LEGALLY ADEQUATE CONSENT

In general, adults with disabilities have the right to control their own lives and make their own decisions. They must give consent to have limitations placed on their activities, or to participate in events that involve risk. For example, consent is necessary for medical operations or in order to participate in a program or activity.

On the other hand, a minor child (under the age of 18 years) usually cannot legally give his or her own consent. Therefore, the child’s parent or guardian must consent for her. For example, parent’s consent may be needed before a minor child can participate in a school outing.

But once a child becomes an adult, the law presumes that she is able to give her own consent when it is needed. This presumption applies to all adults, including those with an intellectual developmental disability, mental illness, and other disabilities. It does not matter whether an adult is actually able to make good decisions or not. Unless state law provides otherwise, an adult will have the legal right to make all of her own decisions until a judge rules that the adult is not able to give her own consent and appoints a guardian. If there is no guardian and no special state law granting someone other than a guardian the right to give consent, and the person with a disability is unable to give consent, no one will be able to consent on behalf of the person with a disability.

Several state laws, address situations where there is no guardian, consent to major medical or dental treatment is needed, and the person with a disability is unable to consent. These laws, which address consent to medical procedures for adult residents of Intermediate Care Facilities for the Mentally Retarded (ICFs-MR), nursing homes and hospital patients, are summarized on the last page.

The purpose of this handout is to explain:
I. The requirements of legally adequate consent under state law;
II. When legally adequate consent is necessary; and
III. Who is authorized to give the needed consent for a person with a disability.

I. The Requirements of "Legally Adequate Consent"

There are three general requirements for legally adequate consent: (a) Legal Capacity, (b) Information and Understanding, and (c) Voluntariness.

A. Legal Capacity

The person giving the consent must have Legal Capacity in order for the consent to be valid. A person has legal capacity to give consent if she:

1. Is over the minimum legal age (usually, age 18) AND

2. has not had a guardian appointed by a court to handle her personal affairs or no previous guardianship is in effect.
B. Information and Understanding

In order for the consent to be valid, the person giving the consent MUST BE TOLD and MUST UNDERSTAND:

1. the nature, purpose, consequences, risks, benefits of, and alternatives to the procedure for which legally adequate consent is needed; AND

2. that refusing or taking away the consent will not risk future care and services.

Note that a person who does not speak English will be unable to give legally adequate consent unless the above information is provided in her native language.

C. Voluntariness

The last requirement of legally adequate consent is that the consent be given VOLUNTARILY. This means that the person gives her consent freely, and not because she is forced or pressured into it.

Note that a person does not need to be able to talk, read, or write to give legally adequate consent, so long as the above requirements are met and the person can communicate her consent.

II. When "Legally Adequate Consent" Is Required

Persons with an intellectual developmental disability formerly known as mental retardation, mental illness, or any other disability have the same fundamental rights as others. Therefore, they must consent in all cases where consent would be required of a person who does not have a disability. State law gives some specifics about when a person with a disability must consent to services.

A. For Persons with Mental Retardation

The Texas Persons with Mental Retardation Act (MRPA) requires that consent be obtained in a number of specific situations.

1. Legally adequate consent is required before a person with an intellectual developmental disability may participate in a program or activity where consent would be required for a person who does not have an intellectual developmental disability (for example, an alcohol or drug abuse program, or a program of behavior treatment employing aversive procedures).

2. Legally adequate consent is required before a person with an intellectual developmental disability is admitted voluntarily for 24 hour residential care at a state supported living center, state center, or community mental health and mental retardation (MHMR) center. If consent cannot be obtained, the individual will have to be court committed.

