Consent and Advance Directives

Kim C. Stanger
IHCA
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Preliminaries

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Today's Program

- Consent principles
  - Competency
  - Surrogates
- Refusal of consent or withdrawal of care
  - General
  - Special rules for developmentally disabled persons
- Advance directives

Bob Aldridge will address guardianships.
Written Materials

- Available through IHCA's website
  - Copy of .ppt slides
  - Idaho Medical Consent and Natural Death Act, IC 39-4501 to 39-4515
  - Care for Developmentally Disabled Statute, IC 66-405

Medical Consent and Natural Death Act (IC 39-4501 et seq.)

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.

Surrogates

- “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.”

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.
Refusal or Withdrawal of Treatment

Refusal of Treatment: Resident

- 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: 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)

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.

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)).”
  (IC 66-405(7))
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.”

(IC 66-405(8))

Problem: with modern technology, it is very difficult to satisfy this standard.

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.
Developmentally Disabled: Proposed Amendment

- Amendment would allow guardian and treating providers to withhold or withdraw treatment if:
  - The attending provider + another provider certify the patient is chronically and irreversibly comatose;
  - Treatment would merely prolong dying, would not be effective in ameliorating or correcting all of the patient's life-threatening conditions, or would otherwise be futile in terms of the survival of the patient; or
  - Treatment would be virtually futile in terms of the survival of the respondent and the treatment itself under such circumstances would be inhumane.
- Based on federal Baby Doe Regulations, IDAPA 16.06.05.004.10.

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)

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(3)).

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; or
  - POST is in effect in which resident declined CPR and conditions have been met.
  (IC 39-4514(5))

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.

Questions?

Kim C. Stanger
kcestanger@hollandhart.com
208-383-3913

Holland & Hart, LLP
Boise, Idaho