

1 STATE OF OKLAHOMA

2 1st Session of the 52nd Legislature (2009)

3 SENATE BILL 1010

By: Laster

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5  
6 AS INTRODUCED

7 An Act relating to public health and safety; creating  
8 the Oklahoma Surrogate Decision Maker Act; providing  
9 short title; providing legislative findings; defining  
10 terms; permitting certain persons to make health care  
11 decisions in specified circumstances; specifying  
12 priority of persons to make health care decisions;  
13 requiring health care decisions to be made based on  
14 certain facts; requiring certain notifications;  
15 providing for certain objection; requiring certain  
16 information to be provided in specified circumstances;  
17 specifying contents of certain statement; directing  
18 the State Department of Health to maintain certain  
19 registry; requiring the Department to post registry on  
20 its website; requiring certain disclaimer; requiring  
21 certain documentation; providing for rights of  
22 surrogates; exempting certain health care providers  
23 from specified claims; providing for expedited  
24 judicial interventions in certain circumstances;  
providing for certain petition; requiring certain  
documentation; providing for emergency orders in  
certain circumstances; requiring certain preliminary  
hearing; providing for certain expedited appeal;  
providing for codification; and providing an effective  
date.

21 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

22 SECTION 1. NEW LAW A new section of law to be codified in  
23 the Oklahoma Statutes as Section 3152 of Title 63, unless there is  
24 created a duplication in numbering, reads as follows:

1 This act shall be known and may be cited as the "Oklahoma  
2 Surrogate Decision Maker Act".

3 SECTION 2. NEW LAW A new section of law to be codified in  
4 the Oklahoma Statutes as Section 3152.1 of Title 63, unless there is  
5 created a duplication in numbering, reads as follows:

6 The Oklahoma Legislature finds that:

7 1. Uncertainty and lack of clarity in state law concerning the  
8 making of private decisions concerning health care and hospice care  
9 when a patient without capacity lacks a guardian, health care proxy,  
10 or advance directive for health care causes unnecessary emotional  
11 distress to the individuals involved; and

12 2. Enacting statutory guidelines regarding surrogate decision  
13 makers will bring improved clarity and certainty to the health care  
14 decision-making process and will substantially reduce the emotional  
15 distress to the individuals involved.

16 SECTION 3. NEW LAW A new section of law to be codified in  
17 the Oklahoma Statutes as Section 3152.2 of Title 63, unless there is  
18 created a duplication in numbering, reads as follows:

19 As used in the Oklahoma Surrogate Decision Maker Act:

20 1. "Capacity" means the ability to appreciate the nature and  
21 implications of a health care decision, to make an informed choice  
22 regarding the alternatives presented, and to communicate that choice  
23 in an unambiguous manner;

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1           2. "Health care provider" means a person or entity that is  
2 licensed, certified, or otherwise authorized by law to administer  
3 health care in the ordinary course of business or practice of a  
4 profession;

5           3. "Reasonable medical judgment" means a medical judgment that  
6 would be made by a reasonably prudent physician, knowledgeable about  
7 the case and the treatment possibilities with respect to the medical  
8 conditions involved;

9           4. "Reasonably available" means that a person is known to the  
10 health care provider and who, after a reasonable inquiry, is  
11 available within twenty-four (24) hours of the time the person is  
12 attempted to be contacted, except that for the purposes of subsection  
13 D of Section 4 of this act, the period shall be seventy-two (72)  
14 hours. For purposes of this paragraph, a reasonable inquiry includes,  
15 but is not limited to, identifying the potential surrogates by  
16 examining the personal effects of the patient and the medical records  
17 of the attending physician. If a potential surrogate is identified,  
18 an attempt to contact that person by telephone shall be made. If the  
19 potential surrogate does not respond within twenty-four (24) hours of  
20 this attempt to contact him or her, he or she is not "reasonably  
21 available", except that for purposes of subsection D of Section 4 of  
22 this act, the period shall be seventy-two (72) hours.

