Advance Directives, the Surrogate and End of Life Issues

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“The choice between life and death is a deeply personal decision of obvious and overwhelming finality.”

Background

• In general, advance directives are meant to provide an individual a means of expressing his or her wishes for medical treatment when he or she is no longer able to make those whose wishes known due to incapacity.
• Included within that document is the ability to express how little or how much of a medical intervention an individual desires under certain clinical circumstances.

Advance Directives

• Two Primary Types
  – Living Wills
  – Durable Powers of Attorney
Living Will

- Living wills, also known as treatment directives, are created by an individual in advance of incapacity and contain instructions for medical personnel regarding that individual’s preference for end-of-life treatment.

Durable Powers of Attorney

- Durable powers of attorney (DPOAs), in contrast, are known as proxy directives, and they allow for a named individual to make a decision on behalf of a patient once that patient becomes personally unable to make the decisions.
Applicable Law

• Patient Self Determination Act
• Arkansas Rights of Terminally Ill or Permanently Unconscious Act
• Durable Power of Attorney for Health Care Act
• Arkansas Health Care Decisions Act

Patient Self Determination Act (PSDA)

• Enacted in 1990
• Created no new specific rights for patients;
• Purpose was to afford patients an opportunity to express wishes for end-of-life treatment as well as to generally educate the public about advance directives.
• All healthcare institutions that receive funds for Medicare or Medicaid fall under PSA.
Patient Self Determination Act (PSDA)

• Missouri case of *Cruzan by Cruzan v. Harmon* (1988)
  1. Nancy Cruzan (an adult) was in a chronic vegetative state as a result of a car accident. She had no advance directive. Her father was appointed as her guardian. A feeding tube was implanted to provide artificial food and water.
  2. Missouri Supreme Court held that the guardian/father could not order withdrawal of the feeding tube in absence of clear and convincing evidence of the health care wishes of Nancy Cruzan.
  3. On remand, the probate court found that Nancy's oral statements before the accident provided clear and convincing evidence that she would not want artificial food and water. She was disconnected from life support and died.

Patient Self Determination Act (PSDA)

• U.S. Supreme Court case of *Cruzan v. Director* (1990)
  1. Upheld the Missouri standard of clear and convincing evidence set out in Missouri Supreme Court decision to be followed where the patient has given no advance directive.
  2. U.S. Supreme Court suggests that a competent person has a constitutional right to make health care decisions and to decide future medical care by advance directives.
Patient Self Determination Act (PSDA)

All healthcare institutions under the scope of the PSDA must meet the following requirements:

1. Provide written information to each adult patient on admission (in-patient facilities), enrollment (HMOs), and at first receipt of care (hospices and home health or personal care agencies). The information provided must describe the individual's legal rights under state law to accept or refuse medical care and to write advance directives for incorporation into his/her medical record;
2. Maintain written policies and procedures regarding advance directives and to provide written information to the patients about those policies;
3. Document in the patient’s medical record whether the individual has executed an advance directive;
4. Ensure compliance with state law requirements regarding advance directives; and
5. Provide, either independently or with other like institutions, for education for the staff and community on issues concerning advance directives.

Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• The Rights of the Terminally Ill Act authorizes an adult person to control decisions regarding administration of life-sustaining treatment by executing a declaration instructing a physician to withhold or withdraw life-sustaining treatment in the event the person is in a terminal condition and is unable to participate in medical treatment decisions.
Arkansas Rights of Terminally Ill or Permanently Unconscious Act

- It does not address treatment of persons who have not executed such a declaration;
- it does not cover treatment of minors; and
- it does not address treatment decisions by proxy.

- Its impact is limited to treatment that is merely life prolonging, and to patients whose terminal condition is incurable and/or irreversible, whose death will soon occur, and who are unable to participate in treatment decisions.
Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• Beyond its narrow scope, the Act is not intended to affect any existing rights and responsibilities of persons to make medical treatment decisions.

• The Act merely provides one way by which a terminally-ill patient's desires regarding the use of life-sustaining procedures can be legally implemented.

