

ACT 332

H.B. NO. 631

A Bill for an Act Relating to Health Care Decisions.

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

SECTION 1. The legislature finds that there continues to be dynamic changes in the health care environment. Past legislation on advance health care directives has helped to maintain the autonomy of health care decision-making, but current law does not adequately address the needs of an individual who becomes incapacitated and unable to make health care decisions but who never executed a valid durable power of attorney for health care decisions or designated a guardian prior to the person's incapacity.

Historically, health care professionals have turned to family members for consent in these situations. This approach has been an accepted community practice for decades; it is the culturally accepted way of "caring for our own." However, there is a growing sense that this community practice is no longer legally adequate. Federal regulations, the increasing numbers of elderly citizens, and others who have

chronic conditions that are often complicated by dementia and the inability to make reasoned, medical decisions, now compel the legislature to further consider the most appropriate ways in which health care decisions should be made.

Guardianship is a judicial process that can transfer the decision-making responsibility from a person who previously had the capacity for decision-making to another individual when the person has been declared to be incapable of handling the person's own affairs. Guardianship is being pursued with increasing frequency in those situations where persons do not have the capacity for decision making and are in need of medical attention.

Guardianship of a person for health care decision making is increasing in Hawaii for several reasons. For example, federal regulations for long-term care nursing facilities require any resident of the facility adjudged or determined to be incompetent under the laws of a state to have the resident's rights exercised by a person appointed to act on the resident's behalf. In cases where a resident has not been judged or determined to be incompetent by a state court, any legal surrogate designated by the resident may exercise the resident's rights to the extent provided by state law. Since Hawaii does not have a statute that provides for some form of surrogate decision making in the absence of a prior health care directive, guardianship of the person must be sought. This can be expensive and time-consuming.

The purpose of this Act is to create a two-year demonstration project that protects the health and safety of a person who:

- (1) Previously had the ability, but who no longer has the ability, to understand the significant benefits, risks, and alternatives to proposed health care, and to make and communicate health care decisions;
- (2) Resides in a skilled nursing or intermediate care facility; and
- (3) Has not executed a health care directive for health care decisions which addresses the specific health care decisions presented, at that time, by or to the facility or health care provider; or whose agent is unavailable and whose whereabouts cannot be ascertained within a reasonable period of time.

SECTION 2. Chapter 327D, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

**“PART . HEALTH CARE DECISIONS BY LEGAL SURROGATE**

**§327D-A Definitions.** Whenever used in this part, unless the context otherwise requires:

“Advance health care directive” means individual instruction or a durable power of attorney for health care decisions.

“Agent” means an individual who is designated in a durable power of attorney to make health care decisions for the individual pursuant to chapter 551D.

“Capacity” means the ability to understand the significant benefits, burdens, risks, and alternatives to proposed health care, and to make and communicate a health care decision.

“Close personal friend” means any person who is twenty-one years of age or older, who has exhibited special care and concern for the resident, and who presents an affidavit to a health care institution or an attending or treating physician stating that the person:

- (1) Is a close, personal friend of the resident;
- (2) Is willing and able to become involved in the resident's health care; and
- (3) Has maintained such regular contact with the resident so as to be familiar with the resident's personal values.

“Guardian” means a court-appointed guardian who has the authority to make health care decisions for an individual.

“Health care” means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual’s physical or mental condition; or admission, transfer, or discharge to effect the foregoing.

“Health care decision” means a decision made by a legal surrogate under this part, regarding the individual’s health care, including:

- (1) The selection and discharge of health care providers;
- (2) The giving, withholding, or withdrawal of diagnostic tests, surgical procedures, and programs of medication to the extent not otherwise prohibited by this chapter; and
- (3) Decisions to apply for private, public, government, or veterans’ benefits to defray the cost of health care.

“Health care institution” means a skilled nursing or intermediate care facility that is licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of business.

“Individual instruction” means an individual’s directions concerning health care decisions for the individual.

“Legal surrogate” means the individual designated as such in accordance with this chapter.

“Life partner” means a person who is currently in a spousal-type relationship with a resident regardless of legal recognition at the time of the resident’s lack of capacity.

“Members of a resident’s family” includes a spouse, a life partner, adult children, parents, adult brothers or sisters, and close personal friends who can obtain and provide information concerning the desires of a resident concerning health care.

“Power of attorney” means the designation of an agent to make health care decisions for an individual granting the durable power of attorney for health care decisions within the meaning of chapter 551D.

“Primary physician” means a physician designated by a resident or the resident’s agent, guardian, or legal surrogate, to have primary responsibility for the individual’s health care or, in the absence of a designation or if the designated physician is not available, a physician who undertakes the foregoing responsibility.

“Resident” means a person who is receiving care in a skilled nursing or intermediate care facility.

“State” means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

“Supervising health care professional” means a primary physician, or designee, or a state recognized advanced practice registered nurse, or designee, who has undertaken primary responsibility for a person’s health care.

**§327D-B Selection of a legal surrogate.** (a) A resident who has capacity may designate another adult to act as a legal surrogate by personally informing the supervising health care professional in writing, or if writing is impossible, by other means of communication, to the supervising health care professional and at least one other competent adult.

