SENATE BILL REPORT
ESHB 1197

As of March 23, 2021

Title: An act relating to health care decisions made by a designated person.

Brief Description: Concerning health care decisions made by a designated person.

Sponsors: House Committee on Civil Rights & Judiciary (originally sponsored by Representatives Riccelli, Tharinger, Cody, Pollet and Harris-Talley).

Brief History: Passed House: 3/4/21, 92-6.
Committee Activity: Law & Justice: 3/23/21.

Brief Summary of Bill

- Allows a patient to designate a person to make health care decisions on their behalf during times when they are incompetent to make health care decisions, who must be given priority to make a surrogate health care decision for the patient over members of the patient's family.
- Provides liability protection to a health care provider who relies on a person who has been designated to make a health care decision on behalf of an incompetent individual.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Kevin Black (786-7747)

Background: In Washington, a person has the right to make their own health care decisions. Under the principle of informed consent, a patient must be provided all the information necessary to make a knowledgeable decision regarding their health care. If a patient is determined to be incapacitated or incompetent to make health care decisions on their own behalf, a surrogate decision-maker may speak for them, unless the patient indicates otherwise. The following persons, in order of priority, may consent to health care

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decisions on behalf of a patient who is incapacitated or incompetent to make a health care decision:

- an appointed guardian;
- a person with durable power of attorney to make health care decisions;
- a spouse or state registered domestic partner;
- adult children;
- parents;
- adult siblings; and
- an unrelated adult who has exhibited care and concern for the patient; is familiar with the wishes and values of the patient; is reasonably available to make health care decisions; is not a member of the patient's medical or care team; does not receive compensation to provide care to the patient; attests that they do not have knowledge of a willing and available person in a higher priority class; and provides a declaration signed under penalty of perjury stating as such.

A health care provider seeking informed consent for a patient who is incapacitated or incompetent is required to make reasonable efforts to secure consent from a surrogate party in descending order. No person may make health care decisions for the incompetent patient if a person in a higher priority can be located. A health care provider's failure to obtain the appropriate consent may give rise to an action for negligence.

A person designated to give informed consent must first determine in good faith 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 it is in the patient's best interests.

Summary of Bill: A patient may designate a person to make health care decisions on their behalf while they are incompetent by orally or personally informing a physician, nurse practitioner, or physician assistant. The designated individual shall have priority as a surrogate decision maker above the incompetent person's undesignated spouse, children, or other family members, but after an appointed guardian or a person with durable power of attorney to make health care decisions for the person. The designated person must not be an employee of the medical facility where the person is receiving care.

A patient who has not been determined to be incapacitated and who is not subject to a guardianship that includes health care decision making is presumed to have capacity to designate a person to make a health care decision on their behalf, unless a health care provider reasonably determines the patient lacks capacity due to a demonstrated inability to understand and appreciate the nature and consequences of designating an individual to make health care decisions on their behalf due to a cognitive impairment. The physician, nurse practitioner, or physician assistant who receives the designation must document the designation in the patient's health care record, and the patient must sign the designation if the person is physically able to sign, or else may make the designation orally. The patient may revoke the designation at any time by creating a signed and dated revocation and

communicating the revocation to the attending physician, or by making a verbal expression of intent to revoke the designation. The attending physician must document the time, date, and place of the revocation.

A health care provider that relies on the consent of a designated person to provide health care is immune from suit an any action, civil or criminal, or from professional or other disciplinary action, unless the health care provider has actual knowledge the patient revoked the designation.

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: The best care at end of life is an issue of national importance. Only 35 percent of hospitalized adults have placed their advance wishes in writing. It is less prevalent among certain demographic groups, and among people with low trust in the health care system. Thousands came out to a discussion about this issue held in Spokane. The surrogate decision-maker hierarchy represents a good faith effort, but a significant number of people would choose a different person, such as an adult child instead of a spouse. This does not take the place of a full advance care directive, which would take precedence. I have been a passionate champion for advance directives since the 1980s. Eighteen states allow physicians to respect oral wishes, and thereby diminish family conflict. A person speaking from grief can override the real wishes of the patient. This is cost-effective and helps maintain self-determination and voice. Care decisions often need to be made in short order. Designation honors priorities, values, and treatment preferences, so having ways to ease the process is good. While a durable power of attorney is preferred, having this option would be helpful.

CON: We need to proceed carefully to protect a person's right to direct their own health care. This bill is flawed. It only covers informed consent, which is a relatively small concern compared to undue influence. Any attending health care worker could make this notation in the chart, when they might not have the appropriate knowledge or context to be aware of the family situation. The uniform law has better protections, because it requires the notation to be done by the supervising physician. The extended list of persons who are able to give informed consent sufficiently addresses this problem and provides safeguards. Designating a decision maker under this bill will cause patients to falsely believe that they do not need to execute a power of attorney. A designated surrogate decision-maker cannot participate in consent to placement in a facility or to withdrawal of life-sustaining treatment. End-of-life care is out of the scope. Health care providers may inappropriately rely on oral designations to make such decisions, exposing them to liability. Hospitals have

easily accessible forms and assistance for those who need to execute a power of attorney. There is not just one or two flaws with this bill. The exception prohibiting employees of a medical center from serving is not well crafted, and critical terms are not defined.

Persons Testifying: PRO: Representative Marcus Riccelli, Prime Sponsor; Ira Byock, Providence; Gregg VandeKieft, Providence St. Peter Hospital.

CON: Karen Boxx, Washington State Bar Association, Elder Law Section; Sage Graves, Washington State Bar Association, Elder Law Section.

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