Consent, Advance Directives, and Guardianships

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Preliminaries

This presentation is similar to any other legal education materials designed to provide general information on pertinent legal topics. The statements made as part of the presentation are provided for educational purposes only. They do not constitute legal advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the speaker. This presentation is not intended to create an attorney-client relationship between you and Holland & Hart LLP. If you have specific questions as to the application of law to your activities, you should seek the advice of your legal counsel.

Fun!

PopQuiz
True or False?

• A healthcare provider may provide care over a competent patient resident’s objection if necessary to save the resident.
• A resident is presumed to have capacity to consent to their own care unless a court has determined otherwise.
• Consents must be written to be valid.
• Surrogate decision makers have authority to trump an incompetent resident’s wishes as set forth in an advance directive.
• The only valid advance directives in Idaho are living wills, durable powers of attorney, POSTs, and DNRs.
• Living wills and durable powers of attorney must contain the elements in the statute to be valid.

True or False?

• Providers must now use POSTs instead of DNRs.
• POST forms must be completed by a physician.
• POST forms must be completed at the request of a resident, not surrogate decision makers.
• Advance directives are automatically suspended during surgeries.
• Advance directives remain valid until revoked in writing.
• Guardians may authorize the withdrawal of life-sustaining treatment for developmentally disabled persons.
• Surrogate decision makers who refuse medically necessary care for a resident must be reported for resident neglect.

Today’s Program

• Informed consent for treatment
• Surrogates
• Refusal of consent or withdrawal of care
• Advance directives
  – Durable power of attorney
  – Living wills
  – POSTs
  – Others
Written materials

- Available through IHCA’s website
  - Idaho Medical Consent and Natural Death Act, IC 39-4501 et seq.
  - Stanger, Medical Consents in Idaho: A Primer (Univ. of Idaho Law Review)
  - Stanger, Changes to Idaho Consent Law
  - Sample Living Will / DPOA form
  - Sample POST form
  - Instructions for POST

Disclaimer

- There is a lot of false doctrine out there.
- This is an overview of relevant laws and situations.
- Application of laws may depend on circumstances.
  - Provider type
  - Patient/resident
  - Treatment
- Check specific laws and regulations when applying to your circumstances.
- Please comment, ask questions.
- This does not create an attorney-client relationship.
- This does not constitute the giving of legal advice.

Informed Consent
### Consent: General Principles

- Must have valid consent for treatment.
- If resident lacks capacity to consent:
  - Check for advance directive, or
  - Obtain consent from authorized representative ("surrogate decision maker").
- In an emergency and no time to obtain consent, provide necessary care.
- Must provide sufficient information to ensure that the consent is informed.

### Consent: Liability

- Failure to obtain consent =
  - Lack of informed consent tort
  - Battery
  - False imprisonment
  - Malpractice
  - Other?
- Penalties
  - Criminal fines and prison
  - Civil damages
  - Administrative penalties
  - Adverse licensure action

Informed consent is a defense

### Medicare: Resident Rights
Federal Resident Rights

SNF Residents have the following rights:

• The resident has the right to be fully informed in language that he or she can understand of his or her total health status, including but not limited to, his or her medical condition;

• The resident has the right to refuse treatment, to refuse to participate in experimental research, and to formulate an advance directive...

(42 CFR 483.10)

Idaho Resident Rights

• SNF Resident Rights: Each resident must be fully informed, by a physician, of his medical condition unless medically contraindicated (as documented, by a physician, in his medical record), and [be] afforded the opportunity to participate in the planning of his medical treatment....

(IDAPA 16.03.02.03(c)).

• RALF Resident Rights: Each resident must have the right to control his receipt of health related services, including ... the right to refuse medical services based on informed decision making. The facility must document that the resident and his legal guardian have been informed of the consequences of the refusal.

(IDAPA 16.03.22.550).

Lack of Informed Consent

• Treat resident who lacks capacity to consent to their own care (e.g., resident medicated, intoxicated, underage, etc.).