(b) In the absence of a designation and when the resident is determined to lack capacity, the following persons in the following order of priority, have priority to designate himself, herself or another adult person who consents to the designation as the legal surrogate for the resident:

- (1) The spouse or life partner of the resident who has reached the age of eighteen;
- (2) Any child of the resident who has reached the age of twenty-one;

- (3) Any parent of the patient who has reached the age of eighteen;
- (4) Any brother or sister of the patient who has reached the age of twenty-one;
- (5) Any grandchild of the patient who has reached the age of twenty-one.

If there is no person with priority under paragraphs (1) to (5) of this subsection available, a close personal friend who has reached the age of twenty-one and who is capable of representing the opinions of the patient may volunteer to assume the authority of legal surrogate; provided that the authority to act shall end if a family member objects in writing and communicates the objection to the supervising health care professional or the facility.

(c) A legal surrogate shall not be an owner, operator, or employee of a health care institution at which the resident is receiving care.

(d) A supervising health care professional shall require an individual who is claiming the right to act as a legal surrogate for a resident to provide a written declaration under penalty of perjury stating such facts and circumstances that may be reasonably sufficient to establish authority as a legal surrogate. This written declaration shall be dated and signed by the surrogate and a witness.

**§327D-C Decisions by the legal surrogate.** (a) A legal surrogate may make health care decisions for a resident if the resident has been determined to lack capacity by the supervising health care professional and that incapacity is confirmed by a second opinion of a physician who is not affiliated with the facility caring for the resident at that time.

(b) A legal surrogate shall make a health care decision in accordance with a resident's individual instructions, if any, and other wishes to the extent known to the legal surrogate. Otherwise, the legal surrogate shall make the decision the legal surrogate reasonably believes the resident would have made under the circumstances.

(c) A health care decision made by a legal surrogate for a resident shall take effect without judicial approval.

**§327D-D Responsibilities of the legal surrogate.** (a) The legal surrogate shall:

- (1) Act for the resident and make all day-to-day health care decisions for the resident in matters regarding health care during the period of incapacity of the resident in accordance with the resident's instructions, best interests, wishes, or values unless that authority has been expressly limited by the resident;
- (2) Provide health care decisions based on informed consent and the decisions the legal surrogate reasonably believes the resident would have made under the circumstances;
- (3) Provide written consent using an appropriate form whenever such a form is required; and
- (4) As appropriate, apply for public benefits, such as medicare and medicaid, for the resident, and have access to information regarding the resident's income, assets, banking, and financial records to the extent required to make the foregoing applications. A health care provider or health care institution shall not make such an application a condition of continued care of the resident.

(b) A legal surrogate may authorize the release of information and clinical records as appropriate to ensure continuity in health care of the resident, and may authorize the admission, transfer, and discharge of the resident to or from a health care institution.

(c) If a court appoints a guardian solely for a resident's estate, or appoints any other fiduciary charged with the management of the principal's property, the legal surrogate shall continue to make health care decisions for the resident. The legal surrogate may report the health care status of the resident to the guardian.

(d) Under no circumstances shall physician-assisted death be ordered by the legal surrogate.

(e) No legal surrogate under this part shall have the power to consent to or order the withdrawal of either natural or artificial hydration and nutrition or to consent to or order actions or inaction which would eliminate the provision of ordinary and usual medical care or treatment.

(f) Under no circumstances shall the legal surrogate make any decisions that would abrogate rights established under chapter 334 or section 327D-21.

(g) Surrogate decision making authority ends at the point of discharge of the surrogate.

**§327D-E Review of legal surrogate's decision.** A member of a resident's family, a health care institution, or a supervising health care professional may seek expedited judicial intervention if that person believes:

- (1) The legal surrogate's decisions are not in accord with the resident's known wishes or values;
- (2) The legal surrogate was improperly designated or appointed; or
- (3) The designation of the legal surrogate is no longer effective.

**§327D-F Obligations of health care providers.** (a) Before implementing a health care decision made by a legal surrogate for a patient, a supervising health care professional shall, if appropriate, promptly communicate to the resident the decision made and the identity of the person making the decision.

(b) A supervising health care professional who knows of the existence of an advance health care directive, a revocation of an advance health care directive, or a designation, termination, or disqualification of a legal surrogate, shall promptly record its existence in the health care record of the resident and, if any of the foregoing are in writing, shall request a copy. If a copy is furnished, it shall be placed in the health care record.

(c) A supervising health care professional who makes, or is informed of, a determination that a resident lacks capacity or has recovered capacity, or that another condition exists that affects an individual instruction or the authority of an agent, guardian, or legal surrogate, shall promptly record the determination in the health care record of the resident and, if appropriate, communicate the determination to the resident, and to any person then authorized to make health care decisions for the resident.

(d) A health care provider or health care institution providing care to a resident shall comply with:

- (1) An individual instruction by the resident and the reasonable interpretation of that instruction made by a person who is then authorized to make health care decisions for the resident; and
- (2) A health care decision for the resident made by a person who is then authorized to make health care decisions for the resident to the same extent as if the decision had been made by the resident while having capacity.

