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Opinion No. 05-093

Authority Under the Tennessee Health Care Decisions Act

QUESTIONS

The Tennessee Health Care Decisions Act (2004 Pub. Acts, Chap. 862)[1] requires the Department of Health's Board for Licensing Health Care Facilities to promulgate rules and create forms to effectuate the legislation. The Board has authorized for rulemaking hearing a "physician order for scope of treatment" form ("POST form") that includes a "do not resuscitate" section as well as additional information concerning ancillary services such as comfort measures. Additionally, the Board's proposed rules include a definition of the term "advance directive" that is not identical to the statutory definition of "advance directive" set out at Tenn. Code Ann. § 68-11-1802(a)(1).

1. Does the proposed POST form exceed the authority granted to the Board by the Tennessee Health Care Decisions Act?

2. May the Board define "advance directive" in its rules without including the term "individual instruction"?

OPINIONS

1. No. We believe arguments that the Board has the authority to enact Sections B, C and D of the POST form under the Health Care Decisions Act are more persuasive than those disfavoring such authority.

2. In our view, the Board would be better advised to use the statutory definition of the term "advance directive."

ANALYSIS

1. The Health Care Decisions Act ("the Act") amends and enacts a number of statutes pertaining to health care decision making. For example, the Act wholly replaces former Tenn. Code

[1] The Act is codified at Tenn. Code Ann. §§ 32-11-113, 34-6-217, 68-11-224, and 68-11-1801 through 68-11-1815.

Ann. § 68-11-224, entitled "Withholding of resuscitative services -- Regulations," with new statutory provisions. It also enacts a new Part 18, Tenn. Code Ann. §§ 68-11-1801 through 68-11-1815, pertaining to advance directives and designation of agents and surrogates for the making of health care decisions on behalf of patients who lack capacity to do so. Both Tenn. Code Ann. §§ 68-11-224(i) and 68-11-1805 direct the Board for Licensing Health Care Facilities to develop and create forms. Tenn. Code Ann. § 68-11-224(i)(1) provides:

> The board for licensing health care facilities shall promulgate and create forms regarding procedures for the withholding of resuscitative services from patients in accordance with the provisions of this part and section.

Tenn. Code Ann. § 68-11-1805, entitled "Model forms — Rules and regulations," provides, in pertinent part:

> (a) The board for licensing health care facilities shall develop and issue appropriate model forms for advance directives that are consistent with provisions of this part.

The Board has developed both a proposed advanced directive form (called "Advance Care Plan Form") and a proposed POST ("physician order for scope of treatment") form. Section A of the POST form contains an express instruction as to whether a patient in cardiopulmonary arrest should be resuscitated by means of cardiopulmonary resuscitation (CPR). Sections B, C, and D of the POST form contain, respectively, orders as to whether a patient should be provided with: 1) medical interventions such as IV fluids, cardiac monitoring, intubation, advanced airway interventions, mechanical ventilation, cardioversion, and transfer to a hospital for intensive care; 2) antibiotics; and 3) "medically administered" fluids and nutrition such as IV-administered fluids and feeding tube. The form states that any section not completed indicates full treatment for that section. The form must be signed by the physician; it must also be signed by the patient, minor patient's parent, or guardian/health care agent/surrogate.[2] The POST form states that a copy of the form must accompany a patient when he or she is transferred or discharged. You question whether, insofar as it contains provisions for physician orders in addition to those concerning resuscitation by means of CPR, the proposed POST form exceeds the authority granted to the Board by the Act.

We note that every action taken by an administrative agency must be grounded in an express statutory grant of authority or must arise by necessary implication from an express statutory grant

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[2] It appears to us that at least one aspect of the proposed POST form may be inconsistent with statutory requirements. Tenn. Code Ann. § 68-11-1806(e) provides that a surrogate who has not been designated by the patient may decide that artificial nutrition and hydration should be withheld or withdrawn from the patient only when the designated physician and a second independent physician certify that the provision or continuation of artificial nutrition or hydration is merely prolonging the act of dying and the patient is highly unlikely to regain capacity to make medical decisions. It does not appear to us that the proposed POST form as currently drafted reflects this statutory requirement.

of authority. *Sanifill of Tennessee, Inc. v. Tennessee Solid Waste Disposal Control Bd.,* 907 S.W.2d 807, 810 (Tenn. 1995). Any action which is not authorized by the statutes is a nullity. *General Portland, Inc. v. Chattanooga-Hamilton County Air Pollution Control Bd.,* 560 S.W.2d 910, 913 (Tenn. App. 1976). Administrative regulations cannot be inconsistent with statutes on the same subject. *Kaylor v. Bradley,* 912 S.W.2d 728, 734 (Tenn. App. 1995). "The powers of [an administrative agency] must be found in the statutes. If they are not there, they are non-existent." *Tennessee-Carolina Transp., Inc. v. Pentecost,* 206 Tenn. 551, 334 S.W.2d 950, 953 (Tenn. 1960).

On the one hand, Tenn. Code Ann. § 68-11-224(g) provides, in pertinent part, that "[t]his section [*i.e.*, the entirety of Tenn. Code Ann. § 68-11-224] shall have no application to any do not resuscitate order that is not a 'universal do not resuscitate order' as defined in this section." A "universal do not resuscitate order," as defined in Tenn. Code Ann. § 68-11-224(e)(5), is limited to withholding of CPR.[3] Tenn. Code Ann. § 68-11-224(c) authorizes qualified emergency medical services personnel and other licensed health care practitioners to follow "universal do not resuscitate orders that are available to them in a form approved by the [Board]." Tenn. Code Ann. § 68-11-224(j) conveys immunity, as set out in the statute, to a health care provider or institution that complies or declines to comply with a "universal do not resuscitate order." All of this limiting language could reasonably be construed as indicative of legislative intention to limit all of Tenn. Code Ann. § 68-11-224's provisions, including its rulemaking directive found at Tenn. Code Ann. § 68-11-224(i)(1), to physician do not resuscitate orders regarding withholding of CPR.

