

# **Unrepresented Patients: Practical, Legal, and Ethical Challenges**

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# My Advisory Group



# Who Are Unrepresented Residents?

1. No capacity
2. No representative/surrogate decisionmaker
3. No advance directive

# Why Worry About Them?

Informed consent laws, autonomy: provision of care w/o consent is battery

Keys:

- Americans value control over their own affairs.
- The more important the decision, the more we want to control it.
- Health care decisions = important.

# Decisionmaking for U.P.s

- Decisionmaking Hierarchy – no default surrogates
- Court intervention required: conservatorship or Probate Code 3201 petition
- Nursing Homes: Health and Safety Code 1418.8

# Health & Safety Code 1418.8

In a nutshell:

- Doc finds resident has no capacity & no surrogate
- Doc recommends treatment
- IDT meets & decides yea or nay

Also known as Epple Act or IDT

# 1418.8 Problems

- As written (and interpreted by Rains):
  - No notice
  - Capacity v. Competency – docs don't do competency
  - No neutral
  - No appeal
- As practiced:
  - No reps
  - Intrusive decisions
  - No docs
  - No diligence



Members present at meeting: Susan Willis RNNP, Geneva Carroll, Ombudsman, Sonia Badesha, RN ADON, Pam Crozier, MRD, David Grimes, SSD, Michelle Skidmore, QSC

**Topic for Discussion:** Mr. H has made several trips to the acute hospital and back in each case resident was septic, septicemia originating from his sacral wound– most recent return was 11/29/2012. Hospital staff called the facility and suggested his POLST be reviewed and the EPPLE Act Committee meet to determine the possibility of a hospice referral for the resident.

**Details of Discussion:** Details of resident's care were discussed, including background information leading up to his admission to this facility. Wound to buttock was stage 3 on initial admission on 4/12/2012, and was on tube feeding at admission, with dx of protein caloric malnutrition. Resident currently on PRN Norco; RNNP recommends pain medication be made routine, as resident is largely uncommunicative, but does verbalize pain. Noted that resident's body is not fighting infection, as evidenced by trips to acute, a course of IV antibiotics completed, and returned to facility. Continued decline in condition when off of antibiotics would indicate infection is actually colonized in the wound, and condition will not improve.

**Final Evaluation:** Ombudsman attempted to ask resident's wishes with respect to changing POLST to DNR; resident did not respond. RNNP and ADON approached resident with Ombudsman asking simply: "Do you want to live or die?" Resident did not respond to direct question, even with a change in facial expression. Question was asked in several different ways, with no response. EPPLE Act Committee finds that change of POLST to DNR is warranted, and with a continued decline in condition without the possibility of recovery, a hospice referral is appropriate and will be arranged; should hospice accept resident for admission, the Committee agrees with admission to hospice for end-of-life care. Additionally, a Speech Therapy order to screen for safety of most appropriate level of food and fluids for pleasure and comfort; feeding tube will remain for fluid intake and medication administration.

Physician's Signature

12-10-12

Date





EMSA #111 B  
(Effective 4/1/2011)

# Physician Orders for Life-Sustaining Treatment (POLST)

First follow these orders, then contact physician. This is a Physician Order Sheet based on the person's current medical condition and wishes. Any section not completed implies full treatment for that section. A copy of the signed POLST form is legal and valid. POLST complements an Advance Directive and is not intended to replace that document. Everyone shall be treated with dignity and respect.

Patient Last Name: <u>Hi</u>	Date Form Prepared: <u>12-6-12</u>
Patient First Name: <u>Mark</u>	Patient Date of Birth: <u>11-4-49</u>
Patient Middle Name: <u>D.</u>	Medical Record #: (optional) <u>28210</u>

**A. CARDIOPULMONARY RESUSCITATION (CPR)** *Person's pulse and/or is breathing*

Attempt Resuscitation/CPR (Selecting CPR in Section A requires selecting Full Treatment in Section B)

Do Not Attempt Resuscitation/DNR (Allow Natural Death)

**B. MEDICAL INTERVENTIONS** *Person's pulse and/or is breathing*

**Comfort Measures Only** Relieve pain and suffering through the use of medication by any route, positioning, wound care and other measures. Use oxygen, suction and manual treatment of airway obstruction as needed for comfort. Transfer to hospital only if comfort needs cannot be met in current location.

**Limited Additional Interventions** In addition to care described in Comfort Measures Only, use medical treatment, antibiotics, and IV fluids as indicated. Do not intubate. May use non-invasive positive airway pressure. Generally avoid intensive care.  
 Transfer to hospital only if comfort needs cannot be met in current location.

**Full Treatment** In addition to care described in Comfort Measures Only and Limited Additional Interventions, use intubation, advanced airway interventions, mechanical ventilation, and defibrillation/ cardioversion as indicated. Transfer to hospital if indicated. Includes intensive care.

Additional Orders: \_\_\_\_\_

**C. ARTIFICIALLY ADMINISTERED NUTRITION** *Oral/enteral/parenteral (feasible and desired)*

No artificial means of nutrition, including feeding tubes. Additional Orders: feeding tubes for liquids and medications only.

Trial period of artificial nutrition, including feeding tubes.

Long-term artificial nutrition, including feeding tubes.

**D. INFORMATION AND SIGNATURES**

Discussed with:  Patient (Patient Has Capacity)  Legally Recognized Decisionmaker

Advance Directive dated \_\_\_\_\_ available and reviewed → Health Care Agent if named in Advance Directive:  
 Advance Directive not available Name: David Grimes, CEO  
 No Advance Directive Phone: 916.445.761 x13

Signature of Physician  
My signature below indicates to the best of my knowledge that these orders are consistent with the person's medical condition and preferences.

Print Physician Name: Dr. Mark Hiroy, M.D. Physician Phone Number: (916) 782-5511 Physician License Number: A23188

Physician Signature (required): [Signature] Date: 12-6-12

Signature of Patient or Legally Recognized Decisionmaker  
By signing this form, the legally recognized decisionmaker acknowledges that this request regarding resuscitative measures is consistent with the known desires of, and with the best interest of, the individual who is the subject of the form.

Print Name: David Grimes Relationship: (write self if patient)

Signature (required): [Signature] Date: 12/6/12

Address: \_\_\_\_\_

# CANHR v. Chapman

- Filed in 2013
- 2015: 1418.8 unconstitutional on 3 grounds:
  - No Notice
  - Antipsychotics
  - End-of-Life
- 2016: both sides appealed, decision stayed pending appeal

# What to Do

- Are you sure there is no capacity?
  - Understanding of risks, benefits, and alternatives
  - Communicate preference
- Are you sure there is no surrogate?
- Are you sure there is no advance direction?
- Probate Code 3201
- Probate Code 2920(b)

# Embrace the UPs

- Have (and use) a legally compliant policy
- Getting the decisionmaking squared away improves continuity which improves outcomes.
- Failure to work with UPs is a failure to do person-centered care

# Thank You for Listening!

