

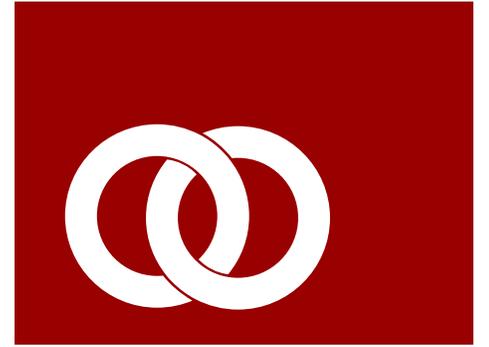


Understanding the Fundamentals of Minor Consent

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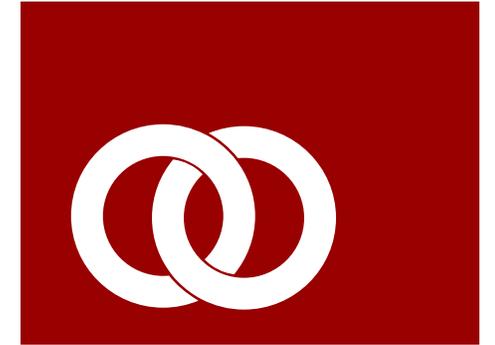


DISCLAIMER



- The information presented in this workshop is for educational purposes only and is not intended to serve as a substitute for independent legal advice.

GOALS & INTENTIONS FOR TODAY



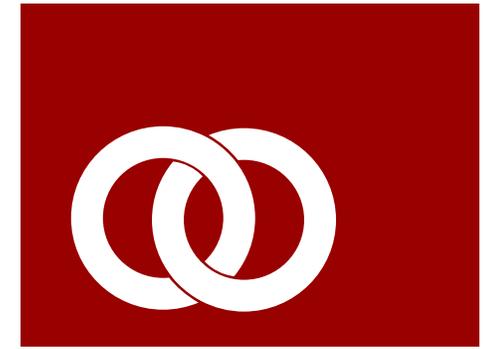
To give you the information you need in order to:

- Make well-informed and legally and ethically sound decisions, and
- Provide a framework that will help you formulate strategies so that you will know what questions to ask, what relevant documents to review and what legal & ethical precepts to remember so that you can **PRACTICE IN PEACE** when working with minor clients.

We are going to review:

- The laws and circumstances that permit minors to lawfully consent to their own treatment,
- Which individuals other than a minor can lawfully consent to a minor's health care treatment,
- The rights of parents/guardians and minors to access and authorize the disclosure of the minor's confidential information, and
- Best practices.

I. INTRODUCTION: Fundamental Considerations



- Minor consent statutes are inextricably linked to other laws that determine who can access, inspect or authorize the disclosure of the minor's information

Fourth, How are minor consent statutes linked to other laws?

First, what is the minor's age?

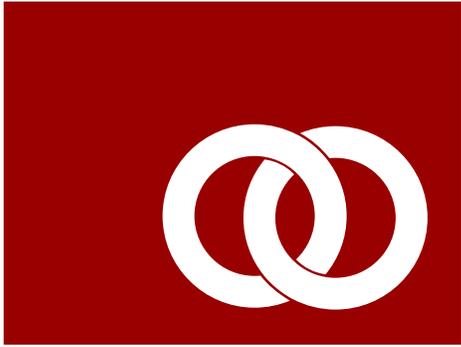
- Based on the age of the minor, the minor may be able to lawfully consent to services themselves

- What mechanism allows for that person to consent to treatment?

Third, what if a non parent adult presents the child for services?

Second, what is the minor's family system?

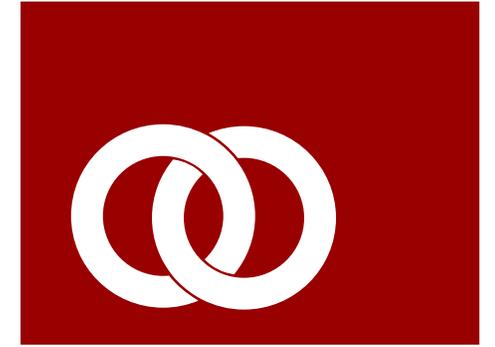
- If the minor's parents are married, unmarried or divorced that may determine the right of the parent(s) to consent



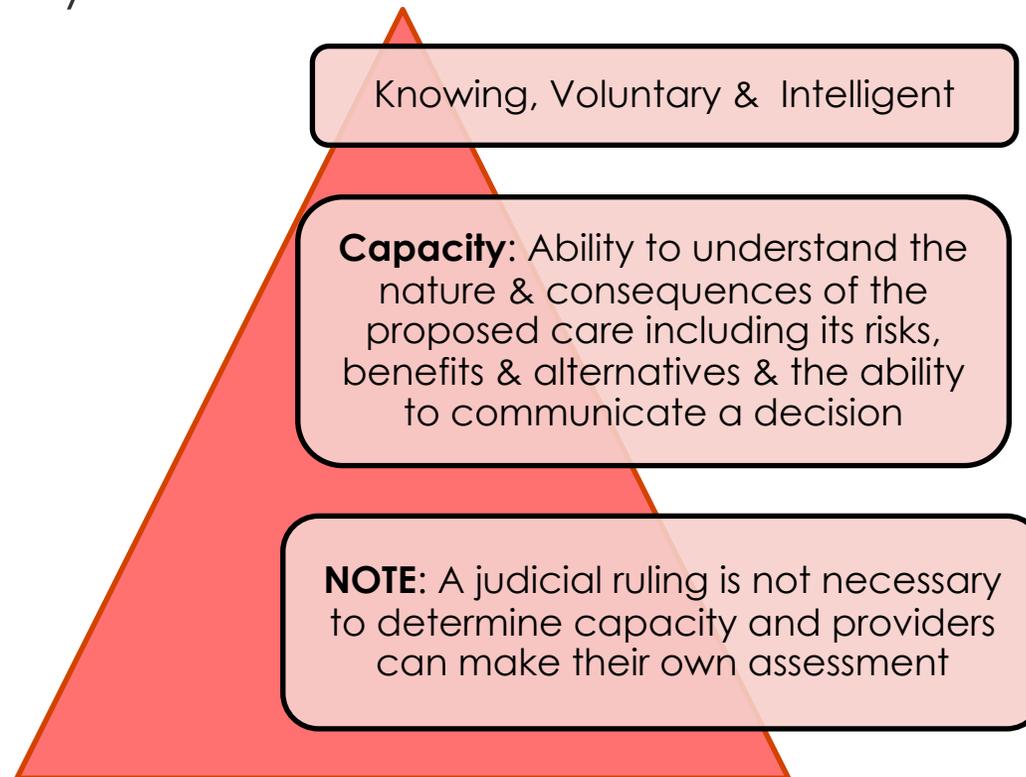
II. CONSENT

- Children are often presented for therapeutic services by a parent or a relative. It is important to obtain consent from a person who has the legal authority to consent because consent from a person who cannot lawfully consent is NO consent at all. The CAMFT Code of Ethics provides guidance on this matter. But, first let's review the definition and elements of consent.

