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Medical Decision-Making for Incapacitated Adult Patients Under Utah Law

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Healthcare providers generally are required to have an adult patient's consent before they can administer any type of medical care, which raises the question: Who has the authority under Utah state law to make medical decisions on behalf of an unconscious (or otherwise incapacitated) *adult* patient. In treating patients with COVID-19, this concern is particularly relevant, as an intubated patient will be sedated and unable to participate in their own medical decision-making. Therefore, it is critical that healthcare providers determine who holds such authority under the applicable state laws.

Under Utah law, an adult with the capacity to make healthcare decisions ("**Capacity**") retains the right to make healthcare decisions on their behalf.[1] Their decisions, however expressed or indicated, will always supersede any prior decisions or healthcare directives they may have made.[2] Also under Utah law, an adult is presumed to have Capacity, which means the ability to make an informed decision about receiving or refusing healthcare, when they have (i) the ability to understand the nature, extent, or probable consequences of health status and healthcare alternatives; (ii) the ability to make a rational evaluation of the burdens, risks, benefits, and alternatives of accepting or rejecting healthcare; and (iii) the ability to communicate a decision.[3]

To overcome the presumption that a particular patient has Capacity, a physician, APRN, or physician assistant[4] who has personally examined the adult patient must perform each of the following:

- find that the patient lacks Capacity;
- record the finding in the patient's medical chart and indicate whether the patient is likely to regain Capacity; and
- make a reasonable effort to communicate the determination to the patient, other healthcare providers, or healthcare facilities that the medical provider would routinely inform of such a finding, and any known surrogate decision maker (*e.g.*, an appointed agent, guardian or a Default Surrogate Decision-Maker (defined below)).[5]

Once the determination is made that an adult patient lacks Capacity (an "Incapacitated Patient"), the question then arises:

Who has the authority to make medical decisions on behalf of the Incapacitated Patient?

First, to determine who can make medical decisions on behalf of an Incapacitated Patient (a "**Surrogate Decision-Maker**"), one should determine if the Incapacitated Patient formerly designated an individual to act on their behalf in such situation[6] (an "**Agent**") or, alternatively, if the Incapacitated Patient has a court-appointed legal guardian.[7] Either an Agent or legal guardian would be the proper Surrogate Decision-Maker, with an Agent having priority over a legal guardian.[8]

In the absence of an Agent or legal guardian (including an Agent that is unavailable or unwilling to act on the Incapacitated Patient's behalf), Utah law designates who can act as a "**Default Surrogate Decision-Maker**."[9] The following family members (as long as they are over 18 years of age, have Capacity themselves, are available, and have not been disqualified by the Incapacitated Patient[10] or a court) can act as a Surrogate Decision-Maker, according to the following hierarchy, in *descending order of priority*:

- the patient's spouse, unless the patient is divorced or legally separated;
- a child;
- a parent;
- a sibling;
- a grandchild; or
- a grandparent.[11]

A person listed above may not act as the Surrogate Decision-Maker if a person of a higher priority class is able and willing to act as the Surrogate Decision-Maker.

If no family member listed above is available or willing to act as the Surrogate Decision-Maker, a non-family member can act as the Surrogate Decision-Maker if they: (i) are at least 18 years of age, (ii) have Capacity, (iii) have exhibited special care and concern for the patient; (iv) know the patient and the patient's personal values; and (v) are reasonably available to act as a Surrogate Decision-Maker.[12]

In those cases where there is more than one individual of the highest priority class that has assumed the role as a Surrogate Decision-Maker (*e.g.*, three adult children) and there is a disagreement between them about healthcare decisions, the provider must follow the majority decision.[13]

If an Incapacitated Patient does not have any family or friends available to act as their Surrogate Decision-Maker, Utah law is silent on who would then become the most appropriate decision-maker. However, it can be helpful to look to other state laws as guidance for this determination. For example, a few states allow clergy or other religious members to act as a Surrogate Decision-Maker.[14] Other states allow a treating or attending physician, provided there is consultation with and concurrence by a second physician.[15] Alternatively, some states allow healthcare decisions to be made following a consultation with the hospital's ethics committee.[16] Regardless of the approach taken, hospitals should create a uniform policy to be followed in such a situation and take care to follow and document

that process. This is especially important when making decisions on behalf of critically ill or terminally ill Incapacitated Patients.

Last, Surrogate Decision-Makers must make healthcare decisions in accordance with the Incapacitated Patient's current preferences (if known), their written or oral healthcare directions (*e.g.*, Living Will, statements previously made by patient prior to losing Capacity, or other advanced healthcare directive), or by using the substituted judgment standard.[17] The substituted judgment standard essentially requires a Surrogate Decision-Maker to consider the preferences of any adult patient who previously had Capacity to make their own decisions.[18] Moreover, Utah law provides that a court-appointed legal guardian of an adult Incapacitated Patient must comply with the patient's advanced healthcare directive and may not revoke the Incapacitated Patient's advanced healthcare directive, without court involvement.[19]

Healthcare providers should cooperate with Surrogate Decision-Makers and ordinarily also must comply with decisions made by the highest-ranking Surrogate Decision-Maker.[20] However, when the decision of a Surrogate Decision-Maker contravenes the known wishes of the Incapacitated Patient (e.g., Living Will, other written documents or statements made by patient prior to losing Capacity), the provider should carefully weigh the facts and evidence. Generally, the patient's wishes should be honored.[21] Utah law specifies that a healthcare provider does not have to comply with the decisions of the Surrogate Decision-Maker if, in the opinion of the healthcare provider, they have evidence that the Surrogate Decision-Maker's instructions are inconsistent with the Incapacitated Patient's healthcare instructions.[22]

