

Kinship Caregiving and Medical Consent Laws: An In-Depth Analysis

Grandparents and other relatives are playing an increasing role in ensuring the health and safety of children who must transition from youth to adulthood in out-of-home care. Frequently with minimal notice, these relative caregivers are forced to undertake all parental duties for the children in their care. Yet only **twenty-nine states** (including the District of Columbia) currently have policies in place that enable relative caregivers to proffer consent for a child's medical, dental, surgical, and psychological needs. Further, these twenty-nine laws are not always consistent or comprehensive.¹ The absence of medical consent laws endangers children in kinship care and sets them up for future health-related problems. This memo will provide an in-depth analysis of the current twenty-nine medical consent laws and will present a set of recommendations for legislators, legal practitioners, and health care providers that will ensure the maximum legal protection of children in kinship care who may require medical attention.

Overview of States' Medical Consent Laws

Twenty-eight states (AR, CA, CO, DE, FL, GA, HI, ID, IN, KS, LA, MD, MS, MO, NV, NM, NY, NC, ND, OH, OK, PA, TX, UT, VA, and WY) and the District of Columbia have enacted legislation that enables grandparents and other relatives to consent to medical treatment for children in their care. Nearly all medical consent statutes specifically reference medical, surgical, and dental care. Seven states (CA, DE, NM, OH, PA, TX, and WA) and the District of Columbia also reference mental health or psychological care. Delaware, a particularly comprehensive medical consent statute, references osteopathic care in addition to medical, surgical, dental, and psychological care.² Four states (KS, MO, NY, and TX) and the District of Columbia allow relative caregivers to consent to immunizations; Colorado does not allow relative caregivers to consent to any medical care besides immunizations.³

Though every statute is different, laws allow grandparents, adult siblings, stepparents, or other persons standing in loco parentis (whether formally or informally) to proffer consent. A few states include aunts, uncles, and close family friends. Five states (FL, ID, MS, ND, and WA) enumerate an order of priority in terms of who may provide consent. For instance, Florida's statute states that the following individuals in order of priority may consent to a minor child's medical care (after a reasonable attempt has been made to contact the parents): a person who possesses a power of attorney to provide medical consent for the minor; the stepparent; the grandparent; an adult brother or sister; an adult aunt or uncle.⁴ In the states that do list an order of priority, informed

consent may not be given by an individual lower on the priority list if a person of higher priority has refused to do proffer consent.⁵

States that Prohibit Caregivers to Consent to Certain Treatments or Procedures

A few states with medical consent laws in place do not allow relatives to consent to all types of treatments or procedures. The most common prohibited procedures are abortion and sterilization, although a few states provide more specific language in their statutes. For example, Arizona does not allow a relative caregiver to consent to anesthesia, surgery, testing for HIV/AIDS, blood transfusions, or abortions; North Dakota does not allow a relative caregiver to consent to sterilization, abortion, psychosurgery, or admission to a state mental health facility for a period of more than forty-five days without a mental health proceeding or other court order.⁶

States that Require Written Affidavits or Consent Forms

Thirteen states (CA, DE, HI, LA, MD, NJ, NC, OH, OK, PA, TX, and WY) and the District of Columbia require an affidavit or some other written consent form. Eight states (AZ, AK, CO, GA, LA, MS, MO, and WA) specifically state in their statute that oral consent is allowed. Interestingly, Louisiana and Washington both requires a written affidavit and allows for oral consent in certain circumstances.⁷

Though states vary in terms of content and format of affidavit form (and most provide specifics in their statutory language), most states require, at a minimum: the minor's name and date of birth; a statement signed by the caregiver that the caregiver is eighteen years of age or older and that the minor resides with the caregiver; the names and signatures of the parents, legal custodian or guardian of the minor indicating their approval of the caregiver's power to consent; the name of the caregiver; the relationship of the caregiver to the minor; and the dated signature of the caregiver.⁸ Some states, Hawaii for example, require the affidavit to be notarized before it becomes effective.⁹