LEGAL DEFINITION AND ELEMENTS OF INFORMED CONSENT

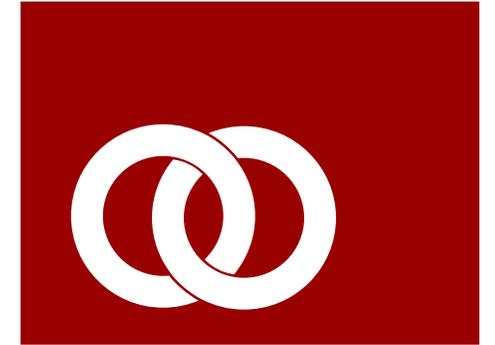


- Consent refers to a person's ability to make an informed decision about the services that person receives. In order to be valid, consent must be knowing, voluntary, intelligent and given by a person with the capacity to consent.



CAMFT CODE OF ETHICS

Section 10:11



“ . . . Marriage and family therapists take care to clarify and determine who has the legal authority to provide consent and treatment for the minor and avoid initiating treatment of the minor until such determination is made. Marriage and family therapist are encouraged to request copies of any court judgements or orders and determine who has the legal authority to make decisions about entering or continuing treatment, or access to or release of confidential information. ”

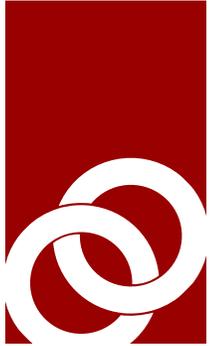
Thus, there is an ethical expectation that a therapist will determine who has legal authority to consent to treatment of the minor even before commencing treatment. The CAMFT Code of Ethics provides excellent guidance on how to determine who has legal authority provide consent through reviewing relevant documents that determine the rights of parents and/or others to consent to a minor's health care treatment.



Who Qualifies as a Minor Under California Law?

Under the California Family Code, a minor is an individual who is **under** 18 years of age. [Cal. Family Code 6500]

III. State Laws That Give Minors the Right to Consent to Their Own Mental Health Care Treatment



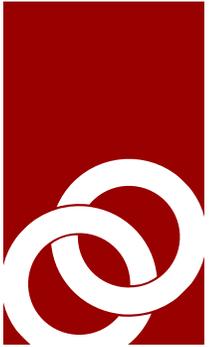
Family Code 6924

- The minor is 12 years of age or older,
- In the opinion of the therapist, the minor is mature enough to participate in outpatient services, and
- Without the treatment, the minor either presents a danger of serious physical or mental harm to himself/herself or to others OR the minor is the victim of incest or child abuse.
- The therapist must involve the minor's parent or guardian unless, **in the opinion of the provider**, the involvement would be inappropriate.

Health and Safety Code 124260

- The minor is 12 years of age or older, and
- In the opinion of the therapist, the minor is mature enough to participate in the outpatient services.
- Treatment authorized by this section must include involvement of the minor's parent or guardian, **unless after consulting with the minor**, the therapist determines that the involvement of the minor's parent(s) or guardian would be inappropriate.

Payment for services under California minor consent laws



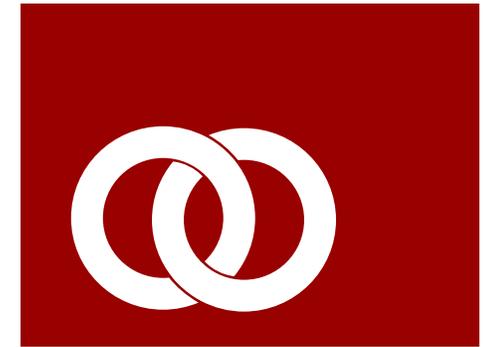
- General Note About Payment: The laws that allow minors to consent to their own treatment do not make any provision for payment for services, and relieve parents of financial liability. Under both the Family Code and Health and Safety Code, a minor's parent or guardian is not liable for payment, unless the parent or guardian participated in the treatment. And, if they did participate they are only liable for the services in which they participated.

Confidential Communications Request:

In the absence of free care or the minor's ability to pay for services themselves, minors may have to rely on their parents or family's health insurance. As of 2015, a health plan is required to honor a Confidential Communications Request (CCR). California law requires that health insurers honor a (CCR). If a minor is insured under their parent's health insurance policy, a minor can submit a CCR to the insurance company requesting that their health service information (i.e., where and when they received mental health care services) not be listed in any insurance documents sent to their parents/policyholders and that all information be sent to them.

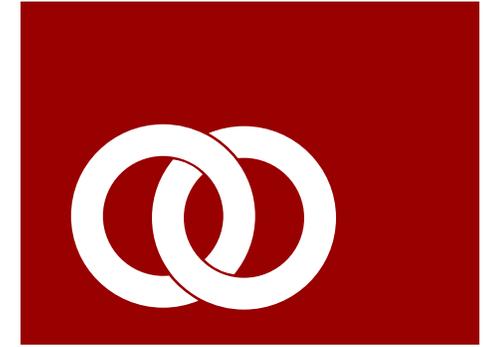
[Cal. Civ. Codes 56.05 and 56.107 and Cal. Insurance Codes 791.02 and 791.29]

Which of the California laws can a therapist rely on?



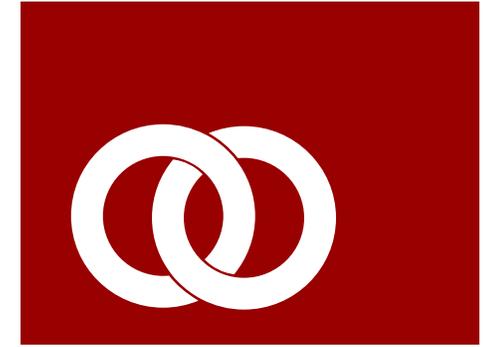
- Both code sections co-exist and a minor only needs to meet the requirements of one of the statutes in order to lawfully consent to their own treatment. Utilize professional judgment to determine whether the minor meets the requirement(s) of either statute.

Other Circumstances where Minors Possess the Ability to Consent to Their Own Treatment



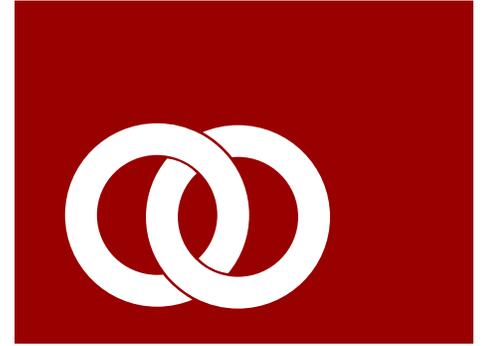
- Emancipated Minors
 - A minor 14 years of age or older may petition the court for emancipation and consent to their own medical, dental or psychiatric care without parental consent, knowledge, or liability [Family Code Sections 7002 and 7050(e) (1)].
- Minors Living Separate and Apart of Parents
 - Minors who are 15 years-old or older and deemed self-sufficient because they live separate and apart from their parents and manage their own financial affairs are able to consent to their mental health care treatment [Family Code §6922].
- Minors who are Married [Cal. Civ. Code §25.6].
- Minors who are in the Armed Forces [Cal. Civ. Code §25.7].
- Minors Seeking Dependency Treatment
 - However, minors may not consent to receive replacement narcotic abuse treatment with methadone. Also, minors do not have the right to refuse counseling for a drug or alcohol related problem when the minor's parents or guardian consents to that treatment[Cal. Family Code § 6929(b) & Cal. Civ. Code §34.10].

