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Rebecca J. O'Neill  
*Southern Illinois University, School of Law*

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# Surrogate Health Care Decisions for Adults in Illinois—Answers to the Legal Questions That Health Care Providers Face on a Daily Basis

Rebecca J. O'Neill\*

## I. INTRODUCTION

For many years, the Illinois Living Will Act, the Illinois Power of Attorney Act, Article XI(a) of the Probate Act of 1975, and the Health Care Surrogate Act have allowed surrogate health care decisions.<sup>1</sup> Nevertheless, there is a lack of understanding of these statutes and their interrelationship that pervades both the health care community and the legal community. This article analyzes each of these acts, their interrelationship, and some of the key areas of confusion concerning treatment for decisionally incapacitated adults. This analysis is necessary to assist health care providers and attorneys who routinely face these matters.

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\* The author of this article, Rebecca J. O'Neill, is an Associate Clinical Professor and works as an attorney in the Elder Law Clinic at Southern Illinois University School of Law. The Clinic serves the 13 southern counties in Illinois and confronts legal issues concerning surrogate health care decisions on a daily basis. The questions surrounding these issues frequently come from nursing home administrators, hospital social service workers, in-home care agency workers, Department of Aging service providers, hospice workers, doctors, and attorneys.

1. The Illinois Living Will Act went into effect in January of 1984. *See* 755 ILL. COMP. STAT. 35/1 to 35/10 (West 1996), *amended by* Act of June 13, 1997, Pub. Act No. 90-14, sec. 4-1, § 35/8, 1997 Ill. Legis. Serv. 1472 (West). The Illinois Power of Attorney Act went into effect in 1987. *See* 755 ILL. COMP. STAT. 45/1-1 to 45/4-12 (West 1996), *amended by* Act of June 20, 1997, Pub. Act No. 90-21, sec. 5, § 45/2-8, 1997 Ill. Legis. Serv. 1710-11 (West). Article XIa of The Probate Act of 1975, which provides for guardians for disabled adults, was enacted in January of 1979. *See* 755 ILL. COMP. STAT. 5/11a-1 to 5/11a-23 (West 1996), *amended by* Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, §§ 5/11a-4, 5/11a-14.1, 5/11a-17, 1997 Ill. Legis. Serv. 2949-51 (West) *and* Act of Aug. 8, 1997, Pub. Act No. 90-345, sec. 5, § 5/11a-18, 1997 Ill. Legis. Serv. 3862-63 (West) *and* Act of Aug. 18, 1997, Pub. Act No. 90-430, sec. 11-5, § 5/11a-5, 1997 Ill. Legis. Serv. 4534-35 (West) *and* Act of Aug. 17, 1997, Pub. Act No. 90-472, sec. 11-5, § 5/11a-5, 1997 Ill. Legis. Serv. 4858 (West). The Health Care Surrogate Act went into effect in September of 1991. *See* 755 ILL. COMP. STAT. 40/1 to 40/55 (West 1996), *amended by* Act of July 29, 1997, Pub. Act No. 90-246, sec. 5-sec. 25, §§ 40/5, 40/10, 40/15, 40/20, 40/25, 1997 Ill. Legis. Serv. 2933-38 (West). In addition, this article examines the Mental Health Treatment Preference Declaration Act which went into effect on June 1, 1996. *See* 755 ILL. COMP. STAT. 43/1-43/115 (West 1996).

A number of issues surface throughout this article. This article examines and explains the threshold questions of determining when a surrogate is required to make health care decisions and which surrogate controls under the various Illinois statutes. In addition, this article discusses the limitations of a surrogate's powers, including involuntary placement of a decisionally incapacitated adult in a nursing home, as well as a surrogate's authority to consent to the administration of psychotropic drugs. A more difficult issue this article addresses is that of what happens when a decisionally incapacitated adult refuses medical care or needs emergency medical care.

Further, this article examines the kinds of decisions a surrogate must make. For example, whether a medical provider has an affirmative obligation to provide resuscitation or life-sustaining treatment absent the patient's or surrogate's consent to forego these measures.<sup>2</sup> This article also addresses a patient's or court's ability to limit the types of decisions a surrogate can make, as well as the power to terminate a surrogate's decision-making capacity.<sup>3</sup>

The presence of a surrogate alters a health care provider's legal status, creating potential liability while providing certain immunities. This article examines the possible penalties health care providers face when they either fail to honor a surrogate's decision, or fail to obtain a patient's or surrogate's consent.<sup>4</sup> Additionally, this article identifies the immunities afforded health care providers when honoring a surrogate's decisions.<sup>5</sup>

## II. WHEN IS A SURROGATE NEEDED TO MAKE HEALTH CARE DECISIONS?

Two factors determine whether a surrogate is needed to make decisions concerning health care. The first factor is whether a person has capacity to give informed consent.<sup>6</sup> The second factor is whether emergency or non-emergency treatment should be administered.<sup>7</sup>

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2. See *infra* text accompanying notes 24-27, 224-232.

3. See *infra* text accompanying notes 55-74.

4. See *infra* text accompanying notes 289-310.

5. See *infra* text accompanying notes 267-88.

6. See *infra* text accompanying notes 8-22 (defining and analyzing capacity); see also Medical Patient Rights Act, 410 ILL. COMP. STAT. 50/3 (West 1996) (providing a patient the right to "refuse any treatment to the extent permitted by law").

7. See *infra* text accompanying notes 24-27.

## A. Capacity

### 1. Defining Capacity

Within the statutes that identify procedures establishing a surrogate's authority to make decisions for an incapacitated adult, Illinois offers various definitions of capacity. The Health Care Surrogate Act provides the most explicit and narrow definition of decisional capacity. "Decisional capacity" means the ability to understand and appreciate the nature and consequences of a decision regarding medical treatment or forgoing life-sustaining treatment . . . ."<sup>8</sup> Rather than defining decisional incapacity, the Illinois Power of Attorney Act refers to the Probate Act of 1975 definition of a disabled person.<sup>9</sup> The Probate Act of 1975 defines a disabled person as:

[A] person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is a person with mental illness or a person with a developmental disability and who because of his mental illness or developmental disability is not fully able to manage his person or estate . . . .<sup>10</sup>

Because the Probate Act of 1975 provides such a broad definition of disabled adult, it does not necessarily follow that someone who has been adjudged "disabled" also lacks capacity to make health care decisions.<sup>11</sup> For example, the Illinois Appellate Court in *In re Estate of Austwick*<sup>12</sup> concluded that the adjudication of a person as disabled under the Probate Act does not automatically overcome the presumption that the person has decisional capacity under the Health Care Surrogate Act.<sup>13</sup> In *Austwick*, the public guardian consented to a "Do Not Resuscitate Order" ("DNR") for the disabled adult.<sup>14</sup> The appellate court found that because the disabled adult possessed decisional capacity, she had to give consent to the appropriate medical personnel to forgo life-sustaining treatment.<sup>15</sup> Accordingly, the

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8. Act of July 29, 1997, Pub. Act No. 90-246, sec. 10, § 40/10, 1997 Ill. Legis. Serv. 2934 (West).

9. See *id.* at 45/2-3.

10. *Id.* at 5/11a-2.

11. See *In re Guardianship of Austin*, 615 N.E.2d 411, 418 (Ill. App. Ct. 4th Dist. 1993).

12. 656 N.E.2d 773 (Ill. App. Ct. 1st Dist. 1995).

13. See *id.* at 776.

14. See *id.* at 775.

15. See *id.* at 776.

appellate court affirmed the trial court's order requiring the removal of the DNR from the disabled adult's medical chart.<sup>16</sup> As shown by *Austwick*, when determining an individual's capacity to consent to medical care, medical providers should follow the most narrow definition of decisional incapacity, as found in the Health Care Surrogate Act.<sup>17</sup>

## 2. Analyzing When a Judicial Determination of Incapacity is Necessary

Health care providers can rely on an agent's decisions acting under a durable power of attorney for health care without a judicial determination of incapacity.<sup>18</sup> The Illinois Power of Attorney Act states, "Whenever a provider believes a patient may lack capacity to give informed consent to health care which the provider deems necessary, the provider shall consult with any available health care agent known to the provider who has power to act for the patient under a health care agency."<sup>19</sup>

Under the Health Care Surrogate Act, a judicial determination of incapacity is not required before a surrogate can make the decision to withhold or withdraw life-sustaining treatment.<sup>20</sup> Similarly, a judicial determination of incapacity is not required before life-sustaining treatment can be withheld or withdrawn from a person who has an operable living will.<sup>21</sup> However, a judicial determination of incapacity may be necessary for other types of treatment or for those who do not have an operable durable power of attorney for health care or a living trust that delegates health care decision-making power to a trustee.<sup>22</sup>

### *B. Emergency Medical Treatment*

Emergency medical situations rarely afford health care providers adequate time to determine the extent of a patient's capacity to make

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16. *See id.* at 777.

17. For the Health Care Surrogate Act's definition of decisional incapacity, *see supra* note 8 and accompanying text.

18. *See* 755 ILL. COMP. STAT. 45/2-8 (West 1996), *amended by* Act of June 20, 1997, Pub. Act No. 90-21, sec. 5, § 45/2-8, 1997 Ill. Legis. Serv. 1710-11 (West).

19. *Id.* at 45/4-7(a).

20. *See id.* at 40/5(b) (explaining that a purpose of the Health Care Surrogate Act is to define circumstances for removing life supports without judicial involvement), *amended by* Act of July 29, 1997, P.A. 90-246, sec. 5, § 40/5, 1997 Ill. Legis. Serv. 2933 (West).

21. *See id.* at 35/6.

22. *See infra* text accompanying notes 28-32 (explaining that a judicial determination of disability may be necessary for non-emergency health care of patients who do not have power of attorney, a living trust, or a surrogate).

decisions or to identify the patient's appropriate surrogate. Rather, emergency medical care requires making split-second decisions. Accordingly, Illinois law recognizes that consent for emergency medical care is not required for those patients who do not have the ability to give consent.<sup>23</sup>

A health care provider can give treatment without a patient's consent if the examining physician determines that a patient is not capable of giving informed consent, and a delay to obtain the consent would either endanger the life or adversely and substantially affect a patient's health.<sup>24</sup> Likewise, in a medical emergency, if a patient cannot give consent and an appropriate surrogate decision maker either cannot be found or has not yet been established, emergency medical care can be provided without a patient's or surrogate's consent.<sup>25</sup> A decisionally capacitated person can refuse emergency medical care. Similarly, an agent under a durable power of attorney for health care can refuse emergency medical care for a decisionally incapacitated principal, unless the agency limits the agent from making this type of decision.<sup>26</sup> If either of these situations occur, a health care provider should not attempt treatment.

### C. *Non-Emergency Medical Care*

In contrast to emergency medical care, the Medical Patient Rights Act states that health care providers must obtain informed consent before providing any non-emergency health care to patients.<sup>27</sup> Therefore, if a health care provider believes that a patient lacks the ability to understand and appreciate the nature and consequences of a

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23. See 405 ILL. COMP. STAT. 5/2-111 (West 1996) (stating that "[w]henver a medical or dental emergency exists, if a physician or licensed dentist who examines a recipient determines that the recipient is not capable of giving informed consent, essential medical or dental procedures may be performed without consent").

24. See *id.*; *supra* text accompanying notes 8-17 (examining the definition of decisional capacity).

25. See 405 ILL. COMP. STAT. 5/2-111.

26. See 755 ILL. COMP. STAT. 45/4-10(b) (West 1996). The statute provides in pertinent part:

The statutory short form power of attorney for health care authorizes the agent to make any and all health care decisions on behalf of the principal which the principal could make if present and under no disability, subject to any limitations on the granted powers that appear on the face of the form . . . .

*Id.*

27. See 410 ILL. COMP. STAT. 50/3(a) (West 1996). The statute provides in pertinent part that it is "the right of each patient . . . to receive information concerning his or her condition and proposed treatment, [and] to refuse any treatment to the extent permitted by law . . . ." *Id.*

decision concerning the proposed medical treatment or lacks the ability to reach and communicate an informed decision in the matter, then the health care provider must look to a surrogate for consent. For a patient without (1) an operable durable power of attorney for health care, (2) a living trust that delegates health care decision-making powers to a trustee, or (3) a surrogate under the Health Care Surrogate Act, health care providers must obtain consent from a patient's guardian for non-emergency care that does not solely involve the withdrawal or withholding of life-sustaining treatment.<sup>28</sup> A court appoints a guardian for a patient upon a determination that a patient is a disabled adult.<sup>29</sup> Guardians must then obtain court authorization to have the power to make medical decisions for the disabled adult.<sup>30</sup> Effective January 1, 1998, a surrogate under the Health Care Surrogate Act has the authority to make decisions concerning medical treatment for any adult patient who lacks decisional capacity without seeking a judicial determination that the patient lacks such capacity.<sup>31</sup>

### III. THE VARIOUS ILLINOIS SURROGATE ACTS

#### A. *Introduction to the Statutes*

Five Illinois statutes specifically address substitute health care decision-makers for decisionally incapacitated adults: the Illinois Power of Attorney Act,<sup>32</sup> the Illinois Living Will Act,<sup>33</sup> the Health

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28. See 755 ILL. COMP. STAT. 5/11a-17 (West 1996), *amended by* Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-17, 1997 Ill. Legis. Serv. 2950-51 (West).

29. See *id.* at 5/11a-3; see *supra* note 10 and accompanying text (providing a definition of the term "disabled person").

30. See *id.* at 5/11a-17(c) (explaining that "[a]bsent court order pursuant to the Illinois Power of Attorney Act directing a guardian to exercise powers of the principal under an agency that survives disability, the guardian has no power, duty, or liability with respect to any personal or health care matters covered by the agency"), *amended by* Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-17, 1997 Ill. Legis. Serv. 2950-51 (West).

31. See *id.* at 40/20(b-5), *amended by* Act of July 29, 1997, Pub. Act No. 90-246, sec. 20, § 40/20, 1997 Ill. Legis. Serv. 2935-36 (West); *infra* text accompanying notes 101-02 (stating that the amendment allows a surrogate to make "medical treatment" decisions for patients who lack decisional capacity, even if those patients do not have a "qualifying condition" as defined by the act).

32. See 755 ILL. COMP. STAT. 45/4-1 to 4-12 (West 1996) (recognizing that disabled individuals may lose their right to control medical treatment unless the individual can delegate decision-making power to an agent), *amended by* Act of June 20, 1997, Pub. Act No. 90-21, sec. 5, § 45/2-8, 1997 Ill. Legis. Serv. 1710-11 (West).

33. See *id.* at 35/1 to 35/10 (recognizing individuals' fundamental right to control decisions pertaining to their own medical care).

Care Surrogate Act,<sup>34</sup> the Probate Act of 1975,<sup>35</sup> and the Mental Health Treatment Preference Declaration Act.<sup>36</sup> Under the Illinois Power of Attorney Act, an individual may designate an agent to make the individual's health care decisions.<sup>37</sup> A durable power of attorney for health care allows an agent to make decisions concerning life-sustaining treatment as well as any other choices that the person "could make to obtain or terminate any type of health care . . . ."<sup>38</sup> In contrast, the Living Will Act allows an individual to instruct a physician to make decisions concerning life-sustaining treatment. The Living Will Act provides that an individual may make a written declaration "instructing his or her physician to withhold or withdraw death delaying procedures in the event of a terminal condition."<sup>39</sup>

The Health Care Surrogate Act identifies circumstances when life-sustaining treatment may be withheld or withdrawn from patients lacking decisional capacity without judicial involvement,<sup>40</sup> and effective January 1, 1998, an amendment to the act identifies the circumstances when other types of medical decisions can be made on behalf of patients lacking decisional capacity.<sup>41</sup> Conversely, under the Probate Act, courts may designate personal guardians who "shall procure" and "make provision for [the disabled adult's] support, care, comfort, health, education and maintenance, and professional services as are appropriate . . . ."<sup>42</sup> Courts may also give guardians the power

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34. *See id.* at 40/1 to 40/55 (defining when capable patients and surrogates acting on behalf of incapable patients may decide to terminate life-sustaining treatment), *amended by* Act of July 29, 1997, Pub. Act No. 90-246, sec. 5-sec. 25, §§ 40/5, 40/10, 40/15, 40/20, 40/25, 1997 Ill. Legis. Serv. 2933-38 (West).

