

Stricken language would be deleted from and underlined language would be added to present law.
Act 1264 of the Regular Session

State of Arkansas
89th General Assembly
Regular Session, 2013

As Engrossed: H4/3/13
A Bill

SENATE BILL 1013

By: Senator Irvin

For An Act To Be Entitled

AN ACT TO CREATE THE ARKANSAS HEALTH CARE DECISIONS ACT; TO PROTECT PATIENTS' RIGHTS TO MAKE THEIR OWN HEALTH CARE DECISIONS; TO PROMOTE ADVANCE DIRECTIVES; TO PROVIDE LEGAL PROTECTION FOR PATIENTS' RIGHTS; AND FOR OTHER PURPOSES.

Subtitle

TO CREATE THE ARKANSAS HEALTH CARE DECISIONS ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code Title 20, Chapter 6, is amended to add an additional subchapter to read as follows:

Subchapter 1 – Arkansas Healthcare Decisions Act

20-6-101. Title.

This subchapter shall be known and may be cited as the "Arkansas Healthcare Decisions Act."

20-6-102. Definitions.

As used in this subchapter:

(1) "Advance directive" means an individual instruction or a written statement that anticipates and directs the provision of health care for an individual, including without limitation a living will or a durable power of attorney for health care;

(2) "Agent" means an individual designated in an advance



directive for health care to make a healthcare decision for the individual granting the power;

(3) "Capacity" means an individual's ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a healthcare decision;

(4) "Designated physician" means a physician designated by an individual or the individual's agent, guardian, or 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 reasonably available, a physician who undertakes responsibility for the individual's health care;

(5) "Emergency responder" means a paid or volunteer firefighter, law enforcement officer, or other public safety official or volunteer acting within the scope of his or her proper function or rendering emergency care at the scene of an emergency;

(6) "Guardian" means a judicially appointed guardian or conservator having authority to make a healthcare decision for an individual;

(7) "Health care" means any care, treatment, service, or procedure to maintain, diagnose, treat, or otherwise affect an individual's physical or mental condition, including medical care;

(8) "Healthcare decision" means consent, refusal of consent, or withdrawal of consent to health care;

(9) "Healthcare institution" means an agency, institution, facility, or place, whether publicly or privately owned or operated, that provides health services and that is one (1) of the following:

(A) An ambulatory surgical treatment center;

(B) A birthing center;

(C) A home care organization;

(D) A hospital;

(E) An intellectual disability institutional habilitation facility;

(F) A mental health hospital;

(G) A nonresidential substitution-based treatment center for opiate addiction;

(H) A nursing home;

(I) An outpatient diagnostic center;

(J) A recuperation center;

(K) A rehabilitation facility; or

(L) A residential hospice;

(10) "Healthcare provider" means a person who is licensed, certified, or otherwise authorized by the laws of this state to administer health care in the ordinary course of the practice of his or her profession;

(11) "Individual instruction" means an individual's direction concerning a healthcare decision for the individual;

(12) "Medical care" means the diagnosis, cure, mitigation, treatment, or prevention of disease for the purpose of affecting any structure or function of the body;

(13) "Person" means an individual, corporation, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, instrumentality, or any other legal or commercial entity;

(14) "Person authorized to consent on the principal's behalf" means:

(A) A person authorized by law to consent on behalf of the principal when the principal is incapable of making an informed decision; or

(B) In the case of a minor child, the parent or parents having custody of the child, the child's legal guardian, or another person as otherwise provided by law;

(15) "Personally inform" means to communicate by any effective means from the principal directly to a healthcare provider;

(16) "Physician" means an individual authorized to practice medicine or osteopathy in this state;

(17) "Power of attorney for health care" means the authority of an agent to make healthcare decisions for the individual granting the power;

(18) "Principal" means an individual who grants authority to an individual under this subchapter;

(19) "Qualified emergency medical service personnel" includes without limitation, emergency medical technicians, paramedics, or other emergency services personnel, providers, or entities acting within the usual course of their professions, and other emergency responders;

(20) "Reasonably available" means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the principal's healthcare needs, including

without limitation availability by telephone;

(21) "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;

