FAMILY ISSUE FACT SHEET

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SB 1404 – PRIORITY FOR HEALTH CARE DIRECTIVES

EXECUTIVE SUMMARY

Arizona law provides for patients to create an advanced health care directive (e.g., a living will or a healthcare power of attorney) that governs their care in the event they are incapacitated and unable to communicate their wishes. Currently, however, a national movement is seeking an alternative approach to care for patients facing terminal diagnoses where a physician (instead of the patient) signs an order listing the care a patient can receive. In some states, the patient's consent is not even required for these "Physician Orders for Life-Sustaining Treatment" (also known as "POLST"). SB 1404 clarifies that if a POLST or similar order conflicts with a health care directive, the document originally created by the patient is presumed to represent his or her wishes. It also puts into law some basic, common sense requirements to ensure patients are informed in their decision making when faced with a terminal condition and a POLST-type document.

BACKGROUND

Under current Arizona law, individuals may ensure that their wishes are followed in the event they cannot communicate by signing an advanced health care directive, most commonly a living will or a healthcare power of attorney. A living will specifies which care and treatment the patient wants, while a healthcare power of attorney appoints a trusted relative or friend to make decisions on the patient's behalf.

The latest trend in this area of law and medical care is known as "POLST" – Physician Orders for Life-Sustaining Treatment. A POLST is "a medical order indicating a patient's wishes regarding treatments that are commonly used in a medical crisis."[1] The POLST concept is essentially a broader application of the do-not-resuscitate ("DNR") order.

Since a POLST is issued by a doctor, paramedics and emergency room doctors must follow these orders for current treatment, as opposed to a document written by the patient regarding future care.[2] While this sounds generally like a good idea, proposals for regulating POLST – including laws passed in other states – allow a doctor to order that a patient not be resuscitated on the basis of the *doctor's* opinion that the care would be futile or medically ineffective, rather than on the basis of the patient's wishes.[3] This idea of a "no consent DNR" is a very concerning use of the POLST program.

Moreover, a major concern about the POLST program is that it seeks to cut out the patient's family members and sometimes even the patient from the decision-making process. In particular, if the patient has signed a healthcare power of attorney appointing a trusted family member or friend with authority to make decisions about his or her healthcare, a POLST could be signed by a doctor and used to override the decisions of the power of attorney.

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Another serious concern is that a standardized POLST form with checkboxes for care that a patient wants or does not want to receive, cannot take into account the full array of possibilities that may be available in any given situation. Some states with POLST programs created through statutes do not address what should happen if a section of the form is not completed, leaving even more uncertainty.[4] Decisions about patient care are best made when all the facts and options are known - this is why Center for Arizona Policy recommends appointing a relative or friend who is familiar with your values as a healthcare power of attorney.

The POLST program originated in Oregon – the state known as the leader in creating a physician-assisted suicide law. POLST orders are another step towards acceptance of the idea of "managed death" and are a subtle part of the agenda to legalize voluntary euthanasia.[5]

Other troubling aspects of the POLST program are the potential abuses when forms are created by a doctor or caregiver for someone with mental disabilities, developmental disabilities, or significant physical disabilities[6] or when the orders are issued for minors,[7] as is allowed in several states.

In short, the POLST concept as composed in many states undermines the autonomy of patients and is loaded with ethical pitfalls. It is not a patient-centered approach to medical care and decision-making.

The POLST program is developing in Arizona, though proponents have opted to not utilize the legislative process at this time.[8] Instead, following the lead of states like Oregon and Washington, the program is being created by building a consensus among medical professionals and conducting a pilot program.

Specific to Arizona, the push is to create a more expansive *Provider's* Order for Life-Sustaining Treatment, which will allow medical professionals beyond just licensed medical doctors to be able to sign these forms. That fact, coupled with the fact that the Arizona POLST form is being crafted off the Oregon form *to not require the signature of the patient and only recommend a patient consent in writing*, is extremely troubling.

SB 1404 seeks to address some of these concerns by ensuring that, in the event of a conflict, the patient's wishes that have been clearly documented in a health care directive like a living will or healthcare power of attorney will be followed. Several states that have adopted POLST have taken this approach to protect patients' decision making.[9]

In addition, SB 1404 puts in place the following common sense requirements to govern when a POLST form is used in the absence of a health care directive and when a POLST form is used as a complement to a valid health care directive:

- The order must be signed by a physician.
- The order must be signed by the patient.

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- The signing must be witnessed by two individuals, one of which whom may be the physician.
- At the time of the signing, the patient must be deemed by the physician to be in a terminal condition with no reasonable expectation of recovery within six months.
- The physician must inform the patient and ensure the order represents the patient's independent decision about end-of-life care.
- The patient must be at least 18 years of age.

TALKING POINTS

- **The patient's preparations should take priority over the doctor's preference.** Many families take the time needed to prepare for potential end-of-life scenarios. These plans should not be able to be disregarded if a POLST conflicts with a clearly documented health care directive.
- **When a patient has taken the step of signing a document to express his or her wishes, the law should safeguard the patient's wishes to the utmost.**
- **Without common sense requirements, POLSTs open the door to untold abuse – and patients suffer the consequences.** The simple truth is that this program not only puts patients in harms way today, but is a part of a larger movement towards "managed death" or euthanasia.

CONCLUSION

The POLST movement is very troubling, and Arizonans should be concerned about forms that need only be signed by a Provider to be operative and binding. SB 1404 seeks to minimize some of the concerns with POLSTs by ensuring that in the event of a direct conflict between a POLST and a health care directive, the health care directive is not circumvented. Additionally, several common sense requirements are put into law to protect against abuse of this type of document.

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[1] *How Does POLST Work?*, National POLST Paradigm, www.polst.org/advance-care-planning/how-does-polst-work/ (last visited Feb. 13, 2014).
[2] *Id.*
[3] Wesley J. Smith, *Vermont, Maryland Legalize No Consent DNRs*, National Review Online, June 19, 2013, www.nationalreview.com/human-exceptionalism/351453/vermont-maryland-legalize-no-consent-dnrs-wesley-j-smith (last visited Feb. 13, 2014).
[4] *Statutory/Regulatory Comparison of State POLST Programs*, ABA Commission on Law and Aging, www.polst.org/wp-content/uploads/2013/05/Leg-Chart-POLST_3-21-13-AG.pdf (last visited Feb. 13, 2014).
[5] Lisa Gasbarre Black, *The Danger of POLST Orders: An Innovation on the DNR*, 7 Nat'l Law Ass'n Brief (2010).
[6] *Physician Orders for Life-Sustaining Treatment (POLST): Use for Persons with Significant Physical Disabilities, Developmental Disabilities and/or Significant Mental Health Condition who are Now Near the End of Life*, Oregon POLST Task Force (1998), *available at* www.polst.org/wp-content/uploads/2013/02/POLSTPersonswithDisabilitiesLongDocument.Final_.pdf.
[7] *Statutory/Regulatory Comparison of State POLST Programs*, ABA Commission on Law and Aging, www.polst.org/wp-content/uploads/2013/05/Leg-Chart-POLST_3-21-13-AG.pdf (last visited Feb. 13, 2014).
[8] Susan E. Hickman, et al., *The POLST (Physician Orders for Life-Sustaining Treatment) Paradigm to Improve End-of-Life Care: Potential State Legal Barriers to Implementation*, J. of Law, Medicine & Ethics 119 (2008), *available at* www.polst.org/wp-content/uploads/2013/02/survey+of+laws+article_1.pdf.
[9] Montana, Tennessee, and West Virginia.

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