

ACT 321

H.B. NO. 515

A Bill for an Act Relating to Living Wills.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 327D, Hawaii Revised Statutes, is amended by adding a section to be appropriately designated and to read as follows:

“§327D- Validity of provisions. (a) The declaration of a person, executed subsequent to July 1, 1991, shall be effective under this chapter only if it includes the checklist in section 327D-4.

(b) Except as otherwise provided in subsection (a), if any provisions of a declaration are found to be invalid, the entire declaration is not invalidated but the instructions that are valid can still be used.”

SECTION 2. Section 327D-1, Hawaii Revised Statutes, is amended to read as follows:

“[[§327D-1]] **Purpose.** The legislature finds that all competent persons have the fundamental right to control the decisions relating to their own medical care, including the decision to have medical or surgical means or procedures calculated to prolong their lives provided, continued, withheld, or withdrawn. The legislature further finds that the artificial prolongation of life for persons with a terminal condition, or a permanent loss of the ability to communicate concerning medical treatment decisions, may secure only a precarious and burdensome existence, while providing nothing medically necessary or beneficial to the [patient.] person.

In order that the rights of patients may be respected [even] after they are no longer able to participate actively in decisions about [themselves,] their medical care and treatment, the legislature hereby declares that the laws of the State [of Hawaii shall] recognize the right of an adult person to make a written declaration instructing [his or her] the person's physician to provide, continue, withhold,

or withdraw life-sustaining procedures [in the event of a terminal condition].”

SECTION 3. Section 327D-2, Hawaii Revised Statutes, is amended as follows:

1. By adding a new definition to be appropriately inserted and to read:

““Permanent loss of the ability to communicate concerning medical treatment decisions” means a state in which a person is diagnosed by a physician as:

- (1) Being in a persistent vegetative state with no reasonable expectation of regaining consciousness;
- (2) Being in a deep coma with no reasonable expectation of regaining consciousness; or
- (3) Having a permanent loss of the capacity to participate in medical treatment decisions, secondary to severe neurological or brain damage, with no reasonable expectation of regaining this capacity.”

2. By adding a new definition to be appropriately inserted and to read:

““Health care facility” includes any program, institution, place, building, or agency, or portion thereof, private or public, whether organized for profit or not, used, operated or designed to provide medical diagnosis, treatment, nursing, rehabilitative, or preventive care to any person or persons. The term includes, but is not limited to, health care facilities that are commonly referred to as hospitals, extended care and rehabilitation centers, nursing homes, skilled nursing facilities, intermediate care facilities, hospices for the terminally ill that require licensure or certification by the department of health, kidney disease treatment centers including freestanding hemodialysis units, outpatient clinics, organized ambulatory health care facilities, emergency care facilities and centers, home health agencies, health maintenance organizations, and others providing similarly organized services regardless of nomenclature.”

3. By amending the definition of “life-sustaining procedure” to read:

““Life-sustaining procedure” means any medical procedure or intervention [except for] including the artificial provision of fluids, nourishment, medication, or other procedures [necessary for patient comfort or pain relief,] that when administered to a [qualified] patient, will serve only to prolong the dying process[.] but does not include procedures necessary for patient comfort or relief.”

4. By amending the definition of “terminal condition” to read:

““Terminal condition” means any incurable or irreversible disease, illness, injury, or condition which without the administration of life-sustaining procedure will, as a medical probability, [result in death in a relatively short time.] only serve to delay the moment of death of the patient.”

5. By deleting the definition of “incompetent person”.

““Incompetent person” means any person who is impaired by reason of mental illness, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause to the extent that the person lacks sufficient understanding

or capacity to make or communicate responsible decisions concerning that person's health care.”]

6. By deleting the definition of “qualified patient”.

[““Qualified patient” means a patient who has executed a declaration in accordance with this chapter, and who has been diagnosed and certified in writing to be in a terminal condition by two physicians who have personally examined the patient, one of whom is the patient’s attending physician. Provided, that if there is more than one attending physician, all such attending physicians must certify in writing that the patient is in a terminal condition.”]

SECTION 4. Section 327D-3, Hawaii Revised Statutes, is amended to read as follows:

“[§327D-3] **Execution of declaration.** (a) Any competent person who has attained the age of majority may[, at any time,] execute a [written] declaration directing the provision, continuation, withholding, or withdrawal of life-sustaining procedures [in the event such person should have a terminal condition].

(b) The declaration made pursuant to this chapter:

- (1) Shall be in writing;
- (2) Shall be signed by the person making the declaration, or by another person in the declarant’s presence and at the declarant’s expressed direction;
- (3) Shall be dated; and
- (4) Shall be signed in the presence of two or more witnesses who:
 - (A) Are at least 18 years of age;
 - (B) Are not related to the declarant by blood, marriage, or adoption; and
 - (C) Are not [the], at the time that the declaration is executed, attending [physician] physicians, [an employee] employees of [the] an attending physician, or [an employee] employees of [the medical] a health care facility in which the declarant is a patient[;].
- (5) Shall have all signatures notarized at the same time.”

