

## Memorandum 99-39

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**Surrogate Committee in Health Care Decisionmaking**

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The Commission's Recommendation on *Health Care Decisions for Adults Without Decisionmaking Capacity*, as introduced in AB 891, included a procedure addressing the difficult problem of health care decisionmaking for the "friendless" — adults who have not executed an advance health care directive and who have no other identifiable surrogate, including family or friends. (The explanatory text and proposed sections from the Commission's printed recommendation are set out in the Exhibit.)

At the April meeting, the Commission approved removing proposed Sections 4720-4726 from AB 891, so the bill could move forward. The consultant for the Assembly Judiciary Committee termed this material "highly controversial," and it was doubtful that the bill would have survived its first hearing with these provisions included. The Commission decided to give the surrogate committee provisions further consideration, with the possibility of submitting recommended legislation in 2000.

There have been no changes in the status of this proposal and we have not detected any change in the political climate. This is an area where the opposition is not inclined to work with proponents to develop an acceptable solution to the problem of making appropriate decisions for the "friendless." When the Commission reviewed comments on the tentative recommendation (Memorandum 98-63, September 1998 meeting), the major objections were directed toward the surrogate committee statute. The forces that opposed the "Epple bill" — Health and Safety Code Section 1418.8, applicable to "medical interventions" in long-term care facilities — in both the Legislature and the courts, have not changed their minds. We assume they would actively oppose a surrogate committee bill, even though it has tighter standards and more protections than the Epple bill, because it is broader in scope and permits removal of life-sustaining treatment.

It would be interesting to test the waters, assuming a legislator could be found to carry the bill, but on balance **the staff recommends against pursuing**

**enactment of the surrogate committee proposal in the near future.** Our assessment is based in part on the surprising number of “no” votes against AB 891 (as amended), which did not contain any “cutting edge” proposals and was not actively opposed by any group.

Until such time as we can work with the opposition constructively, the staff does not believe it is profitable for the Commission to rehash or attempt to fine tune its surrogate committee proposal. The opposition argues that the statute would be unconstitutional as a violation of due process, and it is difficult to find areas of compromise when the opposition is based on a fundamental disagreement over constitutional issues. Writers who opposed the proposal as it appeared in the tentative recommendation have not been satisfied with the revisions the Commission made in the committee selection procedures and the voting rules. Nor have they suggested any other revisions or approaches that would satisfy them.

What is the answer to the problem of making appropriate health care decisions for the thousands of “friendless” patients in California? The opponents of the Commission’s surrogate committee proposal put their reliance on court proceedings, either through assignment to the public conservator or making court-authorized medical treatment decisions under Probate Code Section 3200 *et seq.* While AB 891 has addressed deficiencies in both of these alternatives, which should be of some assistance, the judicial system is not adequate to deal with this problem.

The staff believes the Commission should keep this subject open for a while longer to see if the political climate changes or some new approach surfaces. Organizations that we know are intensely interested in some effective solution to the problem of the friendless patient are, of course, free to use the Commission’s work to the extent they find it useful.

Respectfully submitted,

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### DECISIONMAKING WHERE NO SURROGATE IS AVAILABLE

The law does not address one of the most important problems if it stops at providing rules on advance directives and “family consent.” The statutory surrogate rules will not apply to a significant group of incapacitated adults for whom there are no potential surrogates because they have no close relatives or friends familiar with their health care treatment desires or values, or because potential surrogates are unwilling or unable to make decisions. While the conservatorship statutes provide a remedy of last resort, practically speaking, the conservatorship rules can be cumbersome, inefficient, and expensive, and do not provide the answer in most cases.

Existing law addresses this problem with respect to “medical interventions” involving patients in the nursing home context,<sup>58</sup> but there is no general surrogacy rule appli-

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57. See *infra* text accompanying notes 77-80.

58. Health & Safety Code § 1418.8. See *Rains v. Belshé*, 32 Cal. App. 4th 157, 166, 170, 38 Cal. Rptr. 2d 185 (1995) (upholding the constitutionality of the procedure for patients in nursing homes who lack capacity to make health

cable in these circumstances. The UHCDA does not address this problem.

