



MEDICAL SURROGACY IN NEW HAMPSHIRE: A GUIDE

If you have been or are considering being appointed medical surrogate for an individual in New Hampshire, there are some facts which may be useful to know.

Six Facts about Medical Surrogacy:

- 1) It is temporary. By law, the term of a medical surrogate is limited to 180 days and cannot be renewed or extended, except for a few hours if the subject of the surrogacy decision is moments from death.
- 2) It empowers the named surrogate to make medical decisions only; it does not govern financial matters.
- 3) The surrogate will not be liable for financial or other damages that result from decisions made under this provision of law unless malfeasance is proven in court.
- 4) The duty of the surrogate is to do what they understand to be what the patient would have wanted, were they able to make the decisions themselves. No decision should be made to further the surrogate's interests over the patient's preferences.
- 5) The law is very specific as to the order of preference that must be followed in appointing a surrogate. If you or someone else disagrees that the patient's best interest can be served by the surrogate appointed from this required ranking, the decision can only be overruled by an action of the Probate Court.
- 6) Surrogates, for the duration of their authority have, by law, the same authority as an agent (Durable Power of Attorney for Health Care); like an agent, a surrogate cannot authorize psychosurgery, Electro-convulsive therapy, involuntary commitment to a state psychiatric facility; they may only authorize withholding of life-sustaining treatment to pregnant women under certain conditions and may only authorize experimental treatments that meet some national standards.

Reasons for the above:

- 1) Declaring a person incapable to make their own decisions is a serious matter and contradicts a strong legal and cultural legacy of respecting the rights of individuals. These concerns are overridden by the Legislature to keep everyone who put off making Advance Directives from having to endure the costs, delays, and discomfort of a semi-public hearing in court about their mental capacities. So, this was intended to allow immediate decisions to be made compassionately and quickly, while ongoing needs for guardianship can still be addressed in a more deliberate fashion.

- 2) Powers for Attorney that pertain to estate matters are traditionally separate from Medical Powers of Attorney, on which medical surrogacy authorities are based. The bonding and due diligence process for assigning fiscal authority would exceed the time required for emerging medical choices to be made.
- 3) This immunity is broadly applied to protect unprepared volunteers from fearing that their own interests might be jeopardized. The protection to the patient lies in criminal interventions for malfeasance and court procedures to address conflicts of interest or incompetence. An individual could “fire” a surrogate, as they could an agent appointed by Durable Power of Attorney for Health Care. This rare occurrence would set the stage for probate court action.
- 4) This “Substituted Judgement” standard is the basis for the Medical Power of Attorney laws. It is the ethical standard that must be applied. Determining the patient’s likely choices in current circumstances is often the most challenging duty of a medical surrogate.
- 5) This is based on a traditional “next-of-kin” hierarchy, found in other laws that are modified to modern standards. Flexibility is allowed for the sake of expediency, with the understanding that those who know the patient best are in the best position to represent them.
- 6) Probate court may be approached when exceptions to these prohibitions appear to be in the patient’s best interests. All of these provisions are built into legislation with the intent to protect the rights of individuals, with the Probate Court as the last resort protection.

Resources:

The booklet, *How to Make Medical Decisions for Someone Else*, written by a consortium of organizations who know these laws and practices, is very useful in helping an agent understand the experience of decision-making. It was, however, written before the Surrogacy provision was written into New Hampshire law. This Guide was intended to add the special rules and circumstances which apply to Surrogates. Despite that limitation, the booklet is still the most comprehensive guide to making decisions for another. It is available through the Foundation for Healthy Communities.

Information about the Guardianship process may be obtained at Courts.state.nh.us/probate/guardianship

Information about POLST orders and Advance Care planning may be obtained through Foundation for Healthy Communities at www.healthynh.org.