

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas
91st General Assembly
Regular Session, 2017

As Engrossed: S3/16/17
A Bill

SENATE BILL 676

By: Senator Irvin

For An Act To Be Entitled

AN ACT TO AMEND THE ARKANSAS HEALTHCARE DECISIONS
ACT; AND FOR OTHER PURPOSES.

Subtitle

TO AMEND THE ARKANSAS HEALTHCARE
DECISIONS ACT.

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

SECTION 1. Arkansas Code §§ 20-6-102 – 20-6-108 is amended to read as follows:

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)(A) ~~"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;~~
"Durable power of attorney for health care" means a written advance directive that identifies an agent who is authorized to make healthcare decisions on behalf of the principal.

(B) "Durable power of attorney for health care" includes without limitation a document appointing a healthcare proxy executed under § 20-17-202;

(5) "Emancipated minor" means a minor who has been emancipated under § 9-27-362;

~~(5)(6)~~ (6) "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)(7)~~ (7) "Guardian" means a judicially appointed guardian or conservator having authority to make a healthcare decision for an individual;

~~(7)(8)~~ (8) "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)(9)~~ (9) "Healthcare decision" means consent, refusal of consent, or withdrawal of consent to health care;

~~(9)(10)(A)~~ (10)(A) "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: medical treatment, or nursing or rehabilitative care to a person.

(B) "Healthcare institution" includes without limitation:

~~(A)(i)~~ (i) An ambulatory surgical ~~treatment center~~ facility;

~~(B)(ii)~~ (ii) A birthing center;

~~(C)(iii)~~ (iii) A home ~~care organization~~ health agency;

~~(D)(iv)~~ (iv) A hospital;

~~(E)(v)~~ (v) An ~~intellectual disability institutional habilitation facility~~ intermediate care facility for individuals with intellectual disabilities;

~~(F)(vi)~~ (vi) A mental health ~~hospital~~ center;

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

(vii) An assisted living facility;

~~(H)(viii)~~ A nursing home;

~~(I)(ix)~~ An outpatient diagnostic center;

~~(J) A recuperation center;~~

(x) A residential treatment facility;

~~(K)(xi)~~ A rehabilitation facility; ~~or~~ and

~~(L)(xii)~~ A ~~residential~~ hospice;

~~(10)(11)~~ "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)(12)~~ "Individual instruction" means an individual's direction concerning a healthcare decision for the individual;

(13)(A) "Living will" means a written advance directive describing the principal's individual instructions for health care to be provided or withheld in the event that the principal subsequently lacks decision-making capacity.

(B) "Living will" includes without limitation a declaration executed under § 20-17-202;

~~(12)(14)~~ "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)(15)~~ "Person" means an individual, corporation, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, instrumentality, or any other legal or commercial entity;

~~(14)(16)~~ "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)(17)~~ "Personally inform" means to communicate by any effective means from the principal directly to a healthcare provider;

~~(16)(18)~~ "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)~~(19) “Principal” means an individual who grants authority to ~~an~~ another individual under this subchapter;

~~(19)~~(20) “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)~~(21) “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)~~(22) “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)~~(23) “Supervising healthcare provider” means ~~the designated physician or, if there is no designated physician or the designated physician is not reasonably available, the~~ a licensed physician or other authorized independent healthcare provider who has undertaken primary responsibility for an individual’s health care;

~~(23)~~(24) “Surrogate” means an individual, other than a principal’s agent or guardian, authorized under this subchapter to make a healthcare decision for the principal; and

~~(24)~~(25) “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)(A) An adult, married minor, or emancipated minor may make

healthcare decisions for himself or herself and give an individual instruction.

(B) A person who is authorized to consent on behalf of a principal may make healthcare decisions for the principal and 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, married minor, or emancipated minor may execute an advance directive~~ a durable power of attorney for health care that authorizes the an agent to make a healthcare decision that the principal could make if he or she had capacity.

~~(2) An advance directive~~ A durable power of attorney for health care shall be in writing and signed by the principal.

~~(3) A durable power of attorney for health care remains in effect notwithstanding the principal's latest incapacity and may include a living will or other individual instructions.~~

(c)(1) An advance directive, including without limitation a living will or durable power of attorney for health care, shall be either notarized or witnessed by two (2) witnesses.

~~(4)(2)~~ For the purposes of this subsection 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)(3)~~ A written advance directive, including without limitation a living will or durable power of attorney for health care, that is witnessed shall contain an attestation clause that attests that the witnesses comply with this subsection.

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

~~(7)(4)~~ ~~An~~ A written advance directive may include the principal's nomination of a guardian of the principal.

~~(e)(d)~~ 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)~~(e)(1) If necessary, ~~the designated~~ a licensed 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)~~ (e)(1) of this section, ~~the designated~~ a licensed physician may consult with other persons as he or she deems appropriate.

~~(e)(1)~~(f)(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)~~(g) A healthcare decision made by an agent for a principal is effective without judicial approval.

