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Coates' Canons Blog: The Guardian’s Role in Health Care Decision-making

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A county director of social services may be appointed to serve as guardian for an adult who has been adjudicated incompetent by a clerk of superior court. Making decisions about health care, particularly end of life care, is often one of the most challenging issues a guardian may face. Sometimes, prior to being adjudicated incompetent, the adult may have expressed his or her wishes regarding some of these critical decisions. The adult may have discussed his or her wishes with family, friends or a doctor or possibly executed a health care power of attorney or living will. After the DSS director has been appointed guardian, what happens to those legal documents? How do they impact the DSS director’s authority and role as guardian?

Please note that this blog post is not intended to provide a comprehensive overview of end of life decision-making. Rather, the purpose is to help DSS directors who serve as guardians understand their responsibilities and the legal hierarchy of decision-making during these difficult times.

What is the role of the guardian with respect to health care decisions?

A general guardian or a guardian of the person has broad authority to be involved with the adult’s health care and to make decisions related to that care. The guardian “may give any consent or approval that may be necessary to enable the [adult] to receive medical, legal, psychological, or other professional care, counsel, treatment, or service…” G.S. 35A-1241 (3). The guardian may *not,* however, consent to the sterilization of a mentally ill or mentally retarded adult without an order from the clerk of court.

It is possible for an adult to have a general guardian or guardian of the person and still retain the authority to make health care decisions. A clerk of court may order a “limited guardianship,” which allows the clerk to allocate decision-making authority between the adult and the guardian. G.S. 35A-1212(a). For example, the clerk could order that the adult retain the authority to make health care decisions and the guardian has the authority to make all other decisions, such as those related to housing and employment.

While the general guardian or the guardian of the person has the legal authority to consent to health care independently (except for sterilization of the mentally ill or mentally retarded), the guardian may ask the clerk of court to “concur” in that consent. It’s unusual for a guardian, including a DSS director, to make this type of request. The guardian has the responsibility and authority to make decisions regarding the adult’s care and should have access to all of the necessary information to inform the decision. In addition, taking time to seek a concurrence could result in unnecessary delays in health care. It is unclear how a clerk’s failure to concur impacts the guardian’s authority to act, but it seems unlikely that a guardian would consent to the care, service, or treatment immediately following such a refusal. Further, the clerk always has the option of removing the guardian and appointing another guardian. G.S. 35A-1290.

What happens if the adult has a health care power of attorney?

Prior to being declared incompetent, the adult may have executed a health care power of attorney. This legal document identifies someone to act as the adult’s health care agent. G.S. Chapter 32A, Article 3. The adult may appoint any competent adult to serve as the agent, as long as that person is not engaged in providing health care to the adult for compensation.

The agent has the authority to make health care decisions on behalf of the adult if there is a written determination by a provider or other appropriate person that the adult lacks sufficient understanding or capacity to make or communicate health care decisions. The legal document will define the scope of the agent’s authority. It may allow the agent to have

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the same authority to make decisions that the adult would have had, including decisions related to end of life care, organ donation, and mental health treatment. The adult has the authority to modify or revoke the health care power of attorney as long as he or she is able to make and communicate health care decisions.

If an adult executed a valid health care power of attorney before the clerk declared the adult incompetent and appointed a guardian, there may be a question about whether the guardian or the health care agent has the authority to make health care decisions. ***The general rule is that the health care agent will retain the authority to make health care decisions after a general guardian or a guardian of the person is appointed.*** G.S. 32A-22(a) (health care power of attorney); G.S. 35A-1241(a)(3) (powers and duties of guardian); G.S. 35A-1208 (guardian may request suspension of health care agent); G.S. 90-21.13(c) (informed consent statute restating general rule).

This general rule will not apply if the guardian petitions the court to suspend the authority of the health care agent and the court agrees. The guardian must, however, provide notice of this petition to the health care agent. If the court suspends the health care agent's authority, it must direct "whether the guardian must act consistently with the health care power of attorney or whether and in what respect the guardian may deviate from it." G.S. 32A-22(a)

The adult may not have a health care power of attorney but rather a more expansive power of attorney that addresses not only health but also financial and property matters, such as a durable power of attorney or a statutory short-form power of attorney. G.S. 32A-2 (describing the potential powers and duties that may be assigned using the statutory short form for the power of attorney). The general rule described above granting superior authority to health care agents applies *only* to health care agents identified in health care powers of attorney executed pursuant to Article 3, of G.S. Chapter 32A. It does not apply to attorneys-in-fact identified in general powers of attorney executed pursuant to Article 1 or 2 of G.S. Chapter 32A. See, e.g., G.S. 32A-22; G.S. 90-21.13(c) (referring only to health care agents appointed pursuant to valid powers of attorney).

