Surrogate Decision-Making and Advance Directives
-- Nuts & Bolts --

Charlie Sabatino & Erica Wood
Commission on Law and Aging
American Bar Association

National Aging and Law Conference
December 2010
Slides at: http://new.abanet.org/aging/Pages/CLE.aspx
Untangling the Knots

ADVANCE DIRECTIVE

GUARDIANSHIP

POWER OF ATTORNEY

CAPACITY
What We Will Address…

• What is Capacity?

• What is Surrogate Decision-Making?

• Decision-Making Standards for Surrogates

• Promises and Pitfalls of Financial Powers of Attorney

• Advance Directives

• Default Surrogate Consent

• Guardianship
What is Capacity?
What is Capacity?

Decision-making capacity requires, to greater or lesser degree:

(1) possession of a set of values and goals;
(2) the ability to communicate and to understand information; and
(3) the ability to reason and to deliberate about one’s choices.

– President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (1982).
What is Capacity/Incapacity?

- Not global; decision-specific
- Never put a period after “capacity”
- No bright line; fluctuating
- Influenced by external factors; may be reversible
Incapacity – What is it NOT?

• Advanced age
• Eccentricity
• Refusal of care
• Disagreement in high risk situations
• Medical diagnosis
• Poverty
Capacity To . . .

- Contract
- Make a will
- Give medical consent
- Live independently
- Vote
- Marry
- Manage finances
Capacity to Manage Finances

- Handing money
- Understanding financial concepts
- Managing checkbooks
- Understanding bank statements
- Paying bills
- Detecting fraud
- Understanding assets
- Making investment decisions
Capacity
- Cardinal Rule -

Capacity must be judged according to a standard set by *that person's own habitual or considered standards of behavior and values*, rather than by conventional standards held by others.

Silberfeld & Fish, *When the Mind Fails* (1994)
Task Specific
Legal capacity vs. Clinical capacity

- Has capacity
- Lacks capacity

Has capacity

Diminished capacity

Lacks capacity
Lawyers’ Capacity Assessment Issues

In Litigation -- challenging or defending capacity.
In the Office -- capacity questions most often arise in transactional services.

Does the Client have capacity…
• to contract for my services?
• to complete the legal transaction?
• to do ______________ (fill in the blank).

➢ Need a conceptually sound and consistent process for collecting/weighing relevant information.

➢ *Lawyers Handbook:* A tool to collect relevant observations and make a rough determination + guidance in working w/ mental health professionals.
The APA-ABA Collaboration

- ABA Commission on Law and Aging (COLA) & APA

- ABA-COLA, APA & NCPJ

- ABA-COLA & APA
The Lawyer’s Handbook steps:

1. A structured initial assessment component and, *if necessary*,

2. Use of a clinical consultation or formal evaluation by a clinician, and,

3. A final legal judgment about capacity by the lawyer.

Handbook context: three facets of diminished capacity:

A. Ethical guidelines for assessing client capacity.

B. Approaches to capacity in state guardianship and conservatorship laws.

C. Standards of capacity for specific legal transactions

www.apa.org/pi/aging/diminished_capacity.pdf
What is Surrogate Decision-Making?
What is Surrogate Decision-Making?

Decision-making options when the individual lacks capacity – the 4 D’s:

1. Directed Decision-making  
   Per the individual’s Instructions, e.g. Living Will

2. Delegated Decision-making  
   To an appointed agent, e.g., Power of Attorney – Health or Financial

3. Devolved Decision-making  
   Per a default hierarchy established by law, e.g., Default Surrogate Laws

4. Displaced Decision-making  
   By a court or administrative authority, e.g. Guardianship/Conservatorship, Representative Payee
Families decide
(Devolved/Default)

Courts decide
(Displaced)

Individual
(Directed)

Others designated by individual
(Delegated)
Predominant State Surrogate Legislation

1. Default Surrogate Laws *(Devolved)*
2. HC Advance Directives *(Directed or Delegated)*
   Living Wills / HCDPAs
3. Out-of-Hospital DNR Laws *(Directed or Delegated, or Devolved)*
4. Organ Donation Laws *(Directed)*
5. POLST *(Directed or Devolved)*
6. Financial Powers of Attorney *(Delegated)*
7. Guardianship Laws *(Displaced)*
Our Terminology

- **Agent, attorney-in-fact, proxy** – Delegated
- **Surrogate** – Generic for all substituted decision-makers.
- **Default surrogate** – One whose authority devolves on them as a matter of law or custom
- **Conservator** – Authority from court over property
- **Guardian** – Authority from court over person, but we will use this term for both person & property, unless otherwise specified
- **Rep payee** – Appointed by SSA or other admin agency with authority only over benefits
Decision-Making Standards for Surrogates

- Surrogates must follow the “substituted judgment” standard = individual’s known or probable wishes.
- A few states require “clear and convincing evidence” standard of patient’s actual wishes.
- Most permit “best interests” standard, as the fall-back.
Are Substituted Judgment & Best Interest
One Standard or Two?

