House Legislative Analysis Section

Washington Square Building, Suite 1025
Lansing, Michigan 48909
Phone 517/373-6466

AUTHORITY TO MAKE MEDICAL DECISIONS

House Bill 4647 (Substitute H-1)
First Analysis (12-16-87)

Sponsor: Rep. David Hollister
Committee: Judiciary

THE APPARENT PROBLEM:

When important medical decisions have to be made, the patient is always consulted and his or her preferences are followed so far as the law and medical ethics allow. However, when a patient is incapacitated by illness or injury medical decisions can be made which may be contrary to the wishes of the patient. Many people are concerned that decisions regarding such matters as institutionalization and blood transfusions might be made for them during a period of incapacity without regard for their views, but the most common fear is that of mistaken judgments about the continuation or termination of medical treatment when death seems imminent.

Advances in medical technology have made it possible to preserve the vestiges of life in patients whose condition makes recovery impossible. Heart and lungs can be made to function even after all brain activity has ceased. For many patients in critical condition medical intervention constitutes not so much the preservation of life as the prolongation of death. When death is imminent and inevitable a conscious and capable patient can inform physicians as to the extent of treatment he or she wishes to receive. When the patient is unconscious or incapacitated, however, the family and physicians are faced with a painful decision. People generally want to respect the views of the sick person, but family members have heavy emotional investments of their own in the patient's life, and doctors have both the duty to preserve life and the threat of civil or criminal liability for their actions to consider. Reluctance to give up hope is natural and proper, yet examples of people being kept alive well past the point of any hope of recovery are familiar. To most people the prospect of being so artificially sustained is dreadful, and many would like to have some assurance that when they have reached such a point someone will be authorized to order the termination of medical treatment in accordance with their specific wishes.

Michigan's Revised Probate Code contains a section which has been used to provide for such delegation of authority; this is the section creating the durable power of attorney. The traditional common law power of attorney loses its effect when the person who had delegated the power (the principal) becomes incapacitated. The statutory durable power of attorney, however, can be written so as to have effect despite the incapacity of the principal or only in the event of such incapacity. This section allows a principal to confer unspecified authority upon the "attorney in fact." Lawyers commonly draw up written instruments which specify what decisions the attorney in fact is authorized to make in the event of the principal's incapacitation, including decisions as to medical treatment. While the durable power of attorney is sufficiently general to include authority to make medical decisions, its very generality creates some problems. Doctors and hospital staff are often doubtful of the attorney in fact's authority, and the statute contains no specific safeguards against liability for following his or her instructions. Also, the present statute does not make as clear as some would like the limits of the attorney in fact's authority with regard to medical decisions. Some people think that the Revised Probate Code should be amended to provide specifically for a durable power of attorney which gives the attorney in fact authority to make decisions regarding the person of the principal.

THE CONTENT OF THE BILL:

The bill would amend the Revised Probate Code's present durable power of attorney section to provide that it would apply only to matters having to do with the estate or financial affairs of the principal. The bill would in addition make specific provision for the revocation of a power of attorney and would specify fiduciary duties for someone designated as an attorney in fact under this section. The bill would repeal a section saying that other powers of attorney are not revoked until the attorney in fact is notified of the death, disability, or incompetence of the principal.

The bill would add a new section to the code to regulate a power of attorney which confers authority over the person of the principal. A more detailed description follows.

Designation of a Patient Advocate. An adult of sound mind could designate in a written durable power of attorney any other adult, to be known as the patient advocate, to make care, custody, and medical treatment decisions for the person who made the designation. A designation would have to be signed by two witnesses, neither of whom could be the patient's spouse, immediate family member, heir, physician, patient advocate, or an employee of an entity providing health care or health or life insurance to the patient. The witnesses would have to attest that the patient appeared to be of sound mind and under no duress, fraud, or undue influence. A designation could include a statement of the patient's desires on medical treatment, and could authorize the patient advocate to exercise one or more powers concerning the patient's medical treatment, care and custody that the patient could have exercised on his or her own behalf. The designation and its acceptance by the proposed patient advocate would be filed with the probate court, which would immediately notify the patient and the patient advocate of various rights and responsibilities as prescribed by the bill. The designation would be made a part of the patient's health record.