35. *See id.* at 5/1-1 to 5/28-5 (recognizing that the court may adjudge a person disabled, and appoint a guardian on that person's behalf).

36. *See id.* at 43/1 to 43/115 (providing for the designation of an "attorney-in-fact" to make mental health decisions).

37. *See id.* at 45/4-10(b).

38. *Id.* at 45/4-10. *See infra* notes 53-54 and accompanying text (discussing the potential breadth of an agent's power under a durable power of attorney and a principal's ability to limit such power).

39. *Id.* at 35/1; *see infra* notes 77-84 and accompanying text (providing an illustration of the application of a living will in light of Illinois Supreme Court's interpretation of a surrogate's authority under a living will).

40. *See* 755 ILL. COMP. STAT. 40/20 to 40/25 (West 1996), *amended by* Act of July 29, 1997, Pub. Act No. 90-246, sec. 20-sec. 25, §§ 40/20, 40/25, 1997 Ill. Legis. Serv. 2935-38 (West); *infra* notes 85-92 and accompanying text (discussing the statutory intent to allow termination of life-sustaining treatment even after life supports are provided).

41. *See* Act of July 29, 1997, Pub. Act No. 90-246, sec. 5-sec. 25, §§ 40/5, 40/10, 40/15, 40/20, 40/25, Ill. Legis. Serv. 2935-38 (West); *see infra* notes 100-09 and accompanying text (discussing the Health Care Surrogate Act's amendments).

42. 755 ILL. COMP. STAT. 5/11a-17 (West 1996), *amended by* Act of July 29, 1997,

to place the disabled adult in a residential facility.<sup>43</sup> Finally, under the Mental Health Treatment Preference Declaration Act, a person may designate an agent to consent to or refuse mental health treatment.<sup>44</sup>

The underlying theme found in these statutes is Illinois' recognition of a patient's right to self-determination. Specifically, Illinois recognizes a patient's right "to control all aspects of his or her personal care and medical treatment, including the right to decline medical treatment or to direct that it be withdrawn, even if death ensues."<sup>45</sup> The Illinois legislature classifies this right as fundamental<sup>46</sup> and superior to health care providers' obligation "to render care or to preserve life and health."<sup>47</sup> Thus, the patient's right to self-determination controls the interrelationship of the laws governing the medical decisions of surrogates.

### B. *The Illinois Power of Attorney Act*

Illinois' recognition of a person's right to self-determination includes the right to control all aspects of personal or medical care during incapacitation.<sup>48</sup> If an individual was unable to empower an agent to make medical choices while the individual was decisionally incapacitated,<sup>49</sup> the individual would lose control over making his own health care decisions.<sup>50</sup> The instrument capable of empowering

Pub. Act No. 90-250, sec. 5, § 5/11a-17, 1997 Ill. Legis. Serv. 2950-51 (West); *see infra* notes 129-46 and accompanying text (discussing the depth of a guardian's powers as interpreted by Illinois courts in the areas of psychotropic drugs, abortion, blood transfusions and mental health treatment).

43. *See* 755 ILL. COMP. STAT. at 5/11a-14.1, *amended by* Act of July 29, 1997, P.A. 90-250, sec. 5, §5/11a-14.1, 1997 Ill. Legis. Serv. 2950 (West); *infra* notes 254-66 and accompanying text (discussing residential placement by surrogates).

44. *See* 755 ILL. COMP. STAT. 43/15 (West 1996); *infra* notes 193-97 and accompanying text (discussing an agent's power over the principal's mental health treatment).

45. 755 ILL. COMP. STAT. 45/4-1 (West 1996).

46. *See id.* at 40/5(a), *amended by* Act of July 29, 1997, Pub. Act No. 90-246, sec. 5, § 40/5, 1997 Ill. Legis. Serv. 2933 (West). This section provides, in pertinent part, that "all persons have a fundamental right to make decisions relating to their own medical treatment, including the right to forgo life-sustaining treatment." *Id.*, *amended by* Act of July 29, 1997, Pub. Act No. 90-246, sec. 5, § 40/5, 1997 Ill. Legis. Serv. 2933 (West).

47. *Id.* at 45/4-1. The statute provides that an individual has the right to control his medical care unless he becomes disabled. *See id.* If the individual becomes disabled, "his right to control treatment may be denied unless that individual . . . can delegate the decision making power to a trusted agent . . ." *Id.*

48. *See id.* at 45/2-1.

49. *See supra* notes 8-17 and accompanying text (discussing decisional incapacity under the Illinois Power of Attorney Act).

50. *See* 755 ILL. COMP. STAT. 45/2-1 (discussing the purpose of the Illinois Power of

another individual to make any health care decision is the durable power of attorney for health care.<sup>51</sup>

A durable power of attorney works as follows. While capacitated, an individual, or principal, selects and empowers an agent who the principal believes would best follow his wishes to make the medical decisions<sup>52</sup> that the principal would make for himself. Hopefully, the agent will honor the principal's right to self-determination during the principal's incapacity. Under a durable power of attorney for health care, the powers granted to the agent may be the broadest powers delegated to surrogates in Illinois.<sup>53</sup> However, such delegation of power is subject to any limitations expressed by the principal in the durable power of attorney document. The decision of an agent named under a durable power of attorney for health care controls over any other potential surrogate.<sup>54</sup> Accordingly, when health care providers need a surrogate decision-maker, they should first determine whether the decisionally incapacitated person named an agent under a durable power of attorney.

### 1. Scrutinizing the Agent's Power

Under limited circumstances, courts may scrutinize actions by agents named under a durable power of attorney. For example, a court can appoint a guardian to exercise the principal's powers and can revoke the agent's powers if the court finds that the agent either acted contrary to the principal's benefit under the agency terms, or the agent's actions or omissions resulted in harm to the principal.<sup>55</sup> A court may, without appointing a guardian, enter other orders to provide for the principal's best interests, interpret the agency terms,

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Attorney Act).

51. *See id.* at 45/4-1.

52. *But see infra* notes 156-58 (discussing the Mental Health Treatment Preference Act for the argument that agents do not have the power to consent to mental health treatment that is being refused by a person lacking capacity).

53. *See* 755 ILL. COMP. STAT. 45/4-1 (providing that an agent's power to make decisions on behalf of the principal "will be effective to the same extent as though made by the principal").

54. *See id.* at 45/4-11 (discussing the applicability of inconsistent acts).

55. *See id.* at 45/2-10(a). The statute provides, in pertinent part:

[i]f the court finds that the agent is not acting for the benefit of the principal in accordance with the terms of the agency or that the agent's action or inaction has caused or threatens substantial harm to the principal's person or property in a manner not authorized or intended by the principal, the court may order a guardian . . . to exercise any powers of the principal under the agency, including the power to revoke the agency . . . .

*Id.*

and instruct the agent accordingly.<sup>56</sup> A court, however, has no power to amend the agency.<sup>57</sup> The statute does not define “amend.”<sup>58</sup> Interpreted narrowly, a court cannot change the powers delegated to an agent or limited by the principal, but it could grant the specified powers to a different agent.

Courts should exercise caution when scrutinizing an agent’s actions concerning health care. Obviously, an agent may act for the principal’s benefit and in accordance with the agency terms, yet substantial harm, even death, to the principal may result when the agent decides to withdraw or withhold life-sustaining treatment, or refuse medical treatment. Since the Illinois Power of Attorney Act clearly allows an agent to withhold medical treatment,<sup>59</sup> the only issue is whether the agent’s actions reflect what the principal intended. Because the principal selected a substitute decision-maker to make choices the principal himself would make, courts should be very reluctant to interfere with surrogate health care decisions made by agents acting under a durable power of attorney. Arguably, one purpose of the Illinois Power of Attorney Act is to eliminate the need for judicial involvement in the personal decision-making process.<sup>60</sup> Another concern is a patient’s privacy, which would be undermined if the judiciary provided an open forum to challenge an agent’s decisions.<sup>61</sup>

Nevertheless, there are situations where judicial involvement is required to protect the principal. For example, a court should become involved when it appears that an incapacitated adult is being abused or neglected. Clearly, the State neither intends to give a health care agent the power to abuse or neglect the principal nor to allow such abuse or neglect to occur. A court should intervene to stop any abuse or neglect of a disabled adult. For example, a court should intervene if an agent either causes or permits a disabled adult to be left alone, denies the

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56. *See id.* at 45/2-10(b).

57. *See id.*

58. *See id.*

59. *See id.* at 45/4-10(b)(1). The statute provides, in pertinent part:

[t]he agent is authorized to give consent to and authorize or refuse, or to withhold or withdraw consent to, any and all types of medical care, treatment or procedures relating to the physical or mental health of the principal, including any medication program, surgical procedures, life-sustaining treatment or provision of food and fluids for the principal.

*Id.*

60. *See id.* at 45/4-1.

61. Consider, for example, the evidence necessary to support the court’s appointment of a guardian—medical evidence and a functional assessment. Many individuals would not choose to share this personal information with the public.

disabled adult the basic necessities of life, or physically or verbally abuses the disabled adult. Furthermore, the State should not permit such a situation under the premise that some competent person may choose to live in an abusive and neglectful situation over a different alternative, such as a nursing home. Although some people would choose abusive and neglectful environments over nursing homes, the state's interest in protecting an incapacitated person far exceeds the state's interest in allowing incapacitated people to choose conditions of neglect or abuse. Using the least restrictive alternative<sup>62</sup> for the incapacitated person, all abuse and neglect must be stopped. For example, placement in a group home or an assisted living center should be considered. Unfortunately, nursing home placement for the incapacitated person will often be required.<sup>63</sup>

Because health care involves complex medical issues combined with divergent religious, moral, and ethical views, there will be times when there are closer questions about whether judicial involvement should occur. For example, a diabetic becomes decisionally incapacitated and his agent refuses dialysis because the agent believes the patient does not want dialysis. Depending on the amount of kidney damage, the dialysis may restore the person's capacity. Under what circumstances should the agent be allowed to refuse dialysis? Although many individuals would think that most people would want a chance to regain capacity and survive, others would make a different determination depending on the circumstances. Obviously, life's intricacies do not allow a bright line rule to control the decision-making process and health providers will, at times, experience difficulty in unilaterally following an agent's surrogate decision. Health care providers, however, must always remember that the underlying policy of the Illinois statutes is the individual's right to self-determination.<sup>64</sup> When health care providers question an agent's decision they must always ask whether they are doing so because it is a choice they would not make for themselves. Absent judicial intervention, a decisionally incapacitated person's agent, under a durable power of attorney, possesses the power to make all health care decisions for the patient, unless the durable power of attorney contains limitations.<sup>65</sup> If the

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62. "Least restrictive alternative" means the alternative that gives a person the most freedom under the circumstances.

63. In most guardianship cases handled by the author, the disabled adult's level of incapacity has left no option but 24-hour-care.

64. See 755 ILL. COMP. STAT. 45/4-1; see *supra* notes 45-47 and accompanying text (discussing the individual's right to self-determination as the underlying policy of the Illinois statutes).

65. See *supra* notes 53-54 and accompanying text (discussing the potential breadth of

health care provider does not want to honor the agent's decisions, then the health care provider has the duty to inform the agent of the conflict. The agent must then make all necessary arrangements to transfer the patient to another health care provider.<sup>66</sup> Under these circumstances, the health care provider has a duty to continue to afford reasonably necessary consultation and care in connection with the transfer.<sup>67</sup>

## 2. Revocation of an Agent's Power

The Illinois Power of Attorney Act specifically provides several different methods for the revocation of a health care agency at any time, regardless of "the principal's mental or physical condition."<sup>68</sup> Accordingly, even a decisionally incapacitated principal may revoke an agent's powers under a durable power of attorney for health care. The methods that indicate an intent to revoke include obliterating, burning, tearing, destroying, or defacing the document.<sup>69</sup> In addition, the principal, or a person directed by the principal, may revoke the agency by signing and dating a written revocation.<sup>70</sup> Finally, a principal may revoke the agency orally or by some other expression that reflects the principal's intent to revoke if made in the presence of someone eighteen years or older, who signs and dates a writing that confirms the principal's expressed intent to revoke the agency.<sup>71</sup>

It may seem strange that Illinois allows decisionally incapacitated persons to revoke their powers of attorney. This allowance raises the question of how a decisionally incapacitated person can know how to revoke their Power of Attorney without another's assistance. In instances where a person "assists" a decisionally incapacitated person with revocation, it is difficult, if not impossible, to know which person really made the decision.

It must be remembered, however, that courts rarely adjudicate persons who execute durable powers of health care as disabled adults<sup>72</sup> because, ordinarily, there is no need to declare a person incompetent when that person has already designated an agent under a durable power of attorney. Usually, health care providers can rely upon the

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an agent's power under a durable power of attorney and a principal's ability to limit such power).

66. See 755 ILL. COMP. STAT. 45/4-7(b).

67. See *id.*

68. *Id.* at 45/4-6.

69. See *id.*

70. See *id.*

71. See *id.*

72. See *supra* text accompanying note 10 (defining "disabled adult" as used in both the Probate Act and the Illinois Power of Attorney Act).

agent, who has legal authority to make medical decisions for the principal. Also, because no adjudication of disability occurs, there is no designated starting date for the person's incapacity.<sup>73</sup> In such an instance, some people may view an individual as completely decisionally incapacitated, whereas other people may consider the individual decisionally incapacitated on some days, but not other days. A black letter rule that allows for revocation, regardless of the person's state of decisional capacity, prevents arguments over whether the person had capacity to revoke, eliminates a need for judicial involvement over this issue, and encourages execution of durable powers of attorney because people take comfort in knowing that revocation of the instrument can occur at any time.

Conceivably, Illinois recognizes that some individuals, though decisionally incapacitated for most decisions, may still possess the ability to determine who they want to make their health care decisions. As such, a liberal rule on revocation will encourage agents to fulfill their duties more responsibly because the principal can remove the agent at any time. Whatever Illinois' reasoning, the provision allowing a decisionally incapacitated principal to revoke an agent's powers under a durable power of attorney benefits the incapacitated principal. For example, health care service providers may help disabled adults revoke the agency relationship whenever they confirm abuse or neglect.<sup>74</sup> Although the necessary result may be a guardianship proceeding, this is still preferable to abuse or neglect.

### 3. When a Patient and His Surrogate Conflict

The Illinois Power of Attorney Act provides guidance for situations when health care providers should follow the surrogate's decision over the patient's decision concerning treatment.<sup>75</sup> The Act provides that if a health care provider "believes a patient may lack capacity to give informed consent to health care which the provider deems necessary, the provider shall consult with any available health care agent known to the provider who then has power to act for the patient under a health care agency."<sup>76</sup> This same standard should apply to all surrogate decisions.

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73. See *supra* notes 18-22 and accompanying text (discussing determination of incapacity).

