

# Study On DNR/COLST Order and Informed Consent

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# Vermont Statutes and Surrogate Decisionmaking

# Vermont Statutes that provide for a surrogate decisionmaker

- **Guardianship [14 V.S.A. § 3075]**– hierarchy of consent for medical or dental treatment for ward without capacity
  - An agent
  - If no agent guardian shall follow instructions in the advanced directive
  - If no AD guardian obtains prior written court approval
  - If no time clinician must certify that ward is likely to experience cardiopulmonary arrest before court approval can be obtained. Guardian immediately notifies court of situation and need for decision.
  - If court order is entirely impracticable guardian notifies court by telephone and notifies court of any decision made.

- **Guardianship Services [18 V.S.A. §9301]**- Provision of guardianship for adults with developmental disabilities who are in need of supervision and protection for their own welfare or the public welfare.
- Court appoints Commissioner of DAIL as guardian for some or all needs.

- **Revised Uniform Anatomical Gift Act [18 V.S.A. § 5250i]**– Hierarchy of persons who can make anatomical gift of decedent’s body or part
  - Agent
  - Spouse
  - Reciprocal beneficiary\*
  - Adult children
  - Parents
  - Adult siblings
  - Adult grandchildren
  - Grandparents
  - Adult who exhibited special care and concern
  - Persons acting as guardians at time of death
  - Any other person having authority to dispose of decedent’s body.
  
- **Dispute Resolution** - If a person listed above knows of an objection of another member of the class then the gift may be made only by a majority of the members of the class who are reasonably available.

\*The purpose of Vermont’s reciprocal beneficiary statute was to provide persons who are blood-relatives or related by adoption the opportunity to establish a relationship that allows them to receive the benefits and protections granted to spouses in specific areas. According to the Office of Vital Statistics no one has established such a relationship to date.

- **Right to Disposition of Remains [18 V.S.A. § 5227]**– Absent written directive of decedent priority of competent adult(s) to determine disposition of the remains of decedent.
  - Agent
  - Surviving spouse, CU partner, or reciprocal beneficiary
  - A sole surviving child or a majority of surviving children, or less than a majority if after reasonable efforts they can not be contacted
  - In case of a minor or disabled adult the custodial parent(s) or parent providing primary care
  - Parents or parent if after reasonable efforts the other parent can not be contacted
  - A sole surviving sibling or a majority of surviving siblings, or less than a majority if after reasonable efforts they can not be contacted.
  - Any other family member in descending order of kinship, if more than one of same degree than a majority of those family members
  - A guardian
  - Any other individual whose willing to assume the responsibilities
  - Funeral director or crematory operator

# How Decisions Are Made

Under the guardianship statute:

Consent to the procedure shall be given or withheld consistent with the manner in which the person under guardianship would have given or withheld consent, provided there is sufficient information concerning the person's wishes. The guardian shall:

1. Rely on written and oral expressions of the person.
2. Rely on available information concerning the wishes, values, beliefs, and preferences of the person if the person's written and oral expressions do not provide sufficient information.
3. Follow the best interests of the person under guardianship if (1) and (2) are inapplicable. No decision to withhold or abate medical treatment will be based solely on the age, economic level, or level of disability of the person.

## Under Guardianship Services:

- When exercising powers the commissioner shall be guided by the wishes and preferences of the individual.
- Decisions to withhold or abate medical treatment for an irreversible or terminal condition shall be reviewed by the department's ethics committee.

## Under the Advance Directive Statute:

1. After consultation with the principal, to the extent possible, the principal's clinician and any other appropriate health care providers and, if applicable, individuals identified in the advance directive, the agent shall make decisions by attempting to determine what the principal would have wanted. The agent shall consider the following:
  - A. The principal's specific instructions contained in an advance directive to the extent those directions are applicable;
  - B. The principal's wishes expressed to the agent, guardian, or health care provider, since or prior to the execution of an advance directive, if any, to the extent those expressions are applicable; or
  - C. The agent's knowledge of the principal's values or religious or moral beliefs.
2. If the agent cannot determine what the principal would have wanted under the circumstances, the agent shall make the determination through an assessment of the principal's best interests. The agent shall not authorize the provision or withholding of health care on the basis of the principal's economic status or preexisting, long-term mental or physical disability.
3. When making a determination, the agent shall not consider the agent's own interests, wishes, values, or beliefs.

# Uniform Health-Care Decisions Act

Approved in 1993 by the Uniform Law Commissioners

Purpose: to provide a comprehensive model statute dealing with all decisions about adult health care

Endorsed by the ABA, AARP, ABA Commission on Legal Problems of the Elderly.

Adopted in 5 states: ME, MS, WY, NM, AK, and HI

# How Decisions Are Made

Guiding Principal: The individual is always the dominant source for decision-making.