• Ignore resident’s prior wishes or decisions (e.g., provides care contrary to advance directive).

• Continues treatment even though competent resident or personal rep has objected or withdraws consent.

• Provides treatment that exceeds scope of consent.

• Fails to inform resident of sufficient info reasonably necessary to enable resident to make an informed decision.

• Fails to effectively communicate with resident so as to convey or receive informed consent (e.g., limited English proficiency, disability, education, etc.).
Medical Consent and Natural Death Act (IC 39-4501 et seq.)

www.legislature.idaho.gov/idstat/Title39/T39CH45

Capacity

• “Any person who comprehends the need for, the nature of and the significant risks ordinarily inherent in, any contemplated ... health care, treatment or procedure is competent to consent thereto on his or her own behalf.”

• “Any health care provider may provide such health care and services in reliance upon such a consent if the consenting person appears to the health care provider securing the consent to possess such requisite comprehension at the time of giving consent.”

(IC 39-4503)
Surrogates

- "Consent for the furnishing of ... health care ... to [1] any person who is not then capable of giving such consent ... or [2] who is a minor may be given or refused in the order of priority set forth hereafter; provided
  — that the surrogate decision maker shall have sufficient comprehension as required to consent to his or her own health care, and
  — the surrogate decision maker shall not have authority to consent to or refuse health care contrary to such person's advance directives, POST or wishes expressed by such person while the person was capable of consenting to his or her own health care."

  (IC 39-4504(1))

Surrogates

- Surrogate decision makers
  — Court appointed guardian.
  — Person named in living will and durable power of attorney if conditions triggering authority are satisfied.
  — Spouse.
  — Adult child.
  — Parent.
  — Delegation of parental authority per IC 15-5-104.
  — Relative representing himself as appropriate responsible person to act under the circumstances.
  — Any other competent person representing himself or herself to be responsible for health care.

  (IC 39-4504(1))

Surrogates

- Surrogate who, in good faith, gives consent for another is immune from civil liability.
- Practitioner who, in good faith, obtains consent from apparently competent resident or other authorized surrogate is immune from civil liability.

  (IC 39-4504(2)-(3))
Emergency

- "If the person [1] presents a medical emergency or there is a substantial likelihood of his or her life or health being seriously endangered by withholding or delay in the rendering of ... health care to such person and the person [2] has not communicated and is unable to communicate his or her treatment wishes, the attending health care provider may, in his or her discretion, authorize and/or provide such health care, as he or she deems appropriate, and all persons, agencies and institutions thereafter furnishing the same, including such health care provider, may proceed as if informed, valid consent therefor had been otherwise duly given."

(IC 39-4504(1))

Form of Consent

- "It is not essential to the validity of any consent ... that the consent be in writing or any other specific form of expression."

(IC 39-4507)

- Under Idaho law, consent may be:
  - Implied
  - Oral
  - Written

- The more significant the treatment, the greater the need to document informed consent.

- Other laws or payor standards may require documented consent.

Form of Consent

- "When the giving of such consent is recited or documented in writing and expressly authorizes the care ..., and when such writing or form has been executed or initialed by a person competent to give such consent for himself or another, such written consent, in the absence of convincing proof that it was secured maliciously or by fraud, is presumed to be valid for the furnishing of such care..., and the advice and disclosures of the attending [practitioner], as well as the level of informed awareness of the giver of such consent, shall be presumed to be sufficient."

(IC 39-4507)
Informed Consent

- “Consent, or refusal to consent, for the furnishing of health care ... shall be valid in all respects if the person giving or refusing the consent is sufficiently aware of pertinent facts respecting [1] the need for, [2] the nature of, and [3] the significant risks ordinarily attendant upon such a person receiving such care, as to permit the giving or withholding of such consent to be a reasonably informed decision.”
  (IC 39-4506)

- “Any such consent shall be deemed valid and so informed if the health care provider ... has made such disclosures and given such advice respecting pertinent facts and considerations as would ordinarily be made and given under the same or similar circumstances, by a like health care provider of good standing practicing in the same community.
  As used in this section, the term "in the same community" refers to that geographic area ordinarily served by the licensed general hospital at or nearest to which such consent is given.
  (IC 39-4506)

- “What info would other practitioners in community give?”

