WHO CAN LEGALLY SPEAK FOR A PATIENT

A PRESENTATION BY ATTORNEY JIM WHITLATCH

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There are several ways that a patient can be spoken for in respect to medical decisions when not able to speak for themselves. These methods include, but may not be limited to: (1) Durable Power of Attorneys; (2) Appointment of Health Care Representatives; (3) Living Wills and Live Prolonging Procedures Declarations; (4) Guardians; or, (5) by virtue of a relationship recognized by the Indiana Health Care Consent Statute.

1. **Durable Power of Attorney**

   Durable Power of Attorney statutes permits delegations of health care decision making authority to a representative or agent conditioned upon the delegating individual’s loss of capacity to act on his or her own behalf.

   The Indiana Code defines *Durable Power of Attorney* as follows: a power of attorney that:

   (1) Is executed by an incapacitated person before that person became incapacitated;
(2) Provides that the power survives the person’s incompetence; and
(3) Is executed in accordance with the law in effect in the jurisdiction in which it was executed.

   IC 30-5-5-16 confers general authority with respect to health care powers, by allowing a principal to authorize an attorney in fact to do the following:

   (1) Employ or contract with servants, companions, or health care providers to care for the principal
(2) Consent to or refuse health care for the principal
(3) Admit or release the principal from a hospital or health care facility
(4) Have access to records, including medical records, concerning the principal’s condition
(5) Make anatomical gifts on the principal’s behalf
(6) Request an autopsy
(7) Make plans for the disposition of the principal’s body
If the attorney in fact has the authority to consent to or refuse health care, the attorney in fact may be empowered to ask in the name of the principal for health care to be withdrawn or withheld when it is not beneficial or when any benefits is outweighed by the demands of the treatment and death may result. To empower the attorney to act, the following language, in substantially this form, must be included in an appointment:

I authorize my health care representative to make decisions in my best interest concerning withdrawal or withholding of health care. If at any time based on my previously expressed preferences and the diagnosis and prognosis my health care representative is satisfied that certain health care is not or would not be beneficial or that such health care is or would be excessively burdensome, then my health care representative may express my will that such health care be withheld or withdrawn and may consent on my behalf that any or all health care be discontinued or not instituted, even if death may result.

My health care representative must try to discuss this decision with me. However, if I am unable to communicate, my health care representative may make such a decision for me, after consultation with my physician or physicians and other relevant health care givers. To the extent appropriate, my health care representative may also discuss this decision with my family and others to the extent they are available.

See IC 30-5-5-17

In order to be valid, a power of attorney must meet the following conditions: (1) Be in writing; (2) Name an attorney in fact; (3) Give the attorney in fact the power to act on behalf of the principal; and, (4) Be signed by the principal in the presence of a notary public. See IC 30-5-4-1

2. Appointed Health Care Representative

The second provision equivalent to a durable power of attorney is found in IC 16-36-1-7, which gives an individual who may consent to health care (generally, an adult) the authority to appoint another individual as a representative to act for the appointor in matter affecting the appointor’s health care. Under this section, the appointment and any amendment must be in writing, be signed by the appointor or by the designee in the appointor’s presence, and be witnessed by an adult other than the representative. This section also imposes the following guidelines: (1) The appointor may specify appropriate terms and conditions; (2) The appointment does not commence until the appointor becomes incapable of consenting, and the authority granted in the appointment is not effective if the appointor regains the capacity to consent; (3) A representative appointed has priority to act in all matters of health care for the appointor; (4) In making all decisions regarding the appointor’s health care, a representative must act in good faith and in the best interest of the appointor consistent with the purpose expressed in the appointment.
In addition, an individual who may consent to their own health care may disqualify others from consenting to their health care. A disqualification must be in writing, be signed by the individual, and be designate those disqualified. A health care provider who knows of such written disqualification may not accept consent to health care from a disqualified individual. See IC 16-36-1-9

3. Living Wills and Life Prolonging Procedures Declaration

Living wills provide for directed decision-making by empowering individuals to declare in advance how they would like certain treatment decisions made if they later lose the capacity to give or withhold consent. More specifically, a living wills declaration instructs a physician to withhold life prolonging procedures if death is imminent. In comparison, a life prolonging procedures declaration instructs the physician to perform all life prolonging treatment upon the declarant with a terminal condition.

