

## **Mental Health Advance Directives**

Advance Directives represent a powerful method by which a person can exercise control over his/her decision-making prior to the time such decisions must be made. Such control has been strongly supported by federal and state courts over a person's ability to make end-of-life decisions, in advance of the need. This has been extended by the State of Florida to incorporate all health care decisions as well.

### **Legislative Intent**

The Florida Legislature enacted a landmark statute in enacting Chapter 765, the Florida Health Care Advance Directive law that states:

The Legislature finds that 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.

To ensure that such right is not lost or diminished by virtue of later physical or mental incapacity, the Legislature intends that a procedure be established to allow a person to plan for incapacity by executing a document ...to direct the course of his or her medical treatment upon his or her incapacity.

While the statute refers to the individual executing an advance directive as a "principal", this document refers to that individual as a "person". Person means a competent adult executing an advance directive and on whose behalf health care decisions are to be made. A "health care facility" was redefined in 1996 to include designated receiving facilities governed under the Baker Act.

### **Advance Directives**

An advance directive is a witnessed written document or oral statement designating a surrogate and in which instructions are given by a person concerning any aspect of the person's health care. The advance directive must be signed by the person in the presence of two adult witnesses (A person unable to sign may direct another person to sign his/her name). A person named as a surrogate cannot act as one of the witnesses and one of the witnesses must not be either the person's spouse or blood relative.

An exact copy of the advance directive must be given to the surrogate. The advance directive can also designate an alternate surrogate who would assume his or her duties if the original surrogate is unwilling or unable to perform his or her duties.

### **Capacity/Incapacity/Informed Consent**

A person is presumed by law to be capable of making his or her own health care decisions unless he/she is determined to be incapacitated. Incapacity cannot be inferred from the person's voluntary or involuntary hospitalization for mental illnesses or from his or her mental retardation.

Incapacity or incompetent means the person is physically or mentally unable to communicate a willful and knowing health care decision. A determination that a person lacks capacity to make health care decisions shall not be construed as a finding that the person lacks capacity for any other purpose.

Informed consent means consent voluntarily given by a person after a sufficient explanation and disclosure of the subject matter involved to enable that person to have a general understanding of the treatment or procedure and the medically acceptable alternatives, including the substantial risks and hazards inherent in the proposed treatment or procedures, and to make a knowing health care decision without coercion or undue influence.

If a person's capacity to make health care decisions for himself or herself or provide informed consent is in question, the attending physician must evaluate the person's capacity and, if the physician concludes that the person lacks capacity, enter that evaluation in the person's medical record. If the attending physician has a question as to whether the person lacks capacity, another physician must also evaluate the person's capacity, and if the second physician agrees that the person lacks the capacity to make health care decisions or provide informed consent, the facility must enter both physician's evaluations in the person's medical record.

### **Surrogate/Proxy**

**Surrogate** means any competent adult expressly designated by a person to make health care decisions on behalf of the person upon the person's incapacity. If neither the designated surrogate nor the alternate is able or willing to make health care decisions on behalf of the person and in accordance with the person's instructions, the health care facility may seek the appointment of a proxy.

**Proxy** means a competent adult who has not been expressly designated to make health care decisions for a particular incapacity individual, but who, nevertheless, is authorized pursuant to s. 765. If the person has not executed an advance directive, or designated a surrogate, health care decisions may be made for the person 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:

- Judicially appointed guardian of the person who has been authorized to consent to medical treatment;
- Person's spouse;
- Adult child of the person;
- Person's parent;
- Person's adult sibling;
- Adult relative of the person who has exhibited special care and concern and who has maintained regular contact and who is familiar with the person's activities, health, and religious or moral beliefs; or
- A close friend of the person who is 18 years of age or older who has exhibited special care and concern for the person, and who presents an affidavit to the facility or the physician stating that he or she is a friend; is willing and able to become involved in the

person's health care; and has maintained such regular contact with the person so as to be familiar with the person's activities, health, and religious or moral beliefs.

- Independent clinical social worker (licensed or graduate of court-approved guardianship program)

If the principal has designated a health care surrogate, the facility shall notify the surrogate that his or her authority under the advance directive has commenced. The surrogate's authority commences upon a determination that the person lacks capacity, and the authority shall remain in effect until a determination that the person has regained such capacity.