1 SECTION 4. NEW LAW A new section of law to be codified in  
2 the Oklahoma Statutes as Section 3152.3 of Title 63, unless there is  
3 created a duplication in numbering, reads as follows:

4 A. If a patient eighteen (18) years of age or older has not  
5 executed or issued an advance directive for health care and has been  
6 determined to be incapable of making an informed decision regarding  
7 health care, including the provision, withholding, or withdrawal of  
8 life-sustaining treatment, by the attending physician and another  
9 physician who have examined the patient, the legal guardian of the  
10 patient or a health care surrogate may make a health care decision,  
11 including the decision to elect hospice care, for the patient.

12 B. If such a patient does not have a legal guardian, a person,  
13 if reasonably available, from one of the following categories, in the  
14 following priority, may make a health care decision, including the  
15 decision to elect hospice care, for the patient:

16 1. The spouse of the patient, unless the patient has no spouse,  
17 or is separated, or the spouse lacks capacity, or the location of the  
18 spouse is unknown, or the spouse is otherwise not reasonably  
19 available;

20 2. An adult child with capacity;

21 3. Either parent;

22 4. An adult sibling with capacity; or

23 5. A relative by blood or marriage.

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1 C. A surrogate shall make such decisions based on the known  
2 intentions, personal views, and best interests of the patient. If  
3 evidence of the wishes of the patient is sufficient, those wishes  
4 shall control. If there is not sufficient evidence of the wishes of  
5 the patient, the decisions shall be based on the reasonable judgment  
6 of the individual so deciding about the values of the patient and  
7 what the wishes of the patient would be based upon those values. In  
8 cases of uncertainty, the presumption shall be for life.

9 D. 1. When a surrogate decides to withhold or withdraw  
10 treatment, the implementation of which decision would, in reasonable  
11 medical judgment, likely result in or hasten the death of the patient,  
12 the attending physician or health care provider shall notify all  
13 reasonably available members of the classes described in paragraphs 1  
14 through 4 of subsection B of this section. Pending completion of  
15 this notification, such treatment shall be provided, except that  
16 surgery need not be initiated in the absence of a court order as  
17 provided for in subsection E of Section 7 of this act. If a member  
18 or members of the classes so notified objects to the decision of the  
19 surrogate, the attending physician or health care provider shall  
20 provide the objecting member with the materials described in  
21 paragraph 2 of this subsection, and the treatment shall be provided  
22 for three (3) additional business days after the date on which the  
23 described materials are provided unless the objection is withdrawn,

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1 except that surgery need not be initiated in the absence of a court  
2 order as provided for in subsection E of Section 7 of this act.

3 2. The materials to be provided shall include a copy of the  
4 registry list of groups that have volunteered their readiness to  
5 provide counsel, mediation, or advocacy concerning medical treatment  
6 issues that is posted on the website maintained by the State  
7 Department of Health pursuant to paragraph 3 of this subsection and  
8 the following statement:

9 "When There Is a Disagreement about Medical Treatment: The  
10 Surrogate Recommends Against Life-Sustaining Treatment That You Wish  
11 To Have Provided.

12 You have been given this information because you believe that a  
13 patient you are close to should be given life-sustaining treatment  
14 which the person who has initially been given authority to make  
15 health care decisions for the patient thinks should not be given.  
16 This information is being provided to help you understand state law,  
17 your rights, and the resources available to you in such circumstances.  
18 It outlines the process for resolving disagreements about treatment  
19 among patients, families, and physicians. It is based upon  
20 subsection D of Section 4 of the Oklahoma Surrogate Decision Maker  
21 Act, codified in Section 3152.3 of Title 63 of the Oklahoma Statutes.

22 When an adult patient is unable to make health care decisions and  
23 has not made wishes about those decisions clear through an "advance  
24 directive" or appointed someone else - a "health care proxy" - to

1 make them, Oklahoma law lists an order of those who usually have  
2 authority to make health care decisions for the patient. The highest  
3 available person on this list, who has the authority to make health  
4 care decisions for the patient, is called the "surrogate".

5 First is a legal guardian, if one has been appointed.

6 Next is the person's spouse, unless separated or not reasonably  
7 available.

8 Next is an adult child of the patient, if reasonably available.

9 Next is an adult sibling (brother or sister) of the patient, if  
10 reasonably available.

11 Finally, if none of these is reasonably available, is a relative  
12 by blood or marriage.

13 If the surrogate decides to withhold or withdraw treatment when  
14 this would likely result in or hasten the death of the patient,  
15 however, the health care provider must make a reasonable attempt to  
16 notify others on the list (except in the lowest category) to see if  
17 any object. Other than surgery, the treatment must be given while  
18 the notification is being attempted.