(e) A health care provider or health care institution may not require or prohibit the execution or revocation of an advance health care directive as a condition for providing health care.

(f) A health care provider who, because of personal beliefs or conscience, refuses or is unable to comply with the terms of a legal surrogate's decision, without

delay, shall make the necessary arrangements to effect the transfer of the resident and the appropriate medical records to another health care provider or facility. A health care provider who transfers the resident without unreasonable delay, or who makes a good faith attempt to do so, shall not be subject to criminal prosecution or civil liability, or found to have committed an act of unprofessional conduct, for refusal to comply with the terms of the legal surrogate's decision. Transfer under these circumstances shall not constitute abandonment.

**§327D-G Immunities.** (a) A health care provider or institution acting in good faith and in accordance with generally accepted health care standards applicable to the health care provider or health care institution, shall not be subject to civil or criminal liability, or to discipline for unprofessional conduct for:

- (1) Complying with a health care decision made by a legal surrogate;
- (2) Declining to comply with a health care decision based on conscience;  
or
- (3) Complying with an advance health care directive and assuming that the directive was valid when the directive was made, and had not been revoked or terminated.

(b) An individual acting as a legal surrogate under this part shall not be subject to civil or criminal liability, or to discipline for unprofessional conduct, for health care decisions made in good faith.

(c) The immunities provided for in this section shall not apply to any action taken which is prohibited by this chapter.

**§327D-H Capacity.** (a) This part shall not affect the right of an individual to make informed health care decisions while the individual has the capacity to make such decisions.

(b) An individual shall be presumed to have the capacity to make health care decisions, to give or revoke an advance health care directive, and to designate, terminate, disqualify, or re-designate a legal surrogate.

**§327D-I Advance health care directive.** (a) This part shall not supersede or invalidate any other written advance health care directive a resident has made.

(b) A copy of any written advance health care directive, revocation of health care directive, or designation, termination, or disqualification of a legal surrogate, shall have the same effect as the original document.

**§327D-J Judicial relief.** On the petition of:

- (1) A resident;
- (2) The resident's agent, guardian, or legal surrogate;
- (3) A health care provider or health care institution involved with the resident's care; or
- (4) A member of the resident's family;

the family court may enjoin or direct a health care decision, or order other equitable relief. A proceeding under this section shall be governed by the provisions in chapter 560, relating to expedited proceedings and proceedings affecting incapacitated persons.

**§327D-K Application of part.** Except in cases where the surrogate is selected as provided for in section 327D-B(a), this part shall be applicable only if no person has the authority to make appropriate medical decisions for the resident pursuant to a guardianship under chapter 551, 551A, or 560, living will or declaration under chapter 327D, part I, or durable power of attorney under 551D, or if the

person given the authority to make those medical decisions under the living will, durable power of attorney, or guardianship is unavailable.”

SECTION 3. Chapter 327D, Hawaii Revised Statutes, is amended by designating sections 327D-1 to 327D-27 as:

**“PART I. GENERAL PROVISIONS”**

SECTION 4. (a) This Act shall be monitored by a surrogate decision-making committee which shall be appointed by the governor and staffed by the executive office on aging. The committee shall consist of not less than five and no more than nine members, at least one of which should be a resident advocate. In making the appointments, the governor shall consider appointing representatives from the following:

- (1) Hawaii Medical Association;
- (2) Hawaii Nurses Association;
- (3) Hawaii Chapter of the National Association of Social Workers;
- (4) Commission on Persons with Disabilities;
- (5) Executive Office on Aging;
- (6) American Association of Retired Persons;
- (7) A biomedical ethics committee;
- (8) The clergy; and
- (9) An attorney or law school professor who practices in health care law or advocacy.

(b) The committee shall review and evaluate the effect of this Act on health care decisions, and review the guardianship statutes and seek to reform those statutes to simplify the guardianship appointment process, provide greater protections to incapacitated adults, and incorporate surrogate decision-making provisions.

(c) The committee shall submit a report no later than twenty days prior to the 1999 regular session of the legislature, setting forth its findings and recommendations regarding the efficacy of this Act and its legislative proposals for guardianship reform. The report shall include, but not be limited to, discussion related to:

- (1) Whether individuals with legal surrogate decision makers received care in a timely fashion;
- (2) Whether the care received pursuant to decisions by legal surrogates was in the best interests of the individuals;
- (3) How the guardianship appointment process can be improved and simplified while ensuring greater protections for incapacitated persons and incorporating surrogate decision-making; and
- (4) The appropriateness of allowing end of life decisions by surrogate decision makers, including the withdrawal of artificial nutrition and hydration.

(d) The surrogate decision-making committee shall cease to exist on June 30, 1999.

SECTION 5. In codifying the new part added to chapter 327D, Hawaii Revised Statutes, by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in the designation of the new sections in this Act.

SECTION 6. New statutory material is underscored.

**SECTION 7.** This Act shall take effect upon its approval and shall be repealed on June 30, 1999.

(Approved July 2, 1997.)