Harborview Ethics Forum

Legal Considerations for Critically Ill and Dying Patients Who Lack Surrogate Decision Makers

Expert-Led Panel Discussion

Land Acknowledgement

The University of Washington acknowledges the Coast Salish peoples of this land, the land which touches the shared waters of all tribes and bands within the Duwamish, Puyallup, Suquamish, Tulalip and Muckleshoot nations. Acknowledging the ceded and unceded land on which we all stand could not be more important in our current historical moment. We encourage you to consult Native Land to learn more.

We will be recording today! Video will be available on our website if the speaker has given permission.

Guardianship Ethics

Objectives

1. Review Washington's legal requirements for withholding or withdrawing life-sustaining treatment.
2. Recognize when a guardianship appointment or court authorization is necessary for withholding or withdrawing life-sustaining treatment.

Disclosures

Today's speaker has no financial relationships with an ineligible company relevant to this presentation to disclose.

None of the planners have relevant financial relationship(s) to disclose with ineligible companies whose primary business is producing, marketing, selling, re-selling, or distributing healthcare products used by or on patients

All relevant financial relationships have been mitigated

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Harborview Ethics Forum

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Harborview Ethics Forum

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Summer Seminar in Healthcare Ethics 2025

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Monday, August 4th to Thursday, August 7th

W
BIOETHICS & HUMANITIES
UNIVERSITY of WASHINGTON
School of Medicine

Save the Date

Emergent Personhood Symposium

- **Date/Time**: April 29–30

Harborview Ethics Forums

- May 14th, 2025
- Dr. Lori Bruce

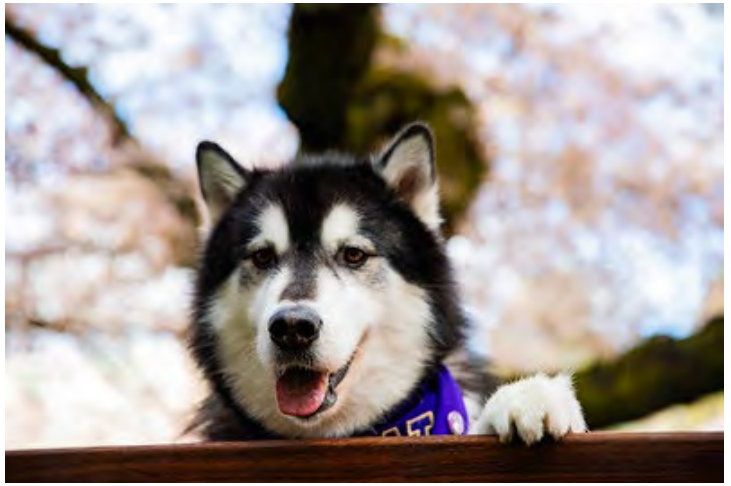
Legal Considerations for Critically Ill and Dying Patients Who Lack Surrogate Decision Makers

Expert-Led Panel Discussion

SPEAKERS:

Dionne Williams, MSW, LICSW, ACM-SW HMC Social Work Supervisor Care Management

I started working at Harborview in 1999 as an undergrad, helping patients apply for Social Security disability. After graduating with my MSW I accepted a job in social work where I've remained since, transitioning to a supervisor role about 5 years ago.



John Gibson, JD Assistant Director Clinical Risk Management | UW Medicine

John Gibson serves UW Medicine as Assistant Director for Clinical Risk Management. He works with faculty and staff at all UW Medicine sites of practice with a focus on Harborview Medical Center and Seattle Children's Hospital. John joined UW Medicine in March 2020 after 25 years as a trial lawyer and is a proud University of Washington alumnus.

Legal Considerations for Critically Ill and Dying Patients Who Lack Surrogate Decision Makers

Expert-Led Panel Discussion

SPEAKERS:

Michelle Nelson, JD, LLM Assistant Attorney General | UW Division WA State Office of the Attorney General

Michelle Nelson is an Assistant Attorney General who provides legal support to UW Medicine, with an emphasis on Harborview. Prior to representing UW Medicine, Michelle represented Western State Hospital in ITA civil commitment proceedings and represented the Health Care Authority, including the Medicaid program and the PEBB/SEBB insurance programs. Michelle holds a J.D. and LL.M. from Georgetown University Law Center and has worked on behalf of the U.S. Federal Trade Commission's Bureau of Competition, Georgetown's Center on Health Insurance Reforms, The O'Neill Institute for National and Global Health Law, Whitman-Walker Health, and the National Center on Protection Orders and Full Faith & Credit.

