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**Judiciary Committee**

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**HB 1041**

**Title:** An act relating to mental health advance directives.

**Brief Description:** Authorizing mental health advance directives.

**Sponsors:** Representatives Lantz, Kagi, Conway, Chase, Kirby, Dickerson, Kenney, Campbell, Talcott, Skinner and Jarrett.

**Brief Summary of Bill**

- Establishes procedures and requirements for a person with capacity to create a mental health advance directive.
- Establishes duties and responsibilities of agents and providers regarding directives.
- Codifies a mental health advance directive form.
- Creates a class C felony for fraudulently creating or revoking another person's directive.

**Hearing Date:** 1/24/03

**Staff:** Trudes Hutcheson (786-7384).

**Background:**

Although there are statutes authorizing "living wills" and powers of attorney, Washington does not have laws explicitly recognizing advance directives for mental health treatment.

Under the Natural Death Act, a person may prepare an advance directive ("living will") instructing providers about the person's end-of-life decisions. The person must sign the directive in the presence of two witnesses and may revoke the directive at anytime.

The durable power of attorney statutes allow a person to appoint an agent (called an attorney in fact) to make decisions on the principal's behalf. The power of attorney may be as broad or limiting as the principal chooses and may authorize the attorney in fact to make certain health care decisions for the principal. The attorney in fact may not consent to involuntary commitment of the principal, therapy that induces convulsion, surgery solely for the purpose

of psychosurgery, or other psychiatric or mental health procedures that restrict freedom of movement.

Under the involuntary treatment laws, a person may be involuntarily committed to inpatient mental health treatment if the person, as a result of a mental disorder, presents a likelihood of serious harm to self or others or is gravely disabled. Generally, the county designated mental health professional (CDMHP) must petition the court to involuntarily commit the person for evaluation and treatment. The courts, CDMHPs, and treatment facilities must follow various procedural requirements and reviews. A person may voluntarily admit himself into an inpatient treatment facility. Generally, a person voluntarily admitted must be released immediately upon that person's request.

Approximately 16 states have enacted legislation recognizing mental health advance directives. Although the states vary in the specifics, the laws generally authorize a person to create a mental health advance directive in which the person can consent to treatment, refuse treatment, consent to inpatient treatment, and appoint an agent to make treatment decisions on the person's behalf.

### **Summary of Bill:**

The legislature makes certain findings regarding the ability of mentally ill individuals to make their own treatment decisions and their need for some method of expressing those decisions while they have capacity.

#### ***(1) Creation of a Mental Health Advance Directive***

An adult with capacity may create a mental health advance directive. A directive may include such provisions as the person's consent to specific types of mental health treatment, refusal to consent to treatment, consent to treatment in an inpatient facility for up to 14 days, instructions regarding the principal's personal affairs, and the appointment of an agent.

With certain exceptions, the durable power of attorney statutes generally apply to agents appointed under a directive. The principal must notify the agent in writing of the appointment. The principal may revoke the appointment of an agent as provided under current law or under conditions stated by the principal in the appointment.

When creating the directive, the principal must designate whether the principal chooses to be able to revoke the directive only when he or she has capacity or whether the principal chooses to be able to revoke the directive at any time, even during periods of incapacity. The directive must be in writing, signed, and witnessed by two adults. The bill lists who may not act as witnesses.

#### ***(2) Determination of Capacity***

An adult is presumed to have capacity unless he or she has been found to be incapacitated under the procedures established in the bill or unless a court has found the person incapacitated to give informed consent to treatment under the guardianship laws.

"Incapacitated" is linked to the ability to give informed consent for treatment.

"Incapacitated" is defined as a person who is unable to understand the nature, character, and anticipated results of proposed treatments or alternatives; the recognized serious possible risks; complications and anticipated benefits to treatments and alternatives, including nontreatment; or a person who is unable to communicate his or her understanding or treatment decisions.

A principal, agent, professional person, or health care provider may request a capacity determination. The determination may be made by either a superior court, two health care providers, or one mental health professional and one health care provider. One of the persons making the capacity determination must be a psychiatrist, psychologist, or advance registered psychiatric nurse. If the court is making the determination, certain procedural requirements apply.

The bill establishes various procedures for capacity determinations, including the time periods under which a determination must be made. If no determination is made within the required time, the principal is presumed to have capacity.

An initial determination of capacity must be completed within 48 hours of the request for a determination. If an incapacitated principal is admitted to inpatient treatment pursuant to a directive, the principal's capacity must be reevaluated within 72 hours of admission or when there has been a change in the principal's condition indicating the principal has regained capacity, whichever is sooner.

If the principal requests a redetermination of capacity while inpatient, the redetermination must be made within 72 hours of the request. If an incapacitated principal is being treated on an outpatient basis and requests a redetermination of capacity, the redetermination must be made within five days of the request. The bill also establishes who is responsible for obtaining the determination of capacity under various circumstances.

### ***(3) Revocation of a Mental Health Advance Directive***

A person with capacity may revoke all or part of the directive. An incapacitated person may revoke the directive only if he or she chose to be able to revoke during periods of incapacity. Revocation must be by written statement by the principal or at the principal's direction, but need not follow any specific form. The principal must provide a copy of the revocation to the agent and health care provider, professional person, or health care facility that received a copy of the directive from the principal.

### ***(4) Consent to Admission to Inpatient Treatment***

A principal may consent in the directive to be treated in an inpatient facility for up to 14 days. If a principal consented to inpatient treatment, but while incapacitated refuses to be admitted and chose not to be able to revoke while incapacitated, then the principal may only be admitted if certain procedures are followed. In those circumstances, a physician member of the treating facility's staff must (a) evaluate the principal's mental condition and determine, along with another health care provider or mental health professional, that the principal is incapacitated; (b) obtain informed consent of the agent; (c) determine that the

principal needs inpatient evaluation or treatment that cannot be accomplished in a less restrictive setting; and (d) document the findings and recommendations in the medical record.

The principal may immediately seek injunctive relief for release from the facility. Consent to inpatient treatment in a directive is effective only while the treatment provider is in substantial compliance with the material provisions of the directive related to inpatient treatment.

#### ***(5) Provider Responsibilities***

A treatment provider must make the directive part of the principal's medical record and is deemed to have actual knowledge of the contents. When receiving the directive, the treatment provider must promptly notify the principal if the provider is unable or unwilling to comply with the directive for any reason.

When acting under a directive, the treatment provider must act in accordance with the directive to the fullest extent possible, unless (a) compliance would violate the accepted standard of care; (b) the requested treatment is not available; (c) compliance would violate applicable law; or (d) it is an emergency situation and compliance would endanger any person's life or health.

A provider is not subject to civil liability or professional conduct sanctions for providing treatment according to a directive, for making capacity determinations, and for other acts related to the directive if the provider acts in good faith and without negligence.

A directive does not create an entitlement to treatment, supercede a determination of medical necessity, or obligate a treatment provider to pay for costs associated with treatment.

#### ***(6) Other Provisions***

The bill contains other provisions relating to treatment, providers, and agents, and does the following:

- prohibits any person from using abuse, neglect, financial exploitation, or abandonment to carry out the directive;
- codifies a form and a notice to the principal about the effects of a directive; and
- creates a class C felony for fraudulently creating or revoking another person's directive.

**Appropriation:** None.

**Fiscal Note:** Requested on January 15, 2003.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.