
Judiciary Committee

ESSB 6589

Title: An act relating to mental health advance directives.

Brief Description: Authorizing mental health advance directives.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senators Keiser and Long).

Brief Summary of Engrossed Substitute Bill

- Establishes procedures and requirements for creating a mental health advance directive.
- Establishes the duties and liabilities of agents and health care providers regarding directives.
- Provides a model form of an advance directive.

Hearing Date: 2/28/02

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. 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, and 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 the importance of mental health advance directives. A person with capacity may create an advance directive for mental health.

Capacity: A person with capacity is an adult who is able to give informed consent. An adult is presumed to be a person with capacity. A person may be declared an incapacitated person only by a court order; one mental health professional and one health care provider; or two health care providers.

If a person, agent, professional person, or health care provider seeks a determination of a person's capacity, the determination must be made within 48 hours of the request for a determination. If a determination has not been made within that time, the principal shall be considered to have been a person with capacity at the time of question.

"Health care provider" means licensed osteopath, osteopath physician's assistant, physician,

physician's assistant, or advanced registered nurse practitioner. "Mental health professional" means a psychiatrist, psychologist, psychiatric nurse, or social worker.

Creation of a directive: A directive must be in writing, signed, and witnessed by two adults. The bill lists who may not act as witnesses. 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.

A directive may not create an entitlement to treatment; obligate any health care provider to pay the costs associated with treatment; or obligate any health care provider to be responsible for the nontreatment personal care or the person's personal affairs.

A person with capacity may revoke all or part of the directive at any time by written statement.

Duties and liability of an agent: An agent must act in good faith and must make decisions on behalf of the principal pursuant to the principal's expressed preferences. If the principal's preferences are not expressed or known, the agent must make decisions based on what the principal would have decided. 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.

An agent may not use or threaten physical force, abuse, neglect, financial exploitation, or abandonment of the principal to enforce the terms of the directive. An agent is not liable for the costs of treatment provided to the principal unless the directive provides otherwise and the agent agrees.

Consent to inpatient treatment: If the directive authorizes the agent to consent on the person's behalf to admission for inpatient treatment and the person refuses to be admitted, the person may be admitted if a physician at the treating facility:

- (a) evaluates the person's mental condition and determines, along with another health care provider or mental health professional, that the person is incapacitated;
- (b) obtains informed consent from the agent, if any;
- (c) makes a written determination that the person needs inpatient evaluation or inpatient treatment that cannot be accomplished in a less restrictive setting; and
- (d) documents a summary of the physician's finding and recommendations for treatment in the person's medical chart.

If the admitting physician is not a psychiatrist, the person shall receive a complete psychological assessment by a mental health professional within 24 hours of admission to determine the continued need for inpatient services. If a person is determined to be incapacitated by providers as opposed to a court, the person may immediately seek injunctive relief for release.

Duties of a professional person: A health care provider or professional person who has obtained a person's directive shall act in accordance with the directive to the fullest extent possible unless:

- (a) compliance would violate the accepted standard of care;
- (b) the requested treatment is not available;
- (c) compliance would violate applicable law;
- (d) it is an emergency and compliance would endanger any person's life or health; or
- (e) the person, without the benefit of the treatment, is incapable of participating in any available treatment plan that will give the person a realistic opportunity of improving his or her condition.

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.

A provider is not subject to liability or professional conduct sanctions when, in good faith, the provider:

- (a) treats a person in absence of actual knowledge of the directive or provides treatment pursuant to a directive in absence of actual knowledge of a revocation, unless absence of actual knowledge is due to negligence;
- (b) determines the person is or is not incapacitated;
- (c) administers or does not administer treatment according to a directive in good faith reliance upon the validity of the directive and the directive is later invalid;
- (d) does not provide treatment based on one of the reasons listed in the bill; or
- (e) provides treatment in accordance with a 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.