

SUBJECT: HEALTH CARE ADVANCE DIRECTIVES

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EFFECTIVE DATE: 06/26/2019

**I. PURPOSE:**

To establish written instructions in accordance with community medical standards, Florida law and patient self-determination rights allowing an inmate to plan for incapacity by executing a document directing the course of his or her medical treatment upon his or her incapacity or designating another person to make health care decisions upon his or her incapacity.

*These standards and responsibilities apply equally to both Department staff and Comprehensive Health Care Contractor (CHCC) staff.*

**II. DEFINITIONS:**

- A. **Advance directive** means a witnessed written document or oral statement in which instructions are given by an inmate or in which the inmate's desires are expressed concerning any aspect of the inmate's health care and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift.
- B. **Anatomical gift** or gift means a donation of all or part of a human body to take effect after the donor's death and to be used for transplantation, therapy, research, or education.
- C. **Do not resuscitate order (DNRO)** is an order signed by the physician and inmate, health care surrogate or health care proxy to refuse cardiopulmonary resuscitation in the event of respiratory or cardiac arrest.
- D. **End-stage condition** is an irreversible condition that is caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and which, to a reasonable degree of medical probability, treatment of the condition would be ineffective.
- E. **Living will** means:
1. A witnessed document in writing, voluntarily executed by the inmate in accordance with [Chapter 765, F.S.](#); or
  2. A witnessed oral statement made by the inmate expressing the inmate's instructions concerning life-prolonging procedures.
- F. **Health care proxy** means a competent adult who has not been expressly designated to make health care decisions for a particular incapacitated individual, but who, nevertheless, is authorized pursuant to s. 765.401 to make health care decisions for such individual.
- G. **Health care surrogate** means any competent adult expressly designated by an inmate to make health care decisions on behalf of the inmate and to receive health information upon the inmate's incapacity.

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- H. **Incapacity** or incompetent means that the patient is physically or mentally unable to communicate a willful and knowing health care decision. For the purposes of making an anatomical gift, the term also includes a patient who is deceased.
- I. **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.
- J. **Life-prolonging procedure** means any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function. The term does not include the administration of medication or performance of medical procedure, when such medication or procedure is deemed necessary to provide comfort care or to alleviate pain.
- K. **Persistent vegetative** state means a permanent and irreversible condition of unconsciousness in which there is:
1. The absence of voluntary action or cognitive behavior of any kind.
  2. An inability to communicate or interact purposefully with the environment.
- L. **Primary or attending physician** is the physician who has responsibility for the treatment and care of the inmate.
- M. **Terminal condition** means a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death.

### III. PRINCIPLES:

- A. Competent adults are presumed to be capable of exercising the right to refuse medical treatments, including life-prolonging measures.
- B. The absence of an advance directive by an inmate does not give rise to any presumption as to her/his intent to consent to, or refuse, life-prolonging procedures.
- C. All inmates will have life-prolonging measures initiated in the event of cardiac or pulmonary arrest unless:
1. There is a duly authorized health care advance directive concerning withholding of life-prolonging procedures in the inmate's medical record, and/or
  2. There is a completed [DH 1896, Do Not Resuscitate Order \(DNRO\)](#), (Official DOH form) by the inmate and/or surrogate and physician in accordance with [HSB 15.02.19](#),

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*"Do Not Resuscitate Orders."* A DNRO only directs that resuscitation be withheld and does not address other treatments that may be addressed in a living will or other advance directive.

- D. Inmates with a known terminal illness or any inmate who inquires should be advised of Health Care Advance Directives in accordance with [Chapter 765](#), Florida Statutes.

#### IV. HEALTH CARE ADVANCE DIRECTIVES:

##### A. HEALTH CARE SURROGATE:

1. The inmate may designate a Health Care Surrogate by signing form [DC4-666](#), *Designation of Health Care Surrogate*.
2. The form shall be signed by the inmate in the presence of two subscribing adult witnesses.
3. If the inmate is unable to sign the form s/he may, in the presence of at least two witnesses, direct that another person sign the inmate's name as required.
4. The person designated as the surrogate shall not act as a witness to the execution of the document designating the surrogate.
5. At least one person who acts as a witness shall be neither the inmate's spouse nor a blood relative.
6. The document designating a health care surrogate may also designate an alternate surrogate. The alternate surrogate may assume his or her duties as surrogate for the inmate if the original surrogate is unwilling or unable to perform his or her duties.
7. The inmate's failure to designate an alternate surrogate shall not invalidate the designation.
8. If neither the designated surrogate nor the designated alternate surrogate is able or willing to make health care decisions on behalf of the inmate and in accordance with the inmate's instructions, the department may seek the appointment of a proxy outlined in Section IV.C, below.
9. An inmate may designate a separate surrogate to consent to mental health treatment in the event that the inmate is determined by a court to be incompetent to consent to mental health treatment and a guardian advocate is appointed as provided under section [394.4598, F.S.](#)
10. If there is no document designating a separate surrogate for mental health treatment, the department shall assume that the health care surrogate authorized to make health care decisions is also the inmate's choice to make decisions regarding mental health treatment.

