WHAT DOES “CONSENSUS” MEAN WHEN CHOOSING A PROXY DECISION MAKER FOR MEDICAL TREATMENT?

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FIRST: THE PROXY-DECISION STATUTE

1. There is an ambiguous aspect of the Colorado statute authorizing proxy decision-makers for medical treatment. There are no interpretive Colorado court decisions.

2. The proxy-statute applies if there has been no *health care agent* explicitly appointed by an ill and incapacitated patient, who then needs health care decisions made. The proxy-statute provides a procedure to assemble *interested persons*, and have to choose a *proxy decision maker*, who has the authority of a health care agent (with one limitation). The interested persons must choose by consensus.

3. If consensus means unanimity, then all of the assembled interested persons must reach an identical agreement. There must be an identical choice. But if consensus means a bare majority, then just one more than half of the interested persons must agree. Other views interpret consensus to mean something more than a majority, but less than a unanimous agreement.

4. This has practical implications. For example, in one ethics consult, there was no explicit health care agent for an incompetent and critically ill patient. There were eleven interested persons present, including relatives, a roommate, and neighbors. Initially, everyone but one was in agreement to appoint the brother. Unfortunately, there was severe antagonism between the roommate and everyone else. Although everyone eventually agreed on the appointment of one person to be the proxy decision maker, a majority agreement would have been easier to achieve. On the other hand, any dissenter could have later sought a guardian.

5. Depending upon the interpretation of consensus, in C.R.S. § 15-18.5-103(4)(a), the mission of an ethics consult will be more or less difficult. It is obviously more difficult to get everyone to agree. The relevant part of the statute is:

    > It shall be the responsibility of the interested persons specified in subsection (3) of this section to make reasonable efforts to reach a consensus as to whom among them shall make medical treatment decisions on behalf of the patient . . . If any of the interested persons specified in subsection (3) of this section disagrees with the selection or the decision of the proxy decision-maker or, if, after reasonable efforts, the interested persons specified in subsection (3) of this section are unable to reach a consensus as to who should act as the proxy decision-maker, then any of the interested persons specified in subsection (3) of this section may seek guardianship of the patient by initiating guardianship proceedings pursuant to part 3 of article 14 of this title (emphasis added).

SECOND: STATUTORY INTERPRETATION

1. **Rules of Interpretation:** Interpretation of a statute uses a few classic rules: "In enacting a statute, it is presumed that . . . the entire statute is intended to be effective." C.R.S. § 2-4-201; *See also* United Airlines, Inc. v. Industrial Claim Appeals Office, 993 P.2d 1152, 1157 (Colo. 2000) ("construe the legislation as a whole and, where possible, give a harmonious effect to each of its parts"). Also, specific provisions prevail over, and are exceptions to, general provisions in a statute. C.R.S § 2-4-205.

2. **The First Provision for Guardian Is Consistent with Consensus as Mere Majority Vote:** The proxy-statute allows "any of the interested persons . . . who disagrees with the selection" (lines 4-5 above) of a particular proxy to petition for a guardian. This implies that a proxy would have been first selected — without a dissenter's consent. If so, then that consensus would have had to have been less than unanimous. Otherwise, there would not have been a proxy selected in the first place.

   For example, if a majority constitutes a consensus, there are three interested persons, two persons agree on the selection of a proxy, and the third dissents — there is a consensus, a proxy is chosen, but the third, dissenting person could petition for a guardian.

3. **The Second Provision for Guardian Is Also Consistent with Consensus as Mere Majority Vote:** In addition to the dissenter above, "any of the interested persons" can petition for a guardian, when they are "unable to reach a consensus" (lines 7-8 above). The first petition for guardianship happens after the selection of a proxy, and this one because there is no consensus to select one in the first place. This second dissent provision — where there is no consensus — would be redundant unless there was consensus-by-majority in ¶2, above. Thus, based on the rule in ¶1, that an "entire statute is intended to be effective," this interpretation is valid.

   For example, if a majority constitutes a consensus, there are three interested persons, and none agree on the selection of a proxy, there is no consensus — and any person could petition for a guardian.

