

Second Supplement to Memorandum 2001-25

Health Care Decisions Law: Miscellaneous Revisions (Letter from Beverly Hills Bar Committee)

Attached to this supplement is a letter from Kenneth G. Petruilis on behalf of the Beverly Hills Bar Association, Probate, Trust and Estate Planning Legislative Committee, commenting on the surrogate duration issue.

Overview

The Committee finds the oral designation of a surrogate to be “troublesome, ... fraught with danger and inappropriate, especially when a written health care directive ... is outstanding.” (See Exhibit p. 1.) The letter poses a hypothetical case of a confused patient who makes an oral designation, but intending that the surrogate make decisions only until the health care agent is available. The Committee asks whether a social worker or ombudsman shouldn’t be involved, and recommends that the special witnessing requirements applicable to powers of attorney for health care executed in nursing homes be applied to surrogate designations. Finally, the letter proposes that a surrogate designation should not supersede a power of attorney for health care “unless the patient clearly indicates the desire to temporarily revoke the health care directive.” The Committee’s draft proposal would presumptively suspend the agent’s authority only until the agent becomes available.

It should be remembered that the surrogate provision, Section 4711, is in the law now. In general terms, it recognizes a clinical reality — that patients make statements of their wishes that should be entitled to respect. To ignore the current expressions of the patient would defeat the fundamental interest in patient autonomy and self-determination. Our problem has been to determine the appropriate statutory level of recognition of surrogate designations, and to make the needed adjustments in the statutory language.

Protective Procedures

Imposing on surrogate designations the ombudsman and witnessing requirements that currently apply in long-term care settings is not appropriate. This would be a drastic change in the law. Formalizing and restricting the

surrogate provision in this manner would defeat its purpose. We already have a formal way to express binding health care instructions and appoint health care agents with limited or general authority, and we don't need to reinvent it.

It would be wonderful if all patients, elderly or not, could be accompanied by social workers, counselors, and ombudsmen, but this is not a practical solution. We might also want to make sure that individuals sitting down to execute a power of attorney for health care are properly vetted, have met the appropriate capacity standard, are informed about what they are doing, and are not confused, depressed, or impaired in some other way. But the statute can only do so much. Health care decisionmaking is not like probating wills or administering estates.

Conflict Between Advance Directives and Surrogate Designations

The proposal to provide as a default rule that the agent would take over when the agent becomes available could be combined with an absolute time limit. However, in the interests of providing a simple rule (albeit inflexible) that applies in all health care institutions and to all types of patients, the staff has proposed a 30- or 60-day maximum time limit. Within that framework, the only issue affecting the agent's long-term authority is whether the patient has expressed an intention to revoke the power of attorney for health care by making the surrogate designation. The proposed draft leaves that issue to the general standard for agency revocation in Section 4695. The staff does not believe it is profitable, nor would it be effective, to set up a more elaborate scheme to try to regulate this type of expression. In the end, some reliance must be placed on medical ethics and recordkeeping. This is fundamental to the Uniform Health-Care Decisions Act and the Health Care Decisions Law.

The Committee letter contrasts the surrogate and agent designations in the following terms:

There is an inherent conflict between an appointment of a surrogate and a designation of an agent under a power of attorney for health care or an advanced directive. The thoughtful preparation of a power of attorney for health care duly considering who should be appointed as agent should be encouraged and given priority over a designation of a surrogate hastily made in a crisis.

(Exhibit, p. 2.) The law encourages formal advance directives, and as proposed to be amended, attempts to limit any potential for surrogacies to undermine advance directives. But it should also be recognized that many advance

directives are not thoughtfully executed. Many will be nearly blank forms with a few boxes checked. Many will be several years old, and we won't know whether the most recent advance health care directive is in the record or whether an old one is what the patient would want today. In some cases, the contemporaneous oral statement will be the best expression of the patient's desires. In other cases, perhaps a significant majority, the Committee's characterization may be the best fit.

Barring imposition of unworkable and expensive technical and procedural rules, however, it is difficult to identify through a statutory rule which is the best indication of the patient's intent. Reliance can be placed on medical ethics, recordkeeping, and institutional policies and procedures. For difficult cases, the statute provides judicial remedies.

Conclusion

Arguably, it might have been better if the Health Care Decisions Law did not attempt to address the surrogate question, but the Commission followed the lead of the uniform commissioners, subject to some restrictions. The Commission is now reexamining the restrictions, but should avoid overlegislating in this difficult area. The Beverly Hills Bar Committee's suggestion to adopt a default rule favoring an agent who become available has some appeal, but it would complicate the statute because it would add another qualification.

Is the Commission interested in adding this type of rule? If so, consider the following language (the new language is in italics):

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.

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

(c) The expiration of a surrogate 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) If the patient has designated an agent under a power of attorney for health care, the surrogate designated under subdivision (a) has priority over the agent for the period provided in subdivision (b) or until the agent becomes available and willing to make health care decisions, whichever period is shorter, but designation of a surrogate does not revoke the designation of an agent unless

the patient communicates the intention to revoke in compliance with subdivision (a) of Section 4695.

Respectfully submitted,

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Assistant Executive Secretary

March 27, 2001

California Law Revision Commission
4000 Middlefield Road, Room D-1
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Re: Health Care Decision Law- Miscellaneous
Revisions [Study L-4004]

Commissioners:

The oral designation of a Surrogate to make health care decisions is very troublesome in its present and proposed forms. We agree fully with Stuart D. Zimring's assessment that oral designations are fraught with danger and inappropriate, especially when a written health care directive or Durable power of attorney for health care is outstanding. To illustrate, the following hypothetical scenario points out the problem:

An 85 year old widow living in Los Angeles appoints her son, living in Fresno as her agent under a health care power of attorney. The woman becomes injured or sick and requires immediate hospitalization so a neighbor drives her to the hospital. In a painful and confused state the patient is asked who should make health care decisions on her behalf and she orally designates her neighbor as surrogate, intending that the neighbor make decisions until the health care agent is available.

Should not the patient be interviewed by an ombudsman or licensed social worker regarding the patient's designation? An ombudsman or social worker should be required to inquire if there are any outstanding advance directives or powers of attorney and if so to contact the agent. The protections of PC Section 4675 should be afforded where possible.

We recommend that section be amended to also refer to designations of surrogate.

An surrogate designation should not supersede a written health care directive unless the patient clearly indicates the desire to temporarily revoke the health care directive. We recommend the following language be inserted at the beginning of proposed PC Section 4711(b):

"Unless the patient designation of surrogate is made with the intent to revoke or temporarily suspend an existing durable power of attorney for health care, the designation

of surrogate shall terminate when the agent under the durable power of attorney for health care is available to act. Otherwise, the duration of a surrogate decision... "

There is an inherent conflict between an appointment of a surrogate and a designation of an agent under a power of attorney for health care or an advanced directive. The thoughtful preparation of a power of attorney for health care duly considering who should be appointed as agent should be encouraged and given priority over a designation of a surrogate hastily made in a crisis.

Respectfully submitted,

BEVERLY HILLS BAR ASSOCIATION
Probate, Trust and Estate
Planning Legislative Committee

By:

Kenneth G. Petrulis, Chair

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