74. See *infra* notes 152-58 and accompanying text (explaining the ways a principal may revoke an agent's power).

75. See 755 ILL. COMP. STAT. 45/4-7(a).

76. *Id.*

### C. *The Illinois Living Will Act*

Unlike the Illinois Power of Attorney Act, the Illinois Living Will Act only addresses the issue of whether a health care provider should withhold or withdraw death-delaying procedures in the event an individual has a terminal condition.<sup>77</sup> This issue is the most significant difference between a living will and a durable power of attorney for health care in Illinois. In contrast to the living will, the durable power of attorney not only allows a person to express his wishes regarding death-delaying procedures, but also allows the person to appoint an agent to make any health care decision for him, the principal.<sup>78</sup> The agent's decision-making authority extends far beyond choices concerning life-sustaining treatment, and includes decisions such as (1) providing consent for surgery, blood transfusions and medication, (2) refusing food or water, and (3) choosing residential care placement.<sup>79</sup>

The following illustrates the application of both the Illinois living will and durable power of attorney. Suppose an individual has a stroke that leaves him decisionally incapacitated,<sup>80</sup> but the physicians do not diagnose the stroke as a terminal condition because death is not imminent.<sup>81</sup> The individual's living will would have no application because it does not give anyone authority to make decisions on the individual's behalf. In contrast, the durable power of attorney would give the principal's agent the power to make any health care decisions for him.<sup>82</sup>

The Illinois Living Will Act specifically provides that "[n]utrition and hydration shall not be withdrawn or withheld from a qualified patient if the withdrawal or withholding would result in death solely from dehydration or starvation rather than from the existing terminal condition."<sup>83</sup> The Illinois Supreme Court expanded the Act's

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77. *See id.* at 35/1.

78. *See id.* at 45/4-10.

79. *See id.*

80. "Decisionally incapacitated" would render the individual without the ability to understand and appreciate the nature and consequences of decisions. *See supra* notes 8-17 and accompanying text (discussing decisional incapacity).

81. *See* 755 ILL. COMP. STAT. 35/2(h) (defining terminal condition).

82. *See supra* notes 53-54 and accompanying text (describing how the Power of Attorney for Health Care instills potentially unlimited power in an agent to make health care decisions for the principal).

83. 755 ILL. COMP. STAT. 35/2(d) (defining a "death delaying procedure" as any medical procedure or intervention that would only serve to postpone the moment of death and stating that in order to invoke such a procedure under the Living Will Act, death must be imminent).

application by determining that, “[w]hen, as the result of incurable illness, a patient cannot chew or swallow and a death-delaying feeding tube is withdrawn in scrupulous accordance with law, the ultimate agent of death is the illness and not the withdrawal.”<sup>84</sup> In contrast, when a principal appoints an agent under the durable power of attorney without any expressed limitations, the issue of whether death results from starvation or dehydration, as opposed to an illness, does not arise. When given the power, an agent under a durable power of attorney may withdraw nutrition and hydration even when death will result solely from dehydration or starvation, and not from the terminal condition.

#### D. The Health Care Surrogate Act

##### 1. Application of the Health Care Surrogate Act

Whenever an incapacitated patient faces a decision concerning life-sustaining treatment, application of the Health Care Surrogate Act depends on whether a patient has a qualifying condition.<sup>85</sup> Qualifying conditions include: “a terminal condition,”<sup>86</sup> “permanent unconsciousness,”<sup>87</sup> or an “incurable or irreversible condition.”<sup>88</sup> The

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84. *In re Estate of Greenspan*, 558 N.E.2d 1194, 1201 (Ill. 1990).

85. See 755 ILL. COMP. STAT. 40/15 (West 1996) (explaining when the Health Care Surrogate Act applies), amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 15, § 40/15, 1997 Ill. Legis. Serv. 2935 (West).

86. *Id.* at 40/10, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 10, § 40/10, 1997 Ill. Legis. Serv. 2934 (West). The statute provides, in pertinent part: “[t]erminally condition” means an illness or injury for which there is no reasonable prospect of cure or recovery, death is imminent, and the application of life-sustaining treatment would only prolong the dying process.” *Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 10, § 40/10, 1997 Ill. Legis. Serv. 2934 (West).

87. *Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 10, § 40/10, 1997 Ill. Legis. Serv. 2934 (West). The statute provides in pertinent part:

“Permanent unconsciousness” means a condition that, to a high degree of medical certainty, (i) will last permanently, without improvement, (ii) in which thought, sensation, purposeful action, social interaction, and awareness of self and environment are absent, and (iii) for which initiating or continuing life-sustaining treatment, in light of the patient’s medical condition, provides only minimal medical benefit.

*Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 10, § 40/10, 1997 Ill. Legis. Serv. 2934 (West).

88. *Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 10, § 40/10, 1997 Ill. Legis. Serv. 2934 (West). The Statute provides, in pertinent part:

“Incurable or irreversible condition” means an illness or injury (i) for which there is no reasonable prospect of cure or recovery, (ii) that ultimately will cause the patient’s death even if life-sustaining treatment is initiated or continued, (iii) that imposes severe pain or otherwise imposes an inhumane burden on the patient, and (iv) for which initiating or continuing life-

patient's attending physician and at least one other qualified physician must verify a qualifying condition in writing, and place it in the patient's medical record.<sup>89</sup>

Once two physicians verify a qualifying condition, a surrogate may decide to forgo life-sustaining treatment.<sup>90</sup> The decision to "forgo life-sustaining treatment" means "to withhold, withdraw, or terminate all or any portion of life-sustaining treatment with knowledge that the patient's death is likely to result."<sup>91</sup> This definition should dispel the myth that once life supports are initiated they cannot be withdrawn without a court order. Clearly, the use of the word "withdraw" indicates that life support that has already been initiated can be withdrawn by the surrogate without court intervention. In fact, the Health Care Surrogate Act specifically states that it is intended to allow the termination of life-sustaining treatment without judicial involvement.<sup>92</sup>

## 2. Selecting the Surrogate under the Health Care Surrogate Act.

The Health Care Surrogate Act does not grant family members the power to simply designate one another as surrogate decision-makers for a patient.<sup>93</sup> Rather, it enumerates a process of selecting a surrogate decision-maker in the following designated order: (1) the patient's guardian of the person, (2) the patient's spouse, (3) any adult son or daughter of the patient, (4) either parent of the patient, (5) any adult brother or sister of the patient, (6) any adult grandchild of the patient,

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sustaining treatment, in light of the patient's medical condition, provides only minimal medical benefit.

*Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 10, § 40/10, 1997 Ill. Legis. Serv. 2934 (West).

89. *See id.* at 40/20(e) (discussing existence of a qualifying condition), amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 20, § 40/20, 1997 Ill. Legis. Serv. 2937 (West).

90. *See id.* (discussing requirements of Health Care Surrogate Act to forgo life-sustaining treatments), amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 20, § 40/20, 1997 Ill. Legis. Serv. 2937 (West).

91. *Id.* at 40/10, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 10, § 40/10, 1997 Ill. Legis. Serv. 2934 (West).

92. *See id.* at 40/5(b), amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 5, § 40/5, 1997 Ill. Legis. Serv. 2933 (West). The statute states: "This Act is intended to define the circumstances under which private decisions by patients with decisional capacity and by surrogate decision makers on behalf of patients lacking decisional capacity to make medical treatment decisions or to terminate life-sustaining treatment may be made without judicial involvement of any kind." *Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 5, § 40/5, 1997 Ill. Legis. Serv. 2933 (West).

93. *See id.* at 40/25(a), amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West).

(7) a close friend of the patient, and (8) the patient's guardian of the estate.<sup>94</sup> When health care providers inquire about the decision to forgo life-sustaining or other treatments, they must give priority to persons listed in the designated order.<sup>95</sup> For instance, if the patient has a spouse and children, the health care provider defers to the spouse to make the decision. If there are two or more surrogates in the same class, the surrogates do not vote on *who* decides whether to provide life-sustaining or other treatments, rather, they vote on *whether* to forego life-sustaining or other treatments.<sup>96</sup> If the group of surrogates from the same class fail to reach a consensus, then the majority vote controls, unless the minority initiates a guardianship proceeding.<sup>97</sup> The Health Care Surrogate Act remains silent in the event that there is no majority, however, it does place responsibility on multiple surrogate decision-makers at the same level to reach a consensus.<sup>98</sup> Although the statute provides for obtaining a guardian to break a tie, this is clearly not the intent of the statute.<sup>99</sup>

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94. See *id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West). The statute provides, in pertinent part: "[w]hen no health care agent is authorized and available, the health care provider must make a reasonable inquiry as to the availability of possible surrogates listed in items (1) through (4) of this subsection." *Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West).

95. See *id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West).

96. See *id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West). The statute states that "[w]here there are multiple surrogate decision makers at the same priority level... it shall be the responsibility of those surrogates to make reasonable efforts to reach a consensus as to their decision on behalf of the patient regarding the forgoing of life-sustaining treatment." *Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West).

97. See *id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West). The statute provides, in pertinent part:

If 2 or more surrogates who are in the same category and have equal priority indicate to the attending physician that they disagree about the health care matter at issue, a majority of the available persons in that category . . . shall control, unless the minority . . . initiates guardianship proceedings in accordance with the Probate Act of 1975.

*Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West).

98. See *id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West).

99. See *id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West). The Act states, "it shall be the responsibility of the surrogates to make reasonable efforts to reach a consensus as to their decision on behalf of the patient regarding the forgoing of life-sustaining treatment." *Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West).

### 3. Recent Amendments to the Health Care Surrogate Act

A recent amendment to the Health Care Surrogate Act, effective January 1, 1998, expands a surrogate's powers.<sup>100</sup> This amendment allows a surrogate to make "medical treatment" decisions for patients who lack decisional capacity, even if these patients do not have a "qualifying condition" as defined by the Act.<sup>101</sup> However, the amendment neither defines "medical treatment," nor provides any guidance as to the scope of a surrogate's powers. Arguably, a surrogate under the Act could make any kind of health care decision, including consent to counseling, surgery, psychotropic medications, electroconvulsive therapy, sterilization, and abortion procedures.

The authority of the amendment to confer such broad new powers to the agent is questionable under the United States and Illinois constitutions.<sup>102</sup> Following the amendment, an individual's right to make private health care decisions may now be invaded based solely on one physician's determination that the patient does not have the ability to understand and appreciate the nature and consequences of a decision regarding treatment. Given that Illinois recognizes that an individual's right to make private health care decisions is "fundamental," the broad new language of the Act could constitute a denial of due process.<sup>103</sup>

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100. See *id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West). The statute provides, in pertinent part:

The surrogate decision makers . . . are then authorized to make decisions as follows: (i) for patients who lack decisional capacity and do not have a qualifying condition, medical treatment decisions may be made in accordance with [the private decision making process section of the Health Care Surrogate Act]; and (ii) for patients who lack decisional capacity and have a qualifying condition, medical treatment decisions including whether to forgo life-sustaining treatment on behalf of the patient may be made without court order or judicial involvement.

*Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West).

101. See *id.* at 40/15, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 15, § 40/15, 1997 Ill. Legis. Serv. 2935 (West).

102. See U.S. CONST. amend. XIV, § 1; ILL. CONST. art. 1, § 2. The United States Constitution provides:

[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

U.S. CONST. amend. XIV, § 1. The Illinois Constitution provides, "[n]o person shall be deprived of life, liberty, or property without due process of law nor be denied the equal protection of the laws." ILL. CONST. art. 1, § 2.

103. See 755 ILL. COMP. STAT. 40/5, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 5, § 40/5, 1997 Ill. Legis. Serv. 2933 (West). The statute provides, in

Prior to the amendment, the Act was narrowly tailored<sup>104</sup> to allow a surrogate to make a decision concerning life-sustaining treatments only if the patient had a qualifying condition, documented by two treating physicians.<sup>105</sup> Now, the amendment creates the risk that doctors will take a paternalistic approach in determining decisional capacity. If the patient makes a decision that the doctor considers to be a "poor" decision, the doctor may conclude that the patient does not understand or appreciate the consequences of the patient's decision. Instead of following the patient's wishes, the doctor and family members may determine what they deem is "best" for the patient.<sup>106</sup>

Aside from the constitutional questions the amendment to the Health Care Surrogate Act raises, it also creates substantial complications for health care providers and places them at a greater risk of incurring liability. Because there is no judicial determination of when an individual is decisionally incapacitated, a physician's decision to rely on a surrogate's consent is vulnerable to challenge. Once a physician determines a patient lacks decisional capacity, the physician must consult with the surrogates, which may consist of a large group of the patient's children or siblings.<sup>107</sup> In addition to being cumbersome and

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pertinent part: [t]he Legislature recognizes that persons have a *fundamental right* to make decisions relating to their own medical treatment, including the right to forgo life-sustaining treatment." *Id.* (emphasis added), amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 5, § 40/5, 1997 Ill. Legis. Serv. 2933 (West).

104. See *id.* at 40/1 to 40/55, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 5- sec. 25, §§ 40/5, 40/10, 40/15, 40/20, 40/25, 1997 Ill. Legis. Serv. 2933-38 (West).

105. See *id.* at 40/20(e), amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 20, § 40/20, 1997 Ill. Legis. Serv. 2933-38 (West) (providing that a second qualified physician must concur, in writing, with the attending physician's opinion that the patient's condition qualifies).

106. For example, the doctor may determine that it is "best" for a patient to go to a nursing home to receive care. Family members may agree, being either unwilling or unable to provide such care themselves.

107. See 755 ILL. COMP. STAT. 40/25(a), amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West). The statute provides, in pertinent part:

The surrogate decision makers . . . are authorized to make decisions whether to forgo life-sustaining treatment . . . in the following order of priority:

- (1) the patient's guardian of the person;
- (2) the patient's spouse;
- (3) any adult son or daughter of the patient;
- (4) either parent of patient;
- (5) any adult brother or sister of patient;
- (6) any adult grandchild of patient;
- (7) a close friend of the patient;
- (8) the patient's guardian of the estate.

time consuming, this process exposes the physician to tort liability. Persons qualified to be surrogates who are not contacted to provide input on a medical decision may sue a physician on behalf of the patient. Such a suit could rest on the ground that the physician acted without authority.

The intention of the amendment was to conform the law to patients' expectations because many people, including physicians, believe that an incapacitated patient's relatives have the legal authority to make health care decisions for the patient.<sup>108</sup> Although this intention should be commended, the current amendment creates insurmountable problems.<sup>109</sup> Thus, the amendment should either be repealed or rewritten to provide procedural protection.

### *E. The Probate Act—Guardians of the Person*

Sometimes, an incapacitated person will have no one with the power to make non-emergency medical decisions on his behalf. Such a patient may be incapacitated, but neither terminally ill nor suffering from a qualifying condition.<sup>110</sup> The patient may not have executed either a durable power of attorney for health care or created a living will delegating the power to make health care decisions.<sup>111</sup> Further, there may be no surrogate under the Health Care Surrogate Act. In these circumstances, a court must appoint a guardian of the person. The Probate Act<sup>112</sup> governs this appointment process and allows a

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*Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West).

108. *See supra* notes 93-99 and accompanying text. The author frequently sees clients who are dismayed to learn they need "legal authority" to make, what they consider, private decisions.

109. The primary problem is that the current statute invades a patient's right to privacy, without adequate procedural protections. *See supra* notes 102-03 and accompanying text (suggesting the statute may be unconstitutional).

110. The Health Care Surrogate Act defines qualifying condition. *See supra* notes 85-88 and accompanying text (listing qualifying conditions and providing their definitions).

111. *See* 755 ILL. COMP. STAT. 45/1 to 45/4-12 (West 1996), amended by Act of June 20, 1997, Pub. Act No. 90-21, sec. 5, § 45/2-8, 1997 Ill. Legis. Serv. 1710-11 (West); *id.* at 35/1 to 35/10 (West 1996), amended by Act of June 13, 1997, Pub. Act No. 90-14, sec. 4-1, § 35/8, 1997 Ill. Legis. Serv. 1472 (West); *supra* notes 77, 82-83 and accompanying text (defining the scope of a surrogates authority under the Living Will Act).

