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**SECOND SUBSTITUTE SENATE BILL 5577**

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**State of Washington 65th Legislature 2017 Regular Session**

**By** Senate Ways & Means (originally sponsored by Senators Conway and Keiser)

AN ACT Relating to the rights and obligations associated with incapacitated persons and other vulnerable adults; amending RCW 74.34.020 and 11.92.043; adding a new section to chapter 11.92 RCW; and adding a new section to chapter 2.72 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  A new section is added to chapter 11.92 RCW to read as follows:

(1) If an incapacitated person is unable to express consent for communication, visitation, or interaction with another person, or is otherwise unable to make a decision regarding association with another person, a guardian of the incapacitated person, whether full or limited, must:

(a) Personally inform the incapacitated person of the decision under consideration, using plain language, in a manner calculated to maximize the understanding of the incapacitated person;

(b) Maximize the incapacitated person's participation in the decision-making process to the greatest extent possible, consistent with the incapacitated person's abilities; and

(c) Give substantial weight to the incapacitated person's preferences, both expressed and historical.

(2) A guardian or limited guardian may not restrict an incapacitated person's right to communicate, visit, interact, or otherwise associate with persons of the incapacitated person's choosing, unless:

(a) The restriction is specifically authorized by the guardianship court in the court order establishing or modifying the guardianship or limited guardianship under chapter 11.88 RCW;

(b) The restriction is pursuant to a protection order issued under chapter 74.34 RCW, chapter 26.50 RCW, or other law, that limits contact between the incapacitated person and other persons; or

(c)(i) The guardian or limited guardian has good cause to believe that there is an immediate need to restrict an incapacitated person's right to communicate, visit, interact, or otherwise associate with persons of the incapacitated person's choosing in order to protect the incapacitated person from abuse, neglect, abandonment, or financial exploitation, as those terms are defined in RCW 74.34.020; and

(ii) Within fourteen calendar days of imposing the restriction under (c)(i) of this subsection, the guardian or limited guardian files a petition for a protection order under chapter 74.34 RCW. The immediate need restriction must remain in place until the court has heard and issued an order or decision on the petition.

(3) A protection order under chapter 74.34 RCW issued to protect an individual subject to a guardianship as described in subsection (2)(c)(ii) of this section:

(a) Must include written findings of fact and conclusions of law;

(b) May not be more restrictive than necessary to protect the incapacitated person from abuse, neglect, abandonment, or financial exploitation as those terms are defined in RCW 74.34.020; and

(c) May not deny communication, visitation, interaction, or other association between the incapacitated person and another person unless the court finds that placing reasonable time, place, or manner restrictions is unlikely to sufficiently protect the incapacitated person from abuse, neglect, abandonment, or financial exploitation as those terms are defined in RCW 74.34.020.

**Sec.**  RCW 74.34.020 and 2015 c 268 s 1 are each amended to read as follows:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Abandonment" means action or inaction by a person or entity with a duty of care for a vulnerable adult that leaves the vulnerable person without the means or ability to obtain necessary food, clothing, shelter, or health care.

(2) "Abuse" means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse, physical abuse, and personal exploitation of a vulnerable adult, and improper use of restraint against a vulnerable adult which have the following meanings:

(a) "Sexual abuse" means any form of nonconsensual sexual conduct, including but not limited to unwanted or inappropriate touching, rape, sodomy, sexual coercion, sexually explicit photographing, and sexual harassment. Sexual abuse also includes any sexual conduct between a staff person, who is not also a resident or client, of a facility or a staff person of a program authorized under chapter 71A.12 RCW, and a vulnerable adult living in that facility or receiving service from a program authorized under chapter 71A.12 RCW, whether or not it is consensual.

(b) "Physical abuse" means the willful action of inflicting bodily injury or physical mistreatment. Physical abuse includes, but is not limited to, striking with or without an object, slapping, pinching, choking, kicking, shoving, or prodding.

(c) "Mental abuse" means a willful verbal or nonverbal action that threatens, humiliates, harasses, coerces, intimidates, isolates, unreasonably confines, or punishes a vulnerable adult. Mental abuse may include ridiculing, yelling, or swearing.

(d) "Personal exploitation" means an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another.

