

1 State of Arkansas  
2 93rd General Assembly  
3 Regular Session, 2021  
4

# A Bill

HOUSE BILL 1685

5 By: Representative M. Gray  
6 By: Senator B. Davis  
7

## For An Act To Be Entitled

9 AN ACT TO AMEND THE ARKANSAS HEALTHCARE DECISIONS  
10 ACT; AND FOR OTHER PURPOSES.  
11

## Subtitle

12  
13 TO AMEND THE ARKANSAS HEALTHCARE  
14 DECISIONS ACT.  
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18 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
19

20 SECTION 1. Arkansas Code §§ 20-6-105 – 20-6-107 are amended to read as  
21 follows:

22 20-6-105. Designation of surrogate.

23 (a)(1) An adult, married minor, or emancipated minor may designate an  
24 individual to act as surrogate by personally informing the supervising  
25 healthcare provider.

26 (2) The designation may be oral or written.

27 (b) A surrogate may make a healthcare decision for a principal who is  
28 an adult or emancipated minor only if:

29 (1) The principal has been determined by a licensed physician to  
30 lack capacity; and

31 (2) An agent or guardian with the authority to make healthcare  
32 or medical decisions about the principal has not been appointed or the agent  
33 or guardian appointed to make healthcare or medical decisions about the  
34 principal is not reasonably available.

35 (c)(1) The supervising healthcare provider shall identify a surrogate  
36 for the principal and document the appointment in the clinical record of the



1 institution or institutions at which the principal is receiving health care  
 2 if the principal:

3 (A) Lacks capacity;

4 (B) Has not appointed an agent or the agent is not  
 5 reasonably available;

6 (C) Has not designated a surrogate or the surrogate is not  
 7 reasonably available; and

8 (D) Does not have a guardian with healthcare or medical  
 9 decision-making authority or the guardian with healthcare or medical  
 10 decision-making authority is not reasonably available.

11 (2)(A) The principal's surrogate shall be an adult who:

12 (i) Has exhibited special care and concern for the  
 13 principal;

14 (ii) Is familiar with the principal's personal  
 15 values;

16 (iii) Is reasonably available; and

17 (iv) Is willing to serve.

18 (B) A person who is the subject of a protective order or  
 19 other court order that directs that person to avoid contact with the  
 20 principal is not eligible to serve as the principal's surrogate.

21 (3) In identifying the person best qualified to serve as the  
 22 surrogate for the principal, the supervising healthcare provider:

23 (A) Shall consider the proposed surrogate's:

24 (i) Ability to make decisions either in accordance  
 25 with the known wishes of the principal or in accordance with the principal's  
 26 best interests;

27 (ii) Frequency of contact with the principal before  
 28 and during the incapacitating illness; and

29 (iii) Demonstrated care and concern; and

30 (B) May consider the proposed surrogate's:

31 (i) Availability to visit the principal during his  
 32 or her illness; and

33 (ii) Availability to fully participate in the  
 34 decision-making process.

35 (4) When identifying the person best qualified to serve as the  
 36 surrogate for the principal, the supervising healthcare provider may proceed

1 in order of descending preference for service as a surrogate to:

2 (A) The principal's spouse, unless legally separated;

3 (B) The principal's adult child;

4 (C) The principal's parent;

5 (D) The principal's adult sibling;

6 (E) Any other adult relative of the principal; ~~or~~

7 (F) A representative of the Adult Protective Services Unit  
 8 of the Department of Human Services; or

9 (G) Any other adult person who satisfies the requirements  
 10 of subdivision (c)(2) of this section.

11 (5) If none of the individuals eligible to act as a surrogate  
 12 under this subsection are reasonably available and informed consent would  
 13 typically be sought from the principal, the supervising healthcare provider  
 14 may make healthcare decisions for the principal after the supervising  
 15 healthcare provider:

16 (A) Consults with and obtains the recommendations of an  
 17 institution's ethics officers or ethics committee; or

18 (B) Obtains concurrence from a second ~~physician~~  
 19 supervising healthcare provider who is:

20 (i) Not directly involved in the principal's health  
 21 care;

22 (ii) Does not serve in a capacity of decision  
 23 making, influence, or responsibility over the designated ~~physician~~  
 24 supervising healthcare provider; and

25 (iii) Does not serve in a capacity under the  
 26 authority of the designated physician's decision making, influence, or  
 27 responsibility.

28 (6)(A) In the event of a challenge to the identification of the  
 29 surrogate or the authority of the surrogate to act, it is a rebuttable  
 30 presumption that the selection of the surrogate was valid.

31 (B) A person who challenges the selection of the surrogate  
 32 has the burden of proving the invalidity of that selection by a preponderance  
 33 of the evidence.

34 (d)(1) Except as provided in subdivision (d)(2) of this section:

35 (A) Neither the treating healthcare provider nor an  
 36 employee of the treating healthcare provider, nor an operator of a healthcare

1 institution, nor an employee of an operator of a healthcare institution may  
 2 be designated as a surrogate; and

3 (B) A healthcare provider or employee of a healthcare  
 4 provider may not act as a surrogate if the healthcare provider becomes the  
 5 principal's treating healthcare provider.

6 (2) An employee of the treating healthcare provider or an  
 7 employee of an operator of a healthcare institution may be designated as a  
 8 surrogate if:

9 (A) The employee so designated is a relative of the  
 10 principal by blood, marriage, or adoption; and

11 (B) The other requirements of this section are satisfied.