### **Authority**

The surrogate, in accordance with the person's instructions, unless the person has expressly limited such authority or the proxy shall:

- Provide informed consent, refusal of consent, or withdrawal of consent to any and all health care for the person during the person's incapacity;
- Consult with appropriate health care providers to provide informed consent, and make only health care decisions for the person, which he or she believes the person would have made under the circumstances if the person were capable of making such decisions. If there is no indication of what the person would have chosen, the surrogate can consider the person's best interest in deciding that proposed treatments are to be withheld or withdrawn;
- Apply for private, public, government, or veterans' benefits to defray the cost of health care;
- Have the right of access to all records of the person reasonably necessary for a health care surrogate to make decisions involving health care and to apply for benefits; and
- Authorize the release of information and medical records to appropriate persons to ensure the continuity of the person's health care and may authorize the admission, discharge, or transfer of the person to or from a facility licensed under chapter 400.
- Authorize the admission, discharge, or transfer of the person to or from a health care facility (other than a Baker Act receiving facility).

Unless the person expressly delegates such authority to the surrogate in writing, or a surrogate or proxy has sought and received court approval, a surrogate or proxy cannot provide consent for:

- Voluntary admission to a mental health facility (Baker Act prohibits a surrogate or proxy from authorizing treatment for a voluntary patient);
- Electroshock therapy;
- Experimental treatments that have not been approved by a federally approved institutional review board;
- Psychosurgery;
- Abortion; or
- Sterilization.

### **Termination of Advance Directive**

Unless the advance directive states a time of termination, the designation remains in effect until revoked by the person. The advance directive or designation of a surrogate may be amended or revoked at any time by a competent person by means of:

- A signed, dated writing;
- The physical cancellation or destruction of the advance directive by the person or by another in the person's presence and at the person's direction;
- An oral expression of intent to amend or revoke; or
- A subsequently executed advance directive that is materially different from a previously executed advance directive.

### **Review of Surrogate/Proxy's Decision**

A number of people are authorized by law to seek expedited judicial intervention to review decisions made by a surrogate or proxy. These include:

- Person's family;
- Health care facility;
- Attending physician; or
- Any other interested person who may reasonably be expected to be directly affected by the surrogate or proxy's decision

### **The request for judicial review can be on the basis of:**

- The surrogate or proxy's decision is not in accord with the person's known desires or the law;
- The advance directive is ambiguous, or the person has changed his or her mind after execution of the advance directive;
- The surrogate or proxy was improperly designated or appointed, or the designation of the surrogate is no longer effective or has been revoked;
- The surrogate or proxy has failed to discharge duties, or incapacity or illness renders the surrogate or proxy incapable of discharging duties;
- The surrogate or proxy has abused powers; or
- The person has sufficient capacity to make his or her own health care decisions.

### **Baker Act Relationship to Advance Directive Statute**

The Baker Act recognizes the guardian advocate [394.4598, FS] as the primary substitute decision-maker for persons on involuntary status who have been found by the court to be incompetent to consent to treatment. The involuntary placement provisions of the Act [394.467(6)(d) FS] state "At the hearing on involuntary placement, the court shall consider testimony and evidence regarding the person's competence to consent to treatment. If the court finds that the person is incompetent to consent to treatment, it shall appoint a guardian advocate".

The Baker Act was revised in 1996 to state "In selecting a guardian advocate, the court shall give preference to a health care surrogate, if one has already been designated by the person". This legislative bill incorporating this revision also modified chapter 765 governing

advance directives in the definition of a “facility” to include all facilities designated as receiving facilities for the purpose of the Baker Act.

Unfortunately, the involuntary placement hearing may take place up to 10 days after the person’s admission to the facility and, if incompetent to consent to treatment, the person may have no one to provide express and informed decision-making on his/her behalf. There are three choices left to the facility, which are to deny treatment during this period, to force treatment via emergency treatment orders even though no imminent danger exists, or to allow the person to consent to treatment even though the facility has already filed an affidavit with the court stating the person is not competent to do so. Each of these three options is fraught with danger for the person, the physician, and the facility.

Since the Baker Act is silent as to remedies during the period of time between the person’s admission/determination of incompetence to consent and the time scheduled for the involuntary placement hearing, an interim decision-maker in the form of a health care surrogate or proxy has been promulgated to the Florida Administrative Code. Even if the person has not executed a mental health advance directive or the surrogate(s) named in the advance directive is not available, Chapter 765 FS and Chapter 65E-5 FAC each permit a proxy to be designated according to a prioritized listing. These two prioritized lists are almost identical to the prioritized list that must be considered by the court for the appointment of a guardian advocate when no guardian or health care surrogate is available. Therefore, if a health care surrogate or proxy is utilized for a person incompetent to consent to his/her own treatment, the surrogate/proxy is very likely to be also appointed under the Baker Act as the person’s guardian advocate.

### **Baker Act Florida Administrative Code**

In 1998, the Florida Administrative code governing the Baker Act was rewritten to incorporate the interim use of health care surrogates and proxies. Chapter 65E-5.2301 states: that during the interim period between the time a person is determined by one or more physicians to be incompetent to consent to treatment and the time a guardian advocate is appointed by a court to provide express and informed consent to the person’s treatment, a health care surrogate designated by the person may provide such consent to treatment. In the absence of an advance directive, a health care proxy may also provide interim consent to treatment.

