

ASSEMBLY HEALTH AND SENIOR SERVICES COMMITTEE

STATEMENT TO

ASSEMBLY, No. 4098

STATE OF NEW JERSEY

DATED: JUNE 13, 2011

The Assembly Health and Senior Services Committee reports favorably Assembly Bill No. 4098.

The purposes of this bill are to: facilitate the making of health care decisions for patients in a general or special hospital, nursing home, or assisted living facility (health care facility) who have lost decision-making capacity; and establish a demonstration program relating to the transfer of certain patients from inpatient care to post-acute care.

The bill provides specifically as follows:

Health Care Decision-Making for Incapacitated Patients

- A health care facility is to establish policies and procedures, in accordance with the provisions of this bill, to provide for the making of health care decisions by a surrogate, who is to be designated by the health care facility, for an adult patient who is determined, pursuant to this bill, to: lack decision-making capacity; not have a patient's representative; and not have executed an advance directive.
- The patient's attending physician is to make an initial determination that the patient lacks decision-making capacity to a reasonable degree of medical certainty, including, but not limited to, an assessment of the cause and extent of the patient's incapacity and the likelihood that the patient will regain decision-making capacity. An initial determination that a patient lacks decision-making capacity is subject to a concurring determination that the patient lacks decision-making capacity to a reasonable degree of medical certainty, independently made by a health or social service practitioner, if the health care decision concerns the withdrawal or withholding of life-sustaining treatment. The concurring determination is to: include, but not be limited to, an assessment of the cause and extent of the patient's incapacity and the likelihood that the patient will regain decision-making capacity; and be included in the patient's medical record.
- If the patient's attending physician has determined that the patient lacks decision-making capacity but the person making a concurring determination disagrees with the attending physician's determination, they are to seek to resolve the disagreement by means of procedures and practices established by the health care facility,

including, but not limited to, consultation with an institutional ethics committee, or with a person designated by the health care facility for this purpose.

- A health care facility is authorized to designate a surrogate to make health care decisions for an adult patient who has been determined to lack decision-making capacity, and is to provide prompt notice of that determination and designation to: the patient, if the health care facility has any indication of the patient's ability to comprehend the information; and at least one person on the surrogate list, set in this bill, who is highest in order of priority listed when persons in prior classes are not reasonably available.
- A determination made pursuant to the bill that an adult patient lacks decision-making capacity is not to be construed as a finding that the patient lacks capacity for any other purpose.
- Notwithstanding a determination that an adult patient lacks decision-making capacity, if the patient objects to the determination of incapacity, or to the choice of a surrogate or to a health care decision made for that patient pursuant to the bill, the patient's objection is to prevail, unless overruled by a court of competent jurisdiction or if another legal basis exists for overriding the patient's decision.
- An adult patient's attending physician is to confirm the patient's continued lack of decision-making capacity before complying with health care decisions made pursuant to the bill.
- A health care facility is to designate one person from the following list, as applicable, from the class highest in priority when persons in prior classes are not reasonably available, willing, and competent to act, to serve as surrogate for an adult patient who is determined to lack decision-making capacity pursuant to the bill; except that the designated person may designate any other person on the list to be surrogate, provided no one in a class higher in priority than the person so designated objects:
 - (1) the patient's spouse, partner in a civil union couple, or domestic partner, if not legally separated from the patient;
 - (2) the patient's son or daughter 18 years of age or older;
 - (3) the patient's parent;
 - (4) the patient's brother or sister 18 years of age or older;
 - (5) a close friend of the patient.
- An operator, administrator, or employee of a health care facility to which a patient has been admitted or from which a patient was transferred, or a physician who has privileges at such a health care facility or a health care professional or other person under contract with such a health care facility may not serve as the surrogate for an adult who is a patient at that facility, unless that person is related to the patient by blood, marriage, civil union, domestic partnership, or adoption, or is a close friend of the patient whose friendship with the patient preceded the patient's admission to the facility. If a

physician serves as surrogate, the physician is not to act as the patient's attending physician after his authority as surrogate begins.

