

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE BILL 490

45TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2001

AN ACT

RELATING TO HEALTH CARE; AMENDING CERTAIN SECTIONS OF THE
UNIFORM HEALTH-CARE DECISIONS ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 24-7A-2 NMSA 1978 (being Laws 1995,
Chapter 182, Section 2) is amended to read:

"24-7A-2. ADVANCE HEALTH-CARE DIRECTIVES. --

A. An adult or emancipated minor, while having
capacity, has the right to make his or her own health-care
decisions and may give an individual instruction. The
individual instruction may be oral or written; if oral, it
[~~must~~] shall be made by personally informing a health-care
provider. The individual instruction may be limited to take
effect only if a specified condition arises. If an adult or

1 emancipated minor who chooses to give an individual instruction
2 is served in a community-based program for persons with mental
3 illness or developmental disabilities, then the instruction,
4 subject to the individual's consent, shall be included in the
5 individual's service plan and may be provided to the
6 individual's health-care provider by the community-based
7 program.

8 B. An adult or emancipated minor, while having
9 capacity, may execute a power of attorney for health care,
10 which may authorize the agent to make any health-care decision
11 the principal could have made while having capacity. The power
12 [~~must~~] shall be in writing and signed by the principal. The
13 power remains in effect notwithstanding the principal's later
14 incapacity under the Uniform Health-Care Decisions Act or
15 Article 5 of the Uniform Probate Code. The power may include
16 individual instructions. Unless related to the principal by
17 blood, marriage or adoption, an agent may not be an owner,
18 operator or employee of a health-care institution at which the
19 principal is receiving care.

20 C. Unless otherwise specified in a power of
21 attorney for health care, the authority of an agent becomes
22 effective only upon a determination that the principal lacks
23 capacity and ceases to be effective upon a determination that
24 the principal has recovered capacity.

underscored material = new
[bracketed material] = delete

1 D. Unless otherwise specified in a written advance
 2 health-care directive, a determination that [~~an individual~~] a
 3 person lacks or has recovered capacity or that another
 4 condition exists that affects an individual instruction or the
 5 authority of an agent shall be made according to the provisions
 6 of Section [~~11 of the Uniform Health-Care Decisions Act~~] 24-7A-
 7 11 NMSA 1978.

8 E. An agent shall make a health-care decision in
 9 accordance with the principal's individual instructions, if
 10 any, and other wishes to the extent known to the agent.
 11 Otherwise, the agent shall make the decision in accordance with
 12 the agent's determination of the principal's best interest. In
 13 determining the principal's best interest, the agent shall
 14 consider the principal's personal values to the extent known to
 15 the agent.

16 F. A health-care decision made by an agent for a
 17 principal is effective without judicial approval.

18 G. A written advance health-care directive may
 19 include the [~~individual's~~] person's nomination of a guardian of
 20 the person. "

21 Section 2. Section 24-7A-5 NMSA 1978 (being Laws 1995,
 22 Chapter 182, Section 5, as amended) is amended to read:

23 "24-7A-5. DECISIONS BY SURROGATE. --

24 A. A surrogate may make a health-care decision for
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1 a patient who is an adult or emancipated minor if the patient
2 has been determined according to the provisions of Section
3 24-7A-11 NMSA 1978 to lack capacity and no agent or guardian
4 has been appointed or the agent or guardian is not reasonably
5 available.

6 B. An adult or emancipated minor, while having
7 capacity, may designate any individual to act as surrogate by
8 personally informing the supervising health-care provider. In
9 the absence of a designation or if the designee is not
10 reasonably available, any member of the following classes of
11 the patient's family who is reasonably available, in descending
12 order of priority, may act as surrogate:

13 (1) the spouse, unless legally separated or
14 unless there is a pending petition for annulment, divorce,
15 dissolution of marriage or legal separation;

16 (2) an individual in a long-term relationship
17 of indefinite duration with the patient in which the individual
18 has demonstrated an actual commitment to the patient similar to
19 the commitment of a spouse and in which the individual and the
20 patient consider themselves to be responsible for each other's
21 well-being;

22 (3) an adult child;

23 (4) a parent;

24 (5) an adult brother or sister; or
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1 (6) a grandparent.

2 C. If none of the individuals eligible to act as
 3 surrogate under Subsection B of this section is reasonably
 4 available, an adult who has exhibited special care and concern
 5 for the patient, who is familiar with the patient's personal
 6 values and who is reasonably available may act as surrogate. A
 7 nonprofit organization that provides state-funded guardianship
 8 services, or protection and advocacy services pursuant to
 9 federal law, to persons with mental illness or developmental
 10 disabilities may serve as a surrogate for a patient with such a
 11 disability if the organization is familiar with the patient's
 12 wishes, interests and values and agrees to serve as the
 13 surrogate.

14 D. A surrogate shall communicate his assumption of
 15 authority as promptly as practicable to the patient, to members
 16 of the patient's family specified in Subsection B of this
 17 section who can be readily contacted and to the supervising
 18 health-care provider.

