
A BILL FOR AN ACT

RELATING TO HEALTH CARE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that recent highly
2 publicized United States Supreme Court cases give reason to
3 clarify existing Hawaii laws concerning health-care decisions
4 for incapacitated patients. Legal and bio-ethics scholars have
5 expressed concern that the current Hawaii law concerning health-
6 care decisions is vague at best, and at worst, unconstitutional.
7 The intent of this Act is to clarify the existing law by
8 creating default rules that allow the spouse or next-of-kin to
9 act as the surrogate for an incapacitated patient and to clarify
10 the circumstances under which the surrogate may decide to
11 withhold the patient's nutrition or hydration.

12 SECTION 2. Section 327E-2, Hawaii Revised Statutes, is
13 amended by adding a new definition to be appropriately inserted
14 and to read as follows:

15 "Persistent vegetative state" means a condition in which
16 an individual exhibits motor reflexes but evinces no indications
17 of significant cognitive function."



1 SECTION 3. Section 327E-5, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "[+]§327E-5[+] **Health-care decisions; surrogates.** (a) [A
4 patient] An adult or emancipated minor may designate or
5 disqualify any individual to act as a surrogate by personally
6 informing the supervising health-care provider. In the absence
7 of [~~such~~] a designation, or if the designee is not reasonably
8 available, a surrogate may be appointed to make a health-care
9 decision for the patient.

10 (b) A surrogate may make a health-care decision for a
11 patient who is an adult or emancipated minor if the patient has
12 been determined by the primary physician to lack capacity and no
13 agent or guardian has been appointed or the agent or guardian is
14 not reasonably available. Upon a determination that [a] an
15 adult or emancipated minor patient lacks decisional capacity to
16 provide informed consent to or refusal of medical treatment, the
17 primary physician or the physician's designee shall make
18 reasonable efforts to notify the patient of the patient's lack
19 of capacity. [~~The primary physician, or the physician's~~
20 ~~designee, shall make reasonable efforts to locate as many~~
21 ~~interested persons as practicable, and the primary physician may~~
22 ~~rely on such individuals to notify other family members or~~



1 ~~interested persons.]~~ Any member of the following classes of the
2 patient's family who is reasonably available, in descending
3 order, may act as surrogate:

4 (1) The spouse, unless legally separated;

5 (2) An adult child;

6 (3) A parent; or

7 (4) An adult brother or sister.

8 ~~[(c) Upon locating interested persons, the primary~~
9 ~~physician, or the physician's designee, shall inform such~~
10 ~~persons of the patient's lack of decisional capacity and that a~~
11 ~~surrogate decision-maker should be selected for the patient.~~

12 ~~(d) Interested persons shall make reasonable efforts to~~
13 ~~reach a consensus as to who among them shall make health-care~~
14 ~~decisions on behalf of the patient. The person selected to act~~
15 ~~as the patient's surrogate should be the person who has a close~~
16 ~~relationship with the patient and who is the most likely to be~~
17 ~~currently informed of the patient's wishes regarding health-care~~
18 ~~decisions. If any of the interested persons disagrees with the~~
19 ~~selection or the decision of the surrogate, or, if after~~
20 ~~reasonable efforts the interested persons are unable to reach a~~
21 ~~consensus as to who should act as the surrogate decision-maker,~~
22 ~~then any of the interested persons may seek guardianship of the~~



1 ~~patient by initiating guardianship proceedings pursuant to~~
2 ~~chapter 551. Only interested persons involved in the~~
3 ~~discussions to choose a surrogate may initiate such proceedings~~
4 ~~with regard to the patient.]~~

5 (c) If none of the individuals eligible to act as
6 surrogate under subsection (b) is reasonably available, an adult
7 who has exhibited special care and concern for the patient, who
8 is familiar with the patient's personal values, and who is
9 reasonably available may act as surrogate.

10 (d) A surrogate shall communicate the surrogate's
11 assumption of authority as promptly as practicable to the
12 members of the patient's family specified in subsection (b) who
13 can be readily contacted.

14 (e) If more than one member of a class of the patient's
15 family assumes authority to act as surrogate, and they do not
16 agree on a health-care decision and the supervising health-care
17 provider is so informed, the supervising health-care provider
18 shall comply with the decision of a majority of the members of
19 that class of the patient's family who have communicated their
20 views to the supervising health-care provider. If the class is
21 evenly divided concerning the health-care decision and the
22 supervising health-care provider is so informed, that class and



1 all individuals having lower priority under subsection (b) are
2 disqualified from making the decision, and members of the
3 divided class may seek guardianship of the patient by initiating
4 guardianship proceedings pursuant to chapter 551.

5 [~~(e)~~] (f) If any interested person, the guardian, or
6 primary physician believes the patient has regained decisional
7 capacity, the primary physician shall reexamine the patient and
8 determine whether or not the patient has regained decisional
9 capacity and shall enter a decision and the basis for [~~such~~] the
10 decision into the patient's medical record and shall notify the
11 patient, the surrogate decision-maker, and the person who
12 initiated the redetermination of decisional capacity.

13 [~~(f)~~] (g) A surrogate who has been designated by the
14 patient may make health-care decisions for the patient that the
15 patient could make on the patient's own behalf.

16 [~~(g)~~] (h) A surrogate who has not been designated by the
17 patient may make all health-care decisions for the patient that
18 the patient could make on the patient's own behalf, except that
19 artificial nutrition and hydration may be withheld or withdrawn
20 for a patient upon a decision of the surrogate only when the
21 primary physician and a second independent physician certify in
22 the patient's medical records that the [~~provision or~~



1 ~~continuation of artificial nutrition or hydration is merely~~
 2 ~~prolonging the act of dying and the patient is highly unlikely~~
 3 ~~to have any neurological response in the future.] patient is in~~
 4 a persistent vegetative state.

5 The surrogate who has not been designated by the patient
 6 shall make health-care decisions for the patient based on the
 7 wishes of the patient[~~r~~] or, if the wishes of the patient are
 8 unknown or unclear, [~~en~~] the patient's best interest.

9 The decision of a surrogate who has not been designated by
 10 the patient regarding whether life-sustaining procedures should
 11 be provided, withheld, or withdrawn shall not be based, in whole
 12 or in part, on either a patient's preexisting, long-term mental
 13 or physical disability[~~r~~] or a patient's economic status. A
 14 surrogate who has not been designated by the patient shall
 15 inform the patient, to the extent possible, of the proposed
 16 procedure and the fact that someone else is authorized to make a
 17 decision regarding that procedure.

18 [~~h~~] (i) A health-care decision made by a surrogate for a
 19 patient is effective without judicial approval.

20 [~~i~~] (j) A supervising health-care provider shall require
 21 a surrogate to provide a written declaration under the penalty



1 of false swearing stating facts and circumstances reasonably
2 sufficient to establish the claimed authority."

3 SECTION 4. Statutory material to be repealed is bracketed
4 and stricken. New statutory material is underscored.

5 SECTION 5. This Act shall take effect upon its approval.
6

INTRODUCED BY: Frank A. Cavanaugh

~~_____~~

Henry Vets

Josh Green

John M. Mignano

Marilyn B. Lee

JAN 19 2007



Report Title:

Health Care Decisions; Surrogates

Description:

Provides process for the spouse or next of kin of incapacitated individuals to act as a surrogate in the absence of an advance health care directive.

