



2023 SENATE BILL 682

November 15, 2023 - Introduced by Senators KNODL and BRADLEY, cosponsored by Representatives WICHGERS, ORTIZ-VELEZ, ARMSTRONG, BEHNKE, BODDEN, BRANDTJEN, DONOVAN, MURPHY, MURSAU, O'CONNOR, RETTINGER and ROZAR. Referred to Committee on Health.

AN ACT *to create* chapter 56 of the statutes; **relating to:** surrogate decision-making.

Analysis by the Legislative Reference Bureau

This bill allows for next of kin to be a surrogate decision maker for a patient in a hospital who is incapacitated in certain circumstances. Under the bill, when a hospital patient is incapacitated, the attending physician for the patient must make a reasonable inquiry as to whether the patient has a guardian of the person or an advanced planning instrument that applies to the patient's condition. For purposes of the bill, either two physicians, a physician and an individual who possesses a resident education license, or a physician and a licensed advanced practice clinician, who have personally examined the patient, must make the determination and sign a statement specifying that the patient is incapacitated.

Under the bill, if there is no guardian or applicable advanced planning instrument, the attending physician must make a reasonable inquiry as to the availability of a surrogate decision maker by contacting any family member identified in the patient's health care records or other personal effects. The bill requires the attending physician to attempt to contact that person by telephone within 24 hours after a determination is made that the patient is incapacitated. Under the bill, the following individuals, in the following order of priority, may act as a surrogate decision maker: 1) the patient's spouse or domestic partner; 2) an adult child of the patient or, if there is more than one adult child, a majority of the

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adult children who are available for consultation within a reasonable period of time; 3) a parent of the patient; 4) an adult sibling of the patient or, if there is more than one adult sibling, a majority of the patient's adult siblings who are available for consultation within a reasonable period of time; 5) a grandparent of the patient; 6) an adult grandchild of the patient or, if there is more than one adult grandchild, a majority of the patient's adult grandchildren who are available for consultation within a reasonable period of time; or 7) a close friend or relative of the patient if the person is at least 18 years of age, has maintained sufficient regular contact with the patient to be familiar with the patient's activities, health, and beliefs, and has exhibited special care and concern for the patient. The bill provides that if a willing surrogate decision maker is identified, the attending physician must record the surrogate decision maker's information in the patient health records. The bill includes provisions for recording a replacement surrogate decision maker if the initial person identified becomes unavailable.

The bill provides that a surrogate decision maker may, if made in accordance with certain requirements, make decisions for the patient concerning the patient's care, treatment, or therapies without involving the courts or legal process, but a surrogate decision maker may not make a decision to continue or to forego life-sustaining treatment. Under the bill, any decision made by a surrogate decision maker must be recorded in consultation with the attending physician and must conform as closely as possible to what the patient would have decided under the circumstances, taking into account evidence that includes the patient's personal, philosophical, religious, and moral beliefs and ethical values relative to the purpose of life, sickness, medical procedures, suffering, and death. The bill requires that the surrogate decision maker consult any available evidence of the patient's wishes, including an unrevoked advanced planning instrument that is not valid due to a technical deficiency or is not applicable to the patient's condition. The bill provides that the absence of an advanced planning instrument does not give rise to any presumption as to the patient's preferences regarding health care decisions. Under the bill, if the patient's wishes are unknown and remain unknown after reasonable efforts to discern them, the surrogate decision maker must make decisions on the basis of the patient's best interests as determined by the surrogate decision maker. In determining the patient's best interests, the surrogate decision maker must consult with the patient's primary care provider, if any, and weigh all other information, including the views of family and friends, that the surrogate decision maker believes the patient would have considered if able to act for himself or herself. The bill provides that a surrogate decision maker must exercise reasonable diligence and, to the extent feasible under the circumstances, provide to all other individuals known to that individual, including certain specific individuals described in the bill, notice that the patient is incapacitated and of the right for individuals to apply for temporary guardianship.

The bill provides that health care providers and other persons may rely on any decision or direction made by the surrogate decision maker that is not clearly

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contrary to the provisions of the bill to the same extent and with the same effect as though it was made by the patient when the patient was not incapacitated. The bill establishes that in the absence of actual knowledge to the contrary, a person may presume that the acts of the surrogate decision maker conform to the requirements under the bill.

Under the bill, a health care provider who relies on and carries out decisions made by a surrogate decision maker and acts with due care and in accordance with the provisions of the bill may not be subject to any claim, any criminal prosecution, or discipline for unprofessional conduct on the basis of the lack of patient consent. The bill does not prohibit a claim against a health care provider or facility based on negligence relating to the performance of the health care provider's duties or the carrying out of any instructions of the surrogate decision maker, nor does the bill provide immunity from civil liability if the health care provider or other person has actual knowledge either that the surrogate decision maker is not entitled to act at the time an action is taken or that any particular action or inaction by the surrogate decision maker is otherwise contrary to the requirements under the bill.

