

SB 318

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STATE OF WEST VIRGINIA

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1997



ENROLLED

SENATE BILL NO. 318

(By Senator WOOTON, ET AL)



PASSED APRIL 12, 1997

In Effect NINETY Days From Passage

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OFFICE OF THE CLERK OF THE SENATE
STATE OF WEST VIRGINIA

ENROLLED

Senate Bill No. 318

(BY SENATORS WOOTON, BALL, BOWMAN, DITTMAR,
FANNING, HUNTER, OLIVERIO, ROSS, SNYDER,
WHITE, BUCKALEW, DEEM AND SCOTT)

[Passed April 12, 1997; in effect ninety days from passage.]

AN ACT to amend and reenact sections two, three, five, six and seven, article thirty-b, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, all relating to the health care surrogate act; updating definitions and terms; providing for the determination of incapacity by the attending physician or the advanced practice nurse in consultation with the attending physician; providing for the selection of a health care surrogate by the attending physician or the advanced practice nurse in consultation with the attending physician; authorizing the surrogate to consent to organ and tissue donation; requiring the surrogate to adhere to written directives regarding autopsy or anatomical gift donations; authorizing the surrogate to request and

release medical records; allowing formerly incapacitated persons to discharge a surrogate; providing methods for challenging the selection of a surrogate or the decision of a surrogate; assigning court costs regarding surrogate disputes; and requiring notice of the implementation of the surrogate's decisions unless enjoined by court order.

Be it enacted by the Legislature of West Virginia:

That sections two, three, five, six and seven, article thirty-b, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

ARTICLE 30B. HEALTH CARE SURROGATE ACT.

§16-30B-2. Legislative findings and purpose.

1 (a) The Legislature hereby finds that:

2 (1) All adults have a right to make decisions relating to
3 their own medical treatment, including the right to
4 consent to or refuse life-prolonging intervention; and

5 (2) The right to make medical treatment decisions
6 extends to a person who is incapacitated at the moment of
7 decision. An incapacitated person who has not made his
8 or her wishes known in advance through an applicable
9 living will, medical power of attorney or through some
10 other means has the right to have health care decisions
11 made on his or her behalf by a person who will act in
12 accordance with the incapacitated person's expressed
13 values and wishes, or, if those values and wishes are
14 unknown, in the incapacitated person's best interests.

15 (b) The purpose of this article is to set forth a process for
16 private health care decisionmaking for incapacitated
17 adults which reduces the need for judicial involvement
18 and defines the circumstances under which immunity shall
19 be available for health care providers and surrogate
20 decisionmakers who make health care decisions. The
21 intent of the Legislature is to establish an effective
22 method for private health care decisionmaking for inca-
23 pacitated adults, and to provide that the courts should not
24 be the usual venue for making decisions. It is not the
25 intent of the Legislature to legalize, condone, authorize, or

26 approve mercy killing or assisted suicide.

§16-30B-3. Definitions.

1 For the purposes of this article:

2 (a) "Adult" means a person who is eighteen years of age
3 or older, an emancipated minor who has been established
4 as such pursuant to the provisions of section
5 twenty-seven, article seven, chapter forty-nine of this
6 code, or a mature minor.

7 (b) "Attending physician" means the physician selected
8 by or assigned to the person who has primary responsibil-
9 ity for treatment and care of the person and who is a
10 licensed physician. If more than one physician shares that
11 responsibility, any of those physicians may act as the
12 attending physician under this article.

13 (c) "Advanced practice nurse" means a nurse with
14 substantial theoretical knowledge in a specialized area of
15 nursing practice and proficient clinical utilization of the
16 knowledge in implementing the nursing process pursuant
17 to the provisions of title 19, legislative rules for West
18 Virginia board of examiners for registered professional
19 nurses, series 7.

20 (d) "Capable adult" means a person over the age of
21 eighteen years who is physically and mentally capable of
22 making health care decisions and who has not been
23 deemed a protected person pursuant to the provisions of
24 chapter forty-four-a of this code.

25 (e) "Close friend" means any person eighteen years of
26 age or older who has exhibited significant care and
27 concern for an incapacitated person who is willing and
28 able to become involved in the incapacitated person's
29 health care, and has maintained regular contact with the
30 incapacitated person as to be familiar with his or her
31 activities, health, and religious and moral beliefs.

32 (f) "Death" means a finding made in accordance with
33 accepted medical standards of either: (1) The irreversible
34 cessation of circulatory and respiratory functions; or (2)
35 the irreversible cessation of all functions of the entire

36 brain, including the brain stem.

37 (g) "Guardian" means a person appointed by a court
38 pursuant to the provisions of chapter forty-four-a of this
39 code who is responsible for the personal affairs of a
40 protected person, and includes a limited guardian or a
41 temporary guardian.