SECTION 5. Section 327D-4, Hawaii Revised Statutes, is amended to read as follows:

“[§327D-4] **[Suggested form of written declaration.** A declaration executed pursuant to this chapter requesting that medical treatment be withheld or withdrawn may, but need not, be substantially in the following form, and may include other specific directions. Should any of the specific directions be held to be invalid, such invalidity shall not affect other directions of the declaration which can be given effect without the invalid direction, and to this end the directions in a declaration are severable.] Declaration sample form. The following declaration sample form may be copied and used by filling in the blanks or may be changed to add more individualized instructions; or an entirely different format may be used to provide health care instructions.

DECLARATION

A. Statement of Declarant

Declaration made this _____ day of _____ (month, year). I, _____, being of sound mind,

and understanding that I have the right to request that my life be prolonged to the greatest extent possible, wilfully and voluntarily make known my desire that my dying shall not be artificially prolonged under the circumstances set forth below, and do hereby declare:

[If at any time I should have an incurable or irreversible condition certified to be terminal by two physicians who have personally examined me, one of whom shall be my attending physician, and the physicians have determined that I am unable to make decisions concerning my medical treatment, and that without administration of life-sustaining treatment my death will occur in a relatively short time, and where the application of life-sustaining procedures would serve only to prolong artificially the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication, nourishment, or fluids or the performance of any medical procedure deemed necessary to provide me with comfort or to alleviate pain.]

My instructions shall prevail even if they create a conflict with the desires of my relatives, hospital policies, or the principles of those providing my care.

If I should develop a terminal condition or a permanent loss of the ability to communicate concerning medical treatment decisions, with no reasonable chance of regaining this ability, I do not want to have my life prolonged. I would not want to be subjected to surgery or resuscitation. Nor would I then wish to have life sustaining medicine or procedures. Instead, I request care, including medicine and procedures, for the purpose of providing comfort and pain relief.

CHECKLIST

I have also considered whether I want tube feeding to be provided and have selected one of the following provisions by putting a mark in the space provided:

() I do NOT want my life prolonged by tube or other artificial feeding or provision of fluids by a tube if my condition is as stated above.

() I DO want my life prolonged by tube or other artificial feeding and provision of fluids by a tube if my condition is as stated above.

If neither provision is selected or if both are selected, it shall be presumed that tube or other artificial feeding or provision of fluids by a tube are requested to prolong the declarant's life.

This declaration shall control in all circumstances.

[In the absence of my ability to give directions regarding the use of such life-sustaining procedures, it is my intention that this declaration shall be honored by my family and physician(s) as the final expressions of my legal right to refuse medical or surgical treatment and accept the consequences from such refusal.]

I understand the full import of this declaration and I am emotionally and mentally competent to make this declaration.

Signed _____
Address _____

B. Statement of Witnesses

I am at least 18 years of age and

- not related to the declarant by blood, marriage, or adoption; and
- not currently the attending physician, an employee of the attending physician, or an employee of the [medical] health care facility in which the declarant is a patient.

The declarant is personally known to me and I believe the declarant to be of sound mind.

Witness _____
Address _____

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Witness _____
Address _____

C. Notarization

Subscribed, sworn to and acknowledged before me by _____,
the declarant, and subscribed and sworn to before me by _____
and _____,
witnesses, this _____ day of _____, 19____.
(SEAL) Signed _____

(Official capacity of officer)”

SECTION 6. Section 327D-5, Hawaii Revised Statutes, is amended to read as follows:

“[§327D-5]¹ **Presumed validity of declaration.** (a) If the [qualified] patient is incompetent at the time of the decision to withhold or withdraw life-sustaining procedures, a declaration executed in accordance with section 327D-3 is presumed to be valid.

(b) For the purpose of this chapter, a physician or [medical] health care facility may presume, in the absence of actual notice to the contrary, that an individual who executed or revoked a declaration was of sound mind when the declaration was executed[.] or revoked.

(c) The fact of an individual’s having executed a declaration shall not be considered an indication of a declarant’s mental incompetency. Age of itself shall not bar a determination of competency.”

SECTION 7. Section 327D-6, Hawaii Revised Statutes, is amended to read as follows:

“[[§327D-6]] **Pregnancy.** A declaration of a [qualified] patient diagnosed as pregnant by the attending physician shall be given no force or effect during the course of the pregnancy.”

