

HOME HEALTH AND HOSPICE NEWS

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MEDICAL DECISIONMAKING FOR INCOMPETENT PATIENTS: WHO, WHAT AND WHEN?

Substitute medical decisionmaking for incompetent or incapacitated adult patients is a process that often creates confusion for providers and family members as to what laws or documents govern, and what patient-initiated directives take precedence over others. This discussion introduces some of the basic terminology and guidelines for analyzing the laws and documents relating to substitute decisionmaking.

The underlying assumption here is that the patient is an adult (different rules apply to children), and has been determined to be incompetent or incapacitated such that substitute medical decisionmaking is appropriate. Competent individuals are *always* entitled to make their own decisions regarding medical care, even if they have executed a conflicting advance directive or designated a medical power of attorney.

TERMINOLOGY

Although many people use the term "advance directive" in a generic sense, Texas law defines it as an instruction to physicians, made in accordance with the statutory requirements, to *administer, withhold or withdraw* life-sustaining treatment in the event of a terminal or irreversible condition. It is important to note that an advance directive may direct a physician to *administer* a particular type of care, as assumptions about advance directives are often that they only address the withholding or withdrawal of care. An advance directive may also designate a substitute decisionmaker to make treatment decisions in the event the patient becomes incompetent or incapacitated.

An "Out of Hospital Do-Not-Resuscitate Order" ("DNR Order") is a legally binding order, in a prescribed form, prepared and signed by the attending physician, that documents the patient's (or their authorized representative's or guardian's) instructions *not to initiate or continue specified* life-sustaining treatments, such as CPR, artificial ventilation, and defibrillation, as listed in the Statute.

A Medical Power of Attorney ("MPOA") is a document in which a patient designates a substitute decisionmaker ("agent"), to make decisions on behalf of the patient *if, and only if*, the patient becomes incompetent or incapacitated, as certified by the attending physician. The agent is expected to make decisions that he or she believes the patient would make if he or she were competent.

IMPLEMENTATION

In implementing an incompetent patients' wishes, providers

should apply consistent procedures and analyses in each case, even if the treatment decisions are ultimately different for each patient.

If an incompetent patient is *not* certified as terminally or irreversibly ill, no decision may be made to withhold or withdraw any treatment, including life-sustaining treatment.

If a terminal patient has executed an advance directive, the directive must be followed. If the patient has not executed an advance directive, the provider should then determine whether the patient has a legally-appointed guardian or designated an MPOA. If the patient has neither, then the law provides that certain family members may agree upon the proposed medical action or, if no family exists, then the attending physician and one neutral physician may decide. If the patient has *either* a legal guardian *or* an agent under an MPOA, the question becomes whether the proposed medical action is authorized in the guardianship documents or MPOA. If it is authorized, then the provider may rely on the guardian or agent's decision. If it is not authorized, then the family and attending/neutral physician rules would apply. If the patient has *both* a legal guardian and an MPOA, and the proposed medical action is authorized in both documents, the provider should follow whichever document is more recent. If the proposed action is not authorized, then the provider should rely on the family and attending/neutral physician consent rules.

CONFLICTING DIRECTIVES

Complications can arise when directives appear to conflict with one another. If a patient executed a DNR prior to becoming incompetent, and also designated an agent in an MPOA, the agent must comply with the DNR order, and may sign the DNR order in lieu of the patient. However, a legally appointed guardian may be authorized to override the decisions of a designated agent under an MPOA. An agent designated under an MPOA may authorize the withholding or withdrawal of life-sustaining treatment from an incompetent patient, including nutrition and hydration. By contrast, a DNR does not authorize the withholding of comfort care, pain alleviation, or nutrition and hydration, even though it authorizes the withholding and withdrawal of other life-sustaining treatments. In some instances, it may be necessary or good practice for a provider to consult with its Ethics Committee or legal counsel to ensure that proper steps are taken to safeguard the patient's rights and wishes.

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