Who Decides About Feeding Tubes under Oklahoma Law?: A Judicial Perspective

JANICE P. DREILING
RETIRED DISTRICT JUDGE
ATTORNEY AT LAW

OKLAHOMA’S UNIQUE LAW

- “THE HYDRATION AND NUTRITION FOR INCOMPETENT PATIENTS’ ACT”
- A/K/A “HNA” OF 1987
- A/K/A “Feeding Tube Forever” Law
  - 63 O.S. 3080.1 – 3080.5

HNA’S “PRESUMPTION”

- “IT SHALL BE PRESUMED THAT EVERY INCOMPETENT PATIENT HAS DIRECTED HIS HEALTH CARE PROVIDERS TO PROVIDE HIM WITH HYDRATION AND NUTRITION TO A DEGREE THAT IS SUFFICIENT TO SUSTAIN LIFE.”
  - 63 O.S. 3080.3

5 Exceptions – 63 O.S. 3080.4

- ATTENDING PHYSICIAN KNOWS.....BASED UPON INFORMED CONSENT THAT THE PATIENT....WHEN COMPETENT....DECIDED THAT ARTIFICIALLY ADMINISTERED H & N BE WITHHELD OR WITHDRAWN

- A COURT RULING, BASED ON CLEAR AND CONVINCING EVIDENCE, THAT THE PATIENT...WHEN COMPETENT...

5 Exceptions (continued)

- An Advance Directive specifically authorizing withholding or withdrawal of AAHN
- AAHN will itself cause severe/long-lasting pain....is not medically possible
- Patient is chronically and irreversibly incompetent...is in the “final stage” of a terminal illness or injury....and “death is imminent.”

Legislative Intent

63 O.S. 3080.5(C)

- “No guardian, public or private agency, court, or any other person shall have the authority to make a decision on behalf of an incompetent patient to withhold or withdraw hydration or nutrition from said patient except in the circumstances and under the conditions specifically provided for in Section 3080.4 of this title.”
WHY IS THIS SUBJECT IMPORTANT TO YOU?

- PERSONAL LEVEL – Do You Want to Be a “Terri Schiavo”? Do You Want Anyone You Care about to be a “Terri Schiavo”?

- PROFESSIONAL LEVEL – You are an attorney advising clients – advising clients about executing an Advance Directive may be the most important advice you ever give. OR, you are a “Health Care Provider.”

WHO IS A “HEALTH CARE PROVIDER?”

- OKLAHOMA, ARKANSAS, NEW MEXICO define a “health care provider” AS:

- “A person who is licensed, certified, or otherwise authorized by the law of this state to administer health care in the ordinary course of business or practice of a profession.”

WHO IS AN “INCOMPETENT PATIENT”?

AN INCOMPETENT PATIENT MEANS ANY PERSON WHO:

- IS A MINOR, OR
- HAS BEEN DECLARED LEGALLY INCOMPETENT TO MAKE DECISIONS AFFECTING MEDICAL TREATMENT OR CARE, OR
- IN THE REASONABLE JUDGMENT OF THE ATTENDING PHYSICIAN, IS UNABLE TO MAKE DECISIONS AFFECTING MEDICAL TREATMENT OR OTHER HEALTH CARE SERVICES.

63 O.S. 3080.2(4)

PURPOSE OF OKLAHOMA ADVANCE DIRECTIVE ACT (63 O.S. 3101.2)

- Recognize the right of individuals to control SOME ASPECTS of their own medical care and treatment, including but not limited to the RIGHT TO DECLINE MEDICAL TREATMENT or TO DIRECT THAT IT BE WITHDRAWN, even if death ensues.

2nd PURPOSE OF THE ADVANCE DIRECTIVE ACT

- Recognize that the right of individuals to control SOME ASPECTS of their own medical treatment is protected by the Constitution of the United States and OVERRIDES ANY OBLIGATION THE PHYSICIAN AND OTHER HEALTH CARE PROVIDERS MAY HAVE to render care or to preserve life and health.

- 3 other “purposes”

KANSAS PUBLIC HEALTH CODE

- The Legislature finds that adult persons have the FUNDAMENTAL RIGHT TO CONTROL THE DECISIONS RELATING TO THE RENDERING OF THEIR OWN MEDICAL CARE, including the decision to have life-sustaining procedures withheld or withdrawn in instances of a terminal condition. (1979)
WHO IS A “QUALIFIED PATIENT?”

