

Nevada's AB 128 (As Amended): An Untested Hybrid That Is Part Power of Attorney and Part Supported Decision Making Agreement

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This is the first of a series of reviews of the amended version of AB 128 – a Nevada bill to create a medical decision making tool for use by people with intellectual disabilities. In the bill, a person has an intellectual disability when the condition occurred during the developmental stage and the person has an IQ of 70 or less.

Spectrum Institute submitted several reviews of the original version of AB 128, including a legal analysis, a clinical analysis, a response to testimony at the first committee hearing, and an analysis of potential liability to medical providers.

After reviewing the amendments to Section 3 of the bill – scheduled for consideration during a work session on March 9, 2015 – we have concluded that all of our previous concerns apply to the amended version, except one (which is discussed below)

We refer the committee back to the documents mentioned above and to the problems we identified.

The new form in the amended bill is a contract between the person with a disability and the agent. Therefore, capacity to contract must exist at the time it is signed by the adult in question. This is glossed over.

The amended bill does not address concerns about undue influence when the document is signed. Those for whom this bill is intended are very susceptible to actual or perceived pressure from someone in authority.

The form created by the amended bill is just as difficult to understand as the form created in the original version. Many people with intellectual disabilities will not know what the following terms mean, terms which are essential to the contract – insert, designate, agent, health care, decisions, treatment, necessary, paperwork, records, alternative, principal, and authorized.

If there is any doubt about the percent of adults with an IQ lower than 70 who would understand such terms, have a study done and test it out with 30 adults with an IQ of 20, 30 with an IQ of 30, and 30 with an IQ of 40. Even without such a study, professionals who work with adults with I/DD would know that these terms may not be understood by many, perhaps most, of them.

The same liability issues for witnesses, notaries, doctors, and hospitals that applied to the original

version continue to apply to the amended bill.

Regardless of these concerns, the question remains as to exactly what the amended bill creates. It seems to be a hybrid document – part power of attorney and part supported decision making agreement – whereas the original bill was totally a power of attorney (being marketed as supported decision making agreement).

The amended bill attempts to include the person with a disability in the decision-making process. The form says “when WE have made decisions about the treatment.” It also says “I would like my agent to help ME decide.” But then it also says “Once WE decide . . .”

The terms used are inconsistent with each other. “WE have made” implies joint decisions. “Help me decide” clearly gives sole authority to the person with a disability. To complicate matters further, the document says that if the patient is unable to communicate due to an illness or injury, then the agent has sole authority to decide. The agent is told to do what he or she thinks the patient would want and to do what is in the patient’s best interest. But what if what the patient would want is not in the patient’s best interests? Then the agent cannot make a decision because the sentence says “and” which then creates a stalemate.

The use of inconsistent terms, the need for joint agreement for decisions, and the potential veto power the form gives to the patient, are issues that are explored in more depth in another analysis on doctor liability.

A hybrid document like this has never been done anywhere in the nation. Such a grand experiment has personal and medical implications for patients with disabilities as well as liability and cost implications for medical providers. AB 128, as amended, poses problems that may be insurmountable. ♦♦♦

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