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Arkansas Rights of Terminally Ill or Permanently Unconscious Act

The purpose of the Act was to:
1. present an Act which is simple, effective, and acceptable to persons desiring to execute a declaration and to physicians and health-care facilities whose conduct would be affected,
2. to provide for the effectiveness of a declaration in states other than the state in which it is executed through uniformity of scope and procedure, and
3. to avoid the inconsistency in approach which has characterized the early statutes.

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Arkansas Rights of Terminally Ill or Permanently Unconscious Act

“Attending Physician”
- The physician who has primary responsibility for the treatment and care of the patient

“Declaration”
- A writing executed in accordance with statute governing the withholding or withdrawal of life-sustaining treatment

“Health Care Proxy”
- An adult appointed by the patient as attorney-in-fact to make health care decisions including the withholding or withdrawal of life-sustaining treatment if a qualified patient, in the opinion of the attending physician, is permanently unconscious, incompetent, or otherwise mentally or physically incapable of communication
  - Ark. Code Ann. § 20-17-201

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Arkansas Rights of Terminally Ill or Permanently Unconscious Act

“Health Care Provider”
- a person who is licensed, certified, or otherwise authorized by the law of this state to administer health care in the ordinary course of business or practice of a profession

“Life-Sustaining Treatment”
- any medical procedure or intervention that, when administered to a qualified patient, will serve only to prolong the process of dying or to maintain the patient in a condition of permanent unconsciousness

“Permanently Unconscious”
- a lasting condition, indefinitely without change in which thought, feeling, sensations, and awareness of self and environment are absent
  - Ark. Code Ann. § 20-17-201

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# Arkansas Rights of Terminally Ill or Permanently Unconscious Act

**“Qualified Patient”**
- An adult who has executed a declaration or appointed a health care proxy and who has been determined to be in a terminal condition or in a permanently unconscious state by the attending physician and another qualified physician who has examined the patient.

**“Terminal Condition”**
- An incurable and irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of the attending physician, result in death within a relatively short time.
  - [Ark. Code Ann. § 20-17-201](#)

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**Arkansas Rights of Terminally Ill or Permanently Unconscious Act**

**“life-sustaining treatment” and “terminal condition” are interdependent and must be read together.**

**The Act defines “life-sustaining treatment” in an all-inclusive manner, dealing with those procedures necessary for comfort care or alleviation of pain separately, where it is provided that such procedures need not be withdrawn or withheld pursuant to a declaration.**
Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• The Act employs the term “terminal condition” rather than terminal illness, and it is important that these two different concepts be distinguished.
  – Terminal illness connotes a disease process that will lead to death;
  – “Terminal condition” is not limited to disease.
  – “Terminal illness” also connotes as inevitable process leading to death, but does not contain limitations as to the time period prior to death, or potential for non-reversibility, as does “terminal condition.”
• The terminal condition definition requires that the condition be “incurable or irreversible.”

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Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• The Act also requires that the condition result in the death of the patient within a “relatively short time ... without the administration of life-sustaining treatment.”
• The decision that death will occur in a relatively short time is to be made without considering the possibilities of extending life with life-sustaining treatment.

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• The terminal condition definition requires that death result “in a relatively short time.”

• Though the phrase, “relatively short time,” does not eliminate the need for judgment, it focuses the physician's medical judgment and avoids the narrowing implications of the word “imminent.”

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• The “relatively short time” formulation is employed to avoid both the unduly constricting meaning of “imminent” and the artificiality of another alternative--fixed time periods, such as 6 months, 1 year, or the like.

• The circumstances and inevitable variations in disorder and diagnosis make unrealistic a fixed time period. Physicians may be hesitant to make predictions under a fixed time period standard unless the standard of physician judgment is so loose as to be unenforceable. Under the Act's standard, considerations such as the strength of the diagnosis, the type of disorder, and the like can be reflected in the judgment that death will result within a relatively short time.

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• The life-sustaining treatment and terminal condition definitions exclude certain types of disorders, such as kidney disease requiring dialysis, and diabetes requiring continued use of insulin.
• This is accomplished in the requirement that terminal conditions be “irreversible,” and that life-sustaining procedures serve “only to prolong the dying process.”
• For purposes of the Act, diabetes treatable with insulin is “reversible,” a diabetic person so treatable is not in the “dying process,” and insulin is a treatment the benefits of which foreclose it serving “only” to prolong the dying process.

