

# HOUSE BILL REPORT

## EHB 1175

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**As Passed House:**  
February 14, 2019

**Title:** An act relating to authorization of health care decisions by an individual or designated person.

**Brief Description:** Concerning authorization of health care decisions by an individual or designated person.

**Sponsors:** Representatives Kilduff, Irwin, Jinkins, Klippert, Valdez and Ortiz-Self.

**Brief History:**

**Committee Activity:**

Civil Rights & Judiciary: 1/25/19, 2/1/19 [DP].

**Floor Activity:**

Passed House: 2/14/19, 71-25.

### Brief Summary of Engrossed 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.
- Prohibits surrogate decision makers from providing consent to any provision from the Death with Dignity Act.
- Allows an adult to execute a health care directive by signing and acknowledging the directive before a notary public or other individual authorized by law to take acknowledgments as an alternative to signing in the presence of witnesses.
- Emphasizes that a person who knowingly provides a false declaration for the purpose of providing informed consent for health care decisions for an incapacitated or incompetent adult or minor is subject to criminal penalties under the perjury statutes.

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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.*

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## HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

**Majority Report:** Do pass. Signed by 12 members: Representatives Jenkins, Chair; Thai, Vice Chair; Irwin, Ranking Minority Member; Goodman, Graham, Hansen, Kilduff, Kirby, Klippert, Orwall, Valdez and Walen.

**Minority Report:** Do not pass. Signed by 2 members: Representatives Shea and Ybarra.

**Minority Report:** Without recommendation. Signed by 1 member: Representative Dufault, Assistant Ranking Minority Member.

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

### **Background:**

#### Informed Consent.

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 interests.

#### Health Care Advance Directives.

An advance directive is a document that expresses an individual's preferences regarding the withholding or withdrawal of life-sustaining treatment if he or she is in a terminal condition or permanent unconscious state as defined in statute. An advance directive must be signed and dated in the presence of two witnesses by an individual who is at least 18 years old and

not incapacitated. A witness may not be a close family member, a member of the individual's health care team, or a person who may have a claim to the individual's estate.

A suggested form for the Health Care Directive is provided in statute, but a Health Care Directive may include other specific directions beyond those provided in the form.

*Notary Public.* A notary public is a person authorized to perform notarial acts in this state. Notarial acts include taking an acknowledgment. An "acknowledgement" means a statement by an individual confirming that they have executed a record of the individual's free and voluntary act for the uses and purposes stated therein.

In taking an acknowledgment, a notary public must determine and certify, either from personal knowledge or from satisfactory evidence, that the individual appearing before the notary public and making the acknowledgment is the individual whose true signature is on the document. A notary public has satisfactory evidence that an individual is the person described in a document if that individual: (a) is personally known to the notary public; (b) is identified upon the oath or affirmation of a credible witness personally known to the notary public; or (c) is identified on the basis of identification documents.

#### Perjury.

A person is guilty of perjury if he or she makes a materially false statement which he or she knows to be false under an oath required or authorized by law. First degree perjury is a class B felony and second degree perjury is a class C felony.

### **Summary of Engrossed Bill:**

#### Informed Consent.

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;
- adult nieces and nephews;
- adult aunts and uncles; 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 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.

#### Health Care Advance Directives.

A Health Care Directive may be signed and acknowledged before a notary public or other individual authorized by law to take acknowledgments as an alternative to signing in the

presence of witnesses. The directive may include a notarial certificate for an acknowledgement in an individual capacity in short form.

Perjury.

A person who knowingly provides a false declaration for the purpose of providing informed consent for health care decisions for an incapacitated or incompetent adult or minor is subject to criminal penalties under the perjury statutes.

**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) This bill is an amalgam of two areas of the law that share the aim of honoring a person's wishes and ensuring that the person gets the best care possible at critical moments in their lives.

This bill expands on the list of individuals who can give informed consent to include nonrelatives. Many states have already moved in this direction. There are procedural safeguards in this legislation; for example, a nonrelative would need to sign a declaration that there is a connection to the person.

Hospitals have seen an increase in the number of patients who have dementia and geropsychiatric diagnoses who need help in navigating treatment. There has also been an increase in patients with behavioral health conditions who lack competency to make decisions. Many of these patients do not have loved ones and family members who are able to make decisions to transition the patient into the appropriate care setting, such as a skilled nursing facility or long term care facility. This results in a patient being boarded in a hospital for long periods of time in an acute care setting. Hospitals have used the services of trained guardians in order to help make decisions for these patients. Unfortunately guardians do not know the patients and are at a disadvantage. In addition, guardianship is a long process and involves judicial resources. This bill would help to reduce the number of guardianships that would be necessary by identifying certain limited classifications of alternate decisionmakers.

National data shows that only 26 percent of citizens have an advance directive. There are many people in hospitals who have not been able to prepare advance direction in providing for care. There are not enough people authorized in statute to help make decisions for patients when a patient is incapacitated. This bill allows a person who wants an advance directive to execute one when the person does not have two witness. The person is given the opportunity to execute in front of a notary.

(Opposed) None.

**Persons Testifying:** Representative Kilduff, prime sponsor; Jennifer Burkhardt, Olympic Medical Center; Jacqueline Butin, Harborview Medical Center; and Lisa Thatcher and Katie Kolan, Washington State Hospital Association.

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