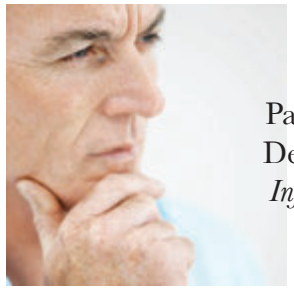
Medical Treatment Decisions: Order of Authority

1. Direct Approach

Patient has Decisional Capacity[1]
May Request or Refuse Treatment

Discuss the Nature of the Illness,
Treatment or None Risks & Benefits[2]

Act as a *Reasonable Physician*[3]
in Similar Circumstances, as a
Reasonable Patient[4] Expects



Patient Makes a
Decision - Gives
Informed Consent[5]

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2. Secondary Approach

Patient Lacks Capacity to Make & Communicate Choices[17]

3. THEN

With Substitute Decision Maker
Follow Instructions[9] in *Medical Orders*
for Scope of Treatment, Living Will,
CPR [or other] *Directive*[10]

4. AND IF

Patient-Appointed
Health Care Agent[6]
Acts as if the Patient[7]

Patient-Named
Designated Beneficiary
(explicitly for
Treatment Decisions)[26]

Beneficiary
Acts as if the patient[27]

Agent and *Beneficiary*
Make Decisions by
Substituted Judgment,
then *Best Interests*[8,28]

5. BUT IF

No *Agent* or *Beneficiary*
No Pertinent Directive

Attending Physician
Seeks *Interested Persons*[18]

They Choose
a *Proxy* by consensus[19]

Proxy **Mostly**
Acts as if the Patient[20]

The *Proxy* Makes
Treatment Decisions
by *Substituted Judgment*,
then *Best Interests*[23]

6. LASTLY

No *Interested Persons*
and Consensus[22]

Attending Documents
Incapacity[23]

Someone Petitions a
Court to Appoint a *Guardian*[24]

A *Guardian* Consults Patient
But Makes Treatment
Decisions using *Best Interests*[25]

WARNING
Any directive may be Impinged
or suspended by pregnancy,
surgery, or crime.[11]
Even incapacitated patients
must be informed of a substitute
decision maker,[12] and can veto
or fire an agent[13] or proxy,[14]
or revoke a written directive.[15]

ENDNOTES

1. "'Decisional capacity' means the ability to provide informed consent to or refusal of medical treatment," C.R.S. § 15-14-505(4).
2. *Miller v. van Newkirk*, 628 P.2d 143, 146 (Colo. App. 1980); *American College of Physicians Ethics Manual*, "Annals of Internal Medicine" (1992) 117: 950.
3. "A physician must inform a patient . . . [as] a reasonable physician practicing in the same field of practice . . . at the same time, would have under the same or similar circumstances," Colorado Jury Instructions, CJI-Civ. 3d 15:16, *Information Required*.
4. It is negligent failure to inform when a "reasonable person in the same or similar circumstances as the Plaintiff would not have consented . . . [if] given the information required for informed consent," CJI-Civ. 3d 15:15, *Uninformed Consent*.
5. Before treating a patient "the physician must obtain the informed consent, whether express or implied, from the patient," Gorab v. Zook, 943 P.2d 423, 427 (Colo. 1997); CJI-Civ. 3d 15:16, above.
6. Contractual capacity to name an *Agent* requires less capacity than to make medical treatment decisions. Thus, one "may be insane on some subjects and still have the capacity to contract." Davis v. Colorado Kenwort*h,* 396 P.2d 958, 961 (Colo. 1964); *Accord* Hanks v. McNeil, 114 Colo. 574, 585 (Colo. 1946); *See also* C.R.S. § 15-14-506(1); *Black's Law Dictionary* (7th ed. 1999) 199.
7. A health care agent "shall have the same power to make medical treatment decisions the principal would have," C.R.S. § 15-14-506(3).
8. "The agent shall act . . . in conformance with the principal's wishes that are known . . . [or] in accordance with the best interests of the principal," C.R.S. § 15-14-506(2).
9. C.R.S. §§ 15-14-506(3), 15-18-102(e).
10. Ibid., C.R.S. §§ 15-18.7-101, 15-18-101; 15-18.6-101.
11. Directives are usually applied differently during surgery. *See* Truog, *et al*, "DNR in the OR: A Goal-directed Approach," *Anesthesiology* 90:1 (January 1999) 289; Pregnancy or crime raise issues too complex to be addressed here, including the effect upon patient directives.
12. C.R.S. § 15-18.5-103(3 & 5); "Incapacity" is used in C.R.S. § 15-14-504; "Incompetency" is used in C.R.S. § 15-18-102; "disability" is used in C.R.S. § 15-14-501(1).
13. As illogical as this seems, the statutory language does not appear ambiguous: "Nothing in this section or in a medical durable power of attorney shall be construed to abrogate or limit any rights of the principal, including the right to revoke an agent's authority or the right to consent to or refuse any proposed medical treatment, and no agent may consent to or refuse medical treatment for a principal over the principal's objection." C.R.S. § 15-14-506(4)(a) & 5(d).
14. C.R.S. § 15-18.5-103(5).
15. "A declaration may be revoked by the declarant orally, in writing, or by burning, tearing, cancelling, obliterating, or destroying said declaration," C.R.S. §§ 15-18-109; 15-18.6-107; 15-14-506(4)(a), above.
16. "The incapacitated person or any person interested in his welfare may petition for a finding of incapacity and appointment of a guardian or other protective order," C.R.S. § 15-14-304.
17. An incapacitated person is "unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care," C.R.S. § 15-14-102(5). *See also* C.R.S. §§ 15-14-505(4); 15-18.5-103(1).
18. The "attending physician, or such physician's designee, shall make reasonable efforts to locate as many interested persons as defined in this subsection (3) as practicable," C.R.S. § 15-18.5-103(3).
19. C.R.S. § 15-18.5-103(4)(a); "Consensus" is undefined in the statute. Black's Law Dictionary (7th ed. 1999) defines *consensus ad idem* as "An agreement of parties as to the same thing; a meeting of minds," but it is most commonly used as somewhere between unanimity & majority. *See, e.g.*, Lindsey v. People, 892 P.2d 281, 289 (Colo. 1995) ("'general acceptance' does not require unanimity, a consensus of opinion or even majority support").
20. "A health care provider or health care facility may rely, in good faith, upon the medical treatment decision of a proxy decision-maker," C.R.S. § 15-18.5-103(1).
21. C.R.S. § 15-18.5-103 (1) & (4)(a).
22. C.R.S. § 15-18.5-103(4)(a).
23. C.R.S. § 15-14-306.
24. Unlike a *Proxy*, there is an assumed order of priority in appointing a guardian, per C.R.S. § 15-14-310; *But see* In the Matter of R.M.S., 128 P.3d 783, 785 (Colo. 2006) (best interest of ward controls appointment after valid objection to testamentary priority).
25. C.R.S. § 15-14-314.
26. C.R.S. § 15-22-105(f).
27. The statute is silent, but C.R.S. § 15-14-506(3) probably applies.
28. The statute is silent, but C.R.S. § 15-14-506(2) probably applies.