

# HOUSE BILL REPORT

## ESHB 2541

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**As Passed House:**  
February 12, 2018

**Title:** An act relating to expanding the classes of persons who may provide informed consent for certain patients who are not competent to consent.

**Brief Description:** Expanding the classes of persons who may provide informed consent for certain patients who are not competent to consent.

**Sponsors:** House Committee on Judiciary (originally sponsored by Representatives Kilduff, Rodne and Eslick).

**Brief History:**

**Committee Activity:**

Judiciary: 1/30/18, 2/1/18 [DPS].

**Floor Activity:**

Passed House: 2/12/18, 84-14.

**Brief Summary of Engrossed Substitute Bill**

- Adds to the list of persons who may give informed consent to health care for an adult who is incapacitated or incompetent.
- Provides immunity to health care providers from liability in any action based upon their reliance on a declaration of an unrelated adult claiming to be a surrogate decision maker.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Jinkins, Chair; Graves, Assistant Ranking Minority Member; Goodman, Hansen, Kirby, Muri, Orwall and Valdez.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Haler, Klippert and Shea.

**Staff:** Ingrid Lewis (786-7289).

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

**Background:**

In Washington a person has the right to make his or her 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 his or her health care. If a patient is determined to be incapacitated or incompetent to make health care decisions on their own behalf, a surrogate party may speak for him or her, unless the patient indicates otherwise. The parties entitled to give informed consent are designated in order of priority by statute. The following is the list of persons, in order of priority, who may consent to health care decisions on behalf of a patient who is incapacitated or incompetent:

- 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; and
- adult siblings.

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 that 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 that it is in the patient's best interest.

**Summary of Engrossed Substitute Bill:**

The list of persons who may provide informed consent for health care decisions for an adult who is incapacitated or incompetent is extended to include, in order of priority:

- adult grandchildren who are familiar with the patient;
- adult nieces and nephews who are familiar with the patient;
- adult aunts and uncles who are familiar with the patient; 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; is not receiving compensation for providing care to the patient; attests that he or she is not aware of a person in a higher priority class available and willing to provide informed consent; and provides a declaration signed under penalty of perjury stating as such. A declaration is effective for up to six months.

The health care provider may, but is not required to, rely on a declaration provided by an unrelated adult. A health care provider who relies upon the declaration is immune from liability in any suit based upon the reliance.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.

**Staff Summary of Public Testimony:**

(In support) Washington is one of a few states who have a narrow definition of who can make informed consent decisions on behalf of someone who is incapacitated. National data shows that only 26 percent of the population have a durable power of attorney, and there are many who do not have a person from one of the six allowable priority classes in their lives. This bill retains the existing hierarchy and adds some additional options. Many states already allow both additional family members and friends to make these decisions.

If there is no decisionmaker for a person who is incapacitated or incompetent and something other than emergency care is needed, a hospital would need to pursue a guardianship through the court system which is expensive and burdensome. There has been an increase in patients who have dementia and other geropsychiatric diagnoses who need help in navigating treatment options and are not competent to make these decisions. They are disconnected from family members or have outlived them. Patients who have no one to help them determine the next steps in their treatment, such as moving to a skilled nursing facility or long-term care, end up boarding in hospitals for long periods of time. Some hospitals submit 40-50 guardianship petitions per year at the cost of \$6,000 each. Pursuing guardianship means that a person may be staying in an acute care bed when they do not need that level of care. This impacts other patients not being able to access an acute care bed and adds to the general difficulty hospitals face in post-acute care discharge.

Social workers at facilities do an exhaustive search for persons in the priority classes, but sometimes there is no one available from this limited list. This is unfortunate because sometimes there are supportive extended family and friends who know a patient's wishes and values who are willing to make decisions. This bill would help reduce delays in decisionmaking and gives people the care that they need in a more timely manner.

(Opposed) None.

(Other) While the ability for an unrelated adult or friend to make a health care decision on behalf of an incapacitated adult is a good option, it is important to stress that any declaration requires the unrelated adult to ensure that they are not aware of a person in a higher priority class available to make these decisions.

**Persons Testifying:** (In support) Zosia Stanley, Washington State Hospital Association; Norma Cole, University of Washington Harborview Medical Center; Jennifer Burkhardt, Olympic Medical Center; Katie Kolan, Washington State Medical Association; and David Lord, Disability Rights Washington.

(Other) David Bucher, Washington State Hospice and Palliative Care Board.

**Persons Signed In To Testify But Not Testifying:** None.