

Negotiated Risk Contracts

Assuming Risks to Secure Benefits of Consumer Direction

Natalie M. Duval, Esq.

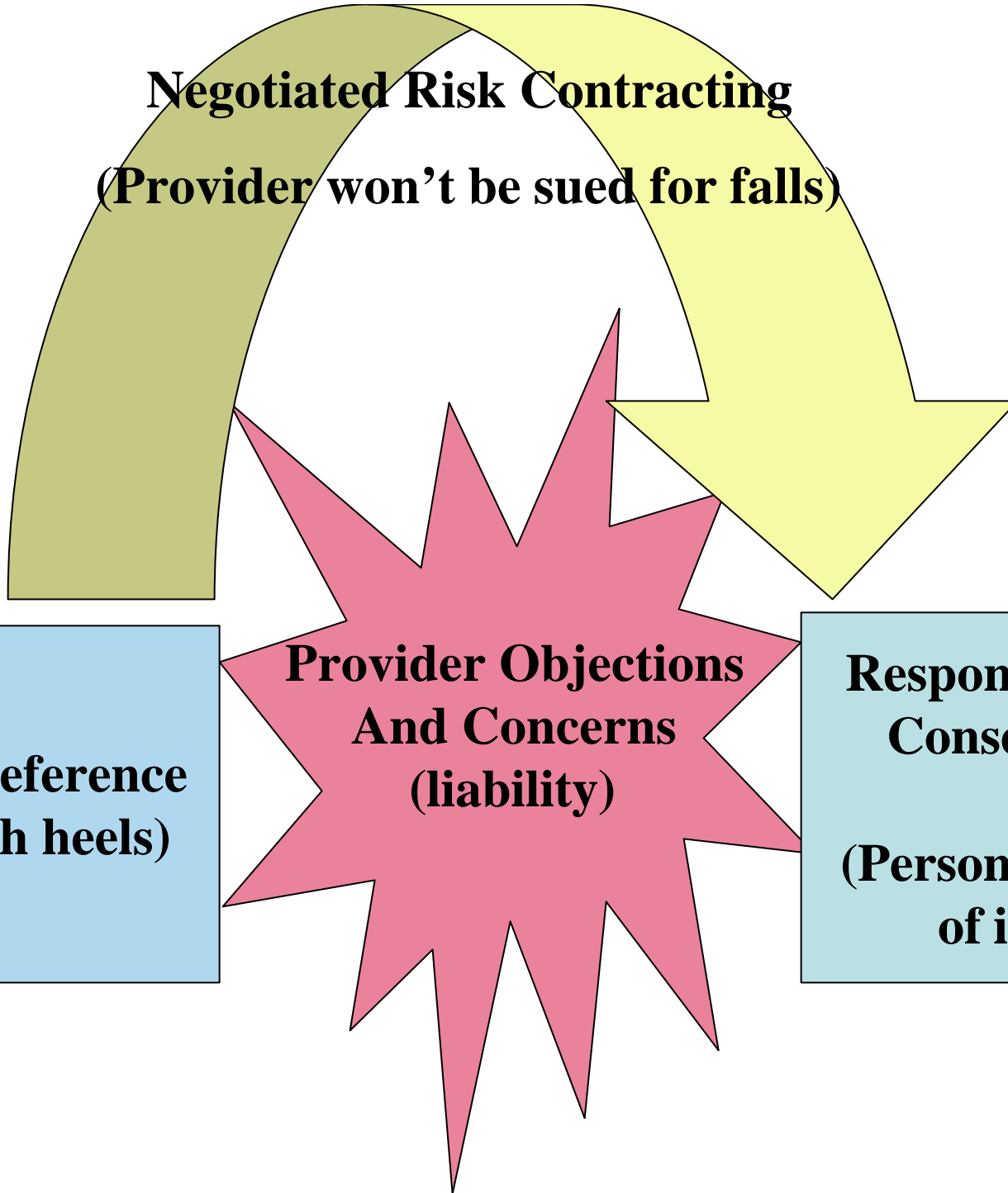
July 2002

Negotiated Risk Contracting
(Provider won't be sued for falls)

Person's Preference
(Wants high heels)

Provider Objections
And Concerns
(liability)

Responsibility for
Consequences
(Person bears cost
of injury)



Consumer direction puts the
person in control.

Negotiated risk contracting
takes the next step:

**Enabling the person to
take responsibility for the
consequences.**

Negotiated Risk Contracting: Key Issues

- **Waiver-** Person waives right to sue provider.
- **Capacity/Authority-** Person or legal surrogate (guardian, DPOA) must sign contract
- **Informed Consent-** Decision to sign must be voluntary with knowledge of risks and alternatives

Provider Objections & Concerns

- **Liability**
 - What if the person gets hurt?
- **Capacity**
 - Does the person have decision-making ability?
 - Does the surrogate have authority?
 - What if the family disagrees with the decision?
- **Licensing**
 - Will I lose my license?

Licensing/Public Policy Issues

- **Licensing:**
 - Can't alter licensing standards or other laws or regulations by contracting.
- **Courts don't like liability waivers:**
 - Unequal Bargaining Power
 - “Special” Relationships

Elements of Model Contracts

- **Formal, signed, clear written waiver**
- **Informed consent**
- **Capacity/Bargaining power**

Contract Contents

Explicit Waiver Terms

Liability Waiver
Parties' future acts

Proof of Informed Consent

ID conflict
Preference
Alternatives
Risks
Acknowledgment

Proof of Capacity & Bargaining Power

Opp'y to confer
Review provisions

Capacity and Decisions

- **Decision-Making Ability**
 - *Evaluating alternatives in light of values, preferences*
 - *Dynamic, task-specific*
- **Legal Capacity**
 - *Presumed, unless ...*
 - *Court finds incapacity:*
 - Can't manage property, finances, or provide for own needs and
 - Likely to suffer, has suffered, or is suffering substantial harm

Capacity and Authority

- **Capacity:**
 - If no capacity and no surrogate, then no contract
 - But ... provider may accept preference if circle of support unanimously signs contract
- **Authority:**
 - Check state law on guardians, DPOA terms

Negotiated Risk Contract Cases

Case A

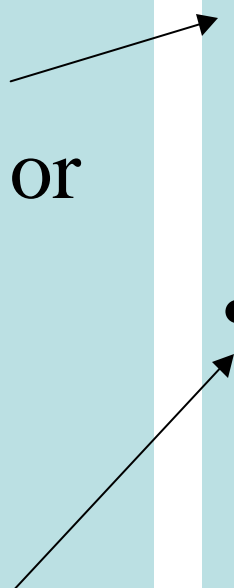
- Person wants to smoke
- Provider policy against smoking
- Discussed risks and alternatives (fire, cancer, carrots and gum)
- Person assumes liability if helped to light up.
- Fire

Case B

- Person wants new nurse.
- Provider staff shortages
- Risks are discussed, but not clearly understood
- Person assumes liability if friend administers meds.
- Overdose

Will the contract be enforced?

Case A: YES

- Contract did not affect licensing standards, laws, or regulations
 - Capacity not in question
 - Informed consent
- 
- Provider policy against smoking
 - Risks & alternatives discussed

Will the contract be enforced?

Case B: NO

- Courts disfavor waivers in “special relationships”
- Licensing laws and regulations
- Capacity?

- Nurse-patient relationship
- Provider staff shortages
- Risks are discussed, but not understood