

# The Resident Wants Marlboros ... Who Should I Listen To?



## **ADVOCATING FOR RESIDENTS WHO HAVE LEGAL REPRESENTATIVES**

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## Some General Examples



- Resident wants to visit a longtime friend, but the legal representative is concerned about the friend.
- Resident wants to remain at one facility, but the legal representative believes it would be better for the resident to reside in a different one.
- Resident wants to continue receiving therapy, but the legal representative believes Hospice care is more appropriate
- Resident wants to smoke or specifically wants to smoke Marlboros!

# Objectives



- Identify with whom the advocate will deal with: the resident, legal representative or both
- Contrast the resident's rights and desires with the legal representative's powers and duties.
- Explain both the substituted decision-making standard and the best interests standard and identify when each standard should be used.
- Apply statutory requirements and ethical considerations to resolve specific situations.

# General Principles



- Every adult is legally competent to make decisions for himself or herself unless the right to make such decisions has been judicially removed
- An adult can delegate his or her authority to make decisions to another person
- Advance directives and other such documents can only be signed by competent adults
- Competent adults may revoke these documents at any time

# What Is A Legal Representative?



- Legal representative - a person authorized by law to act on someone else's behalf
- Types of legal representatives includes: health care proxies, health care surrogates, powers of attorney, trustees, representative payees, guardian advocates, conservators and guardians
- Authority may or may not be stated in a legal document

# Advocating For Residents



- Cami calls your advocacy organization and reports that she visited her grandmother, who lives at Pleasant Hill Nursing Home, during dinner. Her grandmother was given only a small amount of food and is always hungry. The advocate visits the resident and speaks with the resident who confirms Cami's report and wants the advocate to help her. The resident mentions that Cathy, her daughter, is her guardian.

# Advocating For Residents



- *Whom should the advocate look to for direction to resolve the issue?*
- *Should the advocate proceed differently if Cathy is a POA?*
- *What if Cathy is a health care surrogate or proxy?*

# Who Should the Advocate Listen to?



- Resident, if legally and actually able to provide direction
- Resident can always request the advocate accept opinions and advice from others, including family members, healthcare providers and legal representatives
- If resident is unable to provide direction, legal representative decides if decision is within representative's powers and duties



# Types of Legal Representatives



- Health Care Surrogates / Proxies
- Powers of Attorney
- Representative Payees
- Trustees
- Guardian Advocates
- Guardians and Conservators

# Health Care Surrogate or Proxy



- Makes health care decisions for an incapacitated individual
- Incapacity is documented by the *attending physician* who has examined the resident to determine capacity
- Decisions must be based on informed consent, using substituted decision-making
- Only when the resident's choice is not clear, proxy uses the best interest standard

# What Can a Proxy/Surrogate Do?



- Decide on a course of treatment/refusal of treatment
- Provide informed consent for treatment
- Admit to a hospital or long-term care facility
- Apply for public benefits
- Make end of life decisions

# Powers of Attorney



- Permits someone else to manage a person's finances
- Principal retains the right to make decisions as he/she chooses
- Many now include the authority to make healthcare decisions
- When durable, it continues even if a physician or court finds a resident incapacitated
- Agent or attorney-in-fact acts on the principal's behalf; expected to perform as the principal directs

# What Can a Power of Attorney Do?



- Agent can exercise powers listed in the document.
- All-inclusive clause that says agent can exercise “any powers that I can legally exercise” probably does not include health care or social decisions if all other listed powers relate to finances.
- Agent cannot override a competent principal’s decision.
- Advocate should read the document carefully!