112. *See* 755 ILL. COMP. STAT. 5/11a-1 to 5/11a-23 (West 1996), amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, §§ 5/11a-4, 5/11a-14.1, 5/11a-17, 1997 Ill. Legis. Serv. 2949-51 (West) and Act of Aug. 8, 1997, Pub. Act No. 90-345, sec. 5, § 5/11a-18, 1997 Ill. Legis. Serv. 3862-63 (West) and Act of Aug. 18, 1997, Pub. Act No. 90-430, sec. 11-5, § 5/11a-5, 1997 Ill. Legis. Serv. 4534-35 (West) and Act of Aug. 17, 1997, Pub. Act No. 90-472, sec. 11-5, § 5/11a-5, 1997 Ill. Legis. Serv. 4858 (West).

court to appoint a guardian of the person to procure and provide for a person's support, care, comfort, health, education, and maintenance and professional services.<sup>113</sup> The court may also specifically provide the guardian with the power to make residential placement.<sup>114</sup>

Although the law is clear that a guardian does not need the court's permission to make a decision to forgo life-sustaining treatment when the patient has a qualifying condition under the Health Care Surrogate Act,<sup>115</sup> the law is ambiguous regarding whether a guardian must petition the court for authority to make other types of health care decisions. If the Probate Act allows a guardian to make such a final decision without court intervention, then when, if ever, is a guardian required to obtain permission for other types of medical treatment? There is little case law guiding this area.<sup>116</sup>

### 1. The Language of the Probate Act

The Probate Act delineates broad duties to the personal guardian.<sup>117</sup> The Act provides, "[t]o the extent ordered by the court and under the direction of the court, the guardian of the person shall have custody of the ward . . . shall procure for them and shall make provision for their support, care, comfort, health, education and maintenance, and professional services as are appropriate . . . ."<sup>118</sup> Interpreted strictly, this statute could mean that guardians must get specific orders from the court before consenting to medical care.<sup>119</sup> Interpreted broadly, this statute could mean that once a guardian obtains the initial order of

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113. See *id.* at 5/11a-17 (establishing the duties of a personal guardian), amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-17, 1997 Ill. Legis. Serv. 2950-51 (West).

114. See *id.* at 5/11a-14.1 (establishing standards for guardians to follow when placing wards), amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-14.1, 1997 Ill. Legis. Serv. 2949-50 (West).

115. See 755 ILL. COMP. STAT. 40/20 (West 1996) (stating that "[d]ecisions whether to forgo life-sustaining treatment on behalf of a patient without decisional capacity are lawful, without resort to the courts or legal process, if the patient has a qualifying condition . . ."), amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 20, § 40/20, 1997 Ill. Legis. Serv. 2935-37 (West); *supra* notes 85-88 and accompanying text (explaining a "qualifying condition" under the Health Care Surrogate Act).

116. See *infra* Part III.E.2.

117. 755 ILL. COMP. STAT. 5/11a-17, amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-17, 1997 Ill. Legis. Serv. 2950-51 (West).

118. *Id.* at 5/11a-17(a), amended by Act of Jul 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-17, 1997 Ill. Legis. Serv. 2950-51 (West).

119. *In re Estate of Greenspan*, 558 N.E.2d 1194, 1199 (Ill. 1990). The case references the public guardian of Cook County as stating that the practice in that circuit is for a guardian to petition the court, whenever possible, asking for specific leave to make medical decisions. See *id.*

appointment with a provision that the guardian makes all decisions concerning the ward's care, then the guardian has full power to make any type of medical decision for the ward. Neither interpretation fits the needs of wards, guardians, or health care providers. On the one hand, many routine medical decisions that guardians will need to make for wards should not require specific court authorization once general authorization to consent to medical treatment has been obtained.<sup>120</sup> On the other hand, non-routine types of treatment should require guardians to obtain court authorization before consenting to the treatment.<sup>121</sup> Because the Probate Act does not delineate between these different instances, court opinions interpreting the Probate Act serve as the only guide for determining what types of action need specific orders. If the treatment is of the type that has already been found to need court authority before a guardian can consent to the treatment, health care providers must ascertain whether a court has granted the guardian such authority before providing the ward with the treatment.<sup>122</sup>

## 2. Cases Interpreting the Probate Act

Although sparse, cases interpreting the Probate Act which concern a guardian's authority to make medical decisions do provide some guidance. Courts have made decisions concerning mental health treatment,<sup>123</sup> psychotropic drugs,<sup>124</sup> abortion<sup>125</sup> and blood transfusions.<sup>126</sup> Although a guardian does not have the authority to admit a nonconsenting ward to a mental health facility,<sup>127</sup> a guardian does have the authority to consent to the administration of psychotropic drugs, abortions in certain circumstances and blood transfusions.<sup>128</sup>

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120. For example, it would be very burdensome to require a guardian to obtain court authority each time a doctor changes a patient's prescription for antibiotics. It seems that the guardian of the person needs some discretion; otherwise, the courts will be inundated with medical treatment decisions on behalf of wards.

121. For example, a guardian should be required to obtain court authority for an invasive procedure, such as sterilization, abortion, or psychosurgery. In these instances, the court needs to serve as the "watchdog" to protect the ward.

122. See *infra* text accompanying notes 129-46 (discussing the different situations in which guardians need to obtain court approval for certain procedures, and those in which they do not).

123. See *infra* notes 129-32 and accompanying text.

124. See *infra* notes 133-35 and accompanying text.

125. See *infra* notes 136-40 and accompanying text.

126. See *infra* notes 141-46 and accompanying text.

127. See *infra* note 130 and accompanying text.

128. See *infra* notes 133-46 and accompanying text.

### a. Mental Health Treatment

In *In re Gardner*,<sup>129</sup> the Illinois Appellate Court ruled that a guardian does not have “power to admit a nonconsenting ward to a mental health facility for treatment as a voluntary patient.”<sup>130</sup> Thus, the trial court’s order requiring a guardian to execute a voluntary application for mental health treatment for a nonconsenting ward was found erroneous.<sup>131</sup> Accordingly, an involuntary admission hearing would be necessary. Under the Mental Health Care Development Disabilities Code, the court would determine whether the patient should be subjected to involuntary admission to a mental health care facility.<sup>132</sup>

### b. Psychotropic Drugs

While it is clear that guardians do not have the power to admit nonconsenting wards to mental health facilities, the law concerning a guardian’s power to authorize administration of psychotropic drugs recently changed.<sup>133</sup> Until August 20, 1995, guardians were required to obtain court approval before consenting to psychotropic medication.<sup>134</sup> Presently, guardians are no longer required to obtain court approval before consenting to psychotropic medication when neither the guardian nor ward objects to the medication.<sup>135</sup> If the ward objects to psychotropic medication, court authorization must be obtained.

### c. Abortion

In 1985, in *In re Estate of D.W.*,<sup>136</sup> the Illinois Appellate Court ruled that when petitioning the court, a guardian did not need to show a medical necessity for an abortion to receive authority to consent to an abortion for an eighteen year old mentally retarded ward.<sup>137</sup> The appellate court reasoned that absent proof that the guardian was not acting in the ward’s best interest, the lower court lacked legal basis for denying authority.<sup>138</sup> The court stated:

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129. 459 N.E.2d 17 (Ill. App. Ct. 4th Dist. 1984).

130. *Id.* at 20.

131. *See id.* at 21.

132. *See* 405 ILL. COMP. STAT. 5/3-700 (West 1996).

133. *See id.* at 5/2-107.1.

134. *See id.*

135. Act of Dec. 15, 1995, Pub. Act No. 439, sec. 2-107.1, § 5/2-107.1, 1997 Ill. Legis. Serv. (West).

136. 481 N.E.2d 355 (Ill. App. Ct. 1st Dist. 1985).

137. *See id.* at 357.

138. *See id.*

In our view, section 11a-17 of the Probate Act vests a guardian with broad authority to act in the best interest of the ward. The court's duty in this regard is to ensure that the acts and decisions of the guardian reflect the best interest of the ward by judicially interfering if the guardian is about to do some act that would cause harm or threaten harm to the ward.<sup>139</sup>

Accordingly, the court found that there is no legal requirement that a medical necessity exist before a guardian can consent to an abortion.<sup>140</sup>

#### d. Blood transfusions

In *Holmes v. Silver Cross Hospital*,<sup>141</sup> a federal district court found that a conservator,<sup>142</sup> who was specifically appointed for the sole purpose of consenting to surgery and blood transfusions, lacked discretion not to consent.<sup>143</sup> Silver Cross Hospital sued a conservator for violating his ward's religious principles.<sup>144</sup> The court found that the conservator was immune from civil suit under the 1871 Civil Rights Act.<sup>145</sup> Although this case does not address whether it is necessary for a guardian to petition the court for authority to consent to surgery, the court's ruling suggests that if a guardian chooses to consent to a major medical decision, he should consider petitioning the court for authority or direction to protect himself from civil liability.<sup>146</sup>

#### F. *The Mental Health Treatment Preference Declaration Act*

The Mental Health Treatment Preference Declaration Act (the "Declaration Act") sets forth an instrument called a Declaration for Mental Health Treatment ("Declaration").<sup>147</sup> With this instrument, an individual can appoint someone to make a variety of decisions.

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139. *Id.* at 356-57.

140. *See id.* at 357.

141. 340 F. Supp. 125 (N.D. Ill. 1972).

142. A conservator is defined as a guardian, protector, or preserver. *See* BLACK'S LAW DICTIONARY 306 (6th ed. 1990). A conservator is appointed by a court to manage the affairs of incompetents or to liquidate a business. *See id.* The person is appointed by a court to manage the estate of one who is unable to manage property and business affairs effectively. *See id.*

143. *See Holmes*, 340 F. Supp. at 130 (stating that "a state-appointed conservator's ordering of medical treatment for a person in violation of his religious beliefs, no matter how well intentioned the conservator may be, violates the First Amendment's freedom of exercise clause in the absence of some substantial state interest").

144. *See id.* at 127-28.

145. *See id.* at 131 (holding the conservator not liable under the doctrine of judicial immunity); *see also* 42 U.S.C.A. § 1983 (1982).

146. *See Holmes*, 481 N.E.2d at 131.

147. *See* 755 ILL. COMP. STAT. 43/1 to 43/115 (West 1996); *see also id.* at 43/75 (setting forth the statutory form of the declaration).

regarding mental health care. These decisions concern electroconvulsive treatment, treatment of mental illness with psychotropic medication, and admission to and retention in a health care facility for a period of up to seventeen days.<sup>148</sup> The statutory form provides that the principal fill out a declaration “for mental health treatment to be followed” if two physicians determine that the principal’s “ability to receive and evaluate information effectively or communicate decisions is impaired” to the extent that the principal lacks the “capacity to refuse or consent to mental health treatment.”<sup>149</sup> The principal may personally select one of the two physicians required to evaluate the principal’s capacity to give or withhold informed consent for mental health treatment.<sup>150</sup>

The Declaration, which may be invoked within three years of its execution, becomes operative once it is delivered to the principal’s attending physician, and remains valid until revoked or expired.<sup>151</sup> However, if the principal becomes incapable of making mental health treatment decisions during this period and remains incapable of making mental health decisions at the expiration of the period, the Declaration continues until the person regains capacity to make mental health treatment decisions.<sup>152</sup> Unlike the durable power of attorney for health care, if the principal wants to revoke the Declaration, the principal must be capable of revoking the instrument.<sup>153</sup> An effective revocation must be signed by the principal and a physician, and delivered to the attending physician.<sup>154</sup>

Before an agent can make decisions delegated under a Declaration, the agent must accept the appointment in writing.<sup>155</sup> An agent can only make decisions concerning the principal’s mental health treatment when the principal is incapable of making such decisions.<sup>156</sup> The Declaration Act defines “incapable” as:

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148. *See id.* at 43/5(7).

149. *Id.* at 43/75 (providing the statutory form for a declaration for mental health treatment).

150. *See id.*

151. *See id.* at 43/10 (discussing the ways in which a Declaration may be invoked and revoked); *see also id.* at 43/25 (discussing the operation of a Declaration).

152. *See id.* at 43/10.

153. *See id.* at 43/50.

154. *See id.*

155. *See id.* at 43/15. The statute states, “An attorney-in-fact who has accepted the appointment in writing may make decisions about mental health treatment on behalf of the principal . . . .” *See id.*

156. *See id.* at 43/30; *see also id.* at 43/15 (providing additional support by stating that an attorney-in-fact may make such decisions “only when the principal is incapable”).

[I]n the opinion of [two] physicians or the court, a person's ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person currently lacks the capacity to make mental health treatment decisions.<sup>157</sup>

As long as the principal is able to give informed consent or refusal, the physician must obtain the principal's informed consent to all mental health treatment decisions.<sup>158</sup>

#### IV. THE INTERRELATIONSHIPS AMONG ILLINOIS SURROGATE ACTS

##### A. *The Health Care Surrogate Act*

The Health Care Surrogate Act does not apply when an individual has an unrevoked living will or has appointed an agent under an unrevoked durable power of attorney for health care.<sup>159</sup> When issues arise concerning the withholding or withdrawal of life-sustaining treatment, health care providers must first ask whether the patient has an agent under a durable power of attorney for health care.<sup>160</sup> If the decisionally incapacitated patient has an agent under a durable power of attorney for health care, then the health care provider must defer to this agent for decisions concerning life-sustaining treatment.<sup>161</sup> Health care providers must read the durable power of attorney to determine the principal's expressed intentions concerning life supports. If the patient does not have a durable power of attorney for health care, then health care providers must next ask whether the patient has an operable living will.<sup>162</sup> If the patient has a living will, then the health care provider must honor the patient's express decision against the administration of procedures that would only prolong the dying

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157. *Id.* at 43/5(5).

158. *See id.* at 43/25. The statute provides that "[t]he attending physician shall continue to obtain the principal's informed consent to all mental health treatment decisions if the principal is capable of providing informed consent or refusal." *Id.*

159. *See id.* at 40/15, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 15, § 40/15, 1997 Ill. Legis. Serv. 2935 (West). The statute provides, in pertinent part, that "in those instances, the living will, the declaration for mental health treatment, or power of attorney for health care, as the case may be, shall be given effect according to its terms." *Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 15, § 40/15, 1997 Ill. Legis. Serv. 2935 (West).

160. *See supra* text accompanying note 49 (discussing the requirement of a durable power of attorney and the rationale for such a requirement).

161. *See* 755 ILL. COMP. STAT. 40/15 (West 1996), amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 15, § 40/15, 1997 Ill. Legis. Serv. 2935 (West).

162. *See supra* text accompanying notes 78-84 (discussing the significant differences between a living will and a durable power of attorney for health care).

process. Prior to January 1, 1998, the Health Care Surrogate Act applied only to the issue of life-sustaining treatment when the patient had not signed either a durable power of attorney for health care or a living will providing for decisions regarding life-sustaining treatment for a decisionally incapacitated adult.<sup>163</sup>

Operation of the Health Care Surrogate Act presented much confusion among health care providers.<sup>164</sup> Some health care providers mistakenly believed that it allowed family members to vote for which family member would make health care decisions on behalf of the incapacitated person.<sup>165</sup> Other health care providers wrongly concluded that family members voted on which family member would make decisions concerning life-sustaining treatments.<sup>166</sup>

However, as noted, the Health Care Surrogate Act has been amended.<sup>167</sup> One problem with the amendment is that it opens the door to more elder abuse. Effectively, the amendment grants a patient's relatives the power to make a placement decision against the wishes of the patient.<sup>168</sup> Surrogates under the amendment are neither chosen by the patient during a period of capacity nor regulated by the courts. Thus, abuse and neglect becomes possible because there is no independent oversight. For example, a child may choose to have his parent live with him. During this time, the child may divert his parent's social security income, keeping it for himself. Such a circumstance would likely go unnoticed. In contrast, under the Probate Act, a guardian must obtain court authority to make placements and is subject to judicial scrutiny.<sup>169</sup>

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163. See 755 ILL. COMP. STAT. 40/15, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 15, § 40/15, 1997 Ill. Legis. Serv. 2935 (West).