(e) "Improper use of restraint" means the inappropriate use of chemical, physical, or mechanical restraints for convenience ((~~or~~)), discipline, or for the purpose of isolating a vulnerable adult, or in a manner that: (i) Is inconsistent with federal or state licensing or certification requirements for facilities, hospitals, or programs authorized under chapter 71A.12 RCW; (ii) is not medically authorized; or (iii) otherwise constitutes abuse under this section.

(3) "Chemical restraint" means the administration of any drug to manage a vulnerable adult's behavior in a way that reduces the safety risk to the vulnerable adult or others, has the temporary effect of restricting the vulnerable adult's freedom of movement, and is not standard treatment for the vulnerable adult's medical or psychiatric condition.

(4) "Consent" means express written consent granted after the vulnerable adult or his or her legal representative has been fully informed of the nature of the services to be offered and that the receipt of services is voluntary.

(5) "Department" means the department of social and health services.

(6) "Facility" means a residence licensed or required to be licensed under chapter 18.20 RCW, assisted living facilities; chapter 18.51 RCW, nursing homes; chapter 70.128 RCW, adult family homes; chapter 72.36 RCW, soldiers' homes; or chapter 71A.20 RCW, residential habilitation centers; or any other facility licensed or certified by the department.

(7) "Financial exploitation" means the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person's or entity's profit or advantage other than for the vulnerable adult's profit or advantage. "Financial exploitation" includes, but is not limited to:

(a) The use of deception, intimidation, or undue influence by a person or entity in a position of trust and confidence with a vulnerable adult to obtain or use the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult;

(b) The breach of a fiduciary duty, including, but not limited to, the misuse of a power of attorney, trust, or a guardianship appointment, that results in the unauthorized appropriation, sale, or transfer of the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult; or

(c) Obtaining or using a vulnerable adult's property, income, resources, or trust funds without lawful authority, by a person or entity who knows or clearly should know that the vulnerable adult lacks the capacity to consent to the release or use of his or her property, income, resources, or trust funds.

(8) "Financial institution" has the same meaning as in RCW 30A.22.040 and 30A.22.041. For purposes of this chapter only, "financial institution" also means a "broker-dealer" or "investment adviser" as defined in RCW 21.20.005.

(9) "Hospital" means a facility licensed under chapter 70.41, 71.12, or 72.23 RCW and any employee, agent, officer, director, or independent contractor thereof.

(10) "Incapacitated person" means a person who is at a significant risk of personal or financial harm under RCW 11.88.010(1) (a), (b), (c), or (d).

(11) "Individual provider" means a person under contract with the department to provide services in the home under chapter 74.09 or 74.39A RCW.

(12) "Interested person" means a person who demonstrates to the court's satisfaction that the person is interested in the welfare of the vulnerable adult, that the person has a good faith belief that the court's intervention is necessary, and that the vulnerable adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed, to protect his or her own interests.

(13)(a) "Isolate" or "isolation" means to restrict a vulnerable adult's ability to communicate, visit, interact, or otherwise associate with persons of his or her choosing. Isolation may be evidenced by intentional acts, including but not limited to:

(i) Acts that are committed for the purpose of preventing, and do serve to prevent, a vulnerable adult from sending, making, or receiving his or her personal mail, electronic communications, or telephone calls; or

(ii) Acts that prevent or obstruct the vulnerable adult from meeting with others, such as telling a prospective visitor or caller that a vulnerable adult is not present, or does not wish contact, where the statement is contrary to the express wishes of the vulnerable adult and is made for the purpose of preventing his or her contact with family, friends, or concerned persons.

(b) The term "isolate" or "isolation" may not be construed in a manner that prevents a guardian or limited guardian from performing his or her fiduciary obligations under chapter 11.92 RCW.

(14) "Mandated reporter" is an employee of the department; law enforcement officer; social worker; professional school personnel; individual provider; an employee of a facility; an operator of a facility; an employee of a social service, welfare, mental health, adult day health, adult day care, home health, home care, or hospice agency; county coroner or medical examiner; Christian Science practitioner; or health care provider subject to chapter 18.130 RCW.

((~~(14)~~)) (15) "Mechanical restraint" means any device attached or adjacent to the vulnerable adult's body that he or she cannot easily remove that restricts freedom of movement or normal access to his or her body. "Mechanical restraint" does not include the use of devices, materials, or equipment that are (a) medically authorized, as required, and (b) used in a manner that is consistent with federal or state licensing or certification requirements for facilities, hospitals, or programs authorized under chapter 71A.12 RCW.