42 (h) "Health care decision" means a decision to give,
43 withhold or withdraw informed consent to any type of
44 health care, including, but not limited to, medical and
45 surgical treatments, including life-prolonging interven-
46 tions, psychiatric treatment, nursing care, hospitalization,
47 treatment in a nursing home or other facility, home health
48 care and organ or tissue donation.

49 (i) "Health care facility" means a facility commonly
50 known by a wide variety of titles, including, but not
51 limited to, hospital, psychiatric hospital, medical center,
52 ambulatory health care facility, physicians' office and
53 clinic, extended care facility operated in connection with
54 a hospital, nursing home, a hospital extended care facility
55 operated in connection with a rehabilitation center,
56 hospice and other facility established to administer health
57 care in its ordinary course of business or practice.

58 (j) "Health care provider" means any physician, dentist,
59 nurse, physician's assistant, paramedic, psychologist or
60 other person providing medical, dental, nursing, psycho-
61 logical or other health care services of any kind.

62 (k) "Incapacity" means the inability because of physical
63 or mental impairment to appreciate the nature and
64 implications of a health care decision, to make an in-
65 formed choice regarding the alternatives presented and to
66 communicate that choice in an unambiguous manner.

67 (l) "Life-prolonging intervention" means any medical
68 procedure or intervention which, when applied to a
69 person, would serve solely to artificially prolong the dying
70 process or to maintain the person in a persistent vegeta-
71 tive state. The term "life-prolonging intervention" does
72 not include the administration of medication or the
73 performance of any other medical procedure deemed

74 necessary to provide comfort or to alleviate pain.

75 (m) "Limited guardian" means a person appointed by
76 the court pursuant to the provisions of chapter forty-four-
77 a of this code who has only those responsibilities for the
78 personal affairs of a protected person as specified in the
79 order of appointment.

80 (n) "Medical information" or "medical records" means
81 and includes without restriction those medical histories,
82 records, reports, summaries, diagnoses, prognoses, records
83 of treatment, records of medication ordered and given,
84 notes, entries, X rays and other written or graphic data
85 prepared, kept, made or maintained by any health care
86 facility or health care provider regarding a person's
87 confinement, services rendered, admissions, emergency
88 room care or inpatient or outpatient care. These records
89 may not include ordinary business records regarding
90 patient accounts or the administration of the facility or
91 institution.

92 (o) "Parent" means a person who is another person's
93 natural or adoptive mother or father and whose parental
94 rights have not been terminated by a court of law.

95 (p) "Person" means an individual, a corporation, a
96 business trust, a trust, a partnership, an association, a
97 government, a governmental subdivision or agency or any
98 other legal entity.

99 (q) "Protected person" means an adult, eighteen years of
100 age or older, who, pursuant to the provisions of chapter
101 forty-four-a of this code, has been found by a court,
102 because of mental impairment, to be unable to receive and
103 evaluate information effectively or to respond to people,
104 events and environments to an extent that the individual
105 lacks the capacity to: (1) Meet the essential requirements
106 for his or her health, care, safety, habilitation or therapeu-
107 tic needs without the assistance or protection of a guard-
108 ian; or (2) manage property or financial affairs to provide
109 for his or her support or for the support of legal depend-
110 ents without the assistance or protection of a conservator.

111 (r) "Qualified physician" means a physician licensed to

112 practice medicine who has personally examined the
113 person.

114 (s) "Surrogate decisionmaker" or "surrogate" means an
115 adult individual who is reasonably available, is willing to
116 make health care decisions on behalf of an incapacitated
117 person, possesses the capacity to make health care deci-
118 sions and is identified by the primary care provider in
119 accordance with the provisions of this article as the person
120 who is to make those decisions in accordance with the
121 provisions of this article.

122 (t) "Temporary guardian" means a person appointed by
123 a court for a limited or temporary period pursuant to the
124 provisions of section fourteen, article two, chapter forty-
125 four-a of this code who has only those powers and duties
126 specifically set forth in the order of appointment.

§16-30B-5. Private decision-making process; authority of surrogate.

1 (a) Any capable adult may make his or her own health
2 care decisions without regard to guidelines contained in
3 this article.

4 (b) Health care providers and health care facilities may
5 rely upon health care decisions on behalf of an incapaci-
6 tated person without resort to the courts or legal process,
7 if the decisions are made in accordance with the provi-
8 sions of this article.

9 (c) The surrogate shall have the authority to make any
10 and all health care decisions on behalf of an incapacitated
11 person and to release or authorize the release of an
12 incapacitated person's medical records to third parties.

