

## California Law Offers Few Solutions to When Surrogates Collide



It has been almost ten years since the Terry Schiavo case

dominated the national media. This month, the American Journal of Palliative Medicine explored an issue that conjures up memories of that case in a thought provoking piece titled *When Surrogates Collide*.<sup>[1]</sup> The article, which contains the opinions of a physician, nurse, chaplain, social worker, and attorney, attempts to answer the question of who is the most appropriate decision maker for an incapacitated patient when there is a disagreement about care and the patient has neither executed an advanced directive nor appointed a medical decision maker.

As many hospice and home health providers can appreciate, treatment issues at the end-of-life can be an emotional and volatile subject. Loved ones of an incapacitated patient may disagree about the type of care the patient would have wanted if he/she is incapacitated and nearing the end-of-life. Unfortunately, unless the patient indicates his or her wishes beforehand, there may not be a clear-cut answer to the question as to who's the most appropriate person to make that decision.

In California, health care decisions are governed by the Uniform Health Care Decision Act.<sup>[2]</sup> However, California law provides little guidance to health care providers as to who should make those decisions on behalf of an incapacitated patient. Instead, the law encourages a patient to address those issues beforehand to ensure his or her wishes known, including an advanced directive, a power of attorney, or the appointment of a surrogate.

When a provider encounters an incapacitated patient who has not made his or her wishes known, the provider should determine who is best suited to act as the patient's surrogate. The current practice in California is to have the provider consult with the patient's spouse, domestic partner, and close family members to determine the appropriate surrogate. This informal practice is sufficient for most patient situations, but there are still instances where family members and other loved ones feud over who should be the decision maker for the patient.

In order to avoid such disputes, providers should take preventative measures to ensure the patient's wishes are known while the patient still has capacity. Providers should either determine whether the patient has an advanced directive, obtain a written document containing the patient's wishes, or ask the patient if he or she would like to appoint a surrogate for health care decisions. It should be noted though that the appointment of a surrogate is good for only 60 days or the duration of the treatment, whichever is shorter.<sup>[3]</sup> Therefore, the best practice remains for the patient to execute an advanced directive or make his or her wishes known in writing.

If a dispute arises, the physician or provider should turn to the spouse or domestic partner, as well as the family, to determine who the best surrogate is. While other areas of California law give priority to spouses and domestic partners over family members, there is no such formal hierarchy for health care surrogates. As such, a close friend or neighbor may be the best person to act as a surrogate.

If the provider cannot determine who is best suited or there is a dispute among family members as to who should be the surrogate, the courts are equipped to resolve such disagreements. All interested parties, including close friends and the health care provider, have the right to petition the court to appoint a conservator for the patient.<sup>[4]</sup> A court will review the parties' contentions and evidence in determining who is best suited to carry out the patient's

health care wishes.

To return to the article's initial question, under California law, there is not a *de facto* person who is best suited to be the surrogate decision maker for when surrogates collide, which is why providers should find out the patient's wishes before he or she becomes incapacitated. Decisions involving care at the end of life are a highly emotional issue for loved ones of the patients, providers, and even the public at large. For instance, during the Terry Schiavo controversy, the State of Florida went so far as to enact Terry's Law, a law which gave the governor authority to order the reinsertion of her feeding tube after it had been removed.<sup>[5]</sup> Though extreme, this example illustrates why taking the necessary steps to prevent disputes before they arise remains the best strategy to ensure the patient's wishes are carried out and the intended care is delivered without interruption from feuding family members.

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[1] Baumrucker, S. (2012). When Surrogates Collide. *American Journal of Hospice and Palliative Medicine*.  
<http://ajh.sagepub.com/content/early/2012/03/05/1049909112440565.citation>

[2] California Probate Code 4670 *et seq.*

[3] California Probate Code 4711

[4] California Probate Code 4750 *et seq.*

[5] [http://en.wikipedia.org/wiki/Terri\\_Schiavo\\_case#Terri's\\_Law\\_and\\_other\\_government\\_delays](http://en.wikipedia.org/wiki/Terri_Schiavo_case#Terri's_Law_and_other_government_delays)