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SECOND SUBSTITUTE HOUSE BILL 1402

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State of Washington                      65th Legislature                      2017 Regular Session

By House Appropriations (originally sponsored by Representatives Jinkins, Griffey, Rodne, Goodman, Muri, Kilduff, Orwall, Haler, Kirby, Hansen, Frame, Johnson, Appleton, Ortiz-Self, and Cody)

READ FIRST TIME 02/24/17.

1            AN ACT Relating to the rights and obligations associated with  
2 incapacitated persons and other vulnerable adults; amending RCW  
3 74.34.020 and 11.92.043; adding a new section to chapter 11.92 RCW;  
4 adding a new section to chapter 2.72 RCW; and creating a new section.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6            NEW SECTION.    **Sec. 1.**    A new section is added to chapter 11.92  
7 RCW to read as follows:

8            (1)    Except as otherwise provided in this section, an  
9 incapacitated person retains the right to associate with persons of  
10 the incapacitated person's choosing. This right includes, but is not  
11 limited to, the right to freely communicate and interact with other  
12 persons, whether through in-person visits, telephone calls,  
13 electronic communication, personal mail, or other means. If the  
14 incapacitated person is unable to express consent for communication,  
15 visitation, or interaction with another person, or is otherwise  
16 unable to make a decision regarding association with another person,  
17 a guardian of the incapacitated person, whether full or limited,  
18 must:

19            (a)    Personally inform the incapacitated person of the decision  
20 under consideration, using plain language, in a manner calculated to  
21 maximize the understanding of the incapacitated person;

1 (b) Maximize the incapacitated person's participation in the  
2 decision-making process to the greatest extent possible, consistent  
3 with the incapacitated person's abilities; and

4 (c) Give substantial weight to the incapacitated person's  
5 preferences, both expressed and historical.

6 (2) A guardian or limited guardian may not restrict an  
7 incapacitated person's right to communicate, visit, interact, or  
8 otherwise associate with persons of the incapacitated person's  
9 choosing, unless:

10 (a) The restriction is specifically authorized by the  
11 guardianship court in the court order establishing or modifying the  
12 guardianship or limited guardianship under chapter 11.88 RCW;

13 (b) The restriction is pursuant to a protection order issued  
14 under chapter 74.34 RCW, chapter 26.50 RCW, or other law, that limits  
15 contact between the incapacitated person and other persons; or

16 (c)(i) The guardian or limited guardian has good cause to believe  
17 that there is an immediate need to restrict an incapacitated person's  
18 right to communicate, visit, interact, or otherwise associate with  
19 persons of the incapacitated person's choosing in order to protect  
20 the incapacitated person from abuse, neglect, abandonment, or  
21 financial exploitation, as those terms are defined in RCW 74.34.020,  
22 or to protect the incapacitated person from activities that  
23 unnecessarily impose significant distress on the incapacitated  
24 person; and

25 (ii) Within fourteen calendar days of imposing the restriction  
26 under (c)(i) of this subsection, the guardian or limited guardian  
27 files a petition for a protection order under chapter 74.34 RCW. The  
28 immediate need restriction may remain in place until the court has  
29 heard and issued an order or decision on the petition.

30 (3) A protection order under chapter 74.34 RCW issued to protect  
31 an incapacitated person as described in subsection (2)(c)(ii) of this  
32 section:

33 (a) Must include written findings of fact and conclusions of law;

34 (b) May not be more restrictive than necessary to protect the  
35 incapacitated person from abuse, neglect, abandonment, or financial  
36 exploitation as those terms are defined in RCW 74.34.020; and

37 (c) May not deny communication, visitation, interaction, or other  
38 association between the incapacitated person and another person  
39 unless the court finds that placing reasonable time, place, or manner  
40 restrictions is unlikely to sufficiently protect the incapacitated

1 person from abuse, neglect, abandonment, or financial exploitation as  
2 those terms are defined in RCW 74.34.020.