The alternative of appointing a conservator of the person in each of these cases is not an adequate solution to the problem, as recognized by the Legislature when it enacted the nursing home medical intervention procedure.<sup>59</sup> While it is possible to seek court approval for medical “treatment” under Probate Code Section 3200 *et seq.* (authorization of medical treatment for adult without conservator), this procedure does not explicitly authorize orders for *withdrawal* of treatment or *refusal* of consent.<sup>60</sup>

The proposed law adopts a procedure based in large part on the nursing home medical intervention procedure, but with some important additional protections. Under this proposal, health care decisions for the “friendless” incapacitated adult could be made by a “surrogate committee.” It is expected that hospitals and nursing homes will establish a surrogate committee, to take advantage of the statute. In a situation where there is no institutionally founded surrogate committee, or in the rare case where a health care decision needs to be made and there is no institution involved, the proposed law grants authority to the county health officer or county supervisors to establish a surrogate committee.

The basic committee would be made up of the following three persons:

- (1) The patient’s primary physician.

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care decisions, “even though they do not have a next of kin, an appointed conservator, or another authorized decision maker to act as their surrogate”).

59. In most cases, the conservator will be the Public Guardian, which may be a non-solution if the Public Guardian’s policy is not to exercise the duty to decide as set down in *Drabick* and make an individualized assessment for each patient.

60. Probate Code Section 3208 refers to “authorizing the recommended course of medical treatment of the patient” and “the existing or continuing medical condition.”

(2) A professional nurse with responsibility for the patient and with knowledge of the patient's condition.

(3) A patient representative or community member. The patient representative may be a family member or friend of the patient who is unable to take full responsibility for the patient's health care decisions, but has agreed to serve on the surrogate committee. A community member is an adult who is not employed by or regularly associated with the primary physician, the health care institution, or employees of the health care institution.

But in cases involving withholding or withdrawing life-sustaining treatment or other critical health care decisions, the surrogate committee would also be required to include a member of the health care institution's ethics committee or an outside ethics consultant.

The surrogate committee under the proposed law is intended to require the degree of expertise and participation appropriate to the type of health care decision that needs to be made. The proposal provides *minimum* guidelines and is not intended to restrict participation by other appropriate persons, including health care institution staff in disciplines as determined by the patient's needs. The participation of the institutional ethics committee or an outside ethics consultant conforms to the best practice in life-sustaining treatment situations. The inclusion of outside representatives (the patient representative or community member) and, in critical cases, an ethics advisor, provides important protections that are not applicable under the existing nursing home medical intervention scheme.

In reviewing proposed health care decisions, the surrogate committee would be required to consider and review all of the following factors:

- (1) The primary physician's assessment of the patient's condition.
- (2) The reason for the proposed health care decision.

(3) The desires of the patient, if known. To determine the desires of the patient, the surrogate committee must interview the patient, review the patient's medical records, and consult with family members or friends, if any have been identified.

(4) The type of health care to be used in the patient's care, including its probable frequency and duration.

(5) The probable impact on the patient's condition, with and without the use of the proposed health care.

(6) Reasonable alternative health care decisions considered or utilized, and reasons for their discontinuance or inappropriateness.

The surrogate committee is required to evaluate the results of approved health care decisions periodically, as appropriate under applicable standards of care.

The proposed law intends the surrogate committee to try to operate on a consensus basis. If consensus cannot be reached, the committee is authorized to approve proposed health care decisions by majority vote. There is an important exception: health care decisions relating to withholding or withdrawing life-sustaining treatment cannot be implemented if any member of the surrogate committee is opposed. If a surrogate committee becomes hopelessly deadlocked, resort to judicial proceedings may be necessary.

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## CHAPTER 4. HEALTH CARE DECISIONS FOR PATIENTS WITHOUT SURROGATES

### § 4720. Application of chapter

4720. This chapter applies where a health care decision needs to be made for a patient and all of the following conditions are satisfied:

(a) The patient has been determined by the primary physician to lack capacity.