IV. Individuals Other Than a Minor Who Can Lawfully Consent to a Minor's Health Care Treatment



- Biological Parents
 - Who are either married, unmarried or divorced
- Legal Guardians
- Adoptive Parents
 - What About Foster Parents?
- The Court (for Wards or Dependents)
- Qualified Relatives
 - What about Stepparents and Domestic Partners?

Biological Parents



- Married Parents: If the minor's biological parents are married, then *either* parent can consent to the mental health care treatment of the minor.

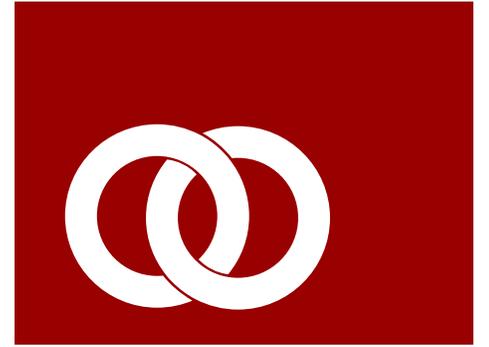
[Cal. Family Code 6903]

Biological Parents

- Unmarried Parents: When a child is born to unmarried parents, the parentage of the child needs to be established by the Court in order for the biological father to obtain legal rights. A biological father can establish parentage through obtaining a court order or signing a declaration of paternity.

[Cal. Family Code 7630-7644].

- If the rights of the alleged father **have not been** established then the child's biological mother has the sole right to make decisions pertaining to the health and welfare of the child.
- If the rights of the father **have been** established, then the father is afforded the same rights and privileges as the minor's biological mother. In this instance, the child's mother and father share the right to make the decisions pertaining to the health and welfare of the child and *either* party would be able to consent to treatment for the minor.



Rights Determined by a Custody Order



Legal Custody

- Legal custody refers to the right and responsibility of a parent to make decisions that relate to the health, education and welfare of the child which includes decisions that pertain to mental health care treatment.
 - “Joint legal custody” = Both/Either
 - “Sole legal custody” = Only One

Legal custody is determinative.

[Cal. Family Code 3003 & 3006]

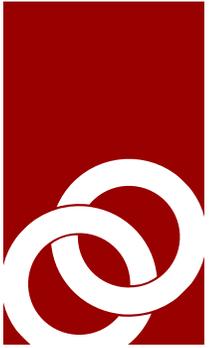
Physical Custody

- Physical custody is *not* legal custody. Physical custody refers to where the minor physically resides and with whom the minor physically lives.
 - “Joint physical custody” = Each
 - “Sole physical custody” = Only One

[Cal. Family Code 3004 & 3007]

Divorced Parents With Joint Legal Custody

- Generally, if the parents are divorced and share *joint legal custody*, then *either* parent can consent to treatment. But, there may be different iterations of a parent's ability to consent to treatment under a joint legal custody order.
- **Important Reminder:** Examine the custody order to determine whether or not the rights and responsibilities to make health care decisions have been conferred solely on one parent; or if the custody order imposes a mutual obligation on both parents to agree on a provider and to consent to treatment.



Divorced Parents Where One Parent Has Sole Legal Custody



- If one parent has *sole legal* custody, then only that parent is vested with the right and responsibility to make decisions on behalf of their minor child including the right to consent to mental health care treatment.
- **Important Reminder:** A parent without legal custody rights has no right to consent to treatment, no right to be involved in the minor's treatment and no right to information about the minor's treatment unless the court order indicates otherwise. For example, the custody order can assign one parent with sole legal custody rights & responsibilities but give the other parent a right to the minor's general treatment information.

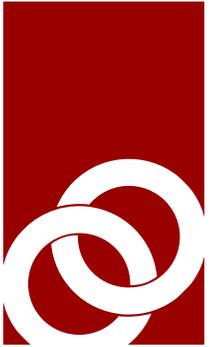
Legal Guardians

- A guardianship is specifically for an adult who seeks to take care of a child whose parents are deceased, incapacitated, or unable to provide adequate care to a child.
- Legal guardians generally have the same rights as biological parents with respect to making mental health care decisions for minor children under their care.
- **Important Reminder:** Review the official letter of guardianship to determine the scope of the guardian's legal authority and whether that includes the ability to consent to mental health care treatment for the minor. Except as specified in the letter of guardianship, the guardian may consent to treatment of the minor.

[Cal. Family Code 6903]



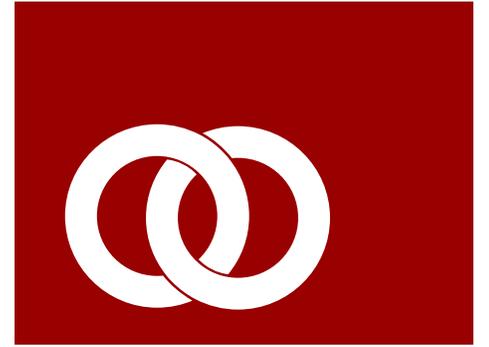
Adoptive Parents



- Adoption is a process that establishes a legal parent-child relationship between a minor and an adult who is not a biological parent. If a minor has been legally adopted, the adoptive parent(s) has the same legal rights and responsibilities of a biological parent which includes the right to consent to the medical and mental health care treatment of the child.
- **Important Reminder:** At the end of an adoption hearing, a judge signs a final decree of adoption or adoption order that establishes the legal rights of the adoptive parent(s). After the hearing, the adoptive parent(s) can obtain a birth certificate from the office of vital records that lists them as the minor's parents. So, if the person(s) presenting the child for services states that they are the adopted parent(s), be sure to examine the birth certificate.

