

SENATE BILL NO. 92

INTRODUCED BY A. OLSZEWSKI

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A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING FOR APPOINTMENT OF PROXY DECISIONMAKERS FOR CERTAIN 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.
- (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
 - (d) close friend.

1 (8) "Physician" means an individual licensed pursuant to Title 37, chapter 3.

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

4 (10) (a) "Proxy decisionmaker" means a person selected pursuant to [sections 1 through 8] who will
5 make medical decisions for a patient who lacks decisional capacity.

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

7

8 **NEW SECTION. Section 2. Determination of decisional capacity -- use of proxy decisionmaker.**

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

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

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

18 (a) a guardian with medical decisionmaking authority;

19 (b) an agent appointed in a medical durable power of attorney; or

20 (c) any other known person with the legal authority to provide consent or refusal of medical treatment
21 on the patient's behalf.

22

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

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

26 (a) the determination that the patient lacks decisional capacity; and

27 (b) the identity of a proxy decisionmaker selected or appointed pursuant to [sections 1 through 8].

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

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

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

7 (a) has a close relationship with the patient; and

8 (b) is most likely to have current knowledge of the patient's wishes regarding medical treatment.

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

11
12 **NEW SECTION. Section 4. Appointment of certain health care providers as proxy decisionmaker**

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

16 (a) after making reasonable efforts, the attending health care provider or the provider's designee is
17 unable to locate any interested persons or no interested person is willing and able to serve as proxy
18 decisionmaker;

19 (b) the attending health care provider has obtained an independent determination of the patient's lack
20 of decisional capacity by a court or another physician, advanced practice registered nurse, or physician assistant;

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

24 (d) the identity of the physician, advanced practice registered nurse, or physician assistant designated
25 as proxy decisionmaker is documented in the medical record.

26 (2) For the purposes of subsection (1)(c), if the health care facility does not have a medical ethics
27 committee, the facility shall refer the attending health care provider or the provider's designee to a medical ethics
28 committee at another health care facility.

29 (3) The authority of a physician, advanced practice registered nurse, or physician assistant serving as
30 a proxy decisionmaker terminates when:

- 1 (a) an interested person is willing to serve as proxy decisionmaker;
2 (b) a guardian is appointed for the patient;
3 (c) the patient regains decisional capacity;
4 (d) the proxy decisionmaker decides to terminate the decisionmaker's role; or
5 (e) the patient is transferred or discharged from the health care facility, if any, where the patient is
6 receiving care unless the proxy decisionmaker expresses an intention to continue in the role.

7 (4) The attending health care provider shall document in the patient's medical record the reason for
8 termination of the authority of a physician, advanced practice registered nurse, or physician assistant serving as
9 a proxy decisionmaker.

10
11 **NEW SECTION. Section 5. Treatment guidelines when health care providers serve as proxy**

12 **decisionmakers.** (1) The attending health care provider and a health care provider appointed pursuant to
13 [section 4] to serve as a proxy decisionmaker shall adhere to the following guidelines for proxy decisionmaking:

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

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

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

21 (i) an independent concurring opinion from a (i) physician, advanced practice registered nurse, or physician
22 assistant other than the proxy decisionmaker; and

23 (ii) a consensus with the medical ethics committee.

24 (2) Artificial nourishment and hydration may be withheld or withdrawn from a patient upon a decision of
25 a physician, advanced practice registered nurse, or physician assistant serving as a proxy decisionmaker only
26 when the attending health care provider and an independent physician trained in neurology or neurosurgery
27 certify in the patient's medical record that the provision or continuation of artificial nourishment or hydration is
28 merely prolonging the act of dying and is unlikely to result in the restoration of the patient to independent
29 neurological functioning.

30 (3) (a) Nothing in [sections 1 through 8] may be construed as condoning, authorizing, or approving

1 euthanasia or mercy killing.

2 (b) Nothing in [sections 1 through 8] may be construed as permitting an affirmative or deliberate act to
3 end a person's life except to permit natural death.

4
5 **NEW SECTION. Section 6. Medical ethics committee assistance in decisions on withholding or**
6 **withdrawing treatment.** The medical ethics committee of a health care facility shall assist a proxy decisionmaker
7 or an interested person upon request if the proxy decisionmaker is considering or has made a decision to withhold
8 or withdraw medical treatment. If the health care facility treating the patient does not have a medical ethics
9 committee, the facility may provide an outside referral for assistance or consultation.

10
11 **NEW SECTION. Section 7. Redetermination of authority of proxy decisionmaker.** The attending
12 health care provider of a patient for whom a proxy decisionmaker has been named shall reexamine the patient
13 and determine whether the patient has regained decisional capacity if an interested person, guardian, attending
14 health care provider, or the proxy decisionmaker believes the patient has regained decisional capacity. The
15 attending health care provider shall enter the determination and the basis for the determination into the patient's
16 medical record and shall notify the patient, the proxy decisionmaker, and the person who requested the
17 redetermination of decisional capacity.

18
19 **NEW SECTION. Section 8. Immunity.** (1) An attending health care provider, provider's designee, or
20 health care facility that makes a reasonable attempt to locate and communicate with a proxy decisionmaker is
21 not subject to civil or criminal liability or regulatory sanction solely for the attempt to locate and communicate with
22 the person.

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

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

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

- 1 (a) a health care facility that is owned or operated by the state or a political subdivision of the state;
- 2 (b) members of a medical ethics committee for a health care facility that is owned or operated by the
- 3 state or a political subdivision of the state; or
- 4 (c) health care providers who are employed by the state or a political subdivision of the state.

5

6 **NEW SECTION. Section 9. Codification instruction.** [Sections 1 through 8] are intended to be codified

7 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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9 **NEW SECTION. Section 10. Effective date.** [This act] is effective on passage and approval.

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