(22) "Supervising healthcare provider" means the designated physician or, if there is no designated physician or the designated physician is not reasonably available, the healthcare provider who has undertaken primary responsibility for an individual's health care;

(23) "Surrogate" means an individual, other than a principal's agent or guardian, authorized under this subchapter to make a healthcare decision for the principal;

(24) "Treating healthcare provider" means a healthcare provider who is directly or indirectly involved in providing health care to the principal; and

(25) "Universal Do Not Resuscitate Order" means a written order that applies regardless of the treatment setting and that is signed by the principal's physician that states that in the event the principal suffers cardiac or respiratory arrest, cardiopulmonary resuscitation should not be attempted.

20-6-103. Oral or written individual instructions -- Advance directive for health care -- When effective -- Decisions based on best interest assessment -- Out-of-state directives -- Construction.

(a)(1) An adult or emancipated minor may give an individual instruction.

(2) The instruction may be oral or written.

(3) The instruction may be limited to take effect only if a specified condition arises.

(b)(1) An adult or emancipated minor may execute an advance directive for health care that authorizes the agent to make a healthcare decision that the principal could make if he or she had capacity.

(2) An advance directive shall be in writing and signed by the principal.

(3) An advance directive shall be either notarized or witnessed by two (2) witnesses.

(4) For the purposes of this subsection (b) a witness shall be

a competent adult who is not the agent and at least one (1) of whom is not related to the principal by blood, marriage, or adoption and who would not be entitled to any portion of the estate of the principal upon the death of the principal under any will or codicil made by the principal existing at the time of execution of the advance directive or by operation of law.

(5) A written advance directive that is witnessed shall contain an attestation clause that attests that the witnesses comply with this subsection (b).

(6) An advance directive remains in effect notwithstanding the principal's last incapacity and may include individual instructions.

(7) An advance directive may include the principal's nomination of a guardian of the principal.

(c) Unless otherwise specified in an advance directive, the authority of an agent becomes effective only upon a determination that the principal lacks capacity, and ceases to be effective upon a determination that the principal has recovered capacity.

(d)(1) If necessary, the designated physician shall determine whether a principal lacks or has recovered capacity, or that another condition exists that affects an individual instruction or the authority of an agent.

(2) In making a determination under subdivision (d)(1) of this section, the designated physician may consult with other persons as he or she deems appropriate.

(e)(1) An agent shall make a healthcare decision in accordance with the principal's individual instructions and other wishes to the extent known to the agent.

(2)(A) In the absence of individual instructions or other information, the agent shall make the decision in accordance with the agent's determination of the principal's best interest.

(B) In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.

(f) A healthcare decision made by an agent for a principal is effective without judicial approval.

(g) An advance directive that is executed outside of this state by a nonresident of this state shall be given effect in this state at the time of execution if the advance directive complies with either this subchapter or

the laws of the state of the principal's residence.

(h) A healthcare provider, healthcare institution, healthcare service plan, insurer issuing disability insurance, self-insured employee welfare benefit plan, or nonprofit hospital plan shall not require the execution or revocation of an advance directive as a condition of the principal's being insured for or receiving health care.

20-6-104. Revocation of the designation of agent -- Revocation of advance directive -- Spouse as agent -- Conflicts.

(a) A principal having capacity may revoke all or part of an advance directive, other than the designation of an agent, at any time and in any manner that communicates an intent to revoke.

(b) A principal having capacity may revoke the designation of an agent only by a signed written statement or by personally informing the supervising healthcare provider.

(c) A decree of annulment, divorce, dissolution of marriage, or legal separation revokes a previous designation of a spouse as agent unless otherwise specified in the decree or in an advance directive.

(d) An advance directive that conflicts with an earlier advance directive revokes the earlier directive to the extent of the conflict.

20-6-105. Designation of surrogate.

(a)(1) An adult or emancipated minor may designate an individual to act as surrogate by personally informing the supervising healthcare provider.

(2) The designation may be oral or written.

(b) A surrogate may make a healthcare decision for a principal who is an adult or emancipated minor only if:

(1) The principal has been determined by the designated physician to lack capacity; and

(2) An agent or guardian has not been appointed or the agent or guardian is not reasonably available.

