House Engrossed

FILED
KEN BENNETT
SECRETARY OF STATE

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CHAPTER 147

HOUSE BILL 2616

AN ACT

AMENDING SECTIONS 14-5303, 36-3203, 36-3205 AND 36-3206, ARIZONA REVISED STATUTES; RELATING TO LIVING WILLS AND HEALTH CARE DIRECTIVES.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 14-5303, Arizona Revised Statutes, is amended to read:

14-5303. Procedure for court appointment of a guardian of an alleged incapacitated person

A. The alleged incapacitated person or any person interested in that person's affairs or welfare may petition for the appointment of a guardian or for any other appropriate protective order.

B. The petition shall CONTAIN A STATEMENT THAT THE AUTHORITY GRANTED TO THE GUARDIAN MAY INCLUDE THE AUTHORITY TO WITHHOLD OR WITHDRAW LIFE SUSTAINING TREATMENT, INCLUDING ARTIFICIAL FOOD AND FLUID, AND SHALL state, to the extent known:

1. The interest of the petitioner.

2. The name, age, residence and address of the alleged incapacitated person.

3. The name, address and priority for appointment of the person whose appointment is sought.

4. The name and address of the conservator, if any, of the alleged incapacitated person.

5. The name and address of the nearest relative of the alleged incapacitated person known to the petitioner.

6. A general statement of the property of the alleged incapacitated person, with an estimate of its value and including any compensation, insurance, pension or allowance to which the person is entitled.

7. The reason why appointment of a guardian or any other protective order is necessary.

8. The type of guardianship requested. If a general guardianship is requested, the petition must state that other alternatives have been explored and why a limited guardianship is not appropriate. If a limited guardianship is requested, the petition also must state what specific powers are requested.

C. On the filing of a petition, the court shall set a hearing date on the issues of incapacity. Unless the alleged incapacitated person is represented by independent counsel, the court shall appoint an attorney to represent that person in the proceeding. The alleged incapacitated person shall be interviewed by an investigator appointed by the court and shall be examined by a physician, psychologist or registered nurse appointed by the court. The investigator and the person conducting the examination shall submit their reports in writing to the court. In addition to information required under subsection D ~~of this section~~, the court may direct that either report include other information the court deems appropriate. The investigator also shall interview the person seeking appointment as guardian, visit the present place of abode of the alleged incapacitated person and the place where it is proposed that the person will be detained or reside if the requested appointment is made and submit a report in writing to the

court. The alleged incapacitated person is entitled to be present at the hearing and to see or hear all evidence bearing on that person's condition. The alleged incapacitated person is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the court-appointed examiner and investigator, and to trial by jury. The court may determine the issue at a closed hearing if the alleged incapacitated person or that person's counsel so requests.

D. A report filed pursuant to this section by a physician, psychologist or registered nurse acting within that person's scope of practice shall include the following information:

1. A specific description of the physical, psychiatric or psychological diagnosis of the person.

2. A comprehensive assessment listing any functional impairments of the alleged incapacitated person and an explanation of how and to what extent these functional impairments may prevent that person from receiving or evaluating information in making decisions or in communicating informed decisions regarding that person.

3. An analysis of the tasks of daily living the alleged incapacitated person is capable of performing without direction or with minimal direction.

4. A list of all medications the alleged incapacitated person is receiving, the dosage of the medications and a description of the effects each medication has on the person's behavior to the best of the declarant's knowledge.

5. A prognosis for improvement in the alleged incapacitated person's condition and a recommendation for the most appropriate rehabilitation plan or care plan.

6. Other information the physician, psychologist or registered nurse deems appropriate.

Sec. 2. Section 36-3203, Arizona Revised Statutes, is amended to read:

36-3203. <u>Surrogate; authority; responsibilities; immunity</u>

A. A person authorized as a surrogate to make health care decisions under this chapter is not responsible for paying the patient's health care costs unless the person is otherwise required to do so.

B. This chapter does not authorize a surrogate to consent to any act or omission to which the patient could not lawfully consent.