164. See *id.* at 40/10, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 10, § 40/10, 1997 Ill. Legis. Serv. 2934 (West).

165. See *supra* Part III.D.2 (discussing the process of selecting a surrogate under the Surrogate Act). In addition, nursing home administrators have frequently relayed these misconceptions to the author.

166. See *supra* note 115; see also *supra* Part III.D.2 (discussing the process of selecting a surrogate under the Health Care Surrogate Act).

167. See *supra* Part III.D.3 (discussing the amendment which now allows a surrogate to make medical treatment decisions for patients who lack decisional capacity, even if they do not have a required qualified condition).

168. See 755 ILL. COMP. STAT. 40/25, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2935 (West).

169. *Id.* at 5/11a-1 to 5/11a-23, amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, §§ 5/11a-4, 5/11a-14.1, 5/11a-17, 1997 Ill. Legis. Serv. 2949-51 (West) and Act of Aug. 8, 1997, Pub. Act No. 90-345, sec. 5, § 5/11a-18, 1997 Ill. Legis. Serv. 3862-63 (West) and Act of Aug. 18, 1997, Pub. Act No. 90-430, sec. 11-5, § 5/11a-5, 1997 Ill. Legis. Serv. 4534-35 (West) and Act of Aug. 17, 1997, Pub. Act No. 90-472, sec. 11-5, § 5/11a-5, 1997 Ill. Legis. Serv. 4858 (West).

### B. *The Living Will Act*

As with other surrogates, the decision of an agent named under a power of attorney is binding if both a durable power of attorney for health care and a living will name an agent.<sup>170</sup> The Illinois Power of Attorney Act specifically provides that as long as an agent is available, the living will is inoperative.<sup>171</sup> Under such circumstances, the agent's power to render such a decision supersedes even the physician's decision-making power.<sup>172</sup>

Considering the clear superiority an agent under a durable power of attorney has over other surrogates, the fact that many health care providers only ask patients if they have a living will when taking patients' medical histories and background information becomes particularly troublesome. Federal law requires health care providers who receive Medicare and Medicaid reimbursement to inform patients, in writing, about their rights under Illinois law to make decisions concerning medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives.<sup>173</sup> To comply with federal law, Illinois adopted a Statement of Illinois Law on Advance Directives (New),<sup>174</sup> which sets forth a short statement about advance directives in Illinois.<sup>175</sup> In addition, federal law requires health care providers to document, in a patient's medical record, whether the patient executed an advance directive.<sup>176</sup> Accordingly, health care providers who fail to ask whether a patient signed a durable power of attorney for health care are not in compliance with this law.

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170. See *supra* text accompanying note 53 (discussing how an agent under a durable power of attorney for health care may make any kind of medical decision that the principal could make).

171. See 755 ILL. COMP. STAT. 45/4-11 (West 1996) (stating that the Illinois Power of Attorney Act "supersedes all other Illinois Acts or parts thereof existing on the effective date of this Article to the extent such other Acts are inconsistent with the terms and operation of this Article; provided, that this Article does not affect the law governing emergency health care").

172. See *id.*

173. See Patient Self-Determination Act, 42 U.S.C. § 1395cc(f)(1) (1996), amended by Act of Aug. 5, 1997, Pub. L. No. 105-33, sec. 4641, § 1395cc(f)(1)(B), 111 Stat. 251.

174. See 2 THEODORE R. LEBLANG, ET AL., THE LAW OF MEDICAL PRACTICE IN ILLINOIS § 8:15 app. OO (2d ed. 1996).

175. See *id.*

176. See 42 U.S.C. § 1395cc(f)(1), amended by Act of Aug. 5, 1997, Pub. L. No. 105-33, sec. 4641, § 1395cc(f)(1)(B), 111 Stat. 251.

### C. *The Probate Act*

Many health care providers and attorneys mistakenly believe that a court appointed guardian's powers supersede or cancel an agent's powers under a durable power of attorney. In fact, some health care providers and attorneys recommend that family members seek guardianship over relatives who have already designated an agent under a durable power of attorney for health care.<sup>177</sup> Other health care providers refuse to provide care to patients at the direction of an agent under a durable power of attorney, and withhold care until provided with proof of a guardianship order.<sup>178</sup> Contrary to these erroneous views and actions, the Probate Act specifically provides that "[a]bsent [a] court order pursuant to the Illinois Power of Attorney Act directing a guardian to exercise powers of the principal under an agency that survives disability, the guardian has no power, duty, or liability with respect to any personal or health care matters covered by the agency."<sup>179</sup> Therefore, unless the agency is revoked, a court cannot grant a guardian powers possessed by an agent under a durable power of attorney for health care. The agent's powers under an unrevoked durable power of attorney control when a person becomes incapacitated.

In guardianship proceedings, the court, not the individual, makes the final determination of selecting a patient's guardian.<sup>180</sup> If an individual, while capacitated, selects a substitute decision-maker, that substitute should possess the power to make the individual's medical choices, not a court-appointed guardian.<sup>181</sup> Allowing a court to override an individual's selection of a surrogate would undermine the individual's right to choose a person who will follow the subtleties of the individual's personal wishes. The court should consider circumventing the individual's selection of a guardian in circumstances involving, for example, abuse or neglect.<sup>182</sup>

The Illinois legislature has made it clear that an agent under a durable power of attorney for health care controls over a court-

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177. The author has had clients who have experienced this.

178. See *supra* note 177.

179. 755 ILL. COMP. STAT. 5/11a-17(c) (West 1996), amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-17, 1997 Ill. Legis. Serv. 2950-51 (West).

180. See *id.* at 5/11a-6.

181. See *id.* at 45/2-1. "The Illinois General Assembly recognizes that each individual has the right to appoint an agent to deal with property or make personal and health care decisions . . ." See *id.*

182. See *supra* Part III.B.1 (discussing the role of a court in intervening in cases of abuse or neglect).

appointed guardian.<sup>183</sup> Illinois law provides that a guardian lacks power over matters covered by an agency created by a durable power of attorney for health care.<sup>184</sup> Furthermore, the law requires that petitioners in guardianship proceedings must notify an agent under a durable power of attorney for health care that a petition for guardianship has been filed.<sup>185</sup> These laws are undoubtedly designed to prevent interference with a person's right to self-determination.<sup>186</sup>

Some health care providers question whether a court must determine an individual's capacity prior to recognizing an agent's powers under a durable power of attorney for health care.<sup>187</sup> However, requiring court determination of incapacity would circumvent one of the Illinois Power of Attorney Act's main purposes to prevent judicial involvement in the private decision-making process.<sup>188</sup> Additionally, unless sealed by the court, a guardianship proceeding would make public very personal, private, and potentially embarrassing information about the individual. Therefore, an agent under a durable power of attorney for health care is not required to get a court order declaring the principal incompetent before exercising his delegated powers.<sup>189</sup> Thus, if health care providers believe a patient cannot give informed consent, they must rely on the agent's decisions.<sup>190</sup>

#### *D. The Mental Health Treatment Preference Declaration Act*

The relationship between an agent named under the Declaration Act and an agent named under a durable power of attorney for health care

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183. See 755 ILL. COMP. STAT. 5/11a-17, amended by Act of Jul 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-17, 1997 Ill. Legis. Serv. 2950-51 (West).

184. See *id.*, amended by Act of Jul 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-17, 1997 Ill. Legis. Serv. 2950-51 (West).

185. See *id.*, amended by Act of Jul 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-17, 1997 Ill. Legis. Serv. 2950-51 (West).

186. See *supra* notes 45-47 and accompanying text (discussing a patient's right to self-determination).

187. The author has heard health care providers express this concern.

188. See 755 ILL. COMP. STAT. 45/2-1 (West 1996).

189. See *id.* at 45/2-8, amended by Act of June 20, 1997, Pub. Act No. 90-21, sec. 5, § 45/2-8, 1997 Ill. Legis. Serv. 1710-11 (West). The statute provides, in pertinent part: "Any person who acts in good faith reliance on a copy of the agency will be fully protected and released to the same extent as though the reliant had dealt directly with the principal as a fully-competent person." See *id.*, amended by Act of June 20, 1997, Pub. Act No. 90-21, sec. 5, § 45/2-8, 1997 Ill. Legis. Serv. (West).

190. See *id.* at 45/4-7(a) (stating that when a health care provider "believes a patient may lack capacity to give informed consent to health care which the provider deems necessary, the provider shall consult with any available health care agent known to the [health care] provider who then has the power to act for the patient under a health care agency").

is ambiguous.<sup>191</sup> It is not entirely clear which act would prevail in the event of a conflict. The Declaration Act does not address whether a principal under the Declaration Act can delegate the same powers to an agent as those powers that a principal can delegate to an agent under a durable power of attorney, nor does the Declaration Act state that it places any limitations on agents acting under a durable power of attorney.<sup>192</sup> In contrast, the Illinois Power of Attorney Act does state that it supersedes all other statutes to the extent that those statutes are inconsistent with it.<sup>193</sup>

One interpretation of the problematic interrelationship between the Declaration Act and the Illinois Power of Attorney Act is that an agent under a durable power of attorney can make all mental health treatment decisions for the principal, excluding involuntary placement of the individual in a mental institution. However, under the Declaration Act there are limits on the types of mental health treatment decisions that a principal can delegate to an agent.<sup>194</sup> The language of the statutory form of the durable power of attorney for health care provides support for this interpretation, and provides:

1. I, . . . , hereby appoint: . . . , as my attorney-in-fact (my "agent") to act for me and in my name (in any way I could act in person) to make any and all decisions for me concerning my personal care, medical treatment, hospitalization and health care and to require, withhold or withdraw any type of medical treatment or procedure, even though my death may ensue . . . .
2. The powers granted above shall not include the following powers or shall be subject to the following rules or limitations (here you may include any specific limitations you deem appropriate, such as: your own definition of when life-sustaining measures should be withheld; a direction to continue food and fluids or life-sustaining treatment in all events; or instructions to refuse any specific types of treatment that are inconsistent with your religious beliefs or unacceptable to you for any other reason, such as blood transfusion, electro-convulsive therapy,

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191. See *id.* at 43/1 to 43/115; *id.* 45/1-1 to 45/4-12 (West 1996), amended by Act of June 20, 1997, Pub. Act No. 90-21, sec. 5, § 45/2-8, 1997 Ill. Legis. Serv. 1710-11 (West).

192. See *id.* at 43/1 to 43/115; *id.* at 45/1-1 to 45/4-12, amended by Act of June 20, 1997, Pub. Act No. 90-21, sec. 5, § 45/2-8, 1997 Ill. Legis. Serv. (West).

193. See *id.* at 45/4-11. The statute provides, "This Article supersedes all other Illinois Acts or parts thereof existing on the effective date of this Article to the extent such other Acts are inconsistent with the terms and operation of this Article . . . ." See *id.*

194. See *id.* at 43/1 to 43/115; *id.* at 45/1-1 to 45/4-12, amended by Act of June 20, 1997, Pub. Act No. 90-21, sec. 5, § 45/2-8, 1997 Ill. Legis. Serv. (West).

amputation, psychosurgery, voluntary admission to a mental institution, etc.)[.]<sup>195</sup>

If the principal signs a durable power of attorney for health care and does not include any limitations following paragraph two of the document, the agent has the power to make any type of health care decisions, including mental health care decisions. Because the statutory form includes different types of mental health treatment as provided in the examples in paragraph two of the form, it is apparent that the document was designed to authorize an agent to make mental health care decisions. However, because the form uses the word "voluntary" before "admission to a mental institution," it is unclear whether the State intended to allow principals to give agents the power to involuntarily admit them admission to a mental institution.<sup>196</sup> As such, a safeguard against unwarranted placement exists. The Mental Health and Developmental Disabilities Code sets forth a procedure that must be followed whenever patients are involuntarily admitted to a mental health facility.<sup>197</sup> It is still unresolved whether a court hearing is necessary every time a principal has not limited the power of attorney for health care to preclude involuntary admission to a mental institution.

If a principal executes both a Declaration and a durable power of attorney, and names the same agent, then the principal's intentions regarding the agent's decision-making authority may be subject to differing interpretations. On the one hand, executing both documents may evidence the principal's intent to limit the agent's mental health decisions to those specifically designated in the Declaration. On the other hand, the principal may intend to allow the agent under the durable power of attorney to make decisions that the principal does not protest, while allowing the same agent under the Declaration to make decisions concerning treatment that the principal does protest. Rather than requiring others to determine the principal's intent, the principal should explicitly state the agent's limitations and delegated powers regarding mental health treatment decisions in the durable power of attorney for health care.

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195. *Id.* at 45/4-10.

196. *Id.*

197. *See* 405 ILL. COMP. STAT. 5/3-700 (West 1997) (providing that "a person 18 years of age or older who is subject to involuntary admission may be admitted to a mental health facility upon court order pursuant to this Article").

## V. ISSUES IN SURROGATE DECISION-MAKING

A. *Psychotropic Drugs*

When dealing with issues involving psychotropic drugs, health care providers face two types of surrogates: a court-appointed guardian and an agent acting under a durable power of attorney for health care. Illinois law treats each of these surrogates differently. In the past, Illinois law required that guardians obtain court approval before consenting to psychotropic medication.<sup>198</sup> An amendment to the Mental Health and Developmental Disabilities Code (“Mental Health Code”), effective June 1996, changed this requirement<sup>199</sup> so that “a guardian may consent to the administration of psychotropic medication to a non-objecting recipient” without first obtaining court approval.<sup>200</sup> If a ward does not consent to psychotropic medication, however, a court hearing must take place before the administration of the psychotropic medication.<sup>201</sup>

A more controversial issue is whether a hearing must occur before the administration of psychotropic medication when an agent under a durable power of attorney directs the administration of such medication against a principal’s wishes. Although no Illinois cases address this issue, the statutory language in the durable power of attorney indicates that a hearing is not necessary if the principal, while competent, executed a durable power of attorney for health care granting the agent power to make all decisions concerning treatment and health care without placing any limitations on the agent. In fact, the statutory form identifies limitations that a principal may place on the agent’s decision-making authority.<sup>202</sup> These limitations include instructions to refuse treatment such as electro-convulsive therapy, psychosurgery and voluntary admission to a mental institution.<sup>203</sup> By identifying these treatment types as possible limitations, the statute implies that the agent will have power to make decisions concerning treatment in these areas absent some express limitation by the principal. It follows,

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198. *See In re Guardianship of Austin*, 615 N.E.2d. 411, 416 (Ill. App. Ct. 4th Dist. 1993).

199. *See* 405 ILL. COMP. STAT. 5/2-107.1.

200. *See id.* at 5/2-107.1(c). The statute states that “[n]otwithstanding any other provision in this section, a guardian may consent to the administration of psychotropic medication to a non-objecting recipient . . .” *Id.*

201. *See id.*

202. *See* 755 ILL. COMP. STAT. 45/4-10 (West 1996).

203. *See supra* text accompanying note 195 (reproducing the statutory form of the durable power of attorney for health care).

therefore, that although psychotropic medication is not specifically mentioned by the statute,<sup>204</sup> the agent would nevertheless have authority to consent to psychotropic medication absent any express limitation in the durable power of attorney for health care.

Although some may argue that the Mental Health Code has expressly defined when psychotropic drugs may be administered without the patient's consent,<sup>205</sup> the Mental Health Code does not explicitly provide that an agent under a durable power of attorney can consent to psychotropic medication. This argument, however, runs counter to the express language in the Illinois Power of Attorney Act, which states that it supersedes all other acts to the extent that the other acts are inconsistent with the Illinois Power of Attorney Act.<sup>206</sup> However, complete reliance upon the decision of an agent acting under a durable power of attorney rather than a patient's decision possesses the danger that a patient's right to self-determination could be thwarted.<sup>207</sup> The key determination that health care providers should make when trying to determine whether to follow the agent's direction to administer psychotropic medication or to honor a patient's refusal of such medication is whether the patient has the capacity to give informed consent regarding whether to accept or refuse the psychotropic medication.<sup>208</sup> If the health care provider believes the patient understands the consequences of the decision to refuse or accept the medication, the health care provider should honor the patient's decision over the agent's decision. If the patient does not understand the consequences of the decision, then the health care provider should rely upon the agent, and be comforted in knowing that the Illinois Power of Attorney Act provides civil and criminal immunity to health care providers that comply with the agent's directions.<sup>209</sup>

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204. See 755 ILL. COMP. STAT. 45/4-10.