<table>
<thead>
<tr>
<th>Informed Consent = Communication</th>
<th>Consent form = Documentation</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Practitioner communicates info relevant to treatment</td>
<td></td>
</tr>
<tr>
<td>• Patient understands the material facts, e.g., benefits, risks, and likely consequence of the proposed treatment and alternatives.</td>
<td></td>
</tr>
<tr>
<td>• Patient makes informed decision to consent or refuse treatment.</td>
<td>• Supplements oral or other info given by the practitioner.</td>
</tr>
<tr>
<td></td>
<td>• Documents that the communication process took place, e.g., that practitioner communicated relevant info, patient understood info, and patient made voluntary, informed decision.</td>
</tr>
</tbody>
</table>
Informed Consent

• Ensure that resident understands.
  – Evaluate whether resident is in a condition so as to be able to process relevant info.
  – Speak at the resident’s level of understanding.
  – Beware language barriers.
    • Discrimination statutes may require interpreters, translators, or communication aids.
  – Supplement oral communications with written or visual material and documentation.
  – Give the resident an opportunity to ask questions and receive answers.

Informed Consent

• Informed consent typically requires disclosure of:
  – Nature of proposed treatment.
  – Potential benefits, risks or side effects, including problems that might occur during recuperation.
  – Likelihood of achieving goals.
  – Reasonable alternatives.
  – Relevant risks, benefits and side effects of alternatives, including consequences of not receiving care.
  – Persons who will perform significant aspects of treatment.

• What information would you want to make informed decision?

Voluntary Consent

• Consent must be voluntary.
  – Not coerced or obtained through intimidation.
  – Not given under duress, if possible.
  – Not obtained by fraud.
Responsibility for Obtaining Consent

- “Obtaining sufficient consent for health care is the duty of the attending health care provider upon whose order or at whose direction the contemplated health care ... is rendered.”
  (IC 39-4508)
- Practitioner is the person with the knowledge, training and licensure necessary to diagnose condition and have effective communication.
- Practitioner is the person who will be liable for failure to obtain informed consent.

- “A licensed hospital and any employee of a health care provider, acting with the approval of such an attending or other individual health care provider, may perform the ministerial act of documenting such consent by securing the completion and execution of a form or statement in which the giving of consent for such care is documented by or on behalf of the person.”
  (IC 39-4508)

Refusal of Treatment
Refusal of Treatment: Resident Self-Determination

- Idaho "recognizes the established common law and the fundamental right of [competent] persons to control the decisions relating to the rendering of their medical care, including the decision to have life-sustaining procedures withheld or withdrawn...." (IC 39-4509)
- Right to consent = right to refuse care or withdraw consent. (See IC 39-4502(7), "Consent to care" includes refusal to consent to care and/or withdrawal of care.)

Refusal of Treatment: "Against Medical Advice"

- Provide sufficient info to allow resident/representative to make informed refusal.
- Document in chart:
  - Resident's competency.
  - Representative's authority.
  - Explanation of risks and benefits.
  - Practitioner's attempt to obtain resident's informed consent.
  - Resident's signature confirming voluntary decision.
  - Witnesses.
- Attempt to obtain resident's signed refusal.

Refusal of Treatment: Surrogates

- Consent for health care "may be given or refused" by the authorized surrogate. (IC 39-4504(1))
- "Health care ... shall be withdrawn and denied in accordance with a valid directive" from:
  - a competent resident,
  - a resident's health care directive, or
  - by a resident's surrogate decision maker.
  
