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Tennessee Advance Directives

Tennessee Health Care Decisions Act - Enacted in 2004

- Revised the system allowing for appointment of a designated **agent**; and
- Provides for appointment of a **surrogate** when no agent is designated
- Codified at T.C.A. Section 68-11-1801 et seq.
- Law does not affect the right of an individual having capacity to make their own health care decisions.
- An individual is **presumed to have capacity** to make a health care decision, to give or revoke an advance directive and to designate or disqualify a surrogate.

Definitions

Advance Directive means an individual instruction or written statement relating to the subsequent provision of health care for the individual, including, but not limited to, a living will or a durable power of attorney for health care.

Capacity means an individual's ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health care decision.

Designated physician means a physician designated by an individual or the individual's agent, guardian, or surrogate, to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes such responsibility.

Health care means any care, treatment, service or procedure to maintain, diagnose, treat, or otherwise affect an individual's physical or mental condition, and includes medical care as defined in § 32-11-103(5).

Health care decision means consent, refusal of consent or withdrawal of consent to health care.

Health care provider means a person who is licensed, certified or otherwise authorized or permitted by the laws of this state to administer health care in the ordinary course of business in practicing of a profession.

Individual instruction means an individual's direction concerning a health care decision for the individual.

Individual Instructions

An adult or emancipated minor may give an individual instruction. The instruction may be oral or written. The instruction may be limited to take effect only if a specified condition arises.

An individual instruction is not the same thing as an advance directive. An advance directive must be in writing. An individual instruction may still direct the use of the advance directive by creating evidence of the patient's wishes and values.

Advance Directives

An Advance Directive:

- Must be in writing
- Must be notarized OR witnessed by two individuals
 - Witnesses must be competent adults, not the agent, and at least one must not be related by blood or marriage and must not be entitled to any portion of the estate of the principal upon death
- Remains in effect despite incapacity
- Must contain an attestation clause that attests witnesses comply with requirements.

Note throughout the distinction between individual instructions and an advance directive. Individual instructions may be oral, may be specific and may state values.

Unless otherwise specified, an advance directive is effective only following a determination that the principal lacks capacity and ceases to be effective upon a determination that the principal has recovered capacity. This determination is made by a designated physician.

This provision of the law makes the advance directive “springing” – triggered by incapacity.

An agent must make decisions consistent with the principal's individual instructions if they exist and if they are known. Otherwise, the agent must make decisions in accordance with the principal's best interests. This includes consideration of the principal's values.

An agent is not free to impose his or her values on the principal. If the patient's wishes are known, then the agent must make decisions consistent with the patient's values. This may become complicated if new technology or new options are available that were not available when the patient originally expressed his or her values.

Judicial approval of decisions made by an agent is not required.

An advance directive may nominate a guardian.

Advance directives made in other states are valid if they were executed in compliance with (1) the Tennessee Health Care Decisions Act; or (2) in compliance with the laws of the principals' state of residence.

Out-of-state advance directives carry the same weight as a Tennessee advance directive if valid in the home state.

A health care provider may not require execution or revocation of an advance directive as a condition for receiving health care.

Living Wills and Health Care Powers of Attorney executed under other provisions of Tennessee law remain valid.

Revocation

Revocation must be in writing or by personally informing the supervising health care provider.

Unlike the creation of an advance directive, a revocation may be oral if conveyed to the provider.

An individual with capacity may revoke all or part of an advance directive at any time and in any manner that communicates an intent to revoke.

A decree of annulment, divorce, dissolution of marriage or legal separation automatically revokes a designation of a spouse as agent unless otherwise specified.

A new advance directive that conflicts with an earlier advance directive revokes the earlier document to the extent of the conflict.

Surrogates

A surrogate is NOT a person designated as an agent.

A surrogate may be designated by personally informing the supervising health care provider. Any adult or emancipated minor may designate any individual to act as a surrogate. The designation may be oral or in writing.

The surrogate may make health care decisions if, and only if, the patient is determined by the designated physician to lack capacity; and no agent or guardian has been appointed, or the agent or guardian is not reasonably available.

As with an advance directive, a surrogate has no authority to act if the patient is able to make his or her own decisions.

If a patient lacks capacity and has not appointed an agent, and has not designated a surrogate, and does not have a guardian, or all of these personal are not reasonably available, then the supervising health care provider may identify a surrogate and document that person as such in the current clinical record of the institution where the patient is then receiving care.