3 **Sec. 2.** RCW 74.34.020 and 2015 c 268 s 1 are each amended to  
4 read as follows:

5 The definitions in this section apply throughout this chapter  
6 unless the context clearly requires otherwise.

7 (1) "Abandonment" means action or inaction by a person or entity  
8 with a duty of care for a vulnerable adult that leaves the vulnerable  
9 person without the means or ability to obtain necessary food,  
10 clothing, shelter, or health care.

11 (2) "Abuse" means the willful action or inaction that inflicts  
12 injury, unreasonable confinement, intimidation, or punishment on a  
13 vulnerable adult. In instances of abuse of a vulnerable adult who is  
14 unable to express or demonstrate physical harm, pain, or mental  
15 anguish, the abuse is presumed to cause physical harm, pain, or  
16 mental anguish. Abuse includes sexual abuse, mental abuse, physical  
17 abuse, and personal exploitation of a vulnerable adult, and improper  
18 use of restraint against a vulnerable adult which have the following  
19 meanings:

20 (a) "Sexual abuse" means any form of nonconsensual sexual  
21 conduct, including but not limited to unwanted or inappropriate  
22 touching, rape, sodomy, sexual coercion, sexually explicit  
23 photographing, and sexual harassment. Sexual abuse also includes any  
24 sexual conduct between a staff person, who is not also a resident or  
25 client, of a facility or a staff person of a program authorized under  
26 chapter 71A.12 RCW, and a vulnerable adult living in that facility or  
27 receiving service from a program authorized under chapter 71A.12 RCW,  
28 whether or not it is consensual.

29 (b) "Physical abuse" means the willful action of inflicting  
30 bodily injury or physical mistreatment. Physical abuse includes, but  
31 is not limited to, striking with or without an object, slapping,  
32 pinching, choking, kicking, shoving, or prodding.

33 (c) "Mental abuse" means a willful verbal or nonverbal action  
34 that threatens, humiliates, harasses, coerces, intimidates, isolates,  
35 unreasonably confines, or punishes a vulnerable adult. Mental abuse  
36 may include ridiculing, yelling, or swearing.

37 (d) "Personal exploitation" means an act of forcing, compelling,  
38 or exerting undue influence over a vulnerable adult causing the  
39 vulnerable adult to act in a way that is inconsistent with relevant

1 past behavior, or causing the vulnerable adult to perform services  
2 for the benefit of another.

3 (e) "Improper use of restraint" means the inappropriate use of  
4 chemical, physical, or mechanical restraints for convenience or  
5 discipline or in a manner that: (i) Is inconsistent with federal or  
6 state licensing or certification requirements for facilities,  
7 hospitals, or programs authorized under chapter 71A.12 RCW; (ii) is  
8 not medically authorized; or (iii) otherwise constitutes abuse under  
9 this section.

10 (3) "Chemical restraint" means the administration of any drug to  
11 manage a vulnerable adult's behavior in a way that reduces the safety  
12 risk to the vulnerable adult or others, has the temporary effect of  
13 restricting the vulnerable adult's freedom of movement, and is not  
14 standard treatment for the vulnerable adult's medical or psychiatric  
15 condition.

16 (4) "Consent" means express written consent granted after the  
17 vulnerable adult or his or her legal representative has been fully  
18 informed of the nature of the services to be offered and that the  
19 receipt of services is voluntary.

20 (5) "Department" means the department of social and health  
21 services.

22 (6) "Facility" means a residence licensed or required to be  
23 licensed under chapter 18.20 RCW, assisted living facilities; chapter  
24 18.51 RCW, nursing homes; chapter 70.128 RCW, adult family homes;  
25 chapter 72.36 RCW, soldiers' homes; or chapter 71A.20 RCW,  
26 residential habilitation centers; or any other facility licensed or  
27 certified by the department.