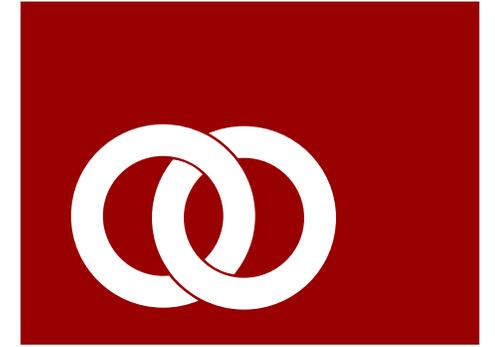
[Cal. Family Code Section 8616]

Foster Parents



- Foster parents generally do not have the right to make health care decisions for their foster children. And, a minor's entry into the foster care system does not automatically remove a parent's legal rights.
- Typically, if the parents legal custody rights have been temporarily stripped, it is the legal guardian of the child in foster care such as the child's social worker, who is able to make decisions for the minor including the consent to treat. However, check the court order for any stipulations regarding the foster parent's ability to consent for medical care. [Cal. Welfare and Institutions Code 361 (a) and 369 (f)]

Wards of the Court



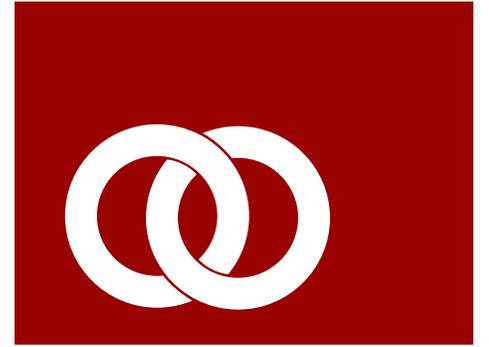
- If a child is adjudged to be a ward of the Court (i.e., because the child committed a crime), the child may also be placed in foster care. In this instance, the Court can make any and all reasonable orders for the care, supervision, custody, maintenance, and support of the child, including medical treatment.
- [Cal. Wel. & Inst. Code 362 (a) and 369(b)].

Which of the following documents would *NOT* determine a parent/guardian's right to consent to treatment for a minor?

- A. Birth Certificate
- B. Power of Attorney for a Minor Child
- C. Custody Order
- D. Letters of Conservatorship
- E. Declaration of Paternity
- F. Order Appointing a Legal Guardian/Letters of Guardianship



ANSWER



D is correct. In California, A conservatorship is specifically for an adult who is either physically or mentally incapacitated and cannot manage their finances or personal life.

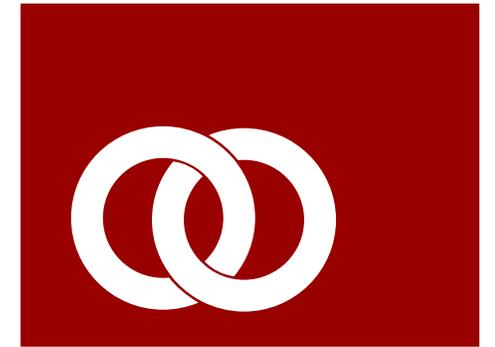
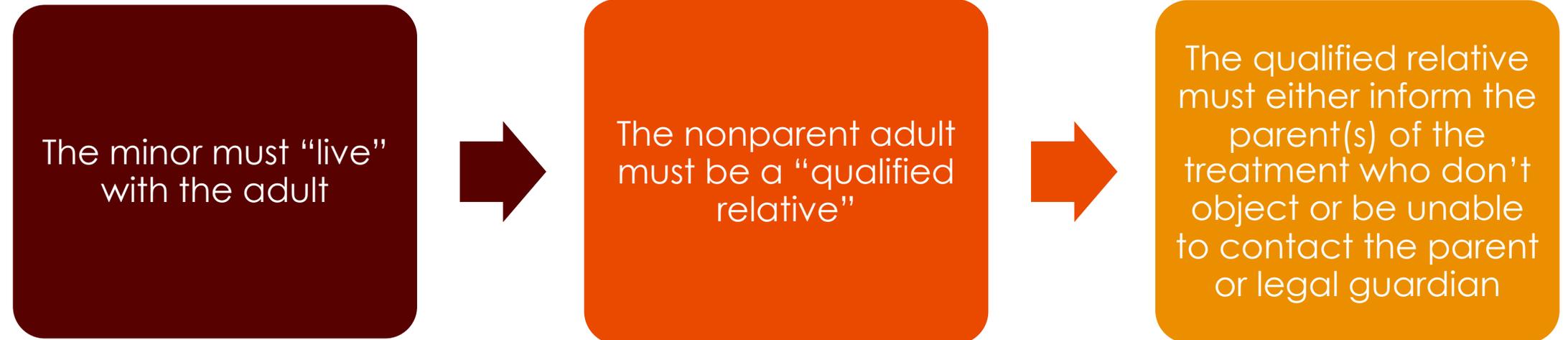
The following are correct and can be relied on to determine a parent or guardian's right to consent.

A. Birth Certificate, B. Power of Attorney for a Minor Child (gives another adult physical custody of the child and lets that person make decisions about the child's education and medical care on a temporary basis), C. Custody Order, E. Declaration of Paternity, F. Order Appointing a Legal Guardian/Letters of Guardianship

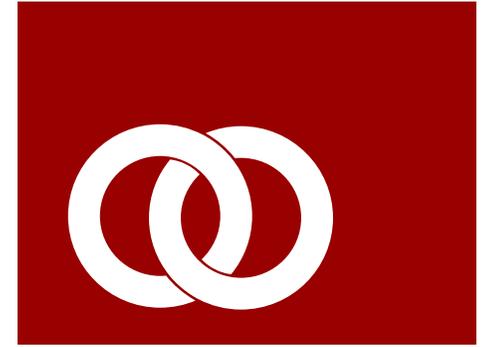
The “CGA” Mechanism

- A Caregiver’s Authorization allows a non-biological parent adult (i.e., a relative) with whom the minor lives, to consent to healthcare treatment for which the minor lacks the authority to consent by signing a “Caregiver’s Authorization Affidavit.”

[Cal. Family Code 6550]



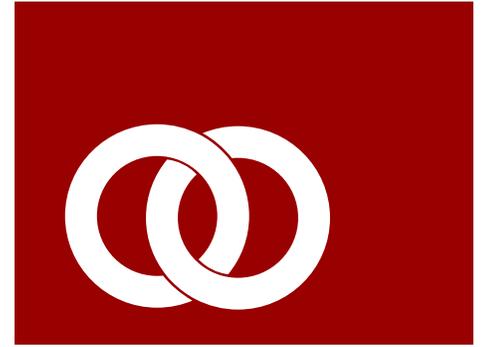
Qualified Relatives



- A “Qualified relative” is a stepparent, brother, sister, stepbrother, stepsister, half brother, half sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix “grand” or “great,” or the spouse of any such person.

[Cal. Family Code 6550]

Stepparents



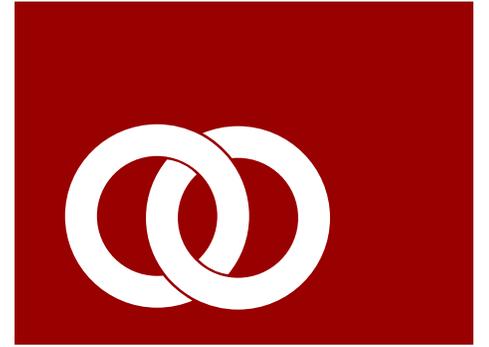
- A stepparent who has not legally adopted his or her spouse's minor child does not have the authority to consent to the mental health care treatment of their spouse's minor child or children without a valid Caregiver's Authorization Affidavit.

[Cal. Fam. Code, Section 6550 (h)(2)].

