TESTIMONY OF THE COMMITTEE ON THE RIGHTS OF THE ELDERLY AND THE HANDICAPPED, SECTION ON CRIMINAL LAW AND INDIVIDUAL RIGHTS ON BILL 7-131, the "DISTRICT OF COLUMBIA HEALTH CARE DECISIONS ACT OF 1987."

PUBLIC HEARING BEFORE THE COMMITTEE ON THE JUDICIARY, DISTRICT OF COLUMBIA COUNCIL, SEPTEMBER 16, 1987.

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The views expressed herein represent only those of the Committee on the Rights of the Elderly and Handicapped, Section on Criminal law and Individual Rights, and not those of the D.C. Bar or its Board of Governors.

EXECUTIVE SUMMARY

INTRODUCTION

The Committee on the Judiciary of the District of Columbia Council invited oral and written testimony for a public hearing on September 16, 1987 with respect to Bill 7-131, the "Health Care Decisions Act of 1987." Bill 7-131 will complement the recently enacted "District of Columbia Guardianship, Protective Proceedings and Durable Attorney Act of 1986." It provides for use of a durable power of attorney for health care decisions, and for surrogate decisionmakers in the absence of such a power.

The Committee on the Rights of the Elderly and Handicapped of the Section on Criminal Law and Individual Rights, proposes to testify on this bill.

I. We explain that this bill provides for a mechanism for appointing a decisionmaker in case of subsequent incapacity.

II. We state that the durable power for health care may be used to direct that certain treatments be either provided or forgone.

III. We explain the distinction between a durable power of attorney for health care, which can be used for health care decisions generally, and a living will, which is normally used only when a patient is terminally ill.

IV. We emphasize the value of a statutory form for the durable power of attorney.

V. We recommend that the legislation clarify that durable powers of attorney executed under the guardiansnip law are valid through the effective date of Bill 7-131.

VI. We explain the protections provided to the elderly and handicapped under Bill 7-131: A) it defines incapacity for making health care decisions; B) it affirms that persons adjudicated incompetent for other purposes nevertheless may be capable of making health care decisions; C) it establishes criteria for determining incapacity; D) it provides for consent by family members on behalf of incapacitated adults who have not executed a durable power of attorney for health care.

Draft 8/27/87

TESTIMONY OF

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and
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Representing the committee on Rights of the Elderly and Handicapped, Criminal Law and Individual Rights Section, DC Bar
at Hearings Before the City Council on the

DISTRICT OF COLUMBIA HEALTH CARE DECISIONS ACT OF 1987
(Bill 7-131), September 14, 1987

Of the Criminal Law and Individual Rights Section

On behalf of the committee on Rights of the Elderly and Handicapped, we support the Health Care Decisions Act of 1987. We believe it will enhance the self-determination of residents of the District of Columbia and, the same time, protect their rights when decisions regarding health care must be made by others. It will also provide better guidance and protection for health care providers and significantly reduce the number of cases requiring judicial review. In addition, it will bring D.C. law in conformity with that of Maryland and Virginia. We shall address first the ways in which it will enhance self-determination and then, discuss the protections afforded elderly disabled patients.

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A. ENHANCING SELF-DETERMINATION

1. The Bill provides a mechanism for appointing a decision-maker in case of subsequent incapacity. Although a durable power of attorney law was passed last year, 1/ the statute as enacted does not make clear whether durable powers of attorney are effective for delegating decision-making authority in the area of health care. The Health Care Decisions Act would make clear that durable powers of attorney may be used to appoint one or more individuals to make health care decisions, and it would do so in the Health portion of the D.C. Code, where it would be most likely to come to the attention of hospital counsel and attorneys concentrating in health law.

2. The Durable Power of Attorney For Health Care May Be Used to Direct that Certain Treatments Be Either Provided or Foregone. This is not a "right to die" law. So-called "Living Wills" typically request the withholding or withdrawal of life-sustaining procedures if the patient has been diagnosed as having a terminal illness. 2/ However, not everyone wants to forego treatment. A durable power of attorney for health care provides a means of directing the appointed agent to make sure

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1/ D.C. Code Ann. § 21-2081 et. seq. (Michie Supp. 1987).

2/ See D.C. Code Ann. §§ 6-2421(5),-2425(c)(Michie Supp. 1987).

that certain treatments are provided, if that is the wish of the individual creating the power of attorney. Of course, the durable power of attorney may also be used to express a preference for a natural death, if that is the patient's preference, or to specify that certain treatments be provided and that others be foregone. 3/

3. The Durable Power of Attorney For Health Care May Be Used Whenever a Patient Is Incapable of Making Health Care Decisions. In contrast to Living Wills (which may be invoked or used only for patients who are terminally ill), a durable power of attorney for health care may be used at any time, and under any circumstances, in which a treatment decision must be made on behalf of an incapacitated adult. For example, if an elderly nursing home resident requires dental surgery, or invasive diagnostic tests, the agent designated in the power of attorney would have authority to consent to the performance of those procedures. The agent's authority also would meet the Medicare requirements for admission to a hospice, (Only the patient or someone legally authorized under state law to make treatment decisions for the patient may sign hospice admission

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3/ See generally, B. Mishkin, A Matter of Choice: Planning Ahead for Health Care Decisions, S. Rpt. 99-211, 99th Cong., 2nd Sess., 1986, reprinted by AARP, 1987.

forms on behalf of medicare beneficiaries.) 4/ Similarly, the agent would be able to authorize admissions to nursing homes and to other health care facilities, and to consent to both diagnostic and therapeutic interventions. Under current law, the only way to accomplish any of these things for an incapacitated individual is through a judicial proceeding which can be costly, time consuming, and often humiliating to the patient and family.

