Advance Health Care Directives and Anatomical Gifts

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Introduction

In a course on the "Essentials of Elder Law," there can be no more a fundamental, core issue than that of end-of-life health care decision making. The right of a person to manifest his or her own health care destiny does not come from words in the constitutions of either Florida or of the United States. Still, the courts have found that some of our most fundamental freedoms appear in both constitutions because they were assumed by our founders to be so inalienable and so fundamental as to be necessary for a free people. Such is the right to control our own health care. The courts have found the right to control our own health care to be grounded in privacy and other more explicit constitutional provisions. *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So. 2d 921, 49 A.L.R.4th 799 (Fla. 1984); *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990); *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990).

As Elder Law Attorneys, we have the privilege and responsibility to inform our clients about the choices they can make in their own health care. Our clients commonly do not know what questions to ask or even what issues are most important. It is up to us to frame the issues without bias or judgment and to then inform, guide, draft and enforce our clients' rights. This article and my accompanying talk cover these rights with practice tips such as talking points, drafting tips and citations to the law. This 2015 'essentials" article draws from the more complete Chapter 27, "Advance Health Care Directives and Anatomical Gifts" in Solkoff & Solkoff, Elder Law Practice Guide (17th ed. 2015-2016).

Practice Tip:

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Guard carefully against putting your own ethics and beliefs on your client. Health care decision making is wrought with highly individual ethical and religious beliefs and experiences. Take care against making assumptions. For example, there are some people who want all extraordinary measures taken to keep them alive and they need their living will and other documents to state these wishes in a legally enforceable way. Most people assume all living wills seek to terminate treatment. Do not put those assumptions on the new client sitting in front of you who may have very different experiences and wishes and who may feel your bias and be influenced or offended by it.

Practice Tip:
Artificial prolongation of the life of a terminally-ill person does not necessarily equate to quality of life. Life prolonging systems may only tend to increase the longevity of suffering, dependence and financial woes, keeping the patient in a precarious and burdensome existence. Sustaining such an existence may be a burden to the patient, the patient's caregivers and family members, and also imposes a cost on society as a whole. On the other hand, there will be clients who desire and some who will benefit from the same artificial procedures rejected by others.

Types of advance health care directives

Advance health care directives are authorized by Florida Statutes, Chapter 765. By statute, they are known as the living will, the health care surrogate designation, health care power of attorney (Chapter 709); and the Do Not Resuscitate Order. *See* F.S.A. § 401.445.

Defining fundamental statutory terms

Fla Stat Ch 765, as amended in 2014, creates advance health care directives requisites and enforcement rights. Key to the legislation are definitions of “terminal illness”, “end-stage condition” and “persistent vegetative state” which are prerequisites to the use of living wills.

Defining End stage condition

An end-stage condition is one that could be due to injury, disease or illness and which: (a) results in progressively severe and permanent deterioration; (b) indicated by incapacity and *complete* physical dependency; and (c) for which, to a reasonable degree of medical probability, treatment of the irreversible condition would be medically ineffective (emphasis added).

Defining “Terminal condition”

A terminal condition is one for which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death.

Defining “Persistent vegetative state”

A persistent vegetative state means a permanent and irreversible condition of unconsciousness in which there is: (i) an absence of voluntary action or cognitive behavior *of any kind*; and (ii) an inability to communicate or interact purposely with the environment. (emphasis added).

Practice Tip:

Newer definitions force a person to rely more on doctor pronouncements of condition than under previous law. Doctors are, however, often hesitant or reluctant to make hard and firm findings for a number of reasons. The health care surrogates, health care attorney in fact or other patient advocates must be vigilant and attempt to get the doctors to commit to a firm status report. It is often found that attending nurses are more frank than doctors and, once the nurses state a prognosis, the advocate should try to pin down the physician. Some doctors do not equate a comatose situation with a “vegetative state.” It is best to include for both conditions in the Advanced Healthcare Directive.

