

SENATE BILL NO. 92

INTRODUCED BY A. OLSZEWSKI, D. KARY

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A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING FOR APPOINTMENT OF PROXY DECISIONMAKERS FOR CERTAIN HOSPITALIZED PATIENTS; ESTABLISHING PROCEDURES FOR NAMING PROXY DECISIONMAKERS; ALLOWING HEALTH CARE PROVIDERS TO SERVE AS PROXY DECISIONMAKERS; PROVIDING FOR REVIEW BY MEDICAL ETHICS COMMITTEES; PROVIDING IMMUNITY; PROVIDING DEFINITIONS; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

NEW SECTION. **Section 1. Definitions.** As used in [sections 1 through 8], the following definitions

apply:

(1) "Adult" means any person 18 years of age or older.

(2) "Advanced practice registered nurse" means an individual who is licensed under Title 37, chapter 8, to practice professional nursing in this state and who has fulfilled the requirements of the board of nursing pursuant to 37-8-202 and 37-8-409.

(3) "Attending health care provider" means the physician, advanced practice registered nurse, or physician assistant, whether selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient.

(4) "Decisional capacity" means the ability to provide informed consent to or refuse medical treatment or the ability to make an informed health care decision AS DETERMINED BY A HEALTH CARE PROVIDER EXPERIENCED IN THIS TYPE OF ASSESSMENT.

(5) "Health care facility" means a hospital, critical access hospital, or facility providing skilled nursing care as those terms are defined in 50-5-101.

(6) "Health care provider" means any individual licensed or certified by the state to provide health care.

(7) "Interested person" means a patient's:

(a) spouse;

(b) parent;

(c) adult child, sibling, or grandchild; or



1 (d) close friend.

2 (8) "MEDICAL PROXY DECISIONMAKER" MEANS A PHYSICIAN OR ADVANCED PRACTICE REGISTERED NURSE
3 DESIGNATED BY THE ATTENDING HEALTH CARE PROVIDER.

4 ~~(9)~~(9) "Physician" means an individual licensed pursuant to Title 37, chapter 3.

5 ~~(9)~~(10) "Physician assistant" means an individual licensed pursuant to Title 37, chapter 20, whose duties
6 and delegation agreement authorizes the individual to undertake the activities allowed under [sections 1 through
7 8].

8 ~~(10)~~(11) (a) "Proxy LAY PROXY decisionmaker" means a AN INTERESTED person selected pursuant to
9 [sections 1 through 8] ~~who will~~ AUTHORIZED TO make medical decisions AND DISCHARGE AND TRANSFER
10 DISPOSITIONS for a patient who lacks decisional capacity.

11 (b) The term does not include the patient's attending health care provider.

12
13 NEW SECTION. Section 2. Determination of decisional capacity -- use of proxy decisionmaker.

14 (1) ~~A court or an~~ AN attending health care provider may determine that an adult patient lacks decisional capacity
15 related to medical treatment. The determination must be documented in the patient's medical record.

16 (2) (A) The attending health care provider shall make specific findings related to the cause, nature, and
17 projected duration of the patient's lack of decisional capacity. The findings must be included in the patient's
18 medical record.

19 (B) HEALTH CARE PROVIDERS MUST USE EVIDENCE-BASED METHODOLOGIES FOR DETERMINING DECISIONMAKING
20 CAPACITY. THE METHOD USED TO DETERMINE DECISIONMAKING CAPACITY MAY BE SELECTED IN COLLABORATION WITH A
21 MEDICAL ETHICS COMMITTEE.

22 (C) PATIENTS WITH CHRONIC COGNITIVE DISABILITIES MAY REQUIRE ASSESSMENT BY HEALTH CARE PROVIDERS
23 FAMILIAR WITH THE PATIENT'S SPECIFIC DISABILITY. HEALTH CARE PROVIDERS FAMILIAR WITH THE PATIENT'S CHRONIC
24 COGNITIVE DISABILITY SHOULD BE RETAINED TO ASSESS DECISIONMAKING CAPACITY.

