



COMMISSIONER  
Adelaide Horn

December 20, 2007

To: Nursing Facilities

Subject: **Provider Letter #07-24** – Authority to Make Health Care Decisions

Effective: December 19, 2007

The Department of Aging and Disability Services (DADS) has noted confusion among nursing facilities about who can make certain types of decisions for residents who are not capable of making decisions for themselves. For example, we have noted instances in which a family member who has durable power of attorney has also made medical decisions, although he/she did not have the legal authority to do so, or instances in which facility staff made a medical decision, such as getting a psychiatrist's order for anxiety medication, without the consent of the legal representative.

The purpose of this letter is to notify facilities of state laws regarding durable powers of attorney, medical powers of attorney, consent to medical treatment, and the consent required for the administration of a psychoactive medication. The purpose of this letter is not to provide legal advice to any facility. Any facility that has questions about the different mechanisms by which a surrogate may make a decision should consult their own attorney. Laws cited or referenced in this letter are current as of the date of this letter. Facilities should consult their own attorney for the current laws and for any guidance in complying with these laws in specific circumstances.

#### **Types of Decision-Making Authority**

A person must have proper legal authority to make a health care decision for another person. For example, a financial power of attorney does not authorize an agent to make health care decisions for another person. Facility staff who do not have proper legal authority to make a health care decision for a resident cannot make medical decisions for a resident.

#### **Durable Power of Attorney**

Durable powers of attorney are governed by Probate Code Chapter XII. A durable power of attorney can cover all aspects of property and financial affairs or may be limited to specific situations and activities. A durable power of attorney that follows the form provided in Probate Code §490 is called a statutory durable power of attorney. The form set out in §490 is not exclusive, and other forms of power of attorney may be used. A person may use a statutory durable power of attorney to grant an attorney in fact or agent powers with respect to a person's property and financial matters. The agent is responsible for acting according to the instructions and in the best interest of the principal.

A durable power of attorney is not intended to cover the power to make medical treatment decisions; that is the purpose of a medical power of attorney.

### **Medical Power of Attorney**

A medical power of attorney is a document delegating to an agent authority to make health care decisions. It is one type of advance directive and as such, is governed by Health and Safety Code Chapter 166, the Advance Directives Act. It is used to designate a person who can make decisions for someone who is incapacitated.

Under a medical power of attorney, an agent may make any health care decision on the principal's behalf that the principal could make if the principal were competent, subject to any restriction set out in the Advance Directives Act or any express limitation on the authority of the agent contained in the medical power of attorney. Section 166.163 provides the Form of Disclosure Statement that must be substantially followed, and Section 166.164 provides the Form of Medical Power of Attorney that must be substantially followed.

### **Consent to Medical Treatment Act**

Health and Safety Code Chapter 313, the Consent to Medical Treatment Act, provides requirements for a surrogate decision-maker to consent to medical treatment on behalf of an incapacitated person. The following excerpts from Chapter 313 are provided for your reference.

#### Health and Safety Code §313.004 Consent for Medical Treatment

- (a) If an adult patient of a home and community support services agency or in a hospital or nursing home is comatose, incapacitated, or otherwise mentally or physically incapable of communication, an adult surrogate from the following list, in order of priority, who has decision-making capacity, is available after a reasonably diligent inquiry, and is willing to consent to medical treatment on behalf of the patient may consent to medical treatment on behalf of the patient:
  - (1) the patient's spouse;
  - (2) an adult child of the patient who has the waiver and consent of all other qualified adult children of the patient to act as the sole decision-maker;
  - (3) a majority of the patient's reasonably available adult children;
  - (4) the patient's parents; or
  - (5) the individual clearly identified to act for the patient by the patient before the patient became incapacitated, the patient's nearest living relative, or a member of the clergy.
- (b) Any dispute as to the right of a party to act as a surrogate decision-maker may be resolved only by a court of record having jurisdiction under Chapter V, Texas Probate Code.
- (c) Any medical treatment consented to under Subsection (a) must be based on knowledge of what the patient would desire, if known.
- (d) Notwithstanding any other provision of this chapter, a surrogate decision-maker may not consent to:
  - (1) voluntary inpatient mental health services;
  - (2) electro-convulsive treatment; or
  - (3) the appointment of another surrogate decision-maker.