Exception: developmentally disabled person. (IC 39-4514(3))
Refusal of Treatment: Surrogates

- Child neglect = “without proper ... medical or other care ... necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them.”
  (IC 16-1602(25))
- Vulnerable adult neglect = “failure of a caretaker to provide ... medical care reasonably necessary to sustain the life and health of a vulnerable adult...”
  (IC 39-5302(8))
- Providers must report suspected neglect.
  (IC 16-1605; 39-5303)

Refusal of Treatment: Surrogates

- Practical advice for situations where surrogates refuse treatment recommended by provider:
  - If surrogates disagree regarding treatment:
    • Treatment not urgent: let them work it out.
    • Treatment is urgent: rely on consent to provide necessary care.
  - If treatment is not necessary to resident's wellbeing, provider should generally respect surrogate's authority.
  - If treatment is necessary, provider may need to report matter to appropriate authorities and let them handle.
  - Provider may petition the court directly or through appointment of temporary guardian.
  - Beware providing treatment without authority.

Refusal of Treatment: Developmentally Disabled

- "Developmental disability" means a chronic disability of a person which appears before the age of twenty-two (22) years of age and:
  (a) Is attributable to an impairment, such as intellectual disability, cerebral palsy, epilepsy, autism or other condition ... and
  (b) Results in substantial functional limitations in three (3) or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, or economic self-sufficiency; and
  (c) Reflects the need for a combination and sequence of special, interdisciplinary or generic care, treatment or other services which are of lifelong or extended duration and individually planned and coordinated.
  (IC 66-402(5))
- Determined by court and guardian appointed through process in IC 66-401 et seq.
Refusal of Treatment: Developmentally Disabled

- "No guardian appointed under [Title 66] shall have the authority to refuse or withhold consent for medically necessary treatment when the effect of withholding such treatment would seriously endanger the life or health and well-being of the person with a developmental disability. To withhold or attempt to withhold such treatment shall constitute neglect of the person and be cause for removal of the guardian."

- "No physician or caregiver shall withhold or withdraw such treatment for a respondent whose condition is not terminal or whose death is not imminent. If the physician or caregiver cannot obtain valid consent for medically necessary treatment from the guardian, he shall provide the medically necessary treatment as authorized by IC 39-4504(1)(i))."

(IG 66-405(7))

Refusal of Treatment: Developmentally Disabled

- "A guardian appointed under [Title 66] may consent to withholding or withdrawal of artificial life-sustaining procedures, only if the [developmentally disabled person]:
  (a) Has an incurable injury, disease, illness or condition, certified by the respondent’s attending physician and at least one (1) other physician to be terminal such that the application of artificial life-sustaining procedures would not result in the possibility of saving or significantly prolonging the life of the respondent, and would only serve to prolong the moment of the respondent’s death for a period of hours, days or weeks, and where both physicians certify that death is imminent, whether or not the life-sustaining procedures are used; or
  (b) Has been diagnosed by the respondent’s attending physician and at least one (1) other physician as being in a persistent vegetative state which is irreversible and from which the respondent will never regain consciousness."

(IG 66-405(8))

Refusal of Treatment: Developmentally Disabled

- To withhold or withdraw life-sustaining treatment for developmentally disabled person, attending physician + one other physician must certify:
  - resident has terminal condition such that the application of artificial life-sustaining procedures would not result in the possibility of saving or significantly prolonging the life of the developmentally disabled resident;
  - Procedures would only prolong the moment of the resident’s death for a period of hours, days or weeks; and
  - Death is imminent, whether or not the life-sustaining procedures are used.

(IG 66-405(8))

- With modern technology, it is very difficult to satisfy this standard.
Refusal of Treatment: Developmentally Disabled

- Possible limits on the standard in IC 66-405(7)-(8).
  - Only applies to residents who have been determined to be developmentally disabled and guardians appointed under process in IC 66-401 et seq.
  - May NOT apply if:
    • Resident has not been determined by court to be “developmentally disabled” under Title 66.
    • Guardians appointed under Title 15, not Title 66.
    • No guardian appointed.
  - But no court decisions on this yet.

