RULES
OF
TENNESSEE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES
DIVISION OF MENTAL RETARDATION SERVICES

CHAPTER 0940-4-4
SURROGATE DECISION MAKING FOR INDIVIDUALS WITH MENTAL RETARDATION
OR MENTAL IMPAIRMENT RELATED TO DEVELOPMENTAL DISABILITIES

TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Rule Number</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>0940-4-04-.01</td>
<td>Purpose</td>
</tr>
<tr>
<td>0940-4-04-.02</td>
<td>Scope</td>
</tr>
<tr>
<td>0940-4-04-.03</td>
<td>Definitions</td>
</tr>
<tr>
<td>0940-4-04-.04</td>
<td>Assessment of Capacity to Make Informed Decisions</td>
</tr>
<tr>
<td>0940-4-04-.05</td>
<td>Qualifications of a Surrogate Decision-Maker</td>
</tr>
<tr>
<td>0940-4-04-.06</td>
<td>Duties of a Surrogate Decision-Maker</td>
</tr>
<tr>
<td>0940-4-04-.07</td>
<td>Rights of a Surrogate Decision-Maker</td>
</tr>
<tr>
<td>0940-4-04-.08</td>
<td>Duties of a Service Provider</td>
</tr>
</tbody>
</table>

**0940-4-04-.01 PURPOSE.**

(1) This chapter establishes a way to get timely and appropriate delivery of routine medical, dental, or mental health treatment for service recipients with mental retardation or mental impairment related to a developmental disability who lack capacity to make informed decisions and do not have:

(a) Parent or guardian for individuals under age 18 or care giver of a minor child under Title 34, Chapter 6, Part 3, Tennessee Code Annotated;

(b) Parent or guardian for individuals under age 16 for mental health treatment;

(c) Conservator, guardian or legal custodian who has court authorization to give consent for such services;

(d) Declaration for mental health treatment which addresses the service to be provided; or

(e) Attorney-in-fact under a durable power of attorney (DPOA) for health care for the services to be provided.

**Authority:** T.C.A. §§4-4-103, 33-1-302, 33-1-305, and 33-3-219 through 33-3-221. **Administrative History:** Original rule filed March 29, 2005; effective June 12, 2005.

**0940-4-04-.02 SCOPE.**

(1) These rules apply to:

(a) An adult:

1. With mental retardation or mental impairment related to a developmental disability;

2. Who is in need of a single routine medical, dental, or mental health treatment or course of treatment; and

3. Lacks capacity to make an informed decision based on an evaluation under Rule 0940-1-6.

(b) An unemancipated child:

1. With mental retardation or mental impairment related to a developmental disability;
(Rule 0940-4-4-.02, continued)

2. Who does not have a parent, legal guardian, legal custodian or caregiver under Part 3, Chapter 6, Title 34, T.C.A.; and

3. Is in need of a single routine medical, dental, or mental health treatment or course of treatment.

(c) An unemancipated child between sixteen (16) and eighteen (18) years old:

1. With mental retardation or mental impairment related to a developmental disability and who has a serious emotional disturbance or mental illness and:

2. Who is in need of a single routine medical, dental, or mental health treatment or course of treatment; and

3. Lacks capacity to make an informed decision based on an evaluation under Rule 0940-1-6.

(2) These rules do not apply to:

(a) An individual with mental illness or serious emotional disturbance who does not have mental retardation or a mental illness due to a developmental disability;

(b) An adult who has:

1. The capacity to make an informed decision about routine medical, dental or mental health treatment;

2. A court-appointed conservator or an attorney in-fact under a durable power of attorney with authority to make decisions; or

3. A declaration for mental health treatment that addresses the service to be provided.

(c) An individual under eighteen (18) years of age who has a parent, legal guardian, or legal custodian; or an individual under sixteen (16) years of age who has a mental illness or serious emotional disturbance and has a parent, legal guardian, legal custodian or an attorney-in-fact under a durable power of attorney for health care.

(d) An emergency as used in the Good Samaritan Law, T.C.A. §63-6-218.

Authority: T.C.A. §§4-4-103, 33-1-302, 33-1-305, and 33-3-219 through 33-3-221. Administrative History: Original rule filed March 29, 2005; effective June 12, 2005.

0940-4-04-.03 DEFINITIONS.

(1) “Actively involved” means involvement with the individual based on the following:

(a) Observed interactions of the person with the individual;

(b) Advocacy for the best interests of the individual;

(c) Knowledge of and sensitivity to the individual’s preferences, values and beliefs;

(d) Ability to communicate with the individual; and
(e) Availability to the individual for assistance or support when needed.

(2) “Caregiver” means a person designated by a parent to care for a minor child under Title 34, Chapter 6, Part 3, T.C.A.