- A surrogate who is designated pursuant to the bill will, subject to the provisions thereof, have the authority to make any health care decision on the adult patient's behalf that the patient could make.
- A health care facility or a health care professional is not obligated to seek the consent of a surrogate if an adult patient has already made a decision about the proposed health care, expressed orally or in writing or, with respect to a decision to withdraw or withhold life-sustaining treatment, expressed either orally during the patient's stay in the health care facility in the presence of two witnesses 18 years of age or older, at least one of whom is a health or social service practitioner affiliated with the health care facility, or in writing.
- In the event that an attending physician determines that the patient has regained decision-making capacity, the authority of the surrogate will cease.
- Notwithstanding any law to the contrary, the surrogate will have the right to receive medical information and medical records necessary to make informed decisions about the patient's health care.
- The surrogate is to make health care decisions for the patient: in accordance with the patient's wishes or values, including, but not limited to, the patient's religious or moral beliefs; or if the patient's wishes or values are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the patient's best interests.
- A decision by the surrogate to withhold or withdraw life-sustaining treatment from the patient is to be authorized only if the attending physician determines, with the independent concurrence of another physician and to a reasonable degree of medical certainty and in accordance with accepted medical standards, that:
 - the patient has an illness or injury which can be expected to cause death within six months, whether or not treatment is provided, or that the patient is permanently unconscious, and the provision or continuation of treatment would be an extraordinary burden to the patient; or
 - the patient has an irreversible or incurable condition, and the provision or continuation of treatment would involve such pain or suffering for, or otherwise be so extraordinarily burdensome to, the patient that it would reasonably be deemed inhumane under the circumstances.
- If the attending physician of a patient in a general hospital objects to a surrogate's decision to withhold or withdraw nutrition and hydration provided by means of medical treatment from the patient, the decision is not to be implemented until the institutional ethics committee, including at least one physician who is not directly responsible for the patient's care, or a court of competent jurisdiction, reviews the decision and determines that it meets the

standards set forth in the bill. This provision would not apply to nutrition and hydration provided to a patient orally and without reliance on medical treatment.

- The parent or guardian of a minor patient has the authority to make decisions about life-sustaining treatment, including decisions to withhold or withdraw such treatment, subject to the provisions of the bill. The parent or guardian of a minor patient is to make decisions in accordance with the minor's best interests, taking into account the minor's wishes as appropriate under the circumstances. An attending physician, in consultation with a minor's parent or guardian, is to determine whether a minor patient has decision-making capacity for a decision to withhold or withdraw life-sustaining treatment; and, if the minor has such capacity, a parent's or guardian's decision to withhold or withdraw life-sustaining treatment for the minor may not be implemented without the minor's consent.
- An attending physician, upon being informed of a decision to withdraw or withhold life-sustaining treatment, made pursuant to the bill, is to record the decision in the patient's medical record, review the medical basis for the decision, and either: implement the decision, or promptly make his objection to the decision and the reasons for the objection known to the decision-maker, and either make all reasonable efforts to arrange for the transfer of the patient to another physician, if necessary, or promptly refer the matter to the institutional ethics committee.
- Notwithstanding the provisions of the bill to the contrary, if a surrogate directs the provision of life-sustaining treatment for a patient, the denial of which in reasonable medical judgment would be likely to result in the patient's death, a health care facility or health care professional not wishing to provide that treatment is to comply with the surrogate's decision pending: transfer of the patient to a health care facility or health care professional willing to receive the patient; or a review of the matter by a court of competent jurisdiction.
- Within a reasonable period of time after an adult patient's admission to a health care facility, the facility is to make reasonable efforts to determine if there is a patient's representative designated for that individual, or if at least one person is available to serve as a surrogate in the event that the patient is determined to lack decision-making capacity. If the health care facility is unable to identify a patient's representative or potential surrogate for a patient who is determined to lack decision-making capacity, it is to seek to identify and act upon, to the extent reasonably possible, the patient's wishes and preferences, including, but not limited to, the patient's religious or moral beliefs or values, in regard to pending health care decisions concerning that patient. The specific procedures to be followed will depend on whether the decision involves routine

medical treatment, major medical treatment, or the withholding or withdrawal of life-sustaining treatment, and the location where the treatment is provided.

- A court of competent jurisdiction may make a decision to withhold or withdraw life-sustaining treatment for an adult patient who has been determined to lack decision-making capacity, pursuant to the bill, if the court finds that the decision accords with standards for decisions for adult patients set forth in the bill.
- Life-sustaining treatment may be withdrawn or withheld from an adult patient who has been determined to lack decision-making capacity pursuant to the bill, without judicial approval, if the patient's attending physician determines to a reasonable degree of medical certainty, and at least one other physician independently makes a concurring determination, that the provision of such treatment: offers the patient no medical benefit because the patient will die imminently, even if the treatment is provided; and would violate accepted medical standards. These provisions will not apply to any treatment necessary to alleviate the patient's pain or discomfort.
- A patient, surrogate, or parent or guardian of a minor patient may at any time revoke his consent to withhold or withdraw life-sustaining treatment by informing the attending physician or a member of the medical or nursing staff of the health care facility of the revocation.
- Nothing in the bill is to be construed to:
 - alter the rights or responsibilities of a health care professional or a private, religiously-affiliated health care facility as provided in the "New Jersey Advance Directives for Health Care Act";
 - make a person liable for the cost of health care provided to an adult patient, pursuant to the bill, who would not be so liable if the health care were provided pursuant to the patient's decision;
 - make a person liable for the cost of health care for a minor solely by virtue of making a decision as a guardian of a minor pursuant to the bill;
 - create, expand, diminish, impair, or supersede any authority that a person may have under law to make or express decisions, wishes, or instructions regarding health care on his behalf, including decisions about life-sustaining treatment;
 - permit or promote suicide, assisted suicide, or euthanasia;
 - diminish the duty of a parent or legal guardian under existing law to consent to treatment for a minor; or
 - limit the authority of a court of competent jurisdiction to appoint a special guardian for a patient or take any other action as set forth by court rule or otherwise authorized by law with respect to providing for the making of health care decisions for a patient who is determined to lack decision-making capacity.
- A surrogate, health care professional, health care facility, or institutional ethics committee will not be subject to criminal or civil