(c)(1) The supervising healthcare provider shall designate a surrogate for the principal and document the appointment in the clinical record of the institution or institutions at which the principal is receiving health care if the principal:

(A) Lacks capacity;

(B) Has not appointed an agent or the agent is not reasonably available;

(C) Has not designated a surrogate or the surrogate is not reasonably available; and

(D) Does not have a guardian or the guardian is not reasonably available.

(2)(A) The principal's surrogate shall be an adult who:

(i) Has exhibited special care and concern for the principal;

(ii) Is familiar with the principal's personal values;

(iii) Is reasonably available; and

(iv) Is willing to serve.

(B) A person who is the subject of a protective order or other court order that directs that person to avoid contact with the principal is not eligible to serve as the principal's surrogate.

(3) In designating the person best qualified to serve as the surrogate for the principal, the supervising healthcare provider shall consider the proposed surrogate's:

(A) Ability to make decisions either in accordance with the known wishes of the principal or in accordance with the principal's best interests;

(B) Frequency of contact with the principal before and during the incapacitating illness;

(C) Demonstrated care and concern;

(D) Availability to visit the principal during his or her illness; and

(E) Availability to engage in face-to-face contact with healthcare providers for the purpose of fully participating in the decision-making process.

(4) Consideration may be given in order of descending preference for service as a surrogate to:

(A) The principal's spouse, unless legally separated;

(B) The principal's adult child;

(C) The principal's parent;

(D) The principal's adult sibling; or

(E) Any other adult relative of the principal.

(5) If none of the individuals eligible to act as a surrogate under this subsection (c) is reasonably available, the designated physician may make healthcare decisions for the principal after the designated physician:

(A) Consults with and obtains the recommendations of an institution's ethics officers; or

(B) Obtains concurrence from a second physician who is:

(i) Not directly involved in the principal's health care;

(ii) Does not serve in a capacity of decision-making, influence, or responsibility over the designated physician; and

(iii) Does not serve in a capacity under the authority of the designated physician's decision-making, influence, or responsibility.

(6)(A) In the event of a challenge to the designation of the surrogate or the authority of the surrogate to act, it is a rebuttable presumption that the selection of the surrogate was valid.

(B) A person who challenges the selection of the surrogate has the burden of proving the invalidity of that selection by a preponderance of the evidence.

(d)(1) Except as provided in subdivision (g)(2) of this section:

(A) Neither the treating healthcare provider nor an employee of the treating healthcare provider, nor an operator of a healthcare institution, nor an employee of an operator of a healthcare institution may be designated as a surrogate; and

(B) A healthcare provider or employee of a healthcare provider may not act as a surrogate if the healthcare provider becomes the principal's treating health care provider.

(2) An employee of the treating healthcare provider or an employee of an operator of a healthcare institution may be designated as a surrogate if:

(A) The employee so designated is a relative of the principal by blood, marriage, or adoption; and

(B) The other requirements of this section are satisfied.

(e) A health care provider may require an individual claiming the

right to act as surrogate for a principle to provide a written declaration under penalty of perjury stating facts and circumstances reasonably sufficient to establish the claimed authority.

20-6-106. Authority of surrogate.

(a)(1) A surrogate shall make a healthcare decision in accordance with the principal's individual instructions, if any, and other wishes to the extent known to the surrogate.

(2)(A) Otherwise, the surrogate shall make the decision in accordance with the surrogate's determination of the principal's best interest.

(B) In determining the principal's best interest, the surrogate shall consider the principal's personal values to the extent known to the surrogate.

(b) A surrogate who has not been designated by the principal may make all health care decisions for the principal that the principal could make on the principal's own behalf, except that artificial nutrition and hydration may be withheld or withdrawn for a principal upon a decision of the surrogate only if the designated physician and a second independent physician certify in the principal's current clinical records that:

(1) The provision or continuation of artificial nutrition or hydration is merely prolonging the act of dying; and

(2) The principal is highly unlikely to regain capacity to make medical decisions.

(c) A healthcare decision made by a surrogate for a principal is effective without judicial approval.

20-6-107. Requirement to comply with principal's individual instruction -- Order of precedence.