19 When you object to the withholding or withdrawal of life-  
20 sustaining treatment from the patient, the patient must be provided  
21 the treatment (except surgery) for three additional business days  
22 after the day on which you receive this notice. The purpose of this  
23 delay is to enable you, if you wish, to use a special court  
24 proceeding to contest the treatment withholding or withdrawal.

1        You are being given a list of groups that have volunteered their  
2 readiness to provide counsel, mediation, or advocacy concerning  
3 medical treatment issues. You may wish to contact groups on the list  
4 or others of your choice to also get help.

5        You may file a petition with the appropriate district court on a  
6 variety of grounds asking it to order that life-sustaining treatment  
7 be given to the patient. If you file the petition, the court will  
8 order that the treatment (except surgery) be continued until the  
9 court rules on the matter. You may file an emergency motion to ask  
10 the court to order that surgery be performed. Groups on the list you  
11 are being given may be able to assist you in locating a lawyer to  
12 represent you in court."

13        3. The State Department of Health shall maintain a registry  
14 listing the identity of and contact information for groups situated  
15 inside and outside this state that have voluntarily notified the  
16 Department that they may consider providing counsel, mediation, or  
17 advocacy concerning medical treatment issues. The listing of a group  
18 in the registry shall not obligate a group to provide services to any  
19 particular patient or relative of a patient. The State Department of  
20 Health shall post the current registry list on its website in a form  
21 appropriate for easy comprehension by patients and persons  
22 responsible for the health care decisions of patients and shall  
23 provide a clearly identifiable link from its home page to the

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1 registry page. The registry list shall include the following  
2 disclaimer:

3 "This registry lists groups that have indicated to the State  
4 Department of Health their interest in providing counsel, mediation,  
5 or advocacy concerning medical treatment issues, and is provided for  
6 informational purposes only. Neither the State Department of Health  
7 nor the State of Oklahoma endorses or assumes any responsibility for  
8 any representation, claim, or act of the listed groups."

9 E. A health care decision made by a surrogate shall be  
10 documented in the medical record of the patient and signed by the  
11 attending physician.

12 SECTION 5. NEW LAW A new section of law to be codified in  
13 the Oklahoma Statutes as Section 3152.4 of Title 63, unless there is  
14 created a duplication in numbering, reads as follows:

15 A surrogate shall have the same right as the patient to receive  
16 information relevant to the proposed health care and to receive,  
17 review, and consent to the disclosure of medical records. Disclosure  
18 of information regarding contemplated health care to a person  
19 authorized to make a health care decision for an incapacitated person  
20 shall not be a waiver of any evidentiary privilege or of a right to  
21 assert confidentiality.

22 SECTION 6. NEW LAW A new section of law to be codified in  
23 the Oklahoma Statutes as Section 3152.5 of Title 63, unless there is  
24 created a duplication in numbering, reads as follows:

1 A health care provider who relies on and carries out the  
2 directions of a surrogate and who acts with due care and in  
3 accordance with the Oklahoma Surrogate Decision Maker Act shall not  
4 be subject to any claim based on lack of patient counsel or to  
5 criminal prosecution or discipline for unprofessional conduct.  
6 Nothing in the Oklahoma Surrogate Decision Maker Act shall be deemed  
7 to protect a health care provider from liability for the negligence  
8 of the health care provider in the performance of the duties of the  
9 health care provider or in carrying out any instructions of the  
10 surrogate, and nothing in the Oklahoma Surrogate Decision Maker Act  
11 shall be deemed to alter the law of negligence as it applies to the  
12 acts of any surrogate or health care provider.

