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WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1989



ENROLLED

HOUSE BILL No. 2129

(By ~~Mr.~~ Del. Hatfield + White)



Passed March 21, 1989

In Effect Ninety Days From Passage

 C-641

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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ENROLLED
H. B. 2129

(By DELEGATES 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.

- 1 (a) For purposes of this section, "physical or mental
- 2 incapacity" or like words shall mean the inability,
- 3 because of physical or mental impairment, of a nursing
- 4 home or personal care home patient or prospective
- 5 patient to appreciate the nature and implications of a
- 6 health care decision, to make an informed choice
- 7 regarding the alternatives presented, and to commun-
- 8 icate that choice in an unambiguous manner.
- 9 (b) Where there has been no adjudication of incompe-
- 10 tence of a patient or prospective patient, or appointment
- 11 of a guardian for such patient or prospective patient,

12 and where there is no applicable durable power of
13 attorney for such patient or prospective patient, but
14 where such patient or prospective patient is unable to
15 grant informed consent for nursing home or personal
16 care home health care services or to acknowledge
17 notification by a nursing home or personal care home
18 of his or her rights, responsibilities, and any applicable
19 rules and regulations of the nursing home or personal
20 care home due to physical or mental incapacity, as
21 documented in such patient's or prospective patient's
22 health care records by two physicians licensed to
23 practice medicine in this state under the provisions of
24 article three or article fourteen, both of chapter thirty
25 of this code, or one such physician and one licensed
26 psychologist, the following persons shall be deemed the
27 patient's or prospective patient's, representative autho-
28 rized to consent to nursing home or personal care home
29 health care services for such patient or prospective
30 patient to acknowledge notification by a nursing home
31 or personal care home of such patient's or prospective
32 patient's rights, responsibilities and any applicable rules
33 and regulations of the nursing home or personal care
34 home, in the order of class priority set forth below:

35 (1) The patient's or prospective patient's spouse;

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

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

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

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

43 (6) Such other persons or classes of persons including,
44 but not limited to, such public agencies, public
45 guardians, other public officials, public and private
46 corporations, protective service agencies and other
47 representatives as the board of health may from time
48 to time designate in its rules and regulations promul-
49 gated pursuant to chapter twenty-nine-a of this code:
50 *Provided*, That there is no reason to believe that such

51 health care services are contrary to the patient's or
52 prospective patient's religious beliefs and there is no
53 actual notice of opposition by a member of the same or
54 a prior class.

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

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

83 (e) In addition to the reevaluations required by
84 subsection (d) above, a nursing home or personal care
85 home, as applicable, upon request of any interested
86 person, or upon its own initiative if it shall have reason
87 to believe that the patient has regained his or her
88 capacity, shall permit or obtain a reevaluation at any
89 time by one or more physicians licensed to practice
90 medicine in this state as set forth in subsection (b), of
91 a prior determination of capacity or incapacity: *Pro-*

92 *vided*, That no patient shall be required to be reevalu-
93 ated within three months of a prior evaluation except
94 for good cause shown. A physician's determination of
95 capacity upon such reevaluation shall terminate any
96 authority of a patient's representative under this section.

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

108 (g) At least one of the physicians, or the psychologist,
109 who certifies the incapacity under subsections (b) and
110 (d) shall not be associated, in any way, with the personal
111 care home or the nursing home. The two persons
112 performing the certification shall not be associated in
113 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 V. Kelly
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Paul A. Miller
Clerk of the Senate

Donald L. Hopp
Clerk of the House of Delegates

James T. Tucker
President of the Senate

Robert C. Calhoun
Speaker of the House of Delegates

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

Gaston Caperton
Governor

PRESENTED TO THE

GOVERNOR

Date 3/27

Time 5:07