Legal Considerations for Critically Ill and Dying Patients Who Lack Surrogate Decision Makers

Expert-Led Panel Discussion

SPEAKERS:

Amy Spitzer, JD Special Assistant Attorney General Brothers, Henderson, Durkin PS

Amy is an attorney at Brothers Henderson Durkin, P.S. Her practice is dedicated to helping hospital systems with issues related to guardianship, surrogate decision-making, patient capacity, and difficult placement issues.

Mackenzie Wieburg, JD Associate Attorney Brothers, Henderson, Durkin PS

Mackenzie Wieburg's practice focuses on elder law and the representation of hospitals in the initiation of adult guardianships/conservatorships for their patients. This includes working with various entities such as the WA State Department of Social Health Services, Home and Community Services, Office of Public Guardianship, and various certified professional guardians. She was admitted to practice in the State of Washington in 2021.

Legal Considerations for Critically Ill and Dying Patients Who Lack Surrogate Decision Makers

CASE:

HMCpatient is critically ill and lacks decision making capacity and a known surrogate decision maker (despite an exhaustive search from SW). There is consensus among team care members that medical treatments are no longer thought to be beneficial, and our patient is thought to be terminally ill. The social worker petitions the court to appoint a guardian, but the team worries that a timely appointment is rare, and many guardians are uncomfortable consenting to terminal withdrawals. Meanwhile, burdensome treatments continue. The care team decides not to escalate treatment, but they are aware that they cannot unilaterally withdraw life-sustaining treatments based on Washington state case law. A DNR is signed by the attending based on medical futility.

Guardianship at HMC FAQ's

Inpatient Med Surg Social Work

Bianca Caballero, MSW and Dionne Williams, MSW

Why would it be necessary to seek guardianship while a patient is hospitalized?

- Because the patient lacks capacity, has need for non-emergent procedures, and there is no LNOK or surrogate in place to consent

- Because the patient lacks capacity, has discharge planning need needs, may have LNOK but lacks adequate funding, and LNOK does not have access to accounts

- Because the patient lacks capacity, is anticipated to have Home and Community Services (DSHS/Medicaid) Long-term care needs to discharge and has no POA/Payee. HCS does not allow LNOK consent for services (LNOK cannot consent for COPES, ALF, or AFH).

What types of guardianship are there?

- Guardianship (guardian of person)
- Conservatorship (guardian of estate)
- Emergency guardian – In emergent situations, lasts only 60 days, and may be extended to 120. Of note, the bar for meeting criteria for court approval is extremely high, especially in King County. Discharge from the hospital is not considered an emergent need.

Who decides if a patient is appropriate for guardianship and initiates the process?

- As with assessment of capacity regarding any aspect of patient care, the primary team makes this determination and if uncertain may consult psych for assessment of patient capacity to make a specific decisions.

- Unit/Service Social Worker and the provider complete the guardianship forms. The provider completes the professional evaluation, which does NOT need to be completed and signed by an MD, PA and NP are fine as well. If a patient will need guardianship for discharge, the forms should be submitted as soon as possible to the Social Work supervisor, as the process is lengthy.

Why does it take so long?

- The court visitor (CV) must do their investigation and all parties (petitioner, respondent, attorney appointed to patient, CV) have to be in agreement on hearing dates. We are also at the mercy of the court dockets of busy commissioners. It's also difficult to find public guardians willing to pick up our cases which are often complex with low resources, and we cannot file until a candidate is identified. Guardians get limited reimbursement for the service they provide.

- **If guardianship is marginal or concerns patient will disagree, this may go to trail which significantly delays the process and increases the cost to the hospital (legal fees and length of stay).**

Do we have to wait until the guardian is appointed to do anything?

- There are certain aspects of the discharge plan we can work on once we have identified a guardian candidate but are still waiting for the appointment hearing, such as requesting the CV be granted additional powers to consent for Medicaid application, HCS services, and transfer to next level of care. This is only helpful if the CV is agreeable and if the case does not have other complicating factors such as being over resourced for Medicaid. The team can also discharge the patient if patient is ready and guardianship and/or HCS services are no longer needed.