205. See 405 ILL. COMP. STAT. 5/2-107.1.

206. See 755 ILL. COMP. STAT. 45/4-11.

207. See *supra* text accompanying notes 45-47 (asserting that a theme underlying Illinois law is a patient's right of self-determination, that is to control all aspects of his health care).

208. See *supra* notes 8-22 and accompanying text (defining capacity to give informed consent).

209. See 755 ILL. COMP. STAT. 45/4-8 (West 1996). The statute provides:

Each health care provider and each other person who acts in good faith reliance on any direction or decision by the agent that is not clearly contrary to the terms of a health care agency (a "reliant") will be protected and released to the same extent as though the reliant had dealt directly with the principal as a fully-competent person.

*Id.*

### *B. Medically Futile Treatment*

Many health care providers opine that life-sustaining treatments do not have to be initiated if doing so would be futile. Health care providers reasonably rely upon the American Medical Association Code's ethical guidelines, which provide that "physician[s are] not ethically obligated to make a specific diagnostic or therapeutic procedure available to a patient, even on specific request, if the use of such a procedure would be futile."<sup>210</sup> The problem with relying on these ethical guidelines is that Illinois has not addressed situations when physicians have the authority to decide to withhold or withdraw life-sustaining treatments. Illinois has, however, identified particular situations where surrogates can consent to withhold or withdraw life-sustaining treatments, either as agents under a durable power of attorney or as surrogates for patients with qualifying conditions who have not signed a durable power of attorney or a living will.<sup>211</sup> The only time Illinois has given physicians the authority to determine to withhold or withdraw life-sustaining treatment is when a patient has executed a living will.<sup>212</sup> If a patient has executed both a living will and a durable power of attorney, the durable power of attorney controls.<sup>213</sup> Because Illinois has not legislated an exception to the informed consent doctrine, physicians have no legal authority to withhold life-sustaining treatments that they deem medically futile absent either a patient's consent or a surrogate's consent.

### *C. Distinguishing Between Life-Sustaining Treatment and Do Not Resuscitate Orders*

One of the greatest areas of confusion to health care providers and the legal community is distinguishing between life-sustaining treatment and do-not-resuscitate orders ("DNRs"). Although health care providers often consider them identical, in fact, important distinctions between the orders exist. Health care providers should view resuscitation as a sub-category of life-sustaining treatment and not as an equivalent to life-sustaining treatment. The confusion in this area probably results from the belief that people generally do not want their lives prolonged by life-sustaining treatment when death is imminent.

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210. Council on Ethical and Judicial Affairs, American Med. Ass'n, *Guidelines for the Appropriate Use of Do-Not Resuscitate Orders*, 265 JAMA 1868, 1870 (1991).

211. See *supra* Parts III.B., III.D. (discussing the circumstances under which agents or surrogates may make decisions regarding life-sustaining treatment).

212. See *supra* notes 77-84 and accompanying text (explaining the provisions of the living will in the context of physician decision-making).

213. See *supra* notes 77-84.

Affirmative action, such as pulmonary resuscitation, would only prolong their lives. This generalization, however, is too broad.

Several factors must be considered before an agent decides to forego or withdraw life-sustaining treatment under a durable power of attorney. Specifically, whenever the principal selects the option under the statutory form that indicates that the principal does not want his life prolonged or life-sustaining treatment provided, it includes language that requests the agent to consider whether the burden of treatment and the expenses outweigh the expected benefits, the relief of suffering, and possible extension of life.<sup>214</sup> Selecting this option, however, does not automatically mean that a DNR should be entered.

The DNR should not be entered without the patient's consent. If the patient lacks capacity to give informed consent, then the agent under a durable power of attorney for health care must provide authority for the DNR.<sup>215</sup> Unless the language creating the agency expressly limits the agent's power, the agent under a durable power of attorney for health care can consent to a DNR even though the principal does not have a qualifying condition under the Health Care Surrogate Act.<sup>216</sup> If there is no agent under a durable power of attorney, one must consider whether the patient has a qualifying condition under the Health Care Surrogate Act so that a surrogate can make a decision to forgo life-sustaining treatment.<sup>217</sup> Although the Health Care Surrogate Act's definition of "life sustaining treatment" does not expressly include resuscitation measures, it describes life-sustaining treatment as "any medical treatment, procedure, or intervention that, in the judgment of the attending physician, when applied to a patient with a qualifying condition, would not be effective to remove the qualifying condition or would serve only to prolong the dying process,"<sup>218</sup> indicating that surrogates could choose to forego resuscitation measures as

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214. See 755 ILL. COMP. STAT. 45/4-10 (West 1996).

215. See *supra* notes 51-54 and accompanying text (noting that the durable power of attorney for health care empowers another individual to make health care decisions on behalf of an incapacitated adult).

216. See 755 ILL. COMP. STAT. 40/20, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 20, § 40/20, 1997 Ill. Legis. Serv. 2935-37 (West); see also *supra* notes 53-54 and accompanying text (stating that in the absence of express limitations in the document creating the durable power of attorney the decision of a surrogate named under such a document controls that of any other surrogate).

217. See 755 ILL. COMP. STAT. 40/20, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 20, § 40/20, 1997 Ill. Legis. Serv. 2935-37 (West); see also *supra* notes 85-88 and accompanying text (discussing "qualifying condition" under the Surrogate Act).

218. 755 ILL. COMP. STAT. 40/10, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 10, § 40/10, 1997 Ill. Legis. Serv. 2933-35 (West).

treatment.<sup>219</sup> Therefore, although persons with decisional capacity do not have a qualifying condition as defined under the Health Care Surrogate Act, they have the authority to consent to DNRs.

The circumstance creating the most confusion about the usage of DNRs occurs when the patient has neither the capacity to give informed consent to a DNR nor a “qualifying condition” under the Health Care Surrogate Act.<sup>220</sup> Many health care providers ask the closest living relatives of elderly patients to consent to DNRs when patients either do not have qualifying conditions or qualifying conditions are not documented in the patients’ medical records. This procedure is not within Illinois law because the Health Care Surrogate Act requires a qualifying condition before relatives can consent to DNRs.<sup>221</sup>

Under the Health Care Surrogate Act, guardians of the person can choose to forbid resuscitation for a patient with a qualifying condition. *In re Estate of Greenspan*<sup>222</sup> implies that plenary guardians of a person would be unable to obtain court authority to consent to a DNR when a patient does not have a qualifying condition as defined by the Health Care Surrogate Act.<sup>223</sup>

#### D. *The Affirmative Duty to Provide Life-Sustaining Treatment*

##### 1. The General Duty to Provide Life-Sustaining Treatment

Does a physician have an affirmative obligation to provide life-sustaining treatment absent consent from a patient or authorized

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219. See *id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 10, § 40/10, 1997 Ill. Legis. Serv. 2933-35 (West).

220. Qualifying conditions include a terminal condition, permanent unconsciousness, or incurable or irreversible condition. See *id.*, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 10, § 40/10, 1997 Ill. Legis. Serv. 2933-35 (West). For the complete statutory definitions of these terms, see *supra* notes 86-88.

221. The Health Care Surrogate Act requires a “qualifying condition” before a relative can consent to a DNR. See 755 ILL. COMP. STAT. 40/20, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 20, §40/20, 1997 Ill. Legis. Serv. 2935-37 (West).

222. *In re Estate of Greenspan*, 558 N.E.2d 1194, 1201 (Ill. 1990). The court stated:

We decided in *Longeway* that a patient’s right to refuse medical treatment, including artificial nutrition and hydration, is supported by the common law and that under . . . the Probate Act of 1975, in the case of an incompetent patient, the right may be exercised by a guardian as surrogate. However, we also decided in *Longeway* that, pending any constitutionally permissible modification of the common law by the legislature, a surrogate can exercise the right for an incompetent patient only if [six conditions are met].

*Id.* (citations omitted).

223. See *supra* notes 85-88 and accompanying text (defining a “qualifying condition” under the Surrogate Act).

surrogate to withhold or withdraw life-sustaining treatment? Arguably, health care providers must affirmatively obtain consent from a patient before initiating life-sustaining treatment. This argument, however, does not take into account when health care providers face decisionally incapacitated patients who cannot provide consent. This situation is analogous to an emergency medical situation.<sup>224</sup> In emergency medical situations, health care providers can provide medical care without a patient's consent if a delay in obtaining consent would either endanger the patient's life, or adversely and substantially affect the patient's health.<sup>225</sup> Similarly, consent is unnecessary if delaying or removing life-sustaining treatment would adversely and substantially affect the health of a patient who is unable to give consent and who has no surrogate to authorize consent.<sup>226</sup> The Council on Ethical and Judicial Affairs for the American Medical Association reports a similar conclusion, "[a]s with other emergency procedures, consent to administer CPR is presumed since the patient is incapable at the moment of arrest of communicating his or her treatment preference, and failure to render immediate care is certain to result in the patient's death."<sup>227</sup>

Other individuals might counter that health care providers have no affirmative obligation to provide medical treatment. Under the American Medical Association's Code of Medical Ethics ("AMA Code"), once a physician undertakes a case, the physician must not withdraw life-sustaining treatment from the patient without giving sufficient notice to the patient, the patient's relatives, or responsible friends to permit the selection of another medical attendant.<sup>228</sup> The AMA Code also forbids a physician from neglecting a patient for whom he has begun to care.<sup>229</sup> Therefore, once a physician accepts a patient, the physician has an affirmative ethical duty to provide life-sustaining treatment until the patient or the patient's surrogate refuses such treatment. Although there is presently no Illinois statute that mandates this affirmative obligation, health care providers undoubtedly

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224. See *supra* part II.B (discussing when medical care can be administered without the patient's consent).

225. See 405 ILL. COMP. STAT. 5/2-111 (West 1996). The statute states that "[w]hen a medical . . . emergency exists, if a physician . . . who examines a recipient determines that the recipient is not capable of giving informed consent, essential medical . . . procedures may be performed without consent." *Id.*

226. See *id.*

227. Council on Ethical and Judicial Affairs, American Med. Ass'n, *Guidelines for the Appropriate Use of Do-Not Resuscitate Orders*, 265 JAMA 1868, 1868 (1991).

228. AMA Council on Ethical and Judicial Affairs, Op. 8.11 (1994).

229. See *id.*

risk liability for wrongful death and medical malpractice for failing to provide life-sustaining treatment without first obtaining refusal.

## 2. The Duty to Provide Life-Sustaining Treatment and the Surrogate Act

The possibility of a decisional vacuum presents health care providers with a number of questions regarding their obligations. What obligation does a health care provider have to initiate life-sustaining treatment for a qualifying patient when surrogates fail to reach a consensus concerning life-sustaining treatment? What is the health care provider's obligation during the process of locating the surrogates? Or, if there is a surrogate, what are the health care providers' obligations if surrogates are unavailable, cannot be found, or refuse participation in the decision-making process? Unfortunately, the Health Care Surrogate Act does not specifically address these questions. The Health Care Surrogate Act does, however, set forth a specific process for health care providers to follow before withdrawing life-sustaining treatment.<sup>230</sup> Unless this process is followed, health care providers do not have the authority to withhold or withdraw life-sustaining treatment. Despite this process, health care providers do not have the authority or discretion to make the decision concerning withdrawal or withholding life-sustaining treatment.<sup>231</sup> Naturally then, before a physician may withhold or withdraw life-sustaining treatment from a patient, the physician must first obtain consent from an authorized surrogate.<sup>232</sup> This consent results in a physician's affirmative obligation to provide life-sustaining treatment.

### *E. Provision of Medical Care When it is Refused*

#### 1. When Medical Care Would Avert Non-imminent, But Impending Death

##### a. Refusal by an Incapacitated Person

Frequently, health care providers and social service providers are confronted with elderly people who live alone, are decisionally

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230. See *supra* text accompanying notes 85-99 (setting forth process before withdrawing life-sustaining treatment).

231. See 755 ILL. COMP. STAT. 40/25 (West 1996) (providing that a health care agent or other surrogate decision makers are those authorized to decide whether to withdraw life-sustaining treatment), amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2935-38 (West).

232. See *id.* at 40/25(a), amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 25, § 40/25, 1997 Ill. Legis. Serv. 2937-38 (West).

incapacitated, and refuse needed treatment. In many of these cases, death will occur if the individual does not receive medical treatment within a short period of time. The statutes provide health care providers guidance in handling these situations.

First, it must be determined whether the person has an agent under a durable power of attorney for health care. Service providers who coordinate in-home services for the elderly should always ask the client in the initial interview whether the client has signed a durable power of attorney for health care. Whenever a health care provider believes that a person lacks capacity to give informed consent to health care and when there is a known agent under a durable power of attorney for health care, the agent must consent to any medical treatment.<sup>233</sup>

If a health care provider cannot determine whether there is an agent named under a durable power of attorney for health care, and the lack of immediate medical attention could result in serious physical harm, the health care provider may notify a police officer.<sup>234</sup> Under the Mental Health and Disabilities Code ("MHD Code"), police officers may take people into custody and transport them to a mental health facility if, upon personal observation, the police officer believes the person is subject to involuntary admission and in need of immediate hospitalization to protect the person or another from physical harm.<sup>235</sup> The MHD Code defines a mental health facility as:

any licensed private hospital, institution, or facility or section thereof, and any facility, or section thereof, operated by the State or a political subdivision thereof for the treatment of persons with mental illness and includes all hospitals, institutions, clinics, evaluation facilities, and mental health centers which provide treatment for such persons.<sup>236</sup>

Although the MHD Code provides for involuntary admission of mentally ill persons under certain conditions, it does not define the

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233. See *id.* at 45/4-7(a); see also *supra* text accompanying notes 8-22 (discussing capacity of a patient); text accompanying notes 51-54 and accompanying text (discussing agent's power to give consent under a durable power of attorney).

234. See *infra* note 235.

235. See 405 ILL. COMP. STAT. 5/3-606 (West 1996). The statute provides in part:

A peace officer may take a person into custody and transport him to a mental health facility when, as a result of personal observation, the peace officer has reasonable grounds to believe that the person is subject to involuntary admission and in need of immediate hospitalization to protect such person or others from physical harm . . . .

*Id.*

236. See *id.* at 5/1-114.

meaning of “mentally ill.”<sup>237</sup> Clearly, distinctions exist between decisional incapacitation and mental illness. For instance, many people who are decisionally incapacitated are not considered mentally ill.<sup>238</sup> Arguably then, the MHD Code should not be broadly applied in determining whether a person should be involuntarily admitted to a mental health facility. The problem of applying the MHD Code narrowly, however, is that often the cause of the person’s decisional incapacitation is unknown until medical treatment is provided. Therefore, health care providers err on the side of survival and presume that if the person was decisionally capacitated, he would choose to receive medical treatment.

