

CONSENT, FAMILIES, AND FAMILY BREAKDOWN

A deeper look at some of the issues surrounding consent and what RCCs need to understand

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In March, Alyson Jones and I presented a two-day training event for BCACC's "Families, Family Breakdown and the Law." The things we talked about included getting consent to work with adults and children. This issue provoked a lot of questions from participants, as well as a healthy online discussion, and I thought I'd use this opportunity to take a deeper look at consent in the context of families and family breakdown.

The purpose of getting consent from anyone you work with is to make sure the client understands what's going to happen and agrees to what's going to happen. Consent is more than an ethical consideration and a duty under Principle 1 of BCACC's *Code of Ethical Conduct*.¹ Consent helps to protect you from complaints and lawsuits for negligence or breach of your professional standard of care. Consent helps you manage risk.

BCACC's policy on consent is set out in the *Standard for Informed Consent to Clinical Counselling and the Collection, Use and Disclosure of Personal Information*.² This is an important standard every counsellor should read.

Many counsellors work with people who are separating or who have separated.

Some also work with children of separated parents. Others are hired to prepare parenting assessments and views of the child reports for use in different dispute resolution processes, including court, mediation, and arbitration. All this work requires the informed consent of the clients or a court order, written agreement, or arbitrator's award saying the work will happen.

ADULTS AND CONSENT

Most often, people who ask for your services come to you for help voluntarily. When you're working with an adult, you need to get the person's informed consent before you start working with them. The "informed" part of informed consent means the client understands what's going to happen and the risks and benefits of the work you're going to do together. This means you have to give an explanation about the services you propose to provide in a way the client can understand and be satisfied the client understands the proposed services, understands the risks and benefits of those services, and wants you to provide those services. In other words, you have to do more than have the client check a box on your intake form that says, "I consent."

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You have to talk with the client about the proposed services, invite them to ask questions, then decide whether the client understands what you've told them.

Clients can give their consent orally, without signing anything, just by telling you they understand and agree to the services you propose to provide. If the client provides oral consent, be sure to make a note in your file saying they gave you their oral consent and when they provided their consent.

However, it's much better to get the client's consent in writing. It's always possible for someone to argue that your notes are inaccurate, vague, or misleading. It's much harder to make those arguments when the client has signed a clearly written consent form. Keep this form in your file!

You can also infer the client consents to working with you because they've nodded or made a similar gesture after listening to your explanation of the services you propose to provide or because they've started participating in those services. This is risky, of course, as you can't be sure the client really understands the risks and benefits involved just from their behaviour, and intercultural factors may lead you to make incorrect assumptions about the client's consent. It will be easy for the client to argue that they didn't understand or didn't consent.

CHILDREN, YOUTH, AND THE CONSENT OF GUARDIANS

You also need the consent of children before you begin to work with them

or the consent of an adult on behalf of the young person. In B.C., a "child" is someone younger than 19, the provincial age of majority. Not every adult is able to give consent on behalf of a young person. Only guardians may consent to your work with a young person. Unfortunately, it's not always

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obvious who's a guardian. The law about guardianship is in Part 4 of B.C.'s *Family Law Act*.³ These are the basic rules:

- A parent is usually, but not always, a guardian of their child. You can't be sure that just because

someone is a child's parent, they are also the child's guardian.

- A child can have more than two guardians, just like a child can have more than two legal parents.
- People who are not parents can be a guardian of a child.

A guardian who wants you to work with a young person must provide their informed consent to the services you propose to provide. Just as if they were receiving the services themselves, you have to give an explanation about the services you propose to provide in a way the guardian can understand and be sure the guardian understands the proposed services, understands the risks and benefits of those services, and wants you to provide those services to the young person.

Be sure to make a record of the guardian's consent. It is best to avoid oral consent or trying to infer the guardian's consent from their behaviour. Because young people are more vulnerable than adults and

may be or become the subject of a legal dispute, you should always get the guardians' consent in writing. It's important to avoid the risk of someone, like another guardian, arguing that you didn't have the proper consent to work with the young person.

