LEGISLATION OF NEBRASKA
ONE HUNDRED FIFTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 104

Introduced by Bolz, 29.
Read first time January 06, 2017
Committee: Judiciary

A BILL FOR AN ACT relating to health care decisions; to amend sections 20-405, 30-2628, 30-3420, and 83-4,157, Reissue Revised Statutes of Nebraska, and section 71-4843, Revised Statutes Cumulative Supplement, 2016; to provide for a surrogate to make health care decisions; to define terms; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,
Section 1. For purposes of this section and section 2 of this act:

(1) Adult means an individual who is nineteen years of age or older;

(2) Advance health care directive means an individual instruction, a declaration executed in accordance with the Rights of the Terminally Ill Act, or a power of attorney for health care;

(3) Agent means an individual designated in a power of attorney for health care to make a health care decision for the individual granting the power;

(4) Capacity means an individual's ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health care decision;

(5) Guardian means a judicially appointed guardian or conservator having authority to make a health care decision for an individual;

(6) Health care means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition;

(7) Health care decision means a decision made by an individual, or the individual's agent, guardian, or surrogate, regarding the individual's health care, including:

   (a) Selection and discharge of health care providers, health care facilities, and health care services;

   (b) Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and

   (c) Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care;

(8) Health care facility means a facility licensed under the Health Care Facility Licensure Act or permitted by law to provide health care in the ordinary course of business;

(9) Health care provider means an individual credentialed under the Uniform Credentialing Act or permitted by law to provide health care in the ordinary course of business or practice of a profession;
(10) Health care service means an adult day service, a home health agency, a hospice or hospice service, a respite care service, or a children's day health service licensed under the Health Care Facility Licensure Act or permitted by law to provide health care in the ordinary course of business. Health care service does not include an in-home personal services agency as defined in section 71-6501;

(11) Individual instruction means an individual's direction concerning a health care decision for the individual;

(12) Physician means an individual licensed to practice medicine and surgery or osteopathic medicine under the Uniform Credentialing Act;

(13) Power of attorney for health care means the designation of an agent under sections 30-3401 to 30-3432 or a similar law of another state to make health care decisions for the individual granting the power;

(14) Primary physician means a physician designated by an individual or the individual's agent, guardian, or surrogate, to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility;

(15) Reasonably available means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's health care needs;

(16) State means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States;

(17) Supervising health care provider means the primary physician or, if there is no primary physician or the primary physician is not reasonably available, the health care provider who has undertaken primary responsibility for an individual's health care; and

(18) Surrogate means an individual, other than a patient's agent or guardian, authorized under section 2 of this act to make a health care decision for the patient.
Sec. 2. (1) A surrogate may make a health care decision for a patient who is an adult or emancipated minor if the patient has been determined by the primary physician to lack capacity and no agent or guardian has been appointed.

(2) An adult or emancipated minor may designate any individual to act as surrogate by personally informing the supervising health care provider. In the absence of a designation, or if the designee is not reasonably available, any member of the following classes of the patient's family who is reasonably available, in descending order of priority, may act as surrogate:

(a) The spouse unless legally separated;
(b) An adult child;
(c) A parent; or
(d) An adult brother or sister.

(3) If none of the individuals eligible to act as surrogate under subsection (2) of this section is reasonably available, an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available may act as surrogate.

(4) A surrogate shall communicate his or her assumption of authority as promptly as practicable to the members of the patient's family specified in subsection (2) of this section who can be readily contacted.

(5) If more than one member of a class assumes authority to act as surrogate, if they do not agree on a health care decision, and if the supervising health care provider is so informed, the supervising health care provider shall comply with the decision of a majority of the members of that class who have communicated their views to the provider. If the class is evenly divided concerning the health care decision and the supervising health care provider is so informed, that class and all individuals having lower priority are disqualified from making the decision.
(6) A surrogate shall make a health care decision in accordance with the patient's individual instructions, if any, and other wishes to the extent known to the surrogate. Otherwise, the surrogate shall make the decision in accordance with the surrogate's determination of the patient's best interest. In determining the patient's best interest, the surrogate shall consider the patient's personal values to the extent known to the surrogate.

