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Health Care Decisions for an Incapacitated Person

Senior Citizens' Law Office is funded in part by the City of Albuquerque Area Agency on Aging, Bernalillo County grant, the Center for Civic Values (IOLTA Program), Sandia Foundation's Hugh and Helen Woodward Fund of the Albuquerque Community Foundation, the State Bar Pro Hac Vice Fund, McCune Charitable Foundation, and United Way of Central New Mexico. Rev. 10/10

A New Mexico law known as the Uniform Health Care Decisions Act (UHCDCA)¹ authorizes a person to make **health care decisions** for an incapacitated person even if the incapacitated person lacks a guardian or a durable health care power of attorney.

¹ 24-7A-1 et seq. NMSA 1978.

WHAT IS INCAPACITY?

Incapacity is a person's inability to understand and appreciate the nature and consequences of proposed health care and to communicate an informed health care decision. A finding of incapacity must be made by two qualified health care professionals, one of whom is the primary physician. If the finding of incapacity is based upon mental illness or developmental disability, one of the two must be a person whose training and expertise aids in the assessment of functional impairment.

The allegedly incapacitated person may challenge the finding of incapacity by a signed writing or by personally notifying his supervising health care provider (generally the primary physician). If incapacity is challenged, the challenge stands unless a court directs otherwise. The supervising health care provider should promptly record the finding of incapacity in the incapacitated person's medical record and should tell the incapacitated person about any decision being made and the person who made it.

WHO CAN MAKE HEALTH CARE DECISIONS?

The following people, listed in order of priority, may act as surrogate for an incapacitated person:

1. Spouse
2. Significant other
3. Adult child
4. Parent
5. Adult sibling
6. Grandparent
7. An adult who has exhibited special care and concern for the incapacitated person who is familiar with the incapacitated person's values

Health care decisions include approving surgery or medical treatment, administering or withholding life sustaining treatment, providing or withholding artificial nutrition and hydration, hiring or firing health care providers, and all other health care decisions.

The person who makes decisions for an incapacitated person under the authority of the UHCDA is called a "surrogate." Before a surrogate may be appointed, the person for whom decisions will be made must be found to be "incapacitated."

WHAT ELSE MUST A SURROGATE DO?

A person who elects to act as surrogate should promptly communicate his /her decision to the incapacitated person, the supervising health care provider, and to the family members listed in 1-6. The supervising health care provider may optionally require the surrogate to provide a sworn statement setting forth facts that establish his/her right to act as surrogate.

The surrogate must make health care decisions for the incapacitated person in accordance with the incapacitated person's written instructions (if any) and health care wishes. If no preferences are known, the surrogate must act in the best interests of the incapacitated person.

If more than one member of a class of surrogates (for example, adult children) assumes authority, then the decision of the majority shall prevail, but if the class splits evenly on a decision, then all members of that class and any class ranked lower on the list are disqualified from acting.

The incapacitated person may at any time disqualify a surrogate by a signed writing or by personally notifying the supervising health care professional. Unless related by blood, marriage or adoption, a health care provider may not act as surrogate.