

Stricken language would be deleted from and underlined language would be added to present law.

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

As Engrossed: H4/5/21

# 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.  
15  
16  
17

18 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
19

20 *SECTION 1. Arkansas Code § 20-6-102(19), concerning the definition of*  
21 *"principal" under the Arkansas Healthcare Decisions Act, is amended to read*  
22 *as follows:*

23 *(19) "Principal" means an individual who grants authority to*  
24 *another individual under this subchapter or for whom a surrogate is*  
25 *designated under § 20-6-105;*  
26

27 *SECTION 2. Arkansas Code § 20-6-102(24), concerning the definition of*  
28 *"surrogate" under the Arkansas Healthcare Decisions Act, is amended to read*  
29 *as follows:*

30 *(24)(A) "Surrogate" means an individual, other than a*  
31 *principal's agent or guardian, authorized under this subchapter to make a*  
32 *healthcare decision for the principal.*

33 *(B) "Surrogate" includes without limitation a supervising*  
34 *healthcare provider designated under § 20-6-105; and*  
35

36 *SECTION 3. Arkansas Code §§ 20-6-105 – 20-6-107 are amended to read as*



1 follows:

2 20-6-105. Designation of surrogate.

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

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

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

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

11 (2) An agent or guardian with the authority to make healthcare  
12 decisions about the principal has not been appointed or the agent or guardian  
13 with the authority to make healthcare decisions about the principal is not  
14 reasonably available.

15 (c)(1) The supervising healthcare provider shall identify a surrogate  
16 for the principal and document the appointment in the clinical record of the  
17 institution or institutions at which the principal is receiving health care  
18 if the principal:

19 (A) Lacks capacity;

20 (B) Has not appointed an agent or the agent is not  
21 reasonably available;

22 (C) Has not designated a surrogate or the surrogate is not  
23 reasonably available; and

24 (D) Does not have a guardian with healthcare decision-  
25 making authority or the guardian with healthcare decision-making authority is  
26 not reasonably available, as defined in § 20-6-102(21).

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

28 (i) Has exhibited special care and concern for the  
29 principal;

30 (ii) Is familiar with the principal's personal  
31 values;

32 (iii) Is reasonably available; and

33 (iv) Is willing to serve.

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

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

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

4 (i) Ability to make decisions either in accordance  
5 with the known wishes of the principal or in accordance with the principal's  
6 best interests;

7 (ii) Frequency of contact with the principal before  
8 and during the incapacitating illness; and

9 (iii) Demonstrated care and concern; and

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

11 (i) Availability to visit the principal during his  
12 or her illness; and

13 (ii) Availability to fully participate in the  
14 decision-making process.

15 (4) When identifying the person best qualified to serve as the  
16 surrogate for the principal, the supervising healthcare provider may proceed  
17 in order of descending preference for service as a surrogate to:

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

19 (B) The principal's adult child;

20 (C) The principal's parent;

21 (D) The principal's adult sibling;

22 (E) *Any other adult relative of the principal; or*

23 (F) *Any other adult person who satisfies the requirements*  
24 *of subdivision (c)(2) of this section.*

25 (5) If none of the individuals eligible to act as a surrogate  
26 under this subsection are reasonably available and informed consent would  
27 typically be sought from the principal, the supervising healthcare provider  
28 may make healthcare decisions for the principal after the supervising  
29 healthcare provider:

30 (A) *Consults with and obtains the recommendations of ~~an~~ a*  
31 *healthcare institution's ethics officers or ethics committee; or*

32 (B) *Obtains concurrence from a ~~second~~ physician, advanced*  
33 *practice registered nurse, or physician assistant who is:*

34 *(i) Not the supervising healthcare provider;*

35 *~~(i)~~(ii) Not directly involved in the principal's*  
36 *health care;*

1                   ~~(ii)~~(iii) Does not serve in a capacity of decision  
 2 making, influence, or responsibility over the designated ~~physician~~  
 3 supervising healthcare provider; and

4                   ~~(iii)~~(iv) Does not serve in a capacity under the  
 5 authority of the designated ~~physician's~~ supervising healthcare provider's  
 6 decision making, influence, or responsibility.

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

10                   (B) A person who challenges the selection of the surrogate  
 11 has the burden of proving the invalidity of that selection by a preponderance  
 12 of the evidence.

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

14                   (A) Neither the treating healthcare provider nor an  
 15 employee of the treating healthcare provider, nor an operator of a healthcare  
 16 institution, nor an employee of an operator of a healthcare institution may  
 17 be designated as a surrogate; and

18                   (B) A healthcare provider or employee of a healthcare  
 19 provider may not act as a surrogate if the healthcare provider becomes the  
 20 principal's treating healthcare provider.

21                   (2) An employee of the treating healthcare provider or an  
 22 employee of an operator of a healthcare institution may be designated as a  
 23 surrogate if:

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

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

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

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 32                   20-6-106. Authority of surrogate.

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

36                   (2)(A) ~~Otherwise~~ In the absence of individual instructions or

1 other information, the surrogate shall make the decision in accordance with  
2 the surrogate's determination of the principal's best interest.

3 (B) In determining the principal's best interest, the  
4 surrogate shall consider the principal's personal values to the extent known  
5 to the surrogate or agent.

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

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

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

15 ~~(A) The provision or continuation of artificial nutrition~~  
16 ~~or hydration is merely prolonging the act of dying; and~~

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

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

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22 20-6-107. Requirement of guardian, agent, and surrogate to comply with  
23 principal's individual instruction.

24 (a)(1) Absent a court order to the contrary, a guardian shall comply  
25 with the principal's individual instructions and shall not revoke the  
26 principal's advance directive.

27 ~~(b)(2)~~ Except as provided in § 28-65-102, a healthcare decision made  
28 by a guardian for the principal is effective without judicial approval.

29 (b) An agent or surrogate shall not make a healthcare decision that is  
30 contrary to the express terms of the principal's written advance directive  
31 unless:

32 (1) A supervising healthcare provider who is not acting as a  
33 surrogate and a physician, advanced practice registered nurse, or physician  
34 assistant who is not the supervising healthcare provider certify in the  
35 principal's current clinical records that the principal is highly unlikely to  
36 regain capacity to make healthcare decisions; and

1                   (2) A determination that the particular healthcare decision is  
2 in the principal's best interest or is otherwise appropriate to avoid care  
3 that serves only to prolong the patient's natural death is agreed to by the  
4 supervising healthcare provider and:

5                   (A) A healthcare institution's ethics officer or ethics  
6 committee; or

7                   (B) A physician who is not the supervising healthcare  
8 provider or a treating healthcare provider.

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10               SECTION 4. Arkansas Code § 20-6-111(b), concerning liability under the  
11 Arkansas Healthcare Decisions Act, is amended to read as follows:

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

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17               SECTION 5. Arkansas Code § 20-6-112 is amended to read as follows:  
18               20-6-112. Presumption of capacity.

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

21               (b) ~~A~~ Unless an individual has been determined to permanently lack  
22 capacity under this subchapter or other applicable state law, an individual  
23 is presumed to have capacity to make a healthcare decision, to give or revoke  
24 an advance directive, and to designate or disqualify a surrogate.

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

28               (b) A proceeding under this section shall be expedited on the court's  
29 civil dockets and shall be addressed by the court within three (3) business  
30 days after service of process on all necessary parties is complete.

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32   /s/M. Gray  
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