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11. Unless the document states a time of termination, the designation shall remain in effect until revoked by the inmate.
12. If there are no additional instructions provided on the form write the word **NONE** in that area.
13. Health Care Surrogates must comply with sections 765.205<sup>1</sup> and 765.305<sup>2</sup>, F.S., before selecting or declining health care.

#### B. DETERMINATION OF INCAPACITY:

1. An inmate is presumed to be capable of making health care decisions for herself or himself unless she or he is determined to be incapacitated. "Incapacity" or "incompetent" means the inmate is physically or mentally unable to communicate

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<sup>1</sup> 765.205 Responsibility of the surrogate.—

(1) The surrogate, in accordance with the principal's instructions, unless such authority has been expressly limited by the principal, shall:

(a) Have authority to act for the principal and to make all health care decisions for the principal during the principal's incapacity.

(b) Consult expeditiously with appropriate health care providers to provide informed consent, and make only health care decisions for the principal which he or she believes the principal would have made under the circumstances if the principal were capable of making such decisions. If there is no indication of what the principal would have chosen, the surrogate may consider the patient's best interest in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn.

(c) Provide written consent using an appropriate form whenever consent is required, including a physician's order not to resuscitate.

(d) Be provided access to the appropriate medical records of the principal.

(e) Apply for public benefits, such as Medicare and Medicaid, for the principal and have access to information regarding the principal's income and assets and banking and financial records to the extent required to make application. A health care provider or facility may not, however, make such application a condition of continued care if the principal, if capable, would have refused to apply.

(2) The surrogate may authorize the release of information and medical records to appropriate persons to ensure the continuity of the principal's health care and may authorize the admission, discharge, or transfer of the principal to or from a health care facility or other facility or program licensed under chapter 400 or chapter 429.

(3) If, after the appointment of a surrogate, a court appoints a guardian, the surrogate shall continue to make health care decisions for the principal, unless the court has modified or revoked the authority of the surrogate pursuant to s. 744.3115. The surrogate may be directed by the court to report the principal's health care status to the guardian.

<sup>2</sup> 765.305 Procedure in absence of a living will.—

(1) In the absence of a living will, the decision to withhold or withdraw life-prolonging procedures from a patient may be made by a health care surrogate designated by the patient pursuant to part II unless the designation limits the surrogate's authority to consent to the withholding or withdrawal of life-prolonging procedures.

(2) Before exercising the incompetent patient's right to forego treatment, the surrogate must be satisfied that:

(a) The patient does not have a reasonable medical probability of recovering capacity so that the right could be exercised by the patient.

(b) The patient has an end-stage condition, the patient is in a persistent vegetative state, or the patient's physical condition is terminal.

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a willful and knowing health care decision. Incapacity may not be inferred from the person's voluntary or involuntary hospitalization for mental illness or from her or his intellectual disability.

