

# **Negotiated Risk Contracts**

## ***Assuming Risks to Secure Benefits of Consumer Direction***

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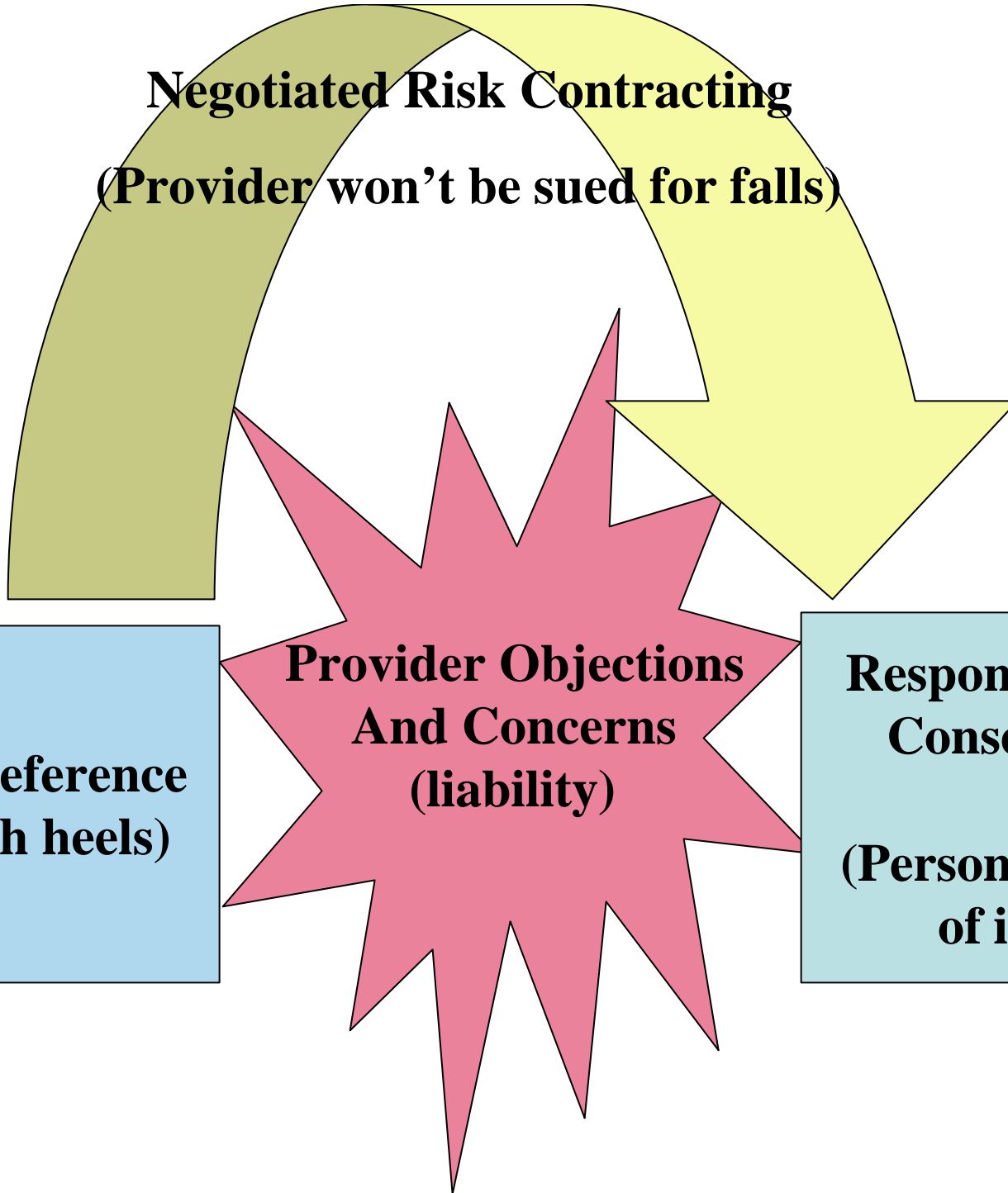
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**Negotiated Risk Contracting**  
**(Provider won't be sued for falls)**

**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

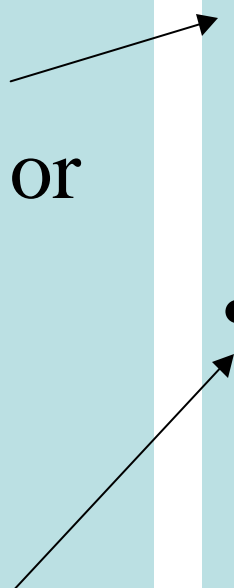
- Person wants to smoke
- Provider policy against smoking
- Discussed risks and alternatives (fire, cancer, carrots and gum)
- Person assumes liability if helped to light up.
- Fire

## 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