12 (e) A healthcare provider may require an individual claiming the right  
 13 to act as surrogate for a principal to provide a written declaration under  
 14 penalty of perjury stating facts and circumstances reasonably sufficient to  
 15 establish the claimed authority.

16  
 17 20-6-106. Authority of surrogate.

18 (a)(1) A surrogate shall make a healthcare decision in accordance with  
 19 the principal's individual instructions, if any, and other wishes to the  
 20 extent known to the surrogate.

21 (2)(A) Otherwise, the surrogate shall make the decision in  
 22 accordance with the surrogate's determination of the principal's best  
 23 interest.

24 (B) In determining the principal's best interest, the  
 25 surrogate shall consider the principal's personal values to the extent known  
 26 to the surrogate or agent.

27 (b) A surrogate who has not been designated by the principal may make  
 28 all healthcare decisions for the principal that the principal could make on  
 29 the principal's own behalf, except that artificial nutrition and hydration  
 30 may be withheld or withdrawn for a principal upon a healthcare decision of  
 31 the surrogate ~~only~~ if the healthcare decision:

32 ~~(1) The action is authorized by the a living will or other~~  
 33 ~~written advance directive; or~~

34 ~~(2) The supervising healthcare provider and a second independent~~  
 35 ~~physician certify in the principal's current clinical records that:~~

36 ~~(A) The provision or continuation of artificial nutrition~~

1 ~~or hydration is merely prolonging the act of dying; and~~

2 ~~(B) The principal is highly unlikely to regain capacity to~~  
 3 ~~make medical decisions.~~

4 (1) Is consistent with the principal's advance directive for  
 5 nutrition and hydration; or

6 (2) Is inconsistent with the principal's advance directive for  
 7 nutrition and hydration and the individual who is authorized to make  
 8 healthcare decisions for the principal provides evidence that the supervising  
 9 healthcare provider or ethics board corroborates that the deviation from the  
 10 express terms of nutrition and hydration in the advance directive is in the  
 11 principal's best interest or otherwise avoids prolongation of death.

12 (c) A healthcare decision made by a surrogate or agent for a principal  
 13 is effective without judicial approval.

14  
 15 20-6-107. Requirement of guardian to comply with principal's  
 16 individual instruction.

17 (a) Absent a court order to the contrary, a guardian with healthcare  
 18 or medical decision-making authority, surrogate, healthcare proxy, durable  
 19 power of attorney for health care, or supervising healthcare provider shall  
 20 comply with the principal's individual instructions and shall not revoke the  
 21 principal's advance directive except as provided in § 20-6-106 and § 20-6-  
 22 109.

23 (b) Except as provided in § 28-65-102, a healthcare decision made by a  
 24 guardian with healthcare or medical decision-making authority for the  
 25 principal is effective without judicial approval.

26  
 27 SECTION 2. Arkansas Code § 20-6-109(a), concerning compliance by a  
 28 healthcare provider or institution under the Arkansas Healthcare Decisions  
 29 Act, is amended to read as follows:

30 (a) Except as provided in subsections (b)-(d) of this section, a  
 31 healthcare provider or institution providing care to a principal shall comply  
 32 with:

33 (1) An individual instruction of the principal and with a  
 34 reasonable interpretation of that instruction by a person authorized to make  
 35 healthcare decisions for the principal; and

36 (2) A healthcare decision for the principal made by a person

1 authorized to make healthcare decisions for the principal to the same extent  
 2 as if the decision had been made by the principal while having capacity if  
 3 the healthcare decision is:

4 (A) Consistent with the principal's advance directive; or

5 (B) Inconsistent with the principal's advance directive  
 6 and the individual authorized to make healthcare decisions for the principal  
 7 provides evidence that the supervising healthcare provider or ethics board  
 8 corroborates that the deviation from the express terms of the advance  
 9 directive is in the principal's best interest.

10  
 11 SECTION 3. Arkansas Code § 20-6-111(b), concerning liability under the  
 12 Arkansas Healthcare Decisions Act, is amended to read as follows:

13 (b) ~~A~~ A healthcare provider, an ethics board member, or any  
 14 individual acting as an agent or surrogate under this subchapter is not  
 15 subject to civil or criminal liability or to discipline for unprofessional  
 16 conduct for healthcare decisions made in good faith.

17  
 18 SECTION 4. Arkansas Code § 20-6-112 is amended to read as follows:  
 19 20-6-112. Presumption of capacity.

20 (a) This subchapter does not affect the right of an individual to make  
 21 healthcare decisions while having capacity to do so.

22 (b) ~~Unless an individual has been determined to lack capacity under~~  
 23 § 20-6-108 or other applicable state law, an individual is presumed to have  
 24 capacity to make a healthcare decision, to give or revoke an advance  
 25 directive, and to designate or disqualify a surrogate.

26  
 27 SECTION 5. Arkansas Code § 20-6-115(b), concerning court jurisdiction  
 28 under the Arkansas Healthcare Decisions Act, is amended to read as follows:

29 (b)(1) A proceeding under this section shall be expedited on the  
 30 court's civil dockets and shall be addressed by the court within three (3)  
 31 business days.

32 (2) If the court does not act within three (3) business days,  
 33 the petition for relief shall be deemed granted.