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Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• An adult of sound mind may execute at any time a declaration governing the withholding or withdrawal of life-sustaining treatment.
  – The declaration must be signed by the patient, or another at the patient's direction, and
  – witnessed by two (2) individuals.
• Ark. Code Ann. § 20-17-202(a)

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• The Act does not require witnesses to meet any specific qualifications for two primary reasons.
  — First, it’s simple and uncomplicated.
  — Second, it relieves physicians of the inappropriate and perhaps impossible burden of determining whether the legalities of the witness requirements have been met.

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Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• A physician or other health care provider who is furnished a copy of the declaration shall make it a part of the declarant's medical record and, if unwilling to comply with the declaration, promptly so advise the declarant.
  — Ark. Code Ann. § 20-17-202(d)

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• A physician or health-care provider who is given a copy of the declaration must record it in the declarant's medical records.

• This step is critical to the effectuation of the declaration, and the duty applies regardless of the time of receipt. If a copy of the same declaration is already in the record, its re-recording would not be necessary, but its receipt should be noted as evidence of its continued force.

Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• The Act imposes a duty on the physician or other health-care provider to inform the declarant of his or her unwillingness to comply with the provisions of the declaration.

• This will provide notice to the declarant that certain terms may be deemed medically unreasonable, or that a different provider who is willing to carry out the Act should be informed of the declaration.
Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• A declaration becomes operative when
  – it is communicated to the attending physician and
  – the patient is determined by the attending physician and another physician in consultation either to be in a terminal condition and no longer able to make decisions regarding administration of life-sustaining treatment or to be permanently unconscious.

• When the declaration becomes operative, the attending physician and other health care providers shall act in accordance with its provisions or comply with the appropriate transfer provisions.
  – Ark. Code Ann. § 20-17-203

Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• This provision is not intended to eliminate the physician's need to evaluate particular requests in terms of reasonable medical practice, nor to relieve the physician from carrying out the declaration except for any specific unreasonable or unlawful request in the declaration.

• Transfer of the patient is to occur if the physician, for reasons of conscience, for example, is unwilling to carry out the Act or to follow medically reasonable requests in the declaration.

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Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• A declaration may be revoked at any time and in any manner by the patient without regard to the patient's mental or physical condition.

• A revocation is effective upon communication to the attending physician or other health care provider by the patient or a witness to the revocation.  
  — Ark. Code Ann. § 20-17-204(a)(1)

Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• The wishes of a patient who requests nutrition or hydration, or both, shall be honored.

• Unless the use of artificial means is specifically requested, a patient's request for nutrition or hydration, or both, shall not be honored by use of artificial means if doing so would require the insertion of any apparatus into the patient's body.  
  — Ark. Code Ann. § 20-17-204(a)(2)
Arkansas Rights of Terminally Ill or Permanently Unconscious Act

- The attending physician or other health care provider shall make the revocation a part of the declarant's medical record.
  — Ark. Code Ann. § 20-17-204(b)

Arkansas Rights of Terminally Ill or Permanently Unconscious Act

- Virtually every other statute sets out specific examples of how a declaration can be revoked—by physical destruction, by a signed, dated writing, or by a verbal expression of revocation.

- A provision that freely allowed revocation and avoided procedural complications was desired.
Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• It should be noted that the revocation is, of course, not effective until communicated to the attending physician or another health-care provider working under a physician’s guidance, such as nursing facility or hospice staff.

• The Act, unlike many statutes, also does not explicitly require that a person relaying the revocation be acting on the patient’s behalf. Such a requirement could impose an unreasonable burden on the attending physician. The communication is assumed to be in good faith, and the physician may rely on it.

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Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• In employing a general revocation provision, it was intended to permit revocation by the broadest range of means.

• Therefore, for example, it is intended that a revocation can be effected in writing, orally, by physical defacement or destruction of a declaration, and by physical sign communicating intention to revoke.

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Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• Upon determining that the patient is in a terminal condition or permanently unconscious, the attending physician who knows of a declaration shall record the determination and the terms of the declaration in the declarant's medical record.
  — Ark. Code Ann. § 20-17-205

Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• The section provides that an attending physician must know of the declaration's existence.

