WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 1993

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ENROLLED

Com. Sub. For

HOUSE BILL No. 2599

(By Delegates Gallagher, Hunt, P. White and Douglas)

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Passed April 8, 1993

In Effect July 1, 1993
AN ACT to repeal section five-a, article five-c, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend said chapter sixteen by adding thereto a new article, designated article thirty-b, relating to health care surrogate act; legislative findings and purposes; definitions; applicability; private decision-making process and authority of surrogate; determination of incapacity; selection of surrogate; surrogate decision-making standards; reliance on authority of surrogate decision-maker and protection of health care providers; conscience objections; interinstitutional transfers; insurance; not suicide or murder; preservation of existing rights; relation to existing law and no abrogation of common law doctrine of medical necessity; and severability.

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article five-c, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; and that said chapter sixteen be amended by adding thereto a new article, designated article thirty-b, to read as follows:

ARTICLE 30B. HEALTH CARE SURROGATE ACT.
§16-30B-1. Short title.

This article may be cited as the "Health Care Surrogate Act."

§16-30B-2. Legislative findings and purpose.

(a) Findings.—The Legislature hereby finds that:

(1) All adults have a right to make decisions relating to their own medical treatment, including the right to consent to or refuse life-prolonging intervention; and

(2) The right to make medical treatment decisions extends to persons who are incapacitated at the moment of decision. Such persons who have not made their wishes known in advance through an applicable living will or medical power of attorney or through other means have the right to have health care decisions made on their behalf by persons who will act in accordance with the person's expressed values and wishes, or, if unknown, in the person's best interests.

(b) Purpose.—It is the purpose of this article to set forth a process for private health care decision-making for incapacitated adults that reduces the need for judicial involvement and that defines the circumstances under which immunity shall be available for health care providers and surrogate decision-makers who make such health care decisions. It is the intent of the Legislature to establish an effective method for private health care decision-making for incapacitated adults, and it is also the intent of the Legislature that the courts should not be the usual venue for making such decisions. It is not the intent of the Legislature to legalize, condone, authorize, or approve mercy killing or assisted suicide.

§16-30B-3. Definitions.

(a) "Adult" means a person who is eighteen years of age or older, an emancipated minor under section twenty-seven, article seven, chapter forty-nine of this code, or a mature minor.

(b) "Attending physician" means the physician selected by or assigned to the person who has primary
responsibility for treatment and care of the person and who is a licensed physician. If more than one physician shares that responsibility, any of those physicians may act as the attending physician under this article.

(c) "Close friend" means any person eighteen years of age or older who has exhibited special care and concern for the person and who, to the reasonable satisfaction of the attending physician, is willing and able to become involved in the person's health care, and has maintained such regular contact with the person as to be familiar with the person's activities, health, and religious and moral beliefs.

(d) "Committee" shall have the same meaning as defined in section one, article eleven, chapter twenty-seven of this code.

(e) "Death" shall have the same meaning as defined in article ten of this chapter.

(f) "Guardian" shall have the same meaning as defined in sections one through six, article ten-a, chapter forty-four of this code.

(g) "Health care decision" means a decision to give, withhold, or withdraw informed consent to any type of health care, including, but not limited to, medical and surgical treatments, including life-prolonging interventions, nursing care, hospitalization, treatment in a nursing home or other facility, and home health care.

(h) "Health care facility" means a type of health care provider commonly known by a wide variety of titles, including, but not limited to, hospitals, medical centers, ambulatory health care facilities, physicians' offices and clinics, extended care facilities operated in connection with hospitals, nursing homes, hospital extended care facilities operated in connection with rehabilitation centers, and other facilities established to administer health care in their ordinary course of business or practice.

(i) "Health care provider" means any physician, dentist, nurse, paramedic, psychologist or other person providing medical, dental, nursing, psychological or
(j) "Incapacity", or words of like import, means the inability because of physical or mental impairment 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.

(k) "Life-prolonging intervention" means any medical procedure or intervention which, when applied to a person, would serve solely to artificially prolong the dying process or to maintain the person in a persistent vegetative state. The term "life-prolonging intervention" does not include the administration of medication or the performance of any other medical procedure deemed necessary to provide comfort or to alleviate pain.

(l) "Medical information" shall have the same meaning as defined in section four-a, article five, chapter fifty-seven of this code and such definition shall apply to other health care facilities as defined in this section.

(m) "Parent" means a person who is the natural or adoptive mother or father of the child and whose parental rights have not been terminated by a court of law.

(n) "Person" means an individual, a corporation, a business trust, a trust, a partnership, an association, a government, a governmental subdivision or agency, or any other legal entity.

(o) "Qualified physician" means a physician licensed to practice medicine who has personally examined the person.

(p) "Surrogate decision-maker" means an adult individual or individuals who are reasonably available, are willing to make health care decisions on behalf of an incapacitated person, and are identified by the attending physician in accordance with the provisions of this article as the person or persons who are to make those decisions in accordance with the provisions of this article.
§16-30B-4. Applicability.