Another problem with broadly applying the MHD Code is that a person, while decisionally capacitated, may choose a course of action, such as refusing medication, which eventually results in death. At some point prior to a person’s death, the person will probably become decisionally incapacitated. At this time, a health care provider may intervene and render medical treatment to someone who purposefully chose to refuse it. In such an instance, however, the health care provider’s intervention ignores the person’s right to self-determination.<sup>239</sup>

#### b. Refusal of Treatment by a Surrogate

Although people have the right to keep their decisions private, a person who wants to refuse medical treatment, even if that refusal leads to death, should express this wish to someone prior to the point of incapacity. A better way that a person can assure that his wishes to refuse medical treatment will be honored after he becomes incapacitated, is by signing a durable power of attorney for health care which authorizes his agent to express his refusal of medical treatment.<sup>240</sup>

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237. *See id.* at 5/1-119. The statute provides:

“Person subject to involuntary admission” . . . means: (1) [a] person with mental illness and who because of his or her illness is reasonably expected to inflict serious physical harm upon himself or herself or another in the near future; or (2) [a] person with mental illness and who because of his or her illness is unable to provide for his basic physical needs so as to guard himself or herself from serious harm.

*Id.*

238. In approximately 100 guardianship cases handled by the author, only two cases were diagnosed with mental illnesses.

239. *See supra* notes 45-47 and accompanying text (discussing the individual’s right to self-determination).

240. *See supra* notes 51-54 and accompanying text (discussing agent’s authority under a durable power of attorney).

If there is no agent under a durable power of attorney, a surrogate under the Health Care Surrogate Act or a temporary guardian under the Probate Act may be appointed. Because the Probate Act requires that a copy of the petition and summons be served on the alleged disabled person at least fourteen days before the hearing, a temporary guardian needs to be appointed.<sup>241</sup> Before appointing a temporary guardian, the court must identify that actual harm will occur if a temporary guardian is not appointed.<sup>242</sup> The immediate welfare and protection of an allegedly disabled person are of paramount concern in temporary guardianship hearings.<sup>243</sup> Courts may grant a temporary guardian authority to make health care decisions for the disabled adult.<sup>244</sup>

A permanent guardianship may be pursued if it is determined that a person will not regain decisional capacity, and neither an authorized agent nor surrogate exists when health care decisions, other than the withholding or withdrawal of life-sustaining treatment, must be made.<sup>245</sup> A court can then give decision-making authority to a guardian of a disabled adult. Once a person has a qualifying condition under the Health Care Surrogate Act, the guardian can make the decision to forego or withdraw life-sustaining treatment.<sup>246</sup>

If the issue of life-sustaining treatment arises when the patient has a qualifying condition as defined under the Health Care Surrogate Act and has not yet designated an agent under a durable power of attorney, then the guardian can decide to forego life-sustaining treatment without petitioning a court for approval.<sup>247</sup> There is, however, a caveat to this

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241. See 755 ILL. COMP. STAT. 5/11a-10 (West 1996) (explaining when it is appropriate to appoint a guardian *ad litem*).

242. See *id.* at 5/11a-4, amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-4, 1997 Ill. Legis. Serv. 2949-50 (West).

243. See *id.*, amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-4, 1997 Ill. Legis. Serv. 2949-50 (West). The statute says that “[p]rior to the appointment of a guardian . . . a court may appoint a temporary guardian upon a showing of the necessity therefore for the immediate welfare and protection of the alleged disabled person or his estate . . . .” *Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-4, 1997 Ill. Legis. Serv. 2949-50 (West).

244. See *id.*, amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-4, 1997 Ill. Legis. Serv. 2949-50 (West). The temporary guardianship can only last 60 days. *Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-4, 1997 Ill. Legis. Serv. 2949-50 (West).

245. See *supra* text accompanying notes 147-50 and accompanying text (discussing decision-making authority regarding medically futile treatment).

246. See *supra* notes 85-92 and accompanying text (discussing “qualifying condition” under the Health Care Surrogate Act).

247. 755 ILL. COMP. STAT. 5/11a-17(d) (West 1996), amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-17, 1997 Ill. Legis. Serv. 2950-51 (West). The statute provides, “[t]he temporary guardian shall have all of the powers and duties of a guardian of the person or of the estate which are specifically enumerated by court

general rule. In 1993, the Illinois Appellate Court ruled that a circuit court did not abuse its discretion in denying the Office of State Guardian authority to forgo life-sustaining treatment when there was no evidence that the ward lacked decisional capacity and when the court required a surrogate decision-maker or the ward to exhibit a qualifying condition.<sup>248</sup> This case serves as a good reminder that even though someone has been adjudged to be a disabled adult under the Probate Act, the person may have decisional capacity to make choices concerning life-sustaining treatment.<sup>249</sup> Health care providers must determine whether someone has decisional capacity before a guardian may consent to withholding or withdrawal of life-sustaining treatment.<sup>250</sup> Furthermore, if the patient does not have a qualifying condition as defined under the Health Care Surrogate Act, then the guardian cannot consent to life-sustaining treatment withdrawal.<sup>251</sup>

Prior to the enactment of the Health Care Surrogate Act, the Illinois Supreme Court, in *In re Estate of Greenspan*,<sup>252</sup> set forth the conditions under which a court may grant a petition permitting a guardian to withdraw life-sustaining treatment from an incompetent patient. The conditions are as follows:

- (1) the incompetent is terminally ill as defined in section 2(h) of the Illinois Living Will Act, . . . *i.e.*, the patient's condition is incurable and irreversible so that death is imminent and the application of death-delaying procedures serves only to prolong the dying process;
- (2) the incompetent has been diagnosed as irreversibly comatose or in a persistently vegetative state;
- (3) the incompetent's attending physician and at least two other consulting physicians have concurred in the diagnosis;
- (4) the incompetent's right outweighs any interests of the State, as it normally does;
- (5) it is ascertained, by an appropriate means—*e.g.*, by the procedure of substituted judgment on the basis of clear and convincing evidence . . . what the incompetent presumably

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order." *Id.* at 5/11a-17, amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-17, 1997 Ill. Legis. Serv. 2950-51 (West).

248. See *In re Guardianship of Austin*, 615 N.E.2d 411, 418 (Ill. App. Ct. 4th Dist. 1993).

249. See *supra* notes 45-47 and accompanying text (describing a patient's right to self-determination).

250. See *supra* text accompanying notes 18-19 (explaining how physicians determine capacity).

251. See *supra* notes 230-31 and accompanying text (describing when a guardian can consent to life-sustaining treatment withdrawal).

252. *In re Estate of Greenspan*, 558 N.E.2d 1194 (Ill. 1990).

would have decided, if competent, in the circumstances; and,  
(6) a court enters an order allowing the surrogate to exercise the incompetent's right to refuse the treatment.<sup>253</sup>

Since the Health Care Surrogate Act defines a qualifying condition basically in the same manner as the court, it is clear that, unless a qualifying condition exists, no court has the power to authorize a guardian to remove life-sustaining treatment.

## 2. Involuntary Placement in a Nursing Home

Health care providers routinely encounter patients who are too frail or sick to live in their homes, yet who refuse to go to nursing homes. If the patient has decisional capacity, that patient possesses the complete right and power to refuse nursing home care. A medical facility that provided nursing home care without a capacitated person's consent would be subject to liability for unauthorized treatment.<sup>254</sup>

### a. Placement by a Surrogate

If the patient does not have capacity to give informed consent, the health care provider may rely on a surrogate. In this situation, health care providers face one of four surrogates: (1) a guardian of the person, (2) an agent under a durable power of attorney, (3) a trustee under a Living Trust, or (4) a surrogate under the Health Care Surrogate Act.

First, in some cases, a guardian's authority to make home or residential placement is clear from the court order establishing the guardianship.<sup>255</sup> If the scope of the guardian's authority is not clear from the court order, the guardian must obtain a court order that specifies he has such power before he can consent to nursing placement.<sup>256</sup> Absent explicit court authority, the guardian lacks the

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253. *Id.* at 1201 (citation omitted).

254. *See infra* part VII (discussing the penalties health care providers face when making decisions for incapacitated persons, and without a surrogate's consent).

255. *See* 755 ILL. COMP. STAT. 5/11a-14.1 (West 1996), *amended by* Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-14.1, 1997 Ill. Legis. Serv. 2950 (West). The Act states that "[t]he guardianship order may specify the conditions on which the guardian may admit the ward to a residential facility without further court order." *Id.*, *amended by* Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-14.1, 1997 Ill. Legis. Serv. 2950 (West).

256. *See id.*, *amended by* Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-14.1, 1997 Ill. Legis. Serv. 2950 (West). The Act states that "[n]o guardian appointed under this Article except for duly appointed Public Guardians and the Office of State Guardian shall have the power, unless specified by court order, to place his ward in a residential facility." *Id.*, *amended by* Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-14.1, 1997 Ill. Legis. Serv. 2950 (West).

ability to make residential placement. Once the guardian obtains such an order, the guardian may arrange for residential care even though the disabled adult might oppose such care.<sup>257</sup> Presumably, courts carefully scrutinize the allegedly disabled person's ability to make the decision about residential care to determine whether the person has capacity to make this type of decision, mainly, whether the person understands the consequences of rejecting residential placement and still chooses to reject it. If it is clear that a person understands the ramifications and chooses to stay at home, the court should honor that decision.

Second, if a person has named an agent under a durable power of attorney or a trustee under a living trust, and has not limited the agent's or trustee's power to make residential placement, an agent can consent to residential care even though the principal may reject the care.<sup>258</sup> Despite an agent's or trustee's consent, the health care provider must believe that the principal lacks capacity to give informed consent before relying on the agent or trustee.<sup>259</sup> If the health care provider believes that the patient has capacity to refuse the care, the health care provider must honor the patient's refusal. Finally, under the new amendments to the Health Care Surrogate Act, a surrogate, arguably, could consent to involuntary placement of a decisionally incapacitated adult.<sup>260</sup>

#### b. Placement by a Health Care Provider

Often, health care providers care for patients who become incapacitated during treatment. In such situations, it is arguable that the patient, while capacitated, gave informed consent to the health care provider for the continued care of the condition that resulted in hospitalization. What does the health care provider do if a new condition arises during the hospitalization or if the treatment of the patient ends and nursing home placement is required? If a surrogate relationship has not been established, an immediate member of the

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residential facility." *Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-14.1, 1997 Ill. Legis. Serv. 2950 (West).

257. *Id.*, amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, § 5/11a-14.1, 1997 Ill. Legis. Serv. 2950 (West).

258. See *supra* text accompanying notes 53-54, 75-76 (discussing the durable power of attorney under the Illinois Power of Attorney Act, including conflicts between principal and agent); text accompanying note 78 (discussing the relationship between trustee and beneficiary under the Illinois Living Will Act).

259. See *id.* at 45/4-7(a); see also *supra* text accompanying notes 8-23 (discussing the definition of decisional capacity and the necessity of the attending physician's determination as to whether the patient possesses such capacity).

260. See Act of July 29, 1997, Pub. Act No. 90-246, sec. 20(b-5)(1), § 40/20, 1997 Ill. Legis. Serv. 2937 (West).

patient's family can contract for his admission to the nursing home as long as the patient does not object to the nursing home placement.<sup>261</sup> Absent a surrogate or family member who executes such a contract, a patient may be admitted to a facility before the execution of the contract, provided a physician determines that a patient is so disabled as to be unable to consent to nursing home placement.<sup>262</sup> If the person has already been determined "disabled," but no court has entered an order allowing residential placement of the person, the medical facility may admit the person before the execution of a contract. However, two actions must occur after the facility makes this placement. First, either a petition for guardianship or for modification of guardianship must be filed within fifteen days of the person's admission to the facility.<sup>263</sup> Second, the contract must be executed "within 10 days of the disposition of the petition."<sup>264</sup> Arguably, if the physician determines that the patient does not have capacity to give informed consent, the patient does not have capacity to refuse nursing home placement.

As written, the Nursing Home Care Act allows involuntary admission to nursing homes.<sup>265</sup> However, this allowance provides no protection for the patient's right to self-determination. Some individuals might downplay this assault on a patient's right to self-determination by responding that patients are not placed in nursing homes against their will. This response is flawed, however, because many individuals placed in nursing homes do not realize they have the power to leave and, instead, believe that they are required to abide by the physician's order. In this regard, the Nursing Home Care Act needs substantial revisions.<sup>266</sup>

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261. See 210 ILL. COMP. STAT. 45/2-202(a) (West 1996). According to the statute, a "member of the person's immediate family" may execute a contract with a licensed health care facility. *Id.* However, the Act also states that "[n]o adult shall be admitted to a facility if he objects, orally or in writing . . ." *Id.*

262. See *id.* Under the terms of the statute, if "a physician determines that a person is so disabled as to be unable to consent to placement in a facility . . . that person may be admitted before the execution of a contract . . ." *Id.*

263. See *id.* The statute provides that a "person may be admitted . . . provided that a petition for guardianship or modification of guardianship is filed within 15 days of the person's admission to a facility . . ." *Id.*

264. *Id.*

265. See *id.* at 45/2-202.

266. See Rebecca O'Neill, *Involuntary Placement of Adults in Nursing Homes in Illinois*, QUEST: THE JOURNAL OF THE ILLINOIS HEALTH CARE ASSOCIATION, Oct. 1996, at 20, 21-22.

## VI. IMMUNITIES

Illinois has granted broad immunity to health care providers who act in good faith reliance on any direction or decision made by an agent under the terms of a durable power of attorney for health care.<sup>267</sup> If a health care provider acts in good faith reliance,<sup>268</sup> and either provides treatment or does not provide treatment in accordance with the agent's direction or decision, then the health care provider is immune from liability.<sup>269</sup> If the health care provider does not comply with the agent's direction, he must take two steps to avoid liability. First, the health care provider must notify the agent of his intent not to comply with the direction or decision. Second, the health care provider must continue to afford reasonably necessary consultation and care in connection with the transfer of the patient to another provider, even though the agent bears responsibility for arranging the transfer.<sup>270</sup> A health care provider that follows these two steps after refusing to comply with the agent's decision or direction, will be immune from liability.<sup>271</sup>

The Health Care Surrogate Act also establishes immunity for health care providers who rely on a surrogate's decision.<sup>272</sup> However, if the health care provider knows the surrogate is not entitled to act, or that action or inaction is contrary to the provisions of the Health Care Surrogate Act, then the health care provider will not be immune from liability.<sup>273</sup> The Health Care Surrogate Act states that health care providers must exercise due care and act in accordance with the Act's provisions.<sup>274</sup> This compliance, however, does not protect health care providers from negligence.<sup>275</sup> The health care provider must notify the

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267. See 755 ILL. COMP. STAT. 45/4-8 (West 1996).

268. See *id.* In this context, good faith is when the health care provider believes the patient may lack capacity to give informed consent to health care which the provider deems necessary. *Id.*

269. See *id.*

270. See *id.* The statute states that "[i]t is understood that a provider who is unwilling to comply with the agent's decision will continue to afford reasonably necessary consultation and care in connection with the transfer." *Id.*

271. See *id.* at 45/4-8(c).

272. See *id.* at 40/30(a). The statute provides that "[e]very health care provider and other person . . . shall have the right to rely on any decision by the surrogate decision maker . . ." *Id.*

273. See *id.* The statute provides that no health care provider will enjoy immunity if he "has actual knowledge that the surrogate is not entitled to act or that any particular action or inaction is contrary to the provisions of this Act." *Id.*

274. See *id.* at 40/30(b). The statute says that "nothing in this Act shall be deemed to alter the law of negligence as it applies to the acts of any surrogate or provider." *Id.*

275. See *id.* The statute reads: "Nothing in this Act shall be deemed to protect a

health care facility's administration if the health care provider is unable to comply with the directions of the surrogate because of his own personal beliefs or conscience.<sup>276</sup> Accordingly, the health care provider must assist the patient or surrogate in a timely transfer to another provider or facility willing to comply with the surrogate's decision.<sup>277</sup> This assistance is also required if the facility's policies preclude compliance with the surrogate's decision concerning life-sustaining treatment.<sup>278</sup>

The Living Will Act sets forth immunity for health care providers who either cause or participate in the withholding or withdrawal of death delaying procedures.<sup>279</sup> Such immunity only applies when the provider treats qualifying patients who have executed declarations under the Living Will Act.<sup>280</sup> This immunity further requires health care providers to act in good faith and in accordance with reasonable medical standards.<sup>281</sup>

In contrast, the provisions of the Probate Act<sup>282</sup> concerning

provider from liability for the provider's own negligence in the performance of the provider's duties or in carrying out any instructions of the surrogate . . ." *Id.*

276. *See id.* at 40/35. The statute provides in pertinent part: "A health care provider who because of personal views or beliefs or his or her conscience is unable to comply with the terms of a decision to forgo life-sustaining treatment shall, without undue delay, so notify the administration of the health care facility." *Id.*

277. *See id.* The statute provides in pertinent part:

The health care provider shall . . . assist the patient or surrogate in effectuating the timely transfer of the patient to another health care provider willing to comply with the wishes of the patient or the surrogate in accordance with this Act or, if necessary, arrange for the patient's transfer to another facility designated by the patient or surrogate decision maker.

