

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1029 (Pellerin)
Version: July 3, 2023
Hearing Date: July 11, 2023
Fiscal: No
Urgency: No
AWM

SUBJECT

Advance health care directive form

DIGEST

This bill clarifies that a person's agent for health care decisions may not consent to certain types of treatment for the patient, and clarifies that a person may execute a standalone psychiatric health care directive.

EXECUTIVE SUMMARY

An advance health care directive is a document, executed by a person with the capacity to do so, that provides guidance or instructions for treatment preferences, or appointing a power of attorney for health care, or both. Existing law establishes the process, and provides a statutory form, for an individual to give instructions for health care decisions through an advance health care directive. The statutes make clear that certain types of treatments may not be consented to on behalf of a patient, including commitment or placement in a mental health treatment facility, sterilization, and abortion.

The current statutory advance health care directive framework and form make reference to mental health care and treatment decisions, but do not flesh out in detail what treatment decisions may be covered; the form itself does not contain any questions specific to mental health treatment. Additionally, according to the author and sponsors, psychiatric advance directives can be useful for individuals who do not want to execute a full advance health care directive.

This bill is intended to do two things. First, it clarifies that a person's agent, conservator, or surrogate may not, pursuant to an advance health care directive, consent to commitment or placement in a mental health facility, convulsive treatment, psychosurgery, sterilization, or abortion on behalf of a patient. Second, it clarifies that a person may execute a standalone psychiatric advance directive without executing a full advance health care directive, and states the Legislature's intent to promote the use of psychiatric advance directives.

This bill is sponsored by Disability Rights California and Mental Health America of California, and is supported by California Advocates for Nursing Home Reform, the California Association of Social Rehabilitation Agencies, the California Association for Nurse Practitioners, the California Catholic Conference, CAMHPRO, the County of Santa Clara, the Depression and Bipolar Support Alliance, and the National Association of Social Workers – California Chapter. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Health Care Decisions Law, which provides for the execution of advance directives to indicate preferences for health care treatment and/or the appointment of an agent to make health care decisions in the event of the executor's incapacity. (Prob. Code, div. 4.5, §§ 4600 et seq.)
- 2) Defines the following relative terms:
 - a) An "advance health care directive" or "advance directive" means either an individual health care instruction or a power of attorney for health care. (Prob. Code, § 4605.)
 - b) "Agent" means an individual designated by a power of attorney for health care to make a health care decision for the principal. (Prob. Code, § 4607.)
 - c) "Capacity" means a person's ability to understand the nature and consequences of a decision and to make and communicate a decision, and in the context of proposed health care, the ability to understand its significant benefits, risks, and alternatives. (Prob. Code, § 4609.)
 - d) A "health care decision" is a decision made by a patient or the patient's agent, conservator, or surrogate, regarding the patient's health care, including (1) selection and discharge of health care providers and institutions, (2) approval or disapproval of diagnostic tests, surgical procedures, and programs of medication, including mental health conditions, and (3) directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation. (Prob. Code, § 4617.)
 - e) An "individual health care instruction" or "individual instruction" is a patient's written or oral direction concerning a health care decision for a patient. (Prob. Code, § 4623.)
 - f) A "power of attorney for health care" is a written instrument designating an agent to make health care decisions for the principle. (Prob. Code, § 4629.)
- 3) States that the Legislature finds all of the following:
 - a) In recognition of the dignity and privacy a person has a right to expect, the law recognizes that an adult has the fundamental right to control the