A surrogate shall be an adult who has exhibited special care and concern for the patient, who is familiar with the patient's values, who is reasonably available, who is willing to serve, and who is not subject to a protective order requiring him or her to avoid contact with the patient.

Consideration may be given, in order of descending preference, to the following persons for service as a surrogate:

- The patient's spouse, unless legally separated;
- The patient's adult child;
- The patient's parent;
- The patient's adult sibling
- Any other relative of the patient; or
- Any other adult who meets the requirements stated above.

The following criteria must be considered in determining who is best qualified to serve as a surrogate:

- Whether the proposed surrogate appears to be better able to make decisions, either in accordance with the known wishes of the patient, or in accordance with the patient's best wishes;

- The proposed surrogate's regular contact with the patient prior to and during the incapacitating illness;
- The proposed surrogate's demonstrated care and concern;
- The proposed surrogate's availability to visit the patient during the patient's illness; and
- The proposed surrogate's availability to engage in face-to-face contact with health care providers for the purpose of fully participating in the decision-making process.

If none of the individuals listed above are reasonably available, the designated physician may make health care decisions for the patient after:

- Consulting with and obtaining the recommendation of an institutions ethics mechanism; or
- Obtaining concurrence from a second physician who is not directly involved in the patient's health care, does not serve in a capacity of decision-making, influence, or responsibility over the designated physician, and is not under the designated physicians' decision-making, influence or responsibility.

If challenged, there is a rebuttable presumption that the selection of the surrogate was valid. The burden of proof lies with the party challenging the selection.

The surrogate must make decisions in accordance with the patient's individual instructions, if any, and other wishes known to the surrogate. Otherwise, the surrogate must make decisions in accordance with the surrogate's determination of the patient's best wishes. The surrogate shall consider the patient's personal values.

As with an advance directive, a surrogate is not free to substitute his or her values for those of the patient.

A surrogate may make all health care decisions, except that a decision to withdraw nutrition and hydration may only be made when the designated physician and a second independent physician certify in the current clinical records that nutrition and hydration are merely prolonging the dying process and the patient is unlikely to regain capacity.

Decisions made by a surrogate do not require court approval.

Health care providers involved in the decision-making process, and their employees, may not serve as a surrogate unless they are related by blood marriage or adoption and the other requirements described above are also satisfied.

A health care provider may require a written statement, under penalty of perjury, stating the facts and circumstances that qualify a person to serve as surrogate.

Guardians

A guardian must comply with a patient's individual instructions and may not revoke an advance directive.

Absent an order to the contrary, a health care decision of an agent takes precedence over that of a guardian.

No court approval is required for health care decisions made by a guardian.

Right to review records

Unless otherwise specified in an advance directive, a person then authorized to make health care decisions for a patient has the same rights as the patient to request, receive, examine, copy, and consent to the disclosure of medical or any other health care information.

<p>This is consistent with HIPAA. Decision-makers are authorized to access information necessary to make health care decisions.</p>

Liability

A health care provider acting in good faith and in accordance with generally accepted health care standards is not subject to civil or criminal liability or to discipline for

- Complying with a health care decision of a person apparently having authority to make health care decisions, including withholding or withdrawing health care;
- Declining to comply with a health care decision of a person based on a belief that the person lacked authority; or
- Complying with an advance directive and assuming the directive was valid when made and that it had not been revoked or terminated.

A person identifying a surrogate is not subject to civil or criminal liability or to disciplinary action for acting in good faith.

A health care provider or institution that intentionally violates this law is subject to damages of \$2,500 or actual damages, whichever is greater, plus attorney's fees.

A person who intentionally falsifies forges, conceals, defaces or obliterates an individual's advance directive is subject to damages of \$2,500 or actual damages, whichever is greater, plus attorney's fees. The same applies to someone who coerces or fraudulently induces someone to give, revoke, or not to give an advance directive.

Miscellaneous

A copy of an advance directive has the same effect as the original.

The law does not create a presumption concerning the intention of a person who has not made, or who has revoked an advance directive.

Death resulting from withholding health care in accordance with the law does not constitute suicide or homicide.

Mercy killing is not authorized.

A court with jurisdiction may enjoin or direct a health care decision. Such proceedings shall be expedited.