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WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 1993



ENROLLED

Com. Sub. For
HOUSE BILL No. *2599*

(By Delegates *Ballaghu Huntwork,*
P. White and Douglas)



Passed *April 8,* 1993

In Effect *July 1, 1993* Passage

ENROLLED
COMMITTEE SUBSTITUTE
FOR
H. B. 2599

(By DELEGATES GALLAGHER, HUNTWORK,
P. WHITE AND DOUGLAS)

[Passed April 8, 1993; in effect July 1, 1993.]

AN ACT to repeal section five-a, article five-c, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend said chapter sixteen by adding thereto a new article, designated article thirty-b, relating to health care surrogate act; legislative findings and purposes; definitions; applicability; private decision-making process and authority of surrogate; determination of incapacity; selection of surrogate; surrogate decision-making standards; reliance on authority of surrogate decision-maker and protection of health care providers; conscience objections; interinstitutional transfers; insurance; not suicide or murder; preservation of existing rights; relation to existing law and no abrogation of common law doctrine of medical necessity; and severability.

Be it enacted by the Legislature of West Virginia:

That section five-a, article five-c, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; and that said chapter sixteen be amended by adding thereto a new article, designated article thirty-b, to read as follows:

ARTICLE 30B. HEALTH CARE SURROGATE ACT.

§16-30B-1. Short title.

1 This article may be cited as the “Health Care
2 Surrogate Act.”

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

1 (a) *Findings.*—The Legislature hereby finds that:

2 (1) All adults have a right to make decisions relating
3 to 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 persons who are incapacitated at the moment
7 of decision. Such persons who have not made their
8 wishes known in advance through an applicable living
9 will or medical power of attorney or through other
10 means have the right to have health care decisions made
11 on their behalf by persons who will act in accordance
12 with the person’s expressed values and wishes, or, if
13 unknown, in the person’s best interests.

14 (b) *Purpose.*—It is the purpose of this article to set
15 forth a process for private health care decision-making
16 for incapacitated adults that reduces the need for
17 judicial involvement and that defines the circumstances
18 under which immunity shall be available for health care
19 providers and surrogate decision-makers who make
20 such health care decisions. It is the intent of the
21 Legislature to establish an effective method for private
22 health care decision-making for incapacitated adults,
23 and it is also the intent of the Legislature that the courts
24 should not be the usual venue for making such decisions.
25 It is not the intent of the Legislature to legalize,
26 condone, authorize, or approve mercy killing or assisted
27 suicide.

§16-30B-3. Definitions.

1 (a) “Adult” means a person who is eighteen years of
2 age or older, an emancipated minor under section
3 twenty-seven, article seven, chapter forty-nine of this
4 code, or a mature minor.

5 (b) “Attending physician” means the physician se-
6 lected by or assigned to the person who has primary

7 responsibility for treatment and care of the person and
8 who is a licensed physician. If more than one physician
9 shares that responsibility, any of those physicians may
10 act as the attending physician under this article.

11 (c) "Close friend" means any person eighteen years of
12 age or older who has exhibited special care and concern
13 for the person and who, to the reasonable satisfaction of
14 the attending physician, is willing and able to become
15 involved in the person's health care, and has maintained
16 such regular contact with the person as to be familiar
17 with the person's activities, health, and religious and
18 moral beliefs.

19 (d) "Committee" shall have the same meaning as
20 defined in section one, article eleven, chapter twenty-
21 seven of this code.

22 (e) "Death" shall have the same meaning as defined
23 in article ten of this chapter.

24 (f) "Guardian" shall have the same meaning as
25 defined in sections one through six, article ten-a, chapter
26 forty-four of this code.

27 (g) "Health care decision" means a decision to give,
28 withhold, or withdraw informed consent to any type of
29 health care, including, but not limited to, medical and
30 surgical treatments, including life-prolonging interven-
31 tions, nursing care, hospitalization, treatment in a
32 nursing home or other facility, and home health care.

33 (h) "Health care facility" means a type of health care
34 provider commonly known by a wide variety of titles,
35 including, but not limited to, hospitals, medical centers,
36 ambulatory health care facilities, physicians' offices and
37 clinics, extended care facilities operated in connection
38 with hospitals, nursing homes, hospital extended care
39 facilities operated in connection with rehabilitation
40 centers, and other facilities established to administer
41 health care in their ordinary course of business or
42 practice.

43 (i) "Health care provider" means any physician,
44 dentist, nurse, paramedic, psychologist or other person
45 providing medical, dental, nursing, psychological or

46 other health care services of any kind.

47 (j) "Incapacity", or words of like import, means the
48 inability because of physical or mental impairment to
49 appreciate the nature and implications of a health care
50 decision, to make an informed choice regarding the
51 alternatives presented and to communicate that choice
52 in an unambiguous manner.