28 (7) "Financial exploitation" means the illegal or improper use,  
29 control over, or withholding of the property, income, resources, or  
30 trust funds of the vulnerable adult by any person or entity for any  
31 person's or entity's profit or advantage other than for the  
32 vulnerable adult's profit or advantage. "Financial exploitation"  
33 includes, but is not limited to:

34 (a) The use of deception, intimidation, or undue influence by a  
35 person or entity in a position of trust and confidence with a  
36 vulnerable adult to obtain or use the property, income, resources, or  
37 trust funds of the vulnerable adult for the benefit of a person or  
38 entity other than the vulnerable adult;

39 (b) The breach of a fiduciary duty, including, but not limited  
40 to, the misuse of a power of attorney, trust, or a guardianship

1 appointment, that results in the unauthorized appropriation, sale, or  
2 transfer of the property, income, resources, or trust funds of the  
3 vulnerable adult for the benefit of a person or entity other than the  
4 vulnerable adult; or

5 (c) Obtaining or using a vulnerable adult's property, income,  
6 resources, or trust funds without lawful authority, by a person or  
7 entity who knows or clearly should know that the vulnerable adult  
8 lacks the capacity to consent to the release or use of his or her  
9 property, income, resources, or trust funds.

10 (8) "Financial institution" has the same meaning as in RCW  
11 30A.22.040 and 30A.22.041. For purposes of this chapter only,  
12 "financial institution" also means a "broker-dealer" or "investment  
13 adviser" as defined in RCW 21.20.005.

14 (9) "Hospital" means a facility licensed under chapter 70.41,  
15 71.12, or 72.23 RCW and any employee, agent, officer, director, or  
16 independent contractor thereof.

17 (10) "Incapacitated person" means a person who is at a  
18 significant risk of personal or financial harm under RCW 11.88.010(1)  
19 (a), (b), (c), or (d).

20 (11) "Individual provider" means a person under contract with the  
21 department to provide services in the home under chapter 74.09 or  
22 74.39A RCW.

23 (12) "Interested person" means a person who demonstrates to the  
24 court's satisfaction that the person is interested in the welfare of  
25 the vulnerable adult, that the person has a good faith belief that  
26 the court's intervention is necessary, and that the vulnerable adult  
27 is unable, due to incapacity, undue influence, or duress at the time  
28 the petition is filed, to protect his or her own interests.

29 (13)(a) "Isolate" or "isolation" means to restrict a vulnerable  
30 adult's ability to communicate, visit, interact, or otherwise  
31 associate with persons of his or her choosing. Isolation may be  
32 evidenced by acts including but not limited to:

33 (i) Acts that prevent a vulnerable adult from sending, making, or  
34 receiving his or her personal mail, electronic communications, or  
35 telephone calls; or

36 (ii) Acts that prevent or obstruct the vulnerable adult from  
37 meeting with others, such as telling a prospective visitor or caller  
38 that a vulnerable adult is not present, or does not wish contact,  
39 where the statement is contrary to the express wishes of the  
40 vulnerable adult.

1        (b) The term "isolate" or "isolation" may not be construed in a  
2 manner that prevents a guardian or limited guardian from performing  
3 his or her fiduciary obligations under chapter 11.92 RCW or prevents  
4 a hospital or facility from providing treatment consistent with the  
5 standard of care for delivery of health services.

6        (14) "Mandated reporter" is an employee of the department; law  
7 enforcement officer; social worker; professional school personnel;  
8 individual provider; an employee of a facility; an operator of a  
9 facility; an employee of a social service, welfare, mental health,  
10 adult day health, adult day care, home health, home care, or hospice  
11 agency; county coroner or medical examiner; Christian Science  
12 practitioner; or health care provider subject to chapter 18.130 RCW.

