Study L-4004 March 22, 2001

Memorandum 2001-15

Health Care Decisions Law: Miscellaneous Revisions (Duration of Surrogate Designation)

At the February meeting, the Commission approved the recommendation on *Health Care Decisions Law: Miscellaneous Revisions*, with the omission of material addressing the issue of duration of a surrogate designation. Commissioner Wayne has introduced a bill (AB 1278) to implement the recommendation. The surrogate duration issue is addressed in this memorandum. If the Commission approves amendments and explanatory text, the staff will seek amendment of AB 1278 and will revise the previously approved recommendation to include the new material.

Attached to this memorandum is a letter from Eric M. Carlson, National Senior Citizens Law Center. (Exhibit pp. 1-2.) Also attached is a revised draft of the portion of the recommendation relating to surrogacy issues. (Exhibit pp. 3-6.)

Background

Memorandum 2001-15 reviewed comments received on the tentative recommendation proposing a number of revisions relating to the Health Care Decisions Law enacted in 1999. The surrogacy duration issue was left open so the Commission could ascertain the views of the people who had originally raised the concerns. The basic concern has been that giving recognition to oral surrogate designations for a lengthy period bypasses the protections applicable to execution of a power of attorney for health care and creates a temptation and risk of undue reliance on entries in the patient's medical record.

One Duration Rule

Since the original focus of commentators' concerns was on surrogacy designations by patients in long-term care, the earlier drafts considered a modified rule for nursing homes, but retained the existing rule for hospitals. As discussed at the February meeting, however, this approach results in an overly complicated statute. In some situations, there may not be a meaningful distinction to be drawn from the technical classification of the health care institution. Dr. Elizabeth S. Menkin reports that "[m]any people now getting

placed in [skilled nursing facilities] are the same patients who 10 years ago would have stayed in hospital." (Memorandum 2001-15, Exhibit p. 14.)

Other than preserving the existing law for acute care hospitals — which law has been operative for less than a year, the staff does not think there is any policy reason to have different duration rules depending on the institution. Accordingly, **the staff recommends adoption of one maximum time period for all surrogate designations**. Eric Carlson concurs in this approach. (Exhibit p. 1.)

How Long

The Commission has struggled with the standard for limiting the duration of surrogate designations from the beginning, when Section 4711 was first being developed. Now the consensus has developed that a time limit may be the only practicable limitation. An arbitrary 30-day period was suggested at the October 2000 meeting in San Francisco. **The Commission needs to decide whether to retain the 30-day period or select another.**

The staff tends to believe a longer period, such as 60 days, would be preferable, but we don't have any factual standard in mind that supports one time period over another, and can't make a strong case for any period. It probably comes down to a matter of taste and what feels right. The time should be long enough to be useful, but not so long that surrogate designations threaten the sanctity of advance directives. We think Eric Carlson and Patricia McGinnis would both prefer the shorter period, but could accept a longer period, since their primary concern has been with the potentially lengthy duration of surrogate designations in the nursing home setting, which could last for several years. Mr. Carlson has used the 30-day period in his draft language. (See Exhibit p. 2.)

The value of recognizing surrogate designations by statute is that the surrogate is subject to the same rights and duties as an agent and the record-keeping and compliance duties of health care professionals are incorporated. See, e.g., Prob. Code §§ 4714 (standard governing surrogate), 4731-4732 (duty to record information), 4741 (immunities of agent and surrogate), 4762 (court jurisdiction). The statute, as proposed to be amended, will also deal with the relation of a surrogate designation to a prior appointment of an agent in an advance health care directive. (See proposed amendments to Section 4711, Exhibit p. 5.)

The risk of setting any specific time period (as discussed below) is that some confusion can arise at the end of the statutory time period. One option would be to delete the part of Section 4711 that formalizes surrogate designations (communication by the patient directly to the supervising health care provider). Then it would not be necessary to deal with the duration issue. The provisions in the Health Care Decisions Law governing the duties of surrogates, recordkeeping, and jurisdiction could be retained, without the statute providing for how surrogates are designated. However, since the surrogate designation provision was just enacted (on Commission recommendation, drawn from the Uniform Health-Care Decisions Act), it should probably not be abandoned so quickly.

