are preferred, regardless of sex.<sup>8</sup> Capability and availability, but also recent contact with and knowledge of the adult – of his or her beliefs and values or wishes respecting the decision to be made – are required as well. Finally, there must be no dispute with the adult that might affect the relative’s ability to comply with the duties of a specific decision maker.<sup>9</sup>

Among the latter, that of taking into consideration any wishes known to have been expressed by the adult while competent is not assigned the prominence it might have been.<sup>10</sup> Only insofar as they inform the adult’s best interests must these, like the adult’s competent values and beliefs, be considered.<sup>11</sup> And this alongside several other matters:

- 93(1)
  - (a) whether the adult’s condition or quality of life is likely to be improved by the proposed health care,
  - (b) whether the benefit that the adult is expected to obtain from the proposed health care is greater than the risk of harm,
  - (c) whether a less restrictive or less intrusive alternative form of health care would be as effective and as beneficial to the adult as the proposed health care, and
  - (d) any other matter specified in the regulations.<sup>12</sup>

Nevertheless, consultation with the adult is required, as are reasonable efforts to notify (another) nearest relative, or the Public Guardian, of any decision made as soon as is practicable.<sup>13</sup> And all is to be acknowledged, by way of a signed and witnessed Declaration of Specific Decision Maker.<sup>14</sup> Should no one thus qualify, or should disagreement arise as to who might thus qualify, either the Public Guardian or a person authorized by the Public Guardian may act.<sup>15</sup>

Even so, certain decisions are off limits. A specific decision maker may not be selected to make and has no authority to make decisions in respect of which the adult has prepared a personal directive or a guardian of the adult has power and authority.<sup>16</sup> Nor may he or she make decisions regarding:

- 88(2)
  - (a) psychosurgery as defined in the *Mental Health Act*;
  - (b) sterilization that is not medically necessary to protect the adult’s health;
  - (c) removal of tissue from the adult’s living body
    - (i) for implantation in the body of another living person pursuant to Part I of the *Human Tissue Gift Act*, or
    - (ii) for medical education or research purposes;
  - (d) 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;
  - (e) any other health care prescribed in the regulations.<sup>17</sup>



There, decisions permitted elsewhere are prohibited. Not only that that is the subject of a treatment decision for an adult who is a formal patient under the *Mental Health Act*, but any 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” is added.<sup>18</sup> In both British Columbia and the Yukon, equivalent legislation specifically allows decisions regarding the latter, provided substitute decision making duties are complied with, and substantial agreement as to the medical appropriateness of a given decision exists.<sup>19</sup>

But even permitted decisions, and the assessments that precipitate them, are reviewable – at the instance of the adult, of the adult’s nearest relatives, legal representative and close friend, though not of the health care provider.<sup>20</sup> A Notice of Application and Hearing, together with any documents intended to be relied upon, is served on the adult, the adult’s specific decision maker and either the adult’s (other) nearest relative or the Public Guardian, and is filed with the Court of Queen’s Bench.<sup>21</sup> There, assessment by a designated capacity assessor – a psychologist or medical practitioner, or a social worker, occupational therapist, registered nurse or registered psychiatric and mental deficiency nurse who has successfully completed an approved training course – may be ordered.<sup>22</sup> And either the health care provider’s assessment or the specific decision maker’s decision is set aside or confirmed.

Once the latter occurs, or once any application for review or appointment of a co-decision maker or guardian that the health care provider knows of either lapses or is withdrawn, a decision may be acted upon.<sup>23</sup> Treatment may be provided, withheld or withdrawn in accordance with it. And that without fear of liability:

100(1) No action lies against a health care provider or specific decision maker for anything done or omitted to be done in good faith while exercising a power or performing a duty or function under this Division.<sup>24</sup>

## Conclusion

Not only health care providers, but their patients, should breathe somewhat easier. As Bernard M. Dickens has suggested:

The purpose of family consent to medical treatment is to present and make effective

what may be described as the ‘authenticity’ of the person represented. Authenticity of an incompetent adult person may be most credibly sought by reference to family members, as opposed to a public officer, such as an Official Guardian, because they are most likely to have not just ties of blood or marriage to the person, but long experience with his personality and ties of affinity and allegiance. They can be heard to speak for the incompetent person because they are supposed to be most likely to know him as a person, and to care that his wishes be served.<sup>25</sup>

To be sure, greater importance might have been attached such wishes, and specific decision making authority might have been extended to those life and death matters such wishes tend most fervently to address. But under Part 3, Division 1, of its new *Adult Guardianship and Trusteeship Act*, Alberta’s most vulnerable adults are now “spoken for” in a way they were not always before.