4. **The First Provision for Guardian Is Also Consistent with Consensus as Unanimity:** The statute allows "any of the interested persons . . . who disagrees with the selection" (lines 4-5) of a particular proxy to petition for a guardian. This could simply mean the dissent from a proposed proxy when there was no unanimous agreement.

   For example, if a consensus requires a unanimous vote, there are three interested persons, two persons agree on the selection of a proxy, the third dissents, then there is no consensus — and any person could petition for a guardian.

5. **The Second Provision for Guardian Is Not Consistent with Consensus as Unanimity:** In addition to the dissenter above, "any of the interested persons" can petition for a guardian, when they are "unable to reach a consensus" (lines 7-8). This second dissent provision would be redundant if consensus required unanimity, because it is covered in the first provision for dissent in ¶ 4. Thus, based on the rule in ¶1, that an "entire statute is intended to be effective," this interpretation is not validated.

6. **Deduction as to Statutory Interpretation:** A strict, literal reading of the statute is consistent with the interpretation of consensus as meaning a majority vote. It is not completely consistent with the interpretation of consensus as meaning a unanimous vote. However, the language of the statute seems too ambiguous and indirect, inasmuch as the legislature could have used "majority" or "unanimity" if it were its clear intent. Accordingly, it is appropriate to look further at the meaning of the word the legislature did use — consensus.

THIRD: DICTIONARY DEFINITIONS

1. As to dictionary definitions, there are both a legal one and a contrasting societal one.

2. **Legal:** A strict Black's Law Dictionary (7th ed. 1999) defines *consensus ad idem* as "An agreement of parties as to the same thing; a meeting of minds." Merriam-Webster's Dictionary of Law (1996) defines *consensus ad idem* the same way, as an "agreement with respect to the same thing: meeting of the minds." Plain "Consensus" is not defined in either source.

3. **Societal:** A strict In contrast, societal definitions are looser. Webster's New World Dictionary (2nd College Ed. 1978) defines *consensus* as "an opinion held by all or most; general agreement, esp. in opinion." Webster's New Collegiate Dictionary (1st ed. 1979) states: "A consensus is defined as group solidarity in sentiment and belief." Microsoft's Bookshelf Dictionary (1998) defines it as: "An opinion or position reached by a group as a whole or by majority will . . . General agreement or accord."

4. **Deduction as to Definitions:** The legal definition refers to the achievement of a legally binding agreement or contract, similar to choosing a proxy, but since it is not identical, and the plain word consensus is not defined, this seems indeterminate.

FOURTH: COURT INTERPRETATIONS

1. There are 86 Colorado cases which contain the word consensus, and none which contain *consensus ad idem.* Most references are ambiguous, but those which use consensus in a manner that can be quantified distribute themselves into two uses.

2. **Definable, Identifiable Groups:**

   a) **Contracts:** The interpretation of *consensus ad idem* as requiring unanimity is the settled one in contract law. *See* Colowyo Coal Co. v. City of Colorado Springs, 879 P.2d 438, 443 (Colo. App. 1994) ("The consensus of both parties is required in order to modify or to supplant a valid contract"); Colfax Envelope Corp. v. Local No. 458, 20 F.3d 750 (7th Cir. 1994) ("no contract has been formed because there is no consensus ad idem — no agreement on the same thing").

   b) **Juries:** Consensus means unanimous consent in jury deliberations, requiring unanimous agreement. *See* People v. Marquez, 692 P.2d 1089, 1105 (Colo. 1984) ("Requiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required"); *Accord* Apodaca v. Oregon, 406 U.S. 404 (1972) ("The final explanation is that jury unanimity arose out of the medieval concept of con-

sent. Indeed, 'the word consent (consensus) carried with it the idea of concordia or unanimity . . .'").