Advanced directives executed in another state

Those advance health care directives executed by clients in another state, if valid there, are also valid in Florida (and visa versa) pursuant to the United States Constitution’s “full faith and credit” and by statute.

Practice Tip:

Many clients are “snow birds” having homes in Florida and another state. Since physicians and hospitals feel more comfortable in honoring forms familiar to them, it is best that the client execute multiple advance directives, one for each state of residency. We do not wish health care providers to balk at honoring directives merely because they are unfamiliar with their formats. Understand also that differences in language between the states can lead to significant misunderstandings and problems in enforcement. For example, under New York law, an analogous term for Florida’s Health Care Surrogate is “Health Care Proxy” where in Florida a “Proxy” is what a person gets if they never named a Surrogate and different standards and authorities apply.

Power of Attorney for Health Care

Florida’s power of attorney law can be used to bolster the enforcement rights of the Surrogate. This may be done within the Health Care Surrogate Designation itself. This can be as simple as stating that the person named as Surrogate “is hereby appointed my duly authorized attorney-in-fact pursuant to Florida Statutes, Chapter 709 and the authority of my attorney-in-fact shall not be affected by my subsequent incapacity.” The drafter can then go on to enumerate specific authorities. Florida’s power of attorney law provides for strict enforcement provisions which do not adhere to a Health Care Surrogate. Yet another reason to include power of attorney provisions is the fact that

restrictions governing surrogates may not apply to attorneys-in-fact. (See “Restrictions” discussion below).

Restrictions

Unless the principal expressly delegates authority to a surrogate in writing or court approval is available, a surrogate or proxy may not provide consent to abortion, sterilization, electroshock therapy, psychosurgery, involuntary admission to mental institutions, or experimental treatments not allowed by a federally approved institutional review board in accordance with 45 C.F.R., part 46 or 21 C.F.R., part 56; Fla. Statute 765.113.

Health care provider's immunity from liability

A health care facility, provider or doctor who obeys an advance health care directive is given immunity from criminal prosecution or civil liability and is not deemed to be engaged in unprofessional conduct. Surrogates (or proxies) are also given immunity for their decisions. However, if a preponderance of evidence shows that the person did not, in good faith, comply with the living will or surrogate designation, the immunity is abrogated.

Enforcement of health care directives-- Court enforcement

Expedited judicial intervention may be used to review a surrogate's decision concerning medical treatment procedures or to enforce compliance with such decisions and the provisions of a living will. FPR 5.900.

Enforcement of health care directives -- Court enforcement and review of surrogate's decision

A surrogate’s or proxy's decisions may be reviewed. The patient's family, a health care facility, the attending physician or any interested person who may reasonably be expected to be directly affected by the surrogate's decision may seek expedited court intervention under Rule 5.900 of Florida Probate Rules if the person believes:

- The decision is not in accord with the patient's known desires or the provisions of Chapter 765
- The advance directive is ambiguous or the patient has changed his or her mind after execution of a directive
- The surrogate or proxy was improperly appointed or the designation is no longer effective
- The surrogate or proxy failed to discharge duties or cannot do so due to illness or incapacity
- The surrogate has abused his or her powers

- The patient has capacity to make his or her own decisions

Fla. Stat. 765.105.

Enforcement of health care directives -- Expedited Hearing

A preliminary hearing on the petition will be held within 72 hours of the filing of the petition. At that time the court will either (a) rule on the request for relief or (b) conduct an evidentiary hearing not later than four days after the preliminary hearing and then rule.

Enforcement of health care directives -- Guardian's decisions

A court-appointed guardian may make end-of-life decisions for a ward (incompetent person) and may act to enforce a Living Will. It has been determined that an incompetent person, through his or her guardian, has the same right to refuse medical treatment as a competent person does. *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990).

