

The Iris Project

Surrogate Healthcare Decision Makers in Colorado

In Colorado, when an adult is unable to make her own decisions regarding healthcare, there are several possible types of “surrogate” (or substitute) decision maker who by various means have the authority to make decisions about medical treatment and procedures, placement for healthcare, and healthcare providers: Guardians, Healthcare Agents, Proxy Decision Makers, and Designated Beneficiaries. Guardians are appointed through a legal process; this paper addresses the other three: agents, proxies, and designated beneficiaries.

A **Healthcare Agent** is appointed by a person (the “principal”) when he is still able to make his own decisions (or, has “decisional capacity”). The principal signs a document called a “Medical Durable Power of Attorney” (MDPOA), which grants the authority to the Agent to make healthcare decisions for the principal when he cannot, due to illness or injury.

In many other states, there is a “default” list of surrogate decision makers who are empowered to make decisions for an adult who cannot make her own choices. Typically this list starts with the person’s spouse, then her parents, then adult children,

then siblings, and so on. In Colorado, if a person has not appointed a Healthcare Agent, no one automatically has decision-making authority for another person. So if a person has not appointed an Agent, and healthcare decisions must be made on her behalf, a **Proxy Decision Maker** must be selected.

In this case, the person’s physician first determines and documents that the person lacks decisional capacity. Then the physician, or someone she designates, must make a reasonable effort to locate “as many interested persons” as possible. “Interested persons” includes the person’s spouse, parent, adult children, siblings, adult grandchildren, or any close friend. This group must then reach agreement on which one of them should make decisions on behalf of the person who is ill or injured. This person selected by the group is called the Proxy Decision Maker. (Many people use the word “Proxy” when they really mean “Agent”—in most states there is no difference, but in Colorado, they really are two different things.)

The Proxy Decision Maker should be the “interested person” who knows the principal best and has the best chance

of being able to make decisions as the principal would. If any one of the group disagrees with the selection of the Proxy or the group cannot come to an agreement on any one Proxy, then any one of them can go to Court and start guardianship proceedings.

A Proxy Decision Maker has almost all the same authority and powers of the principal or a Healthcare Agent—except one: a Proxy may not decide to withhold or withdraw artificial nutrition or hydration (ANH) from the principal unless and until two physicians, one of them trained in neurology, determine that providing ANH is unlikely to help the principal recover and would only prolong the dying process.

In the 2009 legislative session, Colorado lawmakers created a new type of surrogate medical decision maker: the **Designated Beneficiary (DB)**. By completing a DB agreement, two adults who are not married to each other or to anyone else may grant or withhold a number of rights of inheritance, decision making, and other actions on behalf of the other. The agreement must be signed by both parties, notarized, and filed with the County Clerk in the county where at least one of the parties resides.

Among many other options, the parties to the agreement may grant or withhold the right to make health care decisions on their behalf. While it is not clear in the statute, it appears that a DB who has been granted the right to make healthcare decisions is thereby selected as that person's Proxy Decision Maker—without going through a Proxy selection process.

The DB does not have the full powers of a Healthcare Agent, and if either party has appointed an Agent before signing the DB agreement or appoints one after, the Agent has the power of decision making over the DB-Proxy.

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The powers of a Healthcare Agent or Proxy Decision Maker only last as long as the principal lacks decisional capacity, whether this is for a short time (for instance, during recovery from an accident) or for a long time (for instance, if the principal is afflicted with Alzheimer's disease).

The Agent has all the same powers as the principal in making healthcare decisions: to consent to or refuse treatment, procedures, medication; to talk to the principal's healthcare providers about his care and to examine medical records; to choose providers and placement for the principal's care. So does a Proxy, with the ANH exception noted above.

The Agent/Proxy must always consult the principal to the extent possible about these decisions, and if the principal demonstrates understanding and expresses a strong preference, the Agent must defer to the principal's wishes.

Capacity is a slippery thing—when a person is ill or injured and receiving treatment, perhaps including strong medications, her ability to understand and process information enough to make a decision can vary a great deal from day to day, even hour to hour. As well, capacity is "decision-specific"—meaning that someone might be very able to decide what to have for dinner but not able to decide whether to have major surgery.

Most importantly, the Agent/Proxy must always make decisions in accordance with the known wishes of the principal—to make decisions as the principal would. If the Agent/Proxy does not know how the principal would have decided, then the Agent/Proxy must make decisions in the best interests of the principal. The Agent/Proxy must never follow his own preferences or interests, but always the principal's.