(a) Absent a court order to the contrary, a guardian shall comply with the principal's individual instructions and shall not revoke the principal's advance directive.

(b) A healthcare decision made by a guardian for the principal is effective without judicial approval.

20-6-108. Determination of capacity.

If a designated physician who makes a determination or is informed of a determination that a principal lacks or has recovered capacity or that another condition exists that affects an individual instruction or the authority of an agent, guardian, or surrogate, the designated physician shall:

(1) Record promptly the determination in the principal's current clinical record; and

(2) Communicate the determination to the principal, if possible, and to any person authorized to make healthcare decisions for the principal.

20-6-109. Compliance by health care provider or institution.

(a) Except as provided in subsections (b), (c), and (d) of this section, a healthcare provider or institution providing care to a principal shall comply with:

(1) An individual instruction of the principal and with a reasonable interpretation of that instruction by a person authorized to make health care decisions for the principal; and

(2) A healthcare decision for the principal made by a person authorized to make healthcare decisions for the principal to the same extent as if the decision had been made by the principal while having capacity.

(b) A healthcare provider may decline to comply with an individual instruction or healthcare decision for reasons of conscience.

(c) A healthcare institution may decline to comply with an individual instruction or healthcare decision if the instruction or decision:

(1) Is contrary to a policy of the institution that is based on reasons of the conscience; and

(2) The policy was timely communicated to the principal or to a person authorized to make healthcare decisions for the principal.

(d) A healthcare provider or institution may decline to comply with an individual instruction or healthcare decision that requires medically inappropriate health care or healthcare contrary to generally accepted health care standards applicable to the healthcare provider or institution.

(e) A healthcare provider or institution that declines to comply with an individual instruction or healthcare decision under subsections (b), (c), or (d) of this section shall:

(1) Inform promptly the principal, if possible, or a person

authorized to make healthcare decisions for the principal;

(2) Provide continuing care to the principal until a transfer can be effected or until a determination has been made that a transfer cannot be effected; and

(3)(A) Unless the principal or person authorized to make healthcare decisions for the principal refuses assistance, immediately make all reasonable efforts to assist in the transfer of the principal to another healthcare provider or healthcare institution that is willing to comply with the instruction or decision.

(B) If a transfer cannot be effected, the healthcare provider or institution shall not be compelled to comply.

20-6-110. Disclosure of medical or other healthcare information.

Unless otherwise specified in an advance directive, a person authorized to make healthcare decisions for a principal has the same rights as the principal to request, receive, examine, copy, and consent to the disclosure of medical or any other healthcare information.

20-6-111. Liability.

(a) A healthcare provider or healthcare institution acting in good faith and in accordance with generally accepted healthcare standards applicable to the healthcare provider or healthcare institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for:

(1) Complying with a healthcare decision of a person apparently having authority to make a healthcare decision for a principal, including a decision to withhold or withdraw health care;

(2) Declining to comply with a healthcare decision of a person based on a reasonable belief that the person then lacked authority; or

(3) Complying with an advance directive that, to the knowledge of the healthcare provider or healthcare institution, was valid when made and has not been revoked or terminated.

(b) An individual acting as agent or surrogate under this subchapter is not subject to civil or criminal liability or to discipline for unprofessional conduct for healthcare decisions made in good faith.

(c) A person who designates a surrogate under this subchapter is not

subject to civil or criminal liability or to discipline for unprofessional conduct for a designation made in good faith.

20-6-112. Presumption of capacity.

(a) This subchapter does not affect the right of an individual to make health care decisions while having capacity to do so.

(b) An individual is presumed to have capacity to make a health care decision, to give or revoke an advance directive, and to designate or disqualify a surrogate.

20-6-113. Copies have same effect as originals.

A copy of a written advance directive, revocation of an advance directive, or designation or disqualification of a surrogate has the same effect as the original.

20-6-114. Presumptions not created -- Death does not constitute suicide, euthanasia, homicide, mercy killing, or assisted suicide.

(a) This subchapter does not create a presumption concerning the intention of an individual who has not made or who has revoked an advance directive.