Best interest  Substituted Judgment

Best interest  Substituted Judgment
Promises and Pitfalls Of Financial Powers of Attorney
Powers of Attorney

- For property
- Durable – if for planning for incapacity

- Document by which one person ("principal") gives legal authority to another ("agent") to act on behalf of the principal.

- Generally must be signed & notarized.
PoA Advantages/Disadvantages

- Promotes autonomy – puts you in drivers seat
- Avoids guardianship
- Cuts costs
- Helps family members

- Lack of monitoring
- Unclear standards for agent conduct
- Lack of awareness of risks
- Broad decision-making authority
Types of POA Abuse

In creating of the POA (power given, not taken)
- Incapacity at execution
- Forgery/Fraud/Misrepresentation
- Undue influence

Implementing POA (agent is a fiduciary)
- Transactions exceeding intended authority
- Transactions conducted for self-dealing
- Transactions contravening principal’s expectations
“Brooke Astor’s Son Guilty in Scheme to Defraud Her”

- Wealthy NY socialite Brooke Astor, Alzheimer’s, age 105
- Estate more than $180 million
- Son served as power of attorney
- Gave self unauthorized raise of $1 million
- Other counts of financial exploitation
- Neglected mother’s care while enriching self
- Exemplifies financial elder abuse; need for Elder Justice Act
Build Protections into DPA

- Choose someone you trust
- Limit gifting powers
- Require co-signatory on important transactions
- Require periodic accountings
- You can revoke as long as still have capacity
- Seek advice of attorney to customize & ensure meets state law requirements

- Clear statement of agent’s duties
- Act in accord with principal’s expectations, best interests
- Stringent requirements for exercising “hot powers” likely to dissipate property or alter estate plan
- Third party refuse to honor if suspect abuse
- Liability of agents who commit malfeasance
- See www.nccusl.org.
Power of Attorney Legislation – Where Does Your State Stand?

• UPOA enacted in four jurisdictions (MD, VA, WI, V.I.)

Health Care Advance Directives
• In the 1970s -1980s, states generally enacted multiple laws: Living Will, HCPoA with overlap from consent laws.

• Today about half the states have combined/ comprehensive Advance Directive laws

• But still much variation in detail, especially focused on forms.
30 years of research on Advance Directives

1. Most people don’t do.
2. Hard to understand the forms.
4. People change mind.
5. Agent/proxy slightly better than clueless.
6. Health care providers clueless about the directive.
7. Even if providers know directive exists, it’s lost in space.
8. Even if in the record, it’s still lost in space.
What ADs Can’t Do

- Can’t provide cookbook directions.
- Can’t change fact that dying is complicated.
- Can’t eliminate personal ambivalence.
- Can’t be a substitute for Discussion.
- Can’t control health care providers.
What ADs Can Do

1. CAN be an important part of a communication process in “advance care planning”

2. CAN help you stop and think and DISCUSS.
   Less about specific medical decisions, more about GOALS, VALUES & PRIORITIES:

3. CAN empower and give direction if reflective of the patient’s voice.
   Not the legislature’s canned language.
“Advance Care Planning”

- Less focus on formal instructional documents
- Legal focus primarily on naming a proxy
- Discussion oriented (with proxy, family, health care providers)
- More broadly focused on goals + values, spiritual questions, family matters
- Less treatment focused, more on quality of life
- Developmental and iterative in nature
  - (whenever any of the 5 “D”s occur)
- Conversion of goals to a portable plan of care: POLST if available
Signs of Change

- Trend toward simplification of state laws
  - e.g., *Five Wishes* in 33 to 42 states (97-10)

- 1993 Uniform Health-Care Decisions Act

- POLST
  - 11 states

- Oral ADs
  - 15 states

Rise of Workbook approaches
Workbook Samples

- Consumer’s Tool Kit for Health Care Advance Planning
  ABA Commission on Law & Aging
  Sacramento Healthcare Decisions
- Caring Conversations, The Center for Practical Bioethics
- Good to Go Toolkit and Resource Guide, Compassion and Choices
- Thinking Ahead – My Way, My Choice, My Life at the End, California Dept. of Developmental Services & Coalition of Compassionate Care of CA
Agent’s Scope of Authority/Discretion

• Be aware of statutory limits & post mortem authority.
• Be explicit.
• Maximum discretion? Do you want agent to be able to override written instructions, if any?
Selected Drafting Issues

Often overlooked— Authority to . . .

