

Informed consent to dialysis withdrawal

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Two types of consent

- Consent as a defence to unlawful touching, both in criminal law and tort law
- AND
- The duty to provide information about risks: *Rogers v Whittaker* ('informed consent')

The patient must have capacity

- All adults (people over 14 yo in NSW) are presumed to have capacity
- To disprove capacity the patient must be unable to:
 - Understand the information regarding treatment
 - Weigh it
 - Communicate a decision
- Children are presumed to lack capacity but may be able to rebut the presumption and prove that they can make a decision

Re Bridges [2001] Qd R 574

- A mentally ill patient was found to be incompetent to refuse dialysis, after she had ceased taking her anti-psychotic medication.
- The court authorised treatment for both dialysis and medication until such time as the medication took effect and the patient had regained competence, after which she could then make a decision regarding her treatment.

Patients must be provided with information concerning the material risks of treatment

- Health professionals have a duty to provide information to patients about material risks.
- Material risks include those which a reasonable person in the position of the patient would wish to know (“the objective standard”). They also include risks which the particular patient would be likely to attach significance to (“the subjective standard”): *Rogers v Whitaker* (1992) 175 CLR 479; *Rosenberg v Percival* (2001) 205 CLR 434.

Consent must be voluntary

- Patients cannot be forced into making a decision
- A patient may be compromised by pain and drugs
- A patient may have their will overpowered by a close relative

Application of a Local Health District; *Re a Patient Fay [2016] NSWSC 624*

- Fay was 19yo with intellectual disability; 22 weeks pregnant with renal disease
- Dialysis needed and condition was deteriorating.
- Despite haemodialysis and multiple anti-hypertensive medications her blood pressure could not effectively be controlled.
- The treating doctors were of the view that Fay was at a significant risk of permanent cerebral damage and possibly death if the pregnancy continued and had recommended it be terminated to allow more effective control of her blood pressure.
- It was accepted that if intervention occurred, although the foetus had been progressing relatively normally it would not survive at birth
- Fay refused treatment

Application of a Local Health District; *Re a Patient Fay [2016] NSWSC 624*

- Fay did not adequately understand nor was capable of balancing or making an informed such as to permit her to refuse the treatment recommended.
- Judge's decision:
- The influence of her mother was a most significant factor. My very distinct impression was that her mother had run her life for a very long time because Fay was simply incapable of doing it herself. That is not a criticism of her mother, whose heart was and is unquestionably in the right place. As I have clearly said, in my view however Fay's mother did not herself fully appreciate the significance of the risks faced by Fay and how that would play out if any occurred.

A competent adult can refuse treatment

- An adult can refuse treatment for any reason whatsoever
- There are some exceptions: mental health, public health, prisoners
- A refusal can be made in advance
- A child cannot refuse life sustaining treatment:
X v The Sydney Children's Hospitals Network
[2013] NSWCA 320

