WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1989

- - -

ENROLLED

HOUSE BILL No. 2129

(By Mr. Hatfield and White)

- - -

Passed March 21, 1989

In Effect Ninety Days From Passage
AN ACT to amend and reenact section five-a, article five-c, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to substituted consent for nursing home and personal care home health services by making applicable to prospective patients.

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 amended and reenacted to read as follows:

ARTICLE 5C. NURSING AND PERSONAL CARE HOMES.

§16-5C-5a. Substituted consent for nursing home and personal care home health care services.

(a) For purposes of this section, “physical or mental incapacity” or like words shall mean the inability, because of physical or mental impairment, of a nursing home or personal care home patient or prospective patient to appreciate the nature and implications of a health care decision, to make an informed choice regarding the alternatives presented, and to communicate that choice in an unambiguous manner.

(b) Where there has been no adjudication of incompetence of a patient or prospective patient, or appointment of a guardian for such patient or prospective patient,
and where there is no applicable durable power of attorney for such patient or prospective patient, but where such patient or prospective patient is unable to grant informed consent for nursing home or personal care home health care services or to acknowledge notification by a nursing home or personal care home of his or her rights, responsibilities, and any applicable rules and regulations of the nursing home or personal care home due to physical or mental incapacity, as documented in such patient’s or prospective patient’s health care records by two physicians licensed to practice medicine in this state under the provisions of article three or article fourteen, both of chapter thirty of this code, or one such physician and one licensed psychologist, the following persons shall be deemed the patient’s or prospective patient’s, representative authorized to consent to nursing home or personal care home health care services for such patient or prospective patient to acknowledge notification by a nursing home or personal care home of such patient’s or prospective patient’s rights, responsibilities and any applicable rules and regulations of the nursing home or personal care home, in the order of class priority set forth below:

(1) The patient’s or prospective patient’s spouse;

(2) An adult child of the patient or prospective patient;

(3) A parent of the patient or prospective patient;

(4) An adult sibling of the patient or prospective patient;

(5) The nearest living relative of the patient or prospective patient;

(6) Such other persons or classes of persons including, but not limited to, such public agencies, public guardians, other public officials, public and private corporations, protective service agencies and other representatives as the board of health may from time to time designate in its rules and regulations promulgated pursuant to chapter twenty-nine-a of this code:

Provided, That there is no reason to believe that such
health care services are contrary to the patient's or prospective patient's religious beliefs and there is no actual notice of opposition by a member of the same or a prior class.

(c) A nursing home or personal care home, as applicable, shall document its good faith efforts to contact permitted representatives in the order of class priority and its efforts to contact all members of a class before the next class is contacted but shall suffer no liability or deficiency for any failure to apprise the proper persons of the requirements of this section, so long as it has acted reasonably and in good faith. A nursing home or personal care home, as applicable, may rely on the apparent authority of one member of a class to speak for that class.

(d) The determination of incapacity hereunder shall expire after six months or upon the patient's earlier discharge from the nursing home or personal care home. At the end of every such six-month period, if the patient remains admitted to the nursing home or personal care home the patient shall be reexamined by two physicians licensed to practice medicine in this state as set forth in subsection (b), or by one such physician and one licensed psychologist, who shall render a determination whether or not the patient remains physically or mentally incapacitated, and such determination shall be documented in the patient's health care records. The authority of the representatives provided in subsection (b) above shall terminate unless upon such reevaluation the examining physicians, or the physician and the psychologist, as the case may be, shall certify that the patient remains physically or mentally incapacitated.

(e) In addition to the reevaluations required by subsection (d) above, a nursing home or personal care home, as applicable, upon request of any interested person, or upon its own initiative if it shall have reason to believe that the patient has regained his or her capacity, shall permit or obtain a reevaluation at any time by one or more physicians licensed to practice medicine in this state as set forth in subsection (b), of a prior determination of capacity or incapacity: Pro-
vided, That no patient shall be required to be reevaluated within three months of a prior evaluation except for good cause shown. A physician’s determination of capacity upon such reevaluation shall terminate any authority of a patient’s representative under this section.

(f) The board of health shall adopt rules and regulations pursuant to the provisions of chapter twenty-nine-a of this code setting forth a procedure by which any interested person may obtain an administrative review of any determination of capacity or incapacity made pursuant to this section. Nothing contained in this section shall preclude an interested person from seeking a determination of competency or incompetency under the provisions of article eleven, chapter twenty-seven of this code in an appropriate case or from seeking any form of judicial review.

(g) At least one of the physicians, or the psychologist, who certifies the incapacity under subsections (b) and (d) shall not be associated, in any way, with the personal care home or the nursing home. The two persons performing the certification shall not be associated in the same medical practice.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Frederick L. Parker  
Chairman Senate Committee

Bernard W. Kelly  
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Joseph A. Neil  
Clerk of the Senate

Donald L. Hooff  
Clerk of the House of Delegates

Geoff Turner  
President of the Senate

Robert C. Core  
Speaker of the House of Delegates

The within  was approved this the 31st day of March, 1989.  

Yoston Caperton  
Governor