• It is anticipated that knowledge may in some instances occur through oral communication between physicians.
Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• If the attending physician determines that the patient is in a terminal condition, and has been notified of the declaration, the physician is to make the determination of terminal condition part of the patient's medical records.

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• There is no explicit requirement that the physician inform the patient of the terminal condition. That decision is to be left to the physician's professional discretion under existing standards of care.

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• The Act also does not require, as do many statutes, that a physician other than the attending physician concur in the terminal condition determination.

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• A qualified patient may make decisions regarding life-sustaining treatment as long as the patient is able to do so.
  — Ark. Code Ann. § 20-17-206(a)

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Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• This subchapter does not affect the responsibility of the attending physician or other health care provider to provide treatment, including nutrition or hydration, or both, for a patient's comfort or alleviation of pain.
  – Ark. Code Ann. § 20-17-206(b)

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Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• The purpose for permitting continuation of life-sustaining treatment deemed necessary for comfort care or alleviation of pain is to allow the physician to take appropriate steps to insure comfort and freedom from pain, as dictated by reasonable medical standards.
• Many existing statutes employ the term “comfort care” in connection with the alleviation of pain, and the Act follows this example.
• Although the phrase “to alleviate pain” arguably is subsumed within the term comfort care, the additional specificity was considered helpful for both the doctor and layperson.

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Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• The declaration of a qualified patient known to the attending physician to be pregnant must not be given effect as long as it is possible that the fetus could develop to the point of live birth with continued application of life-sustaining treatment.
  — Ark. Code Ann. § 20-17-206(c)

Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• An attending physician or other health care provider who is unwilling to comply with this subchapter shall as promptly as practicable take all reasonable steps to transfer care of the patient to another physician.
  — Ark. Code Ann. § 20-17-207
Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• In the absence of knowledge of the revocation of a declaration, a person is not subject to civil or criminal liability or discipline for unprofessional conduct for carrying out the declaration pursuant to the requirements of this subchapter.
• A physician or other health care provider, whose actions under this subchapter are in accord with reasonable medical standards, is not subject to criminal or civil liability or discipline for unprofessional conduct with respect to those actions.
  — Ark. Code Ann. § 20-17-208

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Arkansas Rights of Terminally Ill or Permanently Unconscious Act

1. A legal guardian of the patient, if one has been appointed;
2. In the case of an unmarried patient under the age of eighteen (18), the parents of the patient;
3. The patient’s spouse;
4. The patient’s adult child or, if there is more than one (1), then a majority of the patient’s adult children participating in the decision;
5. The parents of a patient over the age of eighteen (18);
6. The patient’s adult sibling or, if there is more than one (1), then a majority of the patient’s adult siblings participating in the decision;
7. Persons standing in loco parentis to the patient; or
8. A majority of the patient’s adult heirs at law who participate in the decision.

— Ark. Code Ann. § 20-17-214(a)

Arkansas Rights of Terminally Ill or Permanently Unconscious Act

• Even if an advance directive that includes a directive to withhold nutrition or hydration, or both, is signed by a person under this section, if the terminally ill patient requests nutrition or hydration, his or her wishes shall be honored.

• Unless the use of artificial means is specifically requested, a patient’s request for nutrition or hydration, or both, shall not be honored by use of artificial means if doing so would require the insertion of any apparatus into the patient’s body.

— Ark. Code Ann. § 20-17-214(b)
BREAK!

Durable Power of Attorney for Health Care Act

• Passed in an effort to allow patients to “delegate the decision-making power to a trusted agent and be sure that the agent's power to make personal and health care decisions for the [patient] will be effective to the same extent as though made by the [patient].”
Durable Power of Attorney for Health Care Act

- Allowed an individual to execute a Power of Attorney for health care.

- Provided that an agent appointed under a power of attorney for health care would take priority over any person listed under Arkansas general Consent Law.

Durable Power of Attorney for Health Care Act

- The document must be:
  - In writing;
  - Signed by the principal or acting at the direction of the principal in the principal’s presence; and
  - Attested to and subscribed in the presence of two or more competent witnesses who are at least eighteen (18) years of age
DPOA Difficulties

• One of the most basic problems is the healthcare providers' ability to obtain a copy.