(b) No agent has been designated under a power of attorney for health care and no conservator of the person has been appointed with authority to make health care decisions, or the agent or conservator is not reasonably available.

(c) No surrogate can be selected under Chapter 3 (commencing with Section 4710) or the surrogate is not reasonably available.

(d) No dispositive individual health care instruction is in the patient's record.

**Comment.** Section 4720 is new. The procedure in this chapter is drawn in part from and supersedes former Health and Safety Code Section 1418.8 applicable to medical interventions in long-term care facilities. This chapter does not apply to emergency health care. See Section 4651(b)(2).

See also Sections 4607 (“agent” defined), 4609 (“capacity” defined), 4613 (“conservator” defined), 4617 (“health care decision” defined), 4623 (“individual health care instruction” defined), 4625 (“patient” defined), 4631 (“primary physician” defined), 4635 (“reasonably available” defined), 4643 (“surrogate” defined).

### § 4721. Referral to surrogate committee

4721. A patient's primary physician may obtain approval for a proposed health care decision by referring the matter to a surrogate committee before the health care decision is implemented.

**Comment.** Section 4721 is new. It supersedes former Health and Safety Code Section 1418.8(d) applicable to medical interventions in long-term care facilities. The procedure for making health care decisions

on behalf of incapacitated adults with no other surrogate decisionmakers is optional and it does not displace any other means for making such decisions. See, e.g., Section 3200 *et seq.* (court authorized health care decisions). The scope of a health care decision depends on the circumstances and may include a course of treatment. See Section 4617 Comment.

See also Sections 4617 (“health care decision” defined), 4625 (“patient” defined), 4631 (“primary physician” defined), 4635 (“reasonably available” defined), 4643 (“surrogate” defined).

#### **§ 4722. Composition of surrogate committee**

4722. (a) A surrogate committee may be established by the health care institution. If a surrogate committee has not been established by the patient’s health care institution, or if the patient is not a patient in a health care institution, the surrogate committee may be established by the county health officer or as otherwise determined by the county board of supervisors.

(b) The surrogate committee shall include the following individuals:

(1) The patient’s primary physician.

(2) A professional nurse with responsibility for the patient and with knowledge of the patient’s condition.

(3) A patient representative or community member. The patient representative may be a family member or friend of the patient who is unable to take full responsibility for the patient’s health care decisions, but has agreed to serve on the surrogate committee. A community member is an adult who is not employed by or regularly associated with the primary physician, the health care institution, or employees of the health care institution.

(c) In cases involving withholding or withdrawing life-sustaining treatment or other critical health care decisions, in addition to the individuals described in subdivision (b), the surrogate committee shall include a member of the health care institution’s ethics committee or an outside ethics consultant.

(d) This section provides minimum guidelines for the composition of the surrogate committee and is not intended to restrict participation by other appropriate persons, including health care institution staff in disciplines as determined by the patient's needs.

**Comment.** Section 4722 is new. Subdivision (a) provides for establishment of surrogate committees.

Subdivision (b) is drawn in part from provisions of former Health and Safety Code Section 1418.8(e)-(f) applicable to medical interventions in long-term care facilities. Subdivision (b)(3) makes clear that a person who may be qualified to serve as a surrogate under Chapter 3 (commencing with Section 4710) may still participate in health care decisionmaking as a patient representative. As provided in subdivision (b), the surrogate committee must always include at least three persons, the primary physician, a professional nurse, and a patient representative or community member. Subdivision (c) requires an additional ethics advisor in cases involving life-sustaining treatment or other critical health care decisions. The statute does not attempt to define "critical" health care decisions because of the vast variety of factual circumstances. Routine medical interventions of a type governed by former Health and Safety Code Section 1418.8 would generally not be included in the class of critical health care decisions. However, major surgery, amputation, and treatments involving a significant risk should require participation of an ethicist under subdivision (c).