A person who is of sound mind and is at least eighteen years of age may execute a living will declaration or a life prolonging procedures declaration. Both types of declarations must meet the following conditions: (1) Be voluntary; (2) Be in writing; (3) Be signed by the person making the declaration or by another person in the declarant's presence and at the declarant's express direction; (4) Be dated; (5) Be signed in the presence of at least two competent witnesses who are at least eighteen years of age. See IC 16-36-4-8

However, in the case of a living will witness, the witness may not: (1) Be the person who signed the declaration on behalf of and at the direction of the declarant; (2) Be a parent, spouse, or child of the declarant; (3) Be entitled to any part of the declarant's estate whether the declarant dies testate or intestate, including whether the witness could take from the declarant's estate if the declarant's will is declared invalid; (4) Be directly financially responsible for declarant's medical care. Id.

The living will declarant or the life prolonging procedures will declarant is required to notify the declarant's attending physician of the existence of the declaration. The attending physician who is notified is required to then make the declaration or a copy of the declaration a part of the individual's medical records. Id.

The Indiana Code provides model forms for both the life prolonging procedures will and the living will, and the declarations must substantially follow these model forms. However, a declaration may include additional, specific directions, and the invalidity of these additional directions will not affect the validity of the main declaration. See IC 16-36-4-9

The form for the living will declaration is set out in IC 16-36-4-10. The heart of the language contained in the form follows:

I...willfully and voluntarily make known my desires that my dying shall not be artificially prolonged under the circumstances set forth below, and I declare:
If at any time my attending physician certifies in writing that: (1) I have an incurable injury, disease, or illness; (2) my death will occur within a short time; and (3) the use of life prolonging procedures would serve only to artificially prolong the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the performance or provision of any medical procedure or medication necessary to provide me with comfort care or to alleviate pain, and, if I have so indicated below, the provision of artificially supplied nutrition and hydration...

Similarly, the form for the life prolonging procedures declaration is set out in IC 16-36-4-11. The relevant language states:

I...willfully and voluntarily make known my desire that if at any time I have an incurable injury, disease, or illness determined to be a terminal condition I request the use of life prolonging procedures that would extend my life, to provide comfort care, or to alleviate pain...

Both living will declarations and life prolonging procedure declarations may be revoked at any time by the declarant by any of the following means: (1) A signed, dated writing; (2) Physical cancellation or destruction of the declaration by the declarant or another in the declarant's presence and at the declarant's direction; (3) An oral expression of intent to revoke. Such revocation is effective when communicated to the attending physician. See IC 16-36-4-12

4. **Guardians**

“Guardian” means a person who is a fiduciary and is appointed by a court to be a guardian or conservator responsible as the court may direct for the person or the property of an incapacitated person or a minor. The term includes a temporary guardian, a limited guardian, and a successor guardian but excludes one who is only a guardian ad litem. The terms guardian and conservator are interchangeable. “Incapacitated person” means an individual who:

(1) Cannot be located upon reasonable inquiry;
(2) Is unable:
   a. to manage in whole or in part of the individual’s property;
   b. to provide self-care; or,
   c. both;
   because of insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undue influence of others on the individual, or other incapacity; or
(3) Has a developmental disability.
5. **Indiana Health Care Consent Statute**

Normally, adult individuals may consent to their own health care. However, this is not the case when it is the good faith opinion of the attending physician that the individual is incapable of making a decision regarding the proposed health care. *See* IC 16-36-1-3 and 16-36-1-4. Therefore, if an adult individual is incapable of consent and has not appointed a health care representative, or the appointed representative is not reasonably available or declines to act, consent to health care may be given by: (1) A judicially appointed guardian of the person or a representative appointed by the Probate Court under IC 16-36-1-8; or (2) a spouse, a parent, an adult child, or an adult sibling; or (3) the individual's religious superior. However, options two and three are only available if option one is unavailable due to there being no guardian or other representative or because the guardian is not reasonably available or refuses to act. *See* IC 16-36-1-5.

