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Checks and Balances:

critical interactions between the medical and legal professions in decision making for our most vulnerable community members

Presented by:

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Judge, Superior Court of San Bernardino County

The Unbefriended Patient:

32,000 foot Perspective

Some rudimentary legal ground rules:



Due Process: Notice and Opportunity to be heard.

Equal Protection under the law: similarly situated persons should be treated equally and enjoy same rights and protections.



Hippocratic Oath:

Begins with an agreement by physicians/practitioners to openly share knowledge with those who follow them for the sake of the profession...And of course... swears the treatments will be used for the benefit of the ill and not for harm.

Abbreviations

- CANHR: California Advocates for Nursing Home Reform
- CDPH: California Department of Public Health
- IDT: Interdisciplinary Team
- POLST: Physician Orders for Life Sustaining Treatment
- DNR: Do Not Resuscitate
- L.P.S.: Lanterman Pertris Short Act
- SNF: Skilled Nursing Facility

There are **FOUR** primary legal constructs that permit a **3rd** party to make medical decisions for another person:

- 1) Use of various Powers of Attorney including advance health care directives
- 2) Conservatorships of the person: both probate and L.P.S.
- 3) Probate Code Section 3200
- 4) Health & Safety Code 1418.8

REPRESENTED PATIENTS

Conservatorship:

- A conservatorship is a protective court proceeding.
- In a conservatorship, the conservator (a court-appointed fiduciary), manages the personal care of a person who cannot properly provide for their personal needs.



Conservator

- Under a conservatorship of the person, the conservator has the “care”, custody, and control: of the Conservatee, including the power to determine where the Conservatee will live. Prob. Code, section 2351-2352.

Medical Decisions



Who can make medical decisions in a Conservatorship?

- The Conservatee is presumed to have the capacity to make medical decisions unless the court finds, that the Conservatee lacks the capacity to give informed consent.

When Health Care Decisions May be Made by Conservator

- Four exceptions to the general rule that the Conservatee retains capacity to give informed consent to medical treatment. Three of the exceptions are by statute:
 - 1) Emergency situations.
 - 2) A court order, where the Conservator is given the authority to consent to certain narrowly defined medical treatment, a “single transaction” power.
 - 3) A court order, where the court grants general medical powers to the Conservator when the Conservatee lacks capacity.
 - 4) When Conservatee retains legal counsel to give informed consent but the physician or health care provider refuses to accept just the consent of the Conservatee and requires a court order.

**Probate Code section 3200 et seq.
“unrepresented”-“unbefriended” persons**

- **A petition may be filed** to determine that a patient lacks the capacity to make a health care decision concerning **specified treatment** for an existing or continuing condition, and **further for an order authorizing** a designated person to make a health care decision on behalf of the patient.

THE PETITION

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT – CIVIL DIVISION

In the Matter of

CASE NO.

EX PARTE PETITION FOR COURT
AUTHORIZATION FOR MEDICAL
TREATMENT

(Probate Code § 3200, et seq.)

EX PARTE

DATE: May 22, 2020
TIME: Ex Parte
DEPT:

Patient,

Petitioner respectfully alleges that:

1. Petitioner, _____, M.D., (Ph. _____), is the patient's physician acting on behalf of Arrowhead Regional Medical Center (ARMC), the medical facility where the patient has received treatment.

2. The patient, _____, is 66 years of age and a resident of San Bernardino County. The patient does not have a conservator of the person.

3. The patient was brought to ARMC on January 26, 2020, March 16, 2020, and May 2, 2020, for vaginal bleeding and anemia from uterine cancer.

4. The patient's mother, _____, and sister, _____, reside in the state of Florida. The patient's father is deceased.

5. The patient needs medical treatment and is unable to give informed consent.

6. The declaration of _____, M.D., which is attached hereto as Exhibit A, contains the following information:

- a. The nature of the patient's medical condition requiring treatment;
- b. The recommended course of treatment considered medically appropriate.
- c. The threat to the patient's health if authorization for treatment is delayed;
- d. The predictable or probable outcome of the recommended treatment;
- e. The medically available alternatives, if any, to the treatment recommended;
- f. The efforts made to obtain an informed consent from the patient;
- g. The deficit(s) in the patient's impaired mental functions; and the correlation between the mental function deficit(s) and the patient's ability to respond knowingly and intelligently to queries about the recommended medical treatment or inability to participate in a treatment decision about the recommended medical treatment by means of a rational thought process.

7. As far as is known to Petitioner, all the facts set forth in the medical declaration of _____, M.D. are true.

8. Petitioner has no knowledge of a valid and effective power of attorney for health care or surrogate designation by the patient.

9. The patient is not an adherent of a religion that relies on prayer alone for healing as defined in Probate Code section 2355, subdivision (b).

10. It is in the patient's best interests that _____, M.D., be authorized and directed to consent to the recommended procedure.

11. It is in the patient's best interests that notice of hearing on this petition be waived pursuant to the provisions set forth in Probate Code section 3206, subdivision(c).

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WHEREFORE, PETITIONER PRAYS that:

1. Notice of hearing be waived;
2. That all allegations in the petition are true;
3. That it is the patient's best interests that, _____ M.D. be authorized and directed to consent to the recommended medical treatment on behalf of the patient namely, removal of uterus, fallopian tubes, and ovaries with cancer staging.
4. For such other and further order that the Court deems just and proper.

DATED:

By _____

THE DOCTOR'S DECLARATION

1 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO
2 SAN BERNARDINO DISTRICT – CIVIL DIVISION

3 In the Matter of:

CASE NO.