25 (D) PATIENTS FOR WHOM ENGLISH IS A SECOND LANGUAGE MUST BE ASSESSED BY A HEALTH CARE PROVIDER
26 IN THE PRESENCE OF AN INTERPRETER WHO IS FLUENT IN THE PATIENT'S PRIMARY LANGUAGE.

27 (3) A health care provider or health care facility may rely in good faith upon the medical treatment
28 decision of a proxy decisionmaker selected or appointed in accordance with [sections 1 through 8] if an adult
29 patient's attending health care provider determines that the patient lacks decisional capacity and the patient does
30 not have:

- 1 (a) a guardian with medical decisionmaking authority;
 2 (b) an agent appointed in a medical durable power of attorney; or
 3 (c) any other known person with the legal authority to provide consent or refusal of medical treatment
 4 on the patient's behalf.

5 (4) GUARDIANSHIP PROCEEDINGS MAY BE INITIATED BY THE HEALTH CARE FACILITY IN THE ABSENCE OF FAMILY
 6 OR INTERESTED PARTIES AT THE SAME TIME THAT A PROXY DECISIONMAKER IS SELECTED TO MEET THE PATIENT'S
 7 CURRENT DECISIONAL NEEDS. IF A GUARDIAN IS APPOINTED, THE GUARDIAN MAY ASSUME THE PROXY DECISIONMAKER
 8 ROLE.

9
 10 **NEW SECTION. Section 3. Notification to interested persons -- selection of proxy decisionmaker.**

11 (1) Upon a determination that an adult patient lacks decisional capacity, an attending health care provider or the
 12 provider's designee shall make reasonable efforts to notify the patient of:

- 13 (a) the determination that the patient lacks decisional capacity; and
 14 (b) the identity of a LAY OR MEDICAL proxy decisionmaker selected or appointed pursuant to [sections 1
 15 through 8].

16 (2) An attending health care provider or the provider's designee shall make reasonable efforts to locate
 17 and notify as many interested persons as practicable to inform them of the patient's lack of decisional capacity
 18 and ask that a LAY proxy decisionmaker be selected for the patient.

19 (3) The attending health care provider may rely on interested persons contacted by the provider or the
 20 provider's designee to notify other family members or interested persons.

21 (4) Interested persons who are informed of the patient's lack of decisional capacity shall make
 22 reasonable efforts to reach a consensus as to who among them will make medical treatment decisions on behalf
 23 of the patient. In selecting a LAY proxy decisionmaker, the interested persons should consider which proposed
 24 decisionmaker:

- 25 (a) has a close relationship with the patient; and
 26 (b) is most likely to have current knowledge of the patient's wishes regarding medical treatment.

27 (5) Nothing in this section precludes an interested person from initiating a guardianship proceeding for
 28 any reason at any time.

29
 30 **NEW SECTION. Section 4. Appointment of certain health care providers as MEDICAL proxy**

1 **decisionmaker -- limitations -- termination.** (1) An attending health care provider may designate another willing
 2 physician; OR advanced practice registered nurse; ~~or physician assistant~~ to make health care treatment decisions
 3 as a patient's proxy decisionmaker if:

4 (a) after making reasonable efforts, the attending health care provider or the provider's designee is
 5 unable to locate any ~~interested persons~~ PERSONS WITH AUTHORITY TO MAKE MEDICAL DECISIONS FOR THE PATIENT
 6 or no interested person WITH AUTHORITY TO MAKE MEDICAL DECISIONS FOR THE PATIENT is willing and able to serve
 7 as LAY proxy decisionmaker;

8 (b) the attending health care provider has ~~obtained an independent determination of~~ DETERMINED, WITH
 9 THE ASSISTANCE OF ANY RELEVANT SPECIALISTS OR INTERPRETERS, the patient's lack of decisional capacity ~~by a court~~
 10 ~~or another physician, advanced practice registered nurse, or physician assistant;~~

11 (C) THE ATTENDING HEALTH CARE PROVIDER'S ASSESSMENT OF LACK OF DECISIONAL CAPACITY HAS BEEN
 12 CONFIRMED BY ANOTHER HEALTH CARE PROVIDER;

13 ~~(c)(D)~~ the attending health care provider or the provider's designee has consulted with and obtained a
 14 consensus on the proxy designation with the medical ethics committee of the health care facility where the patient
 15 is receiving care; and

16 ~~(d)(E)~~ the identity of the physician; OR advanced practice registered nurse; ~~or physician assistant~~
 17 designated as proxy decisionmaker is documented in the medical record.