• OKLAHOMA: “A patient 18 years of age or older who has executed an Advance Directive and who has been determined to be incapable of making an informed decision regarding health care, including the provision, withholding, or withdrawal of life-sustaining treatment, by the attending physician and another physician who have examined the patient.” 63 O.S. 3101.3(10)

WHAT IS A “TERMINAL CONDITION?”

• OKLAHOMA’S HYDRATION AND NUTRITION ACT: “an incurable and irreversible medical condition that, even with the use of medical treatment, will result in the death of a person from that condition or a complication arising from that condition.” 63 O.S. 3080.2(6)

TERMINAL CONDITION DEFINITION

• OKLAHOMA’S ADVANCE DIRECTIVE ACT: “an incurable and irreversible condition that, even with the administration of life-sustaining treatment, will, in the opinion of the attending physician and another physician, result in DEATH WITHIN SIX (6) MONTHS.” 63 O.S. 3101.3(12)

• TEXAS: “an incurable condition caused by injury, disease, or illness that according to reasonable medical judgment will produce death within six (6) months, even with available life-sustaining treatment provided in accordance with the prevailing standard of medical care.” (Presumption of terminal condition if HOSPICE)

OKLAHOMA ADVANCE DIRECTIVE ACT (63 O.S. 3101.8)

• A patient may make decisions regarding life-sustaining treatment as long as the patient is able to do so. Even if life-sustaining treatment or artificial administration of nutrition and hydration are withheld or withdrawn, the patient shall be provided with medication or other medical treatment to alleviate pain and will be provided with oral consumption of food and water.

OKLAHOMA ADVANCE DIRECTIVE ACT (63 O.S. 3101.9)

• An attending physician or other health care provider WHO IS UNWILLING TO COMPLY with the Oklahoma Advance Directive Act SHALL AS PROMPTLY AS PRACTICABLE take all reasonable steps to arrange care of the Declarant (the patient with the Advance Directive) by another physician or health care provider when the Declarant becomes a qualified patient.
ADVANCE DIRECTIVES FROM OTHER STATES

• OKLAHOMA ADVANCE DIRECTIVE ACT (63 O.S. 3101.14) – Execution of an Advance Directive in another state is valid in Oklahoma to the extent the A.D. does not exceed authorizations allowed under Oklahoma law.
• But no A.D. shall be deemed to authorize withholding/withdrawal of AANand/orH unless it SPECIFICALLY AUTHORIZES such withholding or withdrawal...

SURROGATE DECISION MAKING

• OKLAHOMA has no prioritized list of surrogates who are authorized to make health care or life-sustaining procedure decisions for another person (with ONE specific exception). Such decisions require a Durable Power of Attorney that authorizes health care decisions, an Advance Directive that names a Health Care Proxy, a “DNR” consent, or a general guardian.

THE “ONE” SPECIFIC EXCEPTION

• When an adult...is treated by a (doctor) holding a faculty appointment at a(n) accredited medical school, or holding clinical privileges at a healthcare institution that conducts HUMAN SUBJECT RESEARCH....and such (adult) is incapable of giving informed consent for a....treatment, test or drug, then such treatment, test or drug may proceed upon obtaining informed consent of a legal guardian, attorney-in-fact...., or a family member in the following order of priority: (continued on next slide)

THE “ONE” SPECIFIC EXCEPTION (continued)

• (ORDER OF PRIORITY)
  • Spouse
  • Adult son or daughter
  • Either parent
  • Adult brother or sister, or
  • A relative by blood or marriage

(Iincapacitated person can refuse)

ARKANSAS SURROGATE LAW
20-17-214, Arkansas Code

• a legal guardian, parents of a minor child, the patient’s spouse, patient’s adult child (if more than one, the majority participating in the decision), parents of a patient over 18, adult sibling (majority participating), persons in loco parentis to patient, majority of patient’s adult heirs at law who participate in the decision.

NEW MEXICO SURROGATE LAW
24-7A-5, New Mexico Code

• Spouse, unless legally separated or pending petition for dissolution....
• Individual in a long-term relationship of indefinite duration with the patient.....
• An adult child
• A parent
• Adult brother or sister
• Grandparent
OKLAHOMA GUARDIANSHIP ACT (30 O.S. 3-119(1))

- “No guardian shall have the power to consent on behalf of the ward to the withholding or withdrawal of life-sustaining procedures as defined by the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act except... with specific authorization from the Court... or as authorized by an Advance Directive.”

OKLAHOMA DURABLE POWER OF ATTORNEY ACT (58 O.S. 1072.1)

- The power may grant complete or limited authority with respect to the principal’s person, including, but not limited to, health and medical care decisions on the principal’s behalf, but excluding:
  - The execution of an A.D.
  - The making of life-sustaining treatment decisions unless the attorney-in-fact is also the named Health Care Proxy under an A.D.