2. In light of section 765.204, F.S., capacity determinations for the purpose of obtaining informed medical consent from a health care surrogate, proxy, etc., may only take place at a hospital or other licensed facility identified in section 765.101, F.S. (hospitals, nursing homes, hospices, home health agencies, or health maintenance organizations licensed in this state, or any facility subject to part [I of chapter 394](#).)
3. If an inmate's capacity to make health care decisions for herself or himself or provide informed consent is in question, the attending physician shall evaluate the inmate's capacity and, if the physician concludes that the inmate lacks capacity, enter that evaluation in the inmate's medical record. If the attending physician has a question as to whether the principal lacks capacity, another physician shall also evaluate the inmate's capacity, and if the second physician agrees that the inmate lacks the capacity to make health care decisions or provide informed consent, the hospital shall enter both physicians' evaluations in the inmate's medical record.
4. If the inmate has designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney, the hospital shall notify such surrogate or attorney in fact in writing that her or his authority under the instrument has commenced.
5. A health care surrogate's authority shall commence upon a determination that the inmate lacks capacity, and such authority shall remain in effect until a determination that the inmate has regained such capacity. Upon commencement of the surrogate's authority, a surrogate who is not the inmate's spouse shall notify the inmate's spouse or adult children of the inmate's designation of the surrogate. In the event the attending physician determines that the inmate has regained capacity, the authority of the surrogate shall cease, but shall recommence if the inmate subsequently loses capacity as described above.
6. Unless the principal expressly delegates such authority to the surrogate in writing, or a surrogate or proxy has sought and received court approval pursuant to rule 5.900 of the Florida Probate Rules, a surrogate or proxy may not provide consent for: abortion, sterilization, electroshock therapy, psychosurgery, experimental treatments that have not been approved by a federally approved institutional review board in accordance with [45 C.F.R. part 46](#) or [21 C.F.R. part 56](#), or voluntary admission to a mental health facility.
7. In the event the surrogate is required to consent to withholding or withdrawing life-prolonging procedures in the absence of a living will, the decision to withhold or withdraw life-prolonging procedures from an inmate may be made by a health care surrogate designated by the inmate unless the designation limits the surrogate's

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authority to consent to the withholding or withdrawal of life-prolonging procedures.

8. If an incapacitated or developmentally disabled inmate 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 inmate by a health care proxy. See Section IV.C. below for instructions regarding the appointment of a proxy.
9. Before exercising an incompetent inmate's right to forego treatment, a surrogate or proxy must be satisfied that:
  - a. The inmate does not have a reasonable medical probability of recovering capacity so that the right could be exercised by the inmate.
  - b. The inmate has an end-stage condition, the inmate is in a persistent vegetative state, or the inmate's physical condition is terminal.
10. In determining whether the inmate has a terminal condition, has an end-stage condition, or is in a persistent vegetative state or may recover capacity, or whether a medical condition or limitation referred to in an advance directive exists, the inmate's attending or treating physician and at least one other consulting physician must separately examine the inmate. The findings of each such examination must be documented in the inmate's medical record and signed by each examining physician before life-prolonging procedures may be withheld or withdrawn.

### C. HEALTH CARE PROXY:

1. If an incapacitated inmate 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 inmate 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:
  - a. The judicially appointed guardian of the inmate who has been authorized to consent to medical treatment, if such guardian has previously been appointed; however, this paragraph shall not be construed to require such appointment before a treatment decision can be made under this subsection;
  - b. The inmate's spouse;
  - c. An adult child of the inmate or, if the inmate has more than one (1) adult child, a majority of the adult children who are reasonably available for consultation;
  - d. A parent of the inmate;
  - e. The adult sibling of the inmate or, if the inmate has more than one (1) sibling, a majority of the adult siblings who are reasonably available for consultation;
  - f. An adult relative of the inmate who has exhibited special care and concern for the inmate and who has maintained regular contact with the inmate and who is familiar with the inmate's activities, health, and religious or moral beliefs;
  - g. A close friend of the inmate, as defined in 765.101 or

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- h. A clinical social worker licensed pursuant to chapter 491, or who is a graduate of a court-approved guardianship program. Such a proxy must be selected by the provider's bioethics committee and must not be employed by the provider. If the provider does not have a bioethics committee, then such a proxy may be chosen through an arrangement with the bioethics committee of another approved provider. The proxy will be notified that, upon request, the provider shall make available a second physician, not involved in the inmate's care to assist the proxy in evaluating treatment. Decisions to withhold or withdraw life-prolonging procedures will be reviewed by the hospital's bioethics committee. Documentation of efforts to locate proxies from prior classes must be recorded in the medical record.
2. Proxies must comply with sections 765.205 and 765.305, F.S. (footnoted above), before selecting or declining health care, except that a proxy's decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the inmate would have chosen had the inmate been competent or, if there is no indication of what the inmate would have chosen, that the decision is in the inmate's best interest.

#### D. LIVING WILL:

1. 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 such person has a terminal condition, has an end-stage condition, or is in a persistent vegetative state.
2. The inmate may complete form [DC4-665 Living Will](#).
3. The form must be signed by the inmate in the presence of two subscribing adult witnesses.
4. At least one person who acts as a witness shall be neither the inmate's spouse nor a blood relative.
5. If the inmate is unable to sign the form s/he may, in the presence of witnesses, direct than another person sign the inmate's name as required.
6. The attending/treating physician should be notified of any inmate's execution of a living will. The living will or a copy thereof shall promptly be made a part of the inmate's medical record.
7. If there are no additional instructions provided on the form write the word **NONE** in that area.
8. Before proceeding in accordance with the inmate's living will, it must be determined that:

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- a. The inmate does not have a reasonable medical probability of recovering capacity so that the right could be exercised directly by the inmate.
- b. The inmate has a terminal condition, has an end-stage condition, or is in a persistent vegetative state.
- c. Any limitations or conditions expressed orally or in a written declaration have been carefully considered and satisfied.