# Representative Payee



- Agent designated by SSA or VA to be the custodian of a resident's governmental benefit
- Accepts the resident's funds from the government and utilizes them for the resident's benefit
- Authority is limited to the specific asset for which the rep payee has been designated

# Trustee



- Manages the resident's assets that have been placed in the trust
- Utilizes the assets for the resident's benefit
- Authority is limited to the specific assets held in the trust

# Guardians/Conservators/Guardian Advocates



- Court authorized agent, empowered and authorized by the court to manage a resident's affairs
- Powers and duties are listed in state statutes and include:
  - Making health care decisions
  - Making financial decisions
  - Applying for governmental benefits
  - Making social decisions
  - Admitting and removing from a facility



# What Can a Guardian Do?



- Exercise those rights that a court has removed from the resident and delegated to the guardian
- Some rights cannot be delegated to another person
- Some rights and decisions require court approval

# Ward's Retained Rights



- In Florida, wards retain certain enumerated rights including the right to:
  - Remain as independent as possible
  - Restored to capacity at the earliest possible time
  - Continuing review of the need for restriction of his or her rights
  - Access to the courts and to counsel
  - Receive services and rehabilitation necessary to maximize the quality of life
  - Free from discrimination because of his or her incapacity
  - Receive visitors and communicate with others

# What Standard Does a Legal Representative Use When Making a Decision?



- Substituted Decision-Making
- Best Interests Standard

# Decision-Making Standards

## *Standard 7, NGA Model Standards of Practice*



- ◉ *Substituted decision-making*: What the resident would have decided or wanted. Is not used when following the resident's wishes would cause *substantial harm* to the resident or when the guardian cannot establish the resident's prior wishes.
- ◉ *Best interests standard*: Used when the legal representative cannot determine what the resident wants or when following the resident's wishes would cause substantial harm. Should make the least intrusive, most normalizing decision and consider both previously expressed and current preferences.

# Which One to Use?

## *NGA Model Code of Ethics*



- Use substituted decision-making in most situations
- Use the best interests standard as a last resort, only in cases where the resident was never competent or where no indication of preference can guide the guardian.
- Understand the current and past functional status of the resident in order to apply the proper standard to the decision.

# Using Substituted Decision-Making



- The legal representative must communicate with the resident when possible. Even a resident who cannot fully participate in the process may be able to indicate a preference.
- Consider the significance of the decision.
- Consider the resident's behavior and choices before incapacity.
- Communicate with family members, friends, physicians, caretakers and other interested persons.
- Override the resident's decision only when *substantial harm* is likely to occur.

# Using the Best Interests Standard



- Consider the choice a reasonable person would make under the circumstances.
- Gather information from all available sources.
- Speak with physicians, caregivers, family members and friends, as necessary.
- Seek independent opinions as necessary.

# Advocating for Residents



- Dan says his son, who is his health care proxy, has decided Dan can no longer participate in therapy. Dan would like to continue working on strengthening his legs and walking with his therapist. Dan has a terminal heart condition, but he could live another two years. The facility will not allow Dan to participate in activities and are following the proxy's wish that only comfort care is provided. *How would you proceed to resolve this case?*



# Advocating for Residents



Charlie complains that he cannot contact family members as he would like to. An advocate visits Charlie at Grace Village and Charlie gives the advocate permission to discuss his case with the administrator. The administrator informs the advocate that, per Charlie's guardian, he is not allowed to receive any phone calls from his family. *How should the advocate proceed?*

# Advocating for Residents



- If the guardian informs the advocate that no contact is allowed because Charlie's family has exploited him in the past and will continue to exploit him, is there anything the advocate can do?
- If so, what can the advocate do?

# Advocating for Residents



Before incapacity, Jethro enjoyed hanging out at The Dome Lounge and shooting darts with friends. He even took the bus from Sand & Surf ALF to the Dome after moving into the facility last year. During one match, he bet \$5000 on a game and lost. He also frequently likes to buy a round for the whole lounge. Brad, Jethro's guardian, is concerned about Jethro going to the Dome and wants to prohibit Jethro from going. What can the advocate do to help resolve this issue for Jethro?

# Advocating for Residents



Martha has lived at Sunshine Acres Nursing Home for four years. She has several friends and enjoys playing in the facility's Wii bowling league. Suzie, her guardian is considering moving her to another skilled nursing facility. Martha adamantly states that she does not want to move. What should the advocate do? When and how is it appropriate for Suzie to consider the Martha's finances?

# Questions?



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