19 E. If more than one member of a class [~~assumes~~]
 20 assume authority to act as surrogate and they do not agree on a
 21 health-care decision and the supervising health-care provider
 22 is so informed, the supervising health-care provider shall
 23 comply with the decision of a majority of the members of that
 24 class who have communicated their views to the provider. If
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1 the class is evenly divided concerning the health-care decision
2 and the supervising health-care provider is so informed, that
3 class and all individuals having lower priority are
4 disqualified from making the decision.

5 F. A surrogate shall make a health-care decision in
6 accordance with the patient's individual instructions, if any,
7 and other wishes to the extent made known to the surrogate
8 [~~otherwise, the surrogate shall make the decision in accordance~~
9 ~~with the surrogate's determination of the patient's best~~
10 ~~interest. In determining the patient's best interest, the~~
11 ~~surrogate shall consider the patient's personal values to the~~
12 ~~extent known to the surrogate]~~ by the patient. If the wishes
13 of a patient who has been determined to lack capacity are
14 unknown or unclear to the surrogate, the surrogate shall:

15 (1) make reasonable, thorough attempts to
16 communicate with the patient, using methods appropriate to the
17 patient's circumstances, in order to determine the patient's
18 wishes, interests and values;

19 (2) make a reasonable attempt to communicate
20 with the patient's primary caretaker, if any, and other readily
21 available family members or other individuals familiar with the
22 patient, to determine the patient's wishes, interests and
23 values when a patient's life reasonably appears to be at risk
24 but the patient is not in need of or receiving emergency
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1 treatment;

2 (3) make the health-care decision in
3 accordance with the surrogate's determination of the patient's
4 best interest, taking into consideration the wishes, interests
5 and values of the patient whether expressed directly by the
6 patient, or as reported by such other knowledgeable sources;
7 and

8 (4) upon request of the health-care provider,
9 describe the steps taken to obtain information pursuant to the
10 provisions of this subsection.

11 G. A health-care decision made by a surrogate for a
12 patient shall not be made solely on the basis of the patient's
13 preexisting physical or medical condition or preexisting or
14 projected disability.

15 H. A health-care decision made by a surrogate for a
16 patient is effective without judicial approval.

17 I. A patient, at any time, may disqualify any
18 person, including a member of the patient's family, from acting
19 as the patient's surrogate by a signed writing or by personally
20 informing a health-care provider of the disqualification. A
21 health-care provider who is informed by the patient of a
22 disqualification shall promptly communicate the fact of
23 disqualification to the supervising health-care provider and to
24 any health-care institution at which the patient is receiving
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1 care.

2 J. Unless related to the patient by blood, marriage
3 or adoption, a surrogate may not be an owner, operator or
4 employee of a health-care institution at which the patient is
5 receiving care.

6 K. A supervising health-care provider may require
7 an individual claiming the right to act as surrogate for a
8 patient to provide a written declaration under penalty of
9 perjury stating facts and circumstances reasonably sufficient
10 to establish the claimed authority."

11 Section 3. Section 24-7A-6.1 NMSA 1978 (being Laws 1997,
12 Chapter 168, Section 13) is amended to read:

13 "24-7A-6.1. DECISIONS FOR UNEMANCIPATED MINORS. --

14 A. Except as otherwise provided by law, a parent or
15 guardian of an unemancipated minor may make that minor's
16 health-care decisions.

17 B. A parent or guardian of an unemancipated minor
18 shall have the authority to withhold or withdraw life-
19 sustaining treatment for the unemancipated minor, subject to
20 the provisions of this section and the standards for surrogate
21 decision making for adults provided for in the Uniform Health-
22 Care Decisions Act.

23 C. Subject to the provisions of Subsection B of
24 this section, if an unemancipated minor has capacity sufficient
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1 to understand the nature of that unemancipated minor's medical
 2 condition, the risks and benefits of treatment and the
 3 contemplated decision to withhold or withdraw life-sustaining
 4 treatment, that unemancipated minor shall have the authority to
 5 withhold or withdraw life-sustaining treatment.

6 D. For purposes of Subsection C of this section, a
 7 determination of the mental and emotional capacity of an
 8 unemancipated minor shall be determined by two qualified
 9 health-care professionals, one of whom shall be the
 10 unemancipated minor's primary physician or, at the request of
 11 the minor or the minor's parent or guardian, another qualified
 12 health-care professional with personal knowledge of and
 13 experience with the minor, if reasonably available, and the
 14 other of whom shall be a physician that works with
 15 unemancipated minors of the minor's age in the ordinary course
 16 of that physician's health-care practice. If the unemancipated
 17 minor lacks capacity due to mental illness or developmental
 18 disability, one of the qualified health-care professionals
 19 shall be a person ~~[whose]~~ with training and expertise ~~[aid in~~
 20 ~~the assessment of functional impairment]~~ in mental illness or
 21 developmental disability, as applicable. Nothing in this
 22 subsection shall be construed to require a health-care
 23 institution to permit a health-care professional to provide
 24 health-care services for or within the institution if the
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1 health-care professional is not otherwise credentialed or
2 authorized to do so.