- decisions relating to their own health care, including the decision to have life-sustaining treatment withheld or withdrawn.
- b) Modern medical technology has made possible the artificial prolongation of human life beyond natural limits. In the interest of protecting individual autonomy, this prolongation of the process of dying for a person for whom continued health care does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person.
 - c) In the absence of controversy, a court is normally not the proper forum in which to make health care decisions, including decisions regarding life-sustaining treatment. (Prob. Code, § 4650.)
- 4) Provides that the Health Care Decisions Law applies to health care decisions for adults who lack capacity to make decisions for themselves, and does not apply to:
- a) The right of an individual to make health decisions while having the capacity to do so.
 - b) The law governing health care in an emergency.
 - c) The law governing health care for unemancipated minors. (Prob. Code, § 4651.)
- 5) Provides that the Health Care Decisions Law does not authorize consent to any of the following on behalf of a patient:
- a) Commitment to or placement in a mental health treatment facility.
 - b) Convulsive treatment, as defined.
 - c) Psychosurgery, as defined.
 - d) Sterilization.
 - e) Abortion. (Prob. Code, § 4652.)
- 6) Provides procedures and requirements for the execution and revocation of advance health care directives and powers of attorney for health care, including that a written advance health care directive be either acknowledged before a notary public or signed by at least two witnesses, as specified. (Prob. Code, §§ 4670-4698.)
- 7) Establishes the Community Assistance, Recovery, and Empowerment (CARE) Act, which, beginning October 1, 2023, establishes a process by which a person who is currently experiencing a severe mental illness, as defined, may be brought before a court for the creation of a CARE agreement to provide for their care and to establish and provide supports. (Welf. & Inst. Code, div. 5, pt. 8, §§ 5970 et seq.)
- 8) Defines, within the CARE Act, a psychiatric advance directive as “a legal document, executed on a voluntary basis by a person who has the capacity to make medical decisions, that allows a person with mental illness to protect their autonomy and ability to self-direct care by documenting their preferences for treatment in advance of a mental health crisis,” and encourages the use of psychiatric advance directives

throughout the CARE process. (Welf. & Inst. Code, § 5971(n); *see generally id.*, §§ 5970-5987.)

This bill:

- 1) Provides that a “health care decision” under the Health Care Decisions Law does not include a decision made by a patient’s agent, conservator, or surrogate to consent to the treatments.
- 2) Provides that the Health Care Decisions Law’s provisions relating to advance health care directives (chapter 1 of part 2 of division 4.7 of the Probate Code) does not prohibit the execution of a voluntary standalone psychiatric advance directive.
- 3) Defines “psychiatric advance directive” as a legal document, executed on a voluntary basis by a person who has the capacity to make medical decisions and in accordance with the requirements for an advance health care directive, that allows a person with mental illness to protect their autonomy and ability to direct their own care by documenting their preferences for treatment in advance of a mental health crisis.
- 4) States that it is the intent of the Legislature to promote the use of a psychiatric advance directive, subject to the requirements of the Health Care Decisions Law, by a person who wants to make sure their health care providers know their treatment preferences in the event of a future mental health crisis.
- 5) States that the Legislature finds and declares all of the following:
 - a) Research has demonstrated that the use of psychiatric advance directives improves collaboration, which improves outcomes, increases empowerment, and improves medication adherence.
 - b) A psychiatric advance directive is most helpful when it includes reasons for preferring or opposing specific types of treatment.
 - c) Mental health treatment preferences that do not constitute health care instructions or decisions, as defined, may provide valuable information to improve an individual’s mental health care.

COMMENTS

1. Author's comment

According to the author:

Last year, AB 2288 (Choi), Chapter 21, Statutes of 2022), added to Advance Health Care Directive laws by including specific references to mental health treatment. AB 2288 had good intentions but there are unfortunate consequences to simply adding “mental health” without tailoring the law to include treatment preferences appropriate for a person in a mental health crisis. AB 1029 further establishes advance directives specific to psychiatric treatment by defining the term in statute as a tool to help communicate mental health patients’ treatment preferences to providers during a mental health crisis.

2. This bill clarifies that an advance health care directive may not give a patient's agent the authority to consent to certain types of procedures

California has long provided means by which a person can take control of their physical health care in the event they lose capacity. The Health Care Decisions Law allows a person to execute documents providing for their health care preferences, to appoint an agent to make health care decisions for them, or both, in the event that they become incapacitated.¹

The Health Care Decisions Law does place some guardrails on what types of treatment may be consented to through the use of an advance health care directive. Specifically, current law does not consent on behalf of the patient for commitment to, or placement in, a mental health facility; convulsive treatment or psychosurgery; sterilization; or abortion.² This bill further clarifies that a “health care decision” made by a patient’s agent, conservator, or surrogate does not include their consent to those treatments. This measure makes clear that a third party may make these highly personal decisions on a patient’s behalf.

3. This bill clarifies that a person may execute a psychiatric advance directive and states the intent of the Legislature to promote such directives

A psychiatric advance directive is akin to an advance health care directive for mental health treatment. Psychiatric advance directives set out in advance, at a time when the person has the capacity to do so, a person’s mental health treatment preferences; the psychiatric advance directive can then help guide mental health professionals if and when the person’s mental illness deteriorates to a point that they are no longer capable of giving consent to treatment. According to stakeholders, psychiatric advance

¹ Prob. Code, §§ 4670-4698.

