

# SENATE BILL REPORT

## ESHB 2541

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As of February 22, 2018

**Title:** An act relating to expanding the classes of persons who may provide informed consent for certain patients who are not competent to consent.

**Brief Description:** Expanding the classes of persons who may provide informed consent for certain patients who are not competent to consent.

**Sponsors:** House Committee on Judiciary (originally sponsored by Representatives Kilduff, Rodne and Eslick).

**Brief History:** Passed House: 2/12/18, 84-14.

**Committee Activity:** Law & Justice: 2/19/18.

### Brief Summary of Bill

- Expands a list of designated persons authorized to provide informed consent for health care treatment to incapacitated persons.
- Excludes a nursing home, long term care facility, physician, or persons receiving compensation who provide care.
- Provides limited immunity to health care providers or facilities that render health care in reliance on a declaration of an adult providing informed consent.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Staff:** Tim Ford (786-7423)

**Background:** Informed Consent for Health Care Treatment. Prior to rendering treatment, a physician or other health care provider must obtain the informed consent of a patient or a patient's authorized representative. Informed consent requires that a consent form be in language which the patient can reasonably be expected to understand which describes:

- the nature of the treatment;
- the anticipated results of the treatment;
- possible alternative forms of treatment; and

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- the risks, complications and benefits related to the treatment, its alternatives, and including non-treatment.

A consent form that provides this information, when signed by the patient or authorized representative, constitutes prima facie evidence of informed consent. Prima facie evidence are facts presumed to be true unless later disproved or rebutted by other evidence. The patient then has the burden of rebutting this presumption by a preponderance of the evidence.

Liability for Failure to Obtain Informed Consent. If a health care provider fails to obtain informed consent, the provider may be subject to liability for injuries resulting from health care treatment, even if the provider complies with the recognized standard of care. If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, the patient's consent to required treatment will be implied.

Legal Incapacity. Under Washington State's guardianship law, a person may be deemed incapacitated when a superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety. A determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate. For purposes of giving informed consent for health care treatment an incompetent person is any person who is incompetent by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity. Under Washington State's guardianship law, an incompetent, disabled, or not legally competent, person is interpreted to mean an incapacitated person.

Persons Authorized to Provide Informed Consent for Incapacitated Persons. If a patient is determined to be incapacitated or incompetent to make health care decisions, an authorized representative may provide informed consent. Authorized persons are designated in order of priority by statute as follows:

- a guardian appointed by a superior court;
- a person with durable power of attorney to make health care decisions;
- a spouse or state registered domestic partner;
- adult children;
- parents; and
- adult siblings.

The authority to provide informed consent does not apply for incapacitated persons who are also minors.

No person may make health care decisions for the incompetent or incapacitated patient if a person in a higher priority can be located. A person designated to give informed consent must first determine in good faith that the patient, if competent, would consent to the proposed health care. If such a determination cannot be made, the decision to consent to the proposed health care may be made only after determining that it is in the patient's best interest.

**Summary of Bill:** The list of statutorily authorized persons who may provide informed consent for health care decisions for an incapacitated adult is expanded to include, in order of priority:

- adult grandchildren who are familiar with the patient;
- adult nieces and nephews who are familiar with the patient;
- adult aunts and uncles who are familiar with the patient; or
- an adult who: (1) has exhibited care and concern for the patient; (2) is familiar with the patient's personal values; (3) is reasonably available to make health care decisions; and (4) who is not a member of the patient's: medical or care team; health care facility; nursing home; long term care facility; or other person receiving compensation for providing care'.

An adult in the last order of priority must sign a declaration under penalty of perjury effective for up to six months, attesting that they are not aware of a person in a higher priority class available and willing to provide informed consent.

The health care provider may, but is not required to, rely on a signed declaration provided by an adult in the last order of priority. A health care provider or facility who relies upon the declaration is immune from liability in any civil or criminal lawsuit, professional, or disciplinary action.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: Our informed consent laws are a critical avenue for incapacitated individuals to get the care they need. My dad had to make some critical end of life decisions for my mom. It is not an overstatement to talk about this in critical terms. Our state laws are restrictive for who can make these health care decisions for incapacitated persons. Thirty states take a wider view and allow more relatives and non-relatives to make informed consent decisions. This bill expands the number of relatives who can make these decisions, and allows non-relatives but with limitations and protections. This is a balanced approach.

Patients are often unable to speak for themselves. Unfortunately sometimes there is no-one available on the authorized list of persons in the RCW. Sometimes we have to go through a lengthy legal process to assign a guardianship to make these decisions. Guardianship cases take extra time and cost about \$6,000 just to appoint someone to provide informed consent. We could have started treatment earlier for many persons in need of treatment. Expanding the list of persons authorized to make informed care decisions will save time and money.

**Persons Testifying:** PRO: Representative Christine Kilduff, Prime Sponsor; Katie Kolan, Washington State Medical Association; Norma Cole, Harborview Medical Center; Jennifer

Burkhardt, Olympic Medical Center; Lisa Thatcher, Washington State Hospital Association;  
David Lord, Disability Rights Washington.

**Persons Signed In To Testify But Not Testifying:** No one.