

Who Can Consent . . . And For What?

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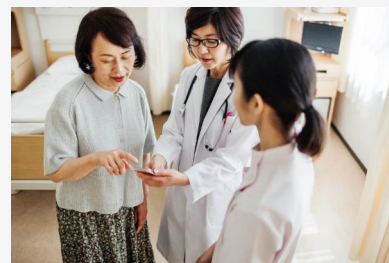


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Reminder: Key Considerations for Patient Consent



- Every **competent adult** has a fundamental right of self-determination over his or her body, which includes the right to make health care decisions
- A person unable to exercise this right for themselves has **the right to be represented by another person** who will protect their interests and preserve their basic rights
- A patient representative (decision maker) is:
 - Determined by law OR
 - Selected by the patient OR
 - Selected by someone else (court, physician)



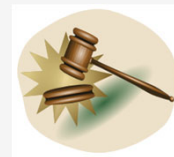
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Reminder: Key Considerations for Patient Consent



- The decision-maker (whether the patient or the patient's legal representative) must have **capacity**:
 - Be conscious AND
 - Be able to understand the purpose and effect of the decision to be made/the form to be signed
- Whoever has the right to consent to treatment and services for the patient generally has the right to refuse treatment and services
 - Must act according to patient's expressed desires or, when those are unknown or unclear, the patient's best interests
- If there's a court order involved: GET IT, REVIEW IT, AND PUT IT IN THE MEDICAL RECORD!



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Consent For Adult Patients

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Categories of Adults for Purposes of Making Medical Decisions



1. Adult with capacity
2. Adult who has appointed an agent or surrogate to make health care decisions
3. Conservatee *specifically adjudicated to lack capacity* to make health care decisions
4. Conservatee *not specifically adjudicated to lack capacity* to make health care decisions
5. Adult lacking capacity (temporarily or permanently) without a conservator, agent, or surrogate for health care decisions



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Who Consents For An Adult?



1. Adult patient who can make his/her own health care decisions

- Must have reached age of 18 or be a minor the law treats as an adult
- Has “capacity” at the time of the health care decision (Probate Code §§ 4609, 812, 813)
 - Able to understand the nature and consequences of the proposed health care treatment, including its significant benefits, risks, and alternatives
 - Able to make and communicate a decision about it
- Patient is **presumed** to have capacity to make a health care decision, to give/revoke an advance directive, and to designate/disqualify a surrogate
 - If there are indications patient may not have capacity, physician must decide patient’s capacity
 - No presumption of incapacity based on evaluation/treatment for mental disorder or chronic alcoholism (whether voluntary or involuntary) or developmental disability

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2. Patient-appointed agent or surrogate to make health care decisions

(Health Care Decisions Law, Probate Code §§ 4600-4805)

- Patient (that has capacity at the time) can execute a **written advance health care directive**
 - *Durable power of attorney for health care*: authorizes another person (the agent) to make health care decisions (including mental health care decisions) for the patient, either immediately or when the patient cannot make decisions for him/herself (a/k/a durable power of attorney for health care)
 - *Individual health care instruction*: A patient's direction concerning a health care decision; may express patient's desires concerning health care decisions, particularly concerning extraordinary measures and end-of-life care
 - Does not affect the right of the individual to make decisions while he/she has the capacity to do so
 - Agent's authority is effective only while patient lacks capacity

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- Patient can **orally designate a surrogate decision maker**
 - Patient personally informs the supervising health care provider or a designee of the facility who they wish to act as their health care decision maker (surrogate)
 - Surrogate takes precedence over an agent identified in a durable power of attorney
 - Designation of surrogate is effective only for the **shorter of**:
 - The course of treatment/illness or stay in the health care institution when the surrogate designation is made
 - 60 days
 - The period of time specified by patient

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3. No appointed decision maker: family member/close friend

- Effective 1/1/2023: Probate Code § 4712(b)
 - Health care provider or a designee of the health care facility caring for the patient may choose a surrogate to make health care decisions on the patient's behalf, as appropriate.
 - Qualifications of surrogate
 - Adult
 - Demonstrated special care and concern for the patient
 - Familiar with patient's personal values and beliefs to the extent known
 - Reasonably available and willing to serve

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- Surrogate to be chosen from among the following (no order of priority)
 - Patient's spouse or domestic partner
 - Adult child
 - Parent
 - Adult sibling
 - Adult grandchild
 - Adult relative or close personal friend

“A patient having capacity at any time may disqualify another person, including a member of the patient's family, from acting as the patient's surrogate by a signed writing or by personally informing the supervising health care provider of the disqualification.” (Probate Code § 4715)

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4. Adult under conservatorship (Probate Code vs. LPS)

