

Healthcare Decision Making when the Patient Lacks Capacity

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Advance
directives are
preferred

Your decision
maker is someone
you chose

BUT

Not completed
Not available

80%

Still need
a SDM

Recap

Patient
cannot speak
for herself

No AD

No agent

**Default
surrogate**

2nd choice –
after agent

Not chosen
by patient

Chosen off
a list

Almost all states
specify a
sequence

Agent
Spouse
Adult child
Adult sibling
Parent

More
relatives

ND list is **longer**
 than most
9 categories deep

23-12-13. Persons authorized to provide informed consent to health care for incapacitated persons - Priority.

1. Informed consent for health care for a minor patient or a patient who is determined by a physician to be an incapacitated person, as defined in subsection 2 of section 30.1-26-01, and unable to consent may be obtained from a person authorized to consent on behalf of the patient. Persons in the following classes and in the following order of priority may provide informed consent to health care on behalf of the patient:
 - a. The individual, if any, to whom the patient has given a durable power of attorney that encompasses the authority to make health care decisions, unless a court of competent jurisdiction specifically authorizes a guardian to make medical decisions for the incapacitated person;
 - b. The appointed guardian or custodian of the patient, if any;
 - c. The patient's spouse who has maintained significant contacts with the incapacitated person;
 - d. Children of the patient who are at least eighteen years of age and who have maintained significant contacts with the incapacitated person;
 - e. Parents of the patient, including a stepparent who has maintained significant contacts with the incapacitated person;
 - f. Adult brothers and sisters of the patient who have maintained significant contacts with the incapacitated person;

- g. Grandparents of the patient who have maintained significant contacts with the incapacitated person;
- h. Grandchildren of the patient who are at least eighteen years of age and who have maintained significant contacts with the incapacitated person; or
- i. A close relative or friend of the patient who is at least eighteen years of age and who has maintained significant contacts with the incapacitated person.

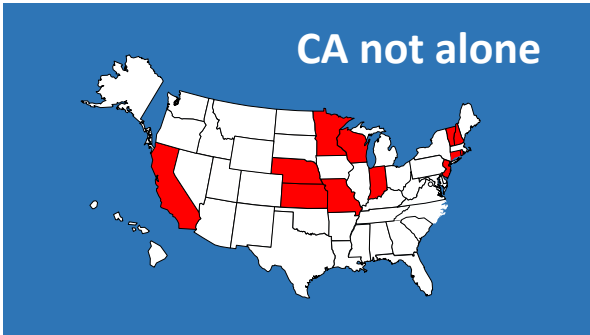
Close
 friend

Priority sequence in
 list might **not** match
 your preference

Nuclear family member	102 042	92.9
Spouse	53 212	48.5
Adult child	22 495	20.5
Parent	14 031	12.8
Sibling	12 304	11.2
Outside the nuclear family	7761	7.1
Nonnuclear relative	3190	2.9
Niece or nephew	1134	1.0
Cousin	523	<1
Aunt or uncle	490	<1
In-law	358	<1
Step-parent or step-sibling	291	<1
Grandparent	170	<1
Grandchild	166	<1
Other blood or legal relative	58	<1
Other relationship	4571	4.2
Friend	1854	1.7
Relationship outside marriage	1329	1.2
Ex-spouse	539	<1
Other	849	<1



No authoritative list in California



Closest Available Relati

Health Care Decisions

No statutory hierarchy'

- Spouse/domestic partner
- Adult child
- Either parent
- Adult sibling
- Grandparent
- Adult aunt/uncle
- Adult niece/nephew



No authoritative list in Minnesota

BUT

Custom & practice



MMA Policies

2015

(reflects policies adopted through April 30, 2015)

240.22 Decisions to Forego Life-Sustaining Treatment for Patients Lacking Decision-Making Capacity

The MMA endorses the AMA Council on Ethical and Judicial Affairs recommendations adopted at the 1991 AMA Annual Meeting as follows:

“**Without** an advance directive that designates a proxy . . .”

“**patient's family** should become the surrogate . . .”

“**Family** includes persons with whom the patient is closely associated.”

“In the case when there is **no one** closely associated with the patient . . .”

“but there are persons who both **care about** the patient and have **some relevant knowledge** of the patient . . .”

“such relations should be involved in the decision-making process, and may be appropriate surrogates.”

Judicially
endorsed

POSITION STATEMENT

Making Treatment Decisions for Incapacitated Older Adults Without Advance Directives

AGS Ethics Committee'

POSITION 2

It should not be assumed that the absence of traditional surrogates (next-of-kin) means the patient lacks an appropriate surrogate decision-maker. A nontraditional surrogate, such as a close friend, a live-in companion who is not married to the patient, a neighbor, a close member of the clergy, or others who know the patient well, may, in individual cases, be the appropriate surrogate. Health professionals should make a conscientious effort to identify such individuals.

STATE OF MINNESOTA
COUNTY OF RAMSEY

CASE TYPE INDICATOR: CIVIL - OTHER
DISTRICT COURT
SECOND JUDICIAL DISTRICT
PROBATE DIVISION
FILE NUMBER: C7-94-1717

RE: James D. Butcher and Patricia A. Butcher, individually and as parents and natural guardians of James D. Butcher, II,
Plaintiffs,

vs.

