

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 2288 (Choi)
Version: March 17, 2022
Hearing Date: May 31, 2022
Fiscal: No
Urgency: No
AWM

SUBJECT

Advance health care directives: mental health treatment

DIGEST

This bill clarifies that advance health care directives include mental health and treatment, modifies the statutory advanced health care directive form accordingly, and makes more prominent the requirement that the advanced health care directive be either notarized or witnessed by two qualified individuals.

EXECUTIVE SUMMARY

An advance health care directive is a document providing guidance or instructions for making health care decisions via an individual health care instruction, a power of attorney for health care, or both. Current law establishes the process and provides an optional statutory form for an individual to establish an advanced health care directive. Under current law, an advanced health care directive may be made for mental health care as well as for care for physical conditions; the model form, however, mentions “mental condition” only once and contains no questions specific to mental health care or treatment.

The author is concerned that the omission of mental health care and treatment from the statutory form may lead individuals to omit instructions for care in the event of certain mental health events. Given that about 1 in 25 Californians experience a serious mental illness, giving individuals the ability to assert their treatment plan and wishes in advance may help with persons who would otherwise be subjected to involuntary treatment. Accordingly, this bill clarifies the authorizing statute and statutory form to make clear that an advanced health care directive may set forth instructions for mental health treatment. The bill also makes additional nonsubstantive clarifying changes.

This bill is sponsored by the author and supported by the California Association of Public Administrators, Public Guardians and Public Conservators, the California

Catholic Conference, the Community Network for Appropriate Technologies, and NAMI-CA, There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Health Care Decisions Law (HCDL), which governs a number of procedures by which a person may make advanced plans for health care decisions. (Prob. Code, div. 4.7, §§ 4600 et seq.)
- 2) Defines the following relevant terms for purposes of the HCDL:
 - a) An “advanced health care directive” or an “advanced directive” is either an individual health care instruction or a power of attorney for health care. (Prob. Code, § 4605.)
 - b) “Capacity” is a person’s ability to understand the nature and consequences of a decision and to make and communicate a decision, and includes in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives. (Prob. Code, § 4609.)
 - c) “Health care” is any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient’s physical or mental condition. (Prob. Code, § 4615.)
 - 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 the following:
 - i. Selection and discharge of health care providers and institutions.
 - ii. Approval or disapproval of diagnostic tests, surgical procedures, and programs of medication.
 - iii. 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 healthcare instruction” or “individual instruction” is a patient’s written or oral direction concerning a health care decision for the patient. (Prob. Code, § 4623.)
- 3) Permits an adult having capacity to give an individual health care instruction, which may be oral or written and may be limited to take effect only if a specified condition arises. (Prob. Code, § 4670.)
- 4) Permits any adult having capacity to execute a power of attorney for health care, and provides that the power of attorney for health care may authorize the agent to make health care decisions and may include individual health care instructions. (Prob. Code, § 4671(a).)

- 5) Provides that the principal in a power of attorney for health care may grant authority to make decisions relating to the personal care of the principal, including, but not limited to, determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment. (Prob. Code, § 4671(b).)
- 6) Allows, but does not require, an advanced health care directive to be established on a statutory form, which an individual may modify as needed. (Prob. Code, § 4700.)
- 7) Sets forth the statutory advanced health care directive form, which allows the person executing the form to designate a power of attorney for health care, provide individual health care instructions, and specify preferences related to donations of organs at death. (Prob. Code, § 4701.)
- 8) Provides that a written advanced health care directive is legally sufficient if all of the following requirements are satisfied:
 - a) The advance directive contains the date of its execution.
 - b) The advance directive is signed either by the patient or in the patient's name by another adult in the patient's presence and at the patient's direction.
 - c) The advance directive is either acknowledged by a notary public or signed by at least two witnesses.¹ (Prob. Code, § 4673(a).)

This bill:

- 1) Clarifies that "health care" under the HCDL includes care, treatment, services, or procedures relating to mental health as well as physical health.
- 2) Clarifies that a "health care decision" under the HCDL includes the approval or disapproval of diagnostic tests, surgical procedures, and programs of medication for mental health as well as physical health.
- 3) Modifies the statutory advance health care directive form to make clear that the person executing the form may provide for advanced directions relating to, or empower a power of attorney to make decisions regarding, mental health as well as physical health care issues.
- 4) Modifies the statutory advance health care directive form to make the requirement for the signatures of two witnesses or notarization more prominent.
- 5) Makes certain technical and nonsubstantive conforming changes.

¹ The Probate Code sets forth limits on who may serve as a witness; these requirements are not relevant to this bill. (See Prob. Code, §§ 4674-4675.)

COMMENTS

1. Author's comment

According to the author:

The model Advance Health Care Directive (AHCD) form is outdated and should reflect existing law that allows an individual to give instructions for health care decisions, both physical and mental. AB 2288 updates the outdated form by clarifying the current AHCD form to reflect instructions for both physical and mental health care decisions.