Domestic Partners

- California law gives registered domestic partners the same rights and obligations as are granted to spouses in a marriage. However, becoming the spouse of a parent is not the same as becoming a parent. As with a stepparent, in order for a domestic partner to be able to consent to the mental health care treatment of their domestic partner's biological child, the domestic partner must have legally adopted the minor child or complete a valid Caregiver's Authorization Affidavit.

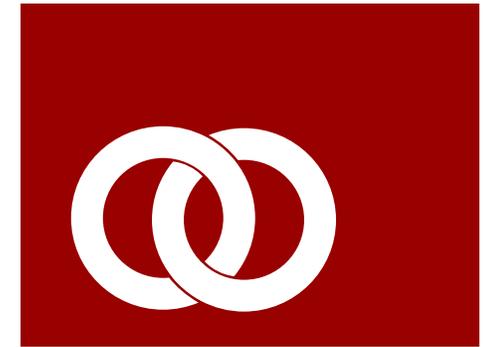
[Family Code Sections 297 and 297.5 (d), *Elisa B. v. Superior Court*, 37 Cal.4th 108].



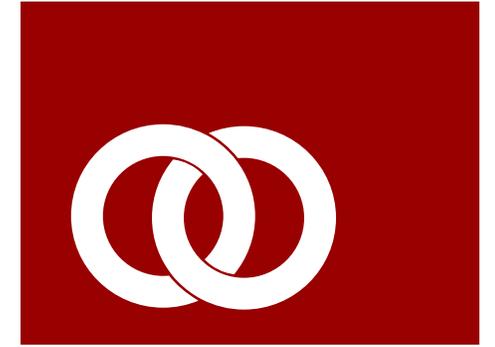
FACT PATTERN 1

- J. Smith, LMFT was asked to provide therapy to a 7 year old boy by the child's father. He and the child's mother are separated, a dissolution of marriage has been filed, but no court order pertaining to custody has been entered. The father seeks services because his son has had difficulty dealing with his parent's separation. J. Smith, LMFT explained to the father that their practice is to involve both parents in a minor child's treatment and that they would not proceed with services until they were able to contact the child's mother and invite her to participate. When J. Smith, LMFT called the child's mother, the mother was adamant that her son did not need treatment, was diametrically opposed to the father seeking treatment for their son, that she would not consent to treatment, and that if J. Smith, LMFT saw her son she would file a claim against J. Smith with the BBS.

Can and should J. Smith, LMFT treat the child?



ANSWER

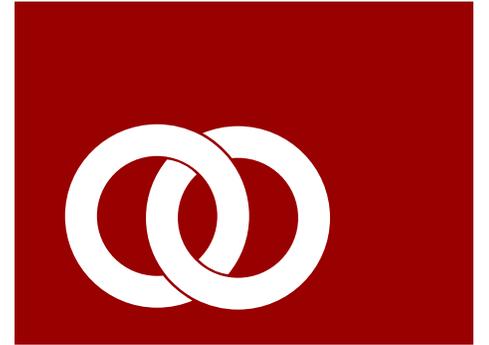


Since the minor's biological parents are not officially divorced and there is no court order that prescribes their legally custody rights, then *either* biological parent can lawfully consent to treatment. So, dad alone can consent to treatment. Hence, J. Smith, LMFT can rely on the consent provided by the 7 year old child's father, in order to commence service. However, what *should* J. Smith, LMFT consider before deciding whether or not to treat the child?

- Whether or not it is appropriate and feasible to involve both parents because sometimes the best outcome for a child's therapy occurs when *both* parents are in agreement on the therapist and the treatment provided.
- The level of conflict between the parents and whether or not that is likely to seep into the child's therapeutic relationship with their provider.

FACT PATTERN 2

Mrs. Whitman, a divorcée brought her 14 year old son Jason to see J. Smith, LMFT. Mrs. Whitman presented J. Smith, LMFT with a custody order that indicated that Mrs. and Mr. Whitman shared joint legal custody of their son Jason. The custody order was silent on whether Mrs. and Mr. Whitman had to mutually agree on mental health care services for their son and did not confer the right on one parent to solely make that decision. Mrs. Whitman stated that she would consent for treatment. J. Smith, LMFT – without objection from either Mrs. Whitman or Jason -- contacted Mr. Whitman to obtain his consent which he provided. J. Smith, LMFT commenced a therapeutic relationship with Jason. After 3 months of services, Mr. Whitman contacted J. Smith, LMFT stating that he was withdrawing his initial consent. Can J. Smith, LMFT continue to treat Jason?



ANSWER

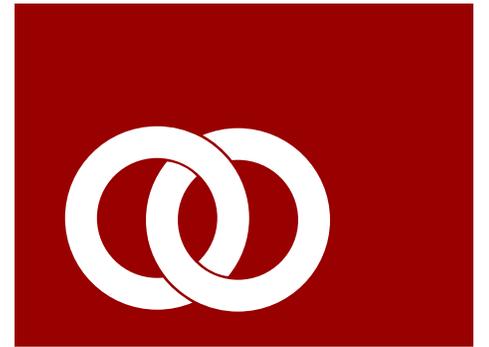
Since both Mrs. and Mr. Whitman share joint legal custody, the consent of both parents is not legally required. Therefore, J. Smith, LMFT may continue to treat Jason even after Mr. Whitman withdrew his consent because the consent of one parent who could lawfully consent remains intact.

What if the custody order required that Mrs. and Mr. Whitman mutually consent to treatment how might this change the outcome?

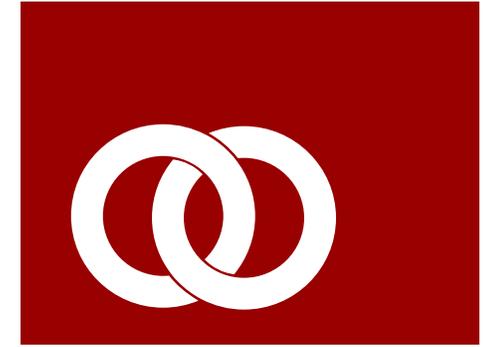
ANSWER: Where a joint legal custody order requires the consent of both parents, and both parents initially consent, the subsequent withdrawal of consent by one parent does not necessarily mean the treatment must end. In this case, it could be argued that if a decision to commence treatment must be mutual, then the decision to terminate the treatment also must be mutual.

What other option does J. Smith, LMFT have?

ANSWER: Since, Jason is 14 years old, then J. Smith, LMFT could have Jason consent to his own treatment under either CA law provided that Jason is mature enough to intelligently participate in his own treatment.

