

## First Supplement to Memorandum 98-28

### Health Care Decisions: Staff Draft Tentative Recommendation (Additional Comment)

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Attached to this supplement is an email message from Dr. Robert D. Orr commenting on the reach of Section 4780 (DNR) and related provisions, and on the functioning of the surrogate committee under Section 4724. We will discuss these matters at the meeting.

**Error correction:** Section 4651 on page B-13 of the draft attached to Memorandum 98-28 is incomplete. The draft section should read as follows:

**§ 4651. Scope of division**

4651. (a) Except as otherwise provided, this division applies to health care decisions for adults who lack capacity to make health care decisions on their own behalf.

(b) This division does not affect any of the following:

- (1) The right of an individual to make health care decisions while having the capacity to do so.
- (2) The law governing health care in an emergency.
- (3) The law governing health care for unemancipated minors.

**Comment.** Subdivision (a) of Section 4651 states the scope of this division.

Subdivision (b)(1) is the same in substance as Section 11(a) of the Uniform Health-Care Decisions Act (1993) and replaces former Health and Safety Code Section 7189.5(a) (Natural Death Act).

Subdivision (b)(2) continues the substance of former Section 4652(b).

Subdivision (b)(3) is new. This division applies to emancipated minors to the same extent as adults. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined), 4617 (“health care decision” defined), 4688 (other authority of person named as agent not affected).

**“Adult”:** The question arose at the March meeting whether the Health Care Decisions Law needed to define “adult” which is used in a number of sections, such as the one just quoted. The staff concludes that a definition is not necessary because the language of Family Code Sections 6500-6502 is intended to apply generally. Family Code Section 6501 defines an adult as “an individual who is 18

**years of age or older.” This conclusion is supported by the language of Family Code Section 6502, which reads in relevant part:**

6502. (a) The use of or reference to the words “age of majority,” “age of minority,” “adult,” “minor,” or words of similar intent in any instrument, order, transfer, or governmental communication made in this state:

(1) Before March 4, 1972, makes reference to individuals 21 years of age and older, or younger than 21 years of age.

(2) On or after March 4, 1972, makes reference to individuals 18 years of age and older, or younger than 18 years of age.

**Respectfully submitted,**

**Stan Ulrich**  
**Assistant Executive Secretary**

Exhibit to 1st Supplement to Memorandum 98-28, April 22, 1998

From: rorr\_at\_medicine@ccmail.ltu.edu  
Date: Wed, 22 Apr 98 09:43:19 GMT

TO: Stan Ulrich

Thank you for sending me the April 15 Staff Draft of the Health Care Decisions for Incapacitated Adults proposal. I am sorry that I will be unable to attend the Commission meeting tomorrow. I believe that Dr. Ronald Miller will attend as a member of the CMA Council on Ethical Affairs.

Again I want to let the Commission know how pleased I am with their efforts and the product. I believe this is a statute that is ethical, logical, comprehensive, and useable.

A couple of comments:

Sec. 4780 defines and gives examples of suitable requests for DNR. It has been my practice, and I believe the practice of many physicians, to consider a Jehovah's Witness wallet card requesting no transfusion as a morally binding document which should be followed even if the patient is unconscious. It is actually not a "Request to Forego Resuscitative Measures", but one to LIMIT those measures. As such, it may not need to be mentioned in this section. However, I see no place in this comprehensive bill which recognizes such a situation. It doesn't really fit in Sec 4700-01 either. Perhaps it could be mentioned somewhere in Chapter 1. Or perhaps the Commission would feel that it is so unique as to not need to be mentioned. I often get questions from students about whether a JW card is "legally binding". My response is that it is not mentioned in statutory law, and I am not aware of relevant case law, but it certainly has moral weight.

Harley Spitler asks if I would like to have my life terminated by a simple majority of any group. My answer is no. I believe if a decision is made to withdraw life-supporting treatment, death is caused by the underlying disease; this is not "life termination" either by the physician or by the committee. But his question does give one pause. However, I also have serious reservations about having my dying needlessly prolonged by one "outlier" on such a committee.

I am currently seeing in consultation a man with terminal cancer who has been on a ventilator in the ICU since New Year's Eve at the insistence of one daughter. All other family members believe he would want to stop the ventilator and allow his cancer to take his life. All of the professionals involved believe that they are needlessly causing him continued suffering, since he is able to perceive pain but is not able to recognize anyone or meaningfully interact with his environment. The lone outlier, who may have an unstated financial agenda, is commanding the troops.

I have seen this type of situation often enough that I am worried about giving veto power to a lone dissenter. In order to protect vulnerable individuals, however, it may be necessary to retain this measure, recognizing that this protection is gained at a trade-off for others who will suffer needlessly.

Thank you for your consideration.

Robert D. Orr, M.D.