(3) “Conservator” means a person appointed by a court under the conservatorship law in Title 34, Chapter 3 or the Veterans Administration Guardianship law in Title 34, Chapter 5, T.C.A., with authority to make decisions for an adult who lacks capacity to make informed decisions.

(4) “Declaration for mental health treatment” means a document authorized by Part 10, Chapter 6, Title 33, T.C.A., that allows a competent adult or emancipated minor to indicate how he/she wants to be treated or not be treated when he/she is unable to make informed decisions about mental health treatment.

(5) “Developmental disability” means a condition based on having either a severe, chronic disability under T.C.A. §33-1-101(10) or mental retardation under T.C.A. §33-1-101(17).

(6) “Durable power of attorney” (DPOA) means a legal document authorized by Title 34, Chapter 6, Part 2, T.C.A., that allows the attorney-in-fact to make health care decisions for the individual.

(7) “Guardian” means a person appointed by a court under the guardianship law in Title 34, Chapter 1, T.C.A., with authority to make decisions for an unemancipated individual under eighteen (18) years of age.

(8) “Legal custodian” means a person appointed by a court under Title 37, Tennessee Code Annotated with authority to make decisions for a child who lacks capacity to make decisions.

(9) “Mental retardation” means substantial limitations in functioning as shown by significantly sub-average intellectual functioning that exists concurrently with related limitations in two (2) or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; and that are manifested before eighteen (18) years of age. [T.C.A. §33-1-101(17)]

(10) “Qualified examiner” means:
    (a) A licensed physician to determine capacity to make an informed decision about routine medical or mental health treatment;
    (b) A licensed psychologist to determine capacity to make an informed decision about routine mental health treatment;
    (c) A licensed dentist to determine capacity to make an informed decision about routine dental care.

(11) “Routine treatment” means commonplace, everyday medical, dental or mental health treatment but excludes psychosurgery, convulsive therapy, and elective surgery, or services solely for behavior control of an individual.

(12) “Service provider” means an individual who provides routine medical, dental, or mental health treatment for individuals with a diagnosis of mental retardation or mental impairment related to a developmental disability.

(13) “Service recipient” means a person who is receiving service, has applied for service, or for whom someone has applied for or proposed service because the person has a mental illness, serious emotional disturbance, or a developmental disability. [T.C.A. §33-1-101(21)]
(14) “Severe, chronic disability” in a person:

(a) Over five (5) years of age means a condition that:

1. Is attributable to a mental or physical impairment or combination of mental and physical impairments;

2. Is manifested before twenty-two (22) years of age;

3. Is likely to continue indefinitely;

4. Results in substantial functional limitations in three (3) or more of the following major life activities:
   (i) Self-care;
   (ii) Receptive and expressive language;
   (iii) Learning;
   (iv) Mobility;
   (v) Self-direction;
   (vi) Capacity for independent living; and
   (vii) Economic self-sufficiency; and

5. Reflects the person’s need for a combination and sequence of special, interdisciplinary, or generic services, supports, or other assistance that is likely to continue indefinitely and to need to be individually planned and coordinated.

(b) Up to five (5) years of age means a condition of substantial developmental delay or specific congenital or acquired conditions with a high probability of resulting in developmental disability as defined for persons over five (5) years of age if services and supports are not provided.


0940-4-04.04 ASSESSMENT OF CAPACITY TO MAKE AN INFORMED DECISION.

(1) Capacity to make informed decisions must be presumed for each adult unless the adult has a conservator. An unemancipated child does not have the capacity to make informed decisions. An emancipated child has the same rights and responsibilities as an adult within the scope of the court order.

(2) When a service provider has reasonable cause to believe that an adult service recipient lacks capacity to make informed decisions, he/she must arrange for a qualified examiner to assess capacity under Department of Mental Health and Developmental Disabilities Rule 0940-1-6. When a service provider has reasonable cause to believe a service recipient sixteen (16) years of age or older lacks capacity to make informed mental health treatment decisions, s/he must arrange for a qualified examiner to assess capacity under Department of Mental Health and Developmental Disabilities Rule 0940-1-6.

(3) If the results of the assessment of capacity indicate that the individual:
(Rule 0940-4-4-.04, continued)

(a) Has the capacity to make an informed decision, only the individual can make the decision regarding the specific treatment recommended;

(b) Lacks the capacity to make an informed decision regarding the routine medical, dental or mental health treatment, then a surrogate decision-maker may be designated.

(4) The results of the assessment and resultant action must be documented and maintained in the individual’s record. The documentation must at least contain a description of the evidence obtained which supports either that the individual can make an informed decision or that there is a designated surrogate decision-maker.


0940-4-04-.05 QUALIFICATIONS OF A SURROGATE DECISION-MAKER.

(1) A surrogate decision-maker must be an adult whom the individual does not reject and must be one of the following adults in descending order of preference:

(a) The individual’s spouse;

(b) The individual’s adult child;

(c) The individual’s parent or stepparent;

(d) The individual’s adult sibling;

(e) Any other adult relative of the individual; or

(f) Any other adult.