• Most advance directives are completed with the assistance of lawyers or members of a patient's family years before they are actually needed.

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DPOA Difficulties

• When advance directives are not readily available, it becomes difficult for healthcare providers to honor the wishes of patients.

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DPOA Difficulties

• In order to provide better access to advance directives, it is recommended that copies be given to (and requested by) the patient's primary care physician, specialist physicians, family members, hospital, nursing facility, hospice, friends, clergy, and home health agency.

Furthermore, in emergency situations in which a determination as to the existence of an advance directive is impracticable, healthcare providers will engage in life-sustaining treatment that is potentially against the patient’s wishes.
DPOA Difficulties

• Finally, patients and their family members may be too overwhelmed, nervous or stressed at the time of admission to a healthcare facility to mention the existence of an advance directive or to place a high priority on locating the document.

Arkansas Health Care Decisions Act

• Passed in 2013 in an effort to:
  – Protect patients’ rights to make their own health care decisions;
  – Promote advance directives;
  – Provide legal protection for patients’ rights; and
  – “For other purposes.”
AHCDA Definitions

• “Advance Directive”
  – an individual instruction or a written statement that anticipates and directs the provision of health care for an individual
  – This includes:
    • Living Will
    • Durable Power of Attorney for Health Care
      – Ark. Code Ann. § 20-6-102

AHCDA Definitions

• “Agent”
  – an individual designated in an advance directive for health care to make a healthcare decision for the individual granting the power
• “Guardian”
  – a judicially appointed guardian or conservator having authority to make a healthcare decision for an individual
• “Surrogate”
  – an individual, other than a principal's agent or guardian, authorized under this subchapter to make a healthcare decision for the principal
  • Ark. Code Ann. § 20-6-102
AHCDA Definitions

• “Capacity”
  – an individual’s ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a healthcare decision
    • Ark. Code Ann. § 20-6-102

AHCDA Definitions

• “Designated Physician”
  – 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 responsibility for the individual’s health care
    • Ark. Code Ann. § 20-6-102
AHCDA Definitions

• “Supervising healthcare provider”
  – the designated physician or, if there is no designated physician or the designated physician is not reasonably available, the healthcare provider who has undertaken primary responsibility for an individual’s health care
  • Ark. Code Ann. § 20-6-102

AHCDA Definitions

• “Treating healthcare provider”
  – a healthcare provider who is directly or indirectly involved in providing health care to the principal
  • Ark. Code Ann. § 20-6-102
AHCDA Definitions

• “Health Care”
  – any care, treatment, service, or procedure to maintain, diagnose, treat, or otherwise affect an individual’s physical or mental condition, including medical care
  • Ark. Code Ann. § 20-6-102

AHCDA Definitions

• “Healthcare Decision”
  – Consent;
  – Refusal of consent; or
  – Withdrawal of consent to health care
  • Ark. Code Ann. § 20-6-102
AHCDA Definitions

• “Healthcare Institution”
  – An agency, institution, facility, or place, whether publicly or privately owned or operated, that provides health services and that is one (1) of the following:

1. An ambulatory surgical treatment center;
2. A birthing center;
3. A home care organization;
4. A hospital;
5. An intellectual disability institutional habilitation facility;
6. A mental health hospital;
7. A nonresidential substitution-based treatment center for opiate addiction;
8. A nursing home;
9. An outpatient diagnostic center;
10. A recuperation center;
11. A rehabilitation facility; or
12. A residential hospice
AHCDA Definitions

• “Healthcare Provider”
  – a person who is licensed, certified, or otherwise authorized by the laws of this state to administer health care in the ordinary course of the practice of his or her profession
  • Ark. Code Ann. § 20-6-102

AHCDA Definitions

• “Individual Instruction”
  – an individual's direction concerning a healthcare decision for the individual
  • Ark. Code Ann. § 20-6-102
AHCDA Definitions

• “Medical Care”
  – the diagnosis, cure, mitigation, treatment, or prevention of disease for the purpose of affecting any structure or function of the body
  • Ark. Code Ann. § 20-6-102

AHCDA Definitions

• “Person”
  – an individual, corporation, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, instrumentality, or any other legal or commercial entity
  • Ark. Code Ann. § 20-6-102
AHCDA Definitions