3 E. If the unemancipated minor's primary physician
4 has reason to believe that a parent or guardian of an
5 unemancipated minor, including a non-custodial parent, has not
6 been informed of a decision to withhold or withdraw life-
7 sustaining treatment, the primary physician shall make
8 reasonable efforts to determine if the uninformed parent or
9 guardian has maintained substantial and continuous contact with
10 the unemancipated minor and, if so, shall make reasonable
11 efforts to notify that parent or guardian before implementing a
12 decision.

13 F. If there is disagreement regarding the decision
14 to withhold or withdraw life-sustaining treatment for an
15 unemancipated minor, the provisions of Section 24-7A-11 NMSA
16 1978 shall apply.

17 G. For purposes of this section, "unemancipated
18 minor" means a person at or under the age of fifteen."

19 Section 4. Section 24-7A-11 NMSA 1978 (being Laws 1995,
20 Chapter 182, Section 11, as amended) is amended to read:

21 "24-7A-11. CAPACITY. --

22 A. The Uniform Health-Care Decisions Act does not
23 affect the right of an individual to make health-care decisions
24 while having capacity to do so.

1 B. An individual is presumed to have capacity to
2 make a health-care decision, to give or revoke an advance
3 health-care directive and to designate a surrogate.

4 C. Unless otherwise specified in a written advance
5 health-care directive, a determination that an individual lacks
6 or has recovered capacity or that another condition exists that
7 affects an individual instruction or the authority of an agent
8 shall be made by two qualified health-care professionals, one
9 of whom shall be the individual's primary physician or, at the
10 request of the individual or the individual's guardian, another
11 qualified health-care professional with personal knowledge of
12 and experience with the individual, if reasonably available.

13 At least one of the two qualified health-care professionals
14 shall be a physician. If the lack of capacity is determined to
15 exist because of mental illness or developmental disability,
16 one of the qualified health-care professionals shall be a
17 person ~~[whose]~~ with training and expertise ~~[aid in the~~
18 ~~assessment of functional impairment]~~ in mental illness or
19 developmental disability, as applicable. Nothing in this
20 subsection shall be construed to require a health-care
21 institution to permit a health-care professional to provide
22 health-care services for or within the institution if the
23 health-care professional is not otherwise credentialed or
24 authorized to do so.

1 D. An individual shall not be determined to lack
2 capacity solely on the basis that the individual chooses not to
3 accept the treatment recommended by a health-care provider.

4 E. An individual, at any time, may challenge a
5 determination that the individual lacks capacity by a signed
6 writing or by personally informing a health-care provider of
7 the challenge. A health-care provider who is informed by the
8 individual of a challenge shall promptly communicate the fact
9 of the challenge to the supervising health-care provider and to
10 any health-care institution at which the individual is
11 receiving care. Such a challenge shall prevail unless
12 otherwise ordered by the court in a proceeding brought pursuant
13 to the provisions of Section 24-7A-14 NMSA 1978.

14 F. A determination of lack of capacity under the
15 Uniform Health-Care Decisions Act shall not be evidence of
16 incapacity under the provisions of Article 5 of the Uniform
17 Probate Code. "

18 Section 5. Section 24-7A-14 NMSA 1978 (being Laws 1995,
19 Chapter 182, Section 14, as amended) is amended to read:

20 "24-7A-14. JUDICIAL RELIEF. --

21 A. On petition of a patient, the patient's agent,
22 guardian or surrogate, a health-care provider or health-care
23 institution involved with the patient's care or an individual
24 described in Subsection B or C of Section 24-7A-5 NMSA 1978,
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1 the district court may enjoin or direct a health-care decision
2 or order other equitable relief. A proceeding under this
3 section is governed by the Rules of Civil Procedure for the
4 District Courts.

5 B. If a guardian ad litem is appointed for a
6 patient by the court, the guardian ad litem shall:

7 (1) meet with and interview the patient prior
8 to the hearing;

9 (2) communicate with individuals involved with
10 or knowledgeable about the patient, such as health-care
11 professionals, relatives, caretakers or others;

12 (3) examine whether procedures called for
13 under the Uniform Health-Care Decisions Act have been followed;

14 (4) represent the patient's wishes, if known;
15 and

16 (5) if the patient's wishes are unclear or
17 unknown, represent the patient's best interest.

18 C. No causes of action, tort claims, lawsuits or
19 civil actions of any kind may be brought against any physician
20 or practitioner acting in good faith and in accordance with
21 generally accepted health-care standards applicable to the
22 health-care provider or institution as a result of that
23 physician's or practitioner's compliance with any portion of
24 this act, or as a result of acting on the recommendation of a
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1 surrogate under the provisions of the Uniform Health-Care
2 Decisions Act. "