² *Id.*, § 4652.

directives can be particularly useful when they provide information about the patient's prior medication history and which medications are, or are not, effective; a mental health professional with this information is less likely to prescribe a medication that will be less effective or have negative side effects, which in turn can increase treatment adherence.

Although many states have codified statutes for the implementation of psychiatric advance directives, California has not formally done so. The CARE Court procedure implemented last year contemplates that participants in the CARE Court process may execute psychiatric advance directives, but does not provide specifics about how they should be executed or their scope.³ And modifications to the statutory advance health care directive form made last year in AB 2288 (Choi, Ch. 21, Stats. 2022) added references to tests, procedures, and medications for mental health conditions, but again did not add any statutory clarity regarding how mental health treatments should be addressed as part of an advance health care directive. Additionally, seven counties in the state are engaging in a pilot project to develop a user-friendly online tool for psychiatric advance directives, with the goal of expanding access to psychiatric advance directives and making them more accessible.⁴

This bill does not implement a full framework for psychiatric advance directives. The issues presented by mental health treatment options – such as whether a person can give consent in advance to being medicated against their consent later, or whether the current prohibition on allowing an agent to consent to commitment should be kept in place – are nuanced and require special attention. This bill is, however, intended to make clear that individuals can execute standalone psychiatric advance directives, separate from advance health care directives, that allow a person to document their preferences for treatment in advance of a mental health crisis even though they are not expressly provided for in the Health Care Decisions Law. The bill also states that it is the intent of the Legislature to promote the use of psychiatric advance directives.

4. Arguments in support

According to Disability Rights California, one of the co-sponsors of the bill:

A Psychiatric Advance Directive (PAD) is a legal document created by an individual that specifies that person's preferences regarding mental health treatment in the event of a future mental health crisis. This can include information about medications known to be effective, an individual's preferences for emergency care, and more. PADs are demonstrated to reduce the need for coercive interventions during mental health crises and increase participants' feelings of autonomy, self-determination and empowerment. PADs can also

³ See SB 1338 (Umberg, Ch. 319, Stats. 2022).

⁴ See PADSCA.org, <https://www.padsca.org/>. Link current as of July 6, 2023.

improve mental health outcomes by facilitating conversations between mental health providers and an individual in mental health crisis.

California law currently includes language clarifying that adults may document advance planning for mental health care decision making through an Advance Health Care Directive (AHCD). Yet, while California's statutory template for an AHCD includes questions regarding health care preferences, it does not include questions related to mental health care. Thus, when mental health care decisions are created within Advance Health Care Directives, the result is incomplete and fails to address issues critical to mental health care such as facility choice, provider choice, medication preferences, and emergency interventions.

AB 1029 will significantly increase the use and effectiveness of PADs in California by amending current California Health Care Decisions law to allow an individual to appoint a separate agent for mental health decision making, and thus facilitate discussions and documentation of mental health care preferences.

SUPPORT

Disability Rights California (co-sponsor)
Mental Health America of California (co-sponsor)
California Advocates for Nursing Home Reform
California Association of Social Rehabilitation Agencies
California Association for Nurse Practitioners
California Catholic Conference
CAMHPRO
County of Santa Clara
Depression and Bipolar Support Alliance
National Association of Social Workers – California Chapter

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: SB 35 (Umberg, 2023) modifies the definition of “psychiatric advance directive” within the CARE Act to clarify that a psychiatric advance directive must be executed in accordance with the requirements of the Health Care Decision law and clarifies that it allows a person to direct their own care. SB 35 is pending before the Assembly Judiciary Committee.

Prior Legislation: SB 1338 (Umberg, Ch. 319, Stats. 2022) established the CARE Act, which included the use of psychiatric advance directives.
AB 2288 (Choi, Ch. 21, Stats. 2022) clarified that advance health care directives may include mental health treatment preferences, modified the statutory advanced health

care directive form accordingly, and made more prominent the requirement that an advanced health care directive be either notarized or witnessed by two qualified individuals

PRIOR VOTES:

Assembly Floor (Ayes 76, Noes 0)

Assembly Judiciary Committee (Ayes 11, Noes 0)