A guardian can only exercise those rights removed from the ward and delegated to the guardian by the Court. Those rights that may be removed and so delegated are set forth in Chapter 744 and include medical decision-making. If the ward had, while competent, executed a health care surrogate designation or health care power of attorney, initially, early on, the guardian should ask for court determination of who (i.e. surrogate, attorney in fact or guardian) is to make health care decisions for the ward. Fla. Stat. § 744.3115. That statute allows the Court to modify or revoke decision-making authority of surrogates.

Living Wills

A living will is a document announcing the maker's end-of-life health care wishes. The vast majority of living wills announce that no heroic measures be taken to keep the maker alive should a terminal or other stated condition befall the maker. Though typical living wills call for a cessation of artificial procedures, some living wills reflect the intention torequire artificial procedures to varying degrees. Observant members of some religious groups have certain requirements for their documents.

Living wills -- Execution and witnesses

A living will must be signed by the maker in the presence of two subscribing witnesses, at least one of whom is not a spouse or blood relative of the maker. If the maker cannot sign, one of the witnesses may sign the maker's name in the maker's presence and at the maker's suggestion. An oral pronouncement may be enforced as a living will. *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990). However, a properly written and executed advance directive is much more likely to be enforced without drama and contests.

Practice Tip:

No notarization is required. However, have the living will executed with the same formality as a Last Will and Testament if possible. More formality breeds greater acceptance. Consider making the advance directives "self-proving" by including an affidavit similar to that used for Florida Last Wills and Testaments. A self-proving affidavit adds to the formality of the document and could assist with enforcememt as an affidavit of the witnesses.

Living wills-- Certification of patient's terminal condition

Two physicians must separately examine the patient, certify the terminal condition and document same on the patient's records to allow enforcement of a living will.

Living wills-- Publication

The burden is on the patient or someone acting for the patient to furnish the living will to the doctor. Unlike hospitals, physicians are not required by law to ask if a Living Will exists. Once so noticed the doctor must make the living will a part of the patient's medical records.

Practice Tip:

The client should receive the original living will, to be held in a place of safekeeping. Give one copy to each designated health care surrogate and give the client any other copies. Suggest that the client or surrogates give copies to the doctors and hospitals now and when and if a life threatening illness, disease or injury occurs. The original should be preserved should court proceedings be necessary and so copies should be given to the health care providers.

Practice Tip:

A suggested form is given in the statute and it is purposely general. Hospitals and nursing homes are required to have forms available for patient completion and execution but these too are generally poor, often mirroring the statutory form. Beware of "cookie cutter" forms, usually one page living wills that may or may not comply with statutory rules. They are too vague and enforcement may be a problem. There have been several occasions when hospitals or doctors have not honored their own forms due to absence of appropriate provisions or ambiguity as it relates to the specific patient in the particular circumstances of the illness. Prepare one that meets your own client's beliefs in as much detail as possible.

Living wills – Hydration and Nutrition

Forced feeding, forced hydration or forced respiration may not be stopped unless clear statement is made to do so in the written living will. *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990). A living will should be carefully prepared, tailor-fit to the individual client's beliefs.

Living wills – Patient's condition when living will is to be enforced

Detail the circumstances of a patient's status for when the living will is to be enforced.

Practice Tip:

One such delineated circumstance may be irreversible brain damage status in which the patient cannot recognize people or speak understandably, whether or not terminal. Most patients would not like to continue life in such a condition. While questionable under statutory prescriptions doctors do often honor such a provision. A permanently brain damaged patient laboring under such disabilities is not reacting with his environment as defined in Section 765.101(15)(b) although he may not necessarily be in a vegetative state.

Living wills – Treatments to be stopped or withheld

Detail the treatments which the patient would wish stopped or withheld if the circumstances detailed exist. Take special caution to list feeding, hydration and respiration if the patient wishes those treatments stopped. The list of treatments to be stopped or withheld does not force the doctor to stop or withhold same unless the patient or his surrogate insists. In other words, all the living will does is give the patient the option to require that treatment be given.

