

## CHAPTER 36

### ADVANCE DIRECTIVES

#### I. INTRODUCTION

Every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment. This right is subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession. An "advance directive" is a statement made by a competent adult, usually in writing, giving instructions concerning the individual's future medical care in the event that the individual becomes unable to speak for him or herself due to illness or mental incapacity. An advance directive may be in the form of a living will, the designation of a health care surrogate, a durable power of attorney for health care, or a do-not-resuscitate (DNR) order.

#### II. FLORIDA STATUTORY LAW ON ADVANCE DIRECTIVES

##### a. **FLORIDA CONSTITUTION**

Many of the cases in Florida concerning a patient's right to make his or her own independent determinations concerning accepting or refusing health care arise out of Article I, Section 23 of the Florida Constitution. Article I, Section 23 of the Florida Constitution states:

Right of privacy. Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

This provision has been interpreted by many Florida Courts as a guarantee that a person and her family have the right to make health care decisions without the intervention of others as a matter of privacy.

##### b. **FLORIDA HEALTH CARE ADVANCE DIRECTIVES ACT**

Additionally, Florida also has a comprehensive act on advance directives known as, the Florida Health Care Advance Directives Act. The original Florida Health Care Advance Directives Act was passed in 1992 and was amended in 1994. Chapter 765, Florida Statutes.

An "advance directive" is a witnessed written document or oral statement in which instructions are given by a principal or in which a principal's desires are expressed concerning any aspect of the principal's health care, and includes, but is not limited to, the designation of a health care surrogate, a living will, or orders not to resuscitate issued pursuant to Section 401.45, Florida Statutes. An advanced directive which has been executed in another state is valid if it was executed in compliance of the laws of that state.

An advance directive or designation of a surrogate may be amended or revoked at any time by a

competent principal. The amendment or revocation will become effective when it is communicated to the surrogate, health care provider, or health care facility. Section 765.104, Florida Statutes, list four ways in which an advanced directive can be revoked or amended. An advanced directive can be amended or revoked by:

1. Means of a signed, dated writing;
2. Means of the physical cancellation or destruction of the advance directive by the principal or by another in the principal's presence and at the principal's direction;
3. Means of an oral expression of intent to amend or revoke the advanced directive; or
4. Means of a subsequently executed advance directive that is materially different from a previously executed advance directive.

Advanced directives are a showing of a competent person's decision to have an act or omission of an act performed, should they become incapable to express their desire themselves. The patient's family, the health care facility, or the attending physician, or any other interested person who may reasonably be expected to be directly affected by the surrogate or proxy's decision concerning any health care decision may seek an expedited judicial intervention if that person believes:

1. The surrogate or proxy's decision is not in accord with the patient's known desires or the provisions of the Florida Health Care Advance Directives Act;
2. The advance directive is ambiguous, or the patient has changed his or her mind after execution of the advance directive;
3. The surrogate or proxy was improperly designated or appointed, or the designation of the surrogate is no longer effective or has been revoked;
4. The surrogate or proxy has failed to discharge duties, or incapacity or illness renders the surrogate or proxy incapable of discharging duties;
5. The surrogate or proxy has abused powers; or
6. The patient has sufficient capacity to make his or her own health care decisions.

As a nurse who is acting under the direction of a health care facility or provider you are not subject to criminal prosecution or civil liability, and will not be deemed to have engaged in unprofessional conduct, as a result of carrying out an advanced directive. In addition, the surrogate, or proxy, who makes a health care decision on a patient's behalf, pursuant to Florida law, is not subject to criminal prosecution or civil liability for their action.

**1. Health Care Surrogates**

The designation of a health care surrogate must be in writing, signed or acknowledged by patient, and in the presence of two subscribing witnesses. The person designated as the surrogate shall not be the witness and at least one witness shall not be the principal's spouse or blood relative. The surrogate must also be given an exact copy of the advanced directive.

Upon designating a surrogate the surrogate may:

- a. Make all health care decisions unless expressly limited by the principal;
- b. Consult with health care providers to give or withhold consent to treatment that surrogate believes the principal would have made under the circumstances;
- c. Access and release medical records;
- d. Apply for public benefits; and
- e. If a court appoints a guardian, the surrogate may continue to make health care decisions unless the court has modified or revoked the authority of the surrogate in its order or letters of guardianship.

**2. Living Wills and Life-prolonging Procedures**

Any competent adult may, at any time, make a living will or written declaration and direct the providing, withholding, or withdrawal of life-prolonging procedures in the event that person has a terminal condition, has an end-stage condition, or is in a persistent vegetative state. A living will must be signed by the principal in the presence of two subscribing witnesses, one of whom is neither a spouse nor a blood relative of the principal. If the principal is physically unable to sign the living will, one of the witnesses must subscribe the principal's signature in the principal's presence and at the principal's direction.

Upon executing a living will it is the responsibility of the principal to provide for notification to her attending or treating physician that the living will has been made. An attending or treating physician or health care facility which is so notified shall promptly make the living will or a copy thereof a part of the principal's medical records.

If a person has made a living will expressing his or her desires concerning life-prolonging procedures, but has not designated a surrogate to execute his or her wishes concerning life-prolonging procedures or designated a surrogate the attending physician may proceed as directed by the principal in the living will. In the event of a dispute or disagreement concerning the attending physician's decision to withhold or withdraw life-prolonging procedures, the attending physician shall not withhold or withdraw life-prolonging procedures pending judicial review. If a review of a disputed decision is not sought within 7 days following the attending physician's decision to withhold or withdraw life-prolonging procedures, the attending physician may proceed in accordance with the principal's instructions.

