LETTER OPINION
97-L-141

August 28, 1997

Honorable Gerald O. Sveen
State Representative
411 East 5th Street
Bottineau, ND 58318

Dear Representative Sveen:

Thank you for your letter concerning the rights of an agent under a durable power of attorney to make health care decisions for the principal. I understand your question relates to a situation at a nursing home regarding use of physical restraints for a resident. I am advised that a spouse, who is an agent for the resident under a durable power of attorney, insists that physical restraints be used for the resident's safety. A survey team questioned the use of restraints by the nursing home because the resident's treating physician did not approve their use as medically necessary.

Both federal and state law govern the use of restraints in nursing facilities. Medicaid and Medicare restrict the use of restraints in nursing facilities. Nursing facilities must provide residents with certain rights and must follow certain procedures to be eligible for reimbursement under these federal programs. A resident of a nursing facility has:

> The right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms. Restraints may only be imposed--
>
> (I) to ensure the physical safety of the resident or other residents, and
>
> (II) only upon the written order of a physician that specifies the duration and circumstances under which the restraints are to be used. (Except in emergency circumstances specified by the Secretary until such an order could reasonably be obtained.)

42 U.S.C. §§ 1395i-3(c)(1)(A)(ii) and 1396r(c)(1)(A)(ii) (emphasis added). State law similarly provides residents of nursing facilities with:

> The right to be free from mental and physical abuse; and the right to be free from physical or chemical restraint except in documented emergencies or when necessary to protect the resident from injury to self or to others. In such cases, the restraint must be authorized and documented by a physician for a limited period of time and, if the restraint is a chemical one, it must be administered by a licensed nurse or physician. Except as provided in this subdivision, drugs or physical restraints may not be used or threatened to be used for the purposes of punishment, for the convenience of staff, for behavior conditioning, as a substitute for rehabilitation or treatment, or for any other purpose not part of an approved treatment plan.

N.D.C.C. § 50-10.2-02(1)(k) (emphasis added). Thus, federal and state law provide that a physician must approve the use of restraints, and may do so only for medical purposes.

State law provides that "[e]very competent adult has the right and the responsibility to control the decisions relating to the adult's own medical care, including the decision to have medical or surgical means or procedures calculated to prolong the adult's life provided, withheld, or withdrawn." N.D.C.C. § 23-06.4-01. State law also provides for a durable power of attorney for health care in order "to enable adults to retain control over their own medical care during periods of incapacity through the prior designation of an individual to make health care decisions on their behalf." N.D.C.C. § 23-06.5-01. Further, certain persons in a close relationship to an incapacitated person are authorized to make surrogate health care decisions for that person. N.D.C.C. § 23-12-13. An agent to whom an adult has given authority to make health care decisions under a durable power of attorney for health care generally has the authority to make any and all health care decisions on the principal's behalf that the principal could make. N.D.C.C. § 23-06.5-03(1). The agent is to base health care decisions on the wishes of the person before incapacity, or if unknown, then on what is in the best interests of the person. Id.; see also N.D.C.C. § 23-12-13(3). Both the Medicare and Medicaid programs allow a resident of a nursing facility to exercise rights either directly or through a person designated or appointed to do so under state law. 42 C.F.R. § 483.110(a). Moreover, federal law requires nursing facilities to comply with

"State law . . . respecting advance directives." 42 U.S.C.S. § 1396.12(C)(2)(E).

The United States Supreme Court has recognized a state's interests in assuring that health care decisions in advance directives or by surrogate decision-makers, such as an agent under durable power of attorney for health care, are in accordance with an incompetent person's wishes, including the possibility of exercising the right of a competent adult to refuse unwanted, even lifesaving, medical treatment. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 278-79, 289-90 (1990). In a concurring opinion, Justice O'Connor suggested that a future decision may determine that the Constitution requires the states to recognize and implement the decisions of a surrogate decision-maker, such as an agent under a durable power of attorney for health care. Id. at 290-92.

The Cruzan decision did not state that individuals have a fundamental constitutional right to whatever medical treatment they desire. Underlying the decision in Cruzan was the Supreme Court's determination that the Constitution provides an individual with the right to refuse unwanted medical treatment even if the refusal results in death, a right which has been distinguished from, and is not equivalent to, a right to medical or other assistance in committing suicide. Washington v. Glucksberg, No. 96-110 (U.S. June 26, 1997). States have legitimate interests in protecting vulnerable groups from abuse, neglect, and mistakes, including protecting the vulnerable from coercion. Id. A state may set conditions upon a patient's access to particular medical treatments consistent with the patient's constitutional rights where the state's action is not arbitrary and irrational. Vacco v. Quill, No. 95-1858 (U.S. June 26, 1997). See generally, Planned Parenthood v. Casey, 505 U.S. 833, 878, 112 S.Ct. 2791, 2821 (1992) (state may regulate health care to foster the patient's health or safety except where regulation presents a substantial obstacle to the exercise of the patient's rights.)