Euthanasia or Assisted Suicide

- Idaho’s consent statute “does not make legal, and in no way condones, Euthanasia or Assisted Suicide, mercy killing, or assisted suicide or permit an affirmative or deliberate act or omission to end life, including any act or omission described in IC 18-4017, other than to allow the natural process of dying.”
  (IC 39-4514(2))

Advance Directives
Advance Directives

• Competent adult residents “have the fundamental right to control the decisions relating to their rendering of their medical care, including the decision to have life-sustaining procedures withheld or withdrawn.”
  (IC 39-4509)

• Competent adult may express their directives through:
  – Direct instructions by competent resident.
  – Be sure to document same.
  – Advance directives executed in case the resident becomes incompetent or unable to communicate.
  (See IC 39-4510)

Patient Self-Determination Act

• Hospitals, nursing facilities, HHAs, FQHCs, RHCs, hospices, and personal care nursing supervisors must:
  – Provide written info to residents regarding right to make decisions concerning their care and execute advance directives.
  – Document in prominent place in medical record whether resident has executed advance directive.
  – Not condition care or discriminate based on advance directive.
  – Educate staff and community regarding advance directives.

• Nursing homes must provide info at time of admission.
  (42 USC 1395cc(f); 42 CFR 489.102)

Nursing Home Resident Rights

• Facilities must “inform and provide written information to all adult residents concerning the right to … formulate an advance directive. This includes a written description of the facility’s policies to implement advance directives and applicable State law.”

• If an adult individual is incapacitated at the time of admission and is unable to receive information (due to the incapacitating condition or a mental disorder) or articulate whether or not he or she has executed an advance directive, the facility may give advance directive information to the individual’s family or surrogate in the same manner that it issues other materials about policies and procedures to the family of the incapacitated individual or to a surrogate or other concerned persons in accordance with State law. The facility is not relieved of its obligation to provide this information to the individual once he or she is no longer incapacitated or unable to receive such information. Follow-up procedures must be in place to provide the information to the individual directly at the appropriate time.
  (42 CFR 483.10)
Advance Directives

- Living Will
- Durable Power of Attorney
- Physician’s Order for Scope of Treatment (“POST”)
- Do Not Resuscitate (“DNR”)
- Mental Health Care Directives
- Others?

Advance Directives

- “Directive,” ‘advance directive’ or ‘health care directive’ means a document that:
  - substantially meets the requirements of Idaho Code 39-4510(1), Idaho Code [i.e., living will/durable power of attorney], or
  - is a Physician Orders for Scope of Treatment” (POST) form, or
  - is another document which represents a competent person’s authentic expression of such person’s wishes concerning his or her health care.” (IC 39-4502(8)).

Advance Directives

- Do not get too hung up on technical compliance with form.
- “It is not essential to the validity of any consent for the furnishing of hospital, medical, dental or surgical care, treatment or procedures that the consent be in writing or any other specific form of expression.” (IC 39-4507).
- “It is the intent of the legislature to establish an effective means for such communication. It is not the intent of the legislature that the procedures described in sections 39-4509 through 39-4515 [e.g., living wills, DPOAs, or POSTs] are the only effective means of such communication.... Any authentic expression of a person’s wishes with respect to health care should be honored.” (IC 39-4509(2)).
Living Will and Durable Power of Attorney

- Combined in single document executed by resident.
- Living will allows resident to direct whether and what type of artificial life-sustaining measures the resident should receive if the resident is incompetent.
- Durable power of attorney (“DPOA”) allows resident to appoint someone to make health care decisions for the resident if the resident is incompetent or unable to communicate wishes.
- Form is located at IC 39-4510 or http://www.ag.idaho.gov/livingWills/LivingWill_DurablePowerOfAttorney.pdf.

www.ag.idaho.gov/livingWills/livingWills_index.html
**Living Will**

- Applies only if resident:
  - Unable to communicate instructions;
  - Is not pregnant; and
  - Either:
    - Has incurable injury, disease, illness or condition and a medical doctor certifies:
      - Condition is terminal, and
      - Artificial life-sustaining procedures would only artificially prolong resident’s life, and
      - Death is imminent whether or not life-sustaining procedures utilized.
    - Is in persistent vegetative state.