When a surrogate assumes the role of decision-maker they must always follow the individual's instructions. Without instructions, the agent, guardian, or surrogate must make the decision in the best interests of the individual

The Act provides broad liability protections for health-care providers, institutions, agents and surrogates for actions taken in good faith.

## Who May Decide

- An agent, if not revoked by patient by personally informing the supervising health care provider.
- A guardian
- Any person designated by the patient by personally informing the supervising health-care provider.
- In absence of designee, or if designee is not reasonably available, any member of the following classes of the patient's family who is reasonably available in descending order of priority"
  - Spouse, unless legally separated;
  - An adult child;
  - A parent; or
  - An adult brother or sister;

If no member of the above list is reasonably available an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values.

# Dispute Resolution

If more than one member of a class assumes authority to act as surrogate, and they do not agree on a health-care decision and the supervising health-care provider is so informed, the supervising health-care provider shall comply with the decision of a majority of the members of that class. If evenly divided that class and all individuals having lower priority are disqualified from making the decision. If such a deadlock arises it may be necessary to seek a court determination of the issue.

# Surrogate Consent Laws

2009 Chart

ABA Commission on Law and  
Aging

# Patient Designation

- Patient designates surrogate in writing or by informing clinician
- Patient disqualifies surrogate in writing or by informing clinician

# Alternatives to Default Rule

For Selection of Surrogate

# Surrogate Selection: Three Models

- Consensus of interested parties (CO/HI)
- Person on list of interested parties – no priority (MI & IN)
- Physician selects from list of interested parties (CT, TN, TX, WV)

# Consensus Model

- Clinician makes reasonable efforts to locate interested persons and may rely on interested persons to notify other interested persons of the need for surrogate
- Interested persons include: spouse, parent, adult child, sibling, grandchild, other relative, religious superior, or close friend
- Interested persons reach consensus on surrogate
- Surrogate should have a close relationship with patient and be most likely to be informed of patient's wishes
- If disagreement, any interested person may seek appointment of a guardian

# List of Interested Parties Model No Priority Provision

- Any member of the list may serve as surrogate
- Clinician informs patient, patient's surrogate or patient's advocate of options to designate surrogate, to make informed decisions about treatment, to choose palliative care (MI)

# Physician Selection Model

- Surrogate selection
  - Supervising physician, with assistance of other clinicians as necessary, selects a surrogate from a prioritized list who
    - Has exhibited special care and concern for the patient;
    - Is familiar with patient's values; and
    - Is reasonably available.
  - Priority list: spouse (unless separated); child; parent; sibling; grandparent; adult relative; religious superior; close friends; other adult

# Clinician Selection Model

- Considerations for selection include:
  - Ability to make decisions in accordance with known wishes or best interests of patient,
  - Regular contact with patient,
  - Demonstrated care and concern for patient,
  - Availability to visit patient during illness, and
  - Availability to engage in face-to-face contact with clinicians.

# Clinician Selection Model

- Considerations for selection (continued)
  - If multiple possible surrogates at same level, clinician selects best qualified
  - Physician may select surrogate of lower priority if physician documents the reason that the person is the best qualified
- Potential surrogates may challenge decisions in probate court

# Physician Selection Model

- Decisions
  - Physician and surrogate may make decision to withdraw or withhold treatment
  - Physician determines patient's wishes from statement of patient or in consultation with next of kin, person to whom patient communicated wishes
  - If no surrogate is available physician makes decisions with concurrence of a second physician or physician member of ethics committee

# Alternatives for Unbefriended Patients

- Attending physician alone or in consultation with a second physician or with facility's ethics committee
- Physician on ethics committee
- Clinical social worker
- Owner/operator of residential LTC facility
- Member of clergy – for patients in hospital or nursing home
- Public agencies or public officials designated by rule

# States with no Surrogate Law or Limited Law

- Kansas – research only
- Massachusetts
- Minnesota
- Missouri
- Nebraska
- New Hampshire
- NJ – research only
- Oklahoma – research
- Rhode Island
- Vermont
- Wisconsin –nursing home and residential care admissions

# Common Law

From: The Right to Die

Alan Meisel

## § 3.15 Legal Status of Clinical Designation of a Surrogate

For patients who do not possess decisionmaking capacity, and who have not been adjudicated incompetent and had a guardian appointed, it is common practice among physicians to turn to family members to make decisions about medical care. This practice is referred to as clinical designation of a surrogate. Attending physicians, in effect, designate a surrogate, though the process of doing so is as much a part of the fabric of dealing with the families of incompetent patients that to refer to this as designating a surrogate is to confer on this process far more visibility than it, in fact, has. Courts, especially in end-of-life cases, have almost always universally endorsed this practice, at least as a presumptive rule. Thus, a clinically designated surrogate has the legal authority to act on behalf of a patient who lacks decisionmaking capacity but who has not been adjudicated as such, and in effect has the same legal authority as a judicially appointed guardian has in making medical decisions for a patient who lacks decisionmaking capacity.