Before proceeding in accordance with the principal's living will, it must be determined that the principal does not have a reasonable medical probability of recovering capacity so that the right could be exercised directly by the principal; the principal has a terminal condition, has an end-stage condition, or is in a persistent vegetative state; or any limitations or conditions expressed orally or in a written declaration have been carefully considered and satisfied. In determining whether any of the foregoing situations have arisen, the patient's attending or treating physician and at least one other consulting physician must separately examine the patient. The findings of each such examination must be documented in the patient's medical record and signed by each examining physician before life-prolonging procedures may be withheld or withdrawn.

The Florida Supreme Court has determined that a patient's will to refuse life-prolonging procedures be respected by health care facilities. In the matter of Dubreuil the court overturned an order issued by a lower court authorizing a hospital to administer blood to a patient (a Jehovah's Witness) against her wishes. The Dubreuil court held that a health care provider must comply with the wishes of a patient to refuse medical treatment (unless ordered to do otherwise by a court of competent jurisdiction). A health care provider who in good faith follows the wishes of a competent and informed patient to refuse medical treatment is acting appropriately and cannot be subjected to civil or criminally liability. The court went on to state that a health care provider wishing to override a patient's decision to refuse medical treatment must notify the state attorney and the reason for the provider denying the patients wishes cannot be because the provider is acting on behalf of the state to assert the states's interest. The state's interests in preservation of life and in protection of third parties must be compelling. There is no longer a presumption of abandonment of a minor child by a female patient in which the father will not assume responsibility unless there is clear and convincing evidence of such.

The implications of Dubreuil are to emphasize and protect the patient's state and federal constitutional rights of privacy, bodily self-determination, and religious freedom. It promotes and protects health care providers who honor a patient's wishes to refuse treatment and it removes the burden on the provider to act as advocates of the state's interests without the protection of immunity from civil liability granted to the state.

The Dubreuil court stated that the "burden" of asserting the interest in preserving life has been removed from health care providers. "A health care provider's function is to provide medical treatment in accordance with the patient's wishes and best interests, not as a 'substitute parent' supervening the wishes of a competent adult." This sends the message that a provider who intervenes by failing to follow through with a patient's wishes may be acting inappropriately.

**3. Absence of Advance Directive**

If an incapacitated or developmentally disabled patient has not executed an advance directive, or designated a surrogate to execute an advance directive, or the designated or alternate surrogate is no longer available to make health care decisions, health care decisions may be made for the patient by any of the following individuals, in the following order of priority, if no individual in a prior class is reasonably available, willing, or competent to act:

1. The judicially appointed guardian of the patient;
2. The patient's spouse;
3. An adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
4. The parent of the patient;
5. The adult sibling of the patient or, if the patient has more than one sibling, a majority of the adult siblings who are reasonably available for consultation;
6. An adult relative of the patient who has exhibited special care and concern for the patient and who has maintained regular contact with the patient and who is familiar with the patient's activities, health, and religious or moral beliefs; or
7. A close friend of the patient.

**III. FEDERAL STATUTORY LAW ON ADVANCED DIRECTIVES**

**A. PATIENT SELF DETERMINATION ACT OF 1990**

In 1990, Congress passed legislation as part of the Omnibus Budget Reconciliation Act of 1990 which has come to be known as the "Patient Self-Determination Act." The act became effective on December 1, 1991.

The Patient Self-Determination Act includes requirements for certain healthcare organizations to inform patients of their right to make their own decisions, including living wills and other advance medical directives which will determine their future medical care. It established a new requirement, as a condition of participation in the Medicare and Medicaid programs; certain healthcare providers have to develop and implement written policies and procedures regarding a patient's rights to provide instructions concerning his or her medical care and to execute written advance directives. Home health agencies and hospices are specifically included in the coverage of the act. The act does not apply to home medical equipment companies and home infusion companies, but many comply with it voluntarily. As of December 1, 1991,

these health care providers participating in Medicare and Medicaid programs are required to:

1. Provide written information to each such individual concerning:
  - a. An individual's rights under State law to make decisions concerning such medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives; and
  - b. The written policies of the provider or organization respecting the implementation of such rights;
2. Document in a prominent part of the individual's current medical record whether or not the individual has executed an advance directive;
3. Not condition the provision of care or otherwise discriminate against an individual based on whether or not the individual has executed an advance directive;
4. Ensure compliance with requirements of State law respecting advance directives at facilities of the provider or organization; and
5. Provide education for staff and the community on issues concerning advance directives.

The act does not require patients to execute advance directives as a condition for receiving care. Indeed, the act prohibits any provider from requiring any patient to have an advance directive for the provision of care, or from discriminating in any way against an individual based on whether or not that person has an advance directive.

These requirements do not prohibit any health care provider from objecting to having to implement a patient's advance directive. Nor does the act prohibit the application of state laws that allow for such objections by healthcare providers. Therefore, the act does allow room for religious and moral objections a health care provider might have, or which might run contrary to its charter or policies. The act is intended to encourage patients and residents of healthcare facilities to make their own decisions concerning the circumstances in which life-sustaining treatment will be provided to them or withdrawn from them.

#### **IV. CONCLUSION**

The area of advance directives is an important area of nursing in which nurses must know and provide training on. The area of advanced directives is an area which is subject to changes made in response to medical progress and patients' needs. The nurse must keep aware of changes in the law on advance directives in order to be sure that he or she is complying with the patient's desires.