

HOUSE BILL REPORT

ESSB 5370

As Passed House - Amended:

April 8, 2021

Title: An act relating to updating mental health advance directive laws.

Brief Description: Updating mental health advance directive laws.

Sponsors: Senate Committee on Behavioral Health Subcommittee to Health & Long Term Care (originally sponsored by Senators Keiser, Dhingra, Saldaña and Wilson, C.).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 3/23/21, 3/24/21 [DP].

Floor Activity:

Passed House: 4/8/21, 79-19.

Brief Summary of Engrossed Substitute Bill (As Amended By House)

- Updates mental health advance directive provisions to include substance use and co-occurring disorders.
- Permits a notary public to take acknowledgment of a mental health advance directive.
- Amends the form used to create a mental health advance directive.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass. Signed by 12 members: Representatives Hansen, Chair; Simmons, Vice Chair; Davis, Entenman, Goodman, Kirby, Orwall, Peterson, Thai, Valdez, Walen and Ybarra.

Minority Report: Do not pass. Signed by 2 members: Representatives Walsh, Ranking

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Minority Member; Klippert.

Minority Report: Without recommendation. Signed by 2 members: Representatives Gilday, Assistant Ranking Minority Member; Graham, Assistant Ranking Minority Member.

Staff: Ingrid Lewis (786-7289).

Background:

Any person with capacity may create a mental health advance directive expressing his or her preferences and instructions about mental health treatment in the event of incapacity. The directive must be respected by medical and mental health professionals, guardians, agents, attorneys-in-fact, and other surrogate decision makers acting on behalf of the document's creator.

A directive may include one or more of the following provisions:

- preferences and instructions for mental health treatment;
- consent, or refusal to consent to specific types of treatment or admission and retention for inpatient treatment;
- descriptions of situations that may cause a mental health crisis;
- suggestions for alternative responses that supplement or are in lieu of direct mental health treatment; and
- appointment of an agent to make a mental health treatment decision.

A directive must be in writing, dated, signed, and witnessed by two people and must substantially follow the statutory form. There are limitations on who may witness a directive or serve as an agent that are focused on excluding persons with real or potential conflicts of interest.

Capacity.

A person with capacity is a person who can give informed consent to medical treatment. A person is presumed to have capacity to create or revoke a directive. Generally, persons under the age of 18 cannot provide consent for their own medical procedures. There are several exceptions, one of which is if a minor is aged 13 or older and seeking behavioral health treatment.

A person, the person's agent, a mental health professional, or a health care provider may seek a determination of a person's capacity. Incapacity is determined by either: (1) a court; (2) one mental health professional and one health care provider; or (3) two health care providers. At least one mental health professional or health care provider must personally examine the person before making a capacity determination.

Summary of Amended Bill:

A mental health advance directive may be acknowledged before a notary public or other individual authorized by law to take acknowledgements instead of two witnesses.

If a spouse or domestic partner has been named as an agent, that authority is terminated upon the filing of a dissolution or annulment action of the marriage to the principal or for their legal separation.

Changes are made to the statutory form used to create a mental health advance directive including, but not limited to: streamlining and simplifying certain language used in the body of the form; adding a section for the principal to describe what works for the principal and the principal's diagnoses, medications, and best approach to treatment; removing language that provides an option for a principal to retain a spouse as an agent in the event of legal separation or dissolution; and granting power to the agent to act as the person's personal representative for the purpose of the Health Insurance Portability and Accountability Act.

A substance use disorder professional may make a capacity determination instead of a mental health professional.

A person who is at least 13 years of age but under the age of 18 is considered to have capacity for the purpose of executing a mental health advance directive if the person is able to demonstrate that they are capable of making informed decisions related to behavioral health care. A mental health advance directive does not restrict the right of a parent to seek parent-initiated treatment pursuant to involuntary treatment laws for minors.

As it relates to mental health advance directives, references to mental health are changed to behavioral health. Less restrictive alternative treatment must include consultation about the formation of a mental health advance directive.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Mental health directives are a critical tool to make sure the preferences of people with disabilities are respected when experiencing a behavioral crisis. Washington has one of the strongest mental health directive laws in the country, but it is not being used. Providers do not understand what they are, and individuals and families do not understand

what needs to be done to execute them. It is a resource that should be used more frequently and more effectively, but many of the terms and language are outdated. The statutory form is overly legalistic due to the numerous guardrails. It has become too difficult for people to use.

Mental health advance directives can hasten recovery and help individuals exit hospital situations earlier because they have outlined what treatment works best for them. Directives reduce trauma and reduce costs to the state and other entities.

This bill will renew interest in mental health advance directives with peers, hospitals, and the service system and will encourage its use and compliance with stated provisions. The form is now more accessible.

(Opposed) None.

Persons Testifying: Senator Keiser, prime sponsor; Lisa Brodoff, Seattle University School of Law; Melanie Smith, National Alliance on Mental Illness Washington; and Darya Farivar, Disability Rights Washington.

Persons Signed In To Testify But Not Testifying: None.