How will end of life decisions be made for an adult who has a guardian?

In certain circumstances, a provider will need to make important decisions related to provision or continuation of life-prolonging measures. A life-prolonging measure is a medical procedure or intervention that "would serve only to postpone artificially the moment of death by sustaining, restoring, or supplanting a vital function, including medical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and similar forms of treatment." G.S. 32A-16(4).

With respect to an adult with an appointed general guardian or guardian of the person (and not subject to limited guardianship, as discussed above), there has already been a judicial determination that someone else should make health care decisions on the adult's behalf. But it is important to recognize that the adult may still have a role in making decisions at this stage – either through an advance directive or through the revocation of an advance directive. As a result, the provider's deliberations about end of life decisions will likely require consideration of the following two questions:

- Has the adult expressed wishes regarding end of life care?
- Who is the authorized health care decision-maker?

Has the adult expressed wishes regarding end of life care?

Many adults have contemplated end of life care and expressed their wishes regarding their care and treatment. They may have done so informally, through conversations with family and friends, or formally through a legal document. The provider and the guardian will want to know about any of these wishes, regardless of when or how they were expressed or documented.

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Prior to being declared incompetent, the adult may have expressed wishes regarding end of life care by executing a living will (also referred to as an “advance directive” or a “declaration of a desire for natural death”). The adult’s attorney, prior medical providers, or family members may have a copy of any advance directive. It is also possible that a directive could be included in the state’s registry of advance directives (but inclusion in the registry is not mandatory for the directive to be valid). If the adult did execute such a directive, the guardian does *not* have the authority to revoke it. G.S. 35A-1208(b); G.S. 90-321(e). A health care agent would have the authority to revoke it if the health care power of attorney *expressly* authorizes the agent to do so. The adult, however, may revoke it at any time *regardless of the adult’s mental or physical condition*. G.S. 90-321(e).

A provider will look to an advance directive for guidance in the following three situations:

1. The adult has an incurable or irreversible condition that will result in the adult’s death within a relatively short period of time;
2. The adult becomes unconscious and, to a high degree of medical certainty, will never regain consciousness; or
3. The adult suffers from advanced dementia or another condition resulting in the loss of cognitive ability and that loss, to a high degree of medical certainty, is not reversible.

Outside those three situations, the provider will look to the authorized health care decision-maker to make choices for an adult who has a guardian.

Who is the authorized health care decision-maker? Does the adult have a health care agent? Or is the guardian authorized to make health care decisions?

As discussed above, the general rule is that a health care agent’s authority is superior to that of the guardian. If the adult does not have an advance directive or the conditions triggering the directive are not satisfied, the provider will consult with the person who has authority to make decisions about the adult’s health care. G.S. 90-322 (authorizing the provider to withhold or discontinue life-prolonging measures in some situations with concurrence from the legally recognized health care decision-maker). For example, a provider may consult with the authorized decision-maker about scope of treatment decisions – should antibiotics be provided if there is an infection? Should CPR be administered if the adult goes into cardiopulmonary arrest? Should intubation or mechanical ventilation be ordered if medically indicated but not expected to lead to an improved medical condition? The decision-maker (the agent or the guardian) may be asked to agree to a Medical Order for Scope of Treatment (MOST). A MOST is an order signed by a physician, physician’s assistant, or nurse practitioner that details many of these decisions and plans for a person who is nearing the end of life. G.S. 90-322; sample MOST form.

If the provider has not consulted with the decision-maker about these critical issues, the decision-maker may initiate the conversations with the health care team. If the adult is hospitalized, the decision-maker may also want to consult with the hospital’s ethics committee, as they are trained and experienced in navigating the complex issues confronted at the end of life.

Gathering information about the adult’s wishes regarding end of life care and knowing who the authorized health care decision-maker is before any crisis unfolds is part of the DSS director’s role in serving as guardian. This information is critically important, as it will empower the director to make informed decisions and will make this end of life journey easier on the adult, the providers, and the family. If you are interested in learning more about this topic, there are many helpful resources available through the medical and legal communities, including this collection of resources from the North Carolina Medical Society, this collection of resources from the Elder Law Clinic at Wake Forest University’s School of Law, and this brochure from the North Carolina Bar Association.

Links

- civil.sog.unc.edu/the-guardian-of-last-resort/
- ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_35A/GS_35A-1241.pdf
- ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_35A/GS_35A-1212.pdf
- ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_35A/GS_35A-1290.pdf

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