**E. WITHHOLDING OR WITHDRAWING OF SUSTENANCE OR OTHER LIFE-PROLONGING TREATMENT:**

1. Nutrition or hydration artificially administered to an inmate through an invasive medical procedure may be withheld or withdrawn as a life-prolonging procedure if the inmate has executed an advance directive such as a living will expressly authorizing the withholding or withdrawal of nutrition or hydration.
2. In determining whether an inmate has a terminal condition, has an end stage condition, or is in a persistent vegetative state or may recover capacity, or whether a medical condition or limitation referred to in an advance directive exists, the inmate's attending or treating physician and at least one other consulting physician must separately examine the inmate. The findings of each such examination must be documented in the inmate's medical record and signed by each examining physician before life-prolonging procedures may be withheld or withdrawn.
3. For inmates in a persistent vegetative state, as determined by the attending physician in accordance with currently accepted medical standards, who have no advance directive and for whom there is no evidence indicating what the person would have wanted under such conditions, and for whom, after a reasonably diligent inquiry, no family or friends are available or willing to serve as a proxy to make health care decisions for them, life-prolonging procedures may be withheld or withdrawn by a hospital under the following conditions:
  - a. The person has a judicially appointed guardian representing his or her best interest with authority to consent to medical treatment; and
  - b. The guardian and the person's attending physician, in consultation with the medical ethics committee of the hospital where the inmate is located, conclude that the condition is permanent and that there is no reasonable medical probability for recovery and that withholding or withdrawing life-prolonging procedures is in the best interest of the inmate. If there is no medical ethics committee at the hospital, the hospital must have an arrangement with the medical ethics committee of another approved facility or with a community-based ethics committee approved by the Florida Bio-ethics Network. The ethics committee shall review the case with the guardian, in consultation with the person's attending physician, to determine whether the condition is permanent and there is no reasonable medical probability for recovery.

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4. In the event of a dispute or disagreement concerning the attending physician's decision to withhold or withdraw life-prolonging procedures, contact the Department of Corrections Office of the General Counsel for further guidance.

**F. DO NOT RESUSCITATE ORDERS:**

1. Resuscitation may be withheld or withdrawn from an inmate by a treating physician if evidence of an order not to resuscitate by the inmate's physician is presented to the treating physician. An order not to resuscitate, to be valid, must be on the form set forth in section [401.45, F.S.](#) (Form DH 1896). A competent inmate is allowed to make the decision and may voluntarily request and/or agree that a DNRO be placed in their medical record. If the inmate is incapacitated, the form must be signed by one of the following:
  - a. The inmate's health care surrogate or proxy as provided in chapter [765, F.S.](#);
  - b. A court-appointed guardian as provided in chapter [744, F.S.](#);
  - c. An attorney-in-fact under a durable power of attorney as provided in chapter [709, F.S.](#)
2. For further instructions regarding DNROs, refer to Health Services Bulletin [15.02.19, Do Not Resuscitate Orders](#).

**G. MENTAL HEALTH ADVANCE DIRECTIVES:**

1. Psychiatrists will offer a mental health advance directive to any mental health inmate who is on medication(s).

**H. ANATOMICAL GIFT:**

1. An inmate who is competent to make a will may make an anatomical gift of his or her body by completing [DC4-699, Uniform Donor Form](#). Florida law provides for other methods of donation, such as by living will.
2. The completed form must be signed by the donor and two witnesses in the presence of each other.
3. The inmate may amend or revoke their anatomical gift in accordance with [765.516, F.S.](#) If questions arise regarding a potential revocation of an anatomical gift, contact the Office of the General Counsel for further guidance.
4. If a deceased inmate has not made an anatomical gift or designated a health surrogate, a member of one of the classes of persons listed below, in the order of priority listed and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of a prior class, may give all or any part of the decedent's body:

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- a. The spouse of the decedent;
- b. An adult son or daughter of the decedent;
- c. Either parent of the decedent;
- d. An adult brother or sister of the decedent;
- e. An adult grandchild of the decedent;
- f. A grandparent of the decedent;
- g. A close personal friend, as defined in s. 765.101;
- h. A guardian of the person of the decedent at the time of his or her death; or
- i. A representative ad litem appointed by a court of competent jurisdiction upon a petition heard ex parte filed by any person, who shall ascertain that no person of higher priority exists who objects to the gift of all or any part of the decedent's body and that no evidence exists of the decedent's having made a communication expressing a desire that his or her body or body parts not be donated upon death.

