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Long Term Care Ombudsman Project

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House Human Services
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S.62

S.62 allows a surrogate to give or withhold consent for a DNR or COLST on behalf of an individual without capacity who does not have a medical guardian or an agent under an advance directive.

Section 1 of the bill adds Subchapter 2 to the existing advance directive statute. This subchapter defines surrogacy and establishes a process for identifying a surrogate. In addition, it explains the clinician's role in this process and it outlines specific responsibilities attributed to clinicians. These include the duty to:

- determine if the patient lacks capacity to consent (§ 9731(b)(1));
- not provide or withhold treatment over the patient's objection (§ 9731(b)(5));
- not follow the direction of the surrogate if the patient objects to the surrogate, even if the patient lacks capacity (§ 9731(c)(3))
- document in the patients record that there is basis for relying on the surrogate to make a decision to withhold or give consent (§ 9731(d));
- make a reasonable effort to inform the patient of the consequences of providing or withholding treatment (§ 9731(f));
- determine if the patient regains capacity to consent and then seek consent from the patient (§9731(g));
- grant the surrogate the same rights as a patient with capacity to receive, review, request and copy the clinician's records and participate in meetings and discussions conferences with the

clinician regarding the patient's health care decisions (§ 9731(h)).

During testimony last week, several witnesses emphasized that one of the goals of S.62 was to ensure that key principals that already apply to advance directives, also apply to surrogates. As a result, S.62 and the current advance directive statute both:

- recognize the individual's constitutional right to refuse treatment;
- require that the substituted judgment standard be used when making decisions on someone's behalf; and
- give the individual the opportunity to designate the person they want to act as their decision maker.

Similarly, we believe that S.62 should offer the same clinician accountability and patient protections that are included for advance directives in current law. Section 9714(a) of the advance directive statute states:

(a) A health care provider, health care facility, residential care facility, funeral director, crematory operator, or cemetery official, or an employee of any of them having actual knowledge of an advance directive or an instruction of the principal, agent, or guardian is subject to review and disciplinary action by the appropriate licensing entity for failing to act in accordance with the advance directive or instruction or with subsection 9707(b) of this title.

S.62 proposes to create a new law that gives surrogates the right to make life and death decisions for patients, whose lives are constitutionally protected. It allows surrogates to have this power without the level of accountability and oversight inherent in the guardianship court process. And, unlike an advance directive, it allows the surrogate to be selected without the consent of the patient. Given the enormity of what is at stake, the lack of judicial oversight or specific direction from the patient, we urge that the following provision be added to the bill:

§9731(i)

A clinician may be subject to review and disciplinary action by the appropriate licensing agency for failing to comply with subchapter 2 of this chapter:

Finally, we also suggest that §9708(d)(2) be amended to require the clinician to consult with the surrogate in addition to the guardian or agent. The new language would require the clinician to;

consult with the patient, and the patient's agent, guardian or surrogate....

Respectfully submitted,
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