Things get a lot more complicated when a young person's parents have separated or never lived together. In cases like this, the chances are very good the child is or may become the subject of a legal dispute. Legal disputes between parents can involve very difficult, emotionally heated discussions about things like:

- Who is or should be a guardian of a child?
- How will the child's time be divided between the child's parents, guardians, and other important people?
- How will the child's guardians make important parenting decisions on behalf of the child, including decisions about things like mental and medical health care?

When a young person's parents are in an intact relationship, you can be fairly sure the parent who is asking you to work with the young person is the young person's guardian and has the agreement of the other parents to ask you to work with the young person. The risk involved in starting to work with a young person with the consent of just one parent in an intact relationship is low but not zero. The worst that is likely to happen, assuming another parent is unhappy about what's going on, is contact from the parent asking you to stop working with the young person. While a complaint is certainly possible, a lawsuit is unlikely.

The risk of working with a young person at the request of a parent who is not in an ongoing relationship with the other parents is much higher. It's higher because of the possibility that the young person is the subject of a legal dispute, that the parents are fighting about the young person's parenting arrangements, and that the parents are in an elevated level of conflict with one another. You should probably avoid providing services to a young person in circumstances like this without checking that:

- The adult who wants you to work with the child is a guardian and is responsible for making decisions about the mental and medical health care of the child.
- The child's other guardians agree that you should work with a child.

The sort of documents that can help you understand the status

of the parent contacting you include court orders, written agreements, or arbitrators' awards that talk about guardianship.

If you work with a young person without the consent of all of the young person's guardians who are responsible making mental and medical health care decisions, you risk a complaint to BCACC, the court making an order directing you to stop working with the young person, and the possibility of a lawsuit for negligence, breach of your standard of care, or another legal complaint. To be completely clear, you can decide to work with a young person without the consent of the young person's other guardians if you want. Nothing is stopping you from doing that. It is, however, a decision

that exposes you to a higher level of risk than that with which you may be comfortable. Be careful and think twice.

It's important to know that a guardian can not only give their consent to your work with a young person but also withdraw their consent, even if your work with the young person is ongoing. When you know a guardian has withdrawn their consent, it's a good idea to stop working with the young person, at least until you get a court order, a written agreement, or an arbitrator's award saying your work should continue. Continuing to provide services when you know a guardian has withdrawn their consent to those services exposes you to the risk of a complaint, the court making an order directing you to stop working with the young person, and a lawsuit for negligence, breach of your standard of care, or another legal complaint.



CONSENT FROM CHILDREN AND YOUTH

To make things a little more complicated, young people may be able to consent to your services without the consent of their guardians. (Of course, it's also important to check whether a young person is willing to receive services consented to by a guardian.)

Under section 41 of the *Family Law Act*, guardians' ability to give consent on behalf of a young person is "subject to section 17 of the *Infants Act*." Section 17 of the *Infants Act* says a child may consent to receive health care without the consent of their parent or guardian.⁴ However, there are conditions. You must explain the proposed services in a way the young person understands and be sure the young person understands the proposed services, the risks and benefits of those services, and wants

you to provide those services. You must also be sure the proposed services are in the young person's best interests.

The term "mature minor" is often used to refer to young people who are able to understand the nature, risks, and benefits of a proposed service and consent to those services themselves. There is no upper or lower age limit you can use to decide whether a young person is able to provide consent. (In fact, the *Infants Act* doesn't use the term "mature minor" at all.) You must decide for yourself whether the young person understands the proposed service and agrees to the proposed service. This is a decision you'll need to make on a case-by-case basis, thinking about factors such as the young person's age, maturity, and cognitive capacity.

You might want to think of the young person's capacity to consent

as a tiebreaker. If the young person's guardians don't agree on your work with the young person or one of them has withdrawn their consent to your services, the young person's consent can break the deadlock. If none of the young person's guardians agree to your work or all of them have withdrawn their consent, the consent of the young person alone will allow you work with them.

Of course, working with a young person against the wishes of one or more guardians will expose you to the risk of a complaint, the court making an order directing you to stop working with the young person, and the possibility of a lawsuit for negligence, breach of your standard of care or another legal complaint. As long as you made the decisions that the young person understands the nature, risks, and benefits of a proposed service and that the proposed service is in the young person's best interests honestly and in good faith, you are not likely to be found liable for working with the young person against their guardians' wishes.