liability for any actions performed in good faith and in accordance with the provisions of the bill; nor will a health care professional be subject to criminal or civil liability or to discipline by a health care facility or the respective State licensing board for professional misconduct for any actions performed in good faith and in accordance with the provisions of the bill, any rules and regulations adopted pursuant thereto, and accepted professional standards for that health care professional.

Transition Authorization Panel Demonstration Program

- The bill establishes a three-year transition authorization panel demonstration program, to be conducted at six program sites, two each in the northern, central, and southern regions of the State, for the purpose of evaluating an approach to making decisions relating to the transition of eligible patients from inpatient care to post-acute care.
- For the purposes of the demonstration program, the bill defines “eligible patient” to mean an adult inpatient at a participating hospital who, according to the patient's attending physician:
 - (1) is ready to be discharged as an inpatient, but needs to be transitioned to post-acute care;
 - (2) lacks capacity to consent to the discharge and to admission to post-acute care;
 - (3) does not have a representative who is reasonably available and willing to make a transition decision on the patient’s behalf, whose consent would be accepted by a proposed post-acute care provider, and who is legally authorized to make all required transition-related financial arrangements;
 - (4) has a discharge plan that identifies an appropriate post-acute care provider that is or may be willing to admit the patient if a transition authorization panel, established under the program, were to authorize the transition and, if necessary, make transition-related financial arrangements; and
 - (5) has not expressed an objection to any of the foregoing findings or to being transitioned to the proposed post-acute facility or service or, if applicable, the proposed transition-related financial arrangements.
- A participating hospital is to create a transition authorization panel pool at a program site, which will have three classes of members, one each to comprise persons designated by the hospital, the director of the applicable county social services agency, and the Ombudsman for the Institutionalized Elderly, respectively, and each member of which is to be an adult with recognized expertise or demonstrated interest in the care and treatment of hospital and post-acute care patients, and who can be expected to apply the standards of the program in good faith and in the best interests of the eligible patient.

- The review of each request made for transition authorization and for transition-related financial arrangements made under the program is to be undertaken by a panel of three members drawn from the transition authorization panel pool, one from each class as set forth above.

-- An eligible patient's attending physician may request that a panel be convened by submitting a written request to the administrator of the participating hospital, for the panel to authorize an eligible patient's transition to post-acute care and, if applicable, make transition-related financial arrangements.

-- Upon receipt of the request from an eligible patient's attending physician, the administrator is required to: decline the request and notify the attending physician of the reason therefor; or take the actions set forth in the bill to convene a panel.

-- The panel is to meet in person or by video conference to conduct its review and may request the attendance at the review of any person who might assist the panel in its review.

-- Any of the persons provided notice of the convening of the panel, pursuant to the bill, are to be afforded an opportunity to address the panel and may be present for such other parts of the panel review as the chair may permit; and the patient may be present when any other person addresses the panel. These individuals are not permitted to be present during the deliberations of the panel.

-- Where practicable, the panel members are to personally interview and observe the patient prior to making their decision.

-- In its review, the panel is to consider whether the proposed transition is to a facility or program that appears able to meet the patient's needs in the least restrictive setting reasonably available to the patient.

-- Upon concluding its review, the panel, by majority vote, is to make a written determination, signed by the chair on behalf of the panel and made part of the patient's medical record, as to:

(1) whether the patient is an eligible patient;

(2) whether to authorize the proposed transition; except that, if the patient has a representative who is reasonably available and willing to make a transition decision on the patient's behalf, but who is not legally authorized to make transition-related financial arrangements, then that person, rather than the panel, will decide whether to authorize the proposed transition; and

(3) whether to authorize transition-related financial arrangements.

-- If the panel determines to authorize the proposed transition, the authorization is to be set forth in an order, signed by the chair on behalf of the panel and made part of the patient's medical record, which may be relied upon by the participating hospital, post-acute care providers, financial institutions, and other third parties as legal authority for them to perform or cooperate in the performance of those actions authorized by the bill.

- No person or entity will be subject to civil or criminal liability or sanction by a governmental agency for actions taken reasonably and in good faith, pursuant to the provisions of the bill, governing the demonstration program.
- The Commissioner of Health and Senior Services, no later than 30 days prior to the third anniversary of the effective date of the bill, will present a report to the Governor and the Legislature on the results of the demonstration program.

Effective Date

The bill takes effect on the first day of the seventh month after enactment, but authorizes the Commissioner of Health and Senior Services to take administrative action in advance as necessary for its implementation.