• “Person authorized to consent on the principal’s behalf”
  – A person authorized by law to consent on behalf of the patient when the patient is incapable of making an informed decision; or
  – In the case of a minor child, the parent or parents having custody of the child, the child's legal guardian, or another person as otherwise provided by law
    • Ark. Code Ann. § 20-6-102

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AHCDA Definitions

• “Personally inform”
  – to communicate by any effective means from the principal directly to a healthcare provider
    • Ark. Code Ann. § 20-6-102

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AHCDA Definitions

• “Power of attorney for health care”
  – the authority of an agent to make healthcare decisions for the individual granting the power
  • Ark. Code Ann. § 20-6-102

AHCDA Definitions

• “Principal”
  – an individual who grants authority to an individual under the Arkansas Health Care Decisions Act
  • Ark. Code Ann. § 20-6-102
AHCDA Definitions

• “Qualified emergency medical service personnel”
  – includes emergency medical technicians, paramedics, or other emergency services personnel, providers, or entities acting within the usual course of their professions, and other emergency responders
  • Ark. Code Ann. § 20-6-102

AHCDA Definitions

• “Reasonably available”
  – readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the principal's healthcare needs, including without limitation availability by telephone
  • Ark. Code Ann. § 20-6-102
AHCDA Definitions

• “Universal Do Not Resuscitate Order”
  – a written order that applies regardless of the treatment setting and that is signed by the principal’s physician that states that in the event the principal suffers cardiac or respiratory arrest, cardiopulmonary resuscitation should not be attempted.
  • Ark. Code Ann. § 20-6-102

AHCDA – Advance Directives

• An adult or emancipated minor may give an individual instruction.
  – May be Oral or Written
  – May be limited to take effect only if a specified condition arises.
  • Ark. Code Ann. § 20-6-103(a)
AHCDA – Advance Directives

• An adult or emancipated minor may execute an advance directive for health care that authorizes the agent to make a healthcare decision that the principal could make if he or she had capacity.
  — Shall be in writing and signed by the Principal
  — Shall either be witnessed or notarized by two witnesses
    • Ark. Code Ann. § 20-6-103(b)

Witnesses - Ark. Code Ann. § 20-6-103(b)

— shall be a competent adults who are not the agent;
— at least one witness is not related to the principal by blood, marriage, or adoption and would not be entitled to any portion of the estate of the principal upon the death of the principal under any will or codicil made by the principal existing at the time of execution of the advance directive or by operation of law.

— A written advance directive that is witnessed shall contain an attestation clause that attests that the witnesses comply with these requirements.
AHCDMA – Advance Directives

• An advance directive remains in effect notwithstanding the principal's last incapacity and may include individual instructions.

• An advance directive may include the principal's nomination of a guardian of the principal.
  – Ark. Code Ann. § 20-6-103(b)

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AHCDMA – Advance Directives

• Unless otherwise specified in an advance directive, the authority of an agent becomes effective only upon a determination that the principal lacks capacity, and ceases to be effective upon a determination that the principal has recovered capacity.
  – Ark. Code Ann. § 20-6-103(c)

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AHCDA – Advance Directives

• If necessary, the designated physician shall determine whether a principal lacks or has recovered capacity or that another condition exists that affects an individual instruction or the authority of an agent.

• In making a determination of capacity, the designated physician may consult with other persons as he or she deems appropriate.

   – Ark. Code Ann. § 20-6-103(d)

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AHCDA – Advance Directives

• An agent shall make a healthcare decision in accordance with the principal's individual instructions and other wishes to the extent known to the agent.

• In the absence of individual instructions or other information, the agent shall make the decision in accordance with the agent's determination of the principal's best interest.

   – In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.