((~~(15)~~)) (16) "Neglect" means (a) a pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) an act or omission by a person or entity with a duty of care that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.

((~~(16)~~)) (17) "Permissive reporter" means any person, including, but not limited to, an employee of a financial institution, attorney, or volunteer in a facility or program providing services for vulnerable adults.

((~~(17)~~)) (18) "Physical restraint" means the application of physical force without the use of any device, for the purpose of restraining the free movement of a vulnerable adult's body. "Physical restraint" does not include (a) briefly holding without undue force a vulnerable adult in order to calm or comfort him or her, or (b) holding a vulnerable adult's hand to safely escort him or her from one area to another.

((~~(18)~~)) (19) "Protective services" means any services provided by the department to a vulnerable adult with the consent of the vulnerable adult, or the legal representative of the vulnerable adult, who has been abandoned, abused, financially exploited, neglected, or in a state of self-neglect. These services may include, but are not limited to case management, social casework, home care, placement, arranging for medical evaluations, psychological evaluations, day care, or referral for legal assistance.

((~~(19)~~)) (20) "Self-neglect" means the failure of a vulnerable adult, not living in a facility, to provide for himself or herself the goods and services necessary for the vulnerable adult's physical or mental health, and the absence of which impairs or threatens the vulnerable adult's well-being. This definition may include a vulnerable adult who is receiving services through home health, hospice, or a home care agency, or an individual provider when the neglect is not a result of inaction by that agency or individual provider.

((~~(20)~~)) (21) "Social worker" means:

(a) A social worker as defined in RCW 18.320.010(2); or

(b) Anyone engaged in a professional capacity during the regular course of employment in encouraging or promoting the health, welfare, support, or education of vulnerable adults, or providing social services to vulnerable adults, whether in an individual capacity or as an employee or agent of any public or private organization or institution.

((~~(21)~~)) (22) "Vulnerable adult" includes a person:

(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or

(b) Found incapacitated under chapter 11.88 RCW; or

(c) Who has a developmental disability as defined under RCW 71A.10.020; or

(d) Admitted to any facility; or

(e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or

(f) Receiving services from an individual provider; or

(g) Who self-directs his or her own care and receives services from a personal aide under chapter 74.39 RCW.

**Sec.**  RCW 11.92.043 and 2011 c 329 s 3 are each amended to read as follows:

(1) It ((~~shall be~~)) is the duty of the guardian or limited guardian of the person:

((~~(1)~~)) (a) To file within three months after appointment a personal care plan for the incapacitated person, which ((~~shall~~)) must include ((~~(a)~~)) (i) an assessment of the incapacitated person's physical, mental, and emotional needs and of such person's ability to perform or assist in activities of daily living, and ((~~(b)~~)) (ii) the guardian's specific plan for meeting the identified and emerging personal care needs of the incapacitated person.

((~~(2)~~)) (b) To file annually or, where a guardian of the estate has been appointed, at the time an account is required to be filed under RCW 11.92.040, a report on the status of the incapacitated person, which shall include:

((~~(a)~~)) (i) The address and name of the incapacitated person and all residential changes during the period;

((~~(b)~~)) (ii) The services or programs ((~~which~~)) that the incapacitated person receives;

((~~(c)~~)) (iii) The medical status of the incapacitated person;

((~~(d)~~)) (iv) The mental status of the incapacitated person, including reports from mental health professionals on the status of the incapacitated person, if any exist;

((~~(e)~~)) (v) Changes in the functional abilities of the incapacitated person;

((~~(f)~~)) (vi) Activities of the guardian for the period;

((~~(g)~~)) (vii) Any recommended changes in the scope of the authority of the guardian;

((~~(h)~~)) (viii) The identity of any professionals who have assisted the incapacitated person during the period;

((~~(i)(i)~~)) (ix)(A) Evidence of the guardian or limited guardian's successful completion of any standardized training video or web cast for guardians or limited guardians made available by the administrative office of the courts and the superior court when the guardian or limited guardian: ((~~(A)~~)) (I) Was appointed prior to July 22, 2011; ((~~(B)~~)) (II) is not a certified professional guardian or financial institution authorized under RCW 11.88.020; and ((~~(C)~~)) (III) has not previously completed the requirements of RCW 11.88.020(3). The training video or web cast must be provided at no cost to the guardian or limited guardian.

