

RESOLUTION 06-08-2016

DIGEST

Advanced Directive: Request Regarding Resuscitative Measures

Amends Probate Code section 4781.4 to provide that the most recent order regarding resuscitative measures signed by the individual is accorded deference.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 4781.4 to read as follows:

§4781.4

- 1 If the orders in an individual's request regarding resuscitative measures directly conflict
2 with his or her individual health care instructions, as defined in Section 4623, then, to the extent
3 of the conflict, the most recent order or instruction signed by the individual is effective.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: An advance health care directive under Probate Code sections 4623 or 4670 et seq. is the expression of the individual only, and cannot be executed by a third party. A Physician Order for Life-Sustaining Treatment (“POLST”), to the contrary, may be executed by the individual or a “legally recognized health care decision-maker.” (Probate Code section 4780 (b).) “Legally recognized health care decision-maker” is not well-defined in the statute. The approved POLST form instructions states that “[a] legally recognized decision-maker” may include, in addition to appointed agents, the “...closest available relative....” (Form EMSA #111 B, Effective 10/1/2014.)

Existing law allows busy medical staff to recognize whichever family member is on hand, regardless of potential conflict, to make decisions on life-sustaining treatment that would supersede an advance health care directive executed by an individual, so long as the POLST executed by the “legally recognized health care decision-maker” is most recent. Under existing law, even a Conservator of the Person could not countermand an advance health care directive absent court order. It is an anomaly that the law would provide such a cavalier treatment of existing planning documents of the individual under the POLST process.

The Solution: The proposal provides that the most recent document executed by the individual themselves should control if there is an inconsistency in the expression of preference for life-sustaining treatment.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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RESPONSIBLE FLOOR DELEGATE: D. Robert Dieringer

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RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 4781.4 to provide that the most recent order regarding resuscitative measures signed by the individual is accorded deference. This resolution should be approved in principle because an individual’s signed directive, if expressed when competent, should be respected above later contrary decisions of others, even if the individual has since lost capacity.

An adult having capacity may give individual health care instructions, either orally or in writing. (See Prob. Code, §§ 4623, 4670.) Particularly when in a signed writing, the individual’s unambiguous directives and preferences should be accorded deference. Where there is a signed directive, it should not be superseded by a different decision of a legally recognized health care decision-maker (see Prob. Code, § 4780, subd. (b)), even if the individual should later lose capacity. A directive signed by the individual when competent averts ambiguity or confusion regarding the individual’s intent and wishes. Should that signed directive extend decision-making authority to an agent or nominee, then that directive too should be respected.

COUNTERARGUMENTS

TEXCOM

SUPPORT if amended

RATIONALE

TEXCOM supports the rationale of the resolution, and agrees, for the reasons proponents have stated, that in the case of a conflict between a POLST and a prior instruction of an individual as defined in Probate Code section 4623, the last instruction by that individual should control.

An ill-defined representative should not be able to countermand an individual's own express directives. However, TEXCOM notes that the resolution only addresses the case of a document "...signed by the individual." Probate Code section 4623, the referenced statute, also covers oral instructions. As such, TEXCOM will support if this resolution is amended as set forth below:

If the orders in an individual's request regarding resuscitative measures directly conflict with his or her individual health care instructions, as defined in Section 4623, then, to the extent of the conflict, the most recent order of the individual or instruction by the individual under Probate Code section 4623 is effective.

DISCLAIMER:

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