

HOUSE BILL NO. 518

INTRODUCED BY C. HUNTER

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A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING PEOPLE SUFFERING FROM MENTAL ILLNESS TO PREPARE A MENTAL HEALTH CARE ADVANCE DIRECTIVE DURING PERIODS OF MENTAL CAPACITY FOR USE DURING PERIODS OF MENTAL INCAPACITY; PROVIDING IMMUNITY FOR HEALTH CARE PROVIDERS AND INSTITUTIONS IN CERTAIN SITUATIONS; PROVIDING FOR JUDICIAL REVIEW; AMENDING SECTION 72-5-402, MCA; AND REPEALING SECTION 53-21-153, MCA."

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

NEW SECTION. **Section 1. Purpose.** The purpose of [sections 1 through 20] is to:

- (1) promote more timely, informed, compassionate, and effective mental health care;
- (2) recognize the right of any person who has capacity to give or withhold informed consent for mental health services;
- (3) prevent unnecessary delays in receiving care for a mental disorder in times of impending or actual crisis;
- (4) allow a person with mental illness to provide the legal authority for provision of health care during a period of incapacity, even over the person's own protest;
- (5) reduce the use of costly legal interventions, including emergency detentions, civil commitment, involuntary medication, and guardianship;
- (6) minimize the impacts of crisis on people, families, communities, and providers; and
- (7) support the relationship between the provider and the patient by promoting thoughtful, constructive, and timely communication.

NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 20], the following definitions apply:

- (1) "Agent" means a person designated in a directive to make health care decisions for the principal granting power.
- (2) "Capacity" is the ability of a person to understand the significant benefits and risks of and alternatives

1 to proposed health care and to make and communicate a health care decision.

2 (3) "Directive" means a mental health care advance directive or any part of a mental health care advance
3 directive.

4 (4) "Health care provider" means a person who is licensed, certified, or otherwise authorized by the laws
5 of this state to administer health care in the ordinary course of business or practice of a profession.

6 (5) "Incapacitated" means that a person is determined by the supervising health care provider or a court
7 to lack the ability to give or withhold consent for medical care.

8 (6) "Principal" means a person who executes a directive, whether or not that directive designates an
9 agent to make health care decisions.

10 (7) "Supervising health care provider" means the primary physician or, if there is no primary physician
11 or the primary physician is not reasonably available, the health care provider who undertakes primary
12 responsibility for a principal's health care.

13

14 **NEW SECTION. Section 3. Presumption of capacity.** (1) A person is presumed to have capacity to
15 make a health care decision and to create or revoke a directive.

16 (2) [Sections 1 through 20] do not affect the right of a person to make health care decisions while having
17 capacity to do so.

18

19 **NEW SECTION. Section 4. Scope of mental health care advance directive.** (1) An adult with capacity
20 may execute a directive. A minor at least 16 years of age with capacity or an emancipated minor as defined in
21 41-1-401 with capacity may execute a directive.

22 (2) A directive must:

23 (a) be in writing;

24 (b) contain language that clearly indicates that the principal intends to create a directive;

25 (c) be dated and signed by the principal or at the principal's direction and in the principal's presence if
26 the principal is unable to sign; and

27 (d) be notarized.

28 (3) A directive executed in accordance with [sections 1 through 20] is presumed to be valid. The inability
29 to honor one or more provisions of a directive does not affect the validity of the remaining provisions.

30 (4) A directive may include any provision relating to mental health treatment, any other medical treatment

1 that may directly or indirectly affect mental health, and the general care of the principal. A directive may include
2 but is not limited to:

- 3 (a) instructions for mental health treatment, including medical, behavioral, and social interventions;
- 4 (b) consent to specific types of mental health treatment, including medications, other medical treatment,
5 hospitalization, and nonmedical interventions;
- 6 (c) refusal to consent to specific types of mental health treatment;
- 7 (d) consent to admission to and retention in a facility for mental health treatment;
- 8 (e) instructions limiting the revocability of the directive;
- 9 (f) descriptions of situations that may cause the principal to experience a mental health crisis;
- 10 (g) descriptions of behaviors and other indicators that the principal lacks capacity;
- 11 (h) instructions to apply interventions that deescalate crisis behaviors and instructions to avoid
12 interventions that escalate crisis behaviors;
- 13 (i) instructions regarding who should or should not be notified of the principal's admission to a treatment
14 facility or be allowed to visit the principal at the facility;
- 15 (j) appointment of an agent to make mental health treatment decisions on the principal's behalf; and
- 16 (k) the principal's nomination of a guardian, limited guardian, or conservator for consideration by the
17 court if guardianship proceedings are commenced.

18
19 **NEW SECTION. Section 5. Validity of appointment of agent.** If the directive appoints an agent, the
20 agent may accept the appointment by signing the directive. The agent's signature does not have to be witnessed,
21 notarized, or otherwise validated. The lack of agent's signature does not affect the validity of the directive. The
22 directive may provide for one or more alternate agents. The authority of the agent is in effect only after a
23 determination of incapacity as provided in [sections 1 through 20] and only for as long as the period of incapacity.

24
25 **NEW SECTION. Section 6. Prohibited elements.** A directive may not:
26 (1) create an entitlement to mental health treatment or other medical treatment;
27 (2) obligate any health care provider, professional person, health care facility, or insurer to pay the costs
28 associated with the treatment requested;
29 (3) obligate any health care provider, professional person, or health care facility to be responsible for
30 services outside the scope of services the person or facility normally provides; or

1 (4) bind any person who is not a provider of health care services to confer any benefit on the principal.

2

3 **NEW SECTION. Section 7. When a directive takes effect -- determination of incapacity.** (1) A
4 directive is valid upon execution but takes effect only upon a determination of incapacity as provided in [sections
5 1 through 20].

6 (2) A principal, agent, professional person, or health care provider may seek a determination regarding
7 whether the principal is incapacitated or has regained capacity.

8 (3) For the purpose of triggering the directive, a determination that the principal lacks capacity or has
9 regained capacity must be made by the supervising health care provider.

10 (4) For the purpose of triggering the directive, a directive may require the concurrence of two health care
11 providers, one of whom must be the supervising health care provider in the determination of incapacity. The
12 directive may require that one of the concurring providers is a psychiatrist or other physician.

13 (5) The determination of incapacity must consider all factors identified in the directive as evidence of
14 incapacity.

15 (6) Unless otherwise specified in the directive, the authority of an agent becomes effective upon a
16 determination that the principal lacks capacity and ceases to be effective upon a determination that the principal
17 has regained capacity.

18 (7) A principal being treated on an inpatient basis who has been determined to lack capacity may request
19 a reconsideration of capacity by another mental health professional as defined in 53-21-102. A new evaluation
20 and determination regarding capacity must be made within 24 hours of the request. To the extent possible the
21 principal may choose the mental health professional who conducts the second evaluation.

22

23 **NEW SECTION. Section 8. Provider of mental health services.** (1) A provider of mental health
24 services or a supervising health care provider shall:

25 (a) inquire whether a directive exists and make a written record of the response; and

26 (b) include a copy of the directive and any written revocation in the health care record if the directive or
27 revocation are provided.

28 (2) A supervising health care provider who makes or is informed of a determination that a principal lacks
29 or has regained capacity or that another condition exists that affects an individual instruction or the authority of
30 an agent shall promptly record the determination or condition in the principal's health care record and

1 communicate the determination or condition to the principal, if possible, and to any person or agent authorized
2 to make health care decisions for the patient.

3 (3) After a determination of incapacity a supervising health care provider shall communicate health care
4 decisions to the principal to the extent possible.

5 (4) A health care provider or institution providing care to the principal under the authority of a directive
6 shall comply with the provisions of the directive and with all reasonable interpretations of the directive by the
7 agent to the fullest extent possible unless the supervising health care provider determines that:

8 (a) compliance violates the accepted standard of care;

9 (b) compliance conflicts with the applicable law or a court order;

10 (c) the requested treatment is not reasonably available; or

11 (d) an emergency situation exists and compliance endangers the principal's life or health.

