

# Informed Consent & Surrogate Decision-Making

## Case

A 32 year old woman was admitted to the Trauma Intensive Care Unit following a motor vehicle accident; she had multiple injuries and fractures, with several complications which continued to develop over the first couple of weeks. The patient rapidly developed Adult Respiratory Distress Syndrome, was on a ventilator, and was continuously sedated. Shortly after the patient's admission, her parents were contacted and remained vigilant at her bedside. The parents reported that the patient was one month away from having her divorce finalized. The patient's husband was reportedly physically and emotionally abusive to her throughout their five years of marriage. The parents had not notified this man of the patient's hospitalization, and reported that visits by him would be distressing to the patient if she were aware of it. The patient's soon to be ex-husband is her legal next of kin.

## Questions:

- Should the husband be responsible for treatment decisions which the patient cannot make?
- What are the legal and ethical parameters?

## Case Discussion

### Specific legal issues:

- There is **implied consent by law for provision of "emergency" medical treatment**. For example, a hospital policy may state:

Consent for care is implied by law when immediate treatment is required to preserve life or to prevent serious impairment of bodily functions and it is impossible to obtain the consent of the patient, his/her legal guardian, or next-of-kin.

In such emergency situations, the physician should consult, whenever possible, with the patient's attending physician or with another physician faculty member about the existence of an emergency. This must be noted in the patient's medical record, together with statements by each physician that the emergency treatment was necessary for the reasons specified. These notations should clearly identify the nature of the threat to life or health, its immediacy, and its magnitude.

Thus, if a medical emergency exists and implied consent is relied on by the health care providers, it should be documented in the patient's medical record in accordance with legal and institutional standards.

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- The **patient may have provided her own consent** to treatment either at the time of her admission or earlier in her hospitalization. At that time, she may have expressed her ongoing wishes for care. The patient's own previous statements/consent may therefore be the basis for continued consent for her ongoing care. The law does not set an explicit time limitation on implied consent based on an "emergency."
- If there is a need for **informed consent for a new treatment decision** on behalf of the patient, the patient's previously expressed wishes may still be relevant to her legally authorized surrogate decision-maker and her treatment plan.
- If the **patient already filed for divorce**, it is likely that there is a temporary court order in effect and this order may affirmatively remove the patient's estranged husband from making medical decisions for her. Also, it is common in divorce paperwork to have mutual restraining orders which prevent both spouses from contacting each other. The patient's parents should be asked to provide the name of her divorce attorney to obtain copies of the relevant legal papers - which can then be placed in the legal section of the patient's medical record. With the husband thus removed as her surrogate decision-maker, it appears the patient's parents would become the highest level class of surrogate decision-maker and could provide informed consent for her care if the patient is unable to do so.
- **Even if the patient's husband remains as her legal surrogate decision-maker, his decisions on the patient's behalf are constrained by legally imposed standards.** A surrogate is legally required to provide "**substituted judgment**" on behalf of the patient. This means that the surrogate must act in accordance with the patient's wishes. If substituted judgment isn't possible (i.e., unknown what the patient would want under the current medical circumstances), then the law requires the surrogate to act in the patient's "**best interests.**" Since the medical team has significant input about what would medically be in the patient's interest, a decision by a surrogate which doesn't adhere to this standard should not be automatically followed and may need to be reviewed by the institutional ethics committee, risk management, or legal counsel.
- The **patient's husband may be willing to waive his surrogate decision-maker role to his estranged wife.** If this occurs, then he would agree to remove himself from the list of potential surrogate decision-makers and the next highest level surrogate decision-maker(s) would be contacted as necessary to provide informed consent for the patient.
- A final option may be for the **patient's parents to file to become the patient's legal guardians for health care decision-making.**