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## Endnotes

- 1 *Adult Guardianship and Trusteeship Act*, S.A. 2008, c. A-4.2 [AGTA]; *Dependent Adults Act*, R.S.A. 2000, c. D-11.
- 2 AGTA, *ibid.*, ss. 2, 74-86, 3-23; see Brenda Lee Doyle, “AGTA – Adult Guardianship and Trusteeship Act: Highlights of New Legislation” (Paper presented to the Elder Law Subsection meeting of the Canadian Bar Association in Edmonton, 1 June 2009) [unpublished].
- 3 Unless, that is, the adult was first involuntarily admitted to a psychiatric facility. See *Mental Health Act*, R.S.A. 2000, c. M-13, s. 28; Ellen I. Picard & Gerald B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 4<sup>th</sup> ed. (Toronto: Thomson Canada, 2007) at 72.
- 4 *Dependent Adults Act*, *supra* note 1 [emphasis added].
- 5 College of Physicians and Surgeons of Alberta, *Competency Assessment and Surrogate Decision Making*:



*Responsibilities and Roles of a Physician* (Edmonton: College of Physicians and Surgeons of Alberta, 2002) at 4.

- 6 AGTA, *supra* note 1, ss. 87-100.
- 7 *Ibid.*, ss. 87(2), 89(1); *Adult Guardianship and Trusteeship Regulation*, Alta. Reg. 219/2009, s. 2(1). Those selected by dentists may make decisions regarding health care, but not temporary admission to or discharge from a residential facility. See *Adult Guardianship and Trusteeship Regulation*, Alta. Reg. 219/2009, s. 2(2). Capacity must have been assessed in accordance with the *Adult Guardianship and Trusteeship Regulation*, Alta. Reg. 219/2009, ss. 18-21.
- 8 AGTA, *ibid.*, s. 1(x). Adoptive relations are included. See *Family Law Act*, R.S.A. 2000, c. F-4.5, s. 7.
- 9 AGTA, *ibid.*, s. 89(1).
- 10 And indeed is, in the equivalent legislation of most other Canadian jurisdictions. See *Care Consent Act*, s. 20, being Sch. B of the *Decision Making, Support and Protection to Adults Act*, S.Y. 2003, c. 21; *Health Care Consent Act, 1996*, s. 21, being Sch. A of the *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act*, S.O. 1996, c. 2; *Health Care Directives and Substitute Health Care Decision Makers Act*, S.S. 1997, c. H-0.001, s. 16(3); *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181, s. 19; *Hospitals Act*, R.S.N.S. 1989, c. 208, s. 54A; *Consent to Treatment and Health Care Directives Act*, R.S.P.E.I. 1988, c. C-17.2, s. 13.
- 11 AGTA, *supra* note 1, ss. 92(3)-(4).
- 12 *Ibid.* To date, no other matters are thus specified.
- 13 *Ibid.*, ss. 92(2), 94.
- 14 *Ibid.*, s. 90; *Adult Guardianship and Trusteeship (Ministerial) Regulation*, Alta. Reg. 224/2009, Form 8. Only Nova Scotia appears to require something similar. See *Hospitals Act*, *supra* note 10, s. 54(5)(d). The declaration, together with the decision made and the capacity assessment performed, must be included in the health care provider's record.
- See *ibid.*, s. 91; *Adult Guardianship and Trusteeship Regulation*, *supra* note 7, s. 25.
- 15 AGTA, *ibid.*, ss. 89(2)-(3).
- 16 *Ibid.*, s. 88(1).
- 17 *Ibid.*
- 18 *Adult Guardianship and Trusteeship Regulation*, *supra* note 7, s. 23.
- 19 See *Health Care (Consent) and Care Facility (Admission) Act*, *supra* note 10, s. 18(2); *Care Consent Act*, *supra* note 10, s. 24. A guardian, however, may consent to the cessation of an adult's life support. See *L.I.C. (Re)*, 2006 ABQB 130, 398 A.R. 229. And a health care provider need not provide health care where, in his or her opinion, its provision would be futile. AGTA, *supra* note 1, s. 98(4)(b).
- 20 AGTA, *ibid.*, s. 97(1). In both Ontario and Nova Scotia, health care providers are specifically given such standing. See *Health Care Consent Act, 1996*, *supra* note 10, s. 37(1); *Hospitals Act*, *supra* note 10, s. 54D(1).
- 21 *Adult Guardianship and Trusteeship Regulation*, *supra* note 7, s. 85(1), Form 39.
- 22 AGTA, *supra* note 1, s. 97(2); *ibid.*, ss. 6-7. Such an assessment is also conducted at the request of the adult, of the adult's nearest relatives, legal representative or close friend. See AGTA, *supra* note 1, s. 96.
- 23 AGTA, *ibid.*, ss. 98(1)-(3). If the health care provider is informed that an assessment by a designated capacity assessor has been or is intended to be requested by the adult, the adult's nearest relatives, legal representative or close friend, he or she may only act if arrangements for such have not been made after seven days, or the resultant report confirms a lack of capacity. *Adult Guardianship and Trusteeship Regulation*, *ibid.*, s. 26.
- 24 AGTA, *ibid.*
- 25 Bernard M. Dickens, "The Role of the Family in Surrogate Medical Consent" (1980) 1 *Health L. Can.* 49 at 50.