18 (2) For the purposes of subsection ~~(1)(c)~~ (1)(D), if the health care facility does not have a medical ethics
 19 committee, the facility ~~shall~~ MAY refer the attending health care provider or the provider's designee to a medical
 20 ethics committee at another health care facility OR OBTAIN CONSENSUS WITH THE HEALTH CARE FACILITY'S CHAPLAIN.

21 (3) The authority of a physician; OR advanced practice registered nurse; ~~or physician assistant~~ serving
 22 as a proxy decisionmaker terminates when:

23 (a) an interested person is willing to serve as A LAY proxy decisionmaker;

24 (B) A FAMILY MEMBER IS WILLING TO SERVE AS A DECISIONMAKER;

25 ~~(b)(C)~~ a guardian is appointed for the patient;

26 ~~(c)(D)~~ the patient regains decisional capacity;

27 ~~(d)(E)~~ the proxy decisionmaker decides to terminate the decisionmaker's role; or

28 ~~(e)(F)~~ the patient is transferred or discharged from the health care facility, if any, where the patient is
 29 receiving care unless the proxy decisionmaker expresses an intention to continue in the role.

30 (4) The attending health care provider shall document in the patient's medical record the reason for

1 termination of the authority of a physician; OR advanced practice registered nurse; ~~or physician assistant~~ serving
 2 as a proxy decisionmaker.

3
 4 **NEW SECTION. Section 5. Treatment guidelines when health care providers serve as proxy**
 5 **decisionmakers.** (1) The attending health care provider and a health care provider appointed pursuant to
 6 [section 4] to serve as a MEDICAL proxy decisionmaker shall adhere to the following guidelines for proxy
 7 decisionmaking:

8 (a) for routine treatments and procedures that are low-risk and within broadly accepted standards of
 9 medical practice, the attending health care provider may make health care treatment decisions;

10 (b) for treatment involving anesthesia, invasive procedures, significant risk of complications, or otherwise
 11 requiring written, informed consent, the attending health care provider shall obtain the written consent of the
 12 MEDICAL proxy decisionmaker ~~and a consensus with the medical ethics committee of the health care facility;~~

13 (c) for end-of-life treatment that is nonbeneficial and involves withholding or withdrawing specific medical
 14 treatments, the attending health care provider shall obtain:

15 (i) an independent concurring opinion from a physician; OR advanced practice registered nurse; ~~or~~
 16 ~~physician assistant~~ other than the MEDICAL proxy decisionmaker; ~~and~~

17 (ii) a consensus with the medical ethics committee, IF AVAILABLE; AND

18 (III) A CONSENSUS WITH THE HEALTH CARE FACILITY'S CHAPLAIN IF A MEDICAL ETHICS COMMITTEE IS NOT
 19 AVAILABLE.

20 (2) Artificial nourishment and hydration may be withheld or withdrawn from a patient upon a decision of
 21 a physician; OR advanced practice registered nurse; ~~or physician assistant~~ serving as a MEDICAL proxy
 22 decisionmaker only when the attending health care provider and an independent physician trained in neurology
 23 or neurosurgery certify in the patient's medical record that the provision or continuation of artificial nourishment
 24 or hydration is merely prolonging the act of dying and is unlikely to result in the restoration of the patient to
 25 independent neurological functioning CANNOT REASONABLY BE EXPECTED TO PROLONG LIFE, WOULD BE EXCESSIVELY
 26 BURDENSOME FOR THE PATIENT, OR WOULD CAUSE THE PATIENT SIGNIFICANT PHYSICAL DISCOMFORT, SUCH AS FROM
 27 COMPLICATIONS FROM THE PROCEDURES USED.