A health care provider or any interested individual may petition the probate court in the county where the individual who is the subject of the petition is present for purposes of receiving health care to: (1) make a health care decision or order health care for an individual incapable of consenting; or (2) appoint a representative to act for the individual. *See* IC 16-36-1-8. The probate court may then hold a hearing and may order health care, appoint a representative to make a health care decision for the individual incapable of consenting to health care with the limitations on the authority of the representative as the probate court considers appropriate, or order any other appropriate relief in the best interest of the individual if the probate court finds the following: (1) A health care decision is required for the individual; (2) The individual is incapable of consenting to health care; (3) There is no individual authorized to consent or an individual authorized to consent to health care is not reasonably available, declines to act, or is not acting in the best interest of the individual in need of the health care. *Id.*

The right to make healthcare decisions for a minor may also be delegated pursuant to IC 16-36-1-3. Additionally, a minor may consent to their own health care if the individual is:

(2) a minor and:

(A) is emancipated;

(B) is:

   (i) at least fourteen (14) years of age;

   (ii) not dependent on a parent for support;

   (iii) living apart from the minor's parents or from an individual in loco parentis; and

   (iv) managing the minor's own affairs;

(C) is or has been married;

(D) is in the military service of the United States; or

(E) is authorized to consent to the health care by any other statute.

(b) A person at least seventeen (17) years of age is eligible to donate blood in a voluntary and noncompensatory blood program without obtaining parental permission.
(c) A person who is sixteen (16) years of age is eligible to donate blood in a voluntary and noncompensatory blood program if the person has obtained written permission from the person's parent.

(d) An individual who has, suspects that the individual has, or has been exposed to a venereal disease is competent to give consent for medical or hospital care or treatment of the individual.

**DNR ORDERS**

In 1999, Indiana adopted chapter 16-36-5 of the Indiana Code, which addresses the topic of "Out of Hospital Do Not Resuscitate (DNR) Declarations". "Out of hospital" refers to a location other than: (1) an acute care hospital licensed under IC 16-21-2; or (2) a health facility licensed under IC 16-28. See IC 16-36-5-5

A Do Not Resuscitate declaration may be executed by a person who is of sound mind and at least eighteen years of age. See IC 16-36-5-11. In addition, a DNR declaration may be executed by a person's representative only if the person is at least eighteen years of age and incompetent. Id. A "representative" means a person's (1) legal guardian or other court appointed representative responsible for making health care decisions for the person; (2) health care representative under IC 16-36-1; or (3) attorney in fact for health care appointed under IC 30-5-5-16. See IC 16-36-5-9

An out of hospital DNR order may be issued only by the declarant's attending physician and only if the attending physician has determined that the patient is a qualified person and if the patient has executed the required out of hospital DNR declaration. See IC 16-36-5-12. A qualified person means an individual that an attending physician has certified as a qualified person because the physician has determined that one of the following conditions is met: (1) the person has a terminal condition; (2) the person has a medical condition such that, if the person were to suffer cardiac or pulmonary failure, resuscitation would be unsuccessful or within a short period the person would experience repeated cardiac or pulmonary failure resulting in death. See IC 16-36-5-10. A terminal condition is defined as a condition caused by injury, disease, or illness from which, to a reasonable degree of medical certainty there can be no recovery and death will occur from the terminal condition within a short period of time without the provision of life prolonging procedures See IC 16-36-4-5

The required forms for the out of hospital do not resuscitate declaration and order are both set out in IC 16-36-5-15. Copies of a person's the hospital DNR declaration and order are required to be kept by both the declarant's attending physician in the declarant's medical file and by the declarant or the declarant's representative. See IC 16-36-5-16.

After the out of hospital DNR declaration and order has been executed by a declarant and an attending physician, an identification device may be created for the declarant. The identification device must be a necklace or bracelet that is inscribed with the declarant's name, date of birth, and the words "Do Not Resuscitate". See IC 16-36-5-17.
PSYCHIATRIC ADVANCE DIRECTIVES

"Psychiatric advance directive" means a written instrument that expresses the individual's preference and consent to the administration of treatment measures for a specific diagnosis for the care and treatment of the individual's mental illness during subsequent periods of incapacity.