SECTION 8. Section 327D-8, Hawaii Revised Statutes, is amended to read as follows:

“[[§327D-8]] **Declaration becomes part of medical records.** It shall be the responsibility of the declarant to provide for the delivery of the notarized declaration to the attending physician. In the event the declarant is comatose, incompetent, or otherwise mentally or physically incapable, any other person may deliver the notarized declaration to the physician. An attending physician who is so notified shall promptly make the declaration a part of the declarant’s medical records.”

SECTION 9. Section 327D-9, Hawaii Revised Statutes, is amended to read as follows:

“[[§327D-9]] **Duty to deliver.** Any person having a declaration of another in [his or her] the person’s possession and who becomes aware that the declarant is in circumstances under which the terms of the declaration may become applicable, shall deliver the declaration to the declarant’s attending physician or to the [medical] health care facility in which the declarant is a patient.”

SECTION 10. Section 327D-10, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§327D-10]]~~ **Written certification.** (a) An attending physician who has been notified of the existence of a declaration executed under this chapter shall make all reasonable efforts to obtain the notarized declaration and[, if the declaration so requests,] shall without delay [after the diagnosis of a terminal condition of the declarant, take the necessary steps to provide for written certification of the declarant’s terminal condition by the attending physician and another physician who has examined the declarant, so that the declarant may be deemed to be a qualified patient, as defined in section 327D-2.] ascertain whether the declarant’s condition corresponds to the directions on the declaration.

(b) Written certification of a declarant’s [terminal] condition shall be made a part of the declarant’s medical record and should be substantially in the following form:

CERTIFICATION OF [INCOMPETENCE AND TERMINAL CONDITION]
CONDITION SPECIFIED IN PATIENT’S DECLARATION

[We] In my professional opinion, I hereby certify that _____

(name of patient)

[is not,] has suffered a permanent loss of the ability to communicate concerning medical treatment decisions [in our professional opinion, able to participate in decisions concerning medical treatment to be administered] and has [been diagnosed as having an incurable or irreversible disease, illness, injury or condition, specifically] the following condition or conditions: _____ ,

(diagnosis)

[and it is our professional judgment that this terminal condition will result in the death of the patient without the use of life-sustaining procedures.] According to the declaration, _____ did not want life-sustaining

(name of patient)

procedures to be administered under these circumstances.

Pursuant to the attached declaration or living will, the patient:

- DOES want tube or other artificial feeding or provision of fluids by a tube to prolong the patient’s life.
- Does NOT want tube or other artificial feeding or provision of fluids by a tube to prolong the patient’s life.

Signed _____

Attending Physician

[Signed _____

Second Attending Physician]

(c) All inpatient [medical] health care facilities shall develop a system to visibly identify when a [qualified] patient’s chart [containing the] contains a declaration as set forth in this chapter.

SECTION 11. Section 327D-11, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§327D-11]]~~ **Transfer to another physician.** (a) An attending physician and any other physician under [his or her] the attending physician’s direction or control, having possession of the patient’s declaration or having knowledge that [such] the declaration is part of the patient’s record in the [medical] health care facility in which the declarant is receiving care, shall [take steps to qualify the patient and shall] follow as closely as possible the terms of the declaration.

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(b) An attending physician who, because of personal beliefs or conscience, refuses[,] or is unable[,] to certify a patient [as terminal], or who is unable to comply with the terms of the patient's declaration shall, without delay, make the necessary arrangements to effect the transfer of the patient, and the appropriate medical records [that qualify or would qualify said patient,] to another physician, [chosen by the qualified patient, or by the family of the qualified patient, for effectuation of the terms of the qualified patient's declaration. Such a] A physician who transfers the patient without unreasonable delay, or who makes a good faith attempt to do so, shall not be subject to criminal prosecution, subject to civil liability, or found to have committed an act of unprofessional conduct for refusal to comply with the terms of the declaration. Transfer under these circumstances shall not constitute abandonment.

(c) Failure of an attending physician to transfer in accordance with this section constitutes professional misconduct."

SECTION 12. Section 327D-12, Hawaii Revised Statutes, is amended to read as follows:

"**[§327D-12] Revocation.** A declaration may be revoked at any time by the declarant [without regard to the declarant's mental state or competency,] by any of the following methods:

- (1) By being canceled, defaced, obliterated, [or] burnt, torn, or otherwise destroyed by the declarant or by some person in the declarant's presence and at the declarant's direction[.];
- (2) By a written revocation signed and dated by the declarant expressing [his or her] the declarant's intent to revoke. The attending physician shall record in the patient's medical record the time and date when the physician received notification of the written revocation[.]; or
- (3) By a declarant's unambiguous verbal expression, in the presence of two adult witnesses, of an intent to revoke the declaration. [Such] The revocation shall become effective upon communication to the attending physician by the declarant or by both witnesses. The attending physician shall record in the patient's medical record the time, date, and place of the revocation and the time, date, and place, if different, of when the attending physician received notification of the revocation[.]; or
- (4) By a declarant's unambiguous verbal expression to an attending physician."