C. The surrogate shall make health care decisions for the patient in accordance with the patient's wishes as expressed in the health care directive. If the health care directive does not provide sufficient information to know what the patient would want in a particular circumstance, the surrogate shall base these decisions on the surrogate's knowledge of the patient's values if those are known or can be determined to the surrogate's satisfaction. If neither the health care directive nor the surrogate's knowledge of the patient's values provides a sufficient basis for making a health care decision, the surrogate shall decide based on the surrogate's good faith belief as to what is in the patient's best interest.

D. A surrogate who makes good faith health care decisions for a patient is not subject to civil or criminal liability for those decisions. Acts and refusals to act made in reliance on the provisions of a health care directive are presumed to be made in good faith. A court shall base a finding of an absence of good faith on information known to the surrogate and shall enter its finding only after it has made a determination of bad faith in written findings of fact based on clear and convincing evidence of improper motive. For the purposes of this subsection, "good faith" includes all health care decisions, acts and refusals to act based on a surrogate's reasonable belief of a patient's desires or a patient's best interest if these decisions, acts or refusals to act are not contrary to the patient's express written directions in a valid health care directive.

E. A surrogate who is not the patient's agent or guardian shall not ~~make decisions to withdraw~~ CONSENT TO OR APPROVE THE PERMANENT WITHDRAWAL OF the artificial administration of food or fluid.

Sec. 3. Section 36-3205, Arizona Revised Statutes, is amended to read:

36-3205. Health care providers; immunity from liability; conditions

A. A health care provider who makes good faith health care decisions in reliance on the provisions of an apparently genuine health care directive or the direction of a surrogate is immune from criminal and civil liability and is not subject to professional discipline for that reliance.

B. Health care provider acts and refusals to act made in reliance on the provisions of a health care directive or directions of a surrogate are presumed to be made in good faith. A court shall base a finding of an absence of good faith on information known to the provider and shall enter its finding only after it has made a determination of bad faith in written findings of fact based on clear and convincing evidence of improper motive. For the purposes of this subsection, "good faith" includes all health care decisions, acts and refusals to act based on a health care provider's reasonable belief of a patient's desires, a patient's best interest or the directives of a patient's surrogate if these decisions, acts or refusals to act are not contrary to the patient's express written directions in a valid health care directive.

C. A health care provider is not subject to criminal or civil liability or professional discipline for any of the following:

1. Failing to comply with a decision or a direction that violates the provider's conscience if the provider promptly makes known the provider's unwillingness and promptly transfers the responsibility for the patient's care to another provider who is willing to act in accordance with the agent's direction.

2. Failing to consult a disabled or incapacitated patient's surrogate if the surrogate cannot be contacted after the health care provider has made a reasonable effort to do so or if an emergency situation does not provide

the health care provider with sufficient time to locate and consult with the surrogate.

3. Relying on a court order concerning a patient.

4. A GUARDIAN'S FAILURE TO COMPLY WITH SECTION 14-5303, SUBSECTION B RELATING TO THE REQUIREMENT THAT THE PETITION INCLUDE A STATEMENT THAT THE AUTHORITY GRANTED TO THE GUARDIAN MAY INCLUDE THE AUTHORITY TO WITHHOLD OR WITHDRAW LIFE SUSTAINING TREATMENT, INCLUDING ARTIFICIAL FOOD AND FLUID.

D. This section does not relieve a health care provider from civil or criminal liability or prevent a provider from being subjected to professional disciplinary action for the provider's negligent treatment of a patient if the negligence is unrelated to the provider's reliance on a health care directive, directions from a surrogate or the recommendations of an institutional ethics committee pursuant to section 36-3231.

Sec. 4. Section 36-3206, Arizona Revised Statutes, is amended to read:

36-3206. <u>Enforcement or challenge of a directive or decision; judicial proceedings; automatic stays</u>

A. An interested person may file a verified petition with the superior court to determine the validity or effect of a health care directive or the decision of a surrogate.

B. The petition shall include the following information:

1. The name and current location of the patient and any surrogate OR GUARDIAN authorized to make decisions for the patient.

2. The name and address of any health care provider known by the petitioner to be providing health care to the principal.

3. IF A HEALTH CARE DIRECTIVE EXISTS, a description or a copy of the health care directive.

4. The judicial relief sought by the petitioner.

C. On the filing of the petition, the court shall enter a temporary order directing compliance with section 36-3203, subsection E. Notice of this order shall be provided by personal service on the surrogate, the patient, the health care providers immediately responsible for the patient's care and other persons the court requires to be notified.