27:36. Living wills – Special provisions to address individual beliefs

Tailor-make the living will to meet the individual client's beliefs. Some clients will observe certain religious rules that will require special drafting. This might include no blood transfusions, consultation with a member of the clergy or other requirements. Special provisions should be made to accommodate religious beliefs.

Living wills-- Palliative care

It is mandated that physicians and health care providers give information concerning pain management and palliative care to the patient, health care surrogate or proxy, the health care attorney in fact and/or the court-appointed guardian with authority to make health care decisions. Moreover, such persons or entities must, when appropriate, comply with the request for pain management or palliative care made by the patient, proxy, attorney in fact or such guardian.

Living wills-- Palliative care-- Definition

F.S.A. § 765.102(5) sets forth the definition of palliative care as comprehensive management of the physical, psychological, social, spiritual and essential needs of the patient who has an incurable, progressive illness. Such palliative care must include assurance that:

- discussion and plan for end-of-life care will be conducted;
- suffering will be carefully attended to;
- preferences for withholding or withdrawing life-sustaining interventions will be honored;
- the personal goals of the dying patient be addressed;
- the dignity of the dying patient will be of priority;
- health care professionals will not abandon the dying patient;
- burdens to family members and others will be handled;
- advance health care directives will be respected;
- organizational mechanisms be in place to evaluate the availability and quality of end-of-life care services, including the evaluation of administration and regulatory barriers;
- necessary health care services be provided and reimbursement policies be available;
- goals will be accomplished in a culturally appropriate manner.

Guardians have a statutory mandate to require that health care providers comply with requests for pain management and palliative care. F.S.A. § 765.1103(2).

Living wills -- When a health care provider may disregard patient's directives

A health care provider may have moral or ethical beliefs inimical to those of the patient's stated beliefs. The law does not require those providers to honor the patient's wishes if: (a) the patient is not in an emergency condition *and* (b) if the provider transfers the patient (*at the provider's expense*) to a different facility (or doctor) that will honor the patient's directions.

Drafting Goals

The preparation of a living will and health care surrogate designation must be accomplished with intent to satisfy physicians and other health care providers. It is

not lawyers or judges that we wish to honor the forms but, rather, health care providers. Doctors do not want to interpret vague pronouncements or guess at the intent of the patient. They want pronouncements to be crystal clear so they can feel comfortable in honoring the maker's wishes without fear of malpractice suits or ethical dilemmas. The more detail as to circumstance of use and treatment to be stopped or withheld, the better the directives will be honored. Even if something is well known to the law, it may not be well known to health care providers.

Health Care Surrogates

A person (the "principal") is allowed to designate one or more persons ("surrogates") to make health care decisions for the principal either with (1) present authority or (2) upon the principle's incapacity. Fla. Stat. 765.202(6). Also, the principal may authorize the Surrogate to only be a recipient of health care information without the authorization to make health care decisions. The Principal can appoint a surrogate to have the present authority to access all medical information but the power to make health care decisions only upon incapacity. This choice must be made in the document. If the document is silent, the Surrogate's authority does not commence until the principal is determined incapacitated. Fla. Stat. 765.101(21). Prior to the 2014 legislative changes, a Surrogate only had authority if the Principal was deemed incapacitated. In this way, all Florida health care surrogate designations were springing. Now, the Principal decides.

Practice Tip:

A suggested form is given in the statute but that is not detailed enough. Many forms handed out by associations are also vague and some do not meet statutory requirements. Documents created by consensus committees are often too vanilla to reflect a client's actual wishes. While the attorneys can work from forms, it is our task to customize the document to the client's actual wishes. In many instances, with greater specificity and drafting from experience, the attorney will draft a document that can be more effective than hand-out forms.

Health care surrogate – Execution

The execution of a health care surrogate designation may be made following the same requirements as that discussed above for a living will. The designation must be signed by the maker in the presence of two subscribing witnesses, at least one of whom is not a spouse or blood relative of the maker. If the maker cannot sign, one of the witnesses may sign the maker's name in the maker's presence and at the maker's suggestion. A surrogate shall not be a witness.