- **Patient may be able to make health care decisions if the patient has not been determined to lack capacity to make health care decisions by a court**
 - **See certified letters of conservatorship for capacity determination!**
- What type of conservatorship is it?
 - *LPS conservatorship*: To provide individualized psychiatric treatment, supervision, and placement for a patient who is gravely disabled
 - *Probate Code conservatorship*
 - Conservator of the person: responsible for individual's care and protection
 - Conservator of the estate: responsible for financial matters

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- Scope of conservator's authority: **See certified letters of conservatorship!**
- Limitations on what conservator can consent to
 - LPS conservator
 - Cannot consent to, or refuse, routine medical treatment of patient
 - Can authorize admission of the patient to a mental health facility
 - Probate conservator cannot consent, without specific authorization, to:
 - Placement in a mental health treatment facility against patient's will
 - Experimental drugs
 - Convulsive treatment
 - Sterilizing a minor

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Who Consents For An Adult? (cont.)



5. Adults lacking capacity, not under a conservatorship, and no available decision maker

Unless emergency medical situation exception applies, medical treatment should be withheld until:

- Patient regains capacity
- Agent appointed in a valid advance health care directive or orally designated surrogate is available and gives consent
- Court order can be issued under Probate Code § 3200 *et seq.* to designate a person to make decisions on patient's behalf
- Conservator (temporary or permanent) who may make health care decisions is appointed
- Petition for appointment of public guardian

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Who Consents For An Adult? (cont.)



- Skilled nursing facilities: Allows an interdisciplinary team (IDT) to provide “informed consent” (Health & Safety Code § 1418.8 as supplemented by *California Advocates for Nursing Home Reform v. Smith* (2019) 37 Cal. App. 5th 814)
 - Composition of IDT: Attending physician, RN with responsibility for the patient, other appropriate staff in disciplines relevant to patient's needs, patient representative
 - Office of the Long-Term Care Patient Representative within Dept. of Aging
 - Trains and certifies public patient representatives for this role
 - Public patient representative provided at no cost to the resident
 - Specifies matters to be reviewed and issues to be considered
 - Requires written and oral notifications to be given to patient and plus a competent person whose interests are aligned with the patient's
 - Patient must be given a reasonable opportunity to seek judicial review

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Who Consents For An Adult? (cont.)



- Per court decision, IDT process can be used to authorize administration of antipsychotic medications and for decisions to create or revise POLSTs, DNRs, comfort care orders, and to elect hospice care

*No comparable statutory legal process exists for acute care facilities.
A model policy for GACHs, based on the SNF process, has been
Jointly developed by CHA, CMA, and the Alliance for Catholic Health Care.
See CHA Consent Manual, Appendix 2-D.*

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Who Consents For An Adult? (cont.)



What if a patient has more than one decision maker?

Probate Code § 4712 (added by AB 2338 (Gipson, 2022)):

*(a) If a patient lacks the capacity to make a health care decision, the following legally recognized health care decisionmakers may make health care decisions on the patient's behalf, in the following **descending order of priority**:*

- (1) The patient's **surrogate** selected pursuant to Section 4711.*
- (2) The patient's **agent pursuant to an advance health care directive or a power of attorney for health care***
- (3) The **conservator or guardian** of the patient having the authority to make health care decisions for the patient.*

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Provider Response to Health Care Decision/Instruction



- Before implementing a decision made by a decision maker, the supervising health care provider must, if possible, communicate to the patient the decision made and the identity of the person making it (Probate Code § 4730)
- Provider/institution shall:
 - Comply with:
 - Patient's individual health care instruction AND
 - A reasonable interpretation of that instruction made by the patient's decision maker
 - Comply with a decision maker's decisions for the patient to the same extent as if the decision had been made by the patient while having capacity (Probate Code § 4733)

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Provider Response to Health Care Decision/Instruction



- When can a health care provider decline to follow an individual health care instruction or decision maker's decision?
 - Individual provider may decline to comply with decision/instruction for reasons of conscience (Probate Code § 4734(a))
 - Health care institution may decline to comply with an individual health care instruction or decision maker's decision if:
 - It is contrary to a policy of the institution based on reasons of conscience AND
 - The policy was timely communicated to the patient/surrogate decision maker (Probate Code § 4734(b))
 - Provider/institution may refuse to provide medically ineffective health care or care contrary to generally accepted health care standards applicable to the provider/institution (Probate Code § 4735)
 - Procedural requirements upon such refusal, including making reasonable efforts to assist in patient's transfer (Probate Code § 4736)

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Obtaining Consent – Who Consents For A Minor?