D. The court shall review the petition, any other pleadings on file and any evidence offered by the petitioner to determine if it should order temporary orders without a further hearing. The court may enter a temporary order directing the provision or the withholding of specific medical treatment pending a further hearing if the court determines that there is reasonable cause to believe that health care decisions are being made by a surrogate or a health care provider that derogate the patient's wishes or, if the patient's wishes are not known, the patient's best interests.

E. The court shall schedule and conduct a hearing within five working days of the filing of a petition. Notice shall be provided by personal service on the surrogate, the patient, the health care providers immediately responsible for the patient's care, and other persons the court requires to be notified.

F. On the filing of the petition the court may:

1. Appoint an attorney for the patient if it appears that this is in the patient's best interests.

2. Appoint an investigator as provided under section 14-5308 or a physician, or both, to evaluate the patient and submit a written report to the court before the hearing.

3. Enter other temporary orders that the court determines are necessary and appropriate to protect the wishes or the best interests of the patient, including an order exercising the power of a guardian or appointing a temporary guardian as provided under section 14-5310.

G. A person filing a petition under this section is not required to post a bond unless the court determines that a bond is necessary to protect the interests of any party.

H. IF A PETITION IS FILED TO CHALLENGE THE DECISION OF A GUARDIAN TO PERMANENTLY WITHDRAW THE ARTIFICIAL ADMINISTRATION OF FOOD AND FLUID FROM A PATIENT WHO IS IN AN IRREVERSIBLE COMA OR IS IN A PERSISTENT VEGETATIVE STATE THAT THE PATIENT'S DOCTOR BELIEVES IS IRREVERSIBLE OR INCURABLE, THERE IS A REBUTTABLE PRESUMPTION THAT A PATIENT WHO DOES NOT HAVE A VALID LIVING WILL, POWER OF ATTORNEY OR OTHER HEALTH CARE DIRECTIVE HAS DIRECTED THE PATIENT'S HEALTH CARE PROVIDERS TO PROVIDE THE PATIENT WITH FOOD AND FLUID TO A DEGREE THAT IS SUFFICIENT TO SUSTAIN LIFE, INCLUDING, IF NECESSARY, THROUGH A MEDICALLY INVASIVE PROCEDURE, BY WAY OF THE GASTROINTESTINAL TRACT OR INTRAVENOUSLY, AND THAT THAT PROVISION IS IN THE PATIENT'S BEST INTERESTS.

I. THE PRESUMPTION PURSUANT TO SUBSECTION H OF THIS SECTION MAY BE REBUTTED ONLY IF EITHER OF THE FOLLOWING APPLIES:

1. IN REASONABLE MEDICAL JUDGMENT ANY OF THE FOLLOWING APPLIES:

(a) THE PROVISION OF FOOD OR FLUID IS NOT MEDICALLY POSSIBLE.

(b) THE PROVISION OF FOOD OR FLUID WOULD HASTEN DEATH.

(c) BECAUSE OF THE MEDICAL CONDITION OF THE PATIENT, THE PATIENT WOULD BE INCAPABLE OF DIGESTING OR ABSORBING THE FOOD OR FLUID SO THAT ITS PROVISION WOULD NOT CONTRIBUTE TO SUSTAINING THE PATIENT'S LIFE OR PROVIDE PHYSICAL COMFORT TO THE PATIENT.

2. THE COURT FINDS BOTH OF THE FOLLOWING BY CLEAR AND CONVINCING EVIDENCE:

(a) THE PATIENT IS IN AN IRREVERSIBLE COMA OR IS IN A PERSISTENT VEGETATIVE STATE THAT IS IRREVERSIBLE OR INCURABLE. EVIDENCE THAT THE PATIENT IS IN AN IRREVERSIBLE COMA OR IS IN A PERSISTENT VEGETATIVE STATE THAT IS IRREVERSIBLE OR INCURABLE MUST BE SUPPORTED BY EITHER OF THE FOLLOWING:

(i) THE OPINION OF AN INDEPENDENT PHYSICIAN WHO IS LICENSED PURSUANT TO TITLE 32, CHAPTER 13 OR 17 AND WHO IS A SPECIALIST IN NEUROLOGY. THE PETITIONER, THE PATIENT OR THE PATIENT'S ATTORNEY MAY PRESENT ADDITIONAL EVIDENCE OF THE PATIENT'S MEDICAL CONDITION THAT IS SUPPORTED BY THE OPINION OF A PHYSICIAN SELECTED BY THAT PARTY.

