



SUBSTITUTED & SURROGATE DECISION MAKING

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Right to autonomy and self-determination is the presumption UNTIL ITS NOT.....

In Washington State, there are two mechanisms for effectuating an incompetent individual's right to make health care decisions:

- A. advance directives and
- B. surrogate decision-making.

In the absence of an advance directive, state law allows surrogates to make medical decisions for incompetent individuals.

æ Financial management decisions and choices associated with assets and liabilities can be done expressly and voluntarily or involuntarily through other legal options.

Legislative Intent and Guardianship Statutory Mandate applicable

æ **RCW 11.130.001 (Effective January 1, 2021)**

“ It is the intent of the legislature to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person. The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian. However, their liberty and autonomy should be restricted through guardianship, conservatorship, emergency guardianship, emergency conservatorship, and other protective arrangements only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs.”

æ **RCW 11.130.010 (15) (Effective January 1, 2021)** “less restrictive alternative” means an approach to meeting an individual's needs which restricts fewer rights of the individual than would the appointment of a guardian or conservator. The term includes supported decision making, appropriate technological assistance, appointment of a representative payee, and appointment of an agent by the individual, including appointment under a power of attorney for health care or power of attorney for finances.

Alternatives: Evaluating Advantages and Disadvantages

Powers of Attorney

RCW 11.125

- æAutonomy and privacy of choice of fiduciary
- æRetains all right and authority to act
- æCan revoke if not “incapacitated”
- æAgent may be at odds with Principal
- æStill vulnerable to bad actors or undue influence
- æNot viable long term option to avoid guardianship

Healthcare Directive (Living Will)

RCW 70.122

- æModel Healthcare Directive form available.
- æAllows direction on whether life-sustaining treatment and artificial nutrition and hydration should be withdrawn or withheld in a terminal or permanent unconscious condition
- æThey are subject to oral, written or destruction of the document regardless of mental state or competency.

Alternatives: Evaluating Advantages and Disadvantages

Trusts

RCW 11.97, 11.98A, 11.98B, 11.100, 11.103, 11.106

- æ Arrangement where Trustor transfers money or property to an entity (Trustee) to be managed and used as directed in a trust document for the benefit of some party (beneficiary)
- æ Allows estate to be managed by person s/he has chosen and in the manner proscribed by the trust document
- æ Lack of safeguards of assets, i.e., no bonding, accounting or oversight, etc
- æ Cost can be less or more expensive.
- æ Can recommend drafting of trust in lieu of a guardianship / conservatorship for autonomy and asset preservation
- æ Animal Trusts RCW 11.118
- æ Special Needs Trusts – complex issues involved See VII-13 to 15 in the 2018 Guardianship GAL Manual

Informed Consent

RCW 7.70.065

- æ Invoked when lacks medical capacity to give informed consent to procedures
- æ Recent Hierarchy changes
- æ Before any person authorized to provide informed consent on behalf of a patient not competent to consent under *RCW **11.88.010**(1)(e), other than a [minor or prohibited]..., exercises that authority, the person must first determine in good faith that that patient, if competent, would consent to the proposed health care. If such a determination cannot be made, the decision to consent to the proposed health care may be made only after determining that the proposed health care is in the patient's best interests.
- æ Problems when there is conflict in a class of people or person needing consent wishes not honored

2019 INFORMED CONSENT STATUTE: This surrogate decision making statute is a particularly useful tool in situations where the patient has not previously executed power of attorney documents or taken other legal steps to authorize an individual to act on their behalf. Washington State legislature has expanded this law to allow additional classes of people to act as surrogate decision makers under this law.

The old version of Washington State's informed consent law allowed only a limited range of people to make medical decisions on behalf of a patient who was incapacitated. The hierarchy (in order of priority) was:

- A guardian;
- A spouse or state registered domestic partner;
- Adult children;
- Parents; and
- Adult siblings

NOW: the following classes of people have been added to the hierarchy (in order of priority following the above list):

- Adult grandchildren who are familiar with the patient;
- Adult nieces and nephews who are familiar with the patient;
- Adult aunts and uncles who are familiar with the patient; and
- Under certain circumstances, an adult who is a close friend of the patient (see below)

The hierarchy laid out above must be followed. If an individual exists in a class, that person is the only one authorized to make medical decisions for the person. **A decision maker in a lower class cannot provide informed consent if a person of a higher priority has refused to give such consent.** And for any class that includes more than one person, **all members of the class must agree.**

“close friend” This category provides flexibility for those who do not have family, but the law also includes important restrictions on who can qualify as a “close friend” to prevent abuse. To qualify, an adult who is a close friend of the patient must have exhibited special care and concern for the patient, be familiar with the patient's values, and be reasonably available to make health care decisions. A person trying to exercise decision making using the “close friend” category will have to sign a declaration that generally recites facts and circumstances demonstrating that the person meets the statutory requirements and that they are unaware of a person in a higher priority class who is willing and able to provide informed consent. This declaration must be signed under penalty of perjury and is effective for up to six months.**PROHIBITED INDIVIDUALS FOR THE** “close friend category: the patient's physician (or the physician's employee); an owner, administrator, or employee of a facility where the patient receives care; or a person who is compensated for providing care to the patient. A person who is authorized to provide informed consent to health care may not exercise any rights under the Death with Dignity Act on behalf of a patient who is not competent to consent.