~~(g)~~(h) An advance directive that is executed outside of this state ~~by a nonresident of this state~~ shall be given effect in this state if, 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~~ in which the advance directive was executed.

~~(h)~~(i) 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~~, including without limitation a living will, durable power of attorney for health care, or other

document, 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.~~

~~(e)(b)~~ 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)(c)~~ An advance directive that conflicts with an earlier advance directive revokes the earlier directive to the extent of the conflict.

(d) A healthcare provider, agent, guardian, or surrogate who is informed of a revocation shall promptly communicate the fact of the revocation to the supervising healthcare provider and any healthcare institution at which the patient is receiving care.

20-6-105. Designation of surrogate.

(a)(1) An adult, married minor, 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 a~~ licensed 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~~ identify 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~~ identifying the person best qualified to serve as the surrogate for the principal, the supervising healthcare provider:

(A) shall ~~shall~~ consider the proposed surrogate's:

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

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

~~(C)(iii)~~ Demonstrated care and concern; and

(B) May consider the proposed surrogate's:

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

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

(4) ~~Consideration may be given~~ When identifying the person best qualified to serve as the surrogate for the principal, the supervising healthcare provider may proceed 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; or

(F) Any other adult person who satisfies the requirements of subdivision (c)(2) of this section.

(5) If none of the individuals eligible to act as a surrogate under this subsection are reasonably available and informed consent would typically be sought from the principal, the ~~designated physician~~ supervising healthcare provider may make healthcare decisions for the principal after the ~~designated physician~~ supervising healthcare provider:

(A) Consults with and obtains the recommendations of an institution's ethics officers or ethics committee; 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~~ identification 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 (d)(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 healthcare 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 healthcare provider may require an individual claiming the right to act as surrogate for a principal 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 or agent.*

(b) *A surrogate who has not been designated by the principal may make all healthcare 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:*

(1) The action is authorized by the a living will or other written advance directive; or

(2) The supervising healthcare provider ~~the designated physician~~ and a second independent physician certify in the principal's current clinical records that:

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

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

~~(e)~~ *A healthcare decision made by a surrogate or agent for a principal is effective without judicial approval.*

20-6-107. *Requirement of a guardian to comply with principal's individual instruction.*

(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 Except as provided in § 28-65-102, a healthcare decision made by a guardian for the principal is effective without judicial approval.~~

~~20-6-108. Determination of capacity.~~

~~If a ~~designated~~ licensed 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~~ licensed 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.~~

~~SECTION 2. Arkansas Code § 20-6-118 is repealed.~~

~~20-6-118. Conflicting laws repealed.~~

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

~~SECTION 3. Arkansas Code § 20-13-104 is repealed.~~

~~20-13-104. Durable power of attorney for health care.~~

~~(a) This section shall be known and may be cited as the "Durable Power of Attorney for Health Care Act".~~

~~(b) The General Assembly recognizes the right of the individual to control all aspects of his or her personal care and medical treatment. However, if the individual becomes incapacitated, his or her right to control treatment may be denied unless the individual, as principal, can delegate the decision-making power to a trusted agent and be sure that the agent's power to make personal and health care decisions for the principal will be effective to the same extent as though made by the principal.~~

~~(c)(1) As used in this section, "health care" means any care, treatment, service, or procedure to maintain, diagnose, treat, or provide for the patient's physical or mental health or personal care.~~

~~(2) "Health care" shall not include decisions concerning life-sustaining treatment set forth in the Arkansas Rights of the Terminally Ill~~

~~or Permanently Unconscious Act, § 20-17-201 et seq. However, a power of attorney for health care may contain the declaration set forth in § 20-17-202 relating to such life-sustaining treatments.~~

~~(d)(1) A person may execute a power of attorney for health care. The power of attorney may be durable.~~

~~(2) The health care agency shall be:~~

~~(A) In writing;~~

~~(B) Signed by the principal or by someone acting at the direction of the principal and in the principal's presence; and~~

~~(C) Attested to by and subscribed in the presence of two (2) or more competent witnesses who are at least eighteen (18) years of age.~~

~~(3) An agent appointed under a power of attorney for health care shall take precedence over any person listed in § 20-9-602.~~

~~(e) This section does not in any way affect or invalidate any health care agency executed or any act of an agent prior to July 1, 1999, or affect any claim, right, or remedy that accrued prior to July 1, 1999. Nothing contained herein shall be interpreted or construed to alter or amend any provision of the Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, § 20-17-201 et seq. The powers of a health care agent may be combined with a declaration made by a qualified patient under the Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, § 20-17-201 et seq.~~

~~(f) This section is wholly independent of the provisions of the Probate Code, § 28-1-101 et seq., relating to wills, trusts, fiduciary relationships, and administration of estates, and nothing in this section shall be construed to affect in any way the provisions of the Probate Code, § 28-1-101 et seq.~~

~~(g) Nothing in this section shall be construed as authorizing or encouraging euthanasia, assisted suicide, suicide, or any action or course of action that violates the criminal laws of this state or of the United States.~~

SECTION 4. Arkansas Code § 20-17-201(2), concerning the definition of "declaration", is amended to read as follows:

(2)(A) "Declaration" means a writing executed in accordance with the requirements of § 20-17-202(a)†.

