

RESOLUTION 05-07-05

DIGEST

Health Care: Limited Involuntary Mental Health Placement of Principal by Agent

Amends Probate Code section 4652 to allow limited involuntary commitment of the principal by the agent named in an advance health care directive.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to 03-11-05, 5-06-05, 5-08-05 and 5-09-05.

Reasons:

This resolution amends Probate Code section 4652 to allow limited involuntary commitment of the principal by the agent named in an advance health care directive. This resolution should be disapproved because placing this power in an agent under an advance health care directive would create opportunities for abuse of the civil rights of the principal without the protections afforded by the Lanterman-Petris-Short Act (LPSA) for involuntary civil commitments and treatment for mentally disordered individuals (Welf. & Inst. Code, §§ 5000 *et seq.*).

Under the present law, the LPSA 72-hour hold is the only realistic method by which a person can be detained and held on a civil basis, with the exception of the power of a conservator with dementia powers to place a conservatee in a "secured perimeter residential care facility for the elderly..." or a "locked and secured nursing facility which specializes in the care and treatment of people with dementia...." (Prob. Code, § 2356.5(b).) The LPSA and Probate Code section 2356.5 contain detailed provisions for the protection of the civil rights of the person detained. The proposed resolution contains no scheme or method for protection of the individual from an ill-intentioned agent. It does not define "mental health facility," "mental illness" or "mental disability." Nor does it contain a provision stating that the agent actually has the power to make the involuntary commitment, or identifying the person or persons having authority to enforce the detention, or other provisions to limit the time or scope of the detention.

SECTION/COMMITTEE REPORTS

TRUSTS & ESTATES COMMITTEE RECOMMENDATION

DISAPPROVE

The proponent's rationale for this proposal is the difficulty in obtaining qualified persons to take action in a §5150 case due to budget cuts. While budget cuts have undoubtedly impacted this area, the remedy proposed by this resolution is far too broad and raises the specter of confinement of individuals subject to conservatorship or who have executed a health care power of attorney with little or no restrictions. The Section believes that individuals would hesitate to execute a power of attorney if the individual knew that the designated agent had the power to involuntarily confine the principal.

This position is only that of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 4652 to read as follows:

1 § 4652

2 This division does not authorize consent to any of the following on behalf of a patient:
3 (a) Commitment or placement in a mental health treatment facility.
4 (b) The prohibition in subdivision (a) does not apply to a patient who has previously been
5 diagnosed with a mental illness and/or mental disability, provided the commitment or placement is for
6 a period not to exceed seventy-two (72) hours and is solely for the purpose of evaluation and
7 stabilization.
8 ~~(b)~~ (c) Convulsive treatment (as defined in Section 5325 of the Welfare and Institutions
9 Code).
10 ~~(c)~~ (d) Psychosurgery (as defined in Section 5325 of the Welfare and Institutions Code).
11 ~~(d)~~ (e) Sterilization.
12 ~~(e)~~ (f) Abortion.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS:

Existing Law: Specifically limits the consent granted to a health care agent or conservator not to include placement in a mental health facility for any reason.

This Resolution: Would expand the definition of consent to a health care decision to include involuntary placement in a mental health facility for a period not to exceed seventy-two (72) hours for the sole purpose of evaluation and stabilization if the principal or conservatee had been previously diagnosed with a mental illness or disability.

The Problem: If an individual has been diagnosed with a mental health illness or disability, is taking medication and then decompensates, the only alternative is to 5150 them as currently set forth in the Welfare and Institutions Code. However, this is a drastic procedure, difficult to obtain and time consuming to the point of being potentially dangerous for the individual and/or the public.

IMPACT STATEMENT:

This resolution affects Probate Code Sections 2356.5, 4617 and 4701 and Welfare and Institutions Code Section 5150.

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COUNTERARGUMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

This amendment and the amendments proposed in companion resolutions 5-06-05, 5-08-05 and 5-09-05 are unnecessary and create the potential for abuse of the rights of conservatees. Conservators may now take conservatees to a mental health facility and/or call the police, and they have authority to recommend placement in the facility for evaluation and stabilization. The amendment would also create another hurdle to the establishment of conservatorships. Proposed conservatees are likely to be less willing to accept a conservator if the conservator has the authority to place them in a mental health facility absent the recommendation of a mental health professional.

BAR ASSOCIATION OF SAN FRANCISCO

This resolution should be disapproved for the same reasons as stated with respect to Resolutions 03-11-05, 05-06-05, and 05-08-05. There is no reason to give the power to involuntarily commit a principal to a conservator or an attorney-in-fact under an advanced health care directive.