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Minors

- **General rule:** Minors lack legal authority to consent to their own care. Parents have the right to control the care of their minor child by consenting to or refusing care.
 - In the absence of an authorized parent, third parties may consent on behalf of the minor as authorized.
- **Exceptions:** In some circumstances, minors have legal authority to consent to their own care. These exceptions are based on either:
 - the status of the minor OR
 - the nature of the treatment in issue

Whoever has authority to consent to treatment on behalf of a minor has the corresponding authority to refuse treatment for the minor.



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Who Consents For A Minor?

Minors Lacking Legal Authority To Consent

1. Parental consent

- **Minor with married parents:** absent evidence of disagreement between them, either parent may consent
- **Minor with divorced parents**
 - Parent with *sole legal custody* is entitled to make health care decisions for the child
 - If the parents have *joint legal custody*, either parent has the right and responsibility to make health care decisions for the child unless the court has specified that the consent of both parents is required
 - But what if they disagree?



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Who Consents For A Minor? (cont.)

- **Minor with stepparent:** Unless they legally adopt the minor, a stepparent has no authority to consent absent written authorization from the natural parent or guardian or a valid Caregiver's Authorization Affidavit
 - Same applies to **registered domestic partner** of a parent
- **Adopted minor:** Where minor has been legally adopted (by court order), adoptive parents have the same right to consent as birth parent(s) do
 - After adoption, birth parents have no rights/responsibilities for the minor and thus cannot consent or object to minor's medical treatment
- **Minor born out of wedlock:** Each biological parent has authority to consent

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Who Consents For A Minor? (cont.)



➤ **Legal guardian**

- Letters of guardianship specify authority granted by the court: **get and review them!**
 - May also address right of parents regarding minor's medical care
- Unless the letters of guardianship provide otherwise:
 - *Nonsurgical treatment:* guardian generally has same consent rights as parent
 - *Surgical treatment:* guardian's consent is necessary, but if minor is ≥ 14 :
 - Minor must also consent OR
 - Guardian must obtain a court order OR
 - Guardian determines in good faith, based on medical advice, that the situation is an emergency (minor faces loss of life or serious bodily injury if surgery is not performed)
- Limits on guardian's authority
 - Cannot consent to elective sterilization, psychosurgery, or administering aid-in-dying medication
 - Must meet additional requirements for placing the minor in a mental health treatment facility, administering experimental drugs or convulsive treatment

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Who Consents For A Minor? (cont.)



2. **Consent by third parties**

- **Caregiver's Authorization Affidavit** (Family Code §§ 6550, 6552): generally gives a "qualified relative" the same rights to authorize medical care for a minor that a guardian has
 - "Qualified relative" (QR): spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother or -sister, uncle, aunt, niece, nephew, first cousin, any "grand" or "great," or the spouse of any of these even after the marriage has been terminated by death or divorce
 - Minor must be living with the QR
 - QR must either:
 - advise parent(s) of proposed medical treatment and received no objection or
 - be unable to contact parents
 - With fully executed Affidavit, provider has no obligation to make further inquiry or investigation
 - Good faith reliance on affidavit = no criminal or civil liability

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Who Consents For A Minor? (cont.)



- **Other Third-Party Authorization to Consent:** Parent, guardian, or QR under Caregiver's Authorization Affidavit can authorize **another adult** to consent to medical or dental care (as defined) for the minor (Family Code § 6910)
 - Consent may be general or specific
 - Authorization must be in writing
 - Need not be completed in the presence of hospital personnel
 - Recommended for use only when
 - Minor is not legally authorized to consent to his/her own treatment
 - When minor's parents/guardians/caregiver under Caregiver Authorization Affidavit are not available

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Who Consents For A Minor? (cont.)



3. Special Situations

- Minors ill or injured during regular school hours
 - May be provided with "reasonable" medical treatment without parental consent if parent(s)/guardian cannot be reached and parent(s)/guardian have not filed a written objection to any treatment other than first aid
- Children of minor parents
 - Minor parent may validly consent to medical or surgical treatment for his/her child so long as they have capacity to consent
- Minors who are also parents
 - Unmarried minor parent has no greater right to consent to his or her own medical treatment than any other minor!

PARENTHOOD IS NOT AN EMANCIPATING EVENT!!!

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Who Consents For A Minor? (cont.)



- Ward or dependent of the juvenile court
 - Parents generally retain right to consent for medical care both before and after minor's adjudication as ward/dependent unless court takes away that right
 - **See court order to see if parent(s)' medical decision-making rights have been terminated**
 - **Court may also authorize medical treatment for the child—see court order**
 - Special requirements for psychotropic medications for wards/dependents
 - Only a juvenile court judicial officer may order them, although the court may delegate this authority to a parent
 - Minors in custody of a social worker (for dependents) or probation officer (wards)
 - Generally the social worker/officer does not have authority to consent, but court orders, including "standing orders," may provide them limited right to consent, so see court order
 - Emergency: medical, surgical, or dental treatment may be provided without a court order and upon authorization of a social worker or probation officer

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Who Consents For A Minor? (cont.)