13 SECTION 7. NEW LAW A new section of law to be codified in  
14 the Oklahoma Statutes as Section 3152.6 of Title 63, unless there is  
15 created a duplication in numbering, reads as follows:

16 A. Anyone described by paragraphs 1 through 5 of subsection B of  
17 Section 4 of this act, a current or former health care provider of  
18 the patient, or any other interested person who may reasonably be  
19 expected to be directly affected by the decision of the surrogate or  
20 proxy concerning any health care decision may seek expedited judicial  
21 intervention in the district court with jurisdiction over the  
22 residence of the patient or over the location in which the patient is  
23 being treated, if that person alleges that:

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1           1. The decision of the surrogate or proxy is not in accord with  
2 the standards established in Section 3101.16 of this title or  
3 subsection C of Section 4 of this act, as applicable, or otherwise is  
4 not in accord with this act or Sections 3101 through 3119 of this  
5 title;

6           2. The advance directive of the patient is ambiguous, or the  
7 patient changed his or her mind after execution of the advance  
8 directive;

9           3. The surrogate or proxy was improperly designated or appointed,  
10 or the designation of the proxy is no longer effective or has been  
11 revoked;

12           4. The surrogate or proxy has failed to discharge duties, or  
13 incapacity or illness renders the surrogate or proxy incapable or  
14 discharging duties;

15           5. The surrogate or proxy has abused powers; or

16           6. The patient has sufficient capacity to make his or her own  
17 health care decisions.

18           B. Any proceeding for expedited judicial intervention concerning  
19 medical treatment procedures may be brought by an interested adult  
20 person and shall be commenced by the filing of a verified petition  
21 which states:

22           1. The name and address of the petitioner;

23           2. The name and location of the person who is the subject of the  
24 petition, hereinafter referred to as the patient;

1 3. The relationship of the petitioner to the patient;

2 4. The names, relationship to the patient, and addresses if  
3 known to the petitioner, of:

4 a. the spouse and adult children of the patient,

5 b. the parents and adult siblings of the patient,

6 c. if none of the above, the next of kin of the patient,

7 d. any guardian and any court-appointed health care  
8 decision-maker,

9 e. any person designated by the patient in an advance  
10 directive or other document to exercise the health care  
11 decision of the patient in the event of the incapacity  
12 of the patient,

13 f. the administrator of the hospital, nursing home, or  
14 other facility where the patient is located, if any,

15 g. the attending physician of the patient, and

16 h. all other persons the petitioner believes may have  
17 information concerning the expressed wishes of the  
18 patient; and

19 5. Facts sufficient to establish the need for the relief  
20 requested, including, but not limited to, facts to support the  
21 allegation that the patient lacks the capacity to make the requisite  
22 medical treatment decision.

23 C. Any affidavits and supporting documentation, including any  
24 advance directive or designation of health care decision maker, shall

1 be attached to the petition. A preliminary brief shall argue the  
2 facts and law in support of the petition.

3 D. Unless waived by the court, the petition, supporting  
4 documentation, and notice of the preliminary hearing shall be served  
5 on the persons listed in subparagraphs a through g of paragraph 4 of  
6 subsection B of this section who have not joined in the petition or  
7 otherwise consented to the proceedings.

8 E. If the petition challenges a decision to withhold or withdraw  
9 treatment, the implementation of which decision would, in reasonable  
10 medical judgment, likely result in or hasten the death of the patient,  
11 the court promptly upon its filing shall issue an order requiring  
12 that the treatment be provided pending issuance of a decision  
13 following the preliminary hearing under subsection F of this section,  
14 except that surgery need not be initiated in the absence of a court  
15 order under this subsection. Upon motion received before or after  
16 the filing of a verified petition and supporting documentation, the  
17 court, after such emergency hearing with such notice as in its sound  
18 discretion may appear warranted in the circumstances, shall rule  
19 whether emergency surgery is necessary to prevent the death or  
20 irremediable deterioration of the patient before a preliminary  
21 hearing can be held, and in the case of a negative ruling on a motion  
22 for such surgery, an expedited interlocutory appeal may be taken to  
23 the Oklahoma Supreme Court.

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1 F. A preliminary hearing on the petition shall be held within  
2 seventy-two (72) hours after the filing of the petition. At that  
3 time the court shall review the petition and supporting documentation.  
4 In its discretion, the court shall either:

5 1. Rule on the relief requested immediately after the  
6 preliminary hearing; or

7 2. Conduct an evidentiary hearing not later than four (4) days  
8 after the preliminary hearing and rule on the relief requested  
9 immediately after the evidentiary hearing.

10 G. An expedited appeal shall be available to the Oklahoma  
11 Supreme Court from the final ruling of the district court.

12 SECTION 8. This act shall become effective November 1, 2009.

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