Upon the documented determination that a person is incompetent to make health care decisions for him or herself by one or more physicians, the facility shall notify the surrogate or proxy in writing that the conditions under which he or she can exercise his or her authority under the law have occurred. A petition for adjudication of incompetence to consent to treatment and appointment of a guardian advocate must be filed with the court within two court working days of the determination of the person’s incompetence to consent to treatment by one or more physicians.

The facility shall immediately provide to the health care surrogate or proxy the same information required by statute to be provided to the guardian advocate. In order to protect the safety of the person, the facility shall make available to the health care surrogate or proxy the training required of guardian advocates and ensure that the surrogate or proxy

communicate with the person and person's physician prior to giving express and informed consent to treatment.

### **District Planning Meeting**

A meeting (on-site or by conference call) will be scheduled between Martha Lenderman, the project coordinator, District ADM staff, and members of an array of local advocacy and provider organizations to discuss the project and to arrange the following logistics:

- Selection of Site Sponsor
- Selection of place and date of training event
- Mailing of materials to participating organizations
- Recruitment of facilitators
- Recruitment of consumers
- Arrangement for copying of materials
- Other

### **Selection of Site Sponsors**

On-site sponsorship of the Mental Health Advance Directive project is essential to ensure appropriate persons are trained to educate individuals and providers about advance directives and oversee implementation. However, such sponsors must avoid any conflicts of interest in either being perceived as coercive in assisting individuals to complete the advance directives, in selecting surrogates, or in requiring health care facilities to recognize and comply with the advance directives.

It is recommended that one or more of the following organizations be approached to sponsor a mental health advance directive project in your community:

Consumer Advocacy Organizations  
Mental Health Association  
National Alliance for Mental Illness

Mental Health Service Providers  
Receiving Facilities  
Other Advocacy/ Provider Organization

### **Education of Sponsors/Providers**

A half-day training (morning) will be scheduled to conduct a train-the-trainers session on mental health advance directives. The goal of the pilot project is to train provider organizations and between 10-15 "facilitators" in each district, who will in turn, assist individuals in completing advance directives during the afternoon session. Major inpatient/outpatient mental health agencies should be invited to participate to ensure each agency is aware of its legal obligation to accept the properly completed advance directive, even if it does not agree with the decisions made by the individual through his or her health care surrogate.

### **Education of individuals with Mental Illnesses**

Local mental health providers and/or sponsoring agency should select 25-30 individuals to attend the afternoon training session; a ratio of no more than three individuals for each

“trainer” is desired. Each individual should be competent at the time of completing the advance directive to make well-reasoned, willful and knowing decisions about his or her mental health care. There is a presumption of competence if the person is not in a crisis and hasn’t had a court adjudicate his or her incapacity, but it must be obvious that the individual, at the time of executing an advance directive, has the current capacity to make their own decisions about desired psychiatric care.

The “facilitators” and the individuals will have a one-hour educational session about mental health advance directives. Following the session, each “facilitator” will work with up to three individuals to further inform them about the benefits of advance directives. Each individual wishing to participate will be assisted in completing his/her advance directive, pursuant to the individual’s individual preferences.

Assuming no indication of lack of competency to make treatment decisions by the individual is identified during the session, each individual desiring to do so will complete the advance directive, selecting a health care surrogate (and alternative if desired), and sign the directive with two eligible witnesses. With the consent of the individual, the advance directive can be kept in the individual’s clinical record; a copy of the advance directive will be provided to the individual and anyone else selected by the individual. Each individual participating in the project will be given a laminated ID card that identifies the existence of a mental health advance directive, the name and a phone number for the person/organization retaining the document, and the toll-free telephone number of the Advocacy Center for Persons with Disabilities for the individual to contact should a hospital/CSU fail to comply with the contents of the advance directive.

### **Follow-up**

Following the train-the-trainers session on mental health advance directives, advocates and members of the sponsoring agency/volunteers will meet with groups of individuals at drop-in centers, day treatment centers, and/or case management agencies to introduce the concept of advance directives to individuals and to assist them in selecting a surrogate and in designating their preferences on the advance directive form.

The sponsoring on-site organization will continue to provide training to individuals at various locations and will assist individuals, as requested, to complete the advance directive forms. The sponsor will continue to educate mental health treatment provider agencies in their obligations under the law.

### **Ongoing Advocacy**

The Advocacy Center for Persons with Disabilities will monitor reports of non-compliance by mental health treatment providers and determine what action should be taken in response.