

# SENATE BILL REPORT

## ESHB 1197

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As of March 23, 2021

**Title:** An act relating to health care decisions made by a designated person.

**Brief Description:** Concerning health care decisions made by a designated person.

**Sponsors:** House Committee on Civil Rights & Judiciary (originally sponsored by Representatives Riccelli, Tharinger, Cody, Pollet and Harris-Talley).

**Brief History:** Passed House: 3/4/21, 92-6.

**Committee Activity:** Law & Justice: 3/23/21.

### Brief Summary of Bill

- Allows a patient to designate a person to make health care decisions on their behalf during times when they are incompetent to make health care decisions, who must be given priority to make a surrogate health care decision for the patient over members of the patient's family.
- Provides liability protection to a health care provider who relies on a person who has been designated to make a health care decision on behalf of an incompetent individual.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Staff:** Kevin Black (786-7747)

**Background:** In Washington, a person has the right to make their own health care decisions. Under the principle of informed consent, a patient must be provided all the information necessary to make a knowledgeable decision regarding their health care. If a patient is determined to be incapacitated or incompetent to make health care decisions on their own behalf, a surrogate decision-maker may speak for them, unless the patient indicates otherwise. The following persons, in order of priority, may consent to health care

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decisions on behalf of a patient who is incapacitated or incompetent to make a health care decision:

- an appointed guardian;
- a person with durable power of attorney to make health care decisions;
- a spouse or state registered domestic partner;
- adult children;
- parents;
- adult siblings; and
- an unrelated adult who has exhibited care and concern for the patient; is familiar with the wishes and values of the patient; is reasonably available to make health care decisions; is not a member of the patient's medical or care team; does not receive compensation to provide care to the patient; attests that they do not have knowledge of a willing and available person in a higher priority class; and provides a declaration signed under penalty of perjury stating as such.

A health care provider seeking informed consent for a patient who is incapacitated or incompetent is required to make reasonable efforts to secure consent from a surrogate party in descending order. No person may make health care decisions for the incompetent patient if a person in a higher priority can be located. A health care provider's failure to obtain the appropriate consent may give rise to an action for negligence.

A person designated to give informed consent must first determine in good faith the patient, if competent, would consent to the proposed health care. If such a determination cannot be made, the decision to consent to the proposed health care may be made only after determining it is in the patient's best interests.

**Summary of Bill:** A patient may designate a person to make health care decisions on their behalf while they are incompetent by orally or personally informing a physician, nurse practitioner, or physician assistant. The designated individual shall have priority as a surrogate decision maker above the incompetent person's undesignated spouse, children, or other family members, but after an appointed guardian or a person with durable power of attorney to make health care decisions for the person. The designated person must not be an employee of the medical facility where the person is receiving care.

A patient who has not been determined to be incapacitated and who is not subject to a guardianship that includes health care decision making is presumed to have capacity to designate a person to make a health care decision on their behalf, unless a health care provider reasonably determines the patient lacks capacity due to a demonstrated inability to understand and appreciate the nature and consequences of designating an individual to make health care decisions on their behalf due to a cognitive impairment. The physician, nurse practitioner, or physician assistant who receives the designation must document the designation in the patient's health care record, and the patient must sign the designation if the person is physically able to sign, or else may make the designation orally. The patient may revoke the designation at any time by creating a signed and dated revocation and

communicating the revocation to the attending physician, or by making a verbal expression of intent to revoke the designation. The attending physician must document the time, date, and place of the revocation.

A health care provider that relies on the consent of a designated person to provide health care is immune from suit an any action, civil or criminal, or from professional or other disciplinary action, unless the health care provider has actual knowledge the patient revoked the designation.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.