Duties of a Patient Advocate. A patient advocate would act as a fiduciary in exercising his or her powers and would have to observe the standards of care applicable to fiduciaries. He or she would have to take reasonable steps to follow the desires, instructions, or guidelines — whether oral or written — given by the patient while he or she was able to participate in treatment decisions. A patient advocate could not delegate his or her powers to another individual without prior authorization from the patient.

OVER

Exercise of Authority. The authority under the designation could be exercised only during a period when the patient was unable to participate in medical treatment decisions. The patient's attending physician and another physician or licensed psychologist would make the determination that a patient was no longer able to participate in medical treatment decisions and would review this determination annually. A patient whose religious beliefs prohibited the necessary examination would indicate in the designation how the determination is to be made.

Revocation of a Designation. A patient could revoke a designation at any time and in any manner by which he or she was able to communicate that desire. If the revocation was not in writing, a witness would sign a written description of the circumstances of the revocation and would notify the patient advocate if possible. A revocation would be made a part of the patient's health records, and the physician or health facility would notify the patient advocate.

Disputes. Disputes over whether a patient was unable to participate in a medical treatment decision or whether a patient advocate was failing to comply with the patient's desires or the bill would be resolved by the probate court.

Health care provider responsibilities. A person providing or withholding treatment due to the decision of someone reasonably believed to be a patient advocate would be liable in the same manner and to the same extent as if the patient had made the decision on his or her own behalf. A care or treatment provider would be bound by sound medical practice and by the patient advocate's instructions if the advocate complied with the bill, but would not be bound by the instructions of a patient advocate who did not comply with the bill. A health care provider could not require a designation to be executed as a condition of medical treatment.

Marital Status. A designation executed before a patient's marriage would terminate upon the patient's marriage. A designation executed during marriage and naming the spouse as the patient advocate would terminate upon divorce unless the patient had executed a separate written designation naming a successor individual to serve as patient advocate.

Pregnant women. If a patient was pregnant, a patient advocate's decision to withhold or withdraw medical treatment would first be reviewed by the probate court if that decision would be detrimental to the embryo or fetus. The court would appoint a guardian ad litem to represent the best interests of the embryo or fetus.

Insurance matters. A life or health insurer would be prohibited from doing any of the following because of the implementation or refusal to implement a designation: refuse or limit coverage, charge a different rate, consider the terms of an existing policy to have been breached or modified, or invoke a suicide exclusion in a policy covering the patient.

Existing designations. A designation executed before the bill took effect would be valid but subject to the bill's provisions other than those prescribing procedures for witnessing.

Suicide, Homicide. The bill would state that a designation executed under it could not be construed to condone, allow, permit, authorize, or approve suicide or homicide.

MCL 700.495, 700.496, and 700.497

FISCAL IMPLICATIONS:

Fiscal information is not available. (12-15-87)

ARGUMENTS:

For:

There is great need for a clear statutory procedure whereby a person can be assured that his or her lawful desires with regard to medical decisions will be observed if he or she should be unable to communicate them. Whether a person dreads being kept alive in a vegetative state or fears that medical efforts may not be continued as long as possible, the person should be able to feel that his or her wishes will be given the same respect during a period of incapacity that they would be accorded if he or she were capable.

Against:

The bill fails to prohibit the withdrawal of food and water, to ensure that death is by disease rather than by starvation and dehydration. The withdrawal of nutrients and water from a seriously ill person is all too likely to increase suffering and cause death. A compassionate respect for life demands that nutrients and fluids continue to be administered.

Response: Testimony from physicians and others experienced in hospice care indicates that the very ill differ from the healthy in their need or desire for food and water. It is natural and common for the dying to reduce or stop their intake of foods and fluids. Artifically-provided nutrition and hydration can greatly increase a dying person's discomfort, not only by the use of tubes but also by taxing an altered digestive system or exacerbating problems with secretions in the throat or lungs. Discomfort created by drying tissues can at least to some degree be relieved by moisturizing the mouth and skin. Nutrition and hydration decisions are best made on a case-by-case basis, to ensure that an individual's wishes and comfort are paramount. The bill should not prohibit the withdrawal of nutrition or hydration, any more than it should prohibit the withdrawal of artifical respiration or heartbeat.

