



**FROM:** Margaret S. Clarke, General Counsel, Eagle Forum of Alabama

**DATE:** Tuesday, January 18, 2022

**ISSUE:** Is there an unreasonable burden on rural healthcare facilities to obtain attestations that outweighs (1) liability protection for healthcare facilities, and surrogate decision makers; and (2) assurances to the patient that end-of-life decisions will be made by the most appropriate independent surrogate?

**RECOMMENDATION:** No, there is not an unreasonable burden on rural healthcare facilities to obtain *attestations* (the action of being a witness to or formally certifying something). An attestation protects the patient's wishes, as well as provides liability protection for healthcare facilities and surrogates.

## I. CONSIDERATIONS

I spoke with Carolyn Bern, Director of Governmental Affairs & Community Relation, Alabama Department of Public Health, who reported that **the primary concern of the Department of Public Health is to reduce the burden on rural healthcare facilities and hospitals on weeknights and weekends caused by attestations.**

This past week I have consulted with Carolyn Bern, Director of Governmental Affairs & Community Relations, Alabama Department of Public Health; Dana Billingsley, Assistant General Counsel, Alabama Department of Public Health; Rick Harris, author of *The Certificate of Health Care Decision Surrogate*; and Eric Johnston, legal consultant on Termination of Life Statute and the *Certificate of Health Care Decision Surrogate*. I have reviewed the Termination of Life Statute, Al. Code Sections, 22-8A-1, et. Seq., and the Administrative Code, Chapter 420-5-19, along with the *Certificate of Health Care Decision Surrogate*, promulgated thereunder. I have also reviewed the attestation provisions for notaries, Al. Code, Sections 36-20-73.1.

## II. ANALYSIS

### ADVANCED DIRECTIVES PROTECT THE WISHES OF A PATIENT

An Advanced Directive allows a patient to select a surrogate to make medical decisions at the end of his or her life when the patient is no longer able to speak for himself or herself. An Advanced Directive is written by the patient, and the surrogate's signature must be witnessed by two witnesses.

## ATTESTATIONS PROTECT THE WISHES OF A PATIENT

The *Certificate of Health Care Decision Surrogate* was created to protect the wishes of a patient at the end of his life when the patient does not have an Advanced Directive.

The patient most likely is unaware of who the surrogate will be. The surrogate is necessarily called on to make an independent decision based on what they believe the patient would wish. The doctors and healthcare facility committees make recommendations, but the surrogate is supposed to make a final independent decision. The process has been implemented to put the weight of the decision on the surrogate, and remove undue influence by the doctors and/or hospital. The legislature identified a hierarchy of potential surrogate medical decision makers who are most likely to fulfill the wishes of the patient, and the attestation makes his decision legally binding. Potential decisions may include taking the patient off life support, and/or removing nutrition, and/or removing water. These decisions are serious and most likely will result in the death of the patient.

The attestation on the *Certificate of Health Care Decision Surrogate* provides an independent third-party verification of the surrogate's identity and assures that the legislative hierarchy is followed. It also provides a warning to the surrogate that he must be truthful under penalty of perjury, that he is who he/she says he/she is, and that he will be held legally responsible for the decision. The surrogate may take the recommendations of the doctors and the healthcare facilities, but he/she is not required to take their recommendations. The attestation protects the wishes of the patient.

## ATTESTATIONS PROTECT THE HOSPITAL AND SURROGATE FROM LIABILITY

The hospital must act consistent with a patient's wishes as expressed by the surrogate. The doctors and hospital make recommendations, but the surrogate makes the decision. If a hospital's action to remove a patient from life support is ever challenged, the notarized *Certificate of Health Care Decision Surrogate* provides some tangible evidence against wrongdoing.

There would be a presumption that a hospital has done its due diligence to find the best decision maker, that the surrogate was appropriately identified by an independent third-party and that the surrogate made an independent decision. Without an attestation, the hospital would provide the form, identify the surrogate, obtain a signature without verification, recommend the decision, and carry out its own decision. **This is precisely what the law was designed to prevent: to keep the hospital from making end-of-life decisions for patients. The attestation provides an independent third-party verification of the identity of the surrogate, thereby protecting both the hospital and the surrogate.**

## THERE IS NO UNDUE BURDEN ON RURAL HEALTHCARE FACILITIES

Rural healthcare facilities regularly attend to end-of-life situations. This is a major purpose for all healthcare facilities. It is inexpensive to obtain a notary license (approx. \$81.00/for 4 year

license) and it doesn't require any particular degree or specialized knowledge. Rural healthcare facilities also are now allowed to use virtual notaries. Al. Code Section, 36-20-73.1

It is important for a healthcare facility to demonstrate respect and honor to each individual patient, particularly at the end of their life. An attestation allows each surrogate to pause and consider the magnitude of the decision he or she is making on behalf of a dying individual.

Removing the attestation on a *Certificate of Health Care Decision Surrogate* removes the pause, the certainty of identity and the protection for the patient's wishes. An attestation is not burdensome when compared with the benefits.

### III. CONCLUSION

**An attestation on a *Certificate of Health Care Decision Surrogate* protects the wishes of a patient at the end of his life by assuring the identity and independence of the most appropriate surrogate decision maker.**

**An attestation on a *Certificate of Health Care Decision Surrogate* protects the healthcare facility and the surrogate decision maker from liability by providing independent third-party verification of the surrogate's identity.**

Rural healthcare facilities are accustomed to dealing with end-of-life situations. It is easy and inexpensive to obtain a notary license. Further, rural healthcare facilities now have access to virtual notaries.

**Please Encourage Your Representative To Vote "No" on HB191**