   • Ark. Code Ann. § 20-6-103(e)

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AHCDA – Advance Directives

• Revocation
  – A principal having capacity may revoke all or part of an advance directive, other than the designation of an agent, at any time and in any manner that communicates an intent to revoke.
    • Ark. Code Ann. § 20-6-104(a)

AHCDA – Advance Directives

• Revocation
  – A principal having capacity may revoke the designation of an agent only by a signed written statement or by personally informing the supervising healthcare provider.
    • Ark. Code Ann. § 20-6-104(b)
AHCDA – Advance Directives

• Revocation
  – A decree of annulment, divorce, dissolution of marriage, or legal separation revokes a previous designation of a spouse as agent unless otherwise specified in the decree or in an advance directive.
  – An advance directive that conflicts with an earlier advance directive revokes the earlier directive to the extent of the conflict.

  • Ark. Code Ann. § 20-6-104(c) and (d)

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AHCDA – Designation of Surrogate

• Adults or emancipated minors can designate a surrogate by personally informing the healthcare provider either orally or in writing.
  – Ark. Code Ann. § 20-6-105(a)

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AHCDA – Designation of Surrogate

• The surrogate can only make decisions if:
  – The designated physician has determined that the principal lacks capacity; and
  – No agent or guardian has been appointed or he or she is not reasonably available.
    • Ark. Code Ann. § 20-6-105(b)

AHCDA – Designation of Surrogate

• The supervising healthcare provider must designate a surrogate and document the designation in the medical records where the patient is receiving healthcare if the patient:
  – Lacks capacity;
  – Has not appointed an agent or the agent is not reasonably available;
  – Same for surrogate;
  – Same for guardian;
    • Ark. Code Ann. § 20-6-105(c)
AHCDA – Designation of Surrogate

• The surrogate must be an adult who:
  – Has exhibited special care and concern for the principal
  – Is familiar with the principal’s personal values
  – Is reasonably available; and
  – Is willing to serve.

• No surrogates who have a protective order against them on behalf of the principal
  – Ark. Code Ann. § 20-6-105(c)(2)

AHCDA – Designation of Surrogate

• When designating a surrogate, the supervising healthcare provider must consider the proposed surrogate’s:
  – Ability to make decisions either in accordance with the known wishes of the principal or in accordance with the principal’s best interests;
  – Frequency of contact with the principal before and during the incapacitating illness;
  – Demonstrated care and concern;
  – Availability to visit the principal during his or her illness; and
  – Availability to engage in face-to-face contact with healthcare providers in order to fully participate in the decision-making process.
  • Ark. Code Ann. § 20-6-105(c)(3)
AHCDA – Designation of Surrogate

• Consideration may be given in order to descending preference for service as a surrogate to:
  – Spouse (unless legally separated);
  – Adult child;
  – Parent;
  – Adult sibling; or
  – Any other adult relative.
  • Ark. Code Ann. § 20-6-105(c)(4)

AHCDA – Designation of Surrogate

• If nobody eligible is reasonably available, the designated physician may make decisions for the principal after the designated physician:
  – Consults with and obtains the recommendations of an institution’s ethics officers; or
  – Obtains concurrence from a second physician who is:
    • Not directly involved in the principal’s healthcare;
    • Does not serve in a capacity of decision-making, influence, or responsibility over the designated physician; and
    • Does not serve in a capacity under the authority of the designated physician’s decision-making, influence, or responsibility.
  • Ark. Code Ann. § 20-6-105(c)(5)
AHCDA – Designation of Surrogate

• Challenges
  — Designations of surrogates are presumed valid, but the presumption is rebuttable.
  — A person who challenges the designation has the burden of proving it invalid by a preponderance of the evidence.
    • Ark. Code Ann. § 20-6-105(c)(6)

• Healthcare providers can’t be surrogates if:
  — Generally, neither the treating healthcare provider, an operator of a healthcare institution, nor an employee of an operator of a healthcare institution may be designated as surrogate.
  — A healthcare provider or employee of a healthcare provider may not act as a surrogate if the healthcare provider becomes the principal’s treating healthcare provider.
    • Ark. Code Ann. § 20-6-105(d)(1)
AHCDA – Designation of Surrogate

• Healthcare providers can be surrogates if:
  – The employee is a relative of the principal by blood, marriage, or adoption and
  – The other requirements of the statute are satisfied.
    • Ark. Code Ann. § 20-6-105(d)(2)

• Ark. Code Ann. § 20-6-105(e)

