

Resident Rights and Alternate Decision-Makers

**Presented by Residential Care Services
In Collaboration with the Adult Family
Home Council, LTC Ombuds, Washington
Health Care Association and LeadingAge**

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Today's Presentation

- **Informed Consent**
- **Alternate Decision-Maker**
- **Resident Rights**
- **Ombuds Role**

Definitions

- A **Legal Guardian**: A person who has the **legal** authority (and the corresponding duty) to care for the personal and property interests of another person, called an incapacitated person.
- A **Power of Attorney**: A legal document giving one person (called an "agent" or "attorney-in-fact") the power to act for another person (the principal). The agent can have broad legal authority or limited authority to make legal decisions about the principal's property and finance.
- A **Durable Power of Attorney**: A type of POA instrument that can last beyond the incapacity of the principal.
- **Informed consent**: The process by which a resident learns about and understands the purpose, benefits, and potential risks of a medical or surgical intervention, including clinical trials, and then agrees to receive the treatment or participate in the trial.
- A **Fiduciary**: A individual with the legal responsibility to act in the best interest of a person or organization.
- An **Advance Directive**: A legal document (as a living will) signed by a capacitated person to provide guidance for medical and health-care decisions (as the termination of life support or organ donation) in the event the person becomes incapacitated to make such decisions.

Informed Consent

- [RCW 7.70.065](#)
- Allows Authorized Person to Provide Consent for “Health Care” Decisions.
- Resident must be incapacitated which means:
incapacitated by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of either managing his or her property or caring for himself or herself, or both.
[RCW 11.88.010](#)

What Does Informed Consent Consist of?

- The nature of the contemplated treatment
- The risks involved
- The prospects of success
- The possibility of complications
- The alternatives available
- The likely result if the resident remains untreated

What Decisions Does it Apply to?

- ‘Health care’ means any care, service, or procedure provided by a *health care provider*:
 - To diagnose, treat, or maintain a resident's physical or mental condition; or
 - That affects the structure or any function of the human body.” [RCW 70.02.010\(14\)](#)
- “‘Health care provider’ means a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession.” [RCW 70.02.010\(18\)](#)

Emergencies – [RCW 7.70.050](#)

- In the event of a recognized health care emergency, the patient's consent will be implied.
 - Life-or-death situations *and*
 - Resident is not competent to consent and nobody authorized to provide consent is readily available *then*
 - All “required treatment” will be provided

Who Can Give Informed Consent?

- Number #1-The Resident
- Alternate Legal Decision-Maker Order of Priority:
 - Guardian
 - DPOA (of Health Care Decisions)
 - Spouse or Registered Domestic Partner
 - Adult Children (all)
 - Parents
 - Adult Brothers and Sisters

Skilled Nursing Facility Requirements

WAC 388-97-0260 Informed Consent

The nursing home must ensure that the informed consent process is followed with:

- The resident to the maximum extent possible, taking into consideration his or her ability to understand and respond; and
- The surrogate decision maker when the resident is determined to be incapacitated as established through the provision of a legal document such as durable power of attorney for health care, a court proceeding, or as authorized by state law, including [RCW 7.70.065](#).

The Surrogate Decision Maker Must:

- First determine if the resident would consent or refuse the proposed or alternative treatment;
- Discuss determination of consent or refusal with the resident whenever possible; and
- When a determination of the resident's consent or refusal of treatment cannot be made, make the decision in the best interest of the resident.

To ensure informed consent or refusal by a resident, or if applicable the resident's surrogate decision maker, the nursing facility must provide the informed consent process as follows:

- In a neutral manner and in a language and words the resident can understand
- Inform the resident of the right to consent or refuse care/service options

Assisted Living Specific Requirements

[WAC 388-78A-2600](#) Policies and Procedures

The assisted living facility must develop, implement and train staff persons on policies and procedures to address what staff persons must do:

- When there is reason to believe a resident is not capable of making necessary decisions and no substitute decision maker is available
- When a substitute decision maker is no longer appropriate

Assisted Living Specific Requirements

[WAC 388-78A-2410](#) Content of Resident Records

The assisted living facility must organize and maintain resident records in a format that the assisted living facility determines to be useful and functional to enable the effective provision of care and services to each resident.

Adult Family Home Specific Requirements

[WAC 388-76-10320](#) Resident Record Content

(2) The name, address and telephone number of the resident's: (a) Representative (b) Health care providers (c) Significant family members identified by the resident; and (d) other individuals the resident wants involved or notified.

[WAC 388-76-10325](#) Resident record- Legal Documentation- If available

When available, the adult family home must obtain copies of the following legal documents for the resident's records: (1) Any powers of attorney granted by the resident, including for health care decision making and financial; and (2) Court order of guardianship for the resident.

[WAC 388-76-10515](#) Resident rights- Exercise of rights

The adult family home must: (4) Ensure the resident's right to choose a representative who may exercise the resident's rights to the extent provided by law.

Adult Family Home Specific Requirements

[WAC 388-76-10235](#) **Guardianship.**

(1) Effective February 1, 2009, the adult family home must ensure that no provider, entity representative, resident manager, or staff becomes any resident's guardian.

(2) Provider, entity representative, resident manager or staff who is a resident's guardian before February 1, 2009 may continue to be that resident's guardian.

