

POLICY AND PROCEDURE CONCERNING ADVANCE DIRECTIVES

I. PURPOSE

This policy and procedure is designed to assist the agency employees and IPP team members in matters relating to advance directives.

II. AUTHORITY

This procedure has been implemented with the approval of the agency's Governing Board and/or its designee.

III. BACKGROUND TO ADVANCE DIRECTIVES

Competent adult persons have a common-law and constitutional right to make their own health care decisions, including the right to refuse medical treatment. "Advance directives" are written instruments by which a competent person seeks to preserve this right when/if he becomes incompetent. This is done either by appointing another person to make health care decisions for him (a Power of Attorney for Health Care), or by expressing the type of health care he would not want under particular circumstances (a Living Will). Nebraska Statutory authority: the Rights of the Terminally Ill Act, Laws 1992, L.B. 671, and the Power of Attorney for Health Care Act, Laws 1992, L.B. 696.

IV. LIVING WILLS

A. Nature of Living Wills:

The Rights of the Terminally Ill Act gives an adult the right to execute a declaration governing the withholding or withdrawal of "life sustaining treatment" when he is "in a terminal condition or in a permanent vegetative state" and is "unable to make decisions regarding the administration of life-sustaining treatment." Sections 20-404(1) and 20-405.

In the Act, a Living Will is referred to as a "Declaration" and the subject of the Living Will is referred to as the "declarant."

B. Living Will Form:

A suggested Living Will form (Appendix A) is provided in Section 20-404(2) of the Act. Although this is only a suggested form, significant deviation would not be advisable because: (1) physicians will be more comfortable, and thus more likely to promptly comply with, a Living Will which is in the form suggested in the Act, and (2) deviations may render the Living Will invalid or unfairly mislead a declarant as to the effect of his Living Will. One deviation which would be advisable is a statement in the

execution part of the Living Will to the effect that the witnesses satisfied the requirements discussed in the following section.

C. Execution of Living Will:

A Living Will declarant must be an “adult” (i.e., a person who is 19 years of age or older or who is or has been married), and must be “of sound mind” at the time the Living Will is executed. Sections 20-403(1) and 20-404(1). The Living Will must be signed by the declarant, or signed at the declarant’s direction. Section 20-404(1).

The declarant’s signature must be witnessed by either: (1) two adults or (2) a notary public. The following restrictions apply as to who can be a witness: (1) no more than one of the witnesses can be an administrator or employee of a health care provider who is caring for or treating the declarant, and (2) none of the witnesses can be an employee of a life or health insurance provider for the declarant. These restrictions do not apply to a notary public witness. Section 20-404(1).

D. Distribution of Living Will:

Signed copies of the Living Will should be given to the declarant’s physicians and to any residential facility or hospital in or of which the declarant is a resident or patient. Signed copies should also be given to those who may be expected to be present when the declarant becomes ill (i.e., family members or close friends).

V. POWERS OF ATTORNEY FOR HEALTH CARE

A. Nature of Powers of Attorney for Health Care:

The Power of Attorney for Health Care Act authorizes an adult (the “Principal”) to appoint another person (“the Attorney-in-Fact for Health Care”) to make health care decisions for him when he has been determined to be incapable of making his own health care decisions.

B. Power of Attorney for Health Care Form:

A form for a Power of Attorney for Health Care (Appendix B) is provided in Section 30-3408 of the Act. The Power of Attorney for Health Care is required to be “substantially in the form provided” in the Act. Due to this requirement, changes to the statutory form are not recommended, except for changes establishing that the witnesses and the attorney-in-fact meet the qualifications of the Act.

C. Execution of Power of Attorney for Health Care:

The principal must be an “adult” (i.e., a person who is 19 years of age or older or who is or has been married), and must be competent at the time the Power of Attorney for Health Care is executed. Sections 30-3402(1) and (11). The Power of Attorney for Health Care must be signed by the principal. Section 30-3404.

The principal’s signature, or the principal’s acknowledgement of signature and date, must be witnessed by at least two adults. Section 30-3404. The following restrictions apply as to who can be a witness: (1) no more than one of the witnesses can be an administrator or employee of a health care provider who is caring for or treating the principal, and (2) none of the following can be witnesses: the principal’s spouse, parent, child, grandchild, sibling, presumptive heir, known devisee at the time of the witnessing, attending physician, or attorney-in-fact, or an employee of a life or health insurance provider for the principal. Section 30-3405.

D. Attorney-in-Fact:

1. Qualifications:

The attorney-in-fact must be a competent adult. The following persons cannot be an attorney-in-fact: (1) the attending physician, (2) an employee of the attending physician, (3) an owner, operator, or employee of a health care provider in or of which the principal is a patient or resident, and (4) a person who is serving as attorney-in-fact for 10 or more persons (i.e., a person who is effectively a “professional” attorney-in-fact). Any person within the last three named groups can be an attorney-in-fact if related to the principal by blood, marriage, or adoption. Section 6.

2. Successors:

A successor attorney-in-fact may be named. The successor serves if the original attorney-in-fact is not reasonably available or is unable or unwilling to serve. If the original attorney-in-fact becomes available, and is able and willing to serve, the power of the successor ceases and the original attorney-in-fact takes over. Section 30-3403(1). The Act does not expressly provide for the possibility of a second alternate (i.e., a successor to the successor), or for the possibility of individuals serving jointly as attorney-in-fact.