- Make anatomical gifts, autopsy, disposition of remains
- Contract for, hire, fire health care & support personnel
- Direct care even if Pregnancy -- DC/MD/VA permissive
- Change domicile.
- Execute releases & waivers (the “carrot”)
- Institute legal action (the “stick”).
- Consent to experimental treatment
- Delegate d-m during absence
- Care for pets
- Make mental health decisions (Mental Health Directive?)
Effective Date: immediate or springing?

Determining D-M Capacity

- DC -- 2 physicians, one must be psychiatrist
  One must examine w/in 1 day preceding cert.
- MD – 2 physicians unless otherwise specified
  One must examine w/in 1 day preceding cert.
  If can’t communicate or unconscious, only 1 required.
  PVS confirmed by a neurologist, neurosurgeon, or other
  physician w/ expertise in cognitive functioning.
- VA - 1 physician + either 2nd physician or licensed clinical
  psychologist after personal examination.
  Recert. required every 180 days.
Selected Drafting Issues

Specific Instructions: pros & cons
If you do include specific instructions…

• People change their minds.
• Recent medical history is important
• Focus on quality of life. What does that mean? Benefits & burdens are subjective.
• Never say never.
• Consider “values history”
• A secondary illnesses can complicate matters
Time to review AD…

When any of the 5 D’s occur:

1. You reach a new DECADE
2. You experience a DEATH of family or friend
3. You DIVORCE
4. You receive a new DIAGNOSIS
5. You have a significant DECLINE in your condition as measured by Activities of Daily Living (ADLs)
Nice cuff links.

DEATH WITH DIGNITY

11.24.09
POLST – why it is a sea change

• Last 30 years: standardizing patient communications – statutory advance directives
• _POLST_ Paradigm – standardizing physicians EOL orders in order to implement patient’s goals of care. Focus on here and now, high probability crises.
• _POLST_ – requires:
  1. Find out patient’s wishes re: CPR, care goals (comfort vs. treatment), antibiotics, N&H.
  2. Translate into doctors orders on visually distinct (bright pink) med file cover sheet.
  3. Ensure form travels with patient.

At least 12 States have a version of POLST: CA, HI, ID, MT, NY, NC, OR, TN, UT, VT, WA, WV
FORM SHALL ACCOMPANY PATIENT/RESIDENT WHEN TRANSFERRED OR DISCHARGED

Physician Orders for Scope of Treatment (POST)

This is a Physician Order Sheet based on the person’s medical condition and wishes. Any section not completed indicates full treatment for that section. When need occurs, first follow these orders, then contact physician.

<table>
<thead>
<tr>
<th>Last Name</th>
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<tbody>
<tr>
<td></td>
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<table>
<thead>
<tr>
<th>First Name/Middle Initial</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Date of Birth</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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Section A

CARDIOPULMONARY RESUSCITATION (CPR): Person has no pulse and is not breathing.

☐ Resuscitate (CPR) ☐ Do Not Attempt Resuscitation (DNR/no CPR)

When not in cardiopulmonary arrest, follow orders in B, C, and D.

Section B

MEDICAL INTERVENTIONS: Person has pulse and/or is breathing.

☐ Comfort Measures Treat with dignity and respect. Keep clean, warm, and dry.
Use medication by any route, positioning, wound care and other measures to relieve pain and suffering. Use oxygen, suction and manual treatment of airway obstruction as needed for comfort. Do not transfer to hospital for life-sustaining treatment. Transfer only if comfort needs cannot be met in current location.

☐ Limited Additional Interventions Includes care described above. Use medical treatment, IV fluids and cardiac monitoring as indicated. Do not use intubation, advanced airway interventions, or mechanical ventilation. Transfer to hospital if indicated. Avoid intensive care.

☐ Full Treatment Includes care above. Use intubation, advanced airway interventions, mechanical ventilation, and cardioversion as indicated. Transfer to hospital if indicated. Include intensive care.

Other Instructions:

Section C

ANTIBIOTICS

☐ No Antibiotics

☐ Antibiotics

Other Instructions:

Section D

Medically Administered Fluids and Nutrition: Oral fluids and nutrition must be offered if medically feasible.