(B) "Declaration" is an advance directive under § 20-6-

102;

*SECTION 5. Arkansas Code § 20-17-202 is amended to read as follows:
20-17-202. Declaration relating to use of life-sustaining treatment.*

(a)(1) An individual of sound mind and eighteen (18) or more years of age may execute at any time a declaration governing the withholding or withdrawal of life-sustaining treatment. The declaration must be signed by the declarant, or another at the declarant’s direction, and witnessed by two (2) individuals.

(2) A declaration executed under this section before July 1, 2017, is valid if the declaration substantially complies with subsection (a) of this section.

(3) A declaration executed under this section on and after July 1, 2017, is valid if the declaration document:

(A) Is notarized but does not have two (2) witnesses; or

(B) Satisfies the requirements of Arkansas Healthcare Decisions Act, § 20-6-101 et seq.

(b) A declaration may be, but need not be, in the following form in the case where the patient has a terminal condition:

“DECLARATION

*If I should have an incurable or irreversible condition that will cause my death within a relatively short time, and I am no longer able to make decisions regarding my medical treatment, I direct my attending physician, pursuant to the Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, to [withhold or withdraw treatment that only prolongs the process of dying and is not necessary to my comfort or to alleviate pain] [follow the instructions of whom I appoint as my Health Care Proxy to decide whether life-sustaining treatment should be withheld or withdrawn]. It is my specific directive that nutrition may be withheld after consultation with my attending physician. It is my specific directive that hydration may be withheld after consultation with my attending physician. It is my specific directive that nutrition may not be withheld. It is my specific directive that hydration may not be withheld.
Signed this day of, 20*

Signature.....

Address.....

~~The declarant voluntarily signed this writing in my presence.~~ I am a competent adult who is not named as a health care proxy in this document. I witnessed the patient's signature on this form.

Witness.....

Address.....

I am a competent adult who is not named as a health care proxy in this document. 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.

Witness.....

Address.....”

(c) A declaration may be, but need not be, in the following form in the case where the patient is permanently unconscious:

“DECLARATION

If I should become permanently unconscious, I direct my attending physician, pursuant to the Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, to [withhold or withdraw life-sustaining treatments that are no longer necessary to my comfort or to alleviate pain] [follow the instructions of whom I appoint as my health care proxy to decide whether life-sustaining treatment should be withheld or withdrawn]. It is my specific directive that nutrition may be withheld after consultation with my attending physician. It is my specific directive that hydration may be withheld after consultation with my attending physician. It is my specific directive that nutrition may not be withheld. It is my specific directive that hydration may not be withheld.

Signed this day of, 20

Signature.....

Address.....

~~The declarant voluntarily signed this writing in my presence.~~ I am a competent adult who is not named as a health care proxy in this document. I witnessed the patient's signature on this form.

Witness.....

Address.....

I am a competent adult who is not named as a health care proxy in this document. 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.

Witness.....

Address.....”

(d) A physician or other health care provider who is furnished a copy of the declaration shall make it a part of the declarant's medical record and, ~~if unwilling to comply with the declaration, promptly so advise the declarant.~~

(e) In the case of a qualified patient, the patient's health care proxy, in consultation with the attending physician, shall have the authority to make treatment decisions for the patient including the withholding or withdrawal of life-sustaining procedures.

(f) A declaration executed by a qualified individual shall be clear and convincing evidence of his or her wishes, but clear and convincing evidence of an individual's wishes is not limited to the declarations under this section.

(g)(1) The directives concerning nutrition and hydration contained in subsections (b) and (c) of this section shall apply only to declarations executed on and after July 16, 2003.

(2) All declarations executed before that date shall remain in full force and effect, and the provisions of subsections (b) and (c) of this section pertaining to hydration and nutrition shall not be applied in the interpretation or construction of any such declaration, nor shall they be applied to in any way invalidate any such declaration or to otherwise limit the directives, powers, and authority granted under any such declaration.

SECTION 6. Arkansas Code § 20-17-207 is amended to read as follows:

20-17-207. Transfer of patients - Compliance by health care provider or healthcare institution.

~~An attending physician or other health care provider who is unwilling to comply with this subchapter shall as promptly as practicable take all~~

~~reasonable steps to transfer care of the declarant to another physician or health care provider.~~

(a) A declaration under this subchapter is a written advance directive under the Arkansas Healthcare Decisions Act, § 20-6-101 et seq.

(b) The provisions of Arkansas Healthcare Decisions Act, § 20-6-101 et seq., concerning compliance by a health care provider or healthcare institution apply to:

(1) Determine whether an attending physician or other health care provider may decline to comply with a declaration executed under this subchapter; and

(2) Any duty to transfer a patient when the attending physician or other health care provider declines to comply with a declaration executed under this subchapter.

/s/Irvin