

# HOUSE BILL REPORT

## ESHB 1197

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**As Passed House:**

March 4, 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:**

**Committee Activity:**

Civil Rights & Judiciary: 1/19/21, 1/29/21 [DPS].

**Floor Activity:**

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

**Brief Summary of Engrossed Substitute Bill**

- Allows a patient, while competent, to designate a health care proxy by informing certain health care providers, who would then be required to sign and enter the information into the patient's health record.

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### HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Hansen, Chair; Simmons, Vice Chair; Gilday, Assistant Ranking Minority Member; Abbarno, Davis, Entenman, Goodman, Kirby, Orwall, Peterson, Thai, Valdez and Ybarra.

**Minority Report:** Without recommendation. Signed by 3 members: Representatives Walsh, Ranking Minority Member; Graham, Assistant Ranking Minority Member; Klippert.

**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 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 following persons, in order of priority, 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;
- 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 he or she does 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 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.

**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 a person designated by the patient. The patient must communicate the designation by orally or personally informing a physician, nurse practitioner, or physician assistant, who must then sign and enter the information into the patient's health care record. The documentation must include a determination by the physician, nurse practitioner, or physician assistant, that the patient has capacity at the time the designation is being made. A patient is presumed to have capacity provided that the patient is not incapacitated under the Durable Power of Attorney Act nor is subject to a guardianship that includes health care decision-making. The health care

provider may overcome the presumption by reasonably determining that the patient has demonstrated an inability to understand and appreciate the nature and consequences of designating a health care surrogate. An employee of the medical facility where the patient is receiving care is prohibited from serving as a health care surrogate designated by the patient.

A designation may be revoked at any time by a patient either by verbally informing or providing a written statement to an attending physician. The revocation must be documented in the patient's health care record. A health care provider is immune from any civil, criminal, professional, or other disciplinary action if the provider relies on the consent of a designated person to act as a patient's health care surrogate, provided that the health care provider did not have actual knowledge of the patient's revocation of that designation at the time consent was obtained.

A patient's signature is required when establishing or revoking a health care surrogate designation, unless the health care provider determines that the patient is unable to physically sign, in which case the patient may designate or revoke orally.

The person designated by the patient is placed third in line in the health care decisionmaker statutory hierarchy.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** This bill takes effect 90 days after adjournment of the session in which the bill is passed, except for section 2, relating to the Uniform Guardianship Act, which takes effect January 1, 2022.

**Staff Summary of Public Testimony:**

(In support) Honoring patients' values, choices, and personal priorities are bedrock elements of medical ethics and quality medical care. Advance directives are a valuable tool in protecting patient autonomy, but less than one-third of adults have such documents. A significant number of those who do, designate someone other than the identified surrogate decisionmaker in the health care proxy statutory hierarchy. Health care proxy hierarchies inadvertently complicate situations. For example, a patient may choose an adult child as opposed to a spouse to make a health care decision for them. There are instances due to a family member's distress over an illness or conflict or differences of opinion regarding what should be done, that a designation would have been helpful. This bill makes it easier for patients to indicate their wishes and for providers to follow those express wishes. The Uniform Healthcare Decisions Act (Act) recognizes the right of individuals to appoint a healthcare surrogate by both written and oral expression. At least seven states have adopted

or adapted the Act, and 18 states have provisions for oral expressions of the appointment of a health care proxy.

Advance directives are overly detailed and getting notaries and witnesses during a pandemic is challenging. This approach allows for a physician, nurse practitioner, or physician assistant who witnesses a conversation with the patient to write a note in the health record that the patient has capacity and that the patient has made the designation.

Documenting the designation in the health record does not take the place of having an advance directive. If a patient has an advance directive or durable power of attorney those take precedence.

More people need access to a decisionmaker, but some language may be needed to clarify processes used to determine capacity; how a person would be able to revoke a designation; and how the designated person would know that they were designated and accept responsibility for that designation.

(Opposed) None.

**Persons Testifying:** Representative Riccelli, prime sponsor; Ira Byock, Providence; Gregg VandeKieft, Washington Hospice and Palliative Care Organization, and Providence Health System; and Melanie Smith, Washington State Long Term Care Ombuds.

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