

FAST FACTS AND CONCEPTS #378
HOW TO HELP A PATIENT CHOOSE A SURROGATE DECISION MAKER
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Background: Many seriously ill patients lack capacity to speak for themselves and participate in healthcare decision-making. In these situations, clinicians turn to a surrogate decision maker for guidance. Evidence suggests that within 48 hours of admission, 47.4% of hospitalized older adults required surrogate involvement (1). The goal of this *Fast Fact* is to explain the role of a surrogate decision maker, how to guide patients in the selection of a surrogate, and how decision-making proceeds if the patient has never selected a surrogate before becoming incapacitated.

Definitions: *Surrogate* is an all-encompassing term for a person legally or non-legally appointed to make decisions on behalf of a patient who lacks capacity. A *healthcare proxy* (also known as a *durable power of attorney for healthcare*) is a legal document which allows one to assign a *healthcare agent* (also known as a *proxy* or *healthcare power of attorney*), a person designated by the individual to make decisions on his or her behalf in the event of incapacitation. Terms for this decision-making role are often used interchangeably. For this *Fast Fact*, we will use the term *surrogate*. Nuances of these roles vary by state. Check in your jurisdiction for complete details.

Characteristics of a Surrogate: Ideally, patients choose their surrogate, as it is a personal decision. Sometimes patients know right away whom they would choose. Other times, guidance is necessary. Patients should be guided to choose a surrogate who best embodies the characteristics below (2-5):

- Have decision making capacity.
- Know the patient well, having a strong understanding of the patient's values, beliefs and preferences.
- Express care and concern for the patient.
- Advocate for the patient's best-known wishes, seeking to make decisions as the patient would have made them if they had decision-making capacity (*substituted judgment*) (6).
- Use the patient's medical situation/preferences/values to consider what is in their "best interest" (*best interest standard*) (6).
- Advocate for the patient even in emotionally fraught situations. One might ask, "*Facing a life and death decision, would that person state the patient's wishes? Or, would it be too emotionally difficult?*"

Designating a Surrogate: When a patient chooses a surrogate, he or she must have capacity to make that decision and be free of coercion. Because decision-making capacity is decision-specific, a patient may have capacity to assign a surrogate (which is in general felt to be a low-risk medical decision) even if they lack capacity for more complex decisions. Their choice of a surrogate should be formalized through a legal document such as an advance directive or durable power of attorney for health care. This often requires the use of a notary and/or witnesses to be legally binding. While treating clinicians cannot serve as witnesses or complete these forms, the healthcare system can often help patients complete these documents, providing social workers or other support staff for this process. Surrogates can also be designated informally via oral designation to a healthcare provider. While verbal designation may be enough in the short term (i.e. during a hospital stay), it is encouraged to legally document one's wishes. This is particularly important when the patient-designated surrogate does not align with the legally standardized hierarchy (i.e. a friend is chosen rather than a family member or, a child is chosen rather than the spouse) (7). Consult your state laws regarding how to fill out a legally valid medical durable power of attorney for healthcare form as rules vary state-by-state.

Legal Considerations: If the situation arises that a surrogate decision-maker is required, and the patient has not previously documented a healthcare agent, in many states the default surrogate is decided via a legally specified hierarchy of surrogacy. This may or may not match the patients' preferred surrogate (7,8). A common order for this hierarchy is: spouse, adult children, parents, adult siblings, and adult grandchildren. State-by-state differences include the standing of second spouses and children. Some

states do not have a default hierarchy of surrogacy. Instead, protocol for decision-making for an incapacitated patient in the absence of a documented healthcare agent may be set by the local healthcare system. Such protocols may call for “family consensus” decision-making. In certain states, a legally documented healthcare agent is required for specific interventions in the care of an incapacitated patient, such as nursing home transfer. Without documenting a healthcare agent in advance, families can end up going through a lengthy and expensive guardianship process. Check with your hospital legal counsel for the specifics to your state and practice setting.

Tips for Communicating with Patients about Choosing a Surrogate:

- Ask the patient, “*Who would you trust us to talk to if you were so sick that we could not talk to you?*”
- Ask the patient, “*Have you talked to ____ about what is most important should you get sicker?*” Promoting the patient’s discussion with their surrogate may strengthen the surrogate’s ability to advocate in a time of need.
- There are several decision aid tools which explore preferences and aim to elicit values. These include but are not limited to: [Consumer’s Tool Kit for Health Care Advance Planning](#), [Your Life Your Choices](#), [Planning for Future Health Care Decisions My Way](#), [Caring Conversations: Making Your Healthcare Wishes Known](#), [Five Wishes](#) and [Prepare for Your Care](#) (9,10).
- Finally, one should check with the patient about how much flexibility the surrogate should have to modify the patient’s decisions (11). One might ask, “*Some people say, ‘it is OK for my decision maker to change any of my medical decisions if my medical team thinks it is best for me at that time.’ Others say ‘I want my decision maker to follow my medical wishes exactly. It is NOT OK to change my decisions, even if the doctors recommend it.’ How much flexibility should your surrogate have?*”. Surrogate flexibility is a component of several of the decision aids outlined above (10).
- All documentation of healthcare agents should be reviewed periodically (ex: annually) to ensure that they reflect the patient’s most updated wishes.

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Links to Decision Tools:

[Consumer’s Tool Kit for Health Care Advance Planning:](#)

<https://www.dshs.wa.gov/sites/default/files/ALSA/stakeholders/documents/duals/toolkit/Consumers%20Tool%20Kit%20for%20for%20Health%20Care%20Advance%20Planning.pdf> (Accessed 3 April 2019)

[Your Life Your Choices:](#)

http://www.elderguru.com/downloads/your_life_your_choices_advance_directives.pdf (Accessed 3 April 2019)

[Planning for Future Health Care Decisions My Way:](#)

<http://theconversationprojectinboulder.org/wp-content/uploads/2014/11/Planning-My-Way.pdf> (Accessed 3 April 2019)

[Caring Conversations: Making Your Healthcare Wishes Known:](#)

<https://practicalbioethics.org/files/caring-conversations/Caring-Conversations.pdf> (Accessed 3 April 2019)

[Five Wishes:](#) <https://fivewishes.org/> (Accessed 3 April 2019)

[Prepare for Your Care:](#) <https://prepareforyourcare.org/welcome> (Accessed 3 April 2019)

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