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ATTORNEY GENERAL OPINION NO. 2015- 1

The Honorable John Rubin
State Representative, 18th District
13803 W. 53rd Street
Shawnee, Kansas 66216

Re: Public Health—Health Care Providers—Do Not Resuscitate Orders or Directives; Definitions; Immunity from Liability

Probate Code—Guardians or Conservators—Guardian's Duties, Responsibilities, Powers and Authorities

Synopsis: The “Kansas-Missouri Transportable Physician Orders for Patient Preferences” (KM-TPOPP) form is not a “do not resuscitate” *directive* pursuant to K.S.A. 65-4941 et seq.; therefore, the immunity from liability provision in K.S.A. 65-4944 is not applicable or available to a health care provider who relies on the KM-TPOPP form as a DNR directive. Whether the KM-TPOPP form is a DNR *order* under the act and whether the immunity provision in K.S.A. 65-4944 is applicable or available to a health care provider who relies in good faith on the DNR order is a question of fact that cannot be answered in this opinion. The KM-TPOPP form cannot override the statutory limits imposed on guardians pursuant to the Act for Obtaining a Guardian or a Conservator, or Both and cannot grant guardians powers or authority that the Act denies them. Cited herein: K.S.A. 58-625; 59-3050; K.S.A. 2014 Supp. 59-3051; 59-3075; K.S.A. 65-28,101; K.S.A. 2014 Supp. 65-28,108; K.S.A. 65-4941; 65-4942; 65-4943; 65-4944; 65-4947.

* * *

Dear Representative Rubin:

As State Representative of the 18th District, you request an Attorney General opinion on two questions relating to the use by Kansas health care facilities of a form titled the “Kansas-Missouri Transportable Physician Orders for Patient Preferences” (KM-TPOPP).¹ You state that this particular form is created and promoted for use by the Center for Practical Bioethics, a nonprofit corporation.²

Do Not Resuscitate

First, you ask whether the KM-TPOPP form provides “a means valid under current Kansas law for directing a ‘do not resuscitate’ (DNR) *order*, so that a health care provider who causes or participates in the withholding or withdrawing of cardiopulmonary resuscitation (CPR) pursuant to it in good faith is immune from civil or criminal liability or liability for unprofessional conduct.”

K.S.A. 65-4941 *et seq.* provides for DNR orders and DNR directives. A “do not resuscitate” directive or “DNR directive” is a written and witnessed document that is voluntarily executed by the declarant in accordance with the requirements of the act to limit the scope of emergency care.³ Specifically, the DNR directive provides that if the declarant’s heart stops beating or if the declarant stops breathing, CPR to restart heart functioning or breathing will not be instituted.⁴ In Kansas, in order to be legally sufficient a DNR directive must be:

- (a) In writing;
- (b) signed by the person making the declaration, or by another person in the declarant's presence and by the declarant's expressed direction;
- (c) dated; and
- (d) signed in the presence of a witness who is at least 18 years of age and who shall not be the person who signed the declaration on behalf of and at the direction of the person making the declaration, related to the declarant by blood or marriage, entitled to any portion of the estate of the declarant according to the laws

¹ We note that in 2014, a bill relating to the creation of a uniform and standardized transportable physician orders for patient preferences form was introduced in the Legislature. The form that would have been created by this bill is similar to but not identical to the KM-TPOPP form you provided us for this review. The bill did not receive a hearing and it died in committee.

² The Attorney General is not expressing an opinion regarding the business practices of the Center and is not endorsing any of its forms or programs.

³ K.S.A. 65-4941(b) and 65-4942.

⁴ Pursuant to K.S.A. 65-4941(a), “Cardiopulmonary resuscitation” means chest compressions, assisted ventilations, intubation, defibrillation, administration of cardiotoxic medications or other medical procedure which is intended to restart breathing or heart functioning.

of intestate succession of this state or under any will of the declarant or codicil thereto, or directly financially responsible for declarant's medical care.⁵

A “do not resuscitate order” or “DNR order” means instruction regarding the withholding or withdrawing of CPR by the physician who is responsible for the care of the patient while admitted to a licensed medical care facility or a licensed adult care home.⁶ A DNR order issued pursuant to the act shall remain valid during transport of the patient between such licensed medical care facility and a licensed adult care home, and vice versa, unless rescinded by the physician who is responsible for the care of the patient.⁷

The immunity provision found in K.S.A. 65-4944 provides:

No health care provider who in good faith causes or participates in the withholding or withdrawing of cardiopulmonary resuscitation pursuant to a “do not resuscitate” order or directive or the presence of a DNR identifier⁸ shall be subject to any civil liability nor shall such health care provider be guilty of a crime or an act of unprofessional conduct.⁹

Because your first question is limited to the withholding or withdrawing of CPR, we only address Section A of the KM-TPOPP form you provided with your request.¹⁰ It states to check one box, as follows:

Cardiopulmonary Resuscitation (CPR): Person has no pulse and is not breathing.