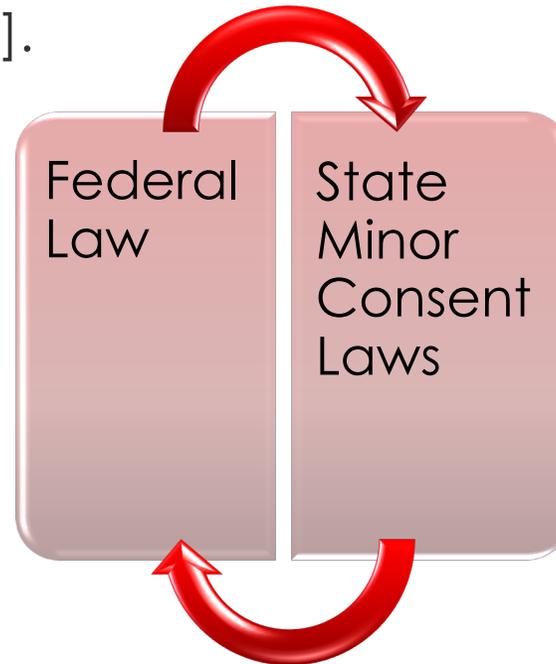


V. Federal Law (HIPAA) Defers to California Law Minor Consent Laws

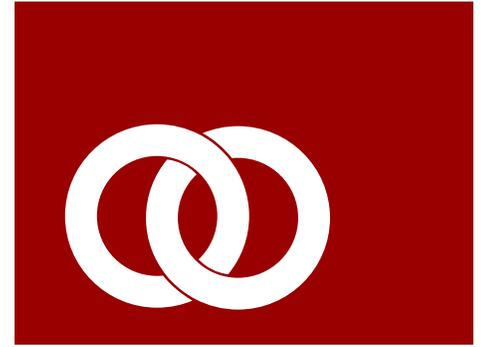


- The HIPAA Privacy Rules do not preempt or change State laws that address minor consent. So, HIPAA defers to state minor consent laws which govern when and whether minors are permitted to consent to their own mental health care treatment.

[45 CFR 164.502(g)(3)(ii)(A)(B)(C)].



VI. Parental Right's to a Minor's Health Care Information

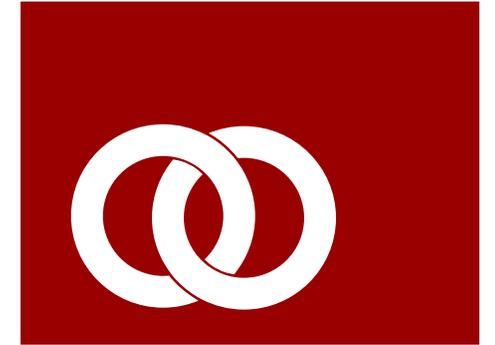


THE BIG THREE QUESTIONS:

- 1) What information is a parent entitled to know about the minor's treatment?
- 2) Can a parent inspect or access a minor's mental health care record?
- 3) Can a parent authorize the disclosure or release of the minor's mental health care record?

Information a Parent is Entitled to Know About the Minor's Treatment

- When parents consent to treatment they have a right to *general* information about the status of treatment for their child (i.e., whether the child is engaged in treatment, whether treatment goals are being met and the general progress of treatment). This is consistent with California law allows providers to disclose confidential information to parents who are involved in the minor's care if the minor 1) was notified and agrees; and 2) the minor was given the opportunity to object, but does not. [Cal. Civ. Code Section 56.1007]



GENERAL



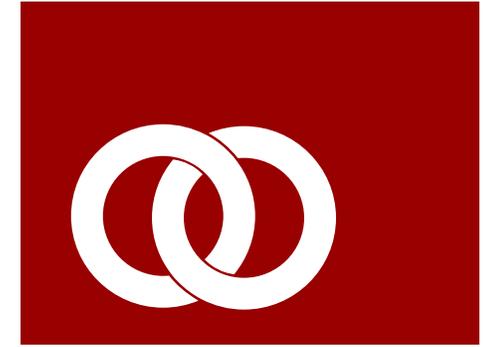
YES

SPECIFIC



NO

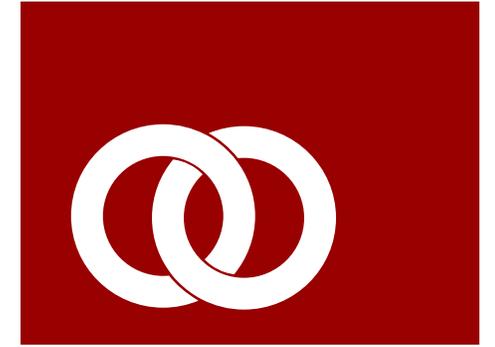
A Parent's Right to Inspect or Access a Minor's Mental Health Care Record



- An individual who has the responsibility and authority for the health care of another, in general has a corresponding right of access to information concerning the care and condition of that individual. This means that as a general rule, the parent or guardian of the minor has a right of access to information about the minor's treatment, and to the minor's health care record. However, there are exceptions to this rule.

[California Health & Safety Code, §123110]

Three Main Exceptions to a Parent's Right to Inspect or Access to a Minor's Record



1. Health and Safety Code Section 123115

- The representative of a minor shall *not* be entitled to inspect or obtain copies of the minor's records if the minor has a right of inspection under H&S Code Section 123110
- H & S Section 123110 states that a minor shall be entitled to inspect their record that pertain to services for which the minor is lawfully authorized to consent.

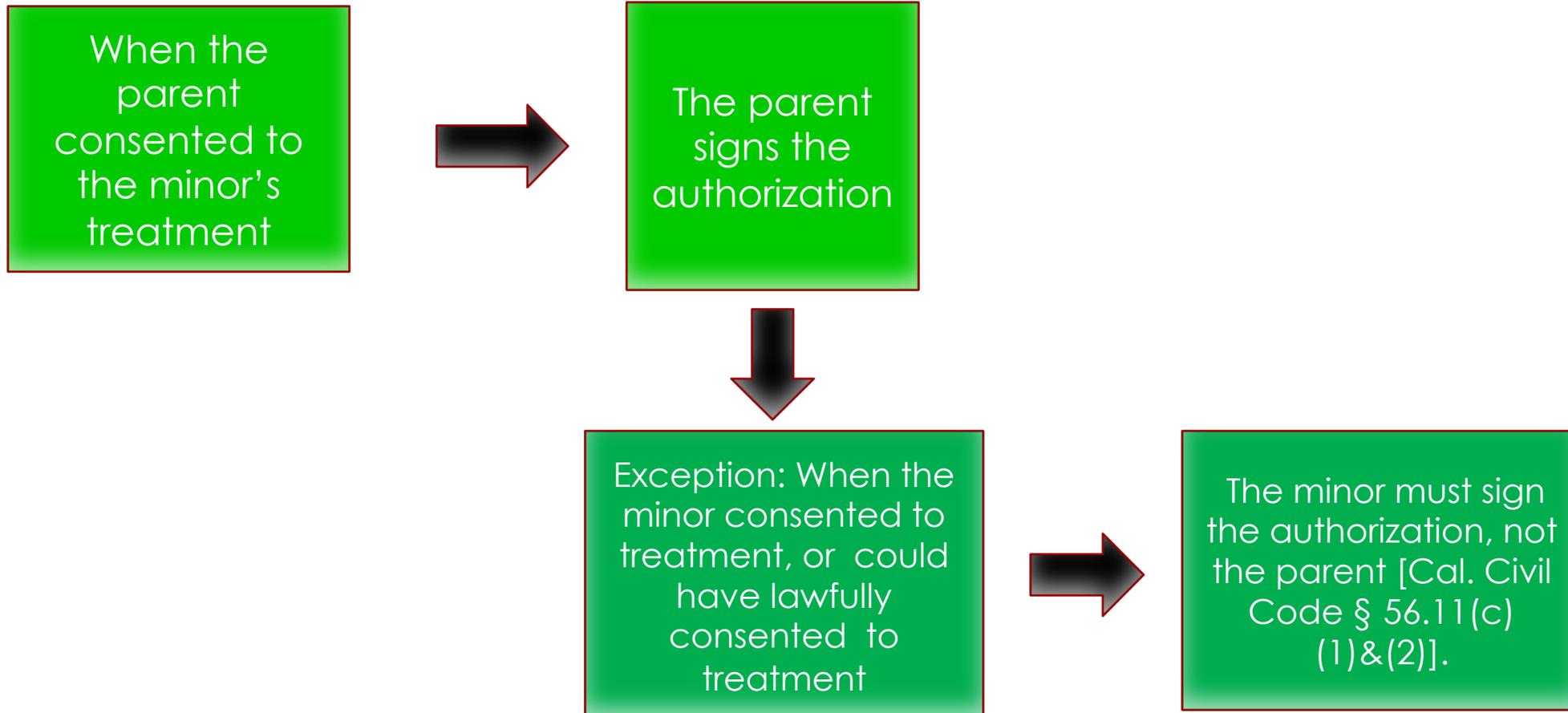
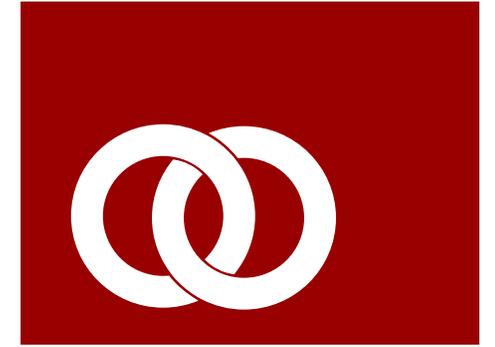
2. Health and Safety Code 123115