(7) A health care decision made by a surrogate for a patient is effective without judicial approval.

(8) An individual at any time may disqualify another, including a member of the individual's family, from acting as the individual's surrogate by a signed writing or by personally informing the supervising health care provider of the disqualification.

(9) Unless related to the patient by blood, marriage, or adoption, a surrogate may not be an owner, operator, or employee of a health care facility at which the patient is residing or receiving health care or a facility or an institution of the Department of Correctional Services or the Department of Health and Human Services to which the patient has been committed.

(10) A supervising health care provider may require an individual claiming the right to act as surrogate for a patient to provide a written declaration under penalty of perjury stating facts and circumstances reasonably sufficient to establish the claimed authority.

Sec. 3. Section 20-405, Reissue Revised Statutes of Nebraska, is amended to read:

20-405 A declaration shall become operative when (1) it is communicated to the attending physician, (2) the declarant is determined by the attending physician to be in a terminal condition or in a persistent vegetative state, (3) the declarant is determined by the attending physician to be unable to make decisions regarding administration of life-sustaining treatment, and (4) the attending
physician has notified a reasonably available member of the declarant's immediate family or guardian, if any, of his or her diagnosis and of the intent to invoke the patient's declaration. When the declaration becomes operative, the attending physician and other health care providers shall act in accordance with its provisions or comply with section 2 of this act or the transfer requirements of section 20-409.

Sec. 4. Section 30-2628, Reissue Revised Statutes of Nebraska, is amended to read:

30-2628 (a) Except as limited by section 30-2620, a guardian of an incapacitated person has the same powers, rights, and duties respecting the guardian's ward that a parent has respecting the parent's unemancipated minor child, except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as may be specified by order of the court:

(1) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, a guardian is entitled to custody of the person of his or her ward and may establish the ward's place of abode within this state or, with court permission, outside of this state. When establishing the ward's place of abode, a guardian shall make every reasonable effort to ensure that the placement is the least restrictive alternative. A guardian shall authorize a placement to a more restrictive environment only after careful evaluation of the need for such placement. The guardian may obtain a professional evaluation or assessment that such placement is in the best interest of the ward.

(2) If entitled to custody of his or her ward, a guardian shall make provision for the care, comfort, and maintenance of his or her ward and, whenever appropriate, arrange for the ward's training and education. Without regard to custodial rights of the ward's person, a guardian shall
take reasonable care of his or her ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of his or her ward is in need of protection.

(3) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical, psychiatric, psychological, or other professional care, counsel, treatment, or service. When making such medical or psychiatric decisions, the guardian shall consider and carry out the intent of the ward expressed prior to incompetency to the extent allowable by law. Notwithstanding this provision or any other provision of the Nebraska Probate Code, the ward may authorize the release of financial, medical, and other confidential records pursuant to sections 20-161 to 20-166.

(4) If no conservator for the estate of the ward has been appointed, a guardian shall, within thirty days after appointment, prepare and file with the appointing court a complete inventory of the ward's estate together with the guardian's oath or affirmation that the inventory is complete and accurate so far as the guardian is informed. The guardian shall mail a copy thereof by first-class mail to the ward, if the ward can be located and has attained the age of fourteen years, and to all other interested persons as defined in section 30-2601. The guardian shall file with the court a certificate of mailing showing that copies were sent to all interested persons by first-class mail along with a form to send back to the court that indicates if such person wants to continue receiving notifications about the proceedings. The guardian shall keep suitable records of the guardian's administration and exhibit the same on request of any interested person. To the extent a guardian, who has not been named a conservator, has possession or control of the ward's estate, the guardian shall file with the court an updated inventory every year along with a certificate of mailing showing that copies were sent to all interested persons and, if a bond has been required, to the bonding company by first-class mail.
(5) If no conservator for the estate of the ward has been appointed, a guardian may:

(i) Institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform such person's duty;

(ii) Receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward; but a guardian may not use funds from his or her ward's estate for room and board which the guardian or the guardian's spouse, parent, or child has furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the ward, if notice is possible. A guardian must exercise care to conserve any excess for the ward's needs; and

(iii) Exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property when authorized by a court acting under the authority of subsection (f) of section 30-3854. In acting under the authority of subsection (f) of section 30-3854, the court shall proceed in the same manner as provided under subdivision (3) of section 30-2637.