4 DOCTOR'S DECLARATION TO
5 SUPPORT THE PETITION TO
6 AUTHORIZE MEDICAL TREATMENT
7 AND TO AUTHORIZE PETITIONER TO
8 CONSENT TO MEDICAL TREATMENT
9 ON BEHALF OF

Patient.

(PROBATE CODE SECTION 3200 et al.)

10 I, _____, hereby declare:

11 1. I am duly licensed medical practitioner, and I have examined _____
12 _____ (hereinafter "patient").

13 2. The patient was admitted to the hospital on _____ for the following
14 reasons:

15 _____
16 _____
17 3. The date of birth of the patient is: _____

18 4. In my opinion, the following medical treatment is medically appropriate for the
19 patient: _____
20 _____

21 5. The procedure consists of: _____
22 _____

23 6. If the procedure is not performed, the threat to the patient is:

24 _____ Save life

25 _____ Prevent serious bodily injury

26 Due to the following: _____
27 _____
28 _____

1 7. As a result of the recommended course of medical treatment, the predictable
2 outcome for the patient is: _____
3 _____

4 8. The medically available alternatives are: _____
5 _____

6 9. The following efforts have been made to obtain the informed consent of patient:
7 _____
8 _____

9 10. The following are the deficit(s) in the patient's mental functions that prevent the
10 patient from knowingly and intelligently responding to queries about the
11 recommended medical treatment, or have the ability to participate in a treatment
12 decision about the recommended medical treatment by means of a rational thought
13 process.
14 _____
15 _____

16 11. The names, addresses, and phone numbers of the patient's all known family
17 members:
18 _____
19 _____

20 I declare under penalty of perjury under the laws of the State of California that
21 the foregoing is true and correct.

22 Executed on _____ (date) at _____ (city),
23 California.

24 _____
25 Print Physician's Name

24 _____
25 Physician's Signature

26 _____
27 Phone Number: _____
28 _____

[Proposed] ORDER

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT – CIVIL DIVISION

In the Matter of

Patient.

CASE NO.

ORDER AUTHORIZING MEDICAL
TREATMENT AND AUTHORIZING
Dr. _____, M.D., TO
CONSENT TO MEDICAL TREATMENT
ON BEHALF OF PATIENT
(Probate Code §3200, et. seq.)

The Petition of _____, M.D., acting on behalf of Arrowhead
Regional Medical Center, for court authorization for medical treatment rendered to
(patient), and to authorize _____, M.D., to consent to medical treatment
on behalf of (patient), was heard ex parte on May 22, 2020, before the Honorable
_____, Judge of the Superior Court. The Patient was
present and represented by the law firm of _____ by _____,
County Counsel, by _____, _____, appeared on
behalf of the petitioner.

THE COURT FINDS, after examining the Petition and the Declarations of
Dr. _____, M.D., attached thereto, and after hearing the evidence and the
arguments of counsel, the Court finds good cause that notice be waived, that all the
allegations are true, that the existing or continuing medical condition of the patient
requires the recommended course of medical treatment, that, if untreated, there is a
probability that the condition will become life-endangering or result in a serious threat
to the physical or mental health of the patient, and that the patient is unable to give an
informed consent to the recommended treatment.

THEREFORE, IT IS HEREBY ORDERED, that the recommended medical
treatment consisting of removal of uterus, fallopian tubes, and ovaries with cancer
staging is authorized and that Dr. _____, M.D., is authorized to give consent.

DATED: _____

JUDGE OF THE SUPERIOR COURT

SKILLED NURSING FACILITIES – SNFs Defined:

- Skilled nursing facilities provide 24-hour skilled nursing and supportive care to resident individuals whose primary need is for the availability of skilled nursing care on an extended basis. (See Health & Saf. Code, § 1250, subd. (c)(1).)
- Intermediate care facilities provide 24-hour inpatient care to individuals who are developmentally disabled or who otherwise do not require continuous skilled nursing care, but have recurring need for skilled nursing supervision and require supportive care. (See *id.*, § 1250, subds. (d), (g) & (h).)

From: *CANHR, et al., vs. Smith* (2019) 37 CA 5th 814, fn 1.

Ca. Health & Safety Code Section 1418.8

- Enacted in 1992.
- Intended to give SNF's intermediate care facilities means of decision making for incapacitated residents who have no one with legal authority to make healthcare decisions on their behalf.
- 1418.8 constitutionality was challenged in *CANHR, et al., vs. Smith* (2019) 37 CA 5th 814.

Notice

- The SNF/physician **must** provide notice **both orally and in writing** to the resident and another competent person whose “interests are aligned with those of the resident” before the recommended intervention may be undertaken.
- **The notice must include the following information:**
 - 1) the fact of the resident has been found to lack capacity and to lack a legal surrogate;
 - 2) the proposed treatment by the attending physician;
 - 3) the fact the IDT will make a decision on the proposed treatment;
 - 4) the resident’s right to have a patient representative participate on the IDT; and
 - 5) the resident’s right to seek judicial review; and
- The resident **must** be given a “**reasonable opportunity**” to seek judicial review after receiving the notice.

IDT Composition

- Every IDT must include a patient representative who is unaffiliated with the SNF except in cases of emergency.



End of Life

- The 1418.8 process may be used to **impose or change** a POLST, DNR, or comfort care orders, or to make a decision to provide hospice care to a terminally ill patient.
- The process **may not** be used to make a determination regarding the withdrawal of life support, that decision must be made through a court process. (Id. At pp. 833-835 & 880)
- The Court also found that the section 1418.8 process may be used to make decisions related to **the administration of antipsychotic medications**. (Id. At p. 835) Further, a “patient representative should be designated for each resident determined” to lack capacity “as soon as that determination is made.” (Id. At p. 849)

IN CONCLUSION...