

Interim Committee to Study Hospice and Palliative Care
September 1, 2009
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POTENTIAL CHANGES
IN THE EXISTING
PROXY DECISION-MAKING STATUTE
TO ADDRESS "UNBEFRIENDED" INDIVIDUALS

[CHANGES ARE INDICATED BELOW IN CAPITAL LETTERS]

1) A health care provider or health care facility may rely, in good faith, upon the medical treatment decision of a proxy decision-maker selected in accordance with subsection (4) of this section if an adult patient's attending physician determines that such patient lacks the decisional capacity to provide informed consent to or refusal of medical treatment and no guardian with medical decision-making authority, agent appointed in a medical durable power of attorney, or other known person has the legal authority to provide such consent or refusal on the patient's behalf.

(2) The determination that an adult patient lacks decisional capacity to provide informed consent to or refusal of medical treatment may be made by a court or the attending physician, and the determination shall be documented in such patient's medical record. The determination may also be made by an advanced practice nurse who has collaborated about the patient with a licensed physician either in person, by telephone, or electronically. The advanced practice nurse shall document in the patient's record the name of the physician with whom the advanced practice nurse collaborated. The attending physician shall make specific findings regarding the cause, nature, and projected duration of the patient's lack of decisional capacity, which findings shall be included in the patient's medical record. (Eff. January 1, 2009)

(3) Upon a determination that an adult patient lacks decisional capacity to provide informed consent to or refusal of medical treatment, the attending physician, the advanced practice nurse, or such physician's or nurse's designee, shall make reasonable efforts to notify the patient of the patient's lack of decisional capacity. In addition, the attending physician, or such physician's designee, shall make reasonable efforts to locate as many interested persons as defined in the FOLLOWING subsectionS (3) (A) - (D) as practicable, and the attending physician or advanced practice nurse may rely on such individuals to notify other family members or interested persons.

(A) For the purposes of this section, "interested persons" means the patient's spouse, either parent of the patient, any adult child, sibling, or grandchild of the patient, or any close friend of the patient.

(B) NOTHING IN THIS SECTION PROHIBITS AN INDIVIDUAL WHO IS EMPLOYED BY A HEALTH CARE OR RESIDENTIAL FACILITY FROM ACTING AS AN ADULT PATIENT'S "CLOSE FRIEND," IF ALL OF THE FOLLOWING PROVISIONS ARE MET: (I) THE INDIVIDUAL'S CONCERN FOR THE PATIENT'S BEST INTERESTS IS NOT OVERSHADOWED BY A CONFLICT OF INTEREST; (II) THE INDIVIDUAL CONSULTS WITH A COMMUNITY-BASED OR A HEALTH FACILITY'S ETHICS COMMITTEE WHENEVER DECISIONS ARE NEEDED CONCERNING THE PATIENT'S MEDICAL TREATMENT, AND (III) NO OTHER INTERESTED PERSON CAN BE LOCATED WITH REASONABLE EFFORTS.

(C) Upon locating an interested person, the attending physician, advanced practice nurse, or such physician's or nurse's designee, shall inform such person of the patient's lack of decisional capacity and that a proxy decision-maker should be selected for the patient. (Eff. January 1, 2009)

(4) (a) It shall be the responsibility of the interested persons specified in subsection (3) of this section to make reasonable efforts to reach a consensus as to whom among them shall make medical treatment decisions on behalf of the patient. The person selected to act as the patient's proxy decision-maker should be the person who has a close relationship with the patient and who is most likely to be currently informed of the patient's wishes regarding medical treatment decisions. If any of the interested persons specified in subsection (3) of this section disagrees with the selection or the decision of the proxy decision-maker or, if, after reasonable efforts, the interested persons specified in subsection (3) of this section are unable to reach a consensus as to who should act as the proxy decision-maker, then any of the interested persons specified in subsection (3) of this section may seek guardianship of the patient by initiating guardianship proceedings pursuant to part 3 of article 14 of this title. Only said persons may initiate such proceedings with regard to the patient.

(b) Nothing in this section shall be construed to preclude any interested person described in subsectionS (3) OR (4.2) of this section from initiating a guardianship proceeding pursuant to part 3 of article 14 of this title for any reason any time after said persons have conformed with paragraph (a) of this subsection (4).