(6) A guardian is required to report the condition of his or her ward and of the estate which has been subject to the guardian's possession or control, at least every year and as required by the court or court rule. The court shall receive from any interested person, for a period of thirty days after the filing of the guardian's report, any comments with regard to the need for continued guardianship or amendment of the guardianship order. If the court has reason to believe that additional rights should be returned to the ward or assigned to the guardian, the court shall set a date for a hearing and may provide all protections as set forth for the original finding of incapacity and appointment of a guardian.

(7) If a conservator has been appointed, all of the ward's estate
received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in the Nebraska Probate Code, and the guardian must account to the conservator for funds expended.

(b) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward and is entitled to receive reasonable sums for the guardian's services and for room and board furnished to the ward as agreed upon between the guardian and the conservator if the amounts agreed upon are reasonable under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.

(c) Nothing in subdivision (a)(3) of this section or in any other part of this section shall be construed to alter the decisionmaking authority of a surrogate under section 2 of this act or an attorney in fact designated and authorized under sections 30-3401 to 30-3432 to make health care decisions pursuant to a power of attorney for health care.

Sec. 5. Section 30-3420, Reissue Revised Statutes of Nebraska, is amended to read:

30-3420 (1) A power of attorney for health care or a health care decision made by an attorney in fact may be revoked at any time by a principal who is competent and in any manner by which the principal is able to communicate his or her intent to revoke. Revocation shall be effective upon communication to the attending physician, the health care provider who shall promptly inform the attending physician of the revocation, or the attorney in fact who shall promptly inform the attending physician of the revocation.

(2) The creation by the principal of written wishes or instructions about health care or limitations upon the attorney in fact's authority shall not revoke a power of attorney for health care unless such wishes,
instructions, or limitations expressly provide otherwise.

(3) Upon learning of the revocation of the power of attorney for health care, the attending physician shall cause the revocation to be made a part of the principal's medical records.

(4) Unless the power of attorney for health care provides otherwise, execution of a valid power of attorney for health care shall revoke any previously executed power of attorney for health care.

(5) Unless the power of attorney for health care provides otherwise, a power of attorney for health care shall supersede:

(a) Any conflicting preexisting directive;

(b) Any guardianship proceedings under the Nebraska Probate Code to the extent the proceedings involve the right to make health care decisions for the protected person; and

(c) Any conservatorship proceedings under the Nebraska Probate Code to the extent the proceedings involve the right to make health care decisions for the protected person.

(6) A decree of divorce or legal separation entered into pursuant to sections 42-347 to 42-380 may specify whether the choice of the principal's spouse as attorney in fact under a power of attorney for health care shall be revoked or remain effective. If the decree does not specify whether the choice of the spouse as the principal's attorney in fact for health care is revoked or remains effective, the choice of the principal's spouse as attorney in fact for health care shall be deemed revoked upon entry of the decree.

(7) The revocation of a power of attorney for health care shall not revoke or terminate the authority as to the attorney in fact or other person who acts in good faith under the power of attorney for health care and without actual knowledge of the revocation. An action taken without knowledge of the revocation, unless the action is otherwise invalid or unenforceable, shall bind the principal and his or her heirs, devisees, and personal representatives.
A surrogate making a health care decision under section 2 of this act revokes a power of attorney for health care unless the principal specifically states that the power of attorney for health care remains effective.