[WAC 388-76-10240](#) **Durable power of attorney for health care or financial decisions.**

The adult family home must not allow a provider, entity representative, owner, administrator, or employees of the home to act as a resident's attorney in fact, according to chapter [11.94 RCW](#), unless the provider, entity representative, owner, administrator, or employee is the resident's: (1) Spouse; (2) Adult child; or (3) Brother or sister.

What is “Capacity”?

- Ability to make decisions regarding one’s person and property
- A legal determination, not a strictly medical one
- A person may have capacity to make some decisions but not others
- Capacity may change and fluctuate over time

When May A Person Be Incapacitated?

- Dementia
- Mental Illness
- Intellectual Disability
- Habitual drunkenness
- Excessive use of drugs

Types of Incapacity

- Incapacity as to person
- Incapacity as to estate

Financial Surrogate Decision-Makers

- Legal Guardian
- Power of Attorney
- Representative Payee

Guardians

- Chapter [11.88](#) and [11.92 RCW](#)
- Different Types, Different Authorities
- Do not have the authority to consent to:
 - Psychotropic medications
 - Sterilize
 - Detain in a facility against the incapacitated person's will

Guardianship Authority: Common Areas of Confusion

- Freedom of expression
 - Lifestyle choices, recreation, leisure, religious activities
- Freedom of movement
 - Community access, mobility, community involvement
- Individual preferences
 - Clothes, food, drink, use of possessions

Durable Powers of Attorney

- DPOA is “Durable” because it lasts past incapacity of the resident
- Chapter [11.94 RCW](#)
- May be very specific or quite vague
- Limited to the Express Terms of the Document

Common Issues with DPOAs

- Durable vs. Non-Durable
- Proper execution
- Still effective
- Scope of decision making authority
- Standby power of attorney has *no authority*
- No transfer of power of attorney
 - A is POA of B. B is POA of C. A cannot act as POA for C.

DPOA: Duties and Limitations

- The “Attorney-in-Fact” has the fiduciary duties of loyalty and care to the resident
- Cannot detain a person in a facility against their will

Substituted Judgment

- **Alternate Decision-Makers Must Use “Substituted Judgment”**
 1. Consider the stated wishes
 2. Consider past decisions and stated wishes
- **Only after these are exhausted,**
 3. Make a decision in the individual’s best interest

Medical Decisions/Housing

- Alternative Decision-Makers may have the authority to make decisions about medical care and housing for the resident
- But, a person may not be detained in a facility through the alternative decision-maker alone.

Resident Rights

- Residents have rights—even when they have an alternative decision-maker
- *Residents have the opportunity to exercise reasonable control over life decisions*

Intent of Resident Right Laws

- Ensure residents can exercise reasonable control over life decisions
- Ensure a resident's right to a dignified existence and self determination
- Ensure that a resident's quality of life includes a safe, clean, comfortable, and homelike environment

“No decision about me without me”

Resident Rights

Increasing Choice and Participation can “...foster a sense of self worth and enhance the quality of life for long-term care residents.” [RCW 70.129.005](#)

- ***It's more than exercise...***

- Promote
- Protect
- Assist

Advocates and Visitation

The facility must ensure each resident receives information from client advocate agencies AND has opportunities to contact these agencies

The facility must ensure a client has the right to access and visit with:

- Advocates
- Physician
- Ombudsman
- Family and friends (with resident permission)
- Any social, legal, health, or other representative

Guidance on Access and Visitation Rights

- LTC facilities must ensure all individuals seeking to visit a resident be given full and equal visitation privileges, consistent with expressed preferences of the resident concerning visitors and within reasonable restrictions ensure safety of residents

Resources

WA State LTC Ombuds Program

- The Washington State Long-Term Care Ombudsman advocates for residents of nursing homes, adult family homes, and assisted living facilities.
- Purpose is to protect and promote the Resident Rights guaranteed these residents under Federal and State law and regulations.
- Trained to resolve problems in situations involving quality of care, use of restraints, transfer and discharge, abuse and other aspects of resident dignity and rights.

Patricia Hunter, State LTC Ombudsman

Vicki Elting, Assistant State LTC Ombudsman

Hotline: 1-800-562-6028

TTY Users: 1-800-737-7931

<http://www.waombudsman.org>



Resources

Washington Health Care Association

<http://www.whca.org/>

Lori Heiner, Assisted Living Program Specialist

LoriHeiner@whca.org

Elena Madrid, Director of Regulatory Affairs

elenamadrid@whca.org

Toll-free (800) 562-6170



Resources

Leading Age WA

<http://leadingage.org>

LeighBeth Merrick, Director of Senior Living and
Community Services

LMerrick@LeadingAgeWA.org

(253) 964-8870

Laura Hofmann, Director of Clinical & Nursing Facility
Regulatory Services

lhofmann@LeadingAgeWA.org

(253) 964-8870



Resources



Adult Family Home Council

OF WASHINGTON STATE

Susan Zarenski

Member Services/Education Specialist

susan@adultfamilyhomecouncil.org

(888) 439-8999

Resources

Transforming
Lives

DSHS/RCS

<https://www.dshs.wa.gov/altsa>

Julie Peters, NH Training Manager
peterjd@dshs.wa.gov, (360) 725-2568

Charles Demler, NH Policy Manager
demlecs@dshs.wa.gov, (360) 725-2581

