

SENATE BILL REPORT

ESSB 5370

As Amended by House, April 8, 2021

Title: An act relating to updating mental health advance directive laws.

Brief Description: Updating mental health advance directive laws.

Sponsors: Senate Committee on Behavioral Health Subcommittee to Health & Long Term Care (originally sponsored by Senators Keiser, Dhingra, Saldaña and Wilson, C.).

Brief History:

Committee Activity: Health & Long Term Care: 2/03/21 [w/oRec-BH].

Behavioral Health Subcommittee to Health & Long Term Care: 2/05/21, 2/12/21 [DPS].

Floor Activity: Passed Senate: 3/8/21, 48-1.

Passed House: 4/8/21, 79-19.

Brief Summary of Engrossed First Substitute Bill

- Simplifies the form used to create a mental health advanced directive.
- Allows a mental health advanced directive to be acknowledged by a notary public instead of two witnesses.
- Changes terminology to refer to behavioral health disorders instead of mental health disorders.
- Creates a role for substance use disorder professionals in evaluating capacity for the purpose of a mental health advanced directive.

SENATE COMMITTEE ON BEHAVIORAL HEALTH SUBCOMMITTEE TO HEALTH & LONG TERM CARE

Majority Report: That Substitute Senate Bill No. 5370 be substituted therefor, and the substitute bill do pass.

Signed by Senators Dhingra, Chair; Wagoner, Ranking Member; Frockt, Nobles and

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

Warnick.

Staff: Kevin Black (786-7747)

Background: A mental health advanced directive is a document that declares a person's preferences regarding the person's mental health treatment in the event of incapacitation. Washington State's mental health advance directive law passed in 2003. A mental health advanced directive may include:

- the person's preferences and instructions for mental health treatment;
- consent to specific types of mental health treatment;
- refusal to consent to specific types of mental health treatment;
- consent to admission to and retention in a facility for mental health treatment for up to 14 days; or
- appointment of an agent to make mental health treatment decisions on behalf of a person, including empowering that person to consent to voluntary mental health treatment on behalf of the person.

A mental health advanced directive must provide a person with a full range of choices and be signed by two witnesses who know the person and attest that the person does not appear to be acting under incapacity, fraud, undue influence, or duress. A mental health advanced directive may be revoked at any time except during a period of incapacity, unless the terms of the directive allow revocation during periods of incapacity.

A health care provider must act in accordance with the terms of a mental health advanced directive to the fullest extent possible, unless compliance would violate an accepted standard of care, the requested treatment is not available, or another exception applies. Liability protections apply to providers who provide treatment according to a mental health advanced directive. A standard form for a mental health advance directive is provided in state law.

Summary of Engrossed First Substitute Bill: The pattern form used to create a mental health advanced directive is changed by:

- removing a long notice section before the start of the directive;
- streamlining and simplifying certain language used in the body of the form;
- adding a "my care needs" section near the front of the form for the principal to describe what works for the principal and the principal's diagnoses, medications, and best approach to treatment;
- granting power to the agent to act as the person's personal representative for the purpose of the Health Insurance Portability and Accountability Act (HIPAA);
- removing language that automatically removes a former spouse as an agent if the principal gets remarried; and
- removing sections to specify limitations on the agent's authority and limitations on ability to revoke a durable power of attorney

A mental health advance directive may be acknowledged before a notary public instead of being witnessed by two adults.

A person who is 13 to 17 years of age may execute a mental health advance directive if the person is able to demonstrate they are capable of making informed decisions relating to behavioral health care.

Provisions stating an agent may act on behalf of the principal with respect to health care information are changed to specify the agent may act as the principal's personal representative for the purposes of HIPAA.

References to mental health are changed to behavioral health in the context of disorders and conditions which could trigger the provisions of a mental health advance directive. A substance use disorder professional may participate in an incapacity determination for the purpose of invoking a person's mental health advance directive in circumstances in which the role may be fulfilled by a mental health professional.

Appropriation: None.

Fiscal Note: Available.

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

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

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: The mental health advance directive law is excellent but has not been implemented as intensively as it could be and it could be much more useful. This bill makes simple but major improvements which make it more contemporary and appropriate. The current form is overly legalistic, long, and densely worded. It leaves out important information about planning opportunities. The important information is too hard to find for behavioral health agencies. Doctors are not lawyers, it is helpful to have something friendlier to read. The form changes cut out paternalistic warning language and go right to the core message of the advance directive. We drew on learnings from peers, clients, and our own life experiences. I appreciate the work put into this process over the summer. I had an advanced directive in Oregon which unfortunately was not followed. Most people laugh them off and do not find them effective, so they are underutilized. Please consult with people with knowledge about substance use disorders as this bill moves forward. An advance directive should be used as a planning tool to track requested services which are not offered in our behavioral health system, such as Yoga as a substitute for involuntary treatment or medication. We need to raise awareness, interest, and understanding of these documents. We are working to educate providers. Please restore references to physician assistants and advance registered nurse practitioners in the form. Please change references to privacy statutes and add a reference

to family initiated treatment. Please make changes to the form which make it more accessible. Peers need to be leading this conversation. We need a registry of advance directives.

OTHER: This bill creates a role for substance use disorder professionals in evaluating incapacity. Please make sure a physician is always included in that situation.

Persons Testifying: PRO: Senator Karen Keiser, Prime Sponsor; Keri Stanberry, The Noble Foundation; Laura Van Tosh; Jaclyn Greenberg, Washington State Hospital Association; Darya Farivar, Disability Rights Washington; Lisa Brodoff, Seattle University School of Law.

OTHER: Katie Kolan, Washington State Psychiatric Association.

Persons Signed In To Testify But Not Testifying: No one.

EFFECT OF HOUSE AMENDMENT(S):

- Terminates the authority of an agent designated through a mental health advance directive to act on behalf of a principal after an action is filed for dissolution or annulment of the agent's marriage to the principal, or their state registered domestic partnership with the principal, or an action is filed for their legal separation.
- Strikes a provision that may be checked on the pattern form for mental health directives which reads "If my spouse is my agent, that person shall remain my agent even if we become legally separated or our marriage is dissolved, unless there is a court order to the contrary."