12 (5) A health care provider or mental health professional may not require or prohibit the execution or
13 revocation of a directive as a condition for providing health care and may not promote the creation, alteration,
14 adoption, or revocation of a directive under circumstances that are or reasonably appear to be coercive.

15

16 **NEW SECTION. Section 9. Duties of agent.** (1) An agent shall act in good faith.

17 (2) An agent shall make health care decisions in accordance with the principal's written instructions or
18 directive if any. When the agent must make decisions not addressed by the written instructions or directive, the
19 agent shall base decisions on the principal's known wishes and upon the agent's best judgment about how the
20 principal would decide based on the principal's own values and experience.

21 (3) An agent may resign by giving written notice to the principal. If the directive is in effect at the time of
22 the resignation, the agent may resign by giving written notice to the supervising health care provider.

23

24 **NEW SECTION. Section 10. Health care decisions in event of the principal's protest.** An agent may
25 make a health care decision over the protest of a principal who lacks capacity if:

26 (1) the directive is irrevocable at times of incapacity;

27 (2) the directive authorizes the agent to make the health care decision at issue; and

28 (3) the health care that is to be provided, continued, withheld, or withdrawn is determined and
29 documented by the supervising health care provider to be medically appropriate and is otherwise permitted by
30 law.

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2 **NEW SECTION. Section 11. Explicit authorization required for certain treatment.** Electroconvulsive
3 therapy or surgical or experimental treatment may be provided to a principal after a determination of incapacity
4 only if the directive explicitly consents to the particular therapy or treatment.

5

6 **NEW SECTION. Section 12. Authorization for admission to inpatient treatment -- effect of**
7 **directive.** (1) A principal whose directive is irrevocable during a period of incapacity and who has provided
8 consent to inpatient treatment in the directive or authorized an agent to consent to inpatient treatment may be
9 admitted to inpatient mental health treatment if:

10 (a) a physician or psychiatric advanced practice registered nurse performs an evaluation of the principal,
11 including consideration of history, diagnosis, and treatment needs and makes a written determination that the
12 principal needs further inpatient evaluation or treatment that cannot be provided in a less restrictive setting; and

13 (b) the agent, if any, provides written consent.

14 (2) The directive may provide limited consent to inpatient treatment, including limitations upon the length
15 of time for each period of hospitalization and limitations on the facility or facilities to which the principal consents
16 to be admitted.

17

18 **NEW SECTION. Section 13. Expiration.** A directive is valid indefinitely unless the directive includes
19 an expiration date. A directive that expires during a period of incapacity of the principal remains in effect until the
20 principal's capacity is restored.

21

22 **NEW SECTION. Section 14. Revocation.** (1) The principal may revoke a directive in whole or in part
23 orally or in writing at any time unless the directive provides that:

24 (a) the directive is not revocable during a period of incapacity; or

25 (b) the directive is not revocable for a specified period of time after a determination of incapacity.

26 (2) As allowed by the terms of the directive, the principal may:

27 (a) revoke the designation of an agent only by a signed writing or by personally informing the supervising
28 health care provider; and

29 (b) revoke other parts of a directive other than the designation of an agent at any time and in any manner
30 that communicates an intent to revoke.

1 (3) A health care provider, agent, guardian, or conservator who is informed of a revocation shall promptly
2 communicate the fact of the revocation to the supervising health care provider and to any health care institution
3 where the patient is receiving care.

4 (4) A decree of annulment, divorce, dissolution of marriage, or legal separation revokes a previous
5 designation of a spouse as agent unless otherwise specified in the directive or in a durable power of attorney.

6 (5) A directive revokes all prior directives unless the newest directive instructs otherwise.

7
8 **NEW SECTION. Section 15. Effect of directive on existing law.** (1) A directive does not override
9 other provisions of law including Title 46, chapter 14, Title 53, chapter 21, part 1, and Title 72, chapter 5.