53 (k) "Life-prolonging intervention" means any medical
54 procedure or intervention which, when applied to a
55 person, would serve solely to artificially prolong the
56 dying process or to maintain the person in a persistent
57 vegetative state. The term "life-prolonging intervention"
58 does not include the administration of medication or the
59 performance of any other medical procedure deemed
60 necessary to provide comfort or to alleviate pain.

61 (l) "Medical information" shall have the same mean-
62 ing as defined in section four-a, article five, chapter
63 fifty-seven of this code and such definition shall apply
64 to other health care facilities as defined in this section.

65 (m) "Parent" means a person who is the natural or
66 adoptive mother or father of the child and whose
67 parental rights have not been terminated by a court of
68 law.

69 (n) "Person" means an individual, a corporation, a
70 business trust, a trust, a partnership, an association, a
71 government, a governmental subdivision or agency, or
72 any other legal entity.

73 (o) "Qualified physician" means a physician licensed
74 to practice medicine who has personally examined the
75 person.

76 (p) "Surrogate decision-maker" means an adult
77 individual or individuals who are reasonably available,
78 are willing to make health care decisions on behalf of
79 an incapacitated person, and are identified by the
80 attending physician in accordance with the provisions of
81 this article as the person or persons who are to make
82 those decisions in accordance with the provisions of this
83 article.

§16-30B-4. Applicability.

1 Nothing in this article shall be applied in derogation
2 of a person's known wishes as expressed in an applicable
3 living will executed in accordance with section three,
4 article thirty of this chapter or a medical power of
5 attorney executed in accordance with section six, article
6 thirty-a of this chapter or by any other means the health
7 care provider determines to be reliable.

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

1 (a) Health care decisions shall be made by capable
2 adults without regard to guidelines contained in this
3 article.

4 (b) Health care providers may rely upon health care
5 decisions on behalf of an incapacitated person without
6 resort to the courts or legal process, if the decisions are
7 made in accordance with the provisions of this article.

8 (c) The surrogate shall have the authority to make any
9 and all health care decisions on the person's behalf.

10 The surrogate's authority shall commence upon a
11 determination, made pursuant to section six of this
12 article, of the incapacity of the adult. In the event the
13 person no longer is incapacitated, the surrogate's
14 authority shall cease, but shall recommence if the person
15 subsequently becomes incapacitated as determined
16 pursuant to section six of this article.

17 (d) The surrogate shall seek medical information
18 necessary to make health care decisions. For the sole
19 purpose of making health care decisions for the person,
20 the surrogate shall have the same right of access to the
21 person's medical information and to discuss this
22 information with the person's attending physician that
23 the person would have had.

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

1 For the purposes of this article, a person shall not be
2 presumed to be incapacitated merely by reason of
3 advanced age or disability. With respect to a person who
4 has a diagnosis of mental illness or mental retardation,

5 such a diagnosis is not a presumption that the person
6 is incapacitated. A determination that a person is
7 incapacitated shall be made by the attending physician.

8 Before implementation of a decision by a surrogate
9 decision-maker to withhold or withdraw life-prolonging
10 intervention, at least one other qualified physician or a
11 licensed psychologist who has personally examined the
12 person must concur in the determination of incapacity
13 of an adult.

14 The determination of incapacity shall be recorded
15 contemporaneously in the person's medical record by the
16 attending physician, and, if one is required, by the
17 second physician or licensed psychologist. The recording
18 shall state the basis for the determination of incapacity,
19 including the cause, nature, and expected duration of
20 the person's incapacity, if these are known.

21 If the person is conscious, the attending physician
22 shall inform the person that he or she has been
23 determined to be incapacitated and that a surrogate
24 decision-maker may be making decisions regarding life-
25 prolonging intervention for the person.

§16-30B-7. Selection of a surrogate.

1 (a) When a person is incapacitated, the health care
2 provider must make reasonable inquiry as to the
3 availability and authority of a medical power of attorney
4 representative under the provisions of article thirty-a of
5 this chapter. When no representative is authorized or
6 available, and willing to serve, the health care provider
7 must make a reasonable inquiry as to the availability
8 of possible surrogates listed in items (1) through (8) of
9 this subsection:

- 10 (1) The person's guardian of the person or committee;
- 11 (2) The person's spouse;
- 12 (3) Any adult child of the person;
- 13 (4) Either parent of the person;
- 14 (5) Any adult sibling of the person;
- 15 (6) Any adult grandchild of the person;

16 (7) A close friend of the person;

17 (8) Such other persons or classes of persons including,
18 but not limited to, such public agencies, public
19 guardians, other public officials, public and private
20 corporations, and other representatives as the depart-
21 ment of health and human resources may from time to
22 time designate in rules and regulations promulgated
23 pursuant to chapter twenty-nine-a of this code.