*(IC 39-4510)*

**Living Will**

- Limited to decisions regarding artificial life-sustaining procedures, e.g.,
  - Provide procedures.
  - Withhold or withdraw all or certain life-sustaining procedures.
  - Hydration and nutrition.

*(IC 39-4510)*

- Must be supported by physician order.

**Durable Power of Attorney for Healthcare (“DPOA”)**

- Different than general power of attorney.
- Applies only if
  - resident incompetent or unable to communicate treatment wishes.
  - resident need NOT be terminal.
- Authority
  - Limited to authority granted in DPOA.
  - Broad authority granted unless DPOA includes limits.
  - resident may limit authority.
  - Decisions must be consistent with resident’s known desires, including living will.

*(IC 39-4510)*

* Not clear if it survives death.
**Durable Power of Attorney**

- Cannot serve as agents:
  - Treating provider
  - Non-relative employee of treating provider
  - Operator of community care facility
  - Non-relative employee of community care facility
- Designation of spouse revoked by divorce.
  (IC 39-4510)

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**Durable Power of Attorney**

- Surrogate decision makers
  - Court appointed guardian.
  - Person named in living will and durable power of attorney if conditions triggering authority are satisfied.
  - Spouse.
  - Adult child.
  - Parent.
  - Delegation of parental authority per IC 15-5-104.
  - Relative representing himself as appropriate responsible person to act under the circumstances.
  - Any other competent person representing himself or herself to be responsible for health care.
  (IC 39-4504(1))

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**General Power of Attorney**

- General power of attorney (POA) does not give holder the authority to make health care decisions.
- IC 39-4504 does not authorize holder of POA to consent to care.
  - POA may allow person to make decisions concerning finances.
  - POA may evidence that person is “another appropriate relative or person” to make health care decisions of no one with priority is present.
Living Will and DPOA

Requirements
• Executed by person who is competent under 39-4503.
• Contains the general elements in IC 39-4510.
• If executed in another state, “substantially complies” with the elements in IC 39-4510.
• Maker may execute by
  — Completing statutory form; or
  — Completing form that contains the required elements.
• Do not need notarization or witnesses.

* But remember: any authentic expression of resident’s wishes ought to be honored.

Physician Order for Scope of Treatment (POST)

• Form developed by DHW.
• Standing order for CPR and artificial life-sustaining care signed by:
  — Physician, PA, or advanced practice professional nurse (“APPN”),
  — resident or surrogate decision-maker, provided that surrogate cannot contradict the resident’s last known expressed wishes or directions.

• Designed to replace DNR and ComfortONE

* But remember: any authentic expression of resident’s wishes ought to be honored.
POST

• Form available to physicians, mid-levels, and facilities.
• Form available at www.idos.state.id.us/general/hcdr.htm.
• To obtain password, send email to idahopost@dhw.idaho.gov.
• To obtain bracelets, send email to idahopost@dhw.idaho.gov.

www.sos.idaho.gov/online/hcdr/getpostform.jsp

POST

• Attending physician or midlevel must:
  – If asked, discuss POST with resident or surrogate, complete form, and give resident or surrogate a copy.
  – Review form
    • Each time resident examined
    • Every 7 days if resident hospitalized
    • Transfer to different care setting
    • Substantial change in resident’s condition
    • Resident’s treatment preferences change
  – Issue superseding POST as conditions warrant.
  – Consult with the resident or surrogate whenever practical.

(IC 39-4512A)
• Providers must make reasonable efforts to inquire as to whether resident has completed a POST and inspect for POST jewelry if:
  – Situation requires artificial life-sustaining treatment, and
  – Not caused by
    • severe trauma,
    • mass casualty,
    • homicide, or
    • suicide.
(IC 39-4512C)

• Provider shall comply with POST if:
  – Presented with proper POST form; or
  – Resident wearing proper POST ID tag.
• Proper POST form is valid DNR in all Idaho facilities.
  – The POST transfers with the resident.
  – Cannot require additional docs to effect resident’s wishes.
• POST remains effective until revoked or new orders issued by the physician or midlevel.
• Copy is as good as original.
  (IC 39-4512B, 4514(9))
• Must honor POST form even if physician does not have privileges at facility.