3. Legally adequate consent is required before (1) a person with an intellectual developmental disability may receive a determination of an intellectual developmental disability, or (2) admitted voluntarily to nonresidential mental retardation services (such as a self help skills program, a sheltered workshop program, or a money management program) at a state supported living center, state center, or community MHMR center. However, if the Texas Department of State Health Services (TDSHS) or a community MHMR center has made and documented all reasonable efforts to obtain legally adequate consent and cannot secure
consent, both the determination of an intellectual developmental disability and nonresidential intellectual developmental disability services can be provided without legally adequate consent. Although the law is not yet clear on this point, it seems that a state supported living center or community center could also apply this provision and arrange for contract services (for example, through an ICF MR or surrogate family home) to be provided to a person with an intellectual developmental disability who could not consent.

4. Legally adequate consent is required before a voluntary resident of a state supported living center, state center, or a community MHMR center may receive non emergency medical or dental treatment. However, if medical treatment is needed by a resident of a DADS facility and the parent of a minor or the guardian cannot be reached or fails to respond, DADS can order the needed medical treatment upon the advice and consent of three (3) physicians. Dental services can be ordered upon the advice and consent of one dentist and two (2) physicians.

5. Legally adequate consent is required before a court committed client in a state supported living center, state center, or community MHMR center receives surgery. The MRPA authorizes medical care for clients in residential care facilities (which includes state supported living center, state centers, and community center operated facilities, but does not include privately operated ICF MR or other facilities) without the need for obtaining consent, except for surgical procedures. This means that a state school, state center, or community MHMR center facility may provide medical care and treatment of a person with an intellectual developmental disability even if that person or her parent (if a minor) or guardian objects to the medical care and treatment. However, surgical procedures may only be performed with consent. If the person who must consent cannot be located or fails to respond to a request for consent, clients of DADS may be provided consent under the advice and permission of three (3) physicians or a dentist and two (2) physicians as discussed in Paragraph 4. A state school or community center that wishes to perform surgery against the wishes of a guardian must obtain a specific court order authorizing the surgery.

6. Legally adequate consent is required before the contents of the records of the identity, diagnosis, evaluation, or treatment of the person with an intellectual developmental disability may be shown to other persons. For more information, see Disability Rights Texas's handout Confidentiality of Mental Health and Intellectual Developmental Disability (pka Mental Retardation) Records.

B. For Persons with Mental Illness

1. The Texas Mental Health Code requires that consent be obtained in the following specific situations:
   a. when a person applies for voluntary admission to a state hospital (note that a guardian cannot give this consent);
   b. before mental health records which directly or indirectly identify a patient can be disclosed (See Disability Rights Texas's handout Confidentiality of Mental Health and Mental Retardation Records.);
   c. before a person can be part of any research program; and
   d. in order to waive the right to jury trial and to other procedural rights in involuntary commitment proceeding.
2. Under state law and court decisions, consent is also required before a person receives medications or medical treatment, except in an emergency situation or when a surrogate decision-maker is authorized by state statute.

Under state law, a person can now write down instructions for her mental health treatment—including medication, ECT, and emergency care—which generally must be followed by her doctors and other mental health providers if she becomes incapacitated. There is particular language that must be used to make an effective Declaration for Mental Health Treatment, also called an advance directive. Please see Disability Rights Texas’s handout, How to Make an Advance Directive. To make an advance directive, a person must be capable of making mental health decisions but does not need to be capable of handling all matters, such as finances. An advance directive is effective from the time a person becomes incapacitated until she becomes competent again. The advance directive states the consumer’s specific instructions for the treatment or medication which she prefers or wishes to avoid.

The directive must be followed by doctors and mental health providers except in certain emergency situations. No other person needs to act on behalf of the consumer and no one has discretion about the consumer’s treatment or medication. An advance directive cannot be revoked while the person who made the directive is incapacitated. This irrevocability during incapacitation is intended to afford a competent person an opportunity to prevent herself from making bad decisions while she is incapacitated.

III. Who is Authorized to give "Legally Adequate Consent" for a Person with an Intellectual Developmental Disability or Mental Illness

A. Minors Without Court Appointed Guardians

If the person with an intellectual developmental disability or mental illness is a minor (most people under age 18) and does not have a guardian, then the child's parent or conservator is the person authorized to give the consent. (In cases where the parents are divorced, the question of who can give consent is controlled by the court's order and the law in the State of Texas concerning divorces and custody of children. You should contact your lawyer if you have any questions about this.) The parent can give consent because, under the law, a parent is the natural guardian of a minor child.