24 (b) After such inquiry, the health care provider shall
25 rely on surrogates in the order of priority set forth
26 above, provided:

27 (1) Where there are multiple possible surrogate
28 decision-makers at the same priority level, the health
29 care provider shall, after reasonable inquiry, choose as
30 the surrogate the one who reasonably appears to be best
31 qualified. In determining who appears to be best
32 qualified, the health care provider shall give special
33 consideration to whether the proposed surrogate reason-
34 ably appears to be better able to make decisions either
35 in accordance with the known wishes of the person or
36 in accordance with the person's best interests. The
37 health care provider shall consider in this determination
38 the proposed surrogate's regular contact with the person
39 prior to and during the incapacitating illness, his or her
40 demonstrated care and concern, and his or her availa-
41 bility to visit the person during the illness and to engage
42 in face-to-face contact with the provider for the purposes
43 of fully participating in the decision-making process; or

44 (2) The health care provider may rely instead on a
45 proposed surrogate lower in the priority if, in the
46 provider's judgment, such individual is best qualified, as
47 described in subsection (b) of this section, to serve as the
48 person's surrogate. The health care provider shall
49 document in the medical record his or her reasons for
50 selecting a surrogate in exception to the priority order
51 in subsection (a) of this section.

52 (c) The surrogate decision-maker, as identified by the
53 health care provider, is authorized to make health care
54 decisions on behalf of the person without court order or
55 judicial involvement. The health care provider may rely

56 on the decisions of the surrogate if the provider believes,
57 after reasonable inquiry, that a representative under a
58 valid, applicable medical power of attorney is unavail-
59 able, and there is no other applicable advance directive:
60 *Provided*, That there is not reason to believe such health
61 care decisions are contrary to the person's religious
62 beliefs or that there is not actual notice of opposition to
63 such health care decisions to the health care provider
64 by a member of the same or a prior class.

65 (d) In the event an individual in a higher, or lower,
66 or the same priority level seeks to challenge the selection
67 of or the decision of the identified surrogate decision-
68 maker, the challenging party may initiate declaratory
69 proceedings in the circuit court of the county in which
70 the incapacitated person resides. No health care
71 provider or other person is required to seek declaratory
72 relief.

73 (e) Any surrogate who becomes unavailable for any
74 reason may be replaced by applying the provisions of
75 this section in the same manner as for the initial choice
76 of surrogate.

77 (f) In the event an individual of a higher priority to
78 an identified surrogate becomes available and willing to
79 be the surrogate, the individual with higher priority
80 may be identified as the surrogate unless the provisions
81 of subsection (b) of this section apply.

82 (g) The authority of the surrogate expires when the
83 person is no longer incapacitated or when the surrogate
84 is unwilling or unable to continue to serve.

§16-30B-8. Surrogate decision-making standards.

1 (a) *General standards.*—

2 The surrogate shall make health care decisions:

3 (1) In accordance with the person's wishes, including
4 religious and moral beliefs; or

5 (2) In accordance with the person's best interests if
6 these wishes are not reasonably known and cannot with
7 reasonable diligence be ascertained; and

8 (3) Which reflect the values of the person, including
9 the person's religious and moral beliefs, to the extent
10 they are reasonably known or can with reasonable
11 diligence be ascertained.

12 (b) *Assessment of best interests.*—

13 An assessment of the person's best interests shall
14 include consideration of the person's medical condition,
15 prognosis, the dignity and uniqueness of every person,
16 the possibility and extent of preserving the person's life,
17 the possibility of preserving, improving or restoring the
18 person's functioning, the possibility of relieving the
19 person's suffering, the balance of the burdens to the
20 benefits of the proposed treatment or intervention, and
21 such other concerns and values as a reasonable individ-
22 ual in the person's circumstances would wish to
23 consider.

**§16-30B-9. Reliance on authority of surrogate decision-
maker and protection of health care
providers.**

1 A health care provider shall not be subject to civil or
2 criminal liability for surrogate selection or good faith
3 compliance and reliance upon the directions of the
4 surrogate in accordance with the provisions of this
5 article.

6 Nothing in this article shall be deemed to protect a
7 provider from liability for the provider's own negligence
8 in the performance of the provider's duties or in
9 carrying out any instructions of the surrogate. Nothing
10 in this article shall be deemed to alter the law of
11 negligence as it applies to the acts of any surrogate or
12 provider, and nothing herein shall be interpreted as
13 establishing a standard of care for health care providers
14 for purposes of the law of negligence.

