

HOUSE BILL REPORT

SSB 5185

As Passed House - Amended:

April 5, 2021

Title: An act relating to capacity to provide informed consent for health care decisions.

Brief Description: Concerning capacity to provide informed consent for health care decisions.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Pedersen and Wilson, C.).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 3/16/21, 3/19/21 [DPA].

Floor Activity:

Passed House: 4/5/21, 97-1.

Brief Summary of Substitute Bill (As Amended By House)

- Establishes a rebuttable presumption that a person has the capacity to make health care decisions, if they are of age.
- Makes terminology changes to reflect changes made in the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass as amended. Signed by 17 members: Representatives Hansen, Chair; Simmons, Vice Chair; Walsh, Ranking Minority Member; Gilday, Assistant Ranking Minority Member; Graham, Assistant Ranking Minority Member; Abbarno, Davis, Entenman, Goodman, Kirby, Klippert, Orwall, Peterson, Thai, Valdez, Walen and Ybarra.

Staff: Ingrid Lewis (786-7289).

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.

Background:

In Washington a person has the right to make his or her 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 his or her health care. If a patient is determined to be incapacitated or incompetent to make health care decisions on their own behalf, a surrogate party may speak for him or her, unless the patient indicates otherwise. Authorization to provide consent proceeds according to a priority list, starting with an appointed guardian, to an individual to whom the person has given a durable power of attorney to make medical decisions on the person's behalf, and then proceeds through a list of family members and interested persons, such as spouse, children, and parents.

Generally, persons under the age of 18 cannot provide consent for their own medical procedures. There are several exceptions if the minor:

- is in need of emergency medical treatment;
- is seeking family planning services or pregnancy care;
- is an emancipated minor or married to someone at or above age 18;
- is age 15 or older and satisfies the court created "mature minor rule," meaning the minor has, based on a number of factors, demonstrated the maturity to provide consent for medical treatment;
- is age 14 or older and is seeking testing or treatment for sexually transmitted diseases;
- or
- is age 13 or older and seeking behavioral health treatment.

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 patient if a person in a higher priority can be located. A decision authorizing health care must be unanimous among all persons in the class, and may not be contradicted by any person authorized to make a decision who is of a higher class. 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 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 interests.

The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act.

The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act amended the informed consent laws in 2020 to remove the term "competent" and its definition as it applies to informed consent and guardianships, effective January 1, 2022, and replaces the term with "capacity."

Summary of Amended Bill:

A person who is of the age of consent to make a health care decision is presumed to have capacity. The presumption of capacity may be overcome if the health care provider reasonably determines the person lacks the capacity to make a particular health care decision due to a demonstrated inability to understand and appreciate the nature and consequences of a health care condition or proposed treatment. The health care provider must document the basis for the determination of capacity in the medical record.

References to competence in statutory provisions related to informed consent are replaced with terminology that refers instead to capacity.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect on January 1, 2022.

Staff Summary of Public Testimony:

(In support) Informed consent laws are vitally important to hospitals and health care providers. The fundamental structure of the health care system is that patients have the right to autonomy and privacy. Consent is required to give action to those rights. The consent process includes elements of capacity, information, understanding, and voluntariness. Staff and providers routinely use the statute for guidance on medical decision making for people who cannot make their own decisions. The trailer bill for the Uniform Guardianship Act inadvertently required guardianship for health care consent; in addition, the informed consent statute was rendered grammatically incorrect.

The bill creates a definition of capacity, as the current law references a definition that will go away when the provision expires. It modernizes language and makes it more respectful. The bill also maintains the statutory structure that establishes different surrogate decision-maker processes for adults and minors. It reflects current practice where a practitioner must reasonably determine whether a person has capacity and requires the provider to document that information.

(Opposed) The presumption that a person subject to guardianship does not have the capacity to make health care decisions is concerning. Health care providers will presume that when medical decisions are being made, they only need to listen to the medical guardian. The current standard is that guardians and other decision makers exercise substituted judgment in performing their duties. Not all guardians are aware of this standard. The statement should be removed and replaced with language requiring providers to ask for an advanced directive and request proof of guardianship.

(Other) Guardians must consult with persons regarding their preferences and must honor their choices.

Persons Testifying: (In support) Senator Pedersen, prime sponsor; and Zosia Stanley, Washington State Hospital Association.

(Opposed) Darya Farivar, Disability Rights Washington.

(Other) Shawn Latham, Allies in Advocacy.

Persons Signed In To Testify But Not Testifying: None.