The bill provides that a surrogate decision maker who acts with due care and in accordance with the provisions of the bill is not subject to criminal prosecution or any claim based on the lack of surrogate authority or based on the surrogate decision maker's failure to act. The bill also provides that a surrogate decision maker may not be liable for any claim solely because he or she may benefit, has individual or conflicting interests in relation to the care and affairs of the patient, or acts in a different manner with respect to the patient's care or interests from what the surrogate decision maker would do with respect to his or her own care or interests.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. Chapter 56 of the statutes is created to read:

CHAPTER 56

HEALTH CARE SURROGATE

DECISION-MAKING

56.01 Definitions. In this chapter:

(1) "Advanced planning instrument" means any of the following:

(a) A declaration, as defined in s. 154.02 (1).

(b) A do-not-resuscitate order, as defined in s. 154.17 (2).

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(c) A power of attorney for health care, as defined in s. 155.01 (10).

(2) “Attending physician” means a physician licensed under subch. II of ch. 448 who is selected by or assigned to the patient and who has primary responsibility for treatment and care of the patient. If more than one physician shares primary responsibility for treatment and care of the patient, any of those physicians may act as the attending physician under this chapter.

(3) “Guardian of the person” has the meaning given in s. 54.01 (12).

(4) “Incapacitated” means unable to receive and evaluate information effectively or to communicate decisions to such an extent that the individual lacks the capacity to manage his or her health care decisions, including decisions about his or her hospital and post-hospital care.

(5) “Patient health care records” has the meaning given in s. 146.81 (4).

56.03 Applicability. (1) Except as otherwise provided in this section, this chapter applies to a patient in a hospital who is incapacitated. The desires of a patient who is not incapacitated supersede any surrogate decision-making authority under this chapter. A determination that a patient is incapacitated for purposes of this chapter shall be made by 2 physicians, as defined in s. 448.01 (5), by one physician and one individual who possesses a resident education license issued under s. 448.04 (1) (bm), or by one physician and one licensed advanced practice clinician, as defined in s. 155.01 (1g), who personally examine the patient and sign a statement specifying that the patient is incapacitated. Mere old age, eccentricity, or physical disability, either singly or together, are insufficient to make a finding that a patient is incapacitated. Neither of the individuals who make a

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determination that a patient is incapacitated may be a relative, as defined in s. 242.01 (11), of the patient or have knowledge that he or she is entitled to or has a claim on any portion of the patient's estate. A copy of the statement shall be included in the patient's health care records.

(2) This chapter does not apply to patients who have in effect any of the following:

- (a) A guardian of the person.
- (b) A declaration, as defined in s. 154.02 (1).
- (c) A do-not-resuscitate order, as defined in s. 154.17 (2).
- (d) A health care agent, as defined in s. 155.01 (4), under a power of attorney for health care, as defined in s. 155.01 (10).

(3) This chapter does not apply to any patient described under sub. (1) who is the subject of any pending action under ch. 51, 54, or 55.

56.05 Identification of a surrogate decision maker. (1) (a) Whenever a patient in a hospital is incapacitated, the attending physician shall make a reasonable inquiry as to whether the patient has a guardian of the person or an advanced planning instrument that applies to the patient's condition. If the patient does not have a guardian of the person or an applicable advanced planning instrument, the attending physician shall make a reasonable inquiry as to the availability of any possible surrogate decision maker under sub. (2). At a minimum, the attending physician shall contact any family member of the patient that is identified in the patient health care records or other personal effects. If a family member is identified, the attending physician shall attempt to contact that person

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by telephone within 24 hours after a determination is made that the patient is incapacitated. No person may be held liable for civil damages or be subject to professional discipline for violating a patient's right to confidentiality as a result of making a reasonable inquiry as to the availability of any possible surrogate decision maker, except for willful or wanton misconduct.

(b) For the purposes of par. (a), the attending physician may delegate the attending physician's duty to do any of the following:

1. Make a reasonable inquiry as to whether the patient has a guardian of the person or an advanced planning instrument that applies to the patient's condition.

2. Make a reasonable inquiry as to the availability of any possible surrogate decision maker under sub. (2).

3. Contact any family member of the patient that is identified in the patient health care records or other personal effects.

(2) The following individuals, in the following order of priority, may act as a surrogate decision maker for an incapacitated patient under this chapter:

- (a) The patient's spouse or domestic partner under ch. 770.

- (b) An adult child of the patient or, if there is more than one adult child, a majority of the patient's adult children who are available within a reasonable period of time for consultation with the patient's attending physician.

- (c) A parent of the patient.

- (d) An adult sibling of the patient or, if there is more than one adult sibling, a majority of the patient's adult siblings who are available within a reasonable period of time for consultation with the patient's attending physician.

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(e) A grandparent of the patient.