Against:

The bill would discriminate against women by limiting the exercise of a patient advocate's authority over a pregnant woman. It could lead to the absurdity of pregnancy testing virtually every woman for whom a designation was being exercised, and, worse, it would establish in the law a procedure allowing the rights of an embryo of any term to supercede those of an adult woman. Rather than allowing a pregnant woman the same death with dignity afforded others, the bill would equate a woman with a womb. The dehumanization and the possible consequences of this way of thinking are dramatically illustrated by recent reports of a case where it appears that a terminally ill woman's pain was increased and death hastened by a court-ordered Caesarian section.

Response: The bill would not imbue a fetus with rights that superceded a woman's. Rather, it would require an examination of each individual case where the withdrawal or withholding of treatment might be detrimental to a fetus. To do otherwise would mean the loss of two lives, one of which had no say in the execution of the durable power of attorney.

Against:

The bill is dangerous in that it would give an individual the power to make life or death decisions for someone else. It is impossible to predict where the adoption of this principle might lead. Should this proposed statute ever become an issue before the courts there is no telling how far the courts might expand such authority. Approval of this legislation will contribute to a general diminution of respect for human life.

MORE

Response: The bill is a clarification of a procedure already in use in this state. It more clearly limits the authority of an attorney in fact in making medical decisions than does the current durable power of attorney statute. The bill strives to eliminate all ambiguity as to the powers and duties of the attorney in fact. It does not expand those powers.

Against:

The bill does not specify any qualifications for a patient advocate, nor does it require that either the physician or the family be consulted before the patient advocate makes a decision. The bill ought to address the matter of who is to make such weighty decisions or who ought to participate in their making.

Response: These decisions are being made now without any regulation. When a medical decision must be made for a person who is incapacitated, hospital staff, in consultation with whomever they deem to have responsibility for the patient, reaches the decision. This bill would help assure that the preferences of the patient himself or herself are given primary importance. It is not likely that a person would appoint an agent in whom he or she did not have confidence, nor that that agent would fail to consult the attending physician before making a decision.

Against:

The bill does not adequately distinguish between temporary and permanent disability, or between a major medical catastrophe and mental incompetence. This opens the way to "passive euthanasia," a course of action where the patient advocate allows the principal to die by withholding medical care because the advocate has made the determination that the principal's life is not worth living.

Response: The bill is intended to give force to the principal's wishes when he or she is incapacitated, whether or not death is imminent. There are medical decisions short of life and death decisions which may be of great importance to an individual. The bill would allow the patient advocate to make only decisions which would be legal for the principal to make if he or she were not incapacitated. Further, a designation under the bill would have force only while a patient was unable to participate in medical treatment decisions; the designation would have no effect on a patient who regained the ability to participate.

POSITIONS:

Lutheran Social Services of Michigan supports the bill. (12-11-87)

The Michigan Catholic Health Association supports the bill. (12-11-87)

The Michigan Hospital Association supports the bill. (12-11-87)

The Michigan Nurses Association supports the bill. (12-11-87)

The Michigan State Medical Society supports the bill. (12-11-87)

The Office of Services to the Aging supports the bill. (12-11-87)

The Probate and Estate Planning Section of the State Bar of Michigan supports the bill. (12-11-87)

The American Association of Retired Persons State Legislative Committee supports the concept of the bill. (12-11-87)

The American Civil Liberties Union supports legislation which gives legal effect to the constitutional right of privacy, including the right to medical self-determination, a patient's right to act before he/she becomes incompetent or unable to act on his/her own behalf by empowering a friend or relative to carry out his/her wishes including the refusal of treatment that only prolongs dying. (12-15-87)

The Area Agencies on Aging Association supports the concept of durable power of attorney legislation. (12-14-87)

The Michigan Senior Advocates Association supports the concept of durable power of attorney legislation. (12-14-87)

The Michigan Conference of the National Organization for Women supports the concept of durable power of attorney legislation, but opposes a pregnant woman exception and could not support the bill with such a provision. (12-11-87)

Right to Life of Michigan opposes the bill. (12-14-87)