28 (3) (a) Nothing in [sections 1 through 8] may be construed as condoning, authorizing, or approving
 29 euthanasia or mercy killing.

30 (b) Nothing in [sections 1 through 8] may be construed as permitting an affirmative or deliberate act to

1 end a person's life except to permit natural death.

2 (4) WHEN A LAY OR MEDICAL PROXY DECISIONMAKER HAS NOT BEEN APPOINTED AND THE ATTENDING HEALTH
 3 CARE PROVIDER DETERMINES THAT A PATIENT REQUIRES END-OF-LIFE TREATMENT THAT INCLUDES ARTIFICIAL
 4 NOURISHMENT AND HYDRATION, BEFORE A LAY OR MEDICAL PROXY DECISIONMAKER MAY BE APPOINTED THE ATTENDING
 5 HEALTH CARE PROVIDER OR HEALTH CARE FACILITY MUST PETITION THE COURT TO HAVE A TEMPORARY GUARDIAN
 6 APPOINTED AS PROVIDED IN 72-5-317. IF THE PETITION TO HAVE A TEMPORARY GUARDIAN APPOINTED IS NOT TIMELY OR
 7 SUCCESSFUL CONSIDERING THE EXIGENCIES OF THE SITUATION, A LAY OR MEDICAL PROXY DECISIONMAKER MAY BE
 8 APPOINTED.

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10 NEW SECTION. Section 6. Medical ethics committee assistance in decisions on withholding or
 11 withdrawing treatment. The medical ethics committee of a health care facility shall assist a LAY OR MEDICAL
 12 proxy decisionmaker ~~or an interested person~~ upon request if the LAY OR MEDICAL proxy decisionmaker is
 13 considering or has made a decision to withhold or withdraw medical treatment. If the health care facility treating
 14 the patient does not have a medical ethics committee, the facility may provide an outside referral for assistance
 15 or consultation.

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17 NEW SECTION. Section 7. Redetermination of authority of LAY OR MEDICAL proxy decisionmaker.
 18 The attending health care provider of a patient for whom a LAY OR MEDICAL proxy decisionmaker has been named
 19 shall reexamine the patient and determine whether the patient has regained decisional capacity if an interested
 20 person, guardian, attending health care provider, or the LAY OR MEDICAL proxy decisionmaker believes the patient
 21 has regained decisional capacity. The attending health care provider shall enter the determination and the basis
 22 for the determination into the patient's medical record and shall notify the patient, the LAY OR MEDICAL proxy
 23 decisionmaker, and the person who requested the redetermination of decisional capacity.

24

25 NEW SECTION. Section 8. Immunity. (1) An attending health care provider, provider's designee, or
 26 health care facility that makes a reasonable attempt to locate and communicate with a proxy decisionmaker is
 27 not subject to civil or criminal liability or regulatory sanction solely for the attempt to locate and communicate with
 28 the person.

29 (2) A member of a health care facility medical ethics committee is not subject to civil or criminal liability
 30 or regulatory sanction solely for taking part in decisions under [sections 1 through 8].

1 (3) A physician; OR advanced practice registered nurse, ~~or physician assistant~~ acting in good faith as
2 a proxy decisionmaker in accordance with [sections 4 and 5] is not subject to civil or criminal liability or regulatory
3 sanction solely for acting as a MEDICAL proxy decisionmaker. An attending health care provider or the provider's
4 designee remains responsible for negligent acts or omissions in providing care to a patient for whom a LAY OR
5 MEDICAL proxy decisionmaker has been named.

6 (4) The immunity provided by this section does not apply to:

7 (a) a health care facility that is owned or operated by the state or a political subdivision of the state;

8 (b) members of a medical ethics committee for a health care facility that is owned or operated by the
9 state or a political subdivision of the state; or

10 (c) health care providers who are employed by the state or a political subdivision of the state.

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12 NEW SECTION. Section 9. Codification instruction. [Sections 1 through 8] are intended to be codified
13 as an integral part of Title 50, chapter 5, and the provisions of Title 50, chapter 5, apply to [sections 1 through 8].
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15 NEW SECTION. Section 10. Effective date. [This act] is effective on passage and approval.

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