10 (2) A court exercising its authority in a civil commitment, guardianship, or protective proceeding that is
11 provided with a directive may enter an order that revokes or contradicts the directive only to the extent necessary
12 to achieve the purposes of the law.

13 (3) If a principal executes other directives allowed under Montana law, including a living will or other
14 power of attorney, the other directives must be construed as consistent with and may not override the mental
15 health care advance directive.

16 (4) In addition to a directive executed under [sections 1 through 20], a principal may designate an agent
17 for other medical decisionmaking under 72-5-501 and 72-5-502.

18
19 **NEW SECTION. Section 16. Nomination of guardian or conservator.** A directive may nominate a
20 guardian or conservator. The court in any guardianship proceeding shall determine whether there is a directive
21 and shall appoint the guardian or conservator nominated in the directive, except when good cause or reason for
22 disqualification exists.

23
24 **NEW SECTION. Section 17. Decisions by guardian or conservator.** When a valid directive is in
25 existence at the time of a judicial determination of incapacity and appointment of a guardian or conservator of the
26 principal:

27 (1) a guardian or conservator shall comply with the instructions in a principal's directive and may not
28 revoke the principal's directive unless the appointing court provides authorization; and

29 (2) absent a court order to the contrary, a health care decision of an agent takes precedence over that
30 of a guardian or conservator.

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2 **NEW SECTION. Section 18. Health care information.** Unless otherwise specified in the directive, the
3 agent has the same rights as the principal to request, receive, examine, copy, and consent to the disclosure of
4 medical or any other health care information during a period of time when the agent is legally authorized to act
5 on behalf of the principal.

6
7 **NEW SECTION. Section 19. Immunities.** (1) A health care provider or institution acting in good faith
8 and in accordance with generally accepted health care standards applicable to the health care provider or
9 institution is not subject to civil or criminal liability or discipline for unprofessional conduct for:

10 (a) complying with a health care decision of an agent who has authority under a directive to make a
11 health care decision for a principal, including a decision to withhold or withdraw health care;

12 (b) declining to comply with a health care decision of a person claiming to be an agent based on a good
13 faith belief that the person then lacked authority; or

14 (c) complying with a directive and assuming that the directive was valid when made and has not been
15 revoked or terminated.

16 (2) A person acting as agent under [sections 1 through 20] is not subject to civil or criminal liability or
17 discipline for unprofessional conduct for health care decisions made in good faith.

18
19 **NEW SECTION. Section 20. Judicial review.** (1) A health care provider, principal, agent, or other
20 interested person may request judicial review of the validity of a directive.

21 (2) A health care provider, principal, or other interested person may request judicial review of a decision
22 by the agent.

23
24 **Section 21.** Section 72-5-402, MCA, is amended to read:

25 **"72-5-402. Contents of petition.** (1) The petition must set forth to the extent known:

26 (a) the interest of the petitioner;

27 (b) the name, age, residence, and address of the person to be protected;

28 (c) the name and address of that person's guardian, if any;

29 (d) the name and address of that person's nearest relative known to the petitioner;

30 (e) a general statement of that person's property with an estimate of the value of the property, including

1 any compensation, insurance, pension, or allowance to which the person is entitled; and

2 (f) the reason why appointment of a conservator or other protective order is necessary.

3 (2) If the appointment of a conservator is requested, the petition also must set forth the name and
4 address of the person whose appointment is sought and the basis of the person's priority for appointment.

5 (3) The petition must affirm that no mental health care advance directive exists or, if a directive exists,
6 the directive must be attached to the petition."

7
8 NEW SECTION. Section 22. Repealer. The following section of the Montana Code Annotated is
9 repealed:

10 53-21-153. Mental health advance directive authorized -- content -- cause of action created -- definitions.

11
12 NEW SECTION. Section 23. Codification instruction. [Sections 1 through 20] are intended to be
13 codified as an integral part of Title 53, chapter 21, and the provisions of Title 53, chapter 21, apply to [sections
14 1 through 20].

15 - END -