2. This bill clarifies the procedures and statutory form for establishing an advanced health care directive to make clear the directive may include treatment or care for mental health conditions

An advance health care directive is a document providing guidance or instructions for making health care decisions that contains either an individual health care instruction, or a power of attorney for health care, or both.² An advanced health care directive may assist in guiding inpatient treatment decisions when the patient no longer has capacity to make their own health care decisions; it is recommended that all adults, regardless of their current health status, have an advanced health care directive setting forth their wishes if they should become incapacitated. By setting forth one's wishes in an advanced health care directive, an individual can ensure that their end-of-life and other treatment preferences are articulated in detail and respected.³

Existing law provides an optional statutory form on which an individual may establish an advanced health care directive.⁴ The statutory form was created in 1999 by AB 891 (Alquist, Ch. 658, Stats. 1999). The form allows an individual who has capacity to make decisions to make end-of-life health care choices – including the choice to prolong, or not prolong, life and to seek relief from pain – to establish a power of attorney for health care decisions who will make choices for the individual, or both.⁵ The form must be either witnessed by two qualified witnesses or acknowledged before a notary public.⁶

Current law allows a person to set forth plans for mental health treatment in an advanced health care directive.⁷ In twenty-five other states, preferences for future

² Prob. Code, §§ 4670-4671.

³ The promise that a person's wishes in an advanced health care directive will be respected is not absolute: a provider may decline to follow the directive if doing so would violate their professional standards of care or for "reasons of conscience." (Prob. Code, §§ 4734-4735.)

⁴ Prob. Code, § 4701.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Id.*, § 4615.

mental health treatment are the subject of a standalone directive, known as a psychiatric advance directive.⁸ The Assembly Judiciary Committee's analysis of this bill suggests that psychiatric advance directives may be superior to simply incorporating mental health treatment into an overall advanced health care directive because it would likely be completed after detailed conversations between the psychiatric provider and patient about the patient's preferences for treatment in a psychiatric emergency.

Pending legislation to establish the Community Assistance, Recovery, and Empowerment (CARE) Court⁹ would introduce the use of psychiatric advance directives for individuals participating in the CARE court process and as part of the graduation plan for persons exiting the process. In light of the CARE court legislations' introduction of specialized psychiatric advance directives, the author of this bill decided to clarify that advanced health care directives may address both mental and physical health care instructions rather than establish a potentially competing psychiatric advance directive scheme. Accordingly, this bill modifies the existing advance health care directive statutory language and form to make clear that an advance health care directive may set forth directions for mental health treatment as well as physical health care treatment. The bill also clarifies that the form must be witnessed by two qualified individuals or acknowledged by a notary public, and makes certain nonsubstantive conforming changes.

3. Arguments in support

According to the California Association of Public Administrators, Public Guardians and Public Conservators:

AB 2288 clarifies that the definition of a "health care decision" included in an Advanced Health Care Directive includes a decision related to treatment for mental health conditions. The bill revises the instructions on the current form to explain this clarification. We believe this is an important clarification for individuals who may not realize the form can be used for this purpose, or who may believe an additional form is needed.

As you are aware, public conservators are appointed for the most vulnerable individuals in a county and many are no longer in a position to care or make decisions for themselves. Understanding an individual's wishes for treatment for health care, including mental health care, is critical to ensuring care that is supportive of that individual's wishes and honors their need for self-determination to the extent possible.

⁸ See NAMI, Psychiatric Advanced Directives, <https://www.nami.org/Advocacy/Policy-Priorities/Responding-to-Crises/Psychiatric-Advance-Directives> (last visited May 16, 2022).

⁹ SB 1338 (Umberg, 2022), AB 2830 (Bloom, 2022).

SUPPORT

California Association of Public Administrators, Public Guardians and Public Conservators
California Catholic Conference
Community Network for Appropriate Technologies
NAMI-CA

OPPOSITION

None known

RELATED LEGISLATION

Pending legislation:

SB 1338 (Umberg, 2022) establishes the Community Assistance, Recovery, and Empowerment (CARE) Act, which establishes the CARE Court system for persons suffering from severe mental illnesses and, among other things, contemplates individuals establishing psychiatric advance directives as part of their treatment and graduation plans. SB 1338 is pending before the Assembly.

AB 2830 (Bloom, 2022) is identical to SB 1338 (Umberg, 2022) and establishes the Community Assistance, Recovery, and Empowerment (CARE) Act, which establishes the CARE Court system for persons suffering from severe mental illnesses and, among other things, contemplates individuals establishing psychiatric advance directives as part of their treatment and graduation plans. AB 2830 is pending before the Assembly Judiciary Committee.

AB 2338 (Gipson, 2022) authorizes legally recognized health care decisionmakers, in an order of priority, who may be chosen as a surrogate if a patient lacks the capacity to make a health care decision or to designate a surrogate. AB 2338 is pending before the Senate Rules Committee.

Prior legislation:

AB 1234 (Arambula, 2021) would have required the California Health and Human Services Agency to develop a registry system for Physician Orders for Life Sustaining Treatment forms, a health care professional-directed advance health care directive. AB 1234 died in the Assembly Health Committee.

AB 891 (Alquist, Ch. 658, Stats. 1999) repealed existing provisions relating to durable powers of attorney for health care and enacted the HCDL, which provided for the

creation, form, and revocation of advance health care directives and for the manner of making health care decisions for patients without surrogates.

PRIOR VOTES:

Assembly Floor (Ayes 71, Noes 0)

Assembly Health Committee (Ayes 13, Noes 0)

Assembly Judiciary Committee (Ayes 9, Noes 0)