3. Duties:

When the attorney-in-fact is notified that the attending physician has or is about to make a determination that the principal is incapable of making health care decisions, the attorney-in-fact,

unless directed otherwise in the declaration, is required to notify the principal's most proximate next of kin, and the court-appointed guardian of the principal, if any. The order of notification is as follows: (1) spouse, (2) adult child, (3) parent, (4) adult brother or sister, and (5) the next closest kin. Section 30-3414.

When the principal has been determined to be incapable of making health care decisions, the attorney-in-fact has the responsibility to make health care decisions on the principal's behalf, after consulting with medical personnel. Sections 30-3417 and 30-3418. The attorney-in-fact is also entitled to receive information regarding the principal's health care, to review the principal's medical and clinical records, and to consent to the disclosures of such records, unless the Power of Attorney for Health Care provides otherwise. Section 30-3417(4). The attorney-in-fact's decisions are to be made (1) in accordance with the principal's wishes as expressed in the Power of Attorney for Health Care, (2) as otherwise made known to the attorney-in-fact, or (3) if the principal's wishes are not reasonably known or ascertainable, in accordance with the principal's best interests, with due regard to the principal's religious and moral beliefs. Sections 30-3417 and 30-3418(1).

4. Assurances:

The attorney-in-fact is not personally responsible for the cost of health care provided to the principal. Section 30-3417(3).

The attorney-in-fact may withdraw from his duties as attorney-in-fact at any time. The attorney-in-fact's withdrawal is accomplished by giving notice of withdrawal to the principal, if the principal is not incapable at that time, and if the principal is incapable, by giving a notice of withdrawal to the attending physician. Section 30-3407.

So long as the attorney-in-fact exercises his powers in good faith, he can not be subject to criminal or civil liability, nor be deemed to be in violation of ethical or professional oaths. Section 30-3423(1).

E. Distribution of Power of Attorney for Health Care:

Signed copies of the Power of Attorney for Health Care should be given to the attorney-in-fact, any named successor, the principal's physician, and any residential facility or hospital in or of which the principal is a resident or patient. Those who may be expected to be present when the principal becomes ill (i.e., family member or close friends) should be advised of the existence of the document, so they can notify the attorney-in-fact when necessary.

VI. SELECTION OF ADVANCE DIRECTIVE

If a person decides he wants an advance directive, he must decide whether to use: (1) a Living Will, (2) a Power of Attorney for Health Care, or (3) a combination of the two.

As shown above, the principal difference between a Living Will and a Power of Attorney for Health Care is that a Living Will stands on its own, while a Power of Attorney for Health Care requires that another person (i.e., an attorney-in-fact) carry out its terms. The choice between using a Living Will and a Power of Attorney for Health Care will depend largely upon this difference.

A. Advantages of Living Will:

The fact that a Living Will stands on its own is advantageous from the standpoint that it relieves another person (i.e., an attorney-in-fact) from being involved in the decision of whether to withdraw or withhold life-sustaining treatment. Since the person named as attorney-in-fact, in the Power of Attorney for Health Care is usually a close family member, this means that a Living Will serves to relieve close family members of a most difficult decision at an emotional time. Also, the Living Will declarant is not at the whim of an attorney-in-fact who may quash an individual's desire to not be maintained on life-support systems by: (1) failing to follow the directions set forth in a Power of Attorney for Health Care (which may lead to litigation), (2) being unavailable, unwilling, or unable to serve (i.e., by being on a trip or by having died or become incompetent), or (3) formally withdrawing as the attorney-in-fact.

B. Advantages of Powers of Attorney for Health Care:

On the other hand, it is advantageous to have another person (i.e., an attorney-in-fact) make the decision of whether to withhold or withdraw life-sustaining treatment, as provided for in a Power of Attorney for health Care, because that person can make the decision under the circumstances actually existing at the time the decision needs to be made. The choice of whether to use a Living Will as opposed to a Power of Attorney for Health Care (at least for purposes of the decision of whether to withdraw or withhold life-sustaining treatment), thus revolves upon whether the individual has available to him a trusted and emotionally strong person, who is willing to make a difficult decision, and who is expected to be available when the decision needs to be made.

C. Use of Living Will in combination with Limited Power of Attorney for Health Care:

If an individual desires to use a Power of Attorney for Health Care, but is concerned that the named attorney-in-fact and any successor will not be available or able or willing to serve, it may be possible to incorporate a

Living Will into the Power of Attorney for Health Care. Language such as the following could be inserted in the Power of Attorney for Health Care to accomplish this:

“If my attorney-in-fact and my successor, if any, are not available or able or willing to serve, or have withdrawn, and if...”[then continue with language from the Living Will form].

Another approach is to use a Living Will for the ultimate health care decision of withdrawing or withholding life-sustaining treatment, and use a Limited Health Care Power of Attorney for other health care decisions. The Limited Power of Attorney for Health Care would be worded so as to give the attorney-in-fact the power to make all health care decisions, except those relating to the withholding or withdrawing of life-sustaining treatment. This would allow the more mundane health care decisions to be made when an individual is rendered incapable of making his own health care decisions, but is not in either a terminal condition or permanent vegetative state.

VII. GUARDIANSHIPS

Where a person is not competent, and there is no advance directive or power of attorney, a guardian must be appointed to make decisions concerning the medical treatment of the person. The pertinent statutory provisions concerning guardianships are included in the Procedure Concerning Guardianship and Conservatorship.

VIII. DO-NOT-RESUSCITATE (DNR) ORDERS

Refer to the agency’s policy concerning DNR Orders (see Policy and Procedure Concerning DNR Orders).

IX. ADDITIONAL RESOURCES

Refer to the Area Program’s file on Advance Directives, DNR’s etc.