



NATIONAL CENTER FOR LESBIAN RIGHTS

## **Frequently Asked Questions Regarding New Federal Rules on Who Can Make Medical Decisions for You**

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The federal government has issued new rules that strengthen patients' rights to choose who can make medical decisions for them if they are unable to speak or make decisions on their own behalf.

Too often, discrimination has kept LGBT families apart during medical crises. In many cases, hospitals have disregarded LGBT people's partners and chosen families, and even separated LGBT parents from their own children. The new rules prevent that discrimination.

Most notably, the new rules:

- Require that when a patient is competent to choose a surrogate decision-maker, hospitals must honor that request, even if the person had previously designated someone else.
- Require that when a patient is incapacitated, hospitals must recognize that patient's self-identified family members, regardless of whether they are related by blood or legally recognized. The rules specifically include same-sex partners and *de facto* parent-child relationships.
- Prohibit a hospital from requiring proof of a relationship in order to respect that relationship.
- Require that when a patient is incapacitated and more than one person claims to be the patient's representative, hospitals must resolve the dispute by considering who the patient would be most likely to choose. The hospital must consider factors including the existence of a marriage, domestic partnership, or civil union, a shared household, or any special factors that show that a person has a special familiarity with the patient and the patient's wishes.

## **When is it effective?**

Now. These new rules became effective immediately when they were issued on September 7, 2011.

## **Is this connected to the recent rules on hospital visitation?**

Yes. The new rules strengthen the November 2010 hospital visitation rules that protect patients' rights to be visited in the hospital by their families and loved ones. For more information, read our [FAQs About New Federal Hospital Visitation Rules](#). It gives more detail as to how those rules will be enforced in addition to providing new guidance about choosing a medical decision-maker. The guidance also makes clear that a surrogate decision-maker must be allowed visitation privileges and access to the patient in order to effectively make decisions about the treatment. In other words, a surrogate decision-maker *must* be allowed to visit the patient.

## **My partner and I aren't legally married. Will we be able to make medical decisions for each other?**

Yes, under the new rules you should be able to make decisions for one another, but the safest and most reliable way to ensure you can choose who will make medical decisions for you is to complete validly executed advance directives, such as durable powers of attorney or health care proxies. These are legal documents in which you can name anyone you choose to act as your surrogate decision-maker if you are incapacitated. That person will then have the authority to make your medical decisions, decisions about end-of-life care, and other crucial determinations about the course of your treatment. An advance directive must be respected by a healthcare provider, regardless of the legal or biological status of your relationship with the person you choose to name as your surrogate. For more information about completing a document like this, visit our [Elder Law Publications website](#).

However, if you do not have an advance directive, you and your partner should still be able to make decisions on each other's behalf, regardless of the legal status of your relationship. According to the new rules, unless it is contested by another family member, a hospital must accept the assertion of a same-sex partner (even if the relationship has not been "formalized") who claims to be the rightful surrogate for the patient, without requiring any proof of the relationship.

If two people claim to be the rightful surrogate, the healthcare providers must consider "who the patient would most want to make decisions on his/her behalf." To make this determination, the providers will consider things like: "proof of a

legally recognized marriage, domestic partnership, or civil union; proof of a joint household; proof of shared or co-mingled finances; and any other documentation the hospital considers evidence of a special relationship that indicates familiarity with the patient's preferences concerning medical treatment." Therefore, there are a number of things you can show to prove that your relationship with your partner makes you best suited to act as each other's surrogates.

Also note, "proof of a legally recognized marriage domestic partnership, or civil union" can be used as proof of a relationship, even if it is not legally recognized in the jurisdiction where the patient is being treated.

**My relationship with my children is not biological or legally recognized. Will I be able to act as surrogate decision-maker?**

The guidance explicitly states that unless it is contested by another family member, a hospital must accept a parent's assertion (including a *de facto* parent) who claims to be the rightful surrogate for the patient without requiring any proof of the relationship. This means that if you act as a parent for a child, regardless of legal or biological status, you must be respected as the surrogate decision-maker for that child. If a child has more than one parent, as long as there is no conflict between them, no one should be asked to show proof of their relationship to the child.

The only situation where you may be asked to show proof of your relationship is if another person claims to be the child's parent and there is a conflict between you and the other claimed parent. If you have acted as a parent for a minor child and are now being shut out of medical decision-making by another parent and healthcare providers, please contact NCLR at 415.392.6257 or toll-free 1.800.528.6257.

**What should I do if I think my rights were violated?**

If you or a loved one are in the hospital and you believe your rights are being violated with respect to hospital visitation or medical decision-making please contact NCLR at 415.392.6257 or toll-free 1.800.528.6257.