Whether restraints should be used is a health care decision regarding a "procedure to maintain . . . an individual's physical or mental condition." N.D.C.C. § 23-06.5-02(5). It is also a medical decision to be made by a physician. Many studies and Health Care Financing Administration guidelines disclose that the use of restraints has many negative consequences which require a careful review of a variety of factors in making a medical assessment whether restraints are appropriate for an individual. See Health Care Financing Administration (H.C.F.A.) "Guidance to Surveyors - Long Term Care Facilities," Tag nos. F221, F222, PP-44 (June 1995) (hereafter H.C.F.A. Guidance); Evans and Strumpf, "Tying Down the Elderly, a

Review of the Literature on Physical Restraints," 37 JAGS 65, 68-69 (1989); Parrish and Weil, "Patient Accidents Occurring in Hospitals: Epidemiologic Study of 614 Accidents," New York State J. Med. 838, 842 (March 1958); Strumpf and Evans, "Physical Restraint of the Hospitalized Elderly: Perceptions of Patients and Nurses," 37 Nursing Research 132 (1988); Shelton, "AMA: Nursing Home Restraints Only if Need Documented," 40 American Medical News 28 (1997); Romano, "Unshackling the Elderly," Contemporary Long-Term Care 36, 41-42 (April 1994); Miles and Meyers, "Untying the Elderly, 1989 to 1993 Update," 10 Clinics in Geriatric Medicine 513, 515-16; Cutchins, "Blueprint for Restraint-Free Care: How to Identify and Carry Out the Changes in Environment, Operations and Clinical Practice That Will Give Patients Maximum Protection From Falls and Other Accidents," American Journal of Nursing 36 (July 1991).

North Dakota has many laws which limit a person's access to desired medical treatment. Certain drugs or medicines are not available without an authorized practitioner's prescription. N.D.C.C. § 19-02.1-15(1). It is a class C felony to perform certain surgery upon a minor female except where medically necessary. N.D.C.C. § 12.1-36-01. Further, a patient is not free to select anyone to provide medical services because it is a class B misdemeanor to practice medicine without a license from the state, N.D.C.C. § 43-17-34, or to practice nursing without a license from the state, N.D.C.C. § 43-12.1-15(4). These and similar laws would be invalid if a patient's right to select medical treatment could not be limited or regulated by the state.

The requirement in North Dakota law and the federal Medicare and Medicaid programs that a physical or chemical restraint must be approved by a physician for the treatment of medical conditions is rationally related to protecting nursing home residents from the harmful effects proven to be caused by restraints and protecting the resident or the resident's agent for health care decisions from coercion or the mistaken use of restraints. Further, this requirement does not increase the risk of harm to residents and it does not interfere with the resident's right to obtain medical care or the resident's personal safety because restraints are available when medically necessary.

Therefore, it is my opinion that N.D.C.C. § 50-10.2-02(1)(k), regulating the use of restraints, does not violate the rights of a resident of a nursing facility. It is my further opinion that since N.D.C.C. § 50-10.2-02(1)(k) does not violate the resident's rights, it cannot violate the rights of an agent under a durable power of attorney for health care.

Medicare and Medicaid guidelines advise that "a surrogate or representative does not have the right to insist that a treatment be performed that is not medically appropriate." H.C.F.A. Guidance, Tag no. F-152, PP-4. "Before a resident is restrained, the facility must demonstrate the presence of a specific medical symptom that would require the use of restraints, and how the use of restraints would treat the cause of the symptom and assist the resident in reaching his or her best level of physical and psychosocial well-being." Id. at Tag nos. F221 and F222, PP-46 (emphasis in original). These federal provisions would apply to nursing facilities even if state law were amended to allow the use of restraints upon a resident's request without the requirement that a physician approve such use as a medical treatment.

Deleted: restraints

The question is not whether the agent can dictate that a nursing facility use restraints, but rather what the agent and physician agree is medically appropriate for a resident. A physician is bound to give some deference to the agent's health care decision. Health care providers, which includes physicians and nursing facilities, "are bound to follow the directives of the principal's designated agent." N.D.C.C. § 23-06.5-09(1). If a health care provider is unable to follow the directives, then the health care provider is obligated to transfer care to another health care provider that is willing to follow the agent's directive. N.D.C.C. § 23-06.5-09(2).

Medical care decisions usually are not made in a vacuum. It would be prudent for an agent to confer with a treating physician and a nursing facility's representative about the benefits and risks connected with the use of restraints. This will facilitate making a decision about what treatment or procedure is medically appropriate and in accord with the resident's expressed wishes or best interests.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

eee/tam/bah