

## HOUSE BILL No. 2720

By Committee on Judiciary

Requested by Tara Mays on behalf of the Kansas Hospital Association

2-5

1 AN ACT concerning health and healthcare; enacting the Kansas surrogate  
2 medical decisions act to establish a hierarchy for identifying a surrogate  
3 who would make healthcare decisions; providing associated definitions  
4 and provider guidelines.

5

6 *Be it enacted by the Legislature of the State of Kansas:*

7 Section 1. (a) This section shall be known and may be cited as the  
8 Kansas surrogate medical decisions act.

9 (b) As used in this act, unless the context requires otherwise:

10 (1) "Advance directive" means a healthcare decision through a  
11 written statement, including, but