Sec. 6. Section 71-4843, Revised Statutes Cumulative Supplement, 2016, is amended to read:

71-4843 (a) For purposes of this section:

(1) Advance health care directive means a power of attorney for health care or a record signed or authorized by a prospective donor containing the prospective donor's direction concerning a health care decision for the prospective donor;

(2) Declaration means a record signed by a prospective donor specifying the circumstances under which life-sustaining treatment may be withheld or withdrawn from the prospective donor; and

(3) Health care decision means any decision regarding the health care of the prospective donor.

(b) If a prospective donor has a declaration or advance health care directive and the terms of the declaration or directive and the express or implied terms of a potential anatomical gift are in conflict with regard to the administration of measures necessary to ensure the medical suitability of a part for transplantation or therapy, the prospective donor's attending physician and prospective donor shall confer to resolve the conflict. If the prospective donor is incapable of resolving the conflict, an agent acting under the prospective donor's declaration or directive, or, if none or the agent is not reasonably available, a surrogate acting under section 2 of this act or another person authorized by law other than the Revised Uniform Anatomical Gift Act to make health care decisions on behalf of the prospective donor, shall act for the donor to resolve the conflict. The conflict must be resolved as expeditiously as possible. Information relevant to the resolution of the conflict may be obtained from the appropriate procurement organization.
and any other person authorized to make an anatomical gift for the prospective donor under section 71-4832. Before resolution of the conflict, measures necessary to ensure the medical suitability of the part from a prospective donor may not be administered if it is determined that the administration of those measures would not provide the prospective donor with appropriate end-of-life care or it can be anticipated by reasonable medical judgment that such measures would cause the prospective donor's death other than by the prospective donor's underlying pathology. If the conflict is not resolved expeditiously, the direction of the declaration or advanced directive controls.

Sec. 7. Section 83-4,157, Reissue Revised Statutes of Nebraska, is amended to read:

83-4,157 The medical director shall:

(1) Coordinate all clinical services;

(2) Participate in the selection and supervision of all clinical staff employed by or under contract with the department, including medical doctors, physician assistants, pharmacists, pharmacy technicians, registered nurses, licensed practical nurses, advanced practice registered nurses practicing under and in accordance with their respective certification acts, mental health practitioners, alcohol and drug counselors, laboratory technicians, physical therapists, optometrists, audiologists, dentists, dental assistants, and dental hygienists;

(3) Maintain and preserve the medical records of health care services;

(4) Approve the purchasing of all necessary medical supplies and medical equipment for the department;

(5) Recommend all necessary programs for the preservice, inservice, and continuing medical training and education of the health care staff and other relevant staff of the department, including training specifically designed to promote prompt and effective responses by all
staff of the department to medical emergencies;

(6) Develop and implement condition-specific medical treatment protocols that ensure compatibility with a community standard of health care, including protocols addressing the: (a) Treatment of gastrointestinal bleeds; (b) detection and treatment of all communicable diseases; (c) treatment of gender-specific problems; (d) treatment of diabetes; (e) treatment of hypertension; (f) treatment of headaches; (g) utilization of surgical procedures; (h) control of infection; (i) provision of dental care; (j) provision of age-specific and gender-specific routine health maintenance; (k) means by which inmates obtain access to health care services; (l) use of prescribed drugs, devices, or biologicals for the purpose of pain management; (m) referral of patients to medical specialists not in the employ of the department; and (n) initiation, observance, and termination of do not resuscitate orders initiated pursuant to the Rights of the Terminally Ill Act; and (o) selection of a surrogate under section 2 of this act to make health care decisions for inmates;

(7) Develop and implement a system of general discharge planning for the health care services to be received by inmates who are soon to be released from the custody of the department and who have chronic health care problems;

(8) Develop and implement a comprehensive health care services plan;

(9) Develop and implement an internal credentialing program for the employment and retention of the health care staff of the department based on a community standard of health care; and

(10) Develop and implement an internal peer review and quality assurance program based upon a community standard of health care.

Sec. 8. Original sections 20-405, 30-2628, 30-3420, and 83-4,157, Reissue Revised Statutes of Nebraska, and section 71-4843, Revised Statutes Cumulative Supplement, 2016, are repealed.