13        ~~((14))~~ (15) "Mechanical restraint" means any device attached or  
14 adjacent to the vulnerable adult's body that he or she cannot easily  
15 remove that restricts freedom of movement or normal access to his or  
16 her body. "Mechanical restraint" does not include the use of devices,  
17 materials, or equipment that are (a) medically authorized, as  
18 required, and (b) used in a manner that is consistent with federal or  
19 state licensing or certification requirements for facilities,  
20 hospitals, or programs authorized under chapter 71A.12 RCW.

21        ~~((15))~~ (16) "Neglect" means (a) a pattern of conduct or  
22 inaction by a person or entity with a duty of care that fails to  
23 provide the goods and services that maintain physical or mental  
24 health of a vulnerable adult, or that fails to avoid or prevent  
25 physical or mental harm or pain to a vulnerable adult; or (b) an act  
26 or omission by a person or entity with a duty of care that  
27 demonstrates a serious disregard of consequences of such a magnitude  
28 as to constitute a clear and present danger to the vulnerable adult's  
29 health, welfare, or safety, including but not limited to conduct  
30 prohibited under RCW 9A.42.100.

31        ~~((16))~~ (17) "Permissive reporter" means any person, including,  
32 but not limited to, an employee of a financial institution, attorney,  
33 or volunteer in a facility or program providing services for  
34 vulnerable adults.

35        ~~((17))~~ (18) "Physical restraint" means the application of  
36 physical force without the use of any device, for the purpose of  
37 restraining the free movement of a vulnerable adult's body. "Physical  
38 restraint" does not include (a) briefly holding without undue force a  
39 vulnerable adult in order to calm or comfort him or her, or (b)

1 holding a vulnerable adult's hand to safely escort him or her from  
2 one area to another.

3 ~~((18))~~ (19) "Protective services" means any services provided  
4 by the department to a vulnerable adult with the consent of the  
5 vulnerable adult, or the legal representative of the vulnerable  
6 adult, who has been abandoned, abused, financially exploited,  
7 neglected, or in a state of self-neglect. These services may include,  
8 but are not limited to case management, social casework, home care,  
9 placement, arranging for medical evaluations, psychological  
10 evaluations, day care, or referral for legal assistance.

11 ~~((19))~~ (20) "Self-neglect" means the failure of a vulnerable  
12 adult, not living in a facility, to provide for himself or herself  
13 the goods and services necessary for the vulnerable adult's physical  
14 or mental health, and the absence of which impairs or threatens the  
15 vulnerable adult's well-being. This definition may include a  
16 vulnerable adult who is receiving services through home health,  
17 hospice, or a home care agency, or an individual provider when the  
18 neglect is not a result of inaction by that agency or individual  
19 provider.

20 ~~((20))~~ (21) "Social worker" means:

21 (a) A social worker as defined in RCW 18.320.010(2); or

22 (b) Anyone engaged in a professional capacity during the regular  
23 course of employment in encouraging or promoting the health, welfare,  
24 support, or education of vulnerable adults, or providing social  
25 services to vulnerable adults, whether in an individual capacity or  
26 as an employee or agent of any public or private organization or  
27 institution.

28 ~~((21))~~ (22) "Vulnerable adult" includes a person:

29 (a) Sixty years of age or older who has the functional, mental,  
30 or physical inability to care for himself or herself; or

31 (b) Found incapacitated under chapter 11.88 RCW; or

32 (c) Who has a developmental disability as defined under RCW  
33 71A.10.020; or

34 (d) Admitted to any facility; or

35 (e) Receiving services from home health, hospice, or home care  
36 agencies licensed or required to be licensed under chapter 70.127  
37 RCW; or

38 (f) Receiving services from an individual provider; or

39 (g) Who self-directs his or her own care and receives services  
40 from a personal aide under chapter 74.39 RCW.