(ii) IF A SPECIALIST IN NEUROLOGY IS NOT AVAILABLE, THE OPINION OF AN INDEPENDENT PHYSICIAN WHO IS LICENSED PURSUANT TO TITLE 32, CHAPTER 13 OR 17 AND WHO HAS EXAMINED THE PATIENT SPECIFICALLY TO ASSESS WHETHER THE PATIENT IS IN AN IRREVERSIBLE COMA OR A PERSISTENT VEGETATIVE STATE THAT IS IRREVERSIBLE OR INCURABLE SUPPORTED BY A RECOMMENDATION OF THE INSTITUTIONAL BIOETHICS COMMITTEE OF THE HEALTH CARE FACILITY.

(b) WHILE COMPETENT THE PATIENT MANIFESTED THE PATIENT'S INTENT THAT MEDICALLY INVASIVE LIFE PROLONGING TREATMENT, INCLUDING THE ARTIFICIAL ADMINISTRATION OF FOOD OR FLUID, NOT BE ADMINISTERED IN THE CASE OF AN IRREVERSIBLE COMA OR A PERSISTENT VEGETATIVE STATE THAT IS IRREVERSIBLE OR INCURABLE.

~~H.~~ J. On notice and a hearing, the court may enter appropriate orders to safeguard the wishes of the patient. If the court is unable to determine those wishes, the court may enter appropriate orders to safeguard the patient's best interest. These orders may include:

1. Appointing a surrogate if the procedural requirements of title 14, chapter 5, article 3 have been met.

2. Removing an agent or any other surrogate and appointing a successor.

3. Directing compliance with the terms of the patient's health care directive, including the provisional removal or withholding of treatment if the court finds that this conforms with the patient's wishes or, if the patient's wishes are not known, is in the patient's best interest.

4. Directing the transfer of the patient to a suitable facility or to the care of a health care provider who is willing to comply with the patient's wishes.

5. Assessing court costs and attorney fees against a party found to have proceeded in bad faith.

~~I.~~ K. Notwithstanding a person's incapacity, the court may deny a petition to appoint a guardian for that person based on the existence of a valid and unrevoked health care directive.

~~J.~~ L. A guardian appointed pursuant to this section is immune from civil and criminal liability to the same extent as any other surrogate pursuant to section 36-3203, subsection D.

M. A SUPERIOR COURT ORDER THAT AUTHORIZES A GUARDIAN TO PERMANENTLY WITHDRAW FOOD OR FLUID FROM A PATIENT WHO IS IN AN IRREVERSIBLE COMA OR IN A PERSISTENT VEGETATIVE STATE THAT IS IRREVERSIBLE OR INCURABLE IS AUTOMATICALLY STAYED FOR FIVE BUSINESS DAYS TO ALLOW A PARTY, OR THAT PARTY'S SUCCESSOR IN INTEREST IN THE EVENT OF THE ORIGINAL PARTY'S DEATH, TO SEEK AN EXPEDITED APPEAL WITH THE COURT OF APPEALS. A DECISION FROM THE COURT OF APPEALS IS AUTOMATICALLY STAYED FOR FIVE BUSINESS DAYS TO ALLOW A PARTY, OR THAT PARTY'S SUCCESSOR IN INTEREST IN THE EVENT OF THE ORIGINAL PARTY'S DEATH, TO SEEK REVIEW BY THE SUPREME COURT. FOOD OR FLUID SHALL NOT BE PERMANENTLY WITHDRAWN PENDING A DECISION ON THE MERITS OF THE CASE BY THE COURT OF APPEALS OR A DECISION ON A PETITION BY THE SUPREME COURT.

APPROVED BY THE GOVERNOR JULY 13, 2009.

FILED IN THE OFFICE OF THE SECRETARY OF STATE JULY 13, 2009.