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Judge halts end-of-life decision-making for nursing home patients

By **Bob Egelko** Published 10:35 pm, Friday, February 5, 2016

An Alameda County judge has ordered state health officials to stop allowing doctors at nursing homes to administer psychiatric drugs or make end-of-life decisions for patients the doctors consider mentally incompetent.

Superior Court Judge **Evelio Grillo** issued the order Jan. 27 after ruling that a 1992 state law, which authorized nursing home physicians to make those decisions on their own, violates patients' constitutional rights. Those rights, Grillo said in a decision in June, include deciding their own course of treatment if possible — either personally or through a surrogate, if they have one — and seeking court review of the nursing home's decisions.

Patients 'at risk'

Grillo suspended enforcement of his Jan. 27 order for two months to give the state **Department of Public Health** time to implement the decision or to appeal it. The department declined to comment, but a lawyer for the **California Association of Health Facilities**, which represents nursing homes, said Friday it would appeal.

"We believe that the judgment in this case puts patients without a decision-maker at risk for receiving the care and treatment that they need," said attorney **Mark Reagan**.

As many as 10,000 nursing home patients in California have been declared incompetent, with no family members or others designated to represent them, and could be affected by the ruling, said **Mort Cohen**, a **Golden Gate University** law professor who argued the lawsuit on behalf of **California Advocates for Nursing Home Reform**.

The ruling "ensures that health care decisions will be made by residents themselves unless a court is convinced they can't," Cohen said, adding that the ruling was the first of its kind in the nation and could be a model for other states with similar laws.

But he said the advocacy group may appeal another part of Grillo's ruling. While striking down sections of the 1992 law that allowed nursing home physicians to make certain decisions for patients they had found incompetent, the judge preserved the doctors' authority under the law to make the initial finding that a patient lacked competence and had not authorized a surrogate decision-maker.

Competent — or not?

Cohen said doctors sometimes ignore evidence that a patient is competent or has a designated surrogate. He noted that the doctor who makes the competency decision can also be a member of the nursing home's "interdisciplinary team" that reviews the decision. But Grillo said a state appeals court had upheld that provision of the law in 1995 on the grounds that the competency decision could be challenged in court.

The suit, filed in 2013, cited the case of a Placer County man who was judged incompetent by his doctor and was fed through a tube at the doctor's direction. When nursing home staff members asked him if he wanted to live or die and he did not answer, they disconnected the tube, revoked an order for life-sustaining care and sent him to a hospice, where he died two months later, the suit said.

The law has allowed nursing home doctors and staffs "to make such end-of-life decisions for the patients, irrespective of the patient instructions," Grillo said.

Patients not consulted

Likewise, he said, doctors are allowed to administer antipsychotic drugs to nursing home patients without determining their wishes or notifying them that they have been found incompetent.

The ruling "will likely create problems" for many nursing homes, the judge said, but the rights of their patients are "more compelling."

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