13 (d) The surrogate's authority shall commence upon a
14 determination, made pursuant to section six of this article,
15 of the incapacity of the adult. In the event the person no
16 longer is incapacitated or the surrogate is unwilling or
17 unable to serve, the surrogate's authority shall cease.
18 However, the authority of the surrogate may recommence
19 if the person subsequently becomes incapacitated as
20 determined pursuant to section six of this article unless
21 during the intervening period of capacity the person

22 executes an advance directive which makes a surrogate
23 unnecessary or expressly rejects the previously appointed
24 surrogate as his or her surrogate. A surrogate's authority
25 terminates upon the death of the incapacitated person
26 except with respect to decisions regarding autopsy and
27 organ and tissue donation.

28 (e) The surrogate shall seek medical information neces-
29 sary to make health care decisions for an incapacitated
30 person. For the sole purpose of making health care
31 decisions for the incapacitated person, the surrogate shall
32 have the same right of access to the incapacitated person's
33 medical information and the same right to discuss that
34 information with the incapacitated person's health care
35 providers that the incapacitated person would have if he
36 or she was not incapacitated.

37 (f) If an incapacitated person previously expressed his or
38 her wishes regarding autopsy or the desire to make an
39 anatomical gift by a written directive such as a living will,
40 medical power of attorney, donor card, drivers' license or
41 other means, the surrogate shall follow the person's
42 expressed wishes regarding autopsy and organ and tissue
43 donation. In the absence of any written directives, any
44 decision regarding anatomical gifts shall be made pursu-
45 ant to the provisions of article nineteen of this chapter.

§16-30B-6. Determination of incapacity.

1 (a) For the purposes of this article, a person may not be
2 presumed to be incapacitated merely by reason of ad-
3 vanced age or disability. With respect to a person who has
4 a diagnosis of mental illness or mental retardation, such
5 a diagnosis is not a presumption that the person is inca-
6 pacitated. A determination that a person is incapacitated
7 shall be made by the attending physician or the advanced
8 practice nurse in consultation with the attending physi-
9 cian.

10 (b) Before implementation of a decision by a surrogate
11 decisionmaker to withhold or withdraw life-prolonging
12 intervention, at least one qualified physician or a licensed
13 psychologist who has personally examined the person, in
14 addition to the attending physician, must concur in the

15 determination of incapacity of an adult.

16 (c) The determination of incapacity shall be recorded
17 contemporaneously in the person's medical record by the
18 attending physician, and, if required, a second health care
19 provider, either a qualified physician or licensed psycholo-
20 gist. The recording shall state the basis for the determina-
21 tion of incapacity, including the cause, nature and ex-
22 pected duration of the person's incapacity, if these are
23 known.

24 (d) If the person is conscious, the attending physician
25 shall inform the person that he or she has been determined
26 to be incapacitated and that a surrogate decisionmaker
27 may be making decisions regarding life-prolonging
28 intervention for the person.

§16-30B-7. Selection of a surrogate.

1 (a) When a person is or becomes incapacitated, the
2 attending physician or the advanced practice nurse in
3 consultation with the attending physician shall select, in
4 writing, a surrogate with the assistance of other health
5 care providers as necessary. The attending physician shall
6 reasonably attempt to determine whether the incapaci-
7 tated person has appointed a representative under a
8 medical power of attorney in accordance with the provi-
9 sions of article thirty-a of this chapter, or if the incapaci-
10 tated person has a guardian in accordance with the
11 provisions of article one, chapter forty-four-a of this code.
12 If no representative or guardian is authorized or capable
13 and willing to serve, the attending physician or advance
14 practice nurse must make a reasonable inquiry as to the
15 availability of a surrogate from the following persons:

- 16 (1) The person's spouse;
- 17 (2) The person's adult children;
- 18 (3) The person's parents;
- 19 (4) The person's adult siblings;
- 20 (5) The person's adult grandchildren;
- 21 (6) The person's close friends;

22 (7) Any other person or entity, including, but not limited
23 to, public agencies, public guardians, public officials,
24 public and private corporations and other persons or
25 entities which the department of health and human
26 resources may from time to time designate in rules pro-
27 mulgated pursuant to chapter twenty-nine-a of this code.