States that Have Imposed Time Limits or Specific Revocation Policies

Nearly all states, regardless of whether or not they require written consent, state that a relative caregiver's consent to medical treatment is always superseded by a parent or legal guardian's decision to rescind the delegated consent (unless such a decision would endanger the life, health, or safety of the minor). The majority of states that do require written consent impose a time limit and/or enunciate a specific revocation policy. In California and Delaware, the caregiver affidavit becomes invalid as soon as the minor stops living with the relative. In Idaho and Washington, the affidavit is invalid after six months; in seven states (DE, LA, MD, NJ, NM, OK, and WY), the affidavit is invalid after one year. In the

District of Columbia, parties may provide for terms in writing which would make revocation of the caregiver affidavit effective only when a specified time period has elapsed after notification of intent to revoke.¹⁰ North Carolina specifies that the authorization to consent to health care form is invalid as soon as the minor turns eighteen if the form itself does not specify a date.¹¹ Ohio's statute is unique in that it provides six specific situations that would require a caregiver affidavit to be revoked: 1) one year elapses following the date the affidavit is notarized; 2) the child ceases to reside with the grandparent; 3) the parent or guardian withdraws consent; 4) the affidavit is terminated by court order; 5) the death of the child who is the subject of the affidavit; and 6) the death of the grandparent who executed the affidavit.¹²

States that Provide Immunity for Providers that Rely on Caregiver's Consent

Twenty medical consent laws contain provisions that provide immunity for health care providers that rely on a caregiver's consent in order to provide treatment to a child in kinship care. The statutory language varies, but the most comprehensive of these provisions state that an individual who acts in good faith reliance on medical consent authorization shall not incur civil or criminal liability or be subject to professional disciplinary action for treating a minor without legal consent. Delaware has instated a penalty of \$1,000 per child for an individual that makes a false statement in a relative caregiver affidavit.¹³ In Oklahoma, an individual making a false statement in a caregiver's authorization affidavit is guilty of a misdemeanor and may be sentenced to one year in the county jail or a fine of not more than \$500.¹⁴

Recommendations

Despite the significant medical problems faced by children in kinship care, the law in twenty-two states is not set up to support grandparents and other relative caregivers who need the power to consent to even the most basic of their relative children's medical, dental, surgical, and psychological needs. As state agencies become increasingly reliant on grandparents and other relatives to care for children, it is essential that:

- All states enact comprehensive legislation that enables kinship caregivers to provide medical consent for children in their care;
- All medical consent statutes include provisions that allow kinship caregivers to consent to, at a minimum, medical, surgical, dental, and mental health treatment and procedures;
- All states increase the accessibility of information pertaining to medical consent, including informational brochures and outreach materials, to grandparents and other relatives providing kinship care;
- All attorneys, judges, and caseworkers working with kinship families be informed about their state's medical consent policies and, where

- necessary, instigate the written caregiver affidavit form immediately after the child moves in with a relative; and
- All physicians, nurse practitioners, and other health care professionals be fully educated and informed about their state's medical consent policies so as to be able to thoroughly advise patients and their caregivers who may not otherwise be aware of the law.
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¹See e.g., COLO. REV. STAT. ANN. § 25-4-1704 (2006) (authorizing relative caregivers to consent to vaccinations, but to no other medical services, under Colorado's Child Immunization Program).

²See DEL. CODE. ANN. TIT. 13, § 707 (B) (2006).

³See COLO. REV. STAT. ANN. § 25-4-1704 (2006).

⁴See FLA. STAT. ANN. § 743.0645 (2006).

⁵See e.g., N.D. CENT. CODE § 23-12-13 (2006).

⁶See ARK. CODE. ANN. § 8-514.05 (2006); N.D. CENT. CODE § 23-12-13 (2006).

⁷See LA. REV. STAT. ANN. 40:1299.53 (2006); WASH. REV. CODE ANN. 7.70.065A (2006)

⁸See e.g., DEL. CODE. ANN. TIT. 13, § 708 (2006).

⁹See HAW. REV. STAT. ANN. § 577-28 (2006).

¹⁰See D.C. CODE ANN. § 16-4901 (d) (2006).

¹¹See N.C. GEN. STAT. ANN. §. 32A-32 (2006).

¹²See OHIO REV. CODE. ANN. § 3109.70 (2006).

¹³See DEL. CODE. ANN. TIT. 13, § 708 (g) (2006).

¹⁴See OKLA. STAT. TIT. 10, § 21.6 (2006).