BEST PRACTICE: nominate an Agent in a power of attorney to make medical decisions on your behalf, the 2019 change gives broader authority to other individuals to assist you if you experience a decline in health.

Alternatives: Evaluating Advantages and Disadvantages

Case Management Services

- æ Despite any other alternative or recommendation for guardianship, the GAL should consider the feasibility of developing a plan of care with a third party to assist the family and protected person
- æ Usually a private pay solution
- æ Protected person can be resistive to assistance
- æ Need for contract; look for DSHS options of inability to pay for services

Representative Payee / Bill Paying Services –

Private, SSA, VA, DSHS, DOD, Railroad, OPM, See also: RCW 74.12.250, 74.08.280 and WAC 388-460-0025

- æ Maintains autonomy and privacy
- æ Limited functions or only specific functions
- æ Costs money
- æ Disagreements of budget
- æ Ability of Protected Person to contact or access the Rep Payee or Bill Paying Service
- æ Social Security Administration has their own rules:
<https://www.ssa.gov/payee/>
- æ SSA handbook <https://www.ssa.gov/pubs/EN-05-10076.pdf>
- æ VA fiduciary Hub: <https://www.benefits.va.gov/fiduciary/>

Substituted Judgment Standard

- æ A surrogate decision-maker must use the doctrine of substituted judgment in consenting to or refusing health care on behalf of an incompetent individual. The standard applies to all medical decisions, whether they involve the discontinuation of life-sustaining treatment or a choice between alternate medical treatments. *In re Ingram*, 102 Wn.2d 827, 839 (1984)
- æ The substituted judgment standard requires that the surrogate decision-maker (whether a guardian, Agent with authority to make health care decisions, family member, or the court) determine whether the patient, if competent, would have consented to the proposed health care. RCW 7.70.065(1)(c). *See also, In re Colyer*, 99 Wn.2d 114, 137, 660 P.2d 738 (1983) (holding that life-sustaining treatment may be withdrawn if it is the guardian's judgment that the patient, if competent, would have chosen to withdraw treatment).

The surrogate should consider all relevant factors that would influence the patient's medical treatment decisions, including:

- æ the person's prior statements (depending on age and maturity of the person, context and connections between statements and patient's condition) regarding medical treatment; *In re Grant*, 109 Wn.2d 545, 567, 747 P.2d 445 (1987).
- æ the person's express wishes, even if made while the individual is incompetent;
- æ the patient's religious or moral views regarding medical care or the dying process;
- æ the person's prognosis if no treatment is given;
- æ the prognosis if one treatment is chosen over another;
- æ the risk of adverse side effects from the proposed treatment;
- æ the intrusiveness or severity of the proposed treatment;
- æ the ability of the patient to cooperate and assist with post-treatment therapy; and
- æ the wishes of family and friends, if those wishes would have influenced the patient. *In re Ingram*, 102 Wn.2d at 840
- æ The Washington Supreme Court has specifically stated that judicial intervention is not generally required when a surrogate decision-maker exercises substituted judgment to make a treatment decision for an incompetent individual. *In re Colyer*, 99 Wn.2d 114, 127-128 (1983)
- æ If the substituted judgment is made in a clinical setting, it will likely be acted upon unless family members or health care providers strongly disagree with the decision.

Best Interest Standard

When you cannot ascertain consent to the proposed healthcare plan

- æ When a surrogate decision-maker cannot in good faith ascertain whether the patient, if competent, would have consented to the proposed health care, he or she must determine that the medical treatment is in the patient's best interests before giving consent. See *RCW 7.70.065(1)(c)*. See also, *In re Grant*, 109 Wn.2d at 567-68.
- æ Where the patient has never been competent, the substituted judgment standard is arguably meaningless, and so the best-interests standard is used instead. See *In re Hamlin*, 102 Wn.2d 810, 814-15, 689 P.2d 1372 (1984).
- æ **FACTORS: that should be considered by the surrogate decision-maker in determining whether medical treatment is in the best interests of the incompetent individual include:**
 - the patient's present level of physical, sensory, emotional, and cognitive functioning;
 - the various treatment options and the risks, side effects, and benefits of each of the options;
 - the life expectancy and prognosis for recovery with and without treatment;
 - the degree of physical pain resulting from the medical condition, treatment, or termination of treatment; and
 - the degree of dependency and loss of dignity resulting from the medical condition and treatment. *In re Grant*, 109 Wn.2d at 568.



Questions?