Healthcare providers also can refuse to follow the decisions of Surrogate Decision-Makers when, in the opinion of the healthcare provider, (i) the Surrogate Decision-Maker lacks Capacity themselves (*e.g.*, mental illness, dementia, disability), or (ii) for a patient that has always lacked Capacity, the Surrogate Decision-Maker's instructions are inconsistent with the best interest of the adult.[23] Additionally, a healthcare provider can decline to follow the decisions of the Surrogate Decision-Maker for reasons of conscience.[24] In cases where a healthcare provider refuses to follow the wishes of the Surrogate Decision-Maker, among other things, the healthcare provider must communicate their decisions, attempt to resolve the conflict (where possible), and provide continuing care until the issue is resolved or the patient can be transferred.[25]

While it can be difficult for healthcare providers and facilities to wade through complicated scenarios involving Incapacitated Patients and decisions of Surrogate Decision-Makers, Utah law offers significant protections. A healthcare provider or facility that acts in good faith, consistent with generally accepted healthcare standards, and in accordance with the provisions contained in the Advance Health Care Directive Act will not be subject to civil or criminal liability or professional disciplinary action for providing or refusing to provide care to Incapacitated Patients.[26]

Protecting patients' rights to direct their own healthcare treatment requires

that providers thoughtfully approach situations where a patient's Capacity is at issue. Healthcare facilities should establish processes to (i) evaluate and document the Capacity of patients; (ii) determine the valid Surrogate Decision-Makers for Incapacitated Patients; (iii) verify that decisions by Surrogate Decision-Makers do not contravene any prior patient healthcare directives; and (iv) give providers an effective avenue for raising concerns that may arise related to Surrogate Decision-Makers and their treatment decisions.

We encourage you to visit Holland & Hart's Coronavirus Resource Site, a consolidated informational resource offering practical guidelines and proactive solutions to help companies protect their business interests and their workforce. The dynamic Resource Site is regularly refreshed with new topics and updates as the COVID-19 outbreak and the legal and regulatory responses continue to evolve. Sign up to receive updates and for upcoming webinars.

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[1]U.C.A. § 75-2a-109(1).
[2]U.C.A. § 75-2a-109(2).
[3]U.C.A. §§ 75-2a-104, 75-2a-103(13).
[4]The physician assistant must be permitted to make determinations of Capacity under their delegation of services agreement with their supervising physician. U.C.A. § 75-2a-104(6).
[5]U.C.A. §§ 75-2a-104(2), 75-2a-103(23). It should also be noted that under Utah law, a patient can challenge the determination that they lack Capacity by submitting written notice or orally informing the healthcare provider that the patient disagrees with the finding. In such case, the healthcare provider must treat the patient as having Capacity unless a court deems otherwise. U.C.A. § 75-2a-104(3).
[6]Designation of an agent can occur via a written document executed by the adult patient (e.g., Living Will, Medical Power of Attorney) or a witnessed oral statement. *See* U.C.A. § 75-2a-103(2).
[7]U.C.A. §§ 75-2a-111(1), 75-2a-112(2).
[8]U.C.A. § 75-2a-108
[9]An adult patient, even if found to lack Capacity, can disqualify a family member or friend from acting as their Surrogate Decision-Maker by personally informing a witness of the disqualification (*e.g.*, telling a nurse or provider), providing a signed writing, or informing the individual trying to act as a Surrogate Decision-Maker. U.C.A. § 75-2a-108(5).
[10]U.C.A. § 75-2a-108(1).
[11]U.C.A. § 75-2a-108(2). However, if the provider has reasonable doubts about an individual's right to act as a Surrogate Decision-Maker (*e.g.*,

someone claiming to be the spouse of an individual and the provider doubts such statement), the healthcare provider may require the person to provide a sworn statement giving facts and circumstances reasonably sufficient to establish the claimed authority, or seek a ruling from the court. U.C.A. § 75-2a-108(6).
[12]U.C.A. § 75-2a-108(4).
[13]*See, e.g.*, TX Health & Safety Code § 313.001.
[14]*See, e.g.*, A.R.S. § 36-3231. Note, however, that some states disqualify the patient's healthcare providers. Tenn. Code Ann. § 68-11-1806.
[15]*See, e.g.*, A.R.S. § 36-3231.
[16]U.C.A. § 75-2a-110(1).
[17]"Substituted judgment" requires the surrogate to consider: (a) specific preferences expressed by the adult when the adult had the capacity to make healthcare decisions; and at the time the decision is being made; (b) the surrogate's understanding of the adult's healthcare preferences; (c) the surrogate's understanding of what the adult would have wanted under the circumstances; and (d) to the extent that the preferences described in (a) through (c) are unknown, the best interest of the adult. U.C.A. § 75-2a-103(22).
[18]U.C.A. § 75-2a-112(1).
[19]U.C.A. § 75-2a-115(4)(a).
[20]U.C.A. § 75-2a-115(4)(a)(ii).
[21]U.C.A. § 75-2a-115(4)(b)(i)(C). A healthcare provider may seek a ruling from a court if they have evidence that a surrogate is making decisions that are inconsistent with an adult patient's wishes or preferences. U.C.A. § 75-2a-108(1)(d).
[22]U.C.A. § 75-2a-115(4)(b).
[23]Id.
[24]U.C.A. § 75-2a-115(4)(c)–(e).
[25]U.C.A. § 75-2a-115(3).

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