At the February meeting, the Commission also discussed the issue of what should happen in cases where the patient loses capacity after making a surrogate designation. If the limit on the surrogacy is based on the idea that we don't want to undermine powers of attorney for health care and that the time period is provided so that the patient has an opportunity to make a formal advance directive, then loss of capacity before the patient has that chance undermines the purpose of the limit. One possibility would be to suspend the expiration during the time of loss of capacity, thereby giving effect to the last expression of the patient's wishes. The staff has supported this view, but we recognize that there are problems with it. Capacity can come and go and be a matter of dispute. The similar rule applicable when the durable power of attorney was subject to a seven-year limit was not believed to have worked well, if it was observed at all. Perhaps more importantly, suspending the expiration of the duration limit does not address the concern that surrogate designations should just not last indefinitely.

First, Do No Harm

A definite time period has some appeal, and certainly solves the issue of "stale" surrogate designations following nursing home patients for years, but the statute must be drawn so that it does not interfere with traditional rules relied on by health care providers and assumed by patients and their families about who can make decisions when the patient lacks capacity. Expiration of a 30-day limitation on the surrogacy designation should not be thought to prevent the person from acting in a surrogate role thereafter under custom and law, whatever it may be. As the Commission knows, proposed rules governing

"family consent" were removed from the Health Care Decisions Law bill before it was passed. After lengthy consideration of several drafts and a number of recent meetings, the Commission has decided not to attempt to address this issue for the time being. So, too, the surrogate designation rules under consideration should not negatively affect whatever commonly accepted principles there are governing medical decisionmaking for incapacitated patients.

Making this clear in the statute will ameliorate some of the concern over a specific duration for surrogate designations. On the 31st day, the surrogate is probably not disempowered in most cases. Of course, if there is an operative power of attorney for health care, the agent would take priority. In other cases, health care providers would do whatever they think is advisable consistent with general law and institutional practice. If the surrogate is the person the health care providers would probably have relied on (and the fact that the person has been selected and been acting as surrogate may bolster that status), then expiration of the time period is not disruptive of the patient's intent. However, if the designated surrogate is a friend and there are other concerned relatives and friends, we can't predict what would happen. It will depend on the policies and practices of the institution and individual health care providers involved. In long term care settings where Health and Safety Code Section 1418.8 applies, it is conceivable that "medical interventions" will occur based on the determination of the "interdisciplinary team" without the involvement of the formerly designated surrogate. But we must recognize that Section 4711 can't solve all of these problems and the most we can probably achieve at this point is to make sure the designated surrogate is not neutralized by operation of Section 4711 alone.

Assuming this is the correct approach, the difficulty is in describing the intent in the statute. Eric Carlson has offered some draft language (see Exhibit p. 2):

> The expiration of a surrogacy designation … does not limit or reduce in any way any authority the former surrogate may have over the patient's health care decisions under any other provisions of law, including but not limited to the common law.

This is a good proposal, but it may be too limited. We don't want to get into a debate about whether the common law in California recognizes "close friends" or whether the standard expressed in *Cobbs v. Grant* is dictum or not. The staff proposes a slightly broader "no harm" rule:

> The expiration of a surrogacy designation does not affect any role the former surrogate may have in making health care decisions for the patient under any other law or standards of practice.

See proposed Section 4711, Exhibit p. 5.

Qualifications on Time Limit

The rule would be simplest if the 30-day (or other) time period is the only limit. Eric Carlson's draft retains the "course of treatment or illness or during the stay in the health care institution" limitation, subject to the 30-day maximum limit. Our concern with the difficulty and uncertainty in applying the treatment-illness-stay standard is greatly reduced where the longest a surrogate designation can last is 30 or 60 days.

Another possibility would be to recognize a longer or shorter period as designated by the patient. The staff assumes that the ability of the patient to override the maximum period would be objected to by those concerned with the competence or integrity of the medical records, and that they would insist that the time limit not be subject to any type of extension. The staff does not think it is necessary for the statute to provide that the patient can specify a shorter period.

Implementation of Suggestions

The staff's draft of implementing legislation and a brief background discussion, intended for inclusion in the previously approved recommendation on *Health Care Decisions Law: Miscellaneous Revisions*, is attached. (See Exhibit pp. 3-6.)

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

SENT BY: 3-19- 1 ; 4:58PM ;NSCLC LOS ANGELES CA→ ;# 2/ 3

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March 19, 2001

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Re: Health Care Decisions; Duration of Surrogate's Authority

Dear Stan:

This letter follows up on our discussion this afternoon.

I agree with you that the duration of a surrogacy designation should not vary with the type of health care facility to which an individual has been admitted.

The duration of a surrogacy designation should be relatively limited. The designation of a surrogate is informal, and has none of the safeguards that surround the execution of a power of attorney for health care. Whereas an individual executing a power of attorney for health care understands that he or she is making a decision that has implications for years to come, an individual designating a surrogate, *i.e.*, talking to his or her doctor, has no such understanding. In addition, the designation of a surrogate is recorded in a relatively casual way – possibly a jotted note within the individual's medical records.

