

Law

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Legal Briefing: The Unbefriended: Making Healthcare Decisions for Patients Without Surrogates (Part 2)

Thaddeus Mason Pope and Tanya Sellers

ABSTRACT

This issue's "Legal Briefing" column continues coverage of recent legal developments involving medical decision making for unbefriended patients. These patients have neither decision-making capacity nor a reasonably available surrogate to make healthcare decisions on their behalf. This topic has been the subject of recent articles in *JCE*.¹ It has been the subject of major policy reports.² Indeed, caring for the unbefriended has even been described as the "single greatest category of problems" encountered in bioethics consultation.³ Moreover, the scope of the problem continues to expand, especially with rapid growth in the elderly population and with an increased prevalence of dementia.

Unfortunately, most U.S. jurisdictions have failed to adopt effective healthcare decision-making systems or procedures for the unbefriended. "Existing mechanisms to address the issue of decision making for the unbefriended are scant and not uniform."⁴ Most providers are "muddling through on an *ad hoc* basis."⁵ Still, over the past several months, a number of state legislatures have finally addressed the issue. These developments and a survey of the current landscape are grouped into the following 14 categories.⁶ The first two cat-

egories define the problem of medical decision making for the unbefriended. The remaining 12 describe different solutions to the problem. The first six categories were covered in Part 1 of this article;⁷ the last eight categories are covered in this issue (Part 2).

1. Who are the unbefriended?
2. Risks and problems of the unbefriended
3. Prevention: advance care planning, diligent searching, and careful capacity assessment
4. Decision-making mechanisms and standards
5. Emergency exception to informed consent
6. Expanded default surrogate lists: close friends
7. Private guardians
8. Volunteer guardians
9. Public guardians
10. Temporary and emergency guardians
11. Attending physicians
12. Other clinicians, individuals, and entities
13. Institutional committees
14. External committees

7. PRIVATE GUARDIANS

Guardianship is a legal relationship that is created by state courts when a judge determines that an individual is incapacitated and unable to make decisions on her or his own behalf. The court creates a relationship in which the guardian is given legal authority to make decisions for an incapacitated individual—referred to as the *ward*—regarding that person and/or her or

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