Hunter and New England Area Health Service v A [2009] NSWSC 761

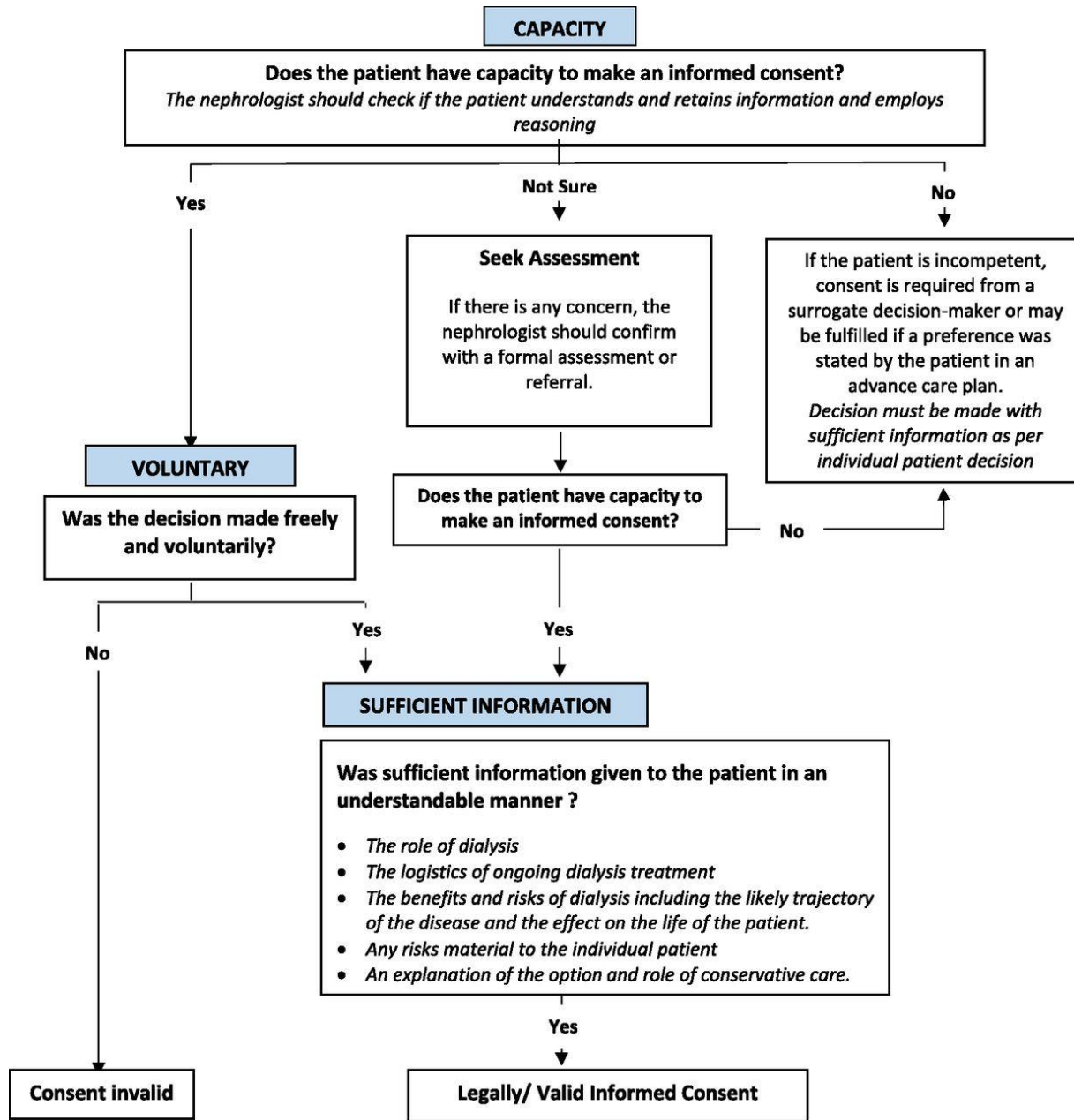
- Patient with septic shock
- Advance directive refusing dialysis in form of worksheet of preferences
- No legislation in NSW
- Was binding and not effected by the Guardianship Act 1987

What if the patient is incapacitated?

- Enduring guardians (a form of power of attorney)
 - Guardians (appointed by NCAT or Supreme Court)
 - Persons responsible
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- Only enduring guardians and guardians with a healthcare function can consent to treatment withdrawal in NSW but the healthcare team can work with the family to decide on what treatments will be offered: *FI v Public Guardian* [2008] NSWADT 263; *HAE* [2018] NSWCATGD 10

Treatment withdrawal and aggressive palliative care are legal

- Treatment can be refused even if it leads to death
- Competent patients can request palliation to help them die
- Incapacitated patients can have treatment withdrawn or withheld if it is in their best interests
- Palliation can be provided to them to help them die with dignity: *Re Baby D (No 2)* [2011] FamCA 17



References

- Brennan, F., Stewart, C., Burgess, H., Davison, S., Moss, A., Murtagh, F., Germain, M., Tranter, S., Brown, M. (2017). Time to Improve Informed Consent for Dialysis: An International Perspective. *Clinical Journal of the American Society of Nephrology*, 12(6), 1001-1009