28 (b) After inquiring about the existence and availability
29 of a medical power of attorney representative or a guard-
30 ian as required by subsection (a) of this section, and
31 determining that such persons either do not exist or are
32 unavailable or unwilling to serve as a surrogate, the
33 primary care provider shall select and rely upon a surro-
34 gate in the order of priority set forth in subsection (a) of
35 this section, subject to the following conditions:

36 (1) Where there are multiple possible surrogate
37 decisionmakers at the same priority level, the attending
38 physician or the advanced practice nurse in consultation
39 with the attending physician shall, after reasonable
40 inquiry, choose as the surrogate the person who reason-
41 ably appears to be best qualified. The following criteria
42 shall be considered in the determination of the person or
43 entity best qualified to serve as the surrogate:

44 (A) Whether the proposed surrogate reasonably appears
45 to be better able to make decisions either in accordance
46 with the known wishes of the person or in accordance with
47 the person's best interests;

48 (B) The proposed surrogate's regular contact with the
49 person prior to and during the incapacitating illness;

50 (C) The proposed surrogate's demonstrated care and
51 concern;

52 (D) The proposed surrogate's availability to visit the
53 incapacitated person during his or her illness; and

54 (E) The proposed surrogate's availability to engage in
55 face-to-face contact with health care providers for the
56 purpose of fully participating in the decision-making
57 process;

58 (2) The attending physician or the advanced practice

59 nurse in consultation with the attending physician may
60 select a proposed surrogate who is ranked lower in
61 priority if, in his or her judgment, that individual is best
62 qualified, as described in this section, to serve as the
63 incapacitated person's surrogate. The attending physician
64 or the advanced practice nurse shall document in the
65 incapacitated person's medical records his or her reasons
66 for selecting a surrogate in exception to the priority order
67 provided in subsection (a) of this section.

68 (c) The surrogate is authorized to make health care
69 decisions on behalf of the incapacitated person without a
70 court order or judicial involvement.

71 (d) A health care provider or health care facility may
72 rely upon the decisions of the selected surrogate if the
73 provider believes, after reasonable inquiry, that:

74 (1) A guardian or representative under a valid, applica-
75 ble medical power of attorney is unavailable, incapable or
76 is unwilling to serve;

77 (2) There is no other applicable advance directive;

78 (3) There is no reason to believe that such health care
79 decisions are contrary to the incapacitated person's
80 religious beliefs; and

81 (4) The attending physician or advanced practice nurse
82 has not received actual notice of opposition to any health
83 care decisions made pursuant to the provisions of this
84 section.

85 (e) If a person who is ranked as a possible surrogate
86 pursuant to subsection (a) of this section wishes to chal-
87 lenge the selection of a surrogate or the health care
88 decision of the selected surrogate, he or she may seek
89 injunctive relief or may file a petition for review of the
90 selection of, or decision of, the selected surrogate with the
91 circuit court of the county in which the incapacitated
92 person resides or the supreme court of appeals. There
93 shall be a rebuttable presumption that the selection of the
94 surrogate was valid, and the person who is challenging the
95 selection shall have the burden of proving the invalidity of
96 that selection. The challenging party shall be responsible

97 for all court costs and other costs related to the proceed-
98 ing, except attorneys' fees, unless the court finds that the
99 attending physician or advanced practice nurse acted in
100 bad faith, in which case the person so acting shall be
101 responsible for all costs. Each party shall be responsible
102 for his or her own attorneys' fees.

103 (f) If the attending physician or advanced practice nurse
104 is advised that a person who is ranked as a possible
105 surrogate pursuant to the provisions of subsection (a) of
106 this section has an objection to a health care decision to
107 withhold or withdraw a life-prolonging intervention
108 which has been made by the selected surrogate, the
109 attending physician or advanced practice nurse shall
110 document the objection in the medical records of the
111 patient. Once notice of an objection or challenge is
112 documented, the attending physician or advanced practice
113 nurse shall notify the challenging party that the decision
114 shall be implemented in seventy-two hours unless the
115 attending physician receives a court order prohibiting or
116 enjoining the implementation of the decision as provided
117 in subsection (e) of this section. In the event that the
118 incapacitated person has been determined to have under-
119 gone brain death and the selected surrogate has autho-
120 rized organ or tissue donation, the decision shall be
121 implemented in twenty-four hours unless the attending
122 physician receives a court order prohibiting or enjoining
123 the implementation of the decision as provided in subsec-
124 tion (e) of this section.

125 (g) If the surrogate becomes unavailable for any reason,
126 the surrogate may be replaced by applying the provisions
127 of this section.

128 (h) If a person who ranks higher in priority relative to a
129 selected surrogate becomes available and willing to be the
130 surrogate, the person with higher priority may be substi-
131 tuted for the identified surrogate unless the attending
132 physician determines that the lower ranked person is best
133 qualified to serve as the surrogate.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Randy Schoonover
.....
Chairman Senate Committee

Nick Fantasia
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Carrelle Holmes
.....
Clerk of the Senate

Bryon M. Boy
.....
Clerk of the House of Delegates

Carl Ray Tomblin
.....
President of the Senate

R. K.
.....
Speaker House of Delegates

The within *is appended* this the *6th*
day of *May*, 1997.

Jay Byrd
.....
Governor

PRESENTED TO THE

GOVERNOR

Date 4/28/97

Time 2:23pm