If a surrogacy designation were to be given a longer duration, health care providers might consider a surrogacy designation as a substitute for a power of attorney for health care. This could lead individuals to forego the execution of a power of attorney for health care, which would be detrimental both to individuals and to health care providers.

It should be noted that a time limit on a surrogacy designation does not mean that, once the surrogacy designation expires, the individual automatically will have no health care decisionmaker. The individual, while mentally competent, can execute a power of attorney for health care. In addition, in any case, the individual will be in no worse position that he or she was before the surrogacy designation. At worst, the health care provider will be free to consult with the closest family member or friend – who may be the former surrogate.

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Recommendation

I recommend an upper limit on the duration of a surrogacy designation, along with a statement that the expiration of a surrogacy designation does not limit in any way the former surrogate's ability to make the individual's health care decisions under any other provision of statutory or common law. Recommended language follows:

Probate Code § 4711

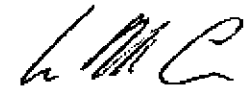
(a) A patient may designate an adult as a surrogate to make health care decisions by personally informing the supervising health care provider. An oral designation of a surrogate shall be promptly recorded in the patient's health care record and is effective only during the course of treatment or illness or during the stay in the health care institution where ~~when~~ the designation is made, or for 30 days, whichever time period is shorter .

(b) The expiration of a surrogacy designation, as set forth in subdivision (a), does not limit or reduce in any way any authority the former surrogate may have over the patient's health care decisions under any other provisions of law, including but not limited to the common law.

(c) Designation of a surrogate under subdivision (a) does not revoke the designation of an agent under a power of attorney for health care unless the patient communicates the intention to revoke in compliance with subdivision (a) of Section 4695.

Thank you again for your extensive work on this important topic. Please feel free to call at any time.

Sincerely,



Eric M. Carlson
Attorney at Law

HEALTH CARE DECISIONS LAW: MISCELLANEOUS REVISIONS

[EXCERPT]

Patient's Designation of Surrogate

The Health Care Decisions Law includes provisions recognizing the patient's right to designate a "surrogate" by personally informing the supervising health care provider, orally or in writing.[1] While designation of an agent under a power of attorney for health care is preferred, recognition of the clinical reality of surrogate designations affirms the fundamental principle of patient autonomy. Due to concerns about the possibility of giving effect to obsolete oral statements in the patient's record, the effectiveness of oral surrogate designations under Section 4711 was limited to the "course of treatment or illness or during the stay in the health care institution when the designation is made."[2] A surrogate designation communicated to the supervising health care provider in writing would not be subject to this limitation.

Two concerns have arisen in applying Section 4711: (1) The default rule that a surrogate designation, whether oral or written, would act as a revocation of the appointment of an agent under a power of attorney for health care[3] is too harsh and may actually defeat a patient's intent. (2) Particularly in the nursing home setting, the restriction on the duration of oral surrogate designations to the "stay in the health care institution" is not a meaningful limitation. Further analysis also suggests that the "course of treatment or illness" rule would not provide any real limit where the patient has diabetes or some other chronic condition.

The Commission recommends amending Section 4711 to address these problems and provide additional statutory guidance on surrogate designations:[4]

(1) Relation of Surrogate Designation to Health Care Agent

The presumption that a surrogate designation revokes the appointment of a health care agent should be reversed. Designating a surrogate should act as a revocation of the agency only if the patient expresses that intention in compliance with the general rule governing powers of attorney for health care.[5] A patient may

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1. Sections 4711-4715 & Comments.

2. See second sentence of Section 4711 & Comment.

3. The statute does not provide explicitly that the surrogate designation revokes the agent's authority, but Uniform Health-Care Decisions Act comment incorporated as background in the Commission's Comment to Section 4711 states that an "oral designation of a surrogate made by a patient directly to the supervising health-care provider revokes a previous designation of an agent." The uniform act comment does not suggest the effect of a written surrogate designation, but there is no reason to think it would have a less significant effect than an oral communication to the supervising health care provider. See also Section 2(b) (provisions drawn from uniform acts to be construed to make law uniform in enacting states).

4. See proposed amendment of Section 4711 *infra*.

5. See Section 4695(a),

want the surrogate to act in place of an agent named in a power of attorney for any number of reasons, without intending to permanently replace the agent. The agent may be unavailable because he or she is on a vacation or otherwise unavailable when the patient is hospitalized. Or the named agent may be experiencing health or personal problems that impel the patient to seek someone else as a temporary surrogate.

