

RESOLUTION 05-08-05

DIGEST

Advance Health Care Directives: Involuntary Placement in Mental Health Facility

Amends Probate Code section 4701 to modify the statutory advance health care directive form to explain that the agent could commit the principal involuntarily to a mental health facility.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to 03-11-05, 5-06-05, 5-07-05 and 5-09-05.

Reasons:

This resolution amends Probate Code section 4701 to modify the statutory advance health care directive form to explain that the agent could commit the principal involuntarily to a mental health facility. 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 4701 to read as follows:

1 § 4701

2 The statutory advance health care directive form is as follows:

3

4 ADVANCE HEALTH CARE DIRECTIVE
5 (CALIFORNIA PROBATE CODE SECTION 4701)

6

7 Explanation

8 You have the right to give instructions about your own health care. You also have the right to
9 name someone else to make health care decisions for you. This form lets you do either or both of
10 these things. It also lets you express your wishes regarding donation of organs and the designation
11 of your primary physician. If you use this form, you may complete or modify all or any part of it. You
12 are free to use a different form.

13 Part 1 of this form is a power of attorney for health care. Part 1 lets you name another
14 individual as agent to make health care decisions for you if you become incapable of making your
15 own decisions or if you want someone else to make those decisions for you now even though you
16 are still capable. You may also name an alternate agent to act for you if your first choice is not
17 willing, able, or reasonably available to make decisions for you. (Your agent may not be an operator
18 or employee of a community care facility or a residential care facility where you are receiving care, or
19 your supervising health care provider or employee of the health care institution where you are
20 receiving care, unless your agent is related to you or is a coworker.)

21 Unless the form you sign limits the authority of your agent, your agent may make all health
22 care decisions for you. This form has a place for you to limit the authority of your agent. You need
23 not limit the authority of your agent if you wish to rely on your agent for all health care decisions that
24 may have to be made. If you choose not to limit the authority of your agent, your agent will have the
25 right to:

26 Consent or refuse consent to any care, treatment, service, or procedure to maintain,
27 diagnose, or otherwise affect a physical or mental condition.

28 Select or discharge health care providers and institutions.

29 Approve or disapprove diagnostic tests, surgical procedures, and
30 programs of medication.

31 Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all
32 other forms of health care, including cardiopulmonary resuscitation.

33 Make anatomical gifts, authorize an autopsy, and direct disposition of remains.

34 Place you in a mental health facility for a period not to exceed seventy-two (72) hours, solely for the
35 purpose of evaluation and stabilization, if you have been previously diagnosed with a mental illness
36 and/or mental disability prior to the placement.

37 Part 2 of this form lets you give specific instructions about any aspect of your health care,
38 whether or not you appoint an agent. Choices are provided for you to express your wishes regarding
39 the provision, withholding, or withdrawal of treatment to keep you alive, as well as the provision of
40 pain relief. Space is also provided for you to add to the choices you have made or for you to write out
41 any additional wishes. If you are satisfied to allow your agent to determine what is best for you in
42 making end-of-life decisions, you need not fill out Part 2 of this form.

43 Part 3 of this form lets you express an intention to donate your bodily organs and tissues following
44 your death.

45 Part 4 of this form lets you designate a physician to have primary responsibility for your
46 health care.

47 After completing this form, sign and date the form at the end. The form must be signed by
48 two qualified witnesses or acknowledged before a notary public. Give a copy of the signed and
49 completed form to your physician, to any other health care providers you may have, to any health
50 care institution at which you are receiving care, and to any health care agents you have named. You
51 should talk to the person you have named as agent to make sure that he or she understands your
52 wishes and is willing to take the responsibility.

53 You have the right to revoke this advance health care directive or replace this form at any
54 time.

55

56 * * * * *

57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111

PART 1
POWER OF ATTORNEY FOR HEALTH CARE

(1.1) DESIGNATION OF AGENT: I designate the following individual as my agent to make health care decisions for me:

(name of individual you choose as agent)

(address) (city) (state) (ZIP Code)

(home phone) (work phone)

OPTIONAL: If I revoke my agent's authority or if my agent is not willing, able, or reasonably available to make a health care decision for me, I designate as my first alternate agent:

(name of individual you choose as first alternate agent)

(address) (city) (state) (ZIP Code)

(home phone) (work phone)

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health care decision for me, I designate as my second alternate agent:

(name of individual you choose as second alternate agent)

(address) (city) (state) (ZIP Code)

(home phone) (work phone)

(1.2) AGENT'S AUTHORITY: My agent is authorized to make all health care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care to keep me alive, except as I state here:

(Add additional sheets if needed.)