(2) The surrogate decision-maker must:

(a) Know about the individual’s developmental disability and condition as it relates to the recommended service;

(b) Be actively involved in the individual’s life;

(c) Be willing to make a decision for the individual on the routine medical, dental or mental health treatment;

(d) Appear to be reasonably capable of making such a decision and likely to make it objectively in the individual’s best interest; and

(e) Appear to have no conflict of interest with the individual.

Authority: T.C.A. §§4-4-103, 33-1-302, 33-1-305, and 33-3-219 through 33-3-221. Administrative History: Original rule filed March 29, 2005; effective June 12, 2005.

0940-4-04-.06 DUTIES OF A SURROGATE DECISION-MAKER.

(1) Obtain information on the following:
(Rule 0940-4-4-.05, continued)

(a) The nature of the proposed treatment or procedure;

(b) The possible risks, including side effects and potential benefits of the proposed treatment, procedure or course of action;

(c) The alternative treatments or courses of action and their attendant risks and potential benefits; and

(d) The period of time involved such as the immediacy of the need for treatment and the length of time the consent will remain valid.

(2) Make treatment decisions for an emancipated individual who lacks capacity and does not have a conservator, court appointed custodian, attorney-in-fact under a durable power of attorney or declaration for mental health treatment, which addresses the routine treatment recommended. The surrogate decision-maker may give or withhold consent for treatment.

(3) If a surrogate decision-maker wishes to discontinue acting as a surrogate, notify the service provider.

Authority: T.C.A. §§4-4-103, 33-1-302, 33-1-305, and 33-3-219 through 33-3-221. Administrative History: Original rule filed March 29, 2005; effective June 12, 2005.

0940-4-04-.07 RIGHTS OF A SURROGATE DECISION-MAKER.

(1) A surrogate decision-maker who acts in good faith, reasonably and without malice in connection with the decision is free from all liability, civil or criminal, by reason of the surrogate’s decision.

Authority: T.C.A. §§4-4-103, 33-1-302, 33-1-305, and 33-3-219 through 33-3-221. Administrative History: Original rule filed March 29, 2005; effective June 12, 2005.

0940-4-04-.08 DUTIES OF A SERVICE PROVIDER.

(1) Follow the decision of an individual who has the authority or capacity to make an informed decision.

(2) If there is no individual who has the authority or capacity to make an informed decision, and a service provider has reasonable cause to believe that a service recipient lacks capacity to make an informed decision, the service provider must:

   (a) determine if there is a declaration for mental health treatment which addresses the routine treatment recommended and follow the declaration, or

   (b) arrange for a qualified examiner to assess capacity under Rule 0940-1-6-.03(5)(b) or if the service provider is a qualified examiner, perform the assessment.

   1. If the qualified examiner determines that the individual lacks capacity and needs a surrogate decision-maker, the service provider must:

      (i) Select a surrogate decision-maker in conformity with 0940-4-04-.05, document the identity of the surrogate decision-maker and obtain consent from the surrogate decision-maker.

   (3) Arrange for reassessment of the individual’s capacity to make informed decisions when the individual or the service provider, conservator, guardian, court-appointed custodian, or attorney-in-fact under a DPOA believes the individual has capacity. Only a qualified examiner may perform a capacity reassessment.
(Rule 0940-4-4-.08, continued)

(4) Inform the surrogate decision-maker of:
    (a) The nature of the proposed treatment or procedure and any immediate need;
    (b) The possible risks, including side effects and potential benefits of the proposed treatment, procedure or course of action;
    (c) The alternative treatments or courses of action and their attendant risks and potential benefits;
    (d) The right to additional information; and
    (e) The right to give or withdraw consent.

(5) Document a surrogate decision-maker’s decision in the service provider’s file.

(6) If a surrogate decision-maker withdraws from decision-making, document the decision and the justification in the service provider’s file.

(7) When a surrogate decision-maker withdraws, identify a new surrogate decision-maker if further routine treatment or course of treatment is needed.

(8) When there is no person willing or qualified to serve in the capacity of surrogate decision-maker, the service provider shall document his/her efforts to obtain a surrogate decision-maker. The service provider shall inform the individual that the required service cannot be provided without the consent of a surrogate decision-maker, conservator, guardian, court-appointed custodian, attorney-in-fact under a DPOA or a declaration for mental health treatment.

(9) Act in reliance on the surrogate decision-maker’s decision.

(10) If there is a disagreement about the right of a person to act as a surrogate decision-maker, notify the parties that the service may be provided when the disagreement has been resolved.

Authority: T.C.A. §§4-4-103, 33-1-302, 33-1-305, and 33-3-219 through 33-3-221. Administrative History: Original rule filed March 29, 2005; effective June 12, 2005.