

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

State of Arkansas
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As Engrossed: H4/5/21 H4/12/21
A Bill

HOUSE BILL 1685

By: Representative M. Gray

By: Senator B. Davis

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(19), concerning the definition of "principal" under the Arkansas Healthcare Decisions Act, is amended to read as follows:

(19) "Principal" means an individual who grants authority to another individual under this subchapter or for whom a surrogate is designated under § 20-6-105;

SECTION 2. Arkansas Code §§ 20-6-105 – 20-6-107 are amended to read as follows:

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 a licensed physician to



lack capacity; and

(2) An agent or guardian with the authority to make healthcare decisions about the principal has not been appointed or the agent or guardian with the authority to make healthcare decisions about the principal is not reasonably available.

(c)(1) The supervising healthcare provider shall 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 with healthcare decision-making authority or the guardian with healthcare decision-making authority is not reasonably available, as defined in § 20-6-102(21).

(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 identifying the person best qualified to serve as the surrogate for the principal, the supervising healthcare provider:

(A) Shall consider the proposed surrogate's:

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

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

(iii) Demonstrated care and concern; and

(B) May consider the proposed surrogate's:

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

(ii) Availability to fully participate in the decision-making process.

(4) 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;

(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 supervising healthcare provider may make healthcare decisions for the principal after the supervising healthcare provider:

(A) *Consults with and obtains the recommendations of ~~an~~ a healthcare institution's ethics officers or ethics committee; or*

(B) *Obtains concurrence from a ~~second~~ physician, advanced practice registered nurse, or physician assistant who is:*

(i) Not the supervising healthcare provider;

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

~~(ii)~~ (iii) Does not serve in a capacity of decision making, influence, or responsibility over the designated ~~physician~~ supervising healthcare provider; and

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

(6)(A) In the event of a challenge to the 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~~ In the absence of individual instructions or other information, 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 and a second independent physician certify in the principal's current clinical records that:~~

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

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

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

20-6-107. Requirement of guardian, agent, and surrogate to comply with principal's individual instruction.

(a)(1) 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)(2) Except as provided in § 28-65-102, a healthcare decision made by a guardian for the principal is effective without judicial approval.*~~

(b) An agent or surrogate shall not make a healthcare decision that is contrary to the express terms of the principal's written advance directive unless a determination is made and certified in the clinical record that the principal is highly unlikely to regain capacity to make healthcare decisions and that the particular healthcare decision is in the principal's best interest or is otherwise appropriate to avoid care that serves only to prolong the patient's natural death is agreed to by the supervising healthcare provider and:

(1) A healthcare institution's ethics officer or ethics committee; or

(2) A physician who is not the supervising healthcare provider or a treating healthcare provider.

SECTION 3. Arkansas Code § 20-6-111(b), concerning liability under the Arkansas Healthcare Decisions Act, is amended to read as follows:

(b) ~~An~~ A healthcare provider, an ethics officer, an ethics committee member, or any individual acting as an 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.

SECTION 4. Arkansas Code § 20-6-112 is amended to read as follows:

20-6-112. Presumption of capacity.

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

(b) ~~A~~ Unless an individual has been determined to permanently lack capacity under this subchapter or other applicable state law, an individual is presumed to have capacity to make a healthcare decision, to give or revoke an advance directive, and to designate or disqualify a surrogate.

SECTION 5. Arkansas Code § 20-6-115(b), concerning court jurisdiction under the Arkansas Healthcare Decisions Act, is amended to read as follows:

(b) A proceeding under this section shall be expedited on the court's civil dockets and shall be addressed by the court within three (3) business days after service of process on all necessary parties is complete.

/s/M. Gray