

ACT 125

H.B. NO. 1812

A Bill for an Act Relating to Health.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that it is critical for the stability of Hawaii's health care system for patients to be covered by private insurance or government subsidized health care coverage whenever possible. In 2017, the department of human services tried to implement new procedures to allow an appointed surrogate to act as a patient's authorized representative to make health care decisions related to medicaid, including the decision to apply for medicaid benefits, on behalf of a patient who lacks decision-making capacity and has not executed a power of attorney or has no legal guardian. However, there were additional medicaid requirements necessary to address before achieving this end. Allowing the patient's appointed surrogate to act as the patient's medicaid authorized representative will benefit individuals, who may become financially responsible for services that could have been covered by medicaid.

The legislature finds that it is vital for individuals who may qualify for medicaid to apply for these benefits without delay even when they are not capable of making health care decisions for themselves. Further, if an appointed surrogate is already making important healthcare decisions for a patient, the surrogate should also be allowed to help the individual apply for medical care coverage required to access services.

The purpose of this Act is to clarify that health care surrogates appointed under section 327E-5, Hawaii Revised Statutes, may operate as authorized representatives in order to act on behalf of a patient during the medicaid application process and for medicaid related matters.

SECTION 2. Section 327E-2, Hawaii Revised Statutes, is amended by amending the definition of "surrogate" to read as follows:

““Surrogate” means an individual, other than a patient’s agent or guardian, authorized under this chapter to make a health-care decision or to act as a medicaid authorized representative for the patient.”

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

“~~§327E-5~~ **Health-care decisions; surrogates.** (a) A patient may designate or disqualify any individual to act as a surrogate by personally informing the supervising health-care provider. In the absence of such a designation, or if the designee is not reasonably available, a surrogate may be appointed to make a health-care decision for the patient.

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

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

(d) Interested persons shall make reasonable efforts to reach a consensus as to who among them shall make health-care decisions on behalf of the patient. The person selected to act as the patient's surrogate should be the person who has a close relationship with the patient and who is the most likely to be currently informed of the patient's wishes regarding health-care decisions. If any of the interested persons disagrees with the selection or the decision of the surrogate, or, if after reasonable efforts the interested persons are unable to reach a consensus as to who should act as the surrogate decision-maker, then any of the interested persons may seek guardianship of the patient by initiating guardianship proceedings pursuant to chapter 551[-] or chapter 560, as applicable. Only interested persons involved in the discussions to choose a surrogate may initiate such proceedings with regard to the patient.

(e) If any interested person, the guardian, or primary physician believes the patient has regained decisional capacity, the primary physician shall reexamine the patient and determine whether or not the patient has regained decisional capacity and shall enter a decision and the basis for such decision into the patient's medical record and shall notify the patient, the surrogate decision-maker, and the person who initiated the redetermination of decisional capacity.

(f) A surrogate who has been designated by the patient may make health-care decisions for the patient that the patient could make on the patient's own behalf.

(g) A surrogate who has not been designated by the patient may make all health-care decisions for the patient that the patient could make on the patient's own behalf, except that artificial nutrition and hydration may be withheld or withdrawn for a patient upon a decision of the surrogate only when the primary physician and a second independent physician certify in the patient's medical records that the provision or continuation of artificial nutrition or hydration is merely prolonging the act of dying and the patient is highly unlikely to have any neurological response in the future.

The surrogate who has not been designated by the patient shall make health-care decisions for the patient based on the wishes of the patient, or, if the wishes of the patient are unknown or unclear, on the patient's best interest.

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

(h) A health-care decision made by a surrogate for a patient is effective without judicial approval.

(i) A surrogate may act as a medicaid authorized representative, pursuant to federal and state medicaid laws relating to authorized representatives, on the patient's behalf for the purposes of medicaid, including but not limited to assisting with, submitting, and executing a medicaid application, redetermination of eligibility, and other on-going medicaid-related communications with the department of human services. For the purposes of medicaid, the surrogate may access medicaid records of the patient on whose behalf the surrogate was designated to act. For a surrogate to be able to act under this subsection, the surrogate shall agree to be legally bound by the federal and state authorities related to authorized representatives, including but not limited to maintaining the confidentiality of any information provided by the department of human services, in compliance with all state and federal confidentiality laws. The surrogate's status as an authorized representative for the purposes of medicaid shall terminate when revoked by a patient who no longer lacks decisional capacity, upon appointment or availability of an agent or guardian of the person, or upon the patient's death.

~~(i)~~ (i) A supervising health-care provider shall require a surrogate to provide a written declaration under the penalty of false swearing stating facts and circumstances reasonably sufficient to establish the claimed authority.”

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

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

(Approved July 5, 2018.)