- The representative of a minor shall not be entitled to inspect or obtain copies of the minor's records, where the health care provider determines that access by the representative would have a detrimental effect on the provider's professional relationship with the minor.

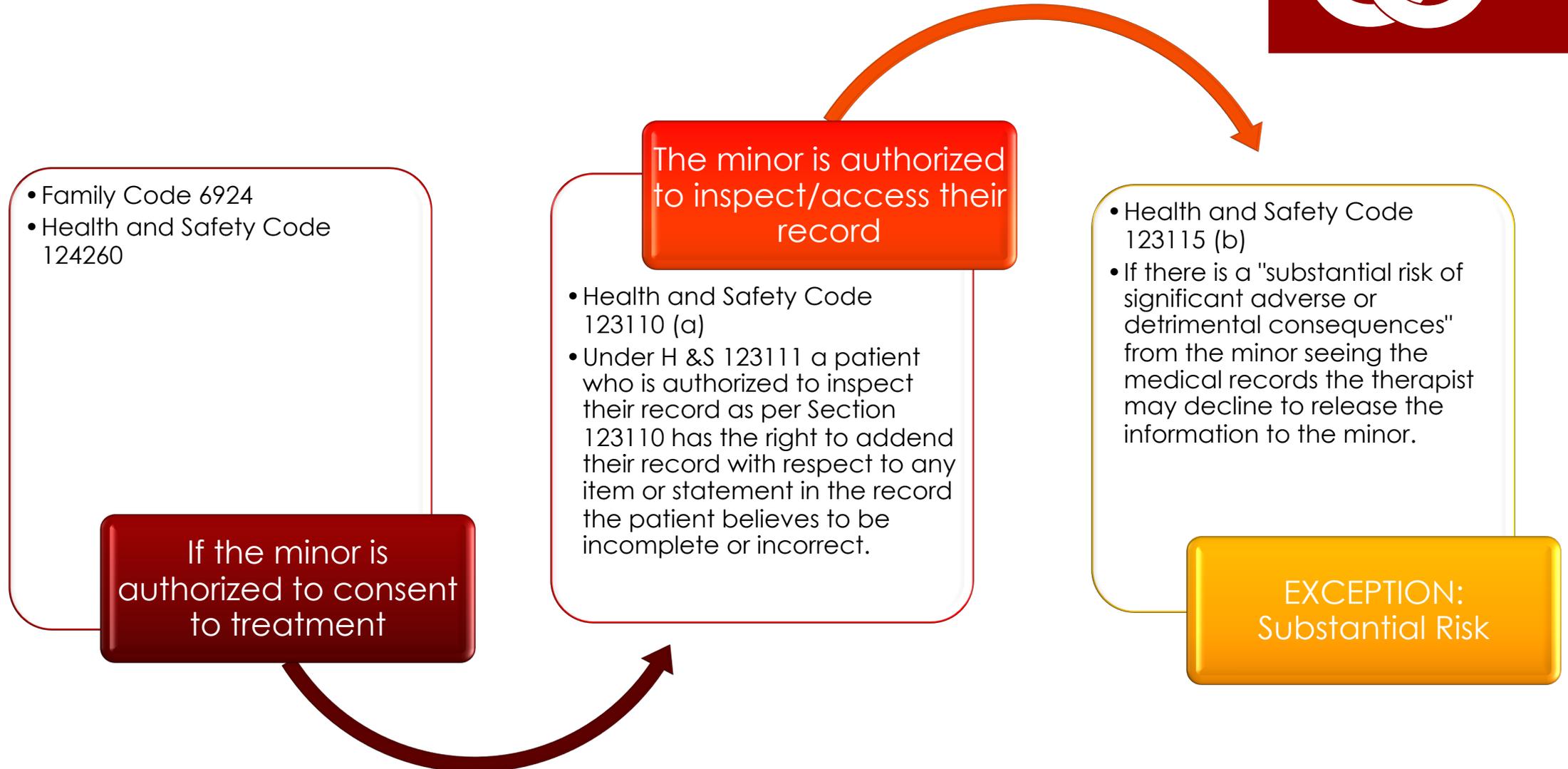
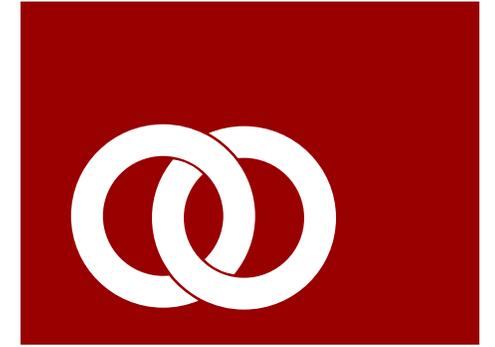
3. Health and Safety Code Section 123115

- The representative of a minor shall not be entitled to inspect or obtain copies of the minor's records when a health care provider determines that access by the representative would have a detrimental effect on the minor's physical safety or psychological well-being.