1 Nothing in this article shall be applied in derogation of a person's known wishes as expressed in an applicable living will executed in accordance with section three, article thirty of this chapter or a medical power of attorney executed in accordance with section six, article thirty-a of this chapter or by any other means the health care provider determines to be reliable.

§16-30B-5. Private decision-making process; authority of surrogate.

1 (a) Health care decisions shall be made by capable adults without regard to guidelines contained in this article.

2 (b) Health care providers may rely upon health care decisions on behalf of an incapacitated person without resort to the courts or legal process, if the decisions are made in accordance with the provisions of this article.

3 (c) The surrogate shall have the authority to make any and all health care decisions on the person's behalf.

4 The surrogate's authority shall commence upon a determination, made pursuant to section six of this article, of the incapacity of the adult. In the event the person no longer is incapacitated, the surrogate's authority shall cease, but shall recommence if the person subsequently becomes incapacitated as determined pursuant to section six of this article.

5 (d) The surrogate shall seek medical information necessary to make health care decisions. For the sole purpose of making health care decisions for the person, the surrogate shall have the same right of access to the person's medical information and to discuss this information with the person's attending physician that the person would have had.

§16-30B-6. Determination of incapacity.

1 For the purposes of this article, a person shall not be presumed to be incapacitated merely by reason of advanced age or disability. With respect to a person who has a diagnosis of mental illness or mental retardation,
such a diagnosis is not a presumption that the person is incapacitated. A determination that a person is incapacitated shall be made by the attending physician. Before implementation of a decision by a surrogate decision-maker to withhold or withdraw life-prolonging intervention, at least one other qualified physician or a licensed psychologist who has personally examined the person must concur in the determination of incapacity of an adult.

The determination of incapacity shall be recorded contemporaneously in the person’s medical record by the attending physician, and, if one is required, by the second physician or licensed psychologist. The recording shall state the basis for the determination of incapacity, including the cause, nature, and expected duration of the person’s incapacity, if these are known.

If the person is conscious, the attending physician shall inform the person that he or she has been determined to be incapacitated and that a surrogate decision-maker may be making decisions regarding life-prolonging intervention for the person.

§16-30B-7. Selection of a surrogate.

(a) When a person is incapacitated, the health care provider must make reasonable inquiry as to the availability and authority of a medical power of attorney representative under the provisions of article thirty-a of this chapter. When no representative is authorized or available, and willing to serve, the health care provider must make a reasonable inquiry as to the availability of possible surrogates listed in items (1) through (8) of this subsection:

(1) The person’s guardian of the person or committee;
(2) The person’s spouse;
(3) Any adult child of the person;
(4) Either parent of the person;
(5) Any adult sibling of the person;
(6) Any adult grandchild of the person;
(7) A close friend of the person;

(8) Such other persons or classes of persons including, but not limited to, such public agencies, public guardians, other public officials, public and private corporations, and other representatives as the department of health and human resources may from time to time designate in rules and regulations promulgated pursuant to chapter twenty-nine-a of this code.

(b) After such inquiry, the health care provider shall rely on surrogates in the order of priority set forth above, provided:

(1) Where there are multiple possible surrogate decision-makers at the same priority level, the health care provider shall, after reasonable inquiry, choose as the surrogate the one who reasonably appears to be best qualified. In determining who appears to be best qualified, the health care provider shall give special consideration to whether the proposed surrogate reasonably appears to be better able to make decisions either in accordance with the known wishes of the person or in accordance with the person’s best interests. The health care provider shall consider in this determination the proposed surrogate’s regular contact with the person prior to and during the incapacitating illness, his or her demonstrated care and concern, and his or her availability to visit the person during the illness and to engage in face-to-face contact with the provider for the purposes of fully participating in the decision-making process; or

(2) The health care provider may rely instead on a proposed surrogate lower in the priority if, in the provider’s judgment, such individual is best qualified, as described in subsection (b) of this section, to serve as the person’s surrogate. The health care provider shall document in the medical record his or her reasons for selecting a surrogate in exception to the priority order in subsection (a) of this section.

(c) The surrogate decision-maker, as identified by the health care provider, is authorized to make health care decisions on behalf of the person without court order or judicial involvement. The health care provider may rely
Enr. Com. Sub. for H. B. 2599] 8

on the decisions of the surrogate if the provider believes, after reasonable inquiry, that a representative under a valid, applicable medical power of attorney is unavailable, and there is no other applicable advance directive: 

Provided, That there is not reason to believe such health care decisions are contrary to the person's religious beliefs or that there is not actual notice of opposition to such health care decisions to the health care provider by a member of the same or a prior class.

(d) In the event an individual in a higher, or lower, or the same priority level seeks to challenge the selection of or the decision of the identified surrogate decision-maker, the challenging party may initiate declaratory proceedings in the circuit court of the county in which the incapacitated person resides. No health care provider or other person is required to seek declaratory relief.

(e) Any surrogate who becomes unavailable for any reason may be replaced by applying the provisions of this section in the same manner as for the initial choice of surrogate.

(f) In the event an individual of a higher priority to an identified surrogate becomes available and willing to be the surrogate, the individual with higher priority may be identified as the surrogate unless the provisions of subsection (b) of this section apply.