Thomas Fashingbauer, in his official capacity as Director, Ramsey County Community Human Services Department, and Ramsey County Community Human Services Department,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

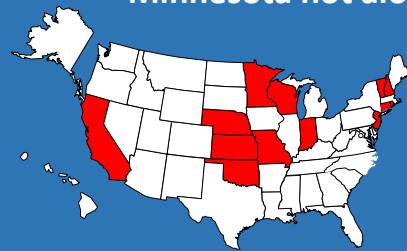
3. Plaintiffs are appropriate surrogate decision makers for all health care decisions for their son, and they are not required to petition for or be appointed guardians or conservators in order to continue making all health care decisions for their son,

is consistent with the standard of medical and ethical practice in the State of Minnesota.



No default
surrogate statute

Minnesota not alone



De facto
flexibility

BUT



Some providers
refuse to
recognize family

NJ IN
NY NJ

Still need
a SDM

Even **with**
a list

Some have
nobody

Still need
a SDM

**Guardian
Conservator**

3rd choice –
After agent &
surrogate

Ask **court** to
appoint SDM

Last
resort

Slow
Expensive
Cumbersome

3 SDM types

Who appoints	Type of surrogate
Patient	Agent DPAHC
Legislature	Surrogate Proxy
Court	Guardian Conservator

How does SDM decide?

Any type of SDM can usually make **any** decision patient could have made

Minn. Stat. 145C.07(3)

Health care agent must “act in the **best interests** . . . considering . . . the principal's **personal values** to the extent known”

Hierarchy

1. Subjective
2. Substituted judgment
3. Best interests



Subjective

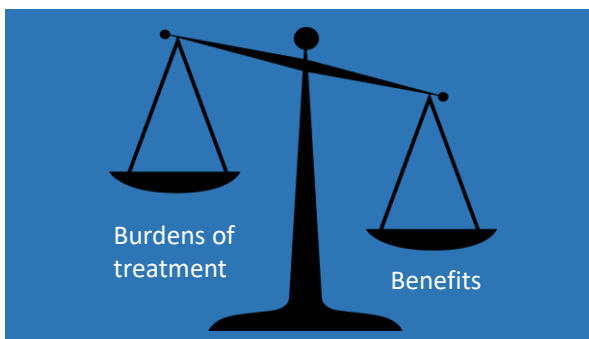
If patient left
instructions,
follow them

Substituted Judgment

Do what patient **would
do** (using known values,
preferences)

Best interests

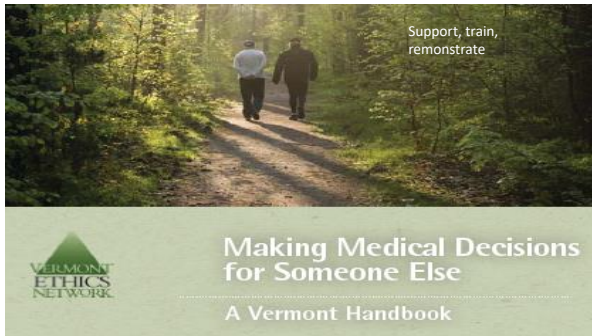
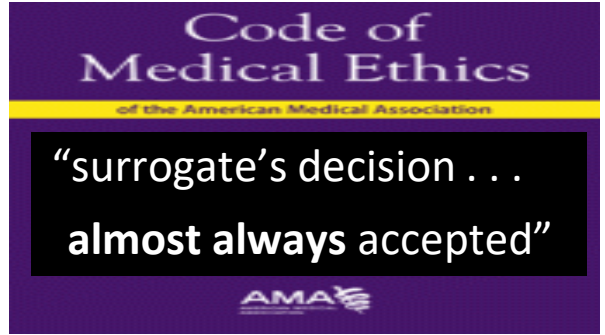
If cannot exercise
substituted
judgment, then
objective standard



~ 60%
accuracy



More
aggressive
treatment



***State of Minnesota
District Court—Probate
Court Division
County of Hennepin
Fourth Judicial District***

In Re: The Conservatorship of
Helga M. Wanglie

File No. PX-91-283

Findings of Fact:
Conclusions of Law And Order



Advanced dementia
End stage kidney disease
Chronic respiratory failure



Abel Tello
aggressive
treatment is
unethical & painful
CMO

BUT



State of Minnesota
 County of Hennepin

FILED
 11 FEB -4 PM 1:32
 BY: PROBATE/MENTAL HEALTH
 FOURTH DISTRICT COURT

District Court
 Probate Division
 Judicial District: Fourth
 Court File No. 27-GC-PR-111-16

In Re: Emergency Guardianship of

Order Appointing Emergency Guardian

Albert N. Barnes,
 Respondent

Beyond what is identified above, Mrs. Barnes has not acted in the best interest of Mr. Barnes and has failed to appropriately advocate for Mr. Mrs. Barnes continues to demand unnecessary, inappropriate, and in some cases harmful testing and treatment for Mr. Barnes. Mrs. Barnes

Clinicians should
not follow “bad”
 surrogates

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