9/12/83

Memorandum 83-45

Subject: 1983 Legislative Program

The following is a report on the 1983 legislative program.

Enacted

1983 Stats. ch. 6 (Assembly Bill 29) - Emancipated Minors
1983 Stats. ch. 17 (Assembly Bill 28) - Disclaimers
1983 Stats. ch. 18 (Assembly Bill 31) - Bonds and Undertakings
1983 Stats. ch. 52 (Assembly Bill 69) - Vacation of Streets, Highways, and Public Service Easements
1983 Stats. ch. 72 (Assembly Bill 27) - Limited Conservatorships
1983 Stats. ch. 92 (Assembly Bill 53) - Nonprobate Transfers
1983 Stats. ch. 107 (Assembly Bill 30) - Claims Against Public Entities
1983 Stats. ch. 155 (Assembly Bill 99) - Creditors' Remedies
1983 Stats. ch. 201 (Assembly Bill 24) - Missing Persons
1983 Stats. ch. 342 (Assembly Bill 26) - Division of Marital Property
1983 Stats. res. ch. 40 (ACR No. 2) - Authority to Study Topics

Sent to Governor

Assembly Bill 25 - Wills and Intestate Succession and Related Matters (The provisions of AB 68--conforming revisions--were incorporated into AB 25 as passed by the Legislature)
Senate Bill 762 - Durable Power of Attorney for Health Care

Two-Year Bill

Assembly Bill 1460 - Liability of Marital Property for Debts

Dead

Assembly Bill 835 - Support After Death of Support Obligor

If the Governor signs the bills now awaiting his signature, the 1983 legislative program will be an outstanding success. Although the bill relating to wills and intestate succession and the bill relating to durable power of attorney for health care were both extensively amended, the staff believes that both bills effectuate the Commission's recommendations.

It should be noted that the three bills to effectuate recommendations relating to family law were generally not favorably received by the Legislature. One bill was enacted after extensive revision, another is a two-year bill, and the third was held in the Senate Judiciary Committee. Family law is a very controversial and emotional area. There ordinarily will be opposition to any proposal for a significant change of existing law, and the legislative committees are reluctant to approve a family law bill if there is any opposition. Nevertheless, we are hopeful that

we can obtain approval of the two-year bill in 1984, and the staff proposes in a separate memorandum that the Commission recommend in 1984 the substance of the defeated bill in a slightly modified form.

Attached is a copy of a handout in opposition to Senate Bill 762 and a draft of a letter to the Governor on this bill prepared for the signature of the Chairperson.

Respectfully submitted,

John H. DeMoully
Executive Secretary

CLUB of LIFE 304 West 58th Street, 5th Floor New York, New York 10019

Senate Bill 762 Is One Step to Auschwitz

On August 24, 1981, Clarence Herbert was admitted to Kaiser Permanente Hospital for routine elective surgery. This is his story.

Mr. Herbert felt secure, knowing Kaiser is a pre-pay hospital. He's already paid, in case there are complications.

Surgery is Wednesday. There are complications. In the recovery room, suddenly, without warning, his heart stops; he slips into a coma. He is wheeled into intensive care and placed on a respirator. All his vital signs are stable.

The attending physician is a powerful doctor who knows his hospital is in the red. A memo will soon be issued imposing austerity measures and a hiring freeze. Clarence Herbert is very expensive.

The day after surgery, the neurologist orders an EEG to determine Herbert's status. Canceling this, the attending physician writes an order to remove Herbert from life-support systems. The staff, knowing this is against state law, balks. An EEG is done. Herbert is not brain dead; he could recover. The nurses report that his pupils are reacting to light, and he breathes on his own when the respirator is momentarily removed for weighing.

On Saturday, the doctor tells the family Herbert is hopeless. They are instructed to write a note releasing the doctors, hospital, and staff from liability when life-support systems are removed. Lied to and pressured in an emotionally charged situation, the family signs.

The internist removes the respirator. But Clarence Herbert doesn't die. He keeps breathing. Brain dead people don't breathe on their own. The internist worries privately that he may be committing murder. The attending physician tells a nurse who questions why Herbert isn't properly cared for, "We take patients off respirators so they will die." But Clarence Herbert keeps on breathing.

So the doctors order his intravenous feeding and nasal-gastric tubes permanently removed. Herbert is moved to a private room on the surgery floor and for **six days** he is starved and dehydrated to death. His, family, deranged in the situation, pays visits every day, watching his heart-monitor drop slowly to zero. On the sixth day after all food and water has been stopped, living longer than many healthy people would in his place, Clarence Herbert dies in Kaiser Hospital. The autopsy lists "dehydration" as a major cause of death.

The two doctors in this case have been indicted for committing euthanasia—Murder I in the State of California. Their appeal will be heard September 12.

In Nazi Germany, systematic mass murder had its "small beginnings" in the "euthanasia movement," as Dr. Leo Alexander, a prominent U.S. physician, testified at the Nuremberg Tribunal. He said that the idea of "a life not worthy to be lived" was first applied to the "severely and chronically sick." By 1943, the "useless eaters" became Jews, Poles, and any opponent of the Nazis.

The morally bankrupt California State Legislature, which in 1976 passed the first euthanasia law in America, the Natural Death Act, is now trying to expand that euthanasia law in California. The same financial elite that backed Hitler in the 1930s to impose genocidal austerity, is now demanding that the plug be pulled on all future Clarence Herberts, and that this practice be made legal.

Panicked by the possibility that the murderers of Clarence Herbert will be found guilty, these Nazis are attempting to stampede the Legislature into passing Senate Bill 762, giving the power to murder sick people to their friends and relatives. The legislature plans to pass this "Durable Power of Attorney" bill this month, **before** the doctors' appeal is heard.

