Chapter 3
Guardian Advocate’s Decision-Making

Ethics of Medical Decision-making

This chapter deals with issues of competency to consent to treatment, express and informed consent, and the “substitute judgment standard” for decision-making by Guardian Advocates.

In general, all persons are considered to be competent and have the right to refuse treatment that their doctors may believe is essential. If a person is determined by the court to be “incompetent to consent to treatment,” then the person is appointed a Guardian Advocate to protect his/her right to refuse treatment or to consent to certain treatments. When the Guardian Advocate is making such decisions for a person, a question often asked is: “What standard or criteria do I use?”

While the Baker Act is not specific, most attorneys practicing in mental health law advise that the substitute judgment standard should be used by Guardian Advocates when a person’s preferences are known. In such circumstances the person’s preferences, (made known at a time when he or she was mentally competent) should be honored by the Guardian Advocate. If the Guardian Advocate doesn’t know what the person would have preferred, a “best interest” standard can be used instead.

The information gathered and decisions made by the Guardian Advocate under the authority of “express and informed consent” should be used to honor a person’s known preferences in substitute decision-making. This information should also be used to protect the person’s other rights as specified in the Baker Act or other state or federal laws. It should also be used by the Guardian Advocate in monitoring or reviewing the effects or results of any treatments that may have been authorized.

Express and Informed Consent

In order for you to have been appointed by the court as the person’s Guardian Advocate, the person would have had to been found incompetent to consent to his or her own treatment. This means this that the person’s judgment is so affected by the mental illness that the person doesn’t have the ability to make well-reasoned, willful, and knowing decisions about his or her medical or mental health treatment.

“Express and Informed Consent” requires that any consent given be voluntary given in writing by a competent person or his/her substitute decision-maker. The consent must be based on sufficient explanation (disclosure) of all necessary information so the decision-maker can make a knowing and willful decision. For informed consent to meet these requirements, the physician must explain in plain language so the decision-maker understands the:

- Proposed treatment, including proposed psychotherapeutic medications,
- Purpose of treatment,
- Alternative treatments,
- Specific dosage range for medications, when applicable,
- Frequency and method of administration,
- Common risks, benefits, and common short-term and long-term side effects,
- Any contraindications which may exist,
- Clinically significant interactive effects with other medications,
- Similar information on alternative medication which may have less severe or serious side effects,
- Potential effects of stopping treatment,
- Approximate length of care,
- How treatment will be monitored, and that
- Any consent for treatment may be revoked orally or in writing before or during the treatment period by the individual legally authorized to make health care decisions on behalf of the person.

Informed consent is comprised of two separate elements:

- The first element is that of disclosure. Disclosure by the treating physician to the person (Guardian
Advocate) of the necessary information to make a well-reasoned decision about the treatment. This disclosure responsibility includes the physician’s duty to answer questions about the proposed treatments and also alternative treatment approaches so that an informed decision can be made. Such complete disclosure is a primary element of informed consent.

- The second element is consent itself. Having considered the information provided by the doctor, the decision-maker would then consent or refuse consent to the procedures.

If necessary disclosure is delayed or not provided by the doctor or medical staff, the Guardian Advocate should not sign a consent form or other authorization until such information is provided. Never sign a blank consent or authorization form!

An exception to Express and Informed Consent is when an Emergency Treatment Order or “ETO” is used: When informed consent is unavailable from the person or authorized decision-maker, the physician may issue a temporary written order for forced medication of the person in an emergency circumstance when the person’s behavior endangers the person or others. The ETO is only good for up to 24 hours; in some facilities it is only good for a single administration. An ETO is renewable as long as the emergency exists.

As the Guardian Advocate, you will first be requested to sign an authorization for treatment. Before signing any authorizations you might pose the following questions:

- Will the person be receiving psychotherapeutic medication?
- What other forms of therapy, including non-chemical alternatives are available?
- Who will be my primary contact on the treatment team?
- How will we communicate? How frequently?

**The Principle of Substitute Judgment**

Substitute decision-making is the Guardian Advocate making the decisions the person would have to make if competent to do so.