An individual may specify in the psychiatric advance directive treatment measures, including:

1. Admission to an inpatient setting;
2. The administration of prescribed medication:
   (A) orally; or
   (B) by injection;
3. Physical restraint;
4. Seclusion;
5. Electroconvulsive therapy; or
6. Mental health counseling;
for the care and treatment of the individual's mental illness during a period when the individual is incapacitated.

CONSENT TO AUTOPSY

The consent to an autopsy must contain the purpose of and extent of the dissection so authorized and may be obtained only by the use of at least one (1) of the following:

1. A written instrument
2. A telegram
3. A witnessed telephone conversation

Consent for a licensed physician to conduct an autopsy of the body of a deceased person is sufficient when given by the following persons if the persons survive the deceased:

1. By the surviving spouse. However; if the deceased and the surviving spouse were legally separated at the date of death, the survivor is not considered a surviving spouse.
2. If there is no surviving spouse, then by any one (1) adult child of the deceased.
3. If there is no surviving spouse or adult child of the deceased, then by one (1) parent of the deceased.
4. If there is no surviving spouse, adult child, or parent and there is an adult who is next of kin of the deceased residing in the county in which the deceased died a resident, then by any one (1) next of kin.
5. If there is no surviving spouse, adult child, parent, or next of kin, then by any person assuming custody of and financial responsibility for the burial of the body

(b) If there is more than one (1) person authorized to consent, consent of one (1) of the persons is sufficient.
1. You have any 82 year old patient who has been with you for five years. For the past five years she has been a "no code" patient. However, in August of this year she tells your social services staff that she wants to be a "code" patient. This means that everything will be done to preserve her life.

It is now November and her condition has deteriorated considerably. She is no longer able to talk. Her treating physician and her daughter discuss her condition and both agree that she should be a "no code". Consequently, the physician writes a "no code" in the medical records. Your social worker gets upset because of her August conversation with the patient. Everyone agrees that a "no code" order is a sound medical decision. What do you do?

2. You have a patient come to your hospital from a small rural nursing home. She has fallen and broken her hip. The patient is in the late stages of Alzheimer's and is not capable of understanding the medical care being proposed. Her hip should be operated on, although it is not an emergency situation. The patient has no guardian and no known relatives. Is consent needed? If consent is needed, how is the consent obtained?

3. You are the director of a hospital emergency department. You have a 15 year old female come to your emergency room alone. The 15 year old wants to have a pelvic exam and pregnancy test performed. However, she does not want her parents to know that she has been examined or that she has come to the emergency room. What do you do?

4. Same facts as in number 3, except that the 15 year old is brought in by her parents. Also, in this case the parents want the exam but the 15 year old refuses. What do you do?
5. Same facts as number 2, except that the patient is in the earlier stages of Alzheimer's. The patient says that she wants the surgery; however, your nursing staff does not believe the patient understands what is being said to her. The treating physician, however, does believe the patient is capable of understanding. What do you do? What do you do if the patient says that they do not want the surgery?

6. You have a patient at your hospital who has been in an automobile accident which has caused severe head injuries. The patient is in a coma. The physician gives the family two choices. One choice is not to operate. Under this choice, the patient only has a 5 in 100 chance of surviving. However, if he survives his chances of a good recovery with little brain damage are good. The second choice is to do surgery. If surgery is performed his chances of survival increase to 50 in 100. However, he will almost certainly have some brain damage caused by the surgery. This will probably mean he will need around the clock care and will not be anything like he was prior to the accident. The patient's ex-wife and his adult children from his first marriage consent to the operation. The patient's current wife refuses to consent. What do you do?

7. You have a 16 year old female bring her six month old baby to the emergency room. The 16 year old is living at home with her parents. The parents of the 16 year old are unavailable. The six month old needs treatment. Can the 16 year old consent?

8. Same facts as number 6, except that the patient had appointed his current wife as his health care representative prior to the accident.

9. A police officer brings an individual to your emergency department. The police officer wants you to pump the individual's stomach because he swallowed some pills during a drug raid. The individual does not want this done. What do you do?