• Provider may disregard POST if:
  – Believe in good faith that POST has been revoked;
  – To avoid oral or physical confrontation; or
  – If so ordered by attending physician.
(IC 39-4513(5))
Advance Directives: General Rules

Presumed Consent to Resuscitation

- Consent for CPR is presumed unless:
  - Surrogate decision-maker communicates resident’s wishes not to receive CPR and any conditions have been met;
  - Living will or DPOA is in effect in which resident declined CPR and conditions have been met;
  - POST is in effect in which resident declined CPR and conditions have been met.

(IC 39-4514(5))

[Website link: www.healthandwelfare.idaho.gov/Medical/EmergencyMedicalServicesHome/PhysicianCommission/PhysicianOrdersforScopeofTreatment(POST)/tabid/807/Default.aspx]
Valid Advance Directives

- Advance directive law changed in 2012.
- Living will, DPOA, POST or other advance directive executed before 1/1/12 is still valid if:
  - Form complied with law at time of its execution;
  - In another form that contained the elements in the Idaho statutes; or
  - Executed in another state and substantially complies with the requirements of Idaho law.
- “This section shall be liberally construed to give the effect to any authentic expression of the person’s prior wishes or directives concerning his or her health care.”
  (IC 39-4514(7); see also 39-4509(3))

Revocation of Advance Directive

- Maker may revoke at anytime by:
  - Intentionally canceling, defacing, obliterating, burning, tearing, or otherwise destroying the document by maker or in maker’s presence and at maker’s direction.
  - Written revocation signed by maker.
  - Oral revocation by maker.
  * What about other manifestation?
- Maker is responsible for notifying provider.
- Provider not liable for failing to act on revocation unless provider has actual knowledge of revocation.
  (IC 39-4511A)

Suspension of Advance Directive

- Advance directive is NOT automatically suspended during surgery.
- Maker may suspend an advance directive at anytime by:
  - Written, signed suspension by maker expressing intent to suspend.
  - Oral expression by maker expressing intent to suspend.
  * What about other manifestation?
- Upon meeting the termination terms of the suspension as defined by the maker, the living will, DPOA, POST or other advance directive will resume.
  (IC 39-4511B)
Immunity for Acting per Advance Directive

• Providers and facilities are immune from liability if:
  — Provider acts in good faith pursuant to the directives in a facially valid advance directive.
  — If provider cannot assist due to conscience, provider makes good faith effort to help resident obtain services of another provider before withdrawing from care of resident.

• Persons who exercise responsibilities of a DPOA in good faith are immune from liability.
  (IC 39-4513)

Idaho Health Care Directive Registry


• Providers may, but are not required to, check registry.
Advance Directives

Remember:

- Living wills, DPOAs, and POSTs are not the only means of effective communication of resident wishes.
- Any authentic expression of a person’s wishes with respect to health care should be honored.
  
  (IC 39-4509(3))
- This section shall be liberally construed to give the effect to any authentic expression of the person’s prior wishes or directives concerning his or her health care.
  
  (IC 39-4514(7))

Declaration for Mental Health Care

- Competent adult may declare his or her directives for certain types of mental health treatment and designate agent to make mental health decisions.
  
  – Similar to living will/DPOA.
- Declaration becomes effective only if resident is determined to be incompetent by:
  
  – Court,
  – two physicians, one of whom is a psychiatrist, or
  – physician and a professional mental health clinician.
  
  (IC 66-603)
Guardians and Conservators

Guardians: appointed by the court to care for and make decisions for the ward, including healthcare if within scope of order.
- General guardian:
- Developmental disability: NOT
- Surrogate decisionmaker not appointed by court.

Guardian ad litem: attorney appointed by court to represent ward during guardianship proceedings.

Conservators: appointed by the court to make financial decisions.

Questions?

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