If SB 762 passes, it will be you and your family in Clarence Herbert's room. Your family will watch as your vital signs fail and you starve and thirst to death. And it will all be legal, because you will have been pressured to sign a "durable power of attorney."

This is not the first time California has forged Nazi law. In the 1920s, the state was sterilizing more people, particularly poor and brown- and black-skinned people, than the rest of the world combined. In fact, California was so good at its program of racial purification that the Nazis sent over observers to study California's program for implementation later in the death camps.

The people of California must stop SB 762 before it breaks the floodgates against mass murder—before you're old, sick, poor, or just unemployed, and someone tells you to sign a living will or a durable power of attorney.

Call or write your State Senator and Assemblyman today and tell them to vote **No on SB 762.** Call or write Governor Deukmejian as well, and let him know he must veto this bill if it passes. **The stench of Auschwitz is already at the gates of the Capitol.**

Stop SB 762!
Tell Governor Deukmejian to Veto SB 762 If It Passes!

Governor George Deukmejian State Capitol Sacramento, Calif. 95814 Tel: (916)445-2841

For more information call the Club of Life at: (213)738-0807 or (415)753-3238.

Senate Bill 762 has passed the Legislature and has been sent to you for your approval. This bill effectuates a recommendation of the California Law Revision Commission relating to durable powers of attorney for health care.

Using a durable power of attorney, a person can plan effectively for the time when he or she may become incapable of giving informed consent to medical care. The durable power permits the person to determine the course of his or her medical care by appointing a trusted friend or relative to make health care decisions should the need arise and thus provides an important alternative to relying on the court system to make such decisions.

Durable powers of attorney are now used in California to delegate power to make health care decisions. The bill will eliminate any uncertainty whether they can be used for this purpose. The bill requires additional formalities and makes special restrictions and protections applicable when a durable power of attorney is used for health care decisions. The bill makes the durable power more useful because it protects the health care provider who relies in good faith on the durable power of attorney.

The bill requires that health care decisions be consistent with the desires of the principal or, if the principal's desires are unknown, in the best interests of the principal (Section 2434(b)). Nothing in the bill authorizes a health care provider to do anything illegal (Section 2438(b)). Certain types of treatment may not be authorized (Section 2435).

The durable power of attorney must be witnessed by two witnesses or a notary public, and the witnesses must make a declaration under penalty of perjury that the principal appears to be of sound mind and under no duress, fraud, or undue influence. Certain persons are not qualified to be a witness (Section 2432(d), (e)). Additional protections are afforded a conservatee under the Lanterman-Petris-Short Act (Section 2432(c)) or a patient in a nursing home (Section 2432(f)). The bill limits the persons who can be designated to make health care decisions (Section 2432(b)). Provisions are included to assure that the patient is aware of the nature of the document (Section 2433).

Senate Bill 762 includes provisions for a court review to prevent abuse of a durable power of attorney for health care. The principal,

the attorney in fact, a treating health care provider, a spouse, child, parent, or heir of the principal, a conservator, a court investigator, or a public guardian may petition the court for a variety of purposes, such as to determine whether the power of attorney is effective, to determine whether the attorney in fact is acting in accord with the desires of the principal or in the best interests of the principal, to compel a report by the attorney in fact, or to determine whether the durable power of attorney should be terminated because the attorney in fact has failed properly to perform the duties under the power or has authorized anything illegal. A durable power of attorney drafted with the advice of legal counsel and approved by legal counsel may restrict the right to petition for court review. But the right of a conservator of the principal or of the attorney in fact to petition for court review cannot be eliminated by a provision in the durable power of attorney.

Under existing law, a person can avoid the need for a court-supervised conservatorship of the estate by executing a durable power of attorney covering property matters. By making it clear that a durable power of attorney can be used for health care decisions, Senate Bill 762 will avoid the need to establish a court-supervised conservatorship merely for the purpose of authorizing health care decisions.

Senate Bill 762 was not drafted in response to the recent Los Angeles case where two doctors are charged with murder. Rather, this bill is the product of a 32-month study by the Law Revision Commission, working in cooperation with its consultants, sections of the State Bar, lawyers, judges, doctors, representatives of aged persons, and other interested persons and organizations. Work on health care consent legislation commenced in December 1980. A working draft was distributed in February 1982 to interested persons and organizations for review and comment. During the next year, the draft was completely revised to take into account the comments received on the working draft and subsequent drafts. The Commission approved its recommendation to the Legislature in March 1983, and Senate Bill 762 was introduced to effectuate the recommendation. Thereafter, the Commission recommended various amendments to improve the bill and to minimize any opposition to the bill.

Senate Bill 762 does not apply to a situation like the case in Los Angeles where two doctors are charged with murder. In the Los Angeles case, the family consented to the health care decision; it was not a

case where the patient had designated in durable power of attorney for health care the person who was to make health care decisions in accord with the desires of the patient as expressed in the durable power of attorney. And, even if there had been a durable power of attorney for health care, Senate Bill 762 expressly provides that the durable power cannot authorize anything illegal. Nor does the bill protect a doctor who fails to provide information necessary to give informed consent. See Section 2438 and the Comment thereto contained in the enclosed Assembly Committee Report. Moreover, the bill includes provisions for court review to prevent abuse of the authority granted by the durable power.

Enclosed is a copy of the Commission's recommendation relating to Senate Bill 762. This recommendation explains the bill as introduced. The enclosed report of the Assembly Committee on Judiciary contains comments to sections of the bill that reflect the amendments made after the bill was introduced. If you have any questions or need more information concerning the bill, please call the Commission's Executive Secretary, John H. DeMoully at (415) 494-1335.