Health care surrogate – Publication

By law, an exact copy of the designation must be given to the surrogate. It is up to the maker and/or surrogates to give copies to health care providers. Florida does not have a state registry for living wills and health care surrogate designations. There is no one accepted method of carrying the document. For example, there is no law or custom requiring health care professionals to look for a card or a bracelet or a flash drive, etc. The lack of "portability" causes some people to receive interventions they specifically declined in their documents. For all these reasons and more, it is important to distribute the document to the pertinent health care providers and hospitals (where a patient chart is already active) in advance. It is also helpful for the document to be distributed to those who are often with the principal or who would respond in case of an emergency. For example, many people give a copy of their advance directives to a home health aide.

Health care surrogate-- Springing Authority, Present Authority and Incapacity

Prior to October 1, 2014, a surrogate or proxy could not make decisions if the patient was capable of doing so. Lack of capacity would have to be certified by the attending physician or, if capacity is questionable, the attending physician and a second doctor. After October 1, 2015, the Principal can provide that the authority of the Surrogate is effective upon execution of the document. There is a choice. If the document is silent, it is "springing;" that is, it will not be effective until a determination of incapacity. Fla. Stat. 765.204(3).

Incapacity, for this purpose, is defined as a condition where the patient is unable to communicate a "willful and knowing" health care decision. Fla. Stat. 765.101(10).

Practice Tip:

Some bestow health care decision-making authority through delegation by power of attorney. It is important to make sure that this is consistent with the client's choice of whether the Surrogate is effective immediately or only upon incapacity. The power of attorney, under Florida law, must be effective immediately. This could create an unexpected and avoidable conflict for a client who wanted the Surrogate's authority to be springing.

Health care surrogate-- HIPAA and the authority of the surrogate

The statute sets forth responsibilities of the surrogate. This statutory list should not be read as exclusive. *See* Fla. Stat. § 765.205. Additional authority may be stated to detail the Principal's wishes. In light of the Health Insurance

and Portability and Accountability Act (HIPAA) of 1996, there is reluctance by medical providers to give information about a patient unless the patient clearly signs forms allowing such disclosure. Include provisions within the living will and/or health care surrogate designation directing disclosure to named surrogates or attorneys in fact and designating the same agent the HIPAA designated agent. Even though the law allows this without being explicit, the health care providers may not know this. Putting it in writing helps.

27:51. Health care surrogate – Certain authority must be expressly stated

The designator must, in writing, state the authority of the surrogate to consent to abortions, sterilization, electroshock therapy, psychosurgery, experimental treatment not federally approved, or for voluntary admission to mental health facilities. Unless such authority is expressly stated the proxy has no right to consent to those matters. " F.S.A. § 765.113.

Practice Tip:

Like a living will, the health care surrogate designation should be as detailed as possible. Each authority of the surrogate should be listed. Doctors and hospitals will then feel more comfortable in honoring the designation.

Health Care Proxy

Should no written health care surrogate designation be made the following individuals, in the following order of priority, may make decisions for a patient incapable of doing so (F.S.A. § 765.401):

- Guardian
- Spouse
- Adult child of the patient (or majority of adult children if more than one)
- Parent of the patient
- Adult sibling of the patient (or majority if more than one sibling exists)
- Adult relative of the patient who has exhibited special care and concern and who has maintained regular contact with the patient
- Close friend of the patient.

Health Care Proxy vs. Health Care Surrogate

What is the difference between a Health Care Surrogate and a Health Care Proxy? Here is what you need to know:

- A Health Care Surrogate is expressly appointed by the principal. A Health Care Proxy is appointed by statutory default.
- The Surrogate is authorized to make the decisions the principal would have made himself. If there is no indication of

what the principal would have wanted under the circumstances, then the Surrogate may base her direction on the Surrogate's sense of the principal's best interest.