AHCDA – Designation of Surrogate

• Healthcare providers can require a person claiming authority to act as surrogate to provide a written declaration under penalty of perjury stating facts and circumstances reasonably sufficient to establish that claimed authority.
  – Ark. Code Ann. § 20-6-105€
AHCDA – Authority of Surrogate

• Surrogates must make decisions in accordance with principal’s individual instructions, if any, and other wishes to the extent known to the surrogate.
  – Ark. Code Ann. § 20-6-106(a)(1)

AHCDA – Authority of Surrogate

• Substituted Judgment Standard
  – The substituted judgment standard is applicable when the surrogate relies on the patient's known preferences.
• Substituted Judgment Standard
  – Two Scenarios:
    1. the patient has provided previous, and explicit, statements as to his or her treatment preferences, or
    2. the surrogate can infer the treatment decision the patient would have made based on prior conversations, actions, statements, treatment decisions, etc.

AHCDA – Authority of Surrogate

• Substituted Judgment Standard
  – Simply put, substituted judgment allows the surrogate to determine what the patient him or herself would have chosen regarding treatment.
  – Applying this standard, the surrogate is not making medical decisions for the patient but merely is giving effect to decisions the patient made for him or herself before becoming incapacitated.
  – Surrogates should use knowledge of the patient's values and beliefs to aid in the decision-making process.

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AHCDA – Authority of Surrogate

• If the individual instructions are unknown, the surrogate will make the decision in accordance with the principal’s best interests.
  – In determining the principal’s best interests, the surrogate must consider the principal’s personal values to the extent known to the surrogate.
    • Ark. Code Ann. § 20-6-106(a)(2)

AHCDA – Authority of Surrogate

• Best Interest Standard
  – This standard mandates that the surrogate's treatment decision promote the patient's welfare.
  – Making a decision based on what the surrogate believes represents the best interest of the patient requires an understanding and acceptance of a quality of life presumption that all individuals have an interest in being alive, being capable of understanding and communicating their thoughts and feelings, and being able to control and direct their lives and to attain desired satisfactions.
AHCDA – Authority of Surrogate

• Substituted Judgment vs. Best Interest
  – State law differs on which standard applies.
  – Certain states only utilize Substituted Judgment where other states only utilize Best Interest Standard
  – Arkansas combines the standards to direct the surrogate to make decisions consistent with the patient’s wishes, or, if the patient’s wishes are unknown, in the patient’s best interest.

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AHCDA – Authority of Surrogate

• Surrogates not designated by the principal may not make decisions about whether to withhold or withdraw artificial nutrition and hydration, unless the designated physician and a second independent physician certify in the principal’s medical records that:
  – The provision or continuation of artificial nutrition or hydration is merely prolonging the act of dying; and
  – The principal is highly unlikely to regain capacity to make medical decisions.
• Ark. Code Ann. § 20-6-106(b)

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Questions Created by AHCDA

• AHCDA does not specifically repeal § 28-17-201, Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, or § 28-13-104, Durable Power of Attorney for Health Care Act.

• AHCDA requires that new living wills and HCPOAs after 10/1/2013 either refer to this statute or comply with the statute to be valid.

Key Differences

• § 20-6-103(b)(3) states that the advanced directive (either HCPOA or living will) must be either notarized or witnessed by 2 witnesses. If witnessed, one witness shall be not related to the principal by blood, marriage, or adoption and not an heir of the principal.

• The witness statement must contain this language.
Key Differences

• § 20-6-103(c) clarifies that the document is springing unless otherwise stated in the document.
• § 20-6-103(g) states that out of state directives are valid in AR if either compliant with this statute or the statute where the person was a resident at the time of execution.

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Key Differences

• § 20-6-103(h) says that health insurers and providers cannot require the execution of a health care directive as a requirement for providing care.
• § 20-6-104(c) makes it clear that the agent is removed in divorce, annulment, and legal separation.

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Key Differences

• § 20-6-105 provides for designation of a surrogate, which is different than an Agent.
• § 20-6-107(a) states that the guardian may make health care decisions for the ward without court approval (which directly conflicts with 28-65-302).

Key Differences

• § 20-6-109 generally states that the health care provider may not comply for policy reasons.
• § 20-6-110 is the HIPAA release to the agent or surrogate or guardian.
THE END!