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SECRETARY OF STATE

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1992



# ENROLLED

Committee Substitute for  
**SENATE BILL NO. 559**

(By Senator Houck)



**PASSED** March 4, 1992

In Effect 90 days from Passage

# ENROLLED

COMMITTEE SUBSTITUTE

FOR

## Senate Bill No. 559

(BY SENATOR HOLLIDAY, *original sponsor*)

[Passed March 4, 1992; in effect ninety 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.**

- 1 (a) For purposes of this section, “physical or mental
- 2 incapacity”, or like words, means the inability,
- 3 because of physical or mental impairment, of a patient

4 or prospective patient of an extended care facility  
5 operated in connection with a hospital to appreciate  
6 the nature and implications of a health care decision,  
7 to make an informed choice regarding the alternatives  
8 presented and to communicate that choice in an  
9 unambiguous manner.

10 (b) Where there has been no adjudication of incom-  
11 petence of a patient or prospective patient, or appoint-  
12 ment of a guardian for such patient or prospective  
13 patient, and where there is no applicable durable  
14 power of attorney for such patient or prospective  
15 patient, but where such patient or prospective patient  
16 is unable to grant informed consent for health care  
17 services of an extended care facility operated in  
18 connection with a hospital or to acknowledge notifica-  
19 tion by such a facility of his or her rights, responsibil-  
20 ities and any applicable rules of such a facility due to  
21 physical or mental incapacity, as documented in such  
22 patient's or prospective patient's health care records  
23 by two physicians licensed to practice medicine in this  
24 state under the provisions of article three or fourteen,  
25 chapter thirty of this code or one such physician and  
26 one licensed psychologist, the following persons are  
27 deemed the patient's or prospective patient's represen-  
28 tative authorized to consent to health care services by  
29 such a facility for such patient or prospective patient  
30 to acknowledge notification by such a facility of such  
31 patient's or prospective patient's rights, responsibilities  
32 and any applicable rules of such a facility in the order  
33 of class priority set forth below:

- 34 (1) The patient's or prospective patient's spouse;  
35 (2) An adult child of the patient or prospective  
36 patient;  
37 (3) A parent of the patient or prospective patient;  
38 (4) An adult sibling of the patient or prospective  
39 patient; or  
40 (5) The nearest living relative of the patient or  
41 prospective patient;  
42 (6) Such other persons or classes of persons, includ-

43 ing, but not limited to, such public agencies, public  
44 guardians, other public officials, public and private  
45 corporations, protective service agencies and other  
46 representatives as the department of health and  
47 human resources may from time to time designate in  
48 its rules promulgated pursuant to chapter twenty-  
49 nine-a of this code: *Provided*, That there is no reason  
50 to believe that such health care services are contrary  
51 to the patient's or prospective patient's religious  
52 beliefs and there is no actual notice of opposition by a  
53 member of the same or a prior class.

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

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

84 (e) In addition to the reevaluations required by  
85 subsection (d) above, an extended care facility oper-  
86 ated in connection with a hospital, as applicable, upon  
87 request of any interested person, or upon its own  
88 initiative if it has reason to believe that the patient has  
89 regained his or her capacity, shall permit or obtain a  
90 reevaluation at any time by one or more physicians  
91 licensed to practice medicine in this state as set forth  
92 in subsection (b), of a prior determination of capacity  
93 or incapacity: *Provided*, That no patient shall be  
94 required to be reevaluated within three months of a  
95 prior evaluation except for good cause shown. A  
96 physician's determination of capacity upon such  
97 reevaluation shall terminate any authority of a  
98 patient's representative under this section.

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

110 (g) At least one of the physicians, or the psychologist,  
111 who certifies the incapacity under subsections (b) and  
112 (d) of this section shall not be employed by the  
113 hospital-connected extended care facility. The two  
114 persons performing the certification shall not be  
115 associated in the same medical practice.

116 Nothing in this section shall be construed to pre-  
117 clude common membership on a facility medical staff.

118 Nothing in this section shall be interpreted to mean  
119 that the consent of a patient's representative is  
120 required in an emergency to save life or prevent  
121 serious injury.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*Homer Heck*  
.....  
Chairman Senate Committee

*Ernest Moore*  
.....  
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

*Darrell E. Holmes*  
.....  
Clerk of the Senate

*Donald J. Kopp*  
.....  
Clerk of the House of Delegates

*Walter Burdette*  
.....  
President of the Senate

*W. D. Cole*  
.....  
Speaker House of Delegates

The within *is approved* this the *17<sup>th</sup>* .....  
day of *March* ....., 1992.

*Yastin Caperton*  
.....  
Governor

PRESENTED TO THE

GOVERNOR

Date 3/11/92

Time 3:40 pm