- The proxy has the same standard as above except that Florida Statute 765.401(4) requires that there be "clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent or, if there is no indication of what the patient would have chosen, that the decision is in the patient's best interest."
- The above distinction only applies when a Proxy's action would serve to withhold or withdraw life-prolonging procedures.
- A Surrogate can make decisions to withhold or withdraw treatment in the absence of a Living Will unless the surrogate designation specifically states otherwise. No additional evidence of the principal's wishes is required.
- A Proxy cannot remove life prolonging procedures unless there is clear and convincing evidence.

Best Interest vs. Substituted Judgement

There are really two standards at play in end-of-life decision making: The ***Best Interest Standard*** and the ***Substituted Judgment Standard***.

In In Re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990), one of the leading national cases, the Florida Supreme Court found that when the patient has left instructions regarding life sustaining treatment, the surrogate must make the medical choice that the patient would have made if competent. This is the substituted judgment standard that still prevails in Chapter 765. Surrogates must substitute the judgment of the principal for their own as opposed to making a decision the Surrogate believes to be in the best interest of the principal.

Still, Chapter 765 still invokes the "best interest" standard in some part. This has led to considerable, though unnecessary, confusion in the field. Whole presentations have sought to explain the distinction.

It all comes down to this: If there is evidence as to what the patient would have wanted, that prevails. The Surrogate and the Proxy must look to any evidence of the principal's wishes and then substitute the principal's judgment for their own. If there is no evidence, then both the Surrogate and the Proxy "may consider the patient's best interest." For the Surrogate, there should be no second-guessing the surrogate's determination of "best interest." For the Proxy, however, there must be clear and convincing evidence that the decision is in the patient's best interest.

Do Not Resuscitate Orders (DNROs)

Paramedics, emergency medical service (EMS) personnel and medical technicians are required to resuscitate a patient to the point of stabilization of vital signs before transporting the patient to a hospital or before the patient is released from the emergency room at the hospital to another hospital bed or a nursing home. This is so despite the existence of a living will and health care surrogate designation stating otherwise. *See* F.S.A. § 401.45 and, generally, Chapter 401, Florida Statutes. The one and only way to legally enforce the stopping of resuscitation is for the patient to have a valid Do Not Resuscitate Order (DNRO). F.S.A. § 401.45. This may change if and when Florida creates a complete statutory framework for POLSTs.

Do Not Resuscitate Orders (DNROs)-- DNRO form

The Florida Department of Health is required to set the guidelines for the DNRO. F.S.A. § 401.45. Thus, the form may be obtained through the Department. The form of the DNRO, as prepared by the Department, Form 1896, may be obtained from:

The Florida Department of Health
Division of Emergency Medical Operations
Office of Trauma
4052 Bald Cypress Way, Bin C-18
Tallahassee, FL 32399-1738
Telephone: (904)487-1911.

It is printed on yellow paper to make it noticeable.

Practice Tip:

While the statute requires use of the promulgated form, it need not be the one actually handed out by the Department. There is nothing magical or legally significant about the Department's paper. You may copy the form on yellow paper to comply with the rules and you can hand out forms to your clients. The yellow paper is designed to be noticeable. Paramedics are accustomed to look for the yellow form.

Have the ill client tape the completed form to his or her bedpost at home so, if paramedics arrive, they can easily locate the form and bring it with the patient for presentment at the emergency room of the hospital. Also, there are "vials" to hold DNROs and other directives in the refrigerator with a sticker that goes on the refrigerator door or the document itself can be placed on the outside door. Paramedics are accustomed to looking for this.

Do Not Resuscitate Orders (DNROs) – Execution

The form must be signed by the patient in the presence of two subscribing witnesses. A health care surrogate or proxy or guardian could also sign instead of the patient. The patient's physician must sign, showing his or her medical license number, telephone number and the date of the execution.