(b) Notwithstanding any term of an insurance policy or annuity to the contrary, a death resulting from the withholding or withdrawal of health care in accordance with this subchapter does not constitute a suicide or homicide or legally impair or invalidate an insurance policy or an annuity providing a death benefit.

(c) The withholding or withdrawal of medical care from a principal in accordance with this subchapter does not constitute a suicide, euthanasia, homicide, mercy killing, or assisted suicide.

20-6-115. Court jurisdiction.

(a) A court of competent jurisdiction may enjoin or direct a healthcare decision or order other equitable relief on a petition of:

(1) A principal;

(2) a principal's agent, guardian, or surrogate;

(3) A healthcare provider or healthcare institution involved with the principal's care; or

(4) An individual described in § 20-6-107(c).

(b) A proceeding under this section shall be expedited on the court's civil dockets.

20-6-116. Effect and interpretation of living wills.

(a) If a living will entered into before October 1, 2013 was valid at the time of execution, it remains valid.

(b) A living will entered into on or after October 1, 2013 that evidences an intent that it is entered into under this subchapter is valid.

(c) A living will entered into on or after October 1, 2013 that does not evidence an intent that it is entered into under this chapter may be given effect as an individual instruction, if it complies with this subchapter.

20-6-117. Effect and interpretation of durable powers of attorney.

(a) If a durable power of attorney for health care entered into before October 1, 2013 was valid at the time of execution, it remains valid.

(b) A durable power of attorney for health care entered into on or after October 1, 2013, that evidences an intent that it is entered into under this subchapter is valid.

(c) A durable power of attorney for health care entered into on or after October 1, 2013 that does not evidence an intent that it is entered into under this subchapter may be given effect as an advance directive under this subchapter, if it complies with this subchapter.

20-6-118. Conflicting laws repealed.

A law or part of law in conflict with this subchapter is repealed.

SECTION 2. DO NOT CODIFY. Forms.

The State Board of Health shall adopt the following forms and may by rule revise the forms so long as the revisions are consistent with the intent of this act.

FORMS

ADVANCE CARE PLAN

Instructions: Competent adults and emancipated minors may give advance instructions using this form or any form of their own choosing. To be legally binding, the Advance Care Plan must be signed and either witnessed or notarized.

I, _____, hereby give these advance instructions on how I want to be treated by my doctors and other health care providers when I can no longer make those treatment decisions myself.

Agent: I want the following person to make health care decisions for me:

Name: _____ Phone #: _____ Relation: _____
 Address: _____

Alternate Agent: If the person named above is unable or unwilling to make health care decisions for me, I appoint as alternate:

Name: _____ Phone #: _____ Relation: _____
 Address: _____

Quality of Life:

I want my doctors to help me maintain an acceptable quality of life including adequate pain management. A quality of life that is unacceptable to me means when I have any of the following conditions (**you can check as many of these items as you want**):

- Permanent Unconscious Condition:** I become totally unaware of people or surroundings with little chance of ever waking up from the coma.
- Permanent Confusion:** I become unable to remember, understand or make decisions. I do not recognize loved ones or cannot have a clear conversation with them.
- Dependent in all Activities of Daily Living:** I am no longer able to talk clearly or move by myself. I depend on others for feeding, bathing, dressing and walking. Rehabilitation or any other restorative treatment will not help.
- End-Stage Illnesses:** I have an illness that has reached its final stages in spite of full treatment. Examples: Widespread cancer that does not respond anymore to treatment; chronic and/or damaged heart and lungs, where oxygen needed most of the time and activities are limited due to the feeling of suffocation.

Treatment:

If my quality of life becomes unacceptable to me and my condition is irreversible (that is, it will not improve), I direct that medically appropriate treatment be provided as follows. **Checking “yes” means I WANT the treatment. Checking “no” means I DO NOT want the treatment.**

<input type="checkbox"/>	<input type="checkbox"/>	<u>CPR (Cardiopulmonary Resuscitation):</u> To make the heart beat again and restore breathing after it has stopped. Usually this involves electric shock, chest compressions, and breathing assistance.
<input type="checkbox"/>	<input type="checkbox"/>	<u>Life Support / Other Artificial Support:</u> Continuous use of breathing machine, IV fluids, medications, and other equipment that helps the lungs, heart, kidneys and other organs to continue to work.
<input type="checkbox"/>	<input type="checkbox"/>	<u>Treatment of New Conditions:</u> Use of surgery, blood transfusions, or antibiotics that will deal with a new condition but will not help the main illness.
<input type="checkbox"/>	<input type="checkbox"/>	<u>Tube feeding/IV fluids:</u> Use of tubes to deliver food and water to patient’s stomach or use of IV fluids into a vein which would include artificially delivered nutrition and hydration.