(4.1) IF NO INTERESTED PERSON CAN BE LOCATED AFTER REASONABLE EFFORT, NOTHING IN THIS SECTION PROHIBITS THE PATIENT'S ATTENDING PHYSICIAN OR AN ADVANCED PRACTICE NURSE WHO HAS COLLABORATED ABOUT THE

PATIENT WITH A LICENSED PHYSICIAN EITHER IN PERSON, BY TELEPHONE, OR ELECTRONICALLY, FROM ACTING AS AN ADULT PATIENT'S PROXY DECISION-MAKER IF ALL OF THE FOLLOWING PROVISIONS ARE MET: (I) THE ATTENDING PHYSICIAN'S OR ADVANCED PRACTICE NURSE'S CONCERN FOR THE PATIENT'S BEST INTERESTS IS NOT OVERSHADOWED BY A CONFLICT OF INTEREST; (II) THE PATIENT'S ATTENDING PHYSICIAN OR ADVANCED PRACTICE NURSE CONSULTS WITH A PHYSICIAN WHO IS NOT INVOLVED DIRECTLY WITH THE PATIENT'S CARE; (III) THE PATIENT'S ATTENDING PHYSICIAN OR ADVANCED PRACTICE NURSE CONSULTS WITH A COMMUNITY-BASED OR A HEALTH FACILITY'S ETHICS COMMITTEE WHEN DECISIONS ARE NEEDED CONCERNING THE PATIENT'S MEDICAL TREATMENT, AND (IV) NO INTERESTED PERSON CAN BE LOCATED WITH REASONABLE EFFORTS.

(4.2) IF THE PATIENT'S ATTENDING PHYSICIAN OR AN ADVANCED PRACTICE NURSE AS DESCRIBED IN SUBSECTION (4.1) ABOVE DOES NOT ACT AS THE PATIENT'S PROXY DECISION-MAKER, AND IF NO INTERESTED PERSON, AS DEFINED ABOVE IN SUBSECTION (3) CAN BE LOCATED AFTER REASONABLE EFFORT, A PRIVATE INDIVIDUAL, OR AN INDIVIDUAL ACTING ON BEHALF OF AN ENTITY THAT IS WILLING TO VOLUNTARILY ASSUME THE FIDUCIARY RESPONSIBILITY OF SERVING AS A PROXY FOR A PATIENT WHO LACKS DECISIONAL CAPACITY MAY ACT AS A PROXY DECISION-MAKER FOR THE PATIENT.

(5) When an attending physician determines that an adult patient lacks decisional capacity, the attending physician or another health care provider shall make reasonable efforts to advise the patient of such determination, of the identity of the proxy decision-maker, and of the patient's right to object, pursuant to section 15-14-506 (4) (a).

(6) Artificial nourishment and hydration may be withheld or withdrawn from a patient upon a decision of a proxy only when the attending physician and a second independent physician trained in neurology or neurosurgery certify in the patient's medical record that the provision or continuation of artificial nourishment or hydration is merely prolonging the act of dying and is unlikely to result in the restoration of the patient to independent neurological functioning.

(6.5) The assistance of a health care facility's medical ethics committee shall be provided upon the request of a proxy decision-maker or any other interested person specified in subsection (3) of this section whenever the proxy decision-maker is considering or has made a decision to withhold or withdraw medical treatment. If there is no medical ethics committee for a health care facility, such facility may provide an outside referral for such assistance or consultation.

(7) If any of the interested persons specified in subsection (3) of this section or the guardian or the attending physician believes the patient has regained decisional capacity, then the attending physician shall reexamine the patient and determine whether or not the patient has regained such decisional capacity and shall enter the decision and the basis therefore into the patient's medical record and shall notify the patient, the proxy decision-maker, and the person who initiated the redetermination of decisional capacity.

(8) Except for a court acting on its own motion, no governmental entity, including the state department of human services and the county departments of social services, may petition the court as an interested person pursuant to part 3 of article 14 of this title. In addition, nothing in this article shall be construed to authorize the county director of any county department of social services, or designee of such director, to petition the court pursuant to section 26-3.1-104, C.R.S., in regard to any patient subject to the provisions of this article.

(9) Any attending physician, health care provider, or health care facility that makes reasonable attempts to locate and communicate with a proxy decision-maker shall not be subject to civil or criminal liability or regulatory sanction therefor.

(10) ANY HEALTH CARE PROVIDER, HEALTH CARE FACILITY, OR OTHER INDIVIDUAL OR ENTITY THAT ACTS IN RELIANCE ON DECISIONS, INSTRUCTIONS OR AUTHORIZATION FROM A PROXY DECISION-MAKER SELECTED IN ACCORDANCE WITH SUBSECTIONS 3, 4, AND 4.5 OF THIS SECTION SHALL NOT BE SUBJECT TO CIVIL OR CRIMINAL LIABILITY OR REGULATORY SANCTION THEREFOR.

Source: L. 92: Entire article added, p. 1985, § 3, effective June 4. L. 94: (8) amended, p. 2647, § 115, effective July 1. L. 2008: (2) and (3) amended, p. 125, § 5, effective January 1, 2009.

Editor's note: Subsections (2) and (3) were contained in a 2008 act that was passed without a safety clause. The act establishes an effective date of January 1, 2009, for these provisions. For further explanation concerning the effective date, see page ix of this volume.

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Cross references: For the legislative declaration contained in the 1994 act amending subsection (8), see section 1 of chapter 345, Session Laws of Colorado 1994.

ANNOTATION

Subsection (8) does not preclude a governmental entity acting as a guardian from executing a cardiopulmonary resuscitation directive. *People ex rel. Yeager*, 93 P.3d 589 (Colo. App. 2004).