

New Law Allows Patients To Control Mental Health Treatment

The Washington State Legislature passed a bill during its last session that has received little attention yet could affect many Washington residents who receive mental health treatment. The Mental Health Advance Directives Act went into effect on July 27, 2003 and permits most adults to control in advance their mental health care. Some lawyers are now offering this new directive to their clients, along with the previously available durable power of attorney for health care and advance directive under the Natural Death Act.

Directives Allow Patients With Capacity To Make Choices About Mental Health Care

The act is codified at RCW ch. 71.32. According to the preamble, the legislature enacted this law to enable a person to “express his or her choices at a time when the effects of mental illness have not deprived him or her of the power to express his or her instructions or preferences.” The act creates a new legal document known as a “mental health advance directive,” which permits a principal to declare his or her instructions or preferences regarding mental health treatment. The act contains a model directive and requires that all directives substantially follow the model. A mental health advance directive permits a principal to consent to specific types of treatment, refuse specific types of treatment, consent to admission to a facility for mental health treatment, and to suggest alternative responses in lieu of mental health treatment.

The act also allows the principal to appoint an agent to make decisions regarding mental health treatment on the patient’s behalf. If the principal appoints an agent, the directive must state whether the agent’s authority becomes effective upon the incapacity of the principal or whether the authority is effective regardless of the principal’s capacity. Even if the directive appoints an agent, a principal who has capacity can overrule the an agent.

The Story of Homer’s Odyssey

Taya Briley, the Director of Legal Affairs and Clinical Policy for the Washington State Hospital Association, worked with proponents of the directives bill during the last session to address the concerns of hospitals and other healthcare providers. Ms. Briley notes that the directives are sometimes informally called “Ulysses contracts,” based on the experience of Ulysses in Homer’s Odyssey. In that work, Ulysses had been warned that the sirens along the coast could entice sailors to throw themselves into the sea. Ulysses instructed his crew to tie him to the mast and not to release him no matter what he commanded while they passed the sirens. The crew first plugged their ears with wax so they would not hear the sirens. They then followed Ulysses’ instructions and did not release Ulysses despite his pleas and passed safely by the sirens. This classic story is analogous to a principal’s authority under the act to give instructions about mental health care before becoming incapacitated with the knowledge that a health care provider will follow the instructions even

if the principal later contradicts the instructions while incapacitated. According to Ms. Briley, as of 2002, at least 14 other states had adopted statutes permitting mental health advance directives. Ms. Briley said that Washington's bill is one of the broadest approaches and will require careful implementation by health care providers. For example, the bill allows a principal to direct personal matters that are not related to health care and might include such things as caring for pets and paying bills.

Must The Health Provider Follow The Directive?

A health care provider is permitted by the act to presume that a properly executed directive is valid. To be properly executed, the directive must follow the statutory form and must be witnessed by at least two adults who know the principal and can state that the principal did not appear to be incapacitated or acting under fraud or duress. One unusual feature of the directive is that the principal can reserve the right to revoke the directive even if the principal is incapacitated. In other words, an incapacitated principal about to receive treatment in accordance with a directive can lawfully revoke the directive, despite being incapacitated, if he or she reserved the right to do so. Ulysses apparently did not reserve this right.

A health care provider who receives a directive must make the directive a part of the principal's medical record. The act does allow a provider to object upon initial receipt of the directive to any portions with which the provider is unable or unwilling to comply. If the provider does not object upon receipt of the directive, the act requires a health care

provider to act in accordance with the directive unless the requested treatment is not available or if complying with the directive would violate other laws. A health care provider is not required to comply with the directive if doing so would violate the accepted standard of care. If a patient is involuntarily committed, the health care provider is not required to follow any provisions of the directive that are inconsistent with the purpose of the commitment. The directive is considered advisory only while the person is involuntarily committed.

Due Process Protection

Once a patient is determined to be incapacitated, the directive becomes operational. The act establishes a procedure with due process protections for determining whether a patient is incapacitated. One of the protections is that, prior to making a capacity determination, a provider must advise the patient that a capacity determination is being made and permit the patient to request that the determination be made by the court. If the patient does not choose to have the court determine capacity, then at least two health care providers must be involved in determining capacity. The act also sets time frames for making the initial determination and for reevaluating the patient during the course of treatment.

The act creates important new powers for potential mental health patients. The act also imposes new burdens for health care providers in this state. Many hospitals have begun asking patients on admission if they have a directive and providing patients with educational brochures. As with most other complex new laws, a period of adjustment is likely while lawyers, the courts, health care provid-

ers and the public sort out the benefits and costs.

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