(g) The authority of the surrogate expires when the person is no longer incapacitated or when the surrogate is unwilling or unable to continue to serve.

§16-30B-8. Surrogate decision-making standards.

(a) General standards.—

The surrogate shall make health care decisions:

(1) In accordance with the person's wishes, including religious and moral beliefs; or

(2) In accordance with the person's best interests if these wishes are not reasonably known and cannot with reasonable diligence be ascertained; and
(3) Which reflect the values of the person, including the person's religious and moral beliefs, to the extent they are reasonably known or can with reasonable diligence be ascertained.

(b) Assessment of best interests.—

An assessment of the person's best interests shall include consideration of the person's medical condition, prognosis, the dignity and uniqueness of every person, the possibility and extent of preserving the person's life, the possibility of preserving, improving or restoring the person's functioning, the possibility of relieving the person's suffering, the balance of the burdens to the benefits of the proposed treatment or intervention, and such other concerns and values as a reasonable individual in the person's circumstances would wish to consider.

§16-30B-9. Reliance on authority of surrogate decision-maker and protection of health care providers.

A health care provider shall not be subject to civil or criminal liability for surrogate selection or good faith compliance and reliance upon the directions of the surrogate in accordance with the provisions of this article.

Nothing in this article shall be deemed to protect a provider from liability for the provider's own negligence in the performance of the provider's duties or in carrying out any instructions of the surrogate. Nothing in this article shall be deemed to alter the law of negligence as it applies to the acts of any surrogate or provider, and nothing herein shall be interpreted as establishing a standard of care for health care providers for purposes of the law of negligence.

§16-30B-10. Conscience objections.

(a) Health care facilities.—Nothing in this article shall be construed to require a health care facility to change published policy of the health care facility that is expressly based on sincerely held religious beliefs or sincerely held moral convictions central to the facility's
Operating principles.

(b) *Health care providers.*—Nothing in this article shall be construed to require an individual health care provider to honor a health care decision made pursuant to this article if:

1. The decision is contrary to the individual provider's sincerely held religious beliefs or sincerely held moral convictions; and

2. The individual health care provider promptly informs the person who made the decision and the health care facility of his or her refusal to honor the decision. In such event, the surrogate decision-maker shall have responsibility for arranging the transfer of the person to another health care provider. The individual health care provider shall cooperate in facilitating such transfer, and a transfer under these circumstances shall not constitute abandonment.

§ 16-30B-11. Interinstitutional transfers.

If a person with an order to withhold or withdraw life-prolonging intervention is transferred from one health care facility to another, the existence of such order shall be communicated to the receiving facility prior to the transfer, and the written order shall accompany the person to the receiving facility and shall remain effective until a physician at the receiving facility issues admission orders.

§ 16-30B-12. Insurance.

No policy of life insurance, or annuity or other type of contract that is conditioned on the life or death of the person, shall be legally impaired or invalidated in any manner by the withholding or withdrawal of life-prolonging intervention from a person in accordance with the provisions of this article, notwithstanding any terms of the policy to the contrary.

§ 16-30B-13. *Not suicide or murder.*

The withholding or withdrawal of life-prolonging intervention from a person in accordance with the decision of a surrogate decision-maker made pursuant
11 [Enr. Com. Sub. for H. B. 2599

to the provisions of this article does not, for any purpose,
constitute assisted suicide or murder. The withholding
or withdrawal of life-prolonging intervention from a
person in accordance with the decisions of a surrogate
decision-maker made pursuant to the provisions of this
article, however, shall not relieve any individual of
responsibility for any criminal acts that may have
cau sed the person's condition. Nothing in this article
shall be construed to legalize, condone, authorize, or
approve mercy killing or assisted suicide.

§16-30B-14. Preservation of existing rights.

The provisions of this article are cumulative with
existing law regarding an individual's right to consent
to or refuse medical treatment. The provisions of this
article shall not impair any existing rights or respon-
sibilities that a health care provider, a person, including
a minor or an incapacitated person, or a person's family
may have in regard to the withholding or withdrawal
of life-prolonging intervention, including any rights to
seek or forego judicial review of decisions regarding life-
prolonging intervention under the common law or
statutes of this state.

§16-30B-15. Relation to existing law; no abrogation of
common law doctrine of medical necessity.

(a) Individuals designated as patient representatives
pursuant to section five-a of article five-c heretofore set
forth in this chapter may agree to become surrogate
decision-makers subject to the provisions of this article.

(b) Nothing in this article shall be construed to
abrogate the common law doctrine of medical necessity.

§16-30B-16. Severability.

The provisions of this article are severable and if any
provision, section or part thereof shall be held invalid,
unconstitutional or inapplicable to any person or
circumstance, such invalidity, unconstitutionality or
inapplicability shall not affect or impair any other
remaining provisions contained herein.

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

Chairman Senate Committee

Ernest C. Moore
Chairman House Committee

Originating in the House.

Takes effect July 1, 1993.

Clerk of the Senate

Donella J. Hopf
Chancellor of the Senate

President of the Senate

Speaker of the House of Delegates

The within is approved this the 12th day of May, 1993.

Governor