Do Not Resuscitate Orders Frequently Asked Questions (FAQs)

DNROs derive their statutory authority from Chapter 401, Florida Statutes. That Chapter gives authority to the Florida Department of Health to develop and regulate the DNRO form. The following questions and answers were developed by the Department of Health:

What is a Do Not Resuscitate Order?

A Do Not Resuscitate Order (Form 1896) is a form developed by the Department of Health to identify people who do not wish to be resuscitated in the event of respiratory or cardiac arrest.

Who should have a Do Not Resuscitate Order?

Do Not Resuscitate Order forms are generally used by someone who is suffering from a terminal condition, end-stage condition or is in a persistent vegetative state. If you are not sure if a DNRO would be appropriate for you, or you would like additional information, it is best to consult your physician as well as an attorney.

What is the difference between a living will and a DNRO?

A DNRO deals specifically with the refusal of cardiopulmonary resuscitation in the event of cardiac or pulmonary arrest. It is a physician's order, signed and dated. Living wills, or any advanced directive, deal with a broader spectrum of end of life related issues. For information on living wills or advance directives please contact the Department of Elder Affairs helpline at (850) 414-2000.

Why should an individual complete a do not resuscitate order if he or she already has a living will?

A living will is a document that instructs, as specifically as possible, what care and treatment the person wishes under certain circumstances. Any competent person can fill out a living will at any time. A DNRO is a physician’s order to withhold or withdraw resuscitation if a patient goes into cardiac or pulmonary arrest. It is part of the prescribed medical treatment plan and must have a physician’s signature. It is usually written for patients who are terminally ill, suffering from an end-stage condition or who are in a persistent vegetative state.

In what health care settings are the DNRO form honored?

Pursuant to Florida law, the DNRO is honored in most health care settings, including hospices, adult family care homes, assisted living facilities, emergency departments, nursing homes, home health agencies and in hospitals. Florida law further provides that health care providers employed in these health care settings may withhold or withdraw cardiopulmonary resuscitation if presented with a DNRO and be immune from criminal prosecution or civil liability. In addition, when the DNRO is presented to an emergency medical technician or paramedic in a setting other than a health care facility, the form may be honored. Please refer to the links above for a definition of a cardiopulmonary resuscitation. Facilities may honor the form, but they may also honor their own internal forms. Please consult with your risk management/legal office concerning the use of the form in specific health care settings.

How will the properly completed DNRO form look?

The properly completed form will be signed by the competent patient, or the patient's representative, signed by a Florida licensed physician, and it will be on either the original canary yellow form or copied onto similar colored paper.

Can I print it on white paper?

No. Florida Administrative Code 64J-2.018 states specifically that the form shall be printed on yellow paper. The form is not valid unless it is printed on some shade of yellow paper. EMS providers and hospitals are not obligated to honor a form printed on white paper or any other color than yellow.

Does it have to be notarized or witnessed?

No, the form is simply signed by the patient, healthcare surrogate or healthcare proxy and the patient's physician. This is a physician's order.

Where should I keep the form?

The DNRO form should be kept in a noticeable, easily accessible place such as the head or foot of a bed, or on the refrigerator. It should be readily available in the event of an emergency to ensure that the patient's last wishes will be honored.

Is it a requirement to post it somewhere in particular?

No. The Florida Administrative Code does not specifically list a place to keep the form. We do recommend it be somewhere familiar and easily accessible at all times of the day and night. Many people keep the forms on a refrigerator or on the wall by their bed or bedroom door, as many EMS providers are instructed to look for information on medications (Vial of Life Program) in these places.

Is the form good outside of Florida? Can I use a form from another state?

No. This form only applies to those in Florida. Even if someone is planning on visiting family in the state or is living in Florida temporarily, a form outside of Florida will not be accepted. For this reason we do suggest they fill out a Florida DNRO form for the duration of the stay in the state.

Can the form be revoked?

The form can be revoked at any time either orally or in writing, by physical destruction, by failure to present it, or by orally expressing a contrary intent by the patient or the patient's health care surrogate.

