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To: Assisted Living Facility Managers

Re: Provider Letter 99-38 -- Information Regarding Changes to Advance Directives

The purpose of this letter is to inform assisted living managers that there are changes in advance directives, passed by the 76th Texas Legislature, that combine the Directive to Physicians, Medical Power of Attorney, Procedure When a Person Has Not Executed or Issued a Directive, and the Out-of-Hospital Do Not Resuscitate directives under Texas Health and Safety Code, Chapter 166. This chapter is known as the Advance Directives Act, and was effective September 1, 1999. There are many changes within the new law and it is imperative that facilities review these changes with their attorneys. Significant changes in the new law are detailed below.

Administrative Penalties

Assisted living facilities must maintain written policies regarding the implementation of advance directives. The policies must include a clear and precise statement of any procedure the provider is unwilling/unable to provide/withhold in accordance with an advance directive. These written policies must be presented to residents and their families. Providers who fail to comply with this requirement may incur a \$500.00 administrative penalty.

Definitions

1. **Terminal Condition** means an incurable condition that according to reasonable medical judgement will produce death within six months.
2. **Irreversible Condition** means a condition, injury or illness:
 - a. that may be treated but is never cured;
 - b. that leaves a person unable to care for or make decisions for the person's own self; and
 - c. that without life-sustaining treatment, provided in accordance with the prevailing standard of medical care, is fatal.
3. **Qualified Patient** means a patient with a terminal or irreversible condition that has been diagnosed and certified in writing by the attending physician. **The requirement for two physician signatures has been eliminated.**
4. **Declarant** means a person who has executed or issued a directive.
5. **Life Sustaining Treatment** means treatment that based on reasonable medical judgement, sustains the life of a patient and without which the patient will die. The term

includes both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration. The term does not include the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain.

Witness List

Two witnesses, who are competent adults, must sign the directive and at least **one** of the witnesses must be a person who is **not**:

1. a person designated by the declarant to make a treatment decision;
2. a person related to the declarant by blood or marriage;
3. a person entitled to any part of the declarant's estate;
4. the attending physician;
5. an employee of the attending physician;
6. an employee of a health care facility in which a declarant is a patient, if the employee is providing direct care to the declarant, or is an officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility; or
7. a person who has a claim against any portion of the declarant's estate on the declarant's death.

Procedure When a Person Has Not Executed or Issued a Directive

If an adult qualified patient has not executed or issued a directive and is incompetent, or otherwise mentally or physically incapable of communication, the attending physician and one of the following, in the priority given, may make a treatment decision that may include a decision to withhold or withdraw life-sustaining treatment:

1. the patient's spouse;
2. the patient's reasonably available adult children;
3. the patient's parents; or
4. the patient's nearest relative

If there is no family member or guardian available, a physician who is not involved in the treatment of the patient, must concur with the treatment decision. Witness requirements, as mentioned previously, are in effect.

An individual, from the above list, wishing to challenge a treatment decision must apply for temporary guardianship under Section 875, Texas Probate Code.

Form Changes

Directive to Physicians and Families or Surrogates

- Deletes the "two physician certification" rule for diagnosis of a terminal condition for directives executed after September 1, 1999.
- Changes to witness requirements, as mentioned previously.
- Directives executed prior to September 1, 1999 must follow the laws in effect at the time of execution (i.e. two physician certification).

Medical Power of Attorney

- Previously known as the Durable Power of Attorney For HealthCare.
- Changes to witness requirements, as mentioned previously.

Out-of-Hospital Do Not Resuscitate (OOHDNR)

- A new form is being created by the Texas Department of Health (TDH) and will be available from the Texas Medical Association (TMA) after the first of the year. Current forms, with the red Texas Do-Not-Resuscitate emblem, may be ordered by calling the automated response number at 512-370-1306. The ordering process and cost of the forms is detailed at this number. For questions about completion of the form, contact TDH Bureau of Emergency Management at 512-834-6700.
- After an original OOHDNR form, with the red Texas symbol, is completed and signed by the attending physician, **copies** may be made and used like any other advance directive. Original OOHDNR forms completed prior to September 1, 1999, may also be copied and used in the same manner. This is effective immediately. Facilities should keep the original in a safe place.
- The requirement that a person be in a terminal condition to complete this directive is eliminated.
- Changes to witness requirements, as mentioned previously.
- Until the new OOHDNR forms are available, TDH has advised agencies to use the current form (with the red Texas Do-Not-Resuscitate emblem), in the following manner:

At section 2C, **line through the word "two"**, substitute "**one** qualified relative" and write in "**per Chapter 166, Texas Health and Safety Code**".

At section 4, Physician's Statement, **line through "I have diagnosed and certified in patient's records that he/she is in a terminal condition,"** and write in "**per Chapter 166, Texas Health and Safety Code.**" The **attending** physician is still required to sign this form with the appropriate witnesses.

Other Changes

- A physician's refusal to honor an advance directive must be reviewed by an ethics committee (Contact facility attorney for clarification if needed).
- A physician, or a health professional acting under the direction of a physician, is subject to review and disciplinary action by the appropriate licensing board for failing to effectuate a qualified patient's directive (Contact facility attorney for clarification if needed).
- Artificial nutrition and hydration are now recognized as life sustaining treatments.

Forms

Advance directive forms are available at the Long Term Policy website: <http://ltc.dhs.state.tx.us/policy>. Facilities are not required to use these forms, but they contain all the elements of the new law. If the facility wants to design its own directives, the forms must have the same legal components. They may also be obtained from attorneys, hospitals, hospices and the TMA, among others. Forms may be ordered from TMA by calling the automated response number at 512-370-1306. The Texas Department of Human Services will not mail or fax advance directive forms. The forms on the website are:

- Directive to Physicians and Families or Surrogates;
- Medical Power of Attorney;
- Procedure When a Person Has Not Executed or Issued a Directive and is Incompetent or Incapable of Communication (may include withholding or withdrawing life sustaining treatment);
- Information regarding the Out-of-Hospital Do Not Resuscitate advance directive.

Previously Executed Directives

Previously executed directives do not have to be redone. They are still valid under the law in effect at the time of their execution. For example, a Directive to Physicians executed prior to September 1, 1999, will still require two physician signatures to certify a terminal condition.

Due to the complexities of this law, **facilities should confer with their attorneys about implementing changes in their facility's policies and procedures.** For specific questions about this letter, you may contact Sharon Balcezak, R.N., at 512-438-3529.

Sincerely,

Signature -on- file

Marc Gold
Director
Long Term Care Policy

MG:sb