What if an appointed guardian is nonresponsive/not engaging in care planning?

- Depending on the situation we can ask for assist from one of our SAAGs (Brothers and Henderson or Fox Ballard) in reaching out to the guardian to remind them of their duties. If the situation is more demanding of immediate action, they can file a motion which would likely lead to appointment of a court visitor, who would evaluate the situation.

What is the GCAP program and how do patients get into it?

- HCS Guardianship and Conservatorship Assistance Program is meant to help offload hospitals of patients who need a guardian and have no one in their lives to serve. In brief, patient must have a neuro cognitive diagnosis, be on Medicaid or determined eligible, and have no friends or family that can serve. Also, the hospital must search for a certified public guardian in the community for 30 days before we can apply.

BROTHERS HENDERSON DURKIN, P.S.

Legal Considerations in Guardianships for Critically Ill & Dying Patients

Presented by:
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What is Guardianship and Conservatorship?

- Ch. 11.130 RCW – Uniform Guardianship Act
- Guardian ad Litem v. Court Visitor (CV)
- Key differences in practice between RCW 11.88 vs. UGA

BROTHERS HENDERSON DURKIN, P.S.

Emergency Guardianships

- Allows immediate (or almost immediate) appointment of a guardian in "emergent" cases.
  - i.e. Recently filed a petition where a patient needed a PEG/trach.
  - Some courts will appoint an emergency guardian for discharge purposes.
- Only effective if there is someone willing to serve as guardian.
- Alternative Solutions: Interim Authority

BROTHERS HENDERSON DURKIN, P.S.

Case Study

HMC patient is terminally ill & lacks decision-making capacity as well as a known surrogate decisionmaker. There is consensus among team care members that the medical treatments are no longer thought to be beneficial.

BROTHERS HENDERSON DURKIN, P.S.

Steps We Take For Patients Similar to Case Study

- Search for nominee
  - Background search for LNOK
  - Concurrently, recruit for Certified Professional Guardian
- Reach out to CVs who'd be willing to accept interim authority to consent to recommended medical procedures/care
- File Petition for Guardianship
  - Concurrently file Petition for Interim Authority upon appointment of CV
- Present Ex Parte v. Set Hearing
- Timing

BROTHERS HENDERSON DURKIN, P.S.

Thank you!

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Legal Considerations for Critically Ill and Dying Patients Who Lack Surrogate Decision Makers

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Matter of Guardianship of Hamlin

Presented by Michelle Nelson

Assistant Attorney General

April 9, 2025

Mandatory Disclosure

- This presentation represents my perspective. The information presented is not intended to serve as legal advice and is not a formal opinion of the Attorney General's Office. Please contact the UW AGO to request specific legal advice or assistance with a legal issue.

Washington's Natural Death Act
Chapter 70.122 RCW

- Authorizes competent adults to execute an advanced directive to withhold or withdraw life-sustaining treatment
- Applies only if person subsequently becomes incompetent, and is either permanently unconscious or terminally ill
- **Life-sustaining treatment** means "any medical or surgical intervention that uses mechanical or other artificial means, including artificially provided nutrition and hydration, to sustain, restore, or replace a vital function, which, when applied to a qualified patient, would serve only to prolong the process of dying"

Competent Patients

- A competent adult may decline life-sustaining treatment (including artificially administered nutrition or hydration)
- A competent adult may complete an advanced directive to withhold or withdraw life-sustaining treatment should they experience a terminal condition or permanent unconscious condition and subsequently become incompetent to make medical decisions

Caselaw

- Three reported Washington cases address a surrogate's ability to consent to the withholding or withdrawing of life-sustaining treatment:
  - Colyer
  - Hamlin
  - Grant

Matter of Welfare of Colyer, 99 Wn.2d 114, 660 P.2d 738 (1983), holding modified by Matter of Guardianship of Hamlin, 102 Wn.2d 810, 689 P.2d 1372 (1984)

- Spouse, and guardian, of permanently unconscious patient on mechanical ventilation sought court order to authorize withdrawal of life-sustaining treatment
- Court held that a guardian can exercise patient's right to decline life-sustaining treatment without court approval
- Ruling set out procedural safeguards (later modified by Court's decision in *Hamlin*), including:
  - Guardian appointment
  - Diagnosis must be made by the patient's attending physician and confirmed by two disinterested physicians ("prognosis committee")

Matter of Guardianship of Hamlin,
102 Wn.2d 810, 689 P.2d 1372 (1984)

- Whether a guardian, as part of their duty to care for and maintain the ward, may consent to withholding or withdrawal of life-sustaining treatment?
- Is a guardianship appointment necessary to withhold or withdraw life-sustaining treatment?