((~~(ii)~~)) (B) The superior court may, upon ((~~(A)~~)) petition by the guardian or limited guardian((~~;~~)) or ((~~(B)~~)) any other method as provided by local court rule:

(I) For good cause, waive this requirement for guardians appointed prior to July 22, 2011. Good cause ((~~shall~~)) requires evidence that the guardian already possesses the requisite knowledge to serve as a guardian without completing the training. When determining whether there is good cause to waive the training requirement, the court ((~~shall~~)) must consider, among other facts, the length of time the guardian has been serving the incapacitated person; whether the guardian has timely filed all required reports with the court; whether the guardian is monitored by other state or local agencies; and whether there have been any allegations of abuse, neglect, or a breach of fiduciary duty against the guardian; or

(II) Extend the time period for completion of the training requirement for ninety days; and

((~~(j)~~)) (x) Evidence of the guardian or limited guardian's successful completion of any additional or updated training video or web cast offered by the administrative office of the courts and the superior court as is required at the discretion of the superior court unless the guardian or limited guardian is a certified professional guardian or financial institution authorized under RCW 11.88.020. The training video or web cast must be provided at no cost to the guardian or limited guardian.

((~~(3)~~)) (c) To report to the court within thirty days any substantial change in the incapacitated person's condition, or any changes in residence of the incapacitated person.

((~~(4)~~)) (d) To inform any person entitled to special notice of proceedings under RCW 11.92.150 and any other person designated by the incapacitated person as soon as possible, but in no case more than five days, after the incapacitated person:

(i) Makes a change in residence that is intended or likely to last more than fourteen calendar days;

(ii) Has been admitted to a medical facility for emergency or acute care in response to a life-threatening injury or medical condition that requires inpatient care; or

(iii) Dies, in which case the notification must be made in person, by telephone, or by certified mail.

(e) Consistent with the powers granted by the court, to care for and maintain the incapacitated person in the setting least restrictive to the incapacitated person's freedom and appropriate to the incapacitated person's personal care needs, assert the incapacitated person's rights and best interests, and if the incapacitated person is a minor or where otherwise appropriate, to see that the incapacitated person receives appropriate training and education and that the incapacitated person has the opportunity to learn a trade, occupation, or profession.

((~~(5)~~)) (f) Consistent with RCW 7.70.065, to provide timely, informed consent for health care of the incapacitated person, except in the case of a limited guardian where such power is not expressly provided for in the order of appointment or subsequent modifying order as provided in RCW 11.88.125 as now or hereafter amended, the standby guardian or standby limited guardian may provide timely, informed consent to necessary medical procedures if the guardian or limited guardian cannot be located within four hours after the need for such consent arises. No guardian, limited guardian, or standby guardian may involuntarily commit for mental health treatment, observation, or evaluation an alleged incapacitated person who is unable or unwilling to give informed consent to such commitment unless the procedures for involuntary commitment set forth in chapter 71.05 or 72.23 RCW are followed. Nothing in this section ((~~shall~~)) may be construed to allow a guardian, limited guardian, or standby guardian to consent to:

((~~(a)~~)) (i) Therapy or other procedure which induces convulsion;

((~~(b)~~)) (ii) Surgery solely for the purpose of psychosurgery;

((~~(c)~~)) (iii) Other psychiatric or mental health procedures that restrict physical freedom of movement, or the rights set forth in RCW 71.05.217.

(2) A guardian, limited guardian, or standby guardian who believes these procedures are necessary for the proper care and maintenance of the incapacitated person shall petition the court for an order unless the court has previously approved the procedure within the past thirty days. The court may order the procedure only after an attorney is appointed in accordance with RCW 11.88.045 if no attorney has previously appeared, notice is given, and a hearing is held in accordance with RCW 11.88.040.

NEW SECTION. **Sec.**  A new section is added to chapter 2.72 RCW to read as follows:

Subject to the availability of amounts specifically appropriated for this purpose, the office of public guardianship, in partnership with the office of the state long-term care ombuds, must develop and offer training targeted to the legal community and persons working in long-term care facilities regarding the different kinds of decision-making authority, including guardianship, authority granted under power of attorney, and surrogate health care decision-making authority. The training must include, at a minimum, information regarding: The roles, duties, and responsibilities of different kinds of decision makers; the scope of authority and limitations on authority with respect to different kinds of decision makers; and any relevant remedial measures provided in law for activity that exceeds the scope of decision-making authority.

**--- END ---**