- Attempt Resuscitation (CPR)
 - Do Not Attempt Resuscitation (DNR/no CPR/Allow Natural Death)
- When not in cardiopulmonary arrest, follow orders in B, C, and D (below).

Section A of the KM-TPOPP form is not a DNR *directive* pursuant to K.S.A. 65-4941(b). It fails to follow the statutory form in K.S.A. 65-4942, which requires the signature of the

⁵ K.S.A. 65-4943.

⁶ K.S.A. 65-4941(c).

⁷ K.S.A. 65-4947.

⁸ A DNR identifier is a “medallion or bracelet designed to be worn by a patient which has been inscribed to identify the patient and contains the letters “DNR” or the statement “do not resuscitate” when such DNR identifier is distributed by an entity certified by the emergency medical services board.” K.S.A. 65-4941(e).

⁹ Whether reliance by a health care provider on a physician’s DNR order was in good faith is a question of fact that cannot be answered in an advisory opinion. Additionally, we do not opine on the validity of this statute.

¹⁰ The other sections, which relate to medical interventions when the patient has a pulse and/or is breathing, antibiotics, or medically administered fluids and nutrition, are far beyond the scope of withholding CPR and would offer no limitation on liability even if the KM-TPOPP DNR order functions to immunize a health care provider who withholds CPR.

declarant and the signature of an uninterested adult witness; and the KM-TPOPP does not provide for a revocation of the declaration. Therefore, the immunity from liability provision in K.S.A. 65-4944 is not applicable or available to a health care provider who relies on the KM-TPOPP form as a DNR directive.

Section A of the KM-TPOPP form may be a DNR order pursuant to K.S.A. 65-4941(c), but the specific conclusion depends on the facts of a particular case. Unlike a DNR directive, a DNR order is not required by Kansas law to be in a particular form.¹¹ Under the act, a DNR order is issued by the responsible physician while a patient is admitted to a medical care facility or adult care home and is only effective during that admission or during transport to an adult care home or medical care facility. Thus, if the KM-TPOPP form is signed before a patient is admitted, it is not a DNR order pursuant to K.S.A. 65-4941(c). In addition, if the patient is released from the medical care facility, the KM-TPOPP form can no longer be a DNR order pursuant to K.S.A. 65-4941(c) except during transport back to the adult care home.

A DNR order pursuant to K.S.A. 65-4941 *et seq.*, however, is not the exclusive legal method for defining health care decision-making rights and responsibilities; therefore, a continued analysis of the facts would be required to determine the validity of a physician's order to forego CPR and whether immunity or defenses are available to the health care provider.¹²

Guardianship

Your second question is whether the KM-TPOPP “form invalidly enable[s] a guardian to direct the withholding or withdrawal of life-preserving measures without documenting fulfillment of the statutorily required prerequisites for doing so.”

K.S.A. 59-3050 *et seq.* is known as the Act for Obtaining a Guardian or a Conservator, or Both. Generally, the purpose of the Act is to provide for the protection and care of impaired persons who lack the capacity to manage their estate or to meet their essential needs for physical health, safety or welfare by appointing a guardian¹³ or a conservator.¹⁴ The Act authorizes a guardian to consent, on behalf of the ward, to the withholding or withdrawal of life-saving or life sustaining medical care under three

¹¹ See K.S.A. 65-4941(c).

¹² See K.S.A. 2014 Supp. 65-28,108(d) (“Nothing in this act shall impair or supersede any legal right or legal responsibility which any person may have to effect the withholding or withdrawal of life-sustaining procedures in any lawful manner. In such respect the provisions of this act are cumulative.”).

¹³ A guardian is a certified individual or a corporation certified who or which is appointed by a court to act on behalf of a ward, and who or which is possessed of some or all of the powers and duties set out in K.S.A. 59-3075. K.S.A. 2014 Supp. 59-3051(e).

¹⁴ A conservator is an individual or a corporation who or which is appointed by the court to act on behalf of a conservatee and who or which is possessed of some or all of the powers and duties set out in K.S.A. 59-3078. K.S.A. 2014 Supp. 59-3051(d)

limited circumstances.¹⁵ Each of those three circumstances requires a properly documented act in accordance with law. Otherwise, the guardian is without authority to consent.

Clearly, the KM-TPOPP form cannot override the statutory limits imposed on guardians pursuant to the Act for Obtaining a Guardian or a Conservator, or Both and cannot grant guardians powers or authority that the Act denies them.¹⁶ Therefore, we conclude the KM-TPOPP form does not enable a guardian to direct the withholding or withdrawal of life-preserving measures without fulfillment of one or more of the statutorily required prerequisites, each of which requires legal documentation as a matter of law.

Sincerely,

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¹⁵ See K.S.A. 2014 Supp. 59-3075(e)(7)(A), (B), and (C).

¹⁶ K.S.A. 2014 Supp. 59-3075.