Who Makes Health Care Decisions?

Primary Approach

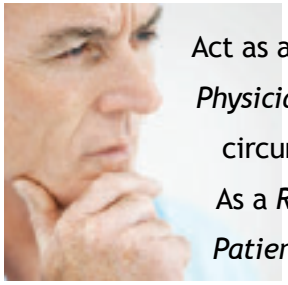
Patient has Decisional Capacity[1]

To Request or Refuse Treatment

Discuss Nature of the Illness

Treatment Alternatives

Risks & Benefits[2]



Act as a *Reasonable Physician* in similar circumstances[3]

As a *Reasonable Patient* Expects[4]

Patient Makes a Decision and Gives Informed Consent[5]

Secondary Approach

Patient Lacks Capacity to Make and Communicate Choices[6]

Follow Dispositive Medical Orders for Scope of Treatment, CPR Directive, Living Will, Five Wishes, or any other Explicit Patient Directive[7]

Still Best to Confer with a Live Decision-Maker

1

Patient-Chosen
Health Care Agent

Acts as the Patient[8-10]

OR

Patient-Chosen
Designated Beneficiary

Acts as the Patient[11]

AND

Agent or *Beneficiary*

Makes Decisions by *Substituted Judgment*

Then *Best Interests*[10]

2

No Agent, nor Beneficiary Nor Dispositive Directive

Attending Physician Seeks *Interested Persons*[12]

They Choose a *Proxy* by consensus[13]

AND

The *Proxy* Mostly Acts as the Patient[14]

AND

Makes Decisions by *Substituted Judgment*

Then *Best Interests*[10]

3

If No Agent, Beneficiary Nor Interested Persons

Obtain a Physician Proxy[15]
Make Decisions as any Proxy[10]

Except also Incorporate Second Opinion on Incapacity & Ethics Consult Consensus[15]

OR

Petition for Guardianship

To a Court or Through Office of Public Guardianship[23]

They Make Decisions After Consulting Patient But by *Best Interests*[16, 17]

An advance directive may be suspended by surgery, or pregnancy.[18] Even Incapacitated[19] patients must be informed of any substitute decision maker.[20] They can veto or fire an agent, a proxy, a beneficiary[21] or revoke a written directive.[22]

REFERENCES

1. "Decisional capacity means the ability to provide informed consent to or refusal of medical treatment, or the ability to make an informed health care benefit decision." C.R.S. § 15-14-505(4), *Powers of Attorney — Definitions.* [C.R.S. = Colorado Revised Statutes]
2. Miller v. Van Newkirk, 628 P.2d 143, 146 (Colo. App. 1980); Lynch, *et al*, *"Informed Consent . . ."* NEJM, 378;25 (June 21, 2018).
3. The standard is to "act consistently with the standards required of the medical profession in the community, while a specialist must treat the patient in accordance with the standard of a reasonable physician practicing in that specialty." In re P.W., 2016 CO 6, n. 5 (2016).
4. It is negligent failure to inform when a "reasonable person in the same or similar circumstances as the Plaintiff would not have consented . . . if given the information required for informed consent." CJI-Civ. 15:10(3), *Uninformed Consent* (2011). [CJI-Civ. = Colorado Civil Jury Instructions]
5. Before treating a patient "the physician must obtain the informed consent, whether express or implied, from the patient," Gorab v. Zook, 943 P.2d 423, 427 (Colo. 1997); CJI-Civ. 15:10 (2), *Uninformed Consent* (2011).
6. If one is "unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care," C.R.S. §§ 15-14-102(5), and see 15-14-505(4), 15-18.5-103(1).
7. C.R.S. §§ 15-14-506 (POA), 15-18-101 (Living Will), 15-18.6-101(CPR Directive), 15-18.7-101 (M.O.S.T.), 15-22-105 (Designated Beneficiary).
8. The level of capacity needed to choose a surrogate is less than to make treatment decisions. In re the Estate of Runyon, 204 COA 181 ¶ 26 (2014). One "may be insane on some subjects and still have the capacity to contract." Davis v. Colorado Kenworth, 396 P.2d 958, 961 (Colo. 1964).
9. A health care agent "shall have the same power to make medical treatment decisions the principal would have." C.R.S. § 15-14-506(3).
10. "The agent shall act . . . in conformance with the principal's wishes that are known [or then in] the best interests of the principal," C.R.S. § 15-14-506(2).
11. C.R.S. § 15-22-105(f). *Effects and applicability of a designated beneficiary agreement*.
12. The "attending physician . . . shall make reasonable efforts to locate . . . interested persons." C.R.S. § 15-18.5-103(3). "The person selected to act as the patient's proxy decision-maker should be the person who has a close relationship with the patient and who is most likely to be currently informed of the patient's wishes regarding medical treatment decisions." C.R.S. § 15-18.5-103 (4)(a).
13. C.R.S. § 15-18.5-103(4)(a); Consensus is undefined in the statute; dictionaries vary markedly; the Oxford English Dictionary yields "Agreement or unity of or of opinion, testimony, etc.; the majority view, a collective opinion"; it is most commonly used as falling between a majority view and unanimity.
14. "Mostly" refers to a limitation that is unique to proxies, concerning withdrawal of artificial nourishment and hydration. C.R.S. § 15-18.5-103(6)(a).
15. C.R.S. § 15-18.5-103(4)(c) (physician proxy appointment).
16. "The incapacitated person or any person interested in his welfare may petition" for a "guardian or other protective order." C.R.S. § 15-14-304.
17. There is an assumed order of priority to appointing a guardian, C.R.S. § 15-14-310, but the best interest of ward trumps that if there is a valid objection. In the Matter of R.M.S., 128 P.3d 783, 785 (Colo. 2006).
18. Directives work differently in surgery. *See* Truog, *et al*, "DNR in the OR: A Goal-directed Approach," *Anesthesiology* 90:1 (January 1999) 289. If a patient has a viable pregnancy, a living will "shall be given no force or effect." C.R.S. § 15-18-104(2).
19. "Incapacity" is used in C.R.S. § 15-14-504; "Incompetency" is used in C.R.S. § 15-18-102; "Disability" is used in C.R.S. § 15-14-501(1).
20. C.R.S. § 15-18.5-103(3 & 5) the provider must "notify the patient of the patient's lack of decisional capacity."
21. "Nothing in this section or in a medical durable power of attorney shall be construed to abrogate or limit any rights of the principal, including the right to revoke an agent's authority or the right to consent to or refuse any proposed medical treatment, and no agent may consent to or refuse medical treatment for a principal over the principal's objection." C.R.S. § 15-14-506(4)(a)&5(d). In contrast, dismissal of a guardian requires approval by the court.
22. "A declaration may be revoked by the declarant orally, in writing, or by burning, tearing, cancelling, obliterating, or destroying said declaration." C.R.S. §§ 15-18-109; 15-18.6-107; 15-14-506(4)(a).
23. If no one else is available to serve; C.R.S. § 13-94-105(4)(a); www.Colorado-OPG.org. That Office estimates 5,800 Coloradans need this service, as of April, 2020.