We want to emphasize the enabling aspect of the durable power of attorney for health care as distinguished from living wills or "right to die" declarations.

4. The Statutory Form Will Facilitate Use of the Durable Power of Attorney For Health Care. Although use of the statutory form is not required, the availability of such a form means that individuals will not have to go to a lawyer (and pay legal fees) in order to create a valid durable power of attorney for health care. Forms can be made available in health care facilities, at community centers, doctors' offices, and elsewhere. If properly filled out, they would be legally valid documents. An explanation of the power of attorney and how it operates would be provided along with the forms, and would make clear that the person signing the form retains the

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4/ 42 C.F.R. §§ 418.3, 418.62 (1986).

right to make his or her own health care decisions unless and until he or she becomes unable to do so. Only then will be person designated as the agent have the power to make decisions on behalf of the individual creating the durable power of attorney. This important point is made clear in the Notice to both the person creating the power and the person(s) appointed as agents.

5. To further enhance individual self-determination, we suggest that the definition of "Durable Power of Attorney for Health Care" be modified to clarify the legal status of documents executed prior to enactment of the legislation. We recommend that Section 4(2) be amended by adding, at page 3, line 7, the following language:

> A power of attorney meeting the general requirements of this part, but executed (either in the District of Columbia or elsewhere) prior to its effective date, shall be legally valid.

We make this recommendation because questions have arisen as to the validity of durable powers of attorney executed prior to enactment of Guardianship, Protective Proceedings, and Durable Power of attorney Act of 1986. 5/ Although the Guardianship Act provides that it shall not affect guardians and conservators appointed prior to its effective

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5/ D.C. Act 6-263, codified at new Chapter 20, of Title 21 of the D.C. Code.

date, it is silent with regard to durable powers of attorney executed prior to the effective date. 6/ We see no public policy or state interest that would be served by failure to honor documents executed prior to enactment of the Act. To the contrary, the purpose of the legislation is best served by assuring the validity of such documents in order to implement the directives of individuals expressed their intentions while competent to do so, but now may be incompetent to execute a new power of attorney.

B. PROVIDING PROTECTION TO THE ELDERLY AND HANDICAPPED

The legislation would provide protection to the elderly and handicapped by: (1) defining incapacity for making health care decisions, (2) affirming that persons adjudicated incompetent for other purposes nevertheless may be capable of making health care decisions, (3) establishing criteria for determining incapacity in this context, and (4) providing for consent by family members on behalf of incapacitated adults who have not executed a durable power of attorney for health care. In general, the provisions are modeled after the Model Health Care Consent Act, approved by the National Conference of Commissioners on Uniform State Laws in 1982, 7/ but with

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6/ Id., new § 21-2002(c).

7/ 9 U.L.A. 332 (West Supp. 1984).

certain additions and improvements.

1. The legislation would clarify the meaning of "incapacitated individual" in the context of health care decisions, Sec. 4(4), and the procedure by which incapacity shall be determined. We note in this regard that the proposed definition of incapacity is consistent with court decisions in this jurisdiction and elsewhere, as well as with scholarly reports and legal commentaries on the subject. We believe that a statutory definition would provide the clarity needed to keep many cases from going to court unnecessarily. 8/

2. The patient's rights are protected by requiring that substituted consent by family members be based on the patient's known wishes, to the extent they can be ascertained. Sec. 12(b). In addition, any person within a category of substitute decision-makers has the right to challenge the decision made by an individual with a higher priority. Thus, decisions made by family members are both guided by statutory standards and open to scrutiny. Again, this is consistent with court cases and with scholarly opinion.

8/ See, In re Harris, 477 A.2d 724 (D.C. 1984), Lane v. Candura, 376 N.E. 2d 1232 (Mass. App. 1978); Mishkin, Matter of Choice, supra at 7-8, President's Commission For the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making health Care Decisions, (1982) Chaps. 8 and 9.

3. The limitations on substituted consent provide protection against infringement of civil liberties without unduly restricting access to innovative treatment. We wish especially to note the similarities and differences between the limitations on substituted consent in this bill and those in Section 21-2047(c) of the Guardianship Act. In the Guardianship Act, guardians are precluded from consenting to certain medical and surgical procedures unless the order appointing them specifically grants authority for such decisions. Procedures for which consent may not be granted without specific court authorization include: abortion, sterilization, psycho-surgery, and removal of a bodily organ (except to preserve life or prevent immediate serious harm or impairment of the physical health of the incapacitated individual). Nor may a guardian without specific authorization consent to convulsive therapy, experimental treatment or research, or behavior modification programs involving aversive stimuli, or to the withholding of life-saving medical procedures unless it appears that the incapacitated person would have consented to the withholding of those procedures.

The Health Care Decisions Act has similar limitations except that family members are not precluded from consenting to experimental treatment or research. The importance of permitting such consent is readily apparent when one considers that the only treatments currently available for senile

dementia of the Alzheimers type and for AIDS are largely experimental, as are many treatments for cancer. It is imperative that access to such therapies not be denied individuals on the basis of their incapacity or disability. We believe that the limitations on family consent as currently drafted in the Health Care Decisions Act are sufficient to prevent violations of civil liberties without improperly restricting patients' access to innovative treatment.

We would be happy to respond to any questions that Council Members may have.