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Law

Legal Briefing: The Unbefriended: Making Healthcare Decisions for Patients without Surrogates (Part 1)

Thaddeus Mason Pope and Tanya Sellers

ABSTRACT

This issue's "Legal Briefing" column covers recent legal developments involving medical decision making for unbefriended patients. These patients have neither decision-making capacity nor a reasonably available surrogate to make healthcare decisions on their behalf. This topic has been the subject of recent articles in *JCE*.¹ It has been the subject of major policy reports.² Indeed, caring for the unbefriended has even been described as the "single greatest category of problems" encountered in bioethics consultation.³ Moreover, the scope of the problem continues to expand, especially with rapid growth in the elderly population and with an increased prevalence of dementia.

Unfortunately, most U.S. jurisdictions have failed to adopt effective healthcare decision-making systems or procedures for the unbefriended. "Existing mechanisms to address the issue of decision making for the unbefriended are scant and not uniform."⁴ Most providers are "muddling through on an *ad hoc* basis."⁵ Still, over the past several months, a number of state legislatures have finally addressed the issue. These developments and a survey of the current landscape are grouped into the following 14 categories.⁶ The first two define the problem of medical decision making for the un-

befriended. The remaining 12 categories describe different solutions to the problem. The first six of these solutions are discussed in this article (Part 1). The last eight solutions will be covered in the Summer 2012 issue of *JCE* (Part 2).

1. Who are the unbefriended?
2. Risks and problems of the unbefriended
3. Prevention: advance care planning, diligent searching, and careful capacity assessment
4. Decision-making mechanisms and standards
5. Emergency exception to informed consent
6. Expanded default surrogate lists: close friends
7. Private guardians
8. Volunteer guardians
9. Public guardians
10. Temporary and emergency guardians
11. Attending physicians
12. Other clinicians, individuals, and entities
13. Institutional committees
14. External committees

1. WHO ARE THE UNBEFRIENDED?

Patient autonomy is highly valued in the United States. Patients with capacity can make their own healthcare decisions. And patients retain the right of self-determination even when they lose the capacity to make healthcare decisions for themselves. The law has devised several tools to promote "prospective autonomy," the right to control one's future medical treatment in the event one loses decision-making capacity. One mechanism is the instructional advance directive or living will. But most of us do not write such directives. Another mecha-

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