WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1992

ENROLLED
Committee Substitute for
SENATE BILL NO. 559

(By Senator Holliday)

PASSED March 4, 1992
In Effect 90 days from Passage
AN ACT to amend article five-b, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section eight-a, relating to substituted consent for health care services provided by extended care facilities operated in connection with hospitals.

Be it enacted by the Legislature of West Virginia:

That article five-b, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section eight-a, to read as follows:

ARTICLE 5B. HOSPITALS AND SIMILAR INSTITUTIONS.

§16-5B-8a. Substituted consent for health care services in extended care facilities operated in connection with hospitals.

(a) For purposes of this section, “physical or mental incapacity”, or like words, means the inability, because of physical or mental impairment, of a patient
or prospective patient of an extended care facility operated in connection with a hospital 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 health care services of an extended care facility operated in connection with a hospital or to acknowledge notification by such a facility of his or her rights, responsibilities and any applicable rules of such a facility 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 fourteen, chapter thirty of this code or one such physician and one licensed psychologist, the following persons are deemed the patient's or prospective patient's representative authorized to consent to health care services by such a facility for such patient or prospective patient to acknowledge notification by such a facility of such patient's or prospective patient's rights, responsibilities and any applicable rules of such a facility 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; or

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

(6) Such other persons or classes of persons, includ-
ing, but not limited to, such public agencies, public
guardians, other public officials, public and private
corporations, protective service agencies and other
representatives as the department of health and
human resources may from time to time designate in
its rules promulgated pursuant to chapter twenty-
ine-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) An extended care facility operated in connection
with a hospital, 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 require-
ments of this section, so long as it has acted reasonably
and in good faith. An extended care facility operated
in connection with hospitals, 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
expires after six months or upon the patient’s earlier
discharge from the extended care facility operated in
connection with a hospital. At the end of every such
six-month period, if the patient remains admitted to
such a facility, 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 deter-
mination shall be documented in the patient’s health
care records. The authority of the representatives
provided in said subsection shall terminate unless
upon such reevaluation the examining physicians, or
the physician and the psychologist as the case may be,
certifies that the patient remains physically or men-
tally incapacitated.
(e) In addition to the reevaluations required by subsection (d) above, an extended care facility operated in connection with a hospital, as applicable, upon request of any interested person, or upon its own initiative if it has 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: Provided, 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 department of health and human resources shall adopt rules 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) of this section shall not be employed by the hospital-connected extended care facility. The two persons performing the certification shall not be associated in the same medical practice.

Nothing in this section shall be construed to preclude common membership on a facility medical staff.

Nothing in this section shall be interpreted to mean that the consent of a patient’s representative is required in an emergency to save life or prevent serious injury.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Homer Hicks
Chairman Senate Committee

Ernest S. Moore
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Nurse E. Johnson
Clerk of the Senate

Donald J. Kepp
Clerk of the House of Delegates

Edward Brown
President of the Senate

Herbert Cole
Speaker House of Delegates

The within is approved this the 17th day of March, 1992.

Yoston Capiston
Governor