In making informed consent decisions, a Guardian Advocate, is acting as the substitute decision-maker for the person. Such substitute decision-making is a two-step process. First, the Guardian Advocate should try to determine the person’s preferences (from an earlier time when the person was competent) and make a decision following those preferences. Second, if those preferences cannot be determined, then the Guardian Advocate should act in the person's best interests instead.

One of the duties of the Guardian Advocate is to make sure that the person’s rights are preserved. The Guardian Advocate should see that the treatment team observes the person's right to his or her own values, goals, and to choices about his or her treatment.

The Guardian Advocate provides “substitute judgment” for the person in all psychiatric treatment (and medical treatment decisions if authorized by the court), and only after the Guardian Advocate's appointment by the court. Therefore a Guardian Advocate represents the person’s choices until he or she regains competency. Consequently, the Guardian Advocate should put his/her personal choices about any of the medications and other therapies aside.

The person’s values and choices are very important in treatment planning. Basically, the Guardian Advocate is the legally authorized decision-maker for the person. Choices for care are always made from the person's viewpoint. Consequently, the Guardian Advocate must make a reasonable effort to make decisions consistent with the person's previously expressed desires (at an earlier time when the person was competent) when known. The medical staff must give the Guardian Advocate complete information about planned medications and alternative therapies to make an informed choice. If “express and informed consent” information is delayed or not provided by the medical staff, the Guardian Advocate should not sign consent or authorization until such information is provided. Never sign a blank consent or authorization form. Alternative treatment methods or medications can typically be found, although some may not be as successful as others. The Guardian Advocate represents the person when he or she signs an Authorization for Treatment Form.
Applying substitute judgment by the Guardian Advocate can be difficult. For example:

You may be a Guardian Advocate for someone who refuses to take recommended medications and who has historically objected to medications prior to becoming incompetent to consent (such as due to religious beliefs). However, the treatment team may strongly feel that medications are necessary. As the person’s Guardian Advocate, in order to honor and preserve the person’s long-standing values and self-determination, you should best represent what you believe the person would have chosen had the person been competent, not necessarily your own personal agreement with the doctor. The person may have previously objected to certain medications that had caused serious side effects. The person is still objecting to those medications. As the person’s Guardian Advocate, you should negotiate an alternative medication for the person that doesn’t have those side effects.

If the person is currently refusing medication but his or her prior history reveals that the person had been agreeable to taking medications in the past when he/she were competent to consent, the Guardian Advocate may reasonably believe that the person would choose to consent to medications now if competent to do so.

If the Guardian Advocate does not have sufficient information to determine what the person would have chosen had the person been competent and cannot after reasonable effort obtain it, then the Guardian Advocate might choose to consent to treatment “in the best interest” of the person.

While a person’s objections to a particular medication, when he or she is incompetent, is not legally binding, the Guardian Advocate should consider whether a substitute medication would be more acceptable to the person. In such cases, the Guardian Advocate should consider asking the doctor to recommend alternate medication, for example to reduce unavoidable symptoms or side effects of a particular medication.

You, as the person’s stand-in, may have to refuse to sign the Authorization for Treatment. In some situations, the facility Administrator or the person’s family or attorney, may choose to ask the court to review your decisions about treatment or medications. Sometimes providing “substitute decision-making” or acting in a person’s “best interest” requires the Guardian Advocate to do what the person or the Guardian Advocate doesn’t want to do.

In cases where imminent danger exists, a physician can order emergency treatment.

**Review of Guardian Advocate’s Decisions**

Another frequently asked question is: “If the Guardian Advocate refuses treatment, then what happens?” The decision of the Guardian Advocate may be reviewed by the court, if a petition is file by the person’s attorney, the person’s family or the facility administrator. If the facility believes that treatment is essential, the facility may petition the court for the appointment of a different Guardian Advocate. In such circumstances, the court will weigh the conflicting testimony given by involved parties and decide whether the Guardian Advocate should be retained or another Guardian Advocate should be selected to serve.