B. Minors with Guardians

Few minors have court appointed guardians. But if a court has granted a minor a full guardian to handle her personal affairs which is still effective, then the guardian is the person authorized to give the consent.

C. Minors with State Conservatorship

If a minor is a ward of the Texas Department of Family and Protective Services (TDFPS), the caseworker assigned to the minor by TDFPS is authorized to give the consent, in most cases. Caseworkers cannot consent to sterilization, withholding of life-sustaining treatment, and other procedures that involve serious deprivation of rights.
D. Adults With Guardians

1. If a court has given a guardian full authority to handle the personal affairs of an adult with an intellectual developmental disability or mental illness, and the guardianship is still effective, then the guardian is the person authorized to give the required consent.

2. If the adult has a guardian with limited authority, you must be sure to check the court order appointing the limited guardian to see if the limited guardian is specifically granted the power to give the kind of consent that is needed. If the limited guardian is not specifically granted the authority to consent to what is needed, then the person with an intellectual developmental disability or mental illness is the person who is authorized to give her own consent. If the limited guardian does not have authority to consent and the adult is, as a factual matter, unable to give the required consent because of lack of understanding, then the limited guardian must go to court and obtain additional powers so that she will be authorized to give the required consent.

E. Adults with An Intellectual Developmental Disability Who Do Not Have Guardians

Under the MRPA, the law presumes that an adult with an intellectual developmental disability is competent and fully capable of giving her own consent when it is needed. This means that the person with an intellectual developmental disability is the only person who can give the required consent, unless she cannot meet the requirements of giving legally adequate consent.

If, as a factual matter, an adult is unable to give the required consent because of a lack of understanding, several options are possible:

1. A guardianship can be obtained so that the guardian can give the required consent for the person with an intellectual developmental disability. (See Disability Rights Texas's handout, Guardianship for Texans with Disabilities.)

2. DADS or a community MHMR center, after making and documenting all reasonable efforts to obtain legally adequate consent and not being able to obtain consent, can provide nonresidential mental retardation services and make a determination of an intellectual developmental disability.

3. In some cases where intellectual developmental disability services are needed and the person with an intellectual developmental disability cannot give consent, court orders can be obtained to authorize the service (for example, with juvenile offenders or persons with IDD who are under the jurisdiction of a family court).

4. Sometimes the person can get emergency services for up to six (6) days with the assistance of TDFPS personnel under the Adult Protective Services statutes. This last option usually will not be done unless the person’s health or safety is threatened if she does not get the services. The person must meet the requirements of state law to get these services.

5. If the adult is a resident of an ICF-MR, nursing home or patient in a hospital, and she cannot give needed consent to major medical or dental treatment, it is possible that a surrogate decision-maker or committee may be able to give consent to the treatment. See section H below.
F. Adults with Mental Illness Who Do Not Have Guardians

Under the Texas Mental Health Code, the law presumes that an adult with mental illness is competent and fully capable of giving her own consent when it is needed. This means that the person with mental illness is the only person who can give the required consent.

In non-emergency situations, if the person, as a factual matter, is unable to give the required consent because of a lack of understanding, the only option available is to obtain a guardianship so that the guardian can give the required consent.

Emergency medical procedures can generally be performed without consent. Some hospitals utilize a three doctor rule requiring three doctors to review the client and agree that the emergency procedure is medically necessary and must be performed if consent cannot be obtained.

If the adult person with mental illness is a patient in a hospital or resident of an ICF-MR or nursing home, a surrogate decision-maker or committee may be able to consent to needed medical or dental services for her. See Section H below.