- Minor in temporary custody: social worker/probation officer may, upon recommendation of attending physician, authorize necessary medical treatment if parent/guardian is first notified
- Minor in foster care (dependent of the juvenile court)
 - If placement is by court order or with consent of child's legal custodians: can consent to "ordinary" medical and dental treatment (immunizations, physical exams, X-rays)
 - If placement is temporary (pending court hearing/placement): generally have no right to consent for child
 - **BUT CHECK "STANDING" COURT ORDERS WHICH MAY GIVE GREATER OR DIFFERENT AUTHORITY!**

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Consent For Minor Patients

Part 2: When Minors Can Consent To Their Own Care

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When Can A Minor Consent To Their Own Care?



• Introduction

- When can minors legally consent to their own care?
 - They have **quasi-adult status** OR
 - Because of the **type of treatment they are seeking**
- Minor (like adult) must still have capacity to consent
- Minor's parents are not financially responsible for services to which the minor may legally give consent
 - Exception for counseling if parents participate in it (Welf. & Inst. Code § 14010)
- Minor has a privacy right in health information resulting from services to which the minor is authorized to consent (even if they didn't)
- If minor can legally self-consent, no court order or other authorization is necessary

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When Can A Minor Consent To Their Own Care? (cont.)



- **Minors with authority to consent based on quasi-adult status** (Family Code §§ 7000 *et seq.*)

- **Emancipated minor pursuant to court order**

- Minor must be ≥ 14
- DMV-issued ID card
- May consent to own medical, dental or psychiatric care without parental knowledge, consent or liability



- **Self-sufficient minor:** Can legally consent to medical and dental care if:

- ≥ 15 AND
- Living separate and apart from parent(s) or legal guardian, with their consent or acquiescence AND
- Is managing own financial affairs, regardless of source of income

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When Can A Minor Consent To Their Own Care? (cont.)



- **Is validly married or previously was validly married**

- Includes valid domestic partnership



- **On active duty with U.S. Armed Forces**



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When Can A Minor Consent To Their Own Care? (cont.)



• Minors With Authority to Consent Based on Type of Care They Are Seeking

- All minors may consent to **pregnancy or contraceptive care**, (but not sterilization)
- Minor ≥ 12 that may have come into contact with an **infectious, contagious, or communicable disease** that must be reported to the local health officer, or a related sexually transmitted disease, may consent to medical care related to diagnosis or treatment
 - Includes HIV tests
 - Includes prevention of a sexually transmitted disease: HPV vaccine
- Minor victim of rape, sexual assault (which includes rape, sodomy, oral copulation), or intimate partner violence
 - Rape victim: must be ≥ 12 to self-consent. No minimum age requirement for victims of sexual assault to self-consent
 - Can consent to hospital, medical and surgical care related to diagnosis or treatment; also “morning after” pill

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When Can A Minor Consent To Their Own Care? (cont.)



- For sexual assault victims: provider must try to contact minor’s parent(s) or guardian (and document this) unless provider reasonably believes the parent(s)/guardian committed the sexual assault
- Minor victim of intimate partner violence

Intimate partner violence: intentional or reckless infliction of bodily harm by a person with whom the minor has or has had a sexual, dating, or spousal relationship
- Minor ≥ 12 in need of outpatient mental health treatment or residential shelter services
 - If minor is mature enough to participate intelligently in the services
 - Minor would present a danger of serious physical or mental harm to self or others without this treatment or is an alleged victim of incest or child abuse
 - Minor’s parent(s)/guardian must be given the opportunity to participate in the treatment or counseling unless provider deems it inappropriate. But if parent(s) participate, they are responsible for paying for the services in which they participate
 - *Minor cannot self-authorize convulsive therapy, psychosurgery, psychotropic drugs, or inpatient mental health care*

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Obtaining Consent – Who Consents For A Minor?



- Minors with drug- or alcohol-related problems ≥ 12
 - May consent to medical care and counseling relating to diagnosis and treatment
 - Parent(s) or guardian must be given the opportunity to participate in treatment or counseling unless provider deems it inappropriate. But if they participate: \$\$\$\$
 - Does not authorize replacement narcotic abuse treatment (methadone, etc.)
- Minors making donation of blood
 - Minor ≥ 17 can self-consent
 - Minor 15-17 can consent, but blood bank may accept donation only with written consent of parent(s)/guardian AND written authorization of physician
- Minor may make anatomical gifts ≥ 15 with written consent of parent/guardian
- Body piercing (except ears) < 18 it can be done only in presence of, or as directed in notarized writing by, minor's parent/guardian

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Questions?



Raise your hand to ask a question.

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Thank you!



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