On the other hand, while Tenn. Code Ann. § 68-11-224(e)(5) defines a physician's "universal do not resuscitate order" solely with reference to withholding of CPR, Tenn. Code Ann. § 68-11-224(i)(1) directs the Board to promulgate rules and create forms "regarding procedures for the withholding of resuscitative services from patients. . .." Arguably, the term "procedures for the withholding of resuscitative services"[4] is broader than "[withholding of] cardiopulmonary resuscitation." If so, it could evidence legislative intention to authorize creation of a form that provides physician orders regarding resuscitative services in addition to CPR; *e.g.*, intubation and advanced airway interventions. Moreover, construing Tenn. Code Ann. § 68-11-224(i)(1) as authorizing the Board to develop a physician's order form that goes beyond withholding of CPR would be consistent with the advance directive provisions found at other sections of the Tennessee Health Care Decisions Act. Those provisions broadly authorize patients and their agents/surrogates to give individual written instructions regarding health care decisions. *See generally* Tenn. Code Ann. §§ 68-11-1802, *et seq.* A "health care decision," for purposes of an advance directive, means "consent, refusal of consent or withdrawal of consent to health care." Tenn. Code Ann. § 68-11-1802(a)(7). "Health care" is broadly defined as "any care, treatment, service or procedure to

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[3] Tenn. Code Ann. § 68-11-224(e)(5) defines a "universal do not resuscitate order" as "a written order that applies regardless of the treatment setting and that is signed by the patient's physician which states that in the event the patient suffers cardiac or respiratory arrest, cardiopulmonary resuscitation should not be attempted."

[4] "Resuscitative services" is not defined in the Act. The ordinary and usual definition of "resuscitate" is "to revive from apparent death or from unconsciousness; revitalize; to come to; revive." Webster's Seventh New Collegiate Dictionary (1970).

maintain, diagnose, treat, or otherwise affect an individual's physical or mental condition. . ..." Tenn. Code Ann. § 68-11-1802(a)(6). Absent certain exceptions set out in the statute, health care providers and institutions must comply with patients' (or their agents' or surrogates') health care decisions. Tenn. Code Ann. § 68-11-1808(b) - (f). The Legislature has given the Board broad authority to develop and issue appropriate model forms for advance directives that are consistent with the provisions of the Act. Tenn. Code Ann. § 68-11-1805(a).

In our view, arguments that the Board has authority to enact Sections B, C and D of the POST form under the Act are more persuasive than those disfavoring such authority.

2. The Board's proposed rules include a definition of the term "advance directive" that is not identical to the statutory definition of "advance directive" set out at Tenn. Code Ann. § 68-11-1802(a)(1). The statutory definition is "*an individual instruction or* a written statement relating to the subsequent provision of health care for the individual including, but not limited to, a living will or a durable power of attorney for health care" (emphasis added). The Board's proposed rule definition would delete the emphasized language; *i.e.*, the reference to "an individual instruction."

The Board proposes to delete the emphasized language in order to clarify legal requirements for advance directives. The term "individual instruction" is defined at Tenn. Code Ann. § 68-11-1802(a)(10) as "an individual's direction concerning a health care decision for the individual." Moreover, Tenn. Code Ann. § 68-11-1803(a) states that an "individual instruction" may be oral or written. However, Tenn. Code Ann. § 68-11–1803(b) provides that an advance directive for health care, which may authorize an agent to make any health care decision the principal could have made while having capacity, "must be in writing and signed by the principal." It must also either be notarized or witnessed by two (2) witnesses. *Id.*[5] The Board is apparently concerned that inclusion of the term "individual instruction" in its regulatory definition of "advance directive" will create confusion.

As noted in our discussion of your first question, administrative regulations cannot be inconsistent with statutes on the same subject. *Kaylor v. Bradley, supra*, 912 S.W.2d at 734. It follows that a regulatory definition of a term should ordinarily be identical to the statutory definition

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[5] In contrast, a person having capacity may *revoke* all or part of an advance directive, other than the designation of an agent made therein, "in any manner that communicates an intent to revoke." Tenn. Code Ann. § 68-11-1804(b). Designation of an agent may be revoked "only by a signed writing or by personally informing the supervising health care provider." Tenn. Code Ann. § 68-11-1804(a).

Moreover, designation of a *surrogate*, as opposed to designation of an agent by means of an advanced directive, may be accomplished by personally informing the supervising health care provider orally or in writing. Tenn. Code Ann. § 68-11-1806(a).

Both agents and surrogates are directed by statute to make a health care decision on behalf of an incapacitated individual in accordance with the latter's individual instructions, if any, and with his/her other wishes to the extent known to them. Tenn. Code Ann. §§ 68-11-1803(e), 68-11-1806(d). Otherwise, they must make the decision in accordance with their determination of the patient's best interest. *Id.*

of the term. In this case, we do not believe that inclusion of the language "an individual instruction" in the Board's "advance directive" definition would be inherently confusing. As noted above, aspects of advance directives can be affected by individual instructions. Thus, in our view, the Board would be better advised to use the statutory definition of the term "advance directive."

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