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## Judiciary Committee

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### HB 2367

**Title:** An act relating to advance directives for mental health treatment.

**Brief Description:** Authorizing advance directives for mental health treatment.

**Sponsors:** Representatives Lantz, Ballasiotes, Cody, McDermott, Veloria, Lysen, Darneille, Dickerson, Linville, Lovick, Edwards, Kagi and Kenney.

#### Brief Summary of Bill

- Establishes procedures for creating a mental health advance directive.
- Allows revocation of a directive if the person has capacity.
- Limits liability of those providing treatment according to a person's directive.
- Codifies a sample form of an advance directive.

**Hearing Date:** 1/25/02

**Staff:** Trudes Hutcheson (786-7384).

#### **Background:**

Before a physician can administer medical treatment, the patient must give informed consent to the particular medical treatment. When a person is incapacitated or unable to consent to health care, informed consent may still be obtained under certain circumstances.

#### ***Durable Power of Attorney***

A person (the "principal") may create a power of attorney that authorizes another person (an agent called "the attorney in fact") to make certain decisions, including health care decisions, for the principal. Depending on the principal's intent, a power of attorney may take effect at any time or upon the occurrence of some event.

The attorney in fact may not consent to involuntary commitment of the principal, therapy that

induces convulsion, surgery solely for the purpose of psychosurgery, or other psychiatric or mental health procedures that restrict freedom of movement.

With certain exceptions, the principal's physician, the physician's employees, and owners, administrators, or employees of the principal's health care facility may not act as the person's attorney in fact.

### ***Guardianship***

If a person is incapacitated, the court may appoint a guardian to care for the incapacitated person and assert that person's rights and best interests. A person is incapacitated for the purpose of guardianship if the court finds that the person has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety. Like an attorney in fact, the guardian cannot consent to certain types of mental health treatment.

### ***Involuntary Treatment***

A person suffering from a mental disorder may not be involuntarily committed for treatment except after certain procedures are followed. A county designated mental health professional (CDMHP) who receives information that a person, as a result of a mental disorder, either presents a likelihood of serious harm or is gravely disabled may file a petition for initial detention. The court may order the person to appear, within 24 hours, at a designated treatment facility for not more than a 72 hour evaluation and treatment period. If the person fails to appear, he or she may be involuntarily taken into custody for evaluation and treatment. If a person presents an *imminent* likelihood of serious harm or is in *imminent* danger because of being gravely disabled, that person may be taken into emergency custody for treatment without a CDMHP first filing a petition. There are various procedures the courts, CDMHPs, and treatment facilities must follow under the involuntary treatment laws.

A person may voluntarily admit himself into an inpatient treatment facility. Generally, a person voluntarily admitted must be released immediately upon that person's request. State and federal case law suggests that if a person is unable to give informed consent to inpatient treatment at the time of admission, the person's admission must be treated as an involuntary commitment.

### ***Advance Directives under the Natural Death Act (Living Wills)***

Under the Natural Death Act, a person may prepare an advance directive to specify that artificial means are not to be used to extend his or her life. The person must sign the directive in the presence of two witnesses who are not related to the person by blood or marriage and who are not entitled to any portion of the person's estate. The directive may be revoked at any time by the person, without regard to the person's mental state or competency.

### **Summary of Bill:**

The Legislature recognizes that a mental health advance directive allows a person to express treatment choices before the person loses that ability due to mental illness.

### ***Capacity***

A person with capacity is an adult who has the ability to understand the significance of a directive or its revocation and who is free from fraud and undue influence. An adult is presumed to have capacity to create or revoke a mental health advance directive. A person declared incapacitated may subsequently reassert his or her capacity and it is presumed that the person has regained capacity until declared otherwise. A person may be declared an incapacitated person only by court order or by two mental health professionals, one of whom must be a psychiatrist.

### ***Creation of a directive***

A directive must be in writing, signed, and witnessed by two adults. The witnesses must certify that they know the person and that the person appeared to have capacity. The bill lists who may not act as witnesses.

A person may make the directive operative immediately or at a later time. A person also may make the directive expire within a certain time or remain effective indefinitely.

A nonexclusive list sets forth provisions that may be included in a directive, such as instructions, appointment of an agent, and consent to be admitted into a facility for treatment.

### ***Authority of an agent to consent to inpatient treatment***

A person may appoint an agent in the directive to act as a surrogate decision-maker. The person may also authorize the agent to consent on the person's behalf to admission for inpatient treatment for up to 72 hours. If a person refuses to be admitted after the agent consents on the person's behalf, the refusal is treated as a revocation of that portion of the directive. The agent may seek a determination of the person's capacity to revoke.

If a determination of capacity is not made within 48 hours of the time the agent sought the determination, the person's admission to inpatient mental health treatment must comply with the involuntary treatment laws. If it is determined that the person does not have capacity to revoke, then the agent's consent on the person's behalf is a voluntary consent.

The restrictions under the power of attorney statutes on who may act as an attorney in fact applies to who may act as an agent in an advance directive. In addition, owners, administrators, or employees of long-term care facilities where the principal resides or receives care are included in the list of persons prohibited from being an agent in the power of attorney statutes.

### ***Revocation of the directive***

A person with capacity may revoke all or part of the directive at any time. If an agent or professional person believes a person does not have capacity to revoke, the agent or professional person may seek a capacity determination within 48 hours of the attempted revocation. If a court or two mental health professionals find that it is more likely than not the person had the capacity to revoke, then the revocation is valid. If a determination is not made within 48 hours of the time the agent seeks a determination, it is presumed the person had capacity to revoke.

### ***Duties of a professional person***

A professional person shall act in accordance with the directive to the fullest extent possible,

consistent with reasonable medical practice, the availability of treatments, and applicable law. If the professional person cannot comply, he or she must offer to withdraw from treating the person.

If the person has been involuntarily admitted under the involuntary treatment laws, the professional person must still provide treatment according to the directive to the fullest extent possible. The professional person may provide treatment that is inconsistent with the directive if the directive authorizes that person to use his or her best medical judgement in cases of emergencies.

***Other provisions***

A private or public agency, government entity, professional person, or personnel acting under the direction of a professional person, or any health care facility or long-term care facility, is not subject to civil liability for: (a) providing treatment in good faith in accordance with a directive; or (b) not acting in accordance with a directive when there was no actual knowledge of the directive.

The bill specifically states that no new right of action is created and nothing in the bill denies or alters any existing legal right or cause of action.

A sample form is provided containing preferences and instructions on treatment, facilities, physicians, and other matters.

**Appropriation:** None.

**Fiscal Note:** Not Requested.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.