

HOUSE BILL REPORT

HB 2367

As Reported by House Committee On:
Judiciary

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 History:

Committee Activity:

Judiciary: 1/25/02, 2/8/02 [DPS].

Brief Summary of Substitute Bill

- Establishes procedures governing the creation of mental health advance directives, including who may act as witnesses and who may be appointed as agents.
- Allows a court or two mental health professionals to determine if a person is incapacitated for the purposes of mental health advance directives.
- 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.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Lantz, Chair; Hurst, Vice Chair; Dickerson, Jarrett, Lovick and Lysen.

Minority Report: Do not pass. Signed by 3 members: Representatives Carrell, Ranking Minority Member; Boldt and Esser.

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.

Under the statutes governing inpatient mental health treatment, "mental health professional" means a psychiatrist, psychologist, psychiatric nurse, or social worker and other professionals as may be defined by DSHS rules. "Professional person" means a mental health professional, physician, registered nurse, and others as defined by DSHS rules.

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 Substitute 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, who is free from fraud and undue influence, and who is not incapacitated under the guardianship laws. 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. An incapacitated person means a person who is not a person with capacity and who has been found to have a demonstrated inability to provide for essential health or mental health needs.

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 for mental health treatment, appointment of an agent, and consent to be voluntarily admitted into a facility for treatment.

Authority of an agent to consent to inpatient treatment

A person may appoint an agent in the directive and authorize the agent to consent on the person's behalf to admission for inpatient treatment for up to 72 hours. If, after 72 hours, the person does not consent to remain for additional treatment, the person must be released during reasonable daylight hours following the expiration of the 72 hours.

If a person refuses, either orally or in writing, 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. Any admission into inpatient treatment may only be imposed pursuant to the involuntary treatment laws.

An agent may not use or threaten physical force, abuse, neglect, financial exploitation, or abandonment, as defined under the laws regarding vulnerable adults, to enforce the directive. Any person who is voluntarily admitted to inpatient mental health treatment shall have no less than all the rights provided to individuals who are voluntarily admitted to treatment under the existing treatment and mental health laws.

The restrictions under the power of attorney statutes governing 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

Upon receiving a directive, a professional person treating the patient shall make the directive part of the patient's medical record and shall be deemed to have actual knowledge of its contents. Whenever possible, the professional person shall inform the person if he or she may be precluded from honoring all or part of the directive.

A professional person shall act in accordance with the directive to the fullest extent possible, consistent with applicable law. If the professional person cannot comply, he or

she must offer to withdraw from treating the person unless no other treatment provider is reasonably available.

If the person has been admitted to a facility under the involuntary treatment laws, the professional person must still provide treatment according to the directive to the fullest extent possible and as permitted by the applicable involuntary detention laws, consistent with reasonable medical practice and the availability of treatment. 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.

A professional person may decline to follow a provision that requires health care contrary to generally accepted health care standards applicable to the professional person or that requires treatment that is not available despite reasonable efforts.

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.

Substitute Bill Compared to Original Bill:

The original bill did not specify that a person who consented to voluntary treatment, but later refused, can do so orally or in writing and that such refusal shall be an automatic revocation of that portion of the directive. The original also did not specify that an agent may not use physical force, abuse, neglect, financial exploitation, or abandonment to enforce the directive. The substitute allows a provider to decline to follow a provision in a directive that requires health care contrary to generally accepted health care standards applicable to the provider or that is not available despite reasonable efforts. The substitute bill also provides that after a court finds a person has capacity, a subsequent capacity determination may be made by a court or two mental health professionals when there has been a subsequent change in the person's condition. The substitute clarifies certain definitions in the bill. An incapacitated person is a person who has shown a demonstrated inability to provide for essential health or mental health care needs. A person with capacity cannot be a person who has been declared incapacitated under the guardianship laws. All references to electroshock therapy and physical restraints have been removed from the form.

Appropriation: None.

Fiscal Note: Not Requested.

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

Testimony For: (In support) Mental health advance directives give power to the patient to direct treatment and helps establish their rights. These directives help provide consistent and continuous care and help to divert a serious mental health crises. There is legitimate confusion in the field right now about the effectiveness of mental health advance directives. This bill is intended to give guidance to consumers, the medical community, and attorneys. Patients need to get treatment but still have their due process rights respected. An advance directive will provide a person with the opportunity to get treatment that is alternative to just hospitalization. Advance directives will help people think about what they really want regarding treatment. The standard for when a person is incapacitated is lower than the standard in the involuntary treatment act so that a person can get treatment sooner and before the person reaches the point of needing involuntary treatment.

(With concerns) An advance directive is a good tool when all the providers are ethical, but it can be dangerous if they are not. There are loopholes in the bill that need to be addressed. Current law prohibits a doctor from admitting a person who cannot give informed consent. An advance directive gives a person earlier access to treatment, but the informality of these directives means there is no oversight. If more safeguards are put in, people will be less afraid to use advance directives. How a court or two mental health professionals determine incapacity and when a person can revoke a directive remain central issues in this bill.

Testimony Against: There is no need for this bill. It may actually disempower the mentally ill. Psychiatric advance directives were originally created so the patient can refuse certain treatment, but this bill goes beyond just refusing treatment. This bill is designed to by-pass the involuntary treatment laws. Directives might be used for purposes of detaining patients against their wishes. In the managed care arena, patients don't have unlimited choices. There is an assumption that treatment is always good, but drugs are sometimes harmful. People with mental illness have a right to the same due process as others. Allowing a psychiatrist to make the capacity determination raises concerns. There may be a liability problem for a hospital presented with a person who has an advance directive.

Testified: (In support) Representative Lantz, prime sponsor; Debra Srebnik, University of Washington; Lisa Brodoff, Seattle University; David Lord, Washington Protection and Advocacy System; and Brad Boswell, National Alliance for the Mentally Ill.

(With concerns) Kary Hyre, Long-Term Care Ombudsman Program; and Jeff Crollard, Attorney for the Long-Term Care Ombudsman Program.

(Opposed) Karl Brimmer, Department of Social and Health Services, Mental Health Division; Keith Hoeller, Center for the Study of Psychiatry; and Richard Warner, President of the Citizens Commission of Human Rights.