G. Exceptions to These Rules—Sterilization and Similar Procedures

Neither the parent of a minor child nor the guardian of an adult may consent to sterilization in the State of Texas. Furthermore, in Texas, not even a court can order or authorize sterilization. However, a person with a disability, including an IDD or mental illness, who has given legally adequate consent can be sterilized. Thus, only the person with the disability herself can consent. For more information, please request Disability Rights Texas's handout, Sterilization of Persons with Mental Disabilities.

Furthermore, under the law, DADS may not perform unusual or hazardous treatment procedures, experimental research, organ transplantation, or non-therapeutic surgery for experimental research. Before any other service providers may do any of these things, the person must have been told and understood the method to be used in the procedure, and the person herself must have consented to it.

Finally, a guardian cannot consent to inpatient psychiatric treatment in Texas; only the person with the disability herself may consent. If consent cannot be obtained, court commitment is the only option.

H. Special Provisions for Obtaining Consent From Residents Of ICFs-MR And Nursing Homes, and from Hospital Patients

In 1993, the Texas Legislature passed a special law that allows for surrogate decision-makers for some residents of Intermediate Care Facilities for the Mentally Retarded (ICF-MR), nursing homes, and hospitals. Tex. Health & Safety Code Ann. § 597.041 et seq. (Vernon Supp. 2000). If the ICF-MR determines that a resident of a community-based ICF-MR lacks the capacity to make a major medical or dental treatment decision, and is an adult who has no guardian or is under age 18 and has no parent, guardian, or managing or possessory conservator, an adult surrogate may consent on behalf of the resident. The surrogate decision-maker must have decision-making capacity and be
willing to consent on behalf of the client. Consent given by the surrogate is valid and competent to
the same extent as if it were given by the person with a disability herself. The surrogate must be
chosen from the following list, in order of descending preference:

1. an actively involved spouse;
2. an actively involved adult child who has the waiver and consent of all other actively involved
   adult children of the client to act as the sole decision-maker;
3. an actively involved parent or stepparent;
4. an actively involved adult sibling who has the waiver and consent of all other actively involved
   adult siblings of the client to act as the sole decision-maker;
5. any other actively involved adult relative who has the waiver and consent of all other actively
   involved adult relatives of the client to act as the sole decision-maker.

Surrogate decision-makers may not consent to experimental research, abortion, sterilization,
electroconvulsive treatment, or management of client finances. If no guardian or surrogate decision-
maker is available, the Texas Department of Aging and Disability Services (DADS) must establish
and maintain a list of individuals qualified to serve on a surrogate consent committee, to consist of
three (3) to five (5) members. This committee (like the surrogate) may consent to major medical or
dermal treatment, psychoactive medication, or a highly restrictive procedure. Consent is based upon
consensus of the committee members. Detailed requirements govern how the committee is
established and how the committee functions. The committee’s decision may be appealed to court.
Similar criteria are followed for the selection of a surrogate decision maker for an adult patient in a
hospital or nursing home who is comatose, who lacks the ability to understand and appreciate the
nature and consequences of a treatment decision or who is otherwise mentally or physically
incapable of communication. This surrogate decision-maker may consent, on behalf of the patient, to
medical treatment except for voluntary inpatient mental health services, electroconvulsive treatment,
or a decision to withhold or withdraw life-sustaining treatment. Tex. Health & Safety Code Ann. §
313.001 et seq. (Vernon Supp. 2000).

Disability Rights Texas’ goal is to make each handout understandable by and useful to the general
public. If you have suggestions on how this handout can be improved, please contact the agency at
the address and telephone number shown on our website at www.DisabilityRightsTx.org or e mail
Disability Rights Texas. at info@DisabilityRightsTx.org. Thank you for your assistance. This handout
is available in Braille and/or on audio tape upon request. Disability Rights Texas strives to update its
materials on an annual basis, and this handout is based upon the law at the time it was written. The
law changes frequently and is subject to various interpretations by different courts. Future changes in
the law may make some information in this handout inaccurate. The handout is not intended to and
does not replace an attorney’s advice or assistance based on your particular situation.