(2) Duration of Surrogate Designation

A surrogate designation should be effective for no more than 30 days.[6] This rule preserves the authority of the formally designated agent under a power of attorney for health care, but recognizes patient autonomy and the potential need for a surrogate where the agent can't act. It also bolsters the power of attorney for health care by making clear that informal surrogate designations, while entitled to respect as expressions of the patient's wishes, are not an alternative to complying with statutory formalities. A patient may not have time to execute a power of attorney for health care, so it is appropriate to recognize the need for surrogate designations. But after a sufficient time has passed, such as 30 days, the person should consider executing a formal advance directive and not rely on statements made in the hospital and the recording of those statements in the person's medical record.

(3) Effect of Surrogacy Expiration

There is a danger that terminating the authority of statutory surrogates under Section 4711 might be read too broadly. Consequently, the proposed law makes clear that the duration limit is intended to affect only the special statutory surrogate rules, and not the ability of designated surrogate to make or participate in making health care decisions for the patient under other principles.[7]

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6. The designation may terminate sooner under the existing standard providing that surrogate designations are effective "during the course of treatment or illness or during the stay in the health care institution." Section 4711.

7. *Cf.* Section 4654 (compliance with generally accepted health care standards). See proposed Section 4711(c) *infra*.

PROPOSED LEGISLATION

[EXCERPT]

Prob. Code § 4711 (amended). Patient's designation of surrogate

SEC. 5. Section 4711 of the Probate Code is amended to read:

4711. (a) A patient may designate an adult as a surrogate to make health care decisions by personally informing the supervising health care provider. ~~An oral~~ The designation of a surrogate shall be promptly recorded in the patient's health care record ~~and is effective~~.

(b) A surrogate designated under subdivision (a) replaces the agent only during the course of treatment or illness or during the stay in the health care institution when the surrogate designation is made, or 30 days, whichever period is shorter.

(c) The expiration of a surrogacy designation under subdivision (b) does not affect any role the former surrogate may have in making health care decisions for the patient under any other law or standards of practice.

(d) Designation of a surrogate under subdivision (a) does not revoke the designation of an agent under a power of attorney for health care unless the patient communicates the intention to revoke in compliance with subdivision (a) of Section 4695.

Comment. Section 4711 is amended to clarify the relation between a surrogate designation under this section and a formal agent designation in a power of attorney for health care under Section 4671 and related provisions, and to provide additional qualifications on surrogacy designations. Both the patient and the surrogate must be adults. See Sections 4625 ("patient" defined), 4643 ("surrogate" defined). "Adult" includes an emancipated minor. See Fam. Code § 7002 (emancipation). "Personally informing," as used in this section, includes both oral and written communications.

Consistent with the statutory purpose of effectuating patient intent, subdivision (a) recognizes the patient's ability to name a person to act as surrogate health care decisionmaker. As amended, this section no longer distinguishes between surrogates named orally and surrogates named in a written communication to the supervising health care provider. Whether it is communicated to the supervising health care provider orally or in writing, the surrogate designation must be promptly recorded in the patient's health care record. See also Section 4731 (supervising health care provider's duty to record relevant information).

Subdivision (b) provides a new maximum limit of 30 days on the duration of surrogate designations under this section. If the patient has an agent under a power of attorney for health care, the agent's authority is suspended during the time the surrogacy is in effect. If the patient names an agent in a power of attorney for health care executed after making a surrogate designation, the agent would have priority over the surrogate as provided in Section 4685 (agent's priority).

Subdivision (c) makes clear that the limits on the duration of a surrogacy designation affect only the special surrogate rules in this section, and not the ability of the person who had been designated as surrogate to make or participate in making health care decisions for the patient under other principles. *Cf.* Section 4654 (compliance with generally accepted health care standards). After expiration of the period specified in subdivision (c), this section does not affect who may make health care decisions for adults lacking capacity.

Subdivision (d) makes clear that the appointment of an agent under a power of attorney for health care is not revoked simply by the act of naming a surrogate under this section. Instead, the patient must express the intent to revoke the agent's appointment, under the terms of the general rule in Section 4695(a). Subdivision (d) reverses the former assumption that a surrogate designation made directly to the supervising health care provider revoked a previous designation of an agent. See Background from Uniform Act in Comment to Section 4711 as enacted, 1999 Cal. Stat. ch. 658, § 39 (operative July 1, 2000).

See also Sections 4617 ("health care decision" defined), 4619 ("health care institution" defined), 4635 ("reasonably available" defined), 4639 ("skilled nursing facility" defined), 4641 ("supervising health care provider" defined).