

SENATE BILL REPORT

EHB 1175

As of March 1, 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: Passed House: 2/14/19, 71-25.

Committee Activity: Law & Justice: 2/25/19.

Brief Summary of Bill

- Expands a list of designated persons authorized to provide informed consent for health care treatment to incapacitated persons.
- Provides limited immunity to health care providers or facilities that render health care in reliance on a declaration of an adult providing informed consent.
- Prohibits a person authorized to provide informed consent from requesting or obtaining medication to end a qualified patient's life under the Death with Dignity law where that patient is an incapacitated person.
- Expands the list of methods for executing a health care directive to include use of a notary public or other individual authorized by law.
- Authorizes criminal penalties under the perjury statutes for false declarations.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Tim Ford (786-7423)

Background: Informed Consent for Health Care Treatment. Prior to rendering treatment, a physician or other health care provider must obtain the informed consent of a patient or a

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.

patient's authorized representative. Informed consent requires that a consent form be in a language which the patient can reasonably be expected to understand which describes:

- the nature of the treatment;
- the anticipated results of the treatment;
- possible alternative forms of treatment; and
- the risks, complications and benefits related to the treatment, its alternatives, and including non-treatment.

A consent form that provides this information, when signed by the patient or authorized representative, constitutes prima facie evidence of informed consent. Prima facie evidence are facts presumed to be true unless later disproved or rebutted by other evidence. The patient then has the burden of rebutting this presumption by a preponderance of the evidence.

Liability for Failure to Obtain Informed Consent. If a health care provider fails to obtain informed consent, the provider may be subject to liability for injuries resulting from health care treatment, even if the provider complies with the recognized standard of care. If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, the patient's consent to required treatment will be implied.

Legal Incapacity. Under Washington State's guardianship law, a person may be deemed incapacitated when a superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety. A determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate. For purposes of giving informed consent for health care treatment an incompetent person is any person who is incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity. Under Washington State's guardianship law, an incompetent, disabled, or not legally competent person is interpreted to mean an incapacitated person.

Persons Authorized to Provide Informed Consent for Incapacitated Persons. If a patient is determined to be incapacitated or incompetent to make health care decisions, an authorized representative may provide informed consent. Authorized persons are designated in order of priority by statute as follows:

- a guardian appointed by a superior court;
- 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.

The authority to provide informed consent does not apply for incapacitated persons who are also minors.

No person may make health care decisions for the incompetent or incapacitated patient if a person in a higher priority can be located. 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.

Natural Death Act. Under the Natural Death Act, any adult person may execute a Health Care Directive that authorizes the withholding or withdrawing of life-sustaining treatment under circumstances where the treatment would serve only to prolong the process of dying after the person has been diagnosed in writing with: (1) a terminal condition by the attending physician; or (2) a permanent unconscious condition by two physicians.

Terminal condition means an incurable and irreversible condition caused by injury, disease, or illness that in reasonable medical judgment would cause death within a reasonable period of time in accordance with accepted medical standards.

Permanent unconscious condition means an incurable and irreversible condition in which the person is medically assessed, in reasonable medical judgment, as having no reasonable probability of recovery from an irreversible coma or a persistent vegetative state.

Life-sustaining treatment means any medical or surgical intervention that uses mechanical or other artificial means, including artificially provided nutrition and hydration, to sustain, restore, or replace a vital function, and does not include the administration of medication or the performance of any medical or surgical intervention deemed necessary solely to alleviate pain.

The directive must be signed by the declarer in the presence of two witnesses. The following persons are not allowed to be witnesses:

- any person related to the declarer by blood or marriage;
- any person entitled, at the time of the execution of the directive, to any portion of the estate of the declarer under any will, codicil, or law;
- the attending physician;
- an employee of the attending physician or a health facility in which the declarer is a patient; or
- any person who, at the time of the execution of the directive, has a claim against any portion of the declarer's estate upon declarer's death.

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.

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 a person that the person has executed an instrument as the person'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 person appearing before the notary public and making the acknowledgment is the person whose true signature is on the document. A notary public has satisfactory evidence that a person is the person described in

a document if that person: (1) is personally known to the notary public; (2) is identified upon the oath or affirmation of a credible witness personally known to the notary public; or (3) is identified on the basis of identification documents.

Summary of Bill: The list of statutorily authorized persons who may provide informed consent for health care decisions for an incapacitated adult is expanded 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; or
- an adult who: (1) has exhibited care and concern for the patient; (2) is familiar with the patient's personal values; (3) is reasonably available to make health care decisions; and (4) who is not a member of the patient's: medical or care team; health care facility; nursing home; long term care facility; or other person receiving compensation for providing care.

An adult in the last order of priority must sign a declaration under penalty of perjury effective for up to six months, attesting that they are not aware of a person in a higher priority class available and willing to provide informed consent.

The health care provider may, but is not required to, rely on a signed declaration provided by an adult in the last order of priority. A health care provider or facility who relies upon the declaration is immune from liability in any civil or criminal lawsuit, professional, or disciplinary action.

An informed decision to request or obtain medication to end a qualified patient's life may not be obtained by persons authorized to provide informed consent on behalf of an incapacitated person as defined in chapter 11.88 RCW.

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.

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.

Staff Summary of Public Testimony: PRO: The essence of the bill is honoring patient wishes and ensuring better delivery of health care across our state often at the most critical moments of people's lives. On the informed consent law, Washington is an outlier with regard to the number of individuals who can stand in the stead of people who are suffering from an incapacity. This bill expands the bench of familial decision makers: adult grandchildren, nieces, nephews, aunts, and uncles who are familiar with that patient. Also,

adds certain non-relatives, close friends, who know the patient and values. They have to sign a declaration under penalty of perjury. There are substantial safeguards. There is no requirement that the health care entity accept that individual. Not everybody has a family member and this bill would bring the law up to date to assist with decision making. Health care directives could now be executed by a notary subject to a licensing scheme and disciplinary action.

People are admitted to hospitals and are unable to speak or make health care decisions. Hospitals have a strong protocol to search for legal kin and it is extensive. If person regains capacity we defer to the person. Our hospital has approximately 50 guardianship petitions a year at \$6,000 a year because we ca not find relatives who qualify as surrogate decision makers under the statutory list.

Most patients in hospital longer than 100 days remain due to no surrogate to authorize placement and are awaiting a guardian who can facilitate their transition to a facility that meets their medical needs and wishes. The backlog of patients creates a crisis for access to acute care facilities. These are adult orphans.

OTHER: Thou shalt not murder. Not killing people who are incompetent to make decisions for themselves is a no brainer. I would like to see that enacted into law. I oppose the vague language where the bill adds to the list relatives and others who may make decisions for the patient if they "are familiar with the patient". The language is vague, and it is difficult for a healthcare provider to make that determination in the moment. It is not the job of health care providers to adjudicate who is familiar with the patient. There should be an objective standard. The worst part of the bill allows friends to self-appoint as decision makers. I have many friends but do not necessarily share their beliefs. Which of my friends should have the right to be a surrogate decision maker. The health care provider is not required to act in good faith to accept a friend as a surrogate decision maker. Appoint the best decision maker not just friends.

Persons Testifying: PRO: Representative Christine Kilduff, Prime Sponsor; Leslie Emerick, Washington State Hospice and Palliative Care Organization; Zosia Stanley, Washington State Hospitals Association; Jacqueline Butin, UW Harborview; Andrea Chapman, Providence St. Joseph Health.

OTHER: Rebecca Faust, citizen.

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