#### Health and Safety Code §313.005 Prerequisites for Consent

- (a) If an adult patient of a home and community support services agency or in a hospital or nursing home is comatose, incapacitated, or otherwise mentally or physically

incapable of communication and, according to reasonable medical judgment, is in need of medical treatment, the attending physician shall describe the:

- (1) patient's comatose state, incapacity, or other mental or physical inability to communicate in the patient's medical record; and
  - (2) proposed medical treatment in the patient's medical record.
- (b) The attending physician shall make a reasonably diligent effort to contact or cause to be contacted the persons eligible to serve as surrogate decision-makers. Efforts to contact those persons shall be recorded in detail in the patient's medical record.
  - (c) If a surrogate decision-maker consents to medical treatment on behalf of the patient, the attending physician shall record the date and time of the consent and sign the patient's medical record. The surrogate decision-maker shall countersign the patient's medical record or execute an informed consent form.
  - (d) A surrogate decision-maker's consent to medical treatment that is not made in person shall be reduced to writing in the patient's medical record, signed by the home and community support services agency, hospital, or nursing home staff member receiving the consent, and countersigned in the patient's medical record or on an informed consent form by the surrogate decision-maker as soon as possible.

#### **Consent for Psychotropic Medications**

Health and Safety Code §242.505 and DADS' rules for nursing facilities in Title 40 Texas Administrative Code Chapter 19 set out specific requirements for consent prior to the administration of a psychoactive medication.

#### 40 TAC §19.1207 Prescription of Psychoactive Medication

- (a) In this section, the following words and terms have the following meanings, unless the context clearly indicates otherwise:
  - (1) Medication-related emergency--A situation in which it is immediately necessary to administer medication to a resident to prevent:
    - (A) imminent probable death or substantial bodily harm (emotional or physical) to the resident; or
    - (B) imminent physical or emotional harm to another because of threats, attempts, or other acts the resident overtly or continually makes or commits.
  - (2) Psychoactive medication--A medication prescribed for the treatment of symptoms of psychosis or other severe mental or emotional disorders and used to exercise an effect on the central nervous system to influence and modify behavior, cognition, or affective state when treating the symptoms of mental illness. The term includes the following categories when used as described by this subdivision:
    - (A) anti-psychotics or neuroleptics;
    - (B) antidepressants;
    - (C) agents for control of mania or depression;
    - (D) anti-anxiety agents;
    - (E) sedatives, hypnotics, or other sleep-promoting drugs; and
    - (F) psychomotor stimulants.
- (b) A person may not administer a psychoactive medication to a resident who does not consent to the prescription unless:
  - (1) the resident is having a medication-related emergency; or

- (2) the person authorized by law to consent on behalf of the resident has consented to the prescription.
- (c) Consent to the prescription of psychoactive medication given by a resident, or by a person authorized by law to consent on behalf of the resident, is valid only if:
  - (1) the consent is given voluntarily and without coercive or undue influence;
  - (2) the person who prescribes the medication, or that person's designee, provides the resident and, if applicable, the person authorized by law to consent on behalf of the resident, with the following information in a single document identified as being for the purpose of consent to treatment with psychoactive medication:
    - (A) the specific condition to be treated;
    - (B) the beneficial effects on that condition expected from the medication;
    - (C) the probable clinically significant side effects and risks associated with the medication, as reported in widely available pharmacy databases or the manufacturer's package insert; and
    - (D) the proposed course of the medication;
  - (3) the resident and, if appropriate, the person authorized by law to consent on behalf of the resident, are informed in writing that consent may be revoked; and
  - (4) the consent is evidenced in the resident's clinical record by a signed form prescribed by the facility, or by a statement of the person who prescribes the medication or that person's designee, that documents consent was given by the appropriate person and the circumstances under which the consent was obtained.
    - (A) Consent is valid until:
      - (i) consent is withdrawn; or
      - (ii) the practitioner has discontinued the medication.
    - (B) For purposes of this rule, a medication will be considered to be discontinued if therapy has been suspended for more than 70 days. If the suspended therapy is resumed within the 70-day period, an oral explanation of side effects should be documented in the clinical record.

If you need additional information or have specific questions regarding this provider letter, please contact a nursing facility policy specialist at 512-438-3161. Please consult an attorney if you need legal advice about a particular situation.

Sincerely,

*[signature on file]*

Veronda L. Durden  
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Regulatory Services

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