Matter of Guardianship of Hamlin,
102 Wn.2d 810, 689 P.2d 1372 (1984)

- Mr. Hamlin was admitted to Harborview. Because of Mr. Hamlin's developmental disabilities, he had not expressed wishes regarding life-sustaining treatment
- Harborview filed for appointment of a guardian. After a guardian was appointed, Mr. Hamlin experienced cardiopulmonary arrest, was resuscitated, and thereafter had minimal brainstem activity
- Treating physicians asked guardian to consent to withdrawal of mechanical ventilator, guardian declined believing that they did not have to authority to provide consent for withdrawal of life-sustaining treatment
- Harborview petitioned the court to authorize withdrawal of life-sustaining treatment

Matter of Guardianship of Hamlin,
102 Wn.2d 810, 689 P.2d 1372 (1984)

- The court entered an order (pending appeal) authorizing:
  - Withholding of resuscitation in the event of cardiopulmonary arrest or respiratory failure;
  - Withholding of antibiotics;
  - Withdrawal of mechanical ventilator

- Mr. Hamlin passed away while the case was being appealed but the WA Supreme Court nonetheless issued a decision to clarify the issues presented
- Court asked to reconsider its position in *Colyer* (requiring guardianship appointment)

Matter of Guardianship of Hamlin,
102 Wn.2d 810, 689 P.2d 1372 (1984)

- If no surrogate is available, a guardian must be appointed to represent the patient's interests
  - If treating physicians, prognosis committee, and guardian agree that patient's best interests are served by withholding or withdrawal of life-sustaining treatment, court approval not required
  - If treating physicians, hospital, prognosis committee, or guardian are not in agreement regarding decision to withhold or withdraw life-sustaining treatment, court approval is required to proceed

Matter of Guardianship of Hamlin,
102 Wn.2d 810, 689 P.2d 1372 (1984)

- If surrogate is available, treating physicians, prognosis committee, and surrogate agree that patient's best interests are served by withholding or withdrawal of life-sustaining treatment, surrogate may exercise the patient's right to decline life-sustaining treatment without a guardianship appointment

In re Guardianship of Grant,

109 Wn.2d 545, 747 P.2d 445 (1987), amended by 757 P.2d 534 (1988)

- Terminally ill patient's mother, and guardian, requested order authorizing her to consent to the withholding of life-sustaining treatment, including:
  - cardiopulmonary resuscitation, defibrillation, respirator, intubation, nasogastric tube, and intravenous nutrition and hydration*
- Court held that a surrogate could exercise a terminally ill patient's right to decline life-sustaining treatment when the patient is also suffering "severe and permanent mental and physical deterioration"
- No distinction between withdrawing and withholding life-sustaining treatment

Takeaway: Hamlin Scenarios

- If a patient does not have capacity to make health care decisions, is terminally ill or permanently unconscious, and a surrogate decision maker is not available, to withhold or withdraw life-sustaining treatment a guardian must be appointed
  - If treating physicians and a prognosis committee are unanimous that life-sustaining efforts should be withheld or withdrawn and the guardian concurs, then court approval is not required to proceed with withholding or withdrawing life-sustaining treatment
  - If there is disagreement between the hospital, prognosis committee, attending physicians or guardian, then court approval is required to proceed with withholding or withdrawing life-sustaining treatment

Takeaway: Colyer Scenarios

- If a patient does not have capacity to make health care decisions, is terminally ill or permanently unconscious, and a surrogate decision maker IS available, a guardian or court approval is not required to withhold or withdraw life-sustaining treatment

Takeaway:

- If a patient is not terminally ill or permanently unconscious, is unable to make health care decisions, and does not have an advanced directive or DPOA to guide decision making, then court approval should be sought to withhold or withdraw life-sustaining treatment (even if the patient has a guardian or another surrogate decision maker available)

THANK YOU

Legal Considerations for Critically Ill and Dying Patients Who Lack Surrogate Decision Makers

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