c) **Other Discrete Groups:** Where there is a smaller, discrete group, consensus means unanimity. *See* S.F.E. ex rel. T.I.E., 981 P.2d 642, 645 (Colo. App. 1998) ("the [divorced] parties cannot come to a consensus concerning matters of importance to [the child]"); In re Marriage of Barnes, 907 P.2d 679, 683 (Colo. App. 1995) ("There was, therefore, no consensus reached [between two different state's courts] as to which was the more appropriate forum to adjudicate the custody issue"); Hibbard v. County of Adams, 900 P.2d 1254, 1261 (Colo. App. 1994) (two county attorneys and county's zoning administrator agreed to demolish a building by reaching a consensus).

d) **Deduction as to Defined Groups:** In all the cases where a circumscribed, well-defined group has a particular mission or legal task to accomplish, consensus means unanimity. These groups are similar to the interested persons choosing a proxy decision maker. However, it is unclear what this signifies if there are two parties, as in some cases above, because a disagreement between them would yield no consensus by any measure. Accordingly, this weakens the analogy to be drawn, although it all told argues for consensus as unanimity.

3. **Inchoate Groups:** Where there is a larger, often vaguer group reaching consensus, it appears to mean a general agreement or accord, but not unanimity, though there is no precise definition. Here we are dealing with groups that could not even be identified fully, much less could there ever be unanimity as to a decision.

a) **Societal consensus:** People v. Dunlap, 975 P.2d 723, 735 (Colo. 1999) ("a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense").

b) **View among courts:** People v. Eppens, 979 P.2d 14, 21 (Colo. 1999) ("consensus view among courts is that prior consistent statements are admissible for rehabilitative purposes").

c) **Medical opinion:** Neodata Services v. Industrial Claim Appeals Office, 805 P.2d 1180, 1183 (Colo. App. 1991) (petitioners' expert witness disagrees, but "the consensus of medical opinion is that claimant should avoid stressful work").

d) **Local governments and citizens:** Dill v. Board of County Com'rs of Lincoln County, 928 P.2d 809, 813 (Colo. App. 1996) ("Local governments and their citizens should be encouraged to work toward consensus concerning their solid waste disposal needs").

e) **Law enforcement:** Robertson v. City and County of Denver, 874 P.2d 325, 350 (Colo. 1994) ("It is the general consensus of law enforcement officials that the ever-increasing presence of assault-type rifles in the illicit drug trade and in other types of crime places the safety and the very lives of the American public in immediate peril").

f) **Scientific Consensus:** *Contrast* Brooks v. People, 975 P.2d 1105, 1112 (Colo. 1999) ("even if there were a universally accepted theory explaining the canine ability to track scent, such consensus would be of little use in analyzing the evidentiary validity" of a specific dog").

g) **Deduction as to Inchoate Groups:** Where there is a larger, often vaguer group reaching consensus, it appears to mean a general agreement or accord, but not unanimity, though there is no precise definition. However, here we are dealing with groups that could not even be identified fully, much less could there ever be unanimity. It does not seem analogous to the selection of a proxy decision maker.

4. **A Compromise View:**

a) A compromise view is that consensus is a stronger agreement than a mere majority, but does not reach the level of unanimity. In discussing the Frye test for the admissibility of scientific evidence, one Colorado Court took this view. *See* Lindsey v. People, 892 P.2d 281, 289 (Colo. 1995) ("First, we should make clear 'general acceptance' does not require unanimity, a consensus of opinion or even majority support by the scientific community").

b) **Deduction:** This succinct comment demonstrates how consensus means different things to different people in different circumstances. It is even worse than "semi-annual" and "bi-annual," both of which have come to mean either twice a year or every two years, and are thus useless for precise language. Consensus is such a word.

FIFTH: CONCLUSION

We need to take an honest look at the law, ask the hard questions, and then within those qualifications, interpret the law in a workable, practical manner. "Consensus" among interested parties can be interpreted in logically and in good faith as being either unanimity or a majority. The language of the statute appears to favor majority, although the legal characteristics of a discrete group like the interested persons favors unanimity. Consensus as unanimous consent is more difficult to achieve, but would reduce downstream dissent if obtained. I recommend that we strive for it, but understand that it is not a conclusive standard. If there is an irreconcilable group of interested persons, we can fairly allow a majority to prevail.