ORDERS, AGREEMENTS, AND AWARDS

The court orders, written agreements, and arbitrators' awards you get will usually tell you who the guardians of a young person are, tell you to provide services to a family or young person, or tell you to stop providing services to a family or young person. Unfortunately, orders, agreements, and awards aren't always clearly written, and it's important to understand exactly what they say. If you are mistaken in your interpretation of an order, agreement, or award, you risk a complaint to BCACC and possibly a lawsuit for negligence,

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breach of your standard of care, or another legal complaint as well.

If you have received an ambiguous order, agreement, or award from a lawyer, you should write to the lawyer, explain your concerns, and ask for written clarification. If there are other lawyers involved, make sure you send a copy of your letter or email to them as well. If there aren't any other lawyers, make sure you send a copy of your letter or email to anyone who doesn't have a lawyer and is shown as a party to the order, agreement, or award.

If you have received an ambiguous order, agreement, or award from a someone who isn't a lawyer, you should write to everyone who is shown as a party to the order, agreement, or award or to their lawyers if they have any, explain your concerns, and ask for written clarification.

TAKING THE CASE

This discussion about risks, complaints, and lawsuits in the context of families and family breakdown is probably a little alarming. It should be. Getting complaints is always upsetting and lawsuits can be embarrassing, not to mention costly when they succeed.

Counsellors who work in or through agencies may not have much choice in the clients they take. Taking care to comply with BCACC's *Code of Ethical*

Conduct along with your employer's policies help minimize risk. Consulting a supervisor if you have questions or concerns helps as well, especially when you have to respond to complaints.

Counsellors in private practice, on the other hand, usually do have a choice in the clients they take. Remember, there is no case you absolutely must take. If you are uncomfortable with a request for your services, you can avoid risk altogether just by saying you are unable to take the case or provide the requested services. If you decide to take the case anyway, you should consider consulting a supervisor.

THE TAKEAWAYS

BCACC's *Code of Ethical Conduct* requires all Registered Clinical Counsellors to obtain the informed consent of all clients. Informed consent requires you to give an explanation about the services you propose to provide in a way the client can understand and be satisfied the client understands the proposed services, understands the risks and benefits of those services, and wants you to provide those services.

Adults usually are able to provide informed consent for their own work with you. The guardians of a young person are usually able to provide informed consent for the young person's work with you. The parents of a young person will usually, but not always, be guardians of the young person, and a young person can have more than two guardians.

Guardians' ability to consent to the mental and medical health care of a young person is subject to section 17 of the *Infants Act*. This part of the *Infants Act* says young people can provide informed consent for their own work with you. Before acting on the consent

of a young person, you must explain the services you propose to provide in a way the young person understands and be sure the young person understands the proposed services, risks, and benefits of those services, and wants you to provide those services to them. You must also be sure the proposed services are in the young person's best interests.

Providing services to an adult without consent exposes you to the risk of a complaint to BCACC and the possibility of a lawsuit for negligence, breach of your standard of care, or another legal complaint. Providing services to a young person without consent exposes you to the risk of a complaint to BCACC, the possibility of the court making an order directing you to stop working with the young person, and the possibility of a lawsuit for negligence, breach of your standard of care, or another complaint. It is up to you to gauge the level of risk with which you are comfortable. A supervisor can help you decide how to deal with risk.

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REFERENCES

- 1 BC Association of Clinical Counsellors *Code of Ethical Conduct*: <https://bcacc.ca/wp-content/uploads/2015/09/BCACC-Code-of-Ethical-Conduct-2014.pdf>
- 2 BC Association of Clinical Counsellors *Standard for Informed Consent to Clinical Counselling and the Collection, Use and Disclosure of Personal Information*: <https://bcacc.ca/wp-content/uploads/2015/09/1BCACC-Standards-Informed-Consent-2010.pdf>
- 3 British Columbia *Family Law Act*: <https://www.canlii.org/en/bc/laws/stat/sbc-2011-c-25/latest/sbc-2011-c-25.html>
- 4 British Columbia *Infants Act*: <https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-223/145538/rsbc-1996-c-223.html>