See also Sections 4615 ("health care" defined), 4617 ("health care decision" defined), 4619 ("health care institution" defined), 4625 ("patient" defined), 4631 ("primary physician" defined).

#### **§ 4723. Conduct and standards of review by surrogate committee**

4723. (a) The surrogate committee's review of proposed health care shall include all of the following:

(1) A review of the primary physician's assessment of the patient's condition.

(2) The reason for the proposed health care decision.

(3) A discussion of the desires of the patient, if known. To determine the desires of the patient, the surrogate committee shall interview the patient, if the patient is capable of communicating, review the patient's medical records, and

consult with family members or friends, if any have been identified.

(4) The type of health care to be administered in the patient's care, including its probable frequency and duration.

(5) The probable impact on the patient's condition, with and without administration of the proposed health care.

(6) Reasonable alternative health care decisions considered or administered, and reasons for their discontinuance or inappropriateness.

(b) The surrogate committee shall periodically evaluate the results of an approved health care decision, as appropriate under applicable standards of health care.

**Comment.** Section 4723 is new and is patterned after provisions of former Health and Safety Code Section 1418.8(e) applicable to medical interventions in long-term care facilities.

Subdivision (b) generalizes the duty to evaluate periodically under former Health and Safety Code Section 1418.8(g), but does not provide any particular time period, as under former law.

See also Sections 4617 ("health care decision" defined), 4625 ("patient" defined), 4631 ("primary physician" defined), 4722 (composition of surrogate committee).

#### **§ 4724. Decisionmaking by surrogate committee**

4724. (a) The surrogate committee shall attempt to reach consensus on proposed health care decisions, but may approve proposed health care decisions by majority vote. However, proposed health care decisions relating to withholding or withdrawing life-sustaining treatment may not be approved if any member of the surrogate committee is opposed.

(b) The surrogate committee shall keep a record of its membership, showing who participated in making a health care decision with regard to a patient, and the result of votes taken, and shall keep a record of its deliberations and conclusions under Section 4723.

**Comment.** Section 4724 is new. The principle of decisionmaking by a majority in subdivision (a) is consistent with the rule applicable to statutory surrogates under Section 5(e) of the Uniform Health-Care Decisions Act (1993). With respect to medical interventions in long-term care facilities, this section supersedes part of the second sentence of former Health and Safety Code Section 1418.8(e) relating to the “team approach to assessment and care planning.” For the standard governing surrogate decisionmaking generally, see Section 4714. Decisions relating to withholding or withdrawal of life-sustaining treatment are subject to a higher standard. If any surrogate committee member votes against the proposed health care decision, the proposal fails; however, an abstention is not counted as opposition.

Subdivision (b) requires that records be kept of the membership, voting, and deliberations of the surrogate committee. This is in addition to any other recordkeeping requirements applicable under this part.

See also Sections 4617 (“health care decision” defined), 4722 (composition of surrogate committee). For provisions concerning judicial proceedings, see Sections 4765(d) (petitioners), 4766 (purposes of petition).

#### **§ 4725. General surrogate rules applicable to surrogate committee**

4725. Provisions applicable to health care decisionmaking, duties, and immunities of surrogates apply to a surrogate committee and its members.

**Comment.** Section 4725 is new. For provisions applicable to health care surrogates generally, see Chapter 3 (commencing with Section 4710), Section 4741 (immunities of surrogate). See also Section 4653 (mercy killing, assisted suicide, euthanasia not approved). For a list of sections applicable to surrogates, see Section 4643 Comment. For the standard governing surrogate decisionmaking generally, see Section 4714.

See also Sections 4617 (“health care decision” defined), 4643 (“surrogate” defined), 4722 (composition of surrogate committee).

#### **§ 4726. Review of emergency care**

4726. In a case subject to this chapter where emergency care is administered without approval by a surrogate committee, if the emergency results in the application of physical or chemical restraints, the surrogate committee shall

meet within one week of the emergency for an evaluation of the health care decision.

**Comment.** Section 4726 generalizes former Health and Safety Code Section 1418.8(h).