(f) An adult grandchild of the patient or, if there is more than one adult grandchild, a majority of the patient's adult grandchildren who are available within a reasonable period of time for consultation with the patient's attending physician.

(g) A close friend or relative of the patient, other than a person specified in pars. (a) to (f), to whom all of the following apply:

1. The person is at least 18 years of age and has maintained sufficient regular contact with the patient to be familiar with the patient's activities, health, and beliefs.

2. The person has exhibited special care and concern for the patient.

(3) (a) If a willing surrogate decision maker has been identified under sub. (2), the patient's attending physician shall record the surrogate decision maker's name, address, telephone number, and relationship to the patient in the patient health care records.

(b) If a surrogate decision maker who has been recorded under par. (a) becomes unavailable for any reason and there are no remaining recorded surrogate decision makers, the unavailable surrogate decision maker may be replaced by identifying a new surrogate decision maker in the same manner as the initial surrogate decision maker.

(c) In the event that an individual who has higher priority than the recorded surrogate decision maker under par. (a) becomes available and is willing to be the surrogate decision maker, the individual with the higher priority shall be recorded as the surrogate decision maker.

(d) A surrogate decision maker recorded pursuant to par. (a) shall have the same right as the patient to access patient health care records and to consent to the disclosure of patient health care records.

56.07 Surrogate decision-making. A surrogate decision maker identified under s. 56.05 may make a decision concerning care, treatment, or therapies, not including decisions to continue or to forego life-sustaining treatment, on behalf of a patient who is incapacitated, without resort to the courts or legal process, if the decision is made in accordance with all of the following:

(1) Any decision is made by a surrogate decision maker recorded pursuant to s. 56.05 (3) in consultation with the attending physician.

(2) A surrogate decision maker makes decisions for the patient conforming as closely as possible to what the patient would have decided under the circumstances, taking into account evidence that includes the patient's personal, philosophical, religious, and moral beliefs and ethical values relative to the purpose of life, sickness, medical procedures, suffering, and death.

(3) The surrogate decision maker consults any available evidence of the patient's wishes. In the event an unrevoked advanced planning instrument is no longer valid due to a technical deficiency or is not applicable to the patient's condition, that document may be used as evidence of a patient's wishes. The absence of an advanced planning instrument does not give rise to any presumption as to the patient's preferences regarding health care decisions.

(4) If the patient's wishes are unknown and remain unknown after reasonable efforts to discern them, any decision shall be made on the basis of the

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patient's best interests as determined by the surrogate decision maker. In determining the patient's best interests, the surrogate shall consult with the patient's primary care provider, if any, and weigh all other information, including the views of family and friends, that the surrogate decision maker believes the patient would have considered if able to act for himself or herself.

(5) An individual who acts as a surrogate decision maker under this chapter shall, exercising reasonable diligence and to the extent feasible under the circumstances, provide to all other individuals known to that individual and listed under s. 56.05 (2) notice that the patient is incapacitated and of the right for individuals to apply for temporary guardianship under s. 54.50.

56.09 Reliance on surrogate decision-making authority. (1) A health care provider and any other person may rely on any decision or direction made by the surrogate decision maker that is not clearly contrary to this chapter to the same extent and with the same effect as though the decision or direction was made by the patient when the patient was not incapacitated. Any person dealing with the surrogate decision maker may presume, in the absence of actual knowledge to the contrary, that the acts of the surrogate decision maker conform to the requirements of this chapter.

(2) Except as provided in sub. (3), any health care provider who relies on and carries out the decisions made by a surrogate decision maker and who acts with due care and in accordance with this chapter may not be subject to any claim, any criminal prosecution, or any discipline for unprofessional conduct on the basis of the lack of patient consent. Nothing in this chapter prohibits a claim against a health

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care provider or facility based on the health care provider's or facility's negligence relating to the performance of the health care provider's duties or the carrying out of any instructions of the surrogate decision maker.

(3) No health care provider or other person is immune from civil liability under sub. (2) if the health care provider or other person has actual knowledge either that the surrogate decision maker is not entitled to act at the time the surrogate decision maker takes an action or that any particular action or inaction by the surrogate decision maker is otherwise contrary to the provisions of this chapter.

(4) A surrogate decision maker who acts with due care and in accordance with the provisions of this chapter may not be subject to criminal prosecution or any claim based on the lack of surrogate authority or based on the surrogate decision maker's failure to act. The surrogate decision maker may not be liable for any claim solely because the surrogate decision maker may benefit from an act taken by the surrogate decision maker, the surrogate decision maker has individual or conflicting interests in relation to the care and affairs of the patient, or the surrogate decision maker acts in a different manner with respect to the patient's care or interests from what the surrogate decision maker would do with respect to his or her own care or interests.

56.11 Health care surrogate; mental health services. A surrogate decision maker may not consent to the administration of psychotropic medication for a patient.

SECTION 2. Effective date.

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SECTION 2

(1) This act takes effect on the first day of the 7th month beginning after publication.

(END)