PLEASE SIGN ON PAGE 2

Page 1 of 2

Other instructions, such as burial arrangements, hospice care, etc.: _____

(Attach additional pages if necessary)

Organ donation (optional): Upon my death, I wish to make the following anatomical gift (please mark one):

Any organ/tissue My entire body Only the following organs/tissues: _____

SIGNATURE

Your signature should either be witnessed by two competent adults or notarized. If witnessed, neither witness should be the person you appointed as your agent, and at least one of the witnesses should be someone who is not related to you or entitled to any part of your estate.

Signature: _____
(Patient)

DATE: _____

Witnesses:

1. I am a competent adult who is not named as the agent. I witnessed the patient's signature on this form.

Signature of witness number 1

2. I am a competent adult who is not named as the agent. I am not related to the patient by blood, marriage, or adoption and I would not be entitled to any portion of the patient's estate upon his or her death under any existing will or codicil or by operation of law. I witnessed the patient's signature on this form.

Signature of witness number 2

This document may be notarized instead of witnessed:

STATE OF ARKANSAS
COUNTY OF _____

I am a Notary Public in and for the State and County named above. The person who signed this instrument is personally known to me (or proved to me on the basis of satisfactory evidence) to be the person who signed as the "patient". The patient personally appeared before me and signed above or acknowledged the signature above as his or her own. I declare under penalty of perjury that the patient appears to be of sound mind and under no duress, fraud, or undue influence.

My commission expires: _____

Signature of Notary Public

WHAT TO DO WITH THIS ADVANCE DIRECTIVE

- Provide a copy to your physician(s)
- Keep a copy in your personal files where it is accessible to others
- Tell your closest relatives and friends what is in the document
- Provide a copy to the person(s) you named as your health care agent

APPOINTMENT OF HEALTH CARE AGENT
(ARKANSAS)

I, _____, give my agent named below permission to make health care decisions for me if I cannot make decisions for myself, including any health care decision that I could have made for myself if able. If my agent is unavailable or is unable or unwilling to serve, the alternate named below will take the agent's place.

Agent:

Alternate:

Name

Name

Address

Address

City State Zip Code

City State Zip Code

() _____
Area Code Home Phone Number

() _____
Area Code Home Phone Number

() _____
Area Code Work Phone Number

() _____
Area Code Work Phone Number

() _____
Area Code Mobile Phone Number

() _____
Area Code Mobile Phone Number

Patient's name (please print or type) Date

Signature of patient (must be at least 18 or emancipated minor)

To be legally valid, **either** block A **or** block B must be properly completed and signed.

Block A Witnesses (2 witnesses required)

1. I am a competent adult who is not named above. I witnessed the patient's signature on this form.

Signature of witness number 1

2. I am a competent adult who is not named above. I am not related to the patient by blood, marriage, or adoption and I would not be entitled to any portion of the patient's estate upon his or her death under any existing will or codicil or by operation of law. I witnessed the patient's signature on this form.

Signature of witness number 2

Block B Notarization

STATE OF ARKANSAS
COUNTY OF _____

I am a Notary Public in and for the State and County named above. The person who signed this instrument is personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is shown above as the "patient." The patient personally appeared before me and signed above or acknowledged the signature above as his or her own. I declare under penalty of perjury that the patient appears to be of sound mind and under no duress, fraud, or undue influence.

My commission expires: _____

Signature of Notary Public

ACCEPTANCE OF SURROGATE SELECTION

I accept the appointment as surrogate for _____
Patient

and understand I have the authority to make all medical decisions.

Signature of Surrogate Date/Time

/s/ Irvin

APPROVED: 04/16/2013