Can a family member revoke the form?

If they signed the DNRO form as the health care surrogate or health care proxy they can revoke the form in writing, by physical destruction, failure to present the form, or orally expressing a contrary intent. The patient can revoke the form in the same manner if they were the one to sign the form. Only those that signed the form (patient, healthcare surrogate or healthcare proxy) may revoke the form, 64J-2.018, FAC.

What is a patient identification device?

Attached to the bottom of the Department of Health's Form 1896 is a patient identification device, which may be removed from the form, laminated and can be worn on a chain around the neck, clipped to a key chain or to clothing/ bed, etc. so it can travel with the patient. It is equally as valid as the DNRO form and can be presented to emergency medical services when they arrive on scene and is designed to allow the patient to move between settings with one document.

Does the patient identification device need to be completed for the form to be valid?

No, the patient identification device is an added option to the form to allow for portability and convenience. It does not have to be completed unless the person wishes to remove it and carry it between settings. Copies of the form on yellow paper will serve the same purpose.

Should 9-1-1 still be called if the patient has a do-not-resuscitate order?

9-1-1 can be called at any time to provide family/caregivers with back up and support for the patient. Many family members call 9-1-1 to control pain and to make sure the patient is comfortable. Others may want the patient to be transported to the hospital so the attending physician will be present. Emergency

medical services are part of the community and are able to provide appropriate care as needed in many capacities. A DNRO only means that in the event of cardiac or pulmonary arrest that CPR will not be initiated. Comfort care measures, such as oxygen administration, hemorrhage control and pain management, will still be used.

Where can the do not resuscitate form be obtained?

Download the Do Not Resuscitate Order - Form 1896 from myflorida.com

Per Florida Administrative Code 64J-2.018 this form MUST be printed on yellow stock paper
to be a legally-recognized form!
The form can also be obtained for free by writing to:

The Florida Department of Health
Division of Emergency Medical Operations
Office of Trauma
4052 Bald Cypress Way, Bin C-18
Tallahassee, FL 32399-1738

You may also call the Department of Health to request a form at (850) 245-4440 or by contacting your local EMS provider.

Additional information on advance directives and end-of-life care can be obtained through the Agency for Health Care Administration and the Department of Elder Affairs, nursing homes, assisted living facilities, senior centers, physicians and local attorneys.

Can you fax the form to me?

Yes, but you must have legal size yellow paper in the fax machine or copy the faxed form onto yellow paper upon receipt in order for it to be valid. Some fax machines do not print clear faxes and since the form must be completely legible to be a legally recognized form, it may be best to order forms from DOH or download the form off of our website.

Is there a charge for the form?

No, the Department provides the form at no cost no matter the quantity. We do encourage that the facilities make copies once they receive enough originals to get them started.

Is it permissible to copy the DNRO form?

The form may be copied either onto similarly colored yellow paper either blank or

after it has been correctly filled out and signed. Copies of the form are also required by Florida Administrative Code to be honored by EMS personnel, as long as they are on similarly colored yellow paper and are completely legible.

Does the form ever expire?

No. The form does not expire. Past versions of the forms will also be honored. If the Department of Health approves an updated version, consumers do not need to fill out the updated version per 64J-2.018(2)(a), FAC.

Conclusion

The Elder Law Attorney is distinguished from his or her estate planning cousins by placing the emphasis on the client's lifetime needs as opposed to what happens after death. One of the best examples of this distinction is end-of-life health care decision-making. Many estate planning attorneys supply their clients with the brief statutory form or something very close to it. It is a document that often has no charge associated with it. It is "thrown in" with the will or trust package and not given proportionate attention. The Elder Law Attorney distinguishes himself or herself by explaining to the client that the health care documents are actually designed to enhance quality of life at end of life and are therefore at least as important as post-mortem planning. By spending time with the client to actualize his or her own wishes and by bringing up the issues they never confronted before, a great and appreciated service is provided.