"I Have to OK My Surgery, But Nobody Asks Where I Want to Live

John P. Schuman and Suzanne Clarke

Children must consent to medical treatment, but they may never be heard in family court

For at least fifteen years, Ontario Law has required doctors and other health care providers to get consent for treatment of children. Throughout the province of Ontario, some medical teams have consulted with young children about their medical issues, in order to obtain their consent for medical procedures. However, decisions regarding the child's care are not easy. They are tough decisions about complex illnesses and injuries. But, even young children receiving treatment in hospitals may know more about their illness and treatment, than most adults. Therefore, many health care professionals expect that they will work together with children to make the treatment decisions.

Compare that approach with that taken in family court, where even though the governing statutes require the court to consider a child's views and preferences, there is strong reluctance to do so. Children know their parents, their homes and their family situation. However, most people assume that children understand those family concepts more readily than medical procedures such as chemotherapy, catheterization and blood transfusions. Therefore, although Ontario Law requires children to participate in their health care decisions, children are often placed at the periphery of other important decisions such as with which parent they will reside.

Children's Role in Health Care Decisions

Outside of hospitals and pediatricians' offices, many people assume that parents, and not kids, make the decisions regarding health care. But, the opposite is true. In fact, some medical teams view it as critically important to the treatment process that children be informed participants in the decision making processes. That same belief is reflected in the law, which mandates that kids who are able to direct their treatment do so.

Ontario's Health Care Consent Act, SO 1996, c-2. ("Consent Act") does not impose any age restrictions on making medical decisions. Instead, the ability to understand the treatment is the critical determinant. Section 4(1) of the Consent Act states,

> A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Sections 4(2) and 4(3) of the Consent Act creates the presumption that people, including children, are able to direct their own treatment unless there is evidence to contrary. Further, not understanding a complex medical decision, and therefore not having capacity in that instance, does not mean a child cannot make other treatment decisions. In fact, section 15(1) of the Consent Act states that children are entitled to direct the treatment they do understand, even if they cannot direct the treatment they do not understand. Further, section 15(2) states that as children gain better understanding as they grow, they are entitled to have their capacity to direct treatment reassessed.

e of children directing their medical treat-
s addressed by the Supreme Court of Canada
decision of *A.C. v. Manitoba* (*Director of Child
Family Services,* 2009 SCC 30, [2009] 2 SCR
1. In that case, a fourteen year old girl and
er parents appealed the order that the girl
receive a blood transfusion despite the fact
that she signed a medical directive contain-
ing her written instructions not to be giv-
en blood under any circumstances. After
the girl refused to consent to the receipt
of blood, the Director of Child and Fam-
ily Services apprehended her as a child
in need of protection, and sought a treat-
ment order from the court under s. 25(8)
of the *Manitoba Child and Family Services
Act*, CCSM 1985, c. C-8. Section 25(8) allows
he Court to authorize a medical treatment
at the court considers to be in the best in-
ests of the child.

st glance, this may seem like a "no brainer" to
ders- shouldn't the hospital's decision be giv-
t considering the girl is a minor, and may not
d the implications of her decision? To these
reme Court would respond, "not necessarily".

Justice Abella writing for the majority of the Court explained that when dealing with medical decisions of children under the age of 16, emphasis should be placed on the child's maturity. She stated that when dealing with children under 16, the more a court is satisfied that a child is capable of making a mature, independent decision on his or her own behalf, the greater the weight that will be given to his or her views when a court is exercising its discretion under s. 25(8) of the Act. Furthermore, when considering the best interests of the child, Justice Abella held that the court should evaluate the following factors:

1. The nature, purpose and utility of the recommended medical treatment and its risks and benefits;
2. The adolescent's intellectual capacity and the degree of sophistication to understand the information relevant to making the decision and to appreciate the potential consequences;
3. The stability of the adolescent's views and whether they are a true reflection of his or her core values and beliefs;
4. The potential impact of the adolescent's lifestyle, family relationships and broader social affiliations on his or her ability to exercise independent judgment;
5. The existence of any emotional or psychiatric vulnerabilities and the impact of the adolescent's illness on his or her decision-making ability and,
6. Any other relevant information from adults who know the adolescent.

Therefore, once a child demonstrates that they appreciate and understand the implications of their decision, a court could endorse their decision even if the decision is contrary to that of the relevant medical personnel.

But With Simple Family Law Decisions, Kids Have Less Say

Doctors and other health care professionals are required to at least meet with a child and consider whether that child understands medical decisions and follow their direction if the child does. Similarly, the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 64 states that Ontario judges making custody and access decisions have the authority to meet with children. However, this is rarely done. In fact, in his article titled, "Representing Children in Custody & Access Proceedings", *Family Law: The Voice of the Child* (Toronto, LSUC, 2009), Dan Goldberg explained that The Office of the Children's Lawyer does not believe that meeting with children is appropriate, despite the requirement that the judge consider the child's views and preferences under the *Children's Law Reform Act.*

Consider the divergent case law on whether a child's view matters in family court:

Children's Aid Society of Ottawa v. K ., 2005 CanLII 16595 at para 12: The trial judge ordered custody to a parent with whom three children, ages 13, 9 and 7 did not want to live. The 13-year old was found to be a "parentified child" whereby his needs were sacrificed in order to take care of the needs of his parents. This factor combined with his special needs, led the judge to determine that he was not mature enough to understand the impact of his decision.

Kincl v. Malkova, 2008 ONCA 524 (CanLII) at para3: The Ontario Court of Appeal, based upon fresh evidence introduced at the appeal, concluded that a 14-year old daughter, who had not seen her father since November of 2005, did not want to have access, and observed, " ... Veronica is almost 14 years of age and her views are entitled to considerable weight; in reality she will do what she wishes in any event and the absence of access over the past almost three years seems to confirm her views in that regard, at least for the present time."

Walker v. Baker, 2010 NSSC 440 (CanLII) at para 25: Justice Dellapinna refused to order a "strong willed" 12-year-old to see her father, and also refused to order the mother to provide further mental health treatment to address the breakdown of the child's relationship with her father, even though such treatment might have been helpful.

Bruni v. Bruni, 2010 ONSC 6568 (CanLII) at para 130: Justice Quinn refused to order access against the wishes of a 13-year-old, finding that the mother and her new partner "have engineered an alienation that is so complete as to leave the court with no feasible option." Justice Quinn also declined to order counseling to repair the relationship between father and daughter.

In hospitals, and other places where the Consent Act applies, if a child understands the decision, regardless of its complexity, that child's decision carries the day. That is true even when the child's parents and health care providers try to influence the child's decision. In family law cases, where the decisions are usually much more straightforward, why does it appear that children's wishes so much less important?

John Schuman is head of the Family Law Group at Devry Smith Frank LLP in Toronto.

Suzanne Clark is a student at Devry Smith Frank LLP.