Those of higher priority who are reasonably available must be contacted and made aware of the proposed gift and a reasonable search must be conducted which shows that there would have been no objection to the gift by the decedent.

5. Any anatomical gift by a health care surrogate designated by the inmate or a member of a class designated above must be made by a document signed by that person or made by that person's witnessed telephonic discussion, telegraphic message, or other recorded message.
6. An anatomical gift made by a qualified donor and not revoked by the donor is irrevocable after the donor's death. A family member, guardian, representative ad litem, or health care surrogate may not modify, deny, or prevent a donor's wish or intent to make an anatomical gift after the donor's death.

#### **V. COMPLETED FORMS:**

- A. Completed advance directive forms/documents will be filed in the Department of Corrections outpatient medical file.
- B. Copies will be given to surrogate, proxy, family members, as appropriate;
- C. Copies will be given to the inmate; and
- D. A copy of the advanced directive will accompany the inmate whenever transported to a hospital.

#### **VI. EFFECT OF PREGNANCY ON ADVANCE DIRECTIVES OR AGREEMENT:**

Pursuant to section 765.113(2), F.S., unless the inmate expressly delegates such authority to a surrogate in writing, or a surrogate or proxy has sought and received court approval pursuant to rule 5.900 of the Florida Probate Rules, the advance directive directing the withholding or withdrawing of life-prolonging procedures or DNR of a qualified inmate diagnosed by the

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attending physician as pregnant shall have no effect prior to viability as defined in section [390.0111\(4\), F.S.](#)

**VII. PRIVACY ACT CONSIDERATION:**

Consent must be obtained and documented from a competent inmate, their health care surrogate or proxy prior to discussing the inmate's advance directives with family members. An inmate's refusal or consent to discuss her/his advance directives will be documented in the inmate's medical record.

**VIII. REVOCATION OF ADVANCE DIRECTIVE:**

- A. An advance directive may be revoked at any time by the declarant in any of the following manners:
1. By means of a signed, dated writing;
  2. By means of the physical cancellation or destruction of the advance directive by the inmate or by another in the inmate's presence and at the inmate's direction. The forms in the medical record cannot be destroyed but can be revoked;
  3. By means of an oral expression of intent to revoke; or
  4. By means of a subsequently executed advance directive that is materially different from a previously executed advance directive.
- B. If an inmate wishes to cancel an advance directive, s/he should notify the attending physician either in person, tell another staff member of the desire to change an advance directive, or write an inmate request from requesting a change in an advance directive.
- C. Unless otherwise provided in the advance directive or in an order of dissolution or annulment of marriage, the dissolution or annulment of marriage of the inmate revokes the designation of the inmate's former spouse as a health care surrogate.

**IX. EDUCATION:**

- A. Each institution shall include information on Health Care Advance Directives and anatomical gifts during orientation and in institutional health care handouts. See [DC4-687, Inmate Information Sheet Regarding Advance Directives](#).
- B. Inmates shall be informed of their rights as set forth in this health services bulletin.

**X. RELEVANT FORMS AND DOCUMENTS:**

- A. [DC4-665, Living Will](#)
- B. [DC4-666, Designation of Health Care Surrogate](#)
- C. [DC4-687, Inmate Information Sheet Regarding Advance Directives](#)

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- D. [DH 1896 DNRO \(Official DOH form\)](#)
- E. [DC4-699, Uniform Donor Form](#)
- F. [HSB 15.02.19](#)
- G. [Florida Statute 390.011\(4\)](#)
- H. [Florida Statute 394.4598](#)
- I. [Florida Statute 401.45](#)
- J. [Florida Statute 709](#)
- K. [Florida Statute 744](#)
- L. [Florida Statute 765](#)
- M. Florida Probate Rule 5.900
- N. [45 CFR part 46](#)
- O. [21 CFR part 56](#)

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Health Services Director

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Date

This Health Services Bulletin Supersedes:

TI 15.02.15 dated 4/18/94  
HSB 15.02.15 dated 01/05/00, 08/15/06,  
01/24/10, 01/31/2014, AND 04/11/2017

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