SECTION 13. Section 327D-14, Hawaii Revised Statutes, is amended to read as follows:

"**[§327D-14] Suicide.** Death resulting from the withholding or withdrawal of life-sustaining procedures from a [qualified] patient under this chapter does not, for any purpose, constitute suicide.

Execution of a declaration under this chapter does not, for any purpose, constitute attempted suicide."

SECTION 14. Section 327D-16, Hawaii Revised Statutes, is amended to read as follows:

"**[§327D-16] Health care or health insurance.** No [physician, medical care facility or other health care provider, nor any health care service plan,

insurer issuing disability insurance, self-insured employee welfare benefit plan, nonprofit medical service corporation, mutual nonprofit hospital service corporation, or nonprofit hospital service plan] person or entity shall require any person to execute a declaration as a condition for being insured for, or receiving[,] insurance benefits or health care services.”

SECTION 15. Section 327D-17, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§327D-17]]~~ **[Penalties.] Criminal penalties.** [(a) Failure of an attending physician to certify a terminal condition in writing according to section 327D-10 or, once a patient is certified as terminal, failure of the physician to transfer according to section 327D-11, constitutes professional misconduct.]

[(b)] (a) Any person who threatens, directly or indirectly, or coerces, or intimidates any person to execute a declaration directing the withholding or withdrawal of life-sustaining procedure shall be guilty of a class C felony.

[(c)] (b) Any person who wilfully conceals, cancels, defaces, obliterates, or damages another’s declaration without the declarant’s consent or who falsifies or forges a declarant’s revocation of declaration with the intent to create the false impression that the declarant has directed that life-sustaining procedures be utilized for the prolongation of the declarant’s life shall be guilty of a misdemeanor.

[(d)] (c) A physician who wilfully fails to record a statement of revocation according to the requirements of section 327D-12 [is] shall be guilty of a misdemeanor.”

SECTION 16. Section 327D-18, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§327D-18]]~~ **Health personnel protections.** In the absence of actual notice of the revocation of a declaration, no health care provider, [medical] health care facility, physician, or other person acting under the direction of an attending physician shall be subject to criminal prosecution or civil liability or be deemed to have engaged in unprofessional conduct as a result of the withholding or the withdrawal of life-sustaining procedures from a patient [with a terminal condition] in accordance with this chapter unless the absence of actual notice resulted from the negligence of the health care provider, physician, or other person.”

SECTION 17. Section 327D-21, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) In the absence of a declaration, ordinary standards of current medical practice will be followed. Although declarations are desirable, nothing in this chapter shall be construed to require a declaration in order for life-sustaining procedures to be provided, continued, withheld, or withdrawn. If there is no declaration, then a verbal statement or statements if they are consistent, made by the patient to either a physician or to the patient’s friend or relative, may be considered by the physician in deciding whether the patient would want the physician to withdraw or to withhold life-sustaining procedures. Unambiguous verbal statements by the patient, or reliable reports thereof, shall be documented in the patient’s medical record.”

SECTION 18. Section 327D-23, Hawaii Revised Statutes, is amended to read as follows:

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“[[§327D-23]] No presumption. This chapter creates no presumption concerning the intention of an individual who has revoked or has not executed a declaration to [consent to the] use, [or withholding] withhold, or [withdrawal of] withdraw life-sustaining procedures [in the event of a terminal condition].”

SECTION 19. Section 327D-24, Hawaii Revised Statutes, is repealed:

“[[§327D-24]] Retroactive effect. The declaration of [any qualified] a patient executed prior to June 13, 1986, and those subsequently executed in compliance with the statute in effect at the time of execution shall be given effect as provided in [this chapter] their term.”

SECTION 20. Section 327D-26, Hawaii Revised Statutes, is amended to read as follows:

“§327D-26 Effect of multiple documents. [In the event a person has one or more valid declarations executed in accordance with this chapter, and/or one or more valid durable powers of attorney executed pursuant to chapter 551D, or both, the most recently executed document shall reflect the person’s intent.] Medical treatment instructions contained in a declaration executed in accordance with this chapter shall supersede:

- (1) Any contrary or conflicting instructions given by a proxy or an attorney for health care decisions unless the proxy appointment or the power of attorney expressly provides otherwise; and
- (2) Any instructions in any prior declaration.”

SECTION 21. Statutory material to be repealed is bracketed. New statutory material is underscored.²

SECTION 22. This Act shall take effect on July 1, 1991.

(Approved July 2, 1991.)

Notes

1. So in original.
2. Edited pursuant to HRS §23G-16.5.