☐ No IV fluids (provide other measures to assure comfort)

☐ No feeding tube

☐ IV fluids for a defined trial period

☐ Feeding tube for a defined trial period
Default Surrogate Laws

(Family Consent)

- Range/Priority of Surrogates
- Scope of Decision Making Authority
- Triggers/Pre-conditions
- How Disagreements are Handled
- Close Friend and Unbefriended Patient

Summary chart:
http://new.abanet.org/aging/Pages/StateLawCharts.aspx
Default Surrogates Laws
43 States + DC

Evolved from many sources:

- 5 Free standing Acts
- 22 Part of comprehensive AD Law
- 4 Addressed by informed consent law
- 7 Part of Living Will Statute
- 2 Part of Health Care DPA Statute
- 4 Decision-specific surrogate consent
  - KS, NJ & OK - medical research;
  - WI - facility admission

Implementation in real life situations --
Guardianship
Guardianship Definition

- Individual (or agency) appointed by court (probate, general jurisdiction).
- With power and duty to make personal and/or financial decisions.
- On behalf of another person.
- Whom court determines lacks decisional capacity.
- Terminology – “guardian” “conservator” and more.
51 State Guardianship Laws; Variability in Practice
Guardianship –
A double-edged sword
Guardianship: A Double-Edged Sword

- *Parens patriae* roots of guardianship
- Guardianship “unpersons” individual (Associated Press, 1987)
- Loss of fundamental rights
- Inherent Tension
  - Between rights and needs
  - Between autonomy and beneficence
  - Between self-determination and protection
Guardianship – “Part ogre and part Santa Claus”
Guardianship Statutory Reform Trends

- Procedural due process
- Determination of incapacity
- Least restrictive alternative & limited guardianship
- Monitoring; court oversight
- Public guardianship

See statutory charts at http://new.abanet.org/aging/Pages/GuardianshipLawandPractice.aspx
How is a Guardian Appointed – Procedural Due Process

- “Any person” files petition
- Notice – is it meaningful/understandable
- Presence of respondent at hearing
- Appointment of counsel, “guardian ad litem,” court visitor
- Hearing rights
Determination of Incapacity in Guardianship Proceeding

Four elements in state guardianship law; mix ‘n match

– Medical condition
– Cognitive element
– Functional element
– Risk of harm
Incapacity Definition in Uniform Guardianship & Protective Proceedings Act

- **[Cognitive]** “unable to receive and evaluate information or make or communicate decisions to such an extent that. . .”

- **[Functional]** “. . . the individual lacks the ability to meet essential requirements of physical health, safety, or self-care, even with appropriate technological assistance.”
Principle of Least Restrictive Alternative

• Constitutional doctrine
• Growing use of alternatives to guardianship
  – Representative payee
  – Power of attorney
  – Trust
  – Supports such as money management!
  – Guardianship as LAST RESORT
• Enactment of limited guardianship provisions
• Use of “substituted judgment standard of decision-making”
Concept of Limited Order

- Limited v plenary order
- Guardian assigned only those duties & powers person is incapable of exercising
- Highlighted in UGPPA
- National Probate Court Standards – directs judge to detail powers & duties & rights retained
- Language included in virtually every state statute – 2008 chart by AARP Public Policy Institute at http://new.abanet.org/aging/Pages/GuardianshipLawandPractice.aspx
Judges are not like baseball umpires, calling strikes and balls or merely labeling someone competent or incompetent. Rather, the better analogy is that of a craftsman who carves staffs from tree branches. Although the end result – a wood staff – is similar, the process of creation is distinct to each staff. Just as the good wood-carver knows that within each tree branch there is a unique staff that can be ‘released’ by the acts of the carver, so too a good judge understands that, within the facts surrounding each guardianship petition, there is an outcome that will best serve the needs of the incapacitated person, if only the judge and the litigants can find it.” Larry Frolik, Stetson L. Rev. Spring 2002
Selection of Guardian

- Statutory preferences; judicial discretion
- Nomination/preference of individual
- Who are the guardians?
  - Family members
  - Friends
  - Private professional guardians
  - Private non-profit & for-profit agencies
  - Public guardians
Guardian Accountability – Who Guards the Guardians?

• Reports & Accounts
• Protection of Assets
• Court Review of Reports & Accounts
• Investigation, Verification & Sanctions
• Guardian Training/ Assistance
• Funding for Monitoring
• Guarding the Guardians: Promising Practices for Court Monitoring, AARP/ABA (2007)

Cartoon: "Don't you worry, Grandma. As your court-appointed guardian, I'm here to lighten your load."
Guardian Standards & Certification

- Center for Guardianship Certification, www.guardianshipcert.org/
- State certification programs
Long & Winding Road of Reform

- Gap between law & practice
- Little data; continuing press stories
- Need for continued advocacy!!
Slides available at:
http://new.abanet.org/aging/Pages/CLE.aspx