(1.3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE: My agent's authority becomes effective when my primary physician determines that I am unable to make my own health care decisions unless I mark the following box. If I mark this box (), my agent's authority to make health care decisions for me takes effect immediately.

112 (1.4) AGENT'S OBLIGATION: My agent shall make health care decisions for
113 me in accordance with this power of attorney for health care, any instructions I give in Part 2 of this
114 form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown,
115 my agent shall make health care decisions for me in accordance with what my agent determines to
116 be in my best interest. In determining my best interest, my agent shall consider my personal values
117 to the extent known to my agent.

118 (1.5) AGENT'S POSTDEATH AUTHORITY: My agent is authorized to make anatomical gifts,
119 authorize an autopsy, and direct disposition of my remains, except as I state here or in Part 3 of this
120 form:

121 -----
122 -----
123 -----
124 -----
125 -----

126 (Add additional sheets if needed.)

127
128 (1.6) NOMINATION OF CONSERVATOR: If a conservator of my person needs to be
129 appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing,
130 able, or reasonably available to act as conservator, I nominate the alternate agents whom I have
131 named, in the order designated.

132 PART 2
133 INSTRUCTIONS FOR HEALTH CARE

134 If you fill out this part of the form, you may strike any wording you do not want.

135 (2.1) END-OF-LIFE DECISIONS: I direct that my health care providers and others involved
136 in my care provide, withhold, or withdraw treatment in accordance with the choice I have marked
137 below:

138 --
139 -- (a) Choice Not To Prolong Life
140 I do not want my life to be prolonged if (1) I have an incurable and irreversible condition that will
141 result in my death within a relatively short time, (2) I become unconscious and, to a reasonable
142 degree of medical certainty, I will not regain consciousness, or (3) the likely risks and burdens of
143 treatment would outweigh the expected benefits, OR

144 --
145 -- (b) Choice To Prolong Life
146 I want my life to be prolonged as long as possible within the limits of
147 generally accepted health care standards.

148 (2.2) RELIEF FROM PAIN: Except as I state in the following space, I direct that treatment for
149 alleviation of pain or discomfort be provided at all times, even if it hastens my death:

150 -----
151 -----
152 -----
153 -----

154 (Add additional sheets if needed.)

155
156 (2.3) OTHER WISHES: (If you do not agree with any of the optional choices above and wish to write
157 your own, or if you wish to add to the instructions you have given above, you may do so here.) I
158 direct that:

159 -----
160 -----
161 -----
162 -----

163 (Add additional sheets if needed.)

164
165 PART 3
166 DONATION OF ORGANS AT DEATH
167 (OPTIONAL)

168 (3.1) Upon my death (mark applicable box):
169 --
170 -- (a) I give any needed organs, tissues, or parts, OR
171 --
172 -- (b) I give the following organs, tissues, or parts only.

173
174 -----

175
176 (c) My gift is for the following purposes (strike any of the following you do not want):
177 Transplant
178 Therapy
179 Research
180 Education

181
182 PART 4
183 PRIMARY PHYSICIAN
184 (OPTIONAL)

185 (4.1) I designate the following physician as my primary physician:

186
187 -----

188 (name of physician)

189
190 -----

191 (address) (city) (state) (ZIP Code)

192
193 -----

194 (phone)

195
196 OPTIONAL: If the physician I have designated above is not willing, able, or reasonably available to
197 act as my primary physician, I designate the following physician as my primary physician:

198
199 -----

200 (name of physician)

201
202 -----

203 (address) (city) (state) (ZIP Code)

204
205 -----

206 (phone)

207 *****

208
209
210 PART 5

211 (5.1) EFFECT OF COPY: A copy of this form has the same effect as the original. (5.2) SIGNATURE:
212 Sign and date the form here:

213
214 -----

215 (date) (sign your name)

216
217 -----

218 (address) (print your name)

219
220 -----

221 (city) (state)

222

223 (5.3) STATEMENT OF WITNESSES: I declare under penalty of perjury under the laws of California
224 (1) that the individual who signed or acknowledged this advance health care directive is personally
225 known to me, or that the individual's identity was proven to me by convincing evidence (2) that the
226 individual signed or acknowledged this advance directive in my presence, (3) that the individual
227 appears to be of sound mind and under no duress, fraud, or undue influence, (4) that I am not a
228 person appointed as agent by this advance directive, and (5) that I am not the individual's health
229 care provider, an employee of the individual's health care provider, the operator of a community care
230 facility, an employee of an operator of a community care facility, the operator of a residential care
231 facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

232
233 First witness Second witness
234
235 -----
236 (print name) (print name)
237
238 -----
239 (address) (address)
240
241 -----
242 (city) (state) (city) (state)
243
244 -----
245 (signature of witness) (signature of witness)
246
247 -----
248 (date) (date)
249

250 (5.4) ADDITIONAL STATEMENT OF WITNESSES: At least one of the above
251 witnesses must also sign the following declaration:

252
253 I further declare under penalty of perjury under the laws of California that I am not related to the
254 individual executing this advance health care directive by blood, marriage, or adoption, and to the
255 best of my knowledge, I am not entitled to any part of the individual's estate upon his or her death
256 under a will now existing or by operation of law.

257
258 -----
259 (signature of witness) (signature of witness)
260

261 PART 6
262 SPECIAL WITNESS REQUIREMENT

263 (6.1) The following statement is required only if you are a patient in a skilled nursing facility--a health
264 care facility that provides the following basic services: skilled nursing care and supportive care to
265 patients whose primary need is for availability of skilled nursing care on an extended basis. The
266 patient advocate or ombudsman must sign the following statement:

267 STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

268 I declare under penalty of perjury under the laws of California that I am a patient advocate or
269 ombudsman as designated by the State Department of Aging and that I am serving as a witness as
270 required by Section 4675 of the Probate Code.

271
272 -----
273 (date) (sign your name)
274

275 -----
276 (address) (print your name)
277

278 -----
279 (city) (state)

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS:

Existing law: The Statutory Form Advanced Health Care Directive does not state that the agent's authority will permit them to involuntarily place the principal in a mental health facility for a limited period and a specific purpose as that authority currently is not granted by law.

This Resolution: Would amend the statutory form Advanced Health Care Directive to advise the principal that the authority granted their agent to make health care decisions for them specifically includes the right to involuntarily admit them to a mental health facility for a specified period and a specific purpose.

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, 4652 and 4617 and Welfare and Institutions Code section 5150.

AUTHOR AND/OR PERMANENT CONTACT: Kim R. Hubbard, 668 N. Coast Hwy., #239, Laguna Beach, CA 92651; (949) 376-4505; FAX (949) 376-4506, oldmotherelderlaw@yahoo.com

RESPONSIBLE FLOOR DELEGATE: Kim R. Hubbard

COUNTERARGUMENTS

BAR ASSOCIATION OF SAN FRANCISCO

As with Resolutions 03-11-05, 05-06-05, and 05-07-05, there is no need for this resolution. An advance health care directive is intended for use in situations where a person is incapacitated and unable to make health care decisions. Usually, this situation involves someone who is comatose or in a persistent vegetative state. It is difficult to think of a situation in which such a person would require involuntary commitment because they posed a danger to themselves or others.

Also, the directive form already includes the ability to order procedures needed for mental health concerns. If a person's primary physician determines that the person is no longer able to make his or her own health care decisions, the directive becomes effective and the agent has the ability under the directive to make health care decisions, including any procedures necessary for the treatment of the person's mental health. It would not appear necessary to commence an involuntary commitment in such a situation; the agent could simply consent to the mental health treatment needed. The addition of a 5150 power in the form is therefore unnecessary.

SAN DIEGO COUNTY BAR ASSOCIATION

This amendment and the amendments proposed in companion resolutions 5-06-05, 5-07-05 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.