*Id.*

278. *See id.*

279. *See id.* at 35/7. The statute provides, in pertinent part:

No physician, health care provider or employee thereof who in good faith and pursuant to reasonable medical standards causes or participates in the withholding or withdrawing of death delaying procedures from a qualified patient pursuant to a declaration which purports to have been made in accordance with this Act shall as a result thereof, be subject to criminal or civil liability, or be found to have committed an act of unprofessional conduct.

*Id.*

280. *See id.*

281. *See id.*

282. *See id.* at 5/11a-1 to 5/11a-23, amended by Act of July 29, 1997, Pub. Act No. 90-250, sec. 5, §§ 5/11a-4, 5/11a-14.1, 5/11a-17, 1997 Ill. Legis. Serv. 2949-51 (West) and Act of Aug. 8, 1997, Pub. Act No. 90-345, sec. 5, § 5/11a-18, 1997 Ill. Legis. Serv. 3862-63 (West) and Act of Aug. 18, 1997, Pub. Act No. 90-430, sec. 11-5, § 5/11a-5, 1997 Ill. Legis. Serv. 4534-35 (West) and Act of Aug. 17, 1997, Pub. Act No. 90-472, sec. 11-5, § 5/11a-5, 1997 Ill. Legis. Serv. 4858 (West).

guardians for disabled adults do not address immunities for health care providers who follow a guardian's decision or order. Clearly, if the guardian is making a decision concerning life-sustaining treatment for a patient who has a qualifying condition under the Health Care Surrogate Act,<sup>283</sup> the health care providers should follow the provisions in the Health Care Surrogate Act, and the protections afforded by it will apply. It is less clear what immunities exist for health care providers that follow guardians' decisions concerning other treatment.

If a court grants a guardian the power to consent to treatment, the guardian enjoys immunity from liability for following the court's direction.<sup>284</sup> Although the Illinois Power of Attorney Act provides immunity to health care providers for following the agent's direction when the agent's direction is not clearly contrary to the agency, i.e., the powers granted under the durable power of attorney for health care,<sup>285</sup> one court found that health providers may be subject to liability under the Civil Rights Act<sup>286</sup> for giving a blood transfusion to a patient who refused the blood transfusion for religious reasons<sup>287</sup> even though the guardian consented to the treatment based upon a court order. This same court of review stated that the court and guardian who consented to the transfusion were immune from liability.<sup>288</sup> For more routine decisions, which guardians make without a specific court order, there are no cases which set forth immunity for health care providers. The State needs to narrow the gap created by the current statute so that it is clear when guardians must seek specific orders for treatment and when

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283. See *id.* at 40/1 to 40/55, amended by Act of July 29, 1997, Pub. Act No. 909-246, sec. 5-sec. 25, §§ 40/5, 40/10, 40/15, 40/20, 40/25, 1997 Ill. Legis. Serv. 2933-38 (West); *supra* text accompanying notes 272-278 (discussing immunity under the Health Care Surrogate Act).

284. See *Holmes v. Silver Cross Hospital*, 340 F. Supp. 125, 130 (N.D. Ill. 1972) (holding that "as an agent of the court" a health care conservator shares the same judicial immunity as the court which appointed the conservator; therefore, so long as the conservator does not act "totally outside of his jurisdiction" he will be immune from suit).

285. 755 ILL. COMP. STAT. 45/4-8 (West 1996). The statute provides, in pertinent part:

Each health care provider and each other person who acts in good faith reliance on any direction or decision by the agent that is not clearly contrary to the terms of a health care agency (a "reliant") will be protected and released to the same extent as though the reliant had dealt directly with the principal as a fully-competent person.

*Id.*

286. 42 U.S.C. § 1983 (1996).

287. See *Holmes*, 340 F. Supp. at 134, 135-36.

288. See *id.* at 130.

guardians have authority to consent to routine care without specific orders. Illinois should also set forth provisions for immunity for health care providers who follow the directions of a guardian as authorized by the Health Care Surrogate Act and by the court for other treatment.

## VII. PENALTIES

### A. *General Penalties*

Health care providers routinely make medical decisions for incapacitated persons, even though there is no one to consent to the medical treatment.<sup>289</sup> Without the consent of the patient or a lawful surrogate, health care providers risk legal consequences by either performing or failing to perform health care services for a decisionally incapacitated person.

When the Department of Public Health inspects nursing homes, the department routinely checks whether decisionally incapacitated patients in nursing homes have legal surrogate decision-makers.<sup>290</sup> Whenever a facility provides services to someone who is decisionally incapacitated without a lawful surrogate who consented to the treatment, the Department cites the facility for violating the Patient Self-Determination Act and for failing to comply with its standard entitled "Protection of Client Rights."<sup>291</sup> Facilities that fail to pursue guardianship or advocacy for clients who need it, or that unofficially delegate patients' rights to others (like family members or advocacy groups) receive citations for deficiencies.<sup>292</sup>

Health care providers who administer care without the patient's consent or the patient's surrogate's consent risk civil sanctions as well. Lawsuits for battery and medical malpractice traditionally result whenever a patient receives unwanted treatment.<sup>293</sup> Even if no injury results from the unwanted treatment, the health care provider can nonetheless be subject to liability because the patient's right to be free from unwanted bodily contact has been compromised.<sup>294</sup> As the

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289. The author routinely encounters patients in nursing homes whose medical records indicate they have lacked capacity for many years and have had no surrogates consenting to medical treatment.

290. See *Intermediate Care Facilities for the Mentally Retarded*, 42 C.F.R. § 483.420(a) (1996).

291. See *id.*

292. See *id.* at § 483.420(a)(1)-(a)(2).

293. See BARRY R. FURROW ET AL., *HEALTH LAW* §§ 6-9(b), at (1995).

294. See *id.*; see also *In re Estate of Greenspan*, 558 N.E.2d 1194, 1204 (Ill. 1990).

Illinois Appellate Court stated, “[t]he right to refuse medical treatment has been recognized under constitutional right-to-privacy principles and is deeply ingrained in common law principles of individual autonomy, self-determination, and informed consent.”<sup>295</sup> The Illinois appellate case law that addresses the extent of liability health care providers face when continuing life-sustaining treatment over the objection of a lawful surrogate is limited. In *Ficke v. Evangelical Health Systems*, the Illinois Appellate Court found that a hospital did not have a duty to inquire about the availability of a surrogate, absent a finding by the attending physician that the patient had a qualifying condition under the Health Care Surrogate Act.<sup>296</sup> The court also found that the family members did not have a cause of action against the hospital, rather, the patient or the patient’s estate was required to bring the cause of action.<sup>297</sup> Actions against health care providers for unauthorized treatment which have reached the supreme courts in other states typically favor the health care providers.<sup>298</sup>

### B. Specific Penalties under the Illinois Surrogate Acts

The Illinois Power of Attorney Act establishes penalties for certain acts committed by health care providers. If a health care provider chooses not to honor a health care agent’s decision under a durable power of attorney for health care, and then refuses to cooperate in the transfer of the patient, the health care provider can be subject to liability.<sup>299</sup> The Act, however, does not specify what type of liability

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(providing that a vegetative patient with severe and irreversible brain damage could have his artificial feeding tube withdrawn as requested by the Cook County Public Guardian). *Id.* at 1199.

295. *Ficke v. Evangelical Health Systems*, 674 N.E.2d 888, 889, (Ill. App. Ct. 1st Dist. 1996) *appeal denied* 679 N.E.2d 379 (Ill. 1997); *see also* *Cruzan v. Missouri Dep’t of Health*, 497 U.S. 261, 278 (1990) (recognizing a constitutional right to refuse unwanted medical treatment).

296. *See Ficke*, 674 N.E.2d at 892.

297. *See id.* at 893.

298. *See, e.g., Anderson v. St. Francis-St. George Hosp., Inc.*, 671 N.E.2d 225, 228 (Ohio 1996) (ruling that a hospital that kept a man alive against his wishes did not have to reimburse the estate for the man’s medical expenses); *Grace Plaza, Inc. v. Elbaum*, 588 N.Y.S.2d 853 (N.Y. App. Div. 1992) *aff’d*, 623 N.E.2d 513 (1993) (finding that the fact that the objections to treatment by the patient’s conservator was not a defense to the nursing home’s action for expenses resulting from the treatment and therefore holding conservator liable for medical bills when nursing home kept comatose patient alive against the wishes of the conservator).

299. *See* 755 ILL. COMP. STAT. 45/4-8(b) (West 1996). The provision provides:

No reliant shall be subject to any type of civil or criminal liability or discipline for unprofessional conduct for failure to comply with any direction or decision by the agent that violates the reliant’s conscience rights, as long as the reliant promptly informs the agent of reliant’s refusal or failure to

will be imposed on the health care provider.<sup>300</sup> The Illinois Power of Attorney Act also sets penalties for certain actions committed by third parties.<sup>301</sup> Civil liability rests with anyone who, without the principal's consent, "wilfully conceals, cancels or alters a health care agency or any amendment or revocation of the agency or who falsifies or forges a health care agency, amendment or revocation."<sup>302</sup> Similar penalties apply under the Living Will Act.<sup>303</sup>

Under the Living Will Act,<sup>304</sup> "[a] person who requires or prohibits the execution of a declaration as a condition for being insured or receiving health-care services is guilty of a Class A misdemeanor."<sup>305</sup> A health care provider who willfully fails to notify the patient or other persons designated by the Act<sup>306</sup> or fails to notify the health care

comply with such direction or decision by the agent.

*Id.*

300. *See id.*

301. *Id.* at 45/4-9.

302. *See id.* at 45/4-9(a).

A person who falsifies or forges a health care agency or wilfully conceals or withholds personal knowledge of an amendment or revocation of a health care agency with the intent to cause a withholding or withdrawal of life-sustaining or death-delaying procedures contrary to the intent of the principal and thereby, because of such act, directly causes life-sustaining or death-delaying procedures to be withheld or withdrawn and death to the patient to be hastened shall be subject to prosecution for involuntary manslaughter.

*Id.* at 45/4-9(b).

303. *See id.* at 35/8, amended by Act of June 13, 1997, Pub. Act No. 90-14, sec. 4-1, § 35/8, 1997 Ill. Legis. Serv. 1472 (West). The statute provides, in pertinent part: "Any person who wilfully conceals, cancels, defaces, obliterates, or damages the declaration of another without such declarant's consent or who falsifies or forges a revocation of the declaration of another or who wilfully fails to comply with Section 6 shall be civilly liable." *Id.* at 35/8(a) (citation omitted), amended by Act of June 13, 1997, Pub. Act No. 90-14, sec. 4-1, § 35/8, 1997 Ill. Legis. Serv. 1472 (West).

304. *See id.* at 35/8(b), amended by Act of June 13, 1997, Pub. Act No. 90-14, sec. 4-1, § 35/8, 1997 Ill. Legis. Serv. 1472 (West). The statute provides, in pertinent part:

Any person who coerces or fraudulently induces another to execute a declaration or falsifies or forges the declaration of another, or wilfully conceals or withholds personal knowledge of a revocation as provided in Section 5 with the intent to cause a withholding or withdrawal of death delaying procedures contrary to the wishes of the qualified patient and thereby, because of such act, directly causes death delaying procedures to be withheld or withdrawn and death to another thereby be hastened, shall be subject to prosecution for involuntary manslaughter.

*Id.* (citation omitted), amended by Act of June 13, 1997, Pub. Act No. 90-14, sec. 4-1, § 35/8, 1997 Ill. Legis. Serv. 1472 (West).

305. *See id.* at 35/8(e), amended by Act of June 13, 1997, Pub. Act No. 90-14, sec. 4-1, § 35/8, 1997 Ill. Legis. Serv. 1472 (West).

306. *See id.* at 35/3. The statute provides, in pertinent part:

If the physician is unwilling to comply with its provisions and the patient is at any time not able to initiate the transfer, then the attending physician shall

facility that he is unwilling to comply with the provisions of the declaration is guilty of engaging in unethical and unprofessional conduct.<sup>307</sup> A physician who willfully fails to record the determination of a qualifying condition in the patient's record, and does so without giving notice to the patient or other person designated by the act, also violates the Medical Practice Act.<sup>308</sup>

Finally, although the Health Care Surrogate Act<sup>309</sup> does not set forth penalties for noncompliance with its provisions, providers who do not act in due care and in accordance with its provisions may find themselves faced with medical malpractice cases for negligence and wrongful death. Specifically, the Health Care Surrogate Act states:

Nothing in this Act shall be deemed to protect a provider from liability for the provider's own negligence in the performance of the provider's duties or in carrying out any instructions of the surrogate, and nothing in this Act shall be deemed to alter the law of negligence as it applies to the acts of any surrogate or provider.<sup>310</sup>

## X. CONCLUSION

On a daily basis, health care providers encounter difficult issues concerning rendering care to decisionally incapacitated adults. Whenever a health care provider encounters a patient who is decisionally incapacitated, the health care provider must immediately initiate the process of identifying an appropriate surrogate to give informed consent. Although Illinois has set forth procedures to

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without delay notify the person with the highest priority, as set forth in this subsection, who is available, able, and willing to make arrangements for the transfer of the patient and the appropriate medical records to another physician for the effectuation of the patient's declaration. The order of priority is as follows: (1) any person authorized by the patient to make such arrangements, (2) a guardian of the person of the patient, without the necessity of obtaining a court order to do so, and (3) any member of the patient's family.

*Id.*

307. *See id.* at 35/8(c), amended by Act of June 13, 1997, Pub. Act No. 90-14, sec. 4-1, § 35/8, 1997 Ill. Legis. Serv. 1472 (West). Such conduct violates 225 ILL. COMP. STAT. 60/22 (5) (West 1996) (permitting disciplinary action against physicians who engage in "unethical or unprofessional conduct").

308. *See id.* at 35/8(d) (West 1996), amended by Act of June 13, 1997, Pub. Act No. 90-14, sec. 4-1, § 35/8, 1997 Ill. Legis. Serv. 1472 (West). Such conduct violates 225 ILL. COMP. STAT. 60/22 (22) (West 1996).

309. *See id.* at 40/1 to 40/55, amended by Act of July 29, 1997, Pub. Act No. 90-246, sec. 5-sec. 25, §§ 40/5, 40/10, 40/15, 40/20, 40/25, 1997 Ill. Legis. Serv. 2933-38 (West).

310. *Id.* at 40/30(b).

establish surrogates for persons who cannot give informed consent, the law needs to be improved and clarified. An individual's right to make personal care decisions overrides the obligation of physicians and health care providers to render care or preserve life.<sup>311</sup> Through its acceptance of surrogate decision-makers, the State recognizes that self-determination is a right also extended to patients lacking decisional capacity. The health care provider must always remember that the ultimate decision concerning the administration of care rests first with the individual, and then the surrogate, not the health care provider.

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311. *See id.* at 45/4-1. The statute provides that, "[t]he General Assembly recognizes the right of the individual to control all aspects of his or her personal care and medical treatment, including the right to decline medical treatment or to direct that it be withdrawn, even if death ensues." *Id.*