OKLAHOMA ADULT PROTECTIVE SERVICES ACT (43A O.S. 10-108)

- 10-108(A)(2) “Under no circumstances shall the court authorize DHS, pursuant to this subsection, to consent or deny consent to a DNR Order or the withdrawal of hydration or nutrition or other life-sustaining treatment although the Court retains jurisdiction to hear such matters under applicable law.”

NATIONALLY KNOWN CASES – “Persistent Vegetative State”

- In the Matter of Quinlan, Supreme Court of New Jersey (1976), 70 N.J. 10, 355 A. 2d. 647.

“PROBLEMATIC WORDS AND PHRASES”

- Imminent
- Short time
- Reasonably short period of time
- Final stage
- Life-sustaining treatment

NO EXISTING CASE LAW IN OKLAHOMA REGARDING HNA OR ADVANCE DIRECTIVE ACT

PEG TUBES

percutaneous endoscopic gastrostomy

- 1989 – PEG tubes – 15,000 patients, U.S.
- 2000 – OVER 216,000
  - OVER 30 PER CENT IN DEMENTIA PATIENTS
  - 10 PER CENT OF INSTITUTIONALIZED ELDERLY

- Source: June 1, 2006, “To Peg or Not to Peg,” Geriatrics
MORE FEEDING TUBE STATISTICS

- 2003 – 146,000 procedures performed to insert permanent feeding tubes into patients. (Source: National Center for Health Statistics)

- 2003 – There are between 35,000 and 40,000 people diagnosed with being in a “persistent vegetative state.” (Source: Brain Injury Association)

FEEDING TUBES ARE CONTROVERSIAL

- Studies have shown that feeding tubes are of unproved benefit in ensuring adequate nutrition, preventing pressure sores, preventing aspiration pneumonia, providing comfort, improving functional status, or extending life in patients with advanced dementia. (Source: April 15, 2002, “Feeding Tubes in Patients with Severe Dementia,” American Family Physician.)

NON-CLINICAL FACTORS INFLUENCING FEEDING TUBE DECISIONS

- Fear of legal action
- Allegations of neglect
- Hand feeding is time consuming and labor intensive
- Absence of instructions to the contrary (Oklahoma’s HNA)

2004 OKLAHOMA JUDICIAL SURVEY

- FINDINGS -- 144 responses out of 231 trial judges
  - “End-of-Life” issues raised in cases in over 20 counties (33 judges)
  - APS cases, guardianships, and deprived child cases
  - Existing Advance Directives, Durable Powers of Attorney, and DNR Orders have been challenged
  - Judges expressed their lack of medical expertise and are torn by the question “are we prolonging life or delaying death?”
  - Judges expressed their personal/family experience with end-of-life issues.

ADVANCE DIRECTIVE REGISTRY – NEW LAW EFFECTIVE 11-1-09

- STATE DEPARTMENT OF HEALTH SHALL ESTABLISH AND MAINTAIN AN ADVANCE DIRECTIVES REGISTRY

- WHAT WILL THE NEW LAW MEAN?
  - 63 O.S. 3102.1 – 3102.3

REFERENCES

GOOGLE:
“Uniform Health-Care Decisions Act”
“Artificial hydration and nutrition”
“Feeding tubes”
“Peg tubes”
“Karen Ann Quinlan”
“Nancy Cruzan”
“Terri Schiavo”
“Advance Directives”
MORE REFERENCES
• [http://huntingtondisease.tripod.com/feedingtubes](http://huntingtondisease.tripod.com/feedingtubes)
• [www.abcd-caring.org](http://www.abcd-caring.org) (Americans for Better Care of the Dying)
• [www.clevelandclinic.org/health/](http://www.clevelandclinic.org/health/) (feeding tubes)
• Handbook for Mortals: Guidance for People Facing Serious Illness

MORE REFERENCES
• Improving Care for the End of Life: A Sourcebook for Health Care Managers and Clinicians.

EVEN MORE REFERENCES
[www.okbar.org](http://www.okbar.org) (Advance Directive Form)
www.oscn.net (Oklahoma Supreme Court website)
FindLaw.com (individual state laws)

SUMMARY – OKLAHOMA LAW
• The only way under Oklahoma law an adult Oklahoman can ensure against becoming a “Terri Schiavo” is to execute an Advance Directive.
• For minors or other incompetent persons, it’s “feeding tube” forever if the law is enforced.