1       **Sec. 3.** RCW 11.92.043 and 2011 c 329 s 3 are each amended to  
2 read as follows:

3       (1) It (~~(shall be)~~) is the duty of the guardian or limited  
4 guardian of the person:

5       (~~(1)~~) (a) To file within three months after appointment a  
6 personal care plan for the incapacitated person, which (~~(shall)~~) must  
7 include (~~(a)~~) (i) an assessment of the incapacitated person's  
8 physical, mental, and emotional needs and of such person's ability to  
9 perform or assist in activities of daily living, and (~~(b)~~) (ii) the  
10 guardian's specific plan for meeting the identified and emerging  
11 personal care needs of the incapacitated person.

12       (~~(2)~~) (b) To file annually or, where a guardian of the estate  
13 has been appointed, at the time an account is required to be filed  
14 under RCW 11.92.040, a report on the status of the incapacitated  
15 person, which shall include:

16       (~~(a)~~) (i) The address and name of the incapacitated person and  
17 all residential changes during the period;

18       (~~(b)~~) (ii) The services or programs (~~(which)~~) that the  
19 incapacitated person receives;

20       (~~(c)~~) (iii) The medical status of the incapacitated person;

21       (~~(d)~~) (iv) The mental status of the incapacitated person,  
22 including reports from mental health professionals on the status of  
23 the incapacitated person, if any exist;

24       (~~(e)~~) (v) Changes in the functional abilities of the  
25 incapacitated person;

26       (~~(f)~~) (vi) Activities of the guardian for the period;

27       (~~(g)~~) (vii) Any recommended changes in the scope of the  
28 authority of the guardian;

29       (~~(h)~~) (viii) The identity of any professionals who have  
30 assisted the incapacitated person during the period;

31       (~~(i)~~(i)) (ix)(A) Evidence of the guardian or limited guardian's  
32 successful completion of any standardized training video or web cast  
33 for guardians or limited guardians made available by the  
34 administrative office of the courts and the superior court when the  
35 guardian or limited guardian: (~~(A)~~) (I) Was appointed prior to July  
36 22, 2011; (~~(B)~~) (II) is not a certified professional guardian or  
37 financial institution authorized under RCW 11.88.020; and (~~(C)~~)  
38 (III) has not previously completed the requirements of RCW  
39 11.88.020(3). The training video or web cast must be provided at no  
40 cost to the guardian or limited guardian.



1        ~~((+ii))~~ (B) The superior court may, upon ~~((+A))~~ petition by the  
2 guardian or limited guardian~~((+))~~ or ~~((+B))~~ any other method as  
3 provided by local court rule:

4        (I) For good cause, waive this requirement for guardians  
5 appointed prior to July 22, 2011. Good cause ~~((shall))~~ requires  
6 evidence that the guardian already possesses the requisite knowledge  
7 to serve as a guardian without completing the training. When  
8 determining whether there is good cause to waive the training  
9 requirement, the court ~~((shall))~~ must consider, among other facts,  
10 the length of time the guardian has been serving the incapacitated  
11 person; whether the guardian has timely filed all required reports  
12 with the court; whether the guardian is monitored by other state or  
13 local agencies; and whether there have been any allegations of abuse,  
14 neglect, or a breach of fiduciary duty against the guardian; or

15        (II) Extend the time period for completion of the training  
16 requirement for ninety days; and

17        ~~((+j))~~ (x) Evidence of the guardian or limited guardian's  
18 successful completion of any additional or updated training video or  
19 web cast offered by the administrative office of the courts and the  
20 superior court as is required at the discretion of the superior court  
21 unless the guardian or limited guardian is a certified professional  
22 guardian or financial institution authorized under RCW 11.88.020. The  
23 training video or web cast must be provided at no cost to the  
24 guardian or limited guardian.

25        ~~((+3))~~ (c) To report to the court within thirty days any  
26 substantial change in the incapacitated person's condition, or any  
27 changes in residence of the incapacitated person.