§16-30B-10. Conscience objections.

1 (a) *Health care facilities.*—Nothing in this article shall
2 be construed to require a health care facility to change
3 published policy of the health care facility that is
4 expressly based on sincerely held religious beliefs or
5 sincerely held moral convictions central to the facility's

6 operating principles.

7 (b) *Health care providers.*—Nothing in this article
8 shall be construed to require an individual health care
9 provider to honor a health care decision made pursuant
10 to this article if:

11 (1) The decision is contrary to the individual provid-
12 er's sincerely held religious beliefs or sincerely held
13 moral convictions; and

14 (2) The individual health care provider promptly
15 informs the person who made the decision and the
16 health care facility of his or her refusal to honor the
17 decision. In such event, the surrogate decision-maker
18 shall have responsibility for arranging the transfer of
19 the person to another health care provider. The individ-
20 ual health care provider shall cooperate in facilitating
21 such transfer, and a transfer under these circumstances
22 shall not constitute abandonment.

§16-30B-11. Interinstitutional transfers.

1 If a person with an order to withhold or withdraw life-
2 prolonging intervention is transferred from one health
3 care facility to another, the existence of such order shall
4 be communicated to the receiving facility prior to the
5 transfer, and the written order shall accompany the
6 person to the receiving facility and shall remain
7 effective until a physician at the receiving facility issues
8 admission orders.

§16-30B-12. Insurance.

1 No policy of life insurance, or annuity or other type
2 of contract that is conditioned on the life or death of the
3 person, shall be legally impaired or invalidated in any
4 manner by the withholding or withdrawal of life-
5 prolonging intervention from a person in accordance
6 with the provisions of this article, notwithstanding any
7 terms of the policy to the contrary.

§16-30B-13. Not suicide or murder.

1 The withholding or withdrawal of life-prolonging
2 intervention from a person in accordance with the
3 decision of a surrogate decision-maker made pursuant

4 to the provisions of this article does not, for any purpose,
5 constitute assisted suicide or murder. The withholding
6 or withdrawal of life-prolonging intervention from a
7 person in accordance with the decisions of a surrogate
8 decision-maker made pursuant to the provisions of this
9 article, however, shall not relieve any individual of
10 responsibility for any criminal acts that may have
11 caused the person's condition. Nothing in this article
12 shall be construed to legalize, condone, authorize, or
13 approve mercy killing or assisted suicide.

§16-30B-14. Preservation of existing rights.

1 The provisions of this article are cumulative with
2 existing law regarding an individual's right to consent
3 to or refuse medical treatment. The provisions of this
4 article shall not impair any existing rights or respon-
5 sibilities that a health care provider, a person, including
6 a minor or an incapacitated person, or a person's family
7 may have in regard to the withholding or withdrawal
8 of life-prolonging intervention, including any rights to
9 seek or forego judicial review of decisions regarding life-
10 prolonging intervention under the common law or
11 statutes of this state.

**§16-30B-15. Relation to existing law; no abrogation of
common law doctrine of medical
necessity.**

1 (a) Individuals designated as patient representatives
2 pursuant to section five-a of article five-c heretofore set
3 forth in this chapter may agree to become surrogate
4 decision-makers subject to the provisions of this article.

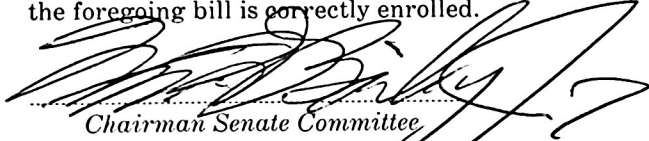
5 (b) Nothing in this article shall be construed to
6 abrogate the common law doctrine of medical necessity.

§16-30B-16. Severability.

1 The provisions of this article are severable and if any
2 provision, section or part thereof shall be held invalid,
3 unconstitutional or inapplicable to any person or
4 circumstance, such invalidity, unconstitutionality or
5 inapplicability shall not affect or impair any other
6 remaining provisions contained herein.

Enr. Com. Sub. for H. B. 2599] 12

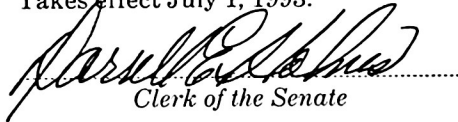
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.


.....
Chairman Senate Committee


.....
Ernest C. Moore
Chairman House Committee

Originating in the House.


Takes effect July 1, 1993.


.....
Clerk of the Senate


.....
Clerk of the House of Delegates


.....
President of the Senate


.....
Speaker of the House of Delegates

The within is approved this the 12th
day of May, 1993.

.....
Governor

PRESENTED TO THE

GOVERNOR

Date

4/22/93

Time

11:38 am