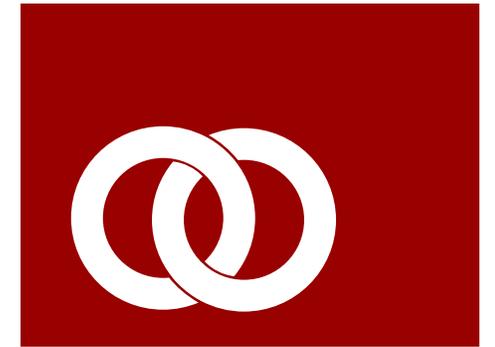
A Parent's Right to Authorize the Release or Disclosure of the Minor's Health Care Record



VII. Minor's Right to Inspect, Access and Addend Health Care Information



A Minor's Right to Right to Authorize the Release or Disclosure of Their Health Care Record



If the minor is authorized to lawfully consent to treatment



Then the minor is authorized to decide whether the records may be released or disclosed to others including the parent

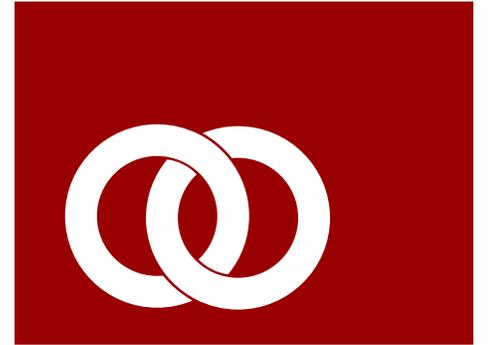


Even if the parent solicited treatment and consented to services

[Cal. Civil Code § 56.11(c) (1)&(2)]

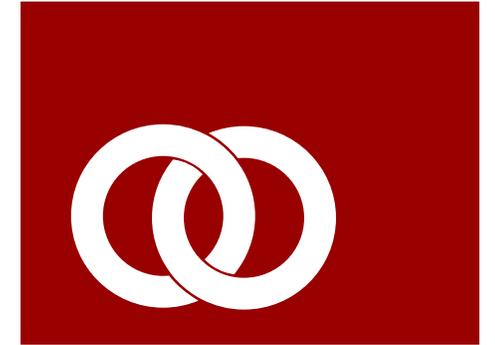
Fact Pattern 3

J. Smith, LMFT was contacted by Mrs. Jones seeking services for her 16 year old daughter, Amanda. Amanda had never been to therapy but wanted some help to deal with what she believed to be anxiety. Amanda's parents, Mr. and Mrs. Jones are divorced, share joint legal and physical custody of Amanda, they are both involved in Amanda's life and support her interest in seeking therapy. Since this is Amanda's first experience with therapy, her mom, Mrs. Jones, filled out the intake form, signed the informed consent and agreed to pay for services. Amanda starts therapy and shares that she is okay with J. Smith, LMFT sharing general information with her parents but not specific information. Six months later, Amanda's mom calls J. Smith, LMFT asking for specific information about Amanda's therapy and for a copy of Amanda's record. Can J. Smith, LMFT disclose specific information and release Amanda's clinical record?

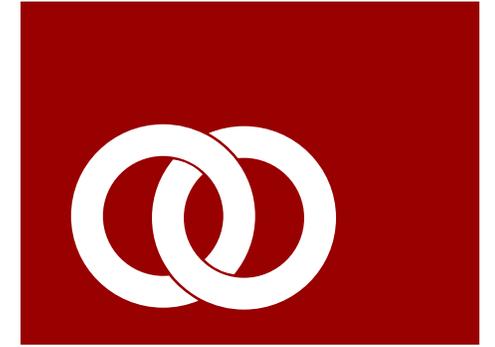


Answer:

- It depends. Because Amanda being 16 years old could have lawfully consented to her own treatment under California law, Amanda has the right to access her record and the right to authorize disclosure of her information to her parents or third parties. Therefore, J. Smith's safest course of action is to maintain Amanda's confidentiality or to obtain a written authorization from Amanda to release or disclose information to her mom. This is true even though Amanda's mom sought services for Amanda, filled out the intake forms, signed informed consent forms, and agreed to pay for the services. Also, if indicated by the facts, J. Smith, LMFT could rely on Health & Safety Code section 123115 to deny access by citing how disclosure would harm the professional relationship between the therapist and Amanda or cause harm to Amanda.



VIII. Best Practices When Treating Minors



Determine the age of the minor and the relationship of the individual requesting services on behalf of the minor.

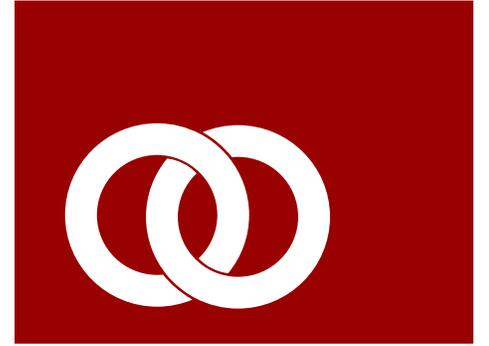
If the minor's parents are divorced and have joint legal custody, consider whether it is necessary and/or appropriate to get the consent of both parents.

Clarify who you will communicate with, what you will communicate, when you will provide status updates to the parents and how you will do that. Have a coordinated and specific plan.

Inform minor patients and their parents about the confidentiality and its limitations

Demand to see and take the time to review any applicable court documents.

IX. Rights Not Linked to Consent

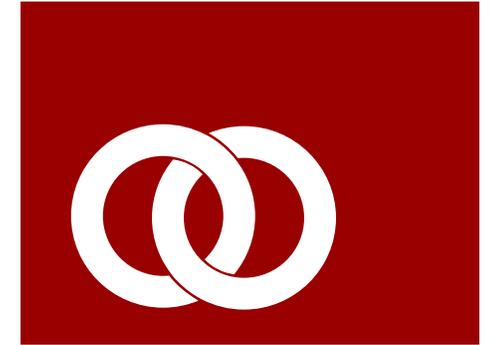


- The Decision to Invoke or Waive Privilege on Behalf of a Minor:

Only the minor's attorney, or the minor's court-appointed guardian ad litem can make the decision to waive or invoke privilege on behalf of the minor. A *guardian ad litem* is a person appointed by the court to stand in the shoes of a minor in a court proceeding in which the minor has an interest. A parent holds privilege *only if* the parent has been appointed by the court to act as the minor's guardian ad litem.

[In re Daniel C.H., (1990) 220 Cal. App 3d. 814]

Additional CAMFT Resources



- *Blue Levis & White T-Shirts: When Treating Minors 12 Years of Age or Older, Consent Does Not Automatically Equal Authorization to Release Confidential Medical Information*, David Jensen, JD (Former CAMFT Staff Attorney)
- *Consent for the Treatment of Minors: Caregiver Authorization*, Bonnie Benitez, JD (Former CAMFT Attorney)
- *Releasing Records in the Age of Adolescent Consent*, Ann Tran-Lien, JD (Managing Director, Legal Affairs)
- *Law & Ethics On-Demand: Consent for the Treatment of Minors*, Sara Jasper, JD (CAMFT Staff Attorney)