28        ~~((+4))~~ (d) To inform any person entitled to special notice of  
29 proceedings under RCW 11.92.150 and any other person designated by  
30 the incapacitated person as soon as possible, but in no case more  
31 than five days, after the incapacitated person:

32        (i) Makes a change in residence that is intended or likely to  
33 last more than fourteen calendar days;

34        (ii) Has been admitted to a medical facility for acute care in  
35 response to a life-threatening injury or medical condition that  
36 requires inpatient care;

37        (iii) Has been treated in an emergency room setting or kept for  
38 hospital observation for more than twenty-four hours; or

39        (iv) Dies, in which case the notification must be made in person,  
40 by telephone, or by certified mail.

1       (e) Consistent with the powers granted by the court, to care for  
2 and maintain the incapacitated person in the setting least  
3 restrictive to the incapacitated person's freedom and appropriate to  
4 the incapacitated person's personal care needs, assert the  
5 incapacitated person's rights and best interests, and if the  
6 incapacitated person is a minor or where otherwise appropriate, to  
7 see that the incapacitated person receives appropriate training and  
8 education and that the incapacitated person has the opportunity to  
9 learn a trade, occupation, or profession.

10       ~~((+5+))~~ (f) Consistent with RCW 7.70.065, to provide timely,  
11 informed consent for health care of the incapacitated person, except  
12 in the case of a limited guardian where such power is not expressly  
13 provided for in the order of appointment or subsequent modifying  
14 order as provided in RCW 11.88.125 as now or hereafter amended, the  
15 standby guardian or standby limited guardian may provide timely,  
16 informed consent to necessary medical procedures if the guardian or  
17 limited guardian cannot be located within four hours after the need  
18 for such consent arises. No guardian, limited guardian, or standby  
19 guardian may involuntarily commit for mental health treatment,  
20 observation, or evaluation an alleged incapacitated person who is  
21 unable or unwilling to give informed consent to such commitment  
22 unless the procedures for involuntary commitment set forth in chapter  
23 71.05 or 72.23 RCW are followed. Nothing in this section ~~((shall))~~  
24 may be construed to allow a guardian, limited guardian, or standby  
25 guardian to consent to:

26       ~~((+a+))~~ (i) Therapy or other procedure which induces convulsion;  
27       ~~((+b+))~~ (ii) Surgery solely for the purpose of psychosurgery;  
28       ~~((+c+))~~ (iii) Other psychiatric or mental health procedures that  
29 restrict physical freedom of movement, or the rights set forth in RCW  
30 71.05.217.

31       (2) A guardian, limited guardian, or standby guardian who  
32 believes these procedures are necessary for the proper care and  
33 maintenance of the incapacitated person shall petition the court for  
34 an order unless the court has previously approved the procedure  
35 within the past thirty days. The court may order the procedure only  
36 after an attorney is appointed in accordance with RCW 11.88.045 if no  
37 attorney has previously appeared, notice is given, and a hearing is  
38 held in accordance with RCW 11.88.040.

1        NEW SECTION.    **Sec. 4.**    A new section is added to chapter 2.72 RCW  
2 to read as follows:

3        The office of public guardianship, in partnership with the office  
4 of the state long-term care ombuds, must develop and offer training  
5 targeted to the legal community and persons working in long-term care  
6 facilities regarding the different kinds of decision-making  
7 authority, including guardianship, authority granted under power of  
8 attorney, and surrogate health care decision-making authority. The  
9 training must include, at a minimum, information regarding: The  
10 roles, duties, and responsibilities of different kinds of decision  
11 makers; the scope of authority and limitations on authority with  
12 respect to different kinds of decision makers; and any relevant  
13 remedial measures provided in law for activity that exceeds the scope  
14 of decision-making authority.

15        NEW SECTION.    **Sec. 5.**    If specific funding for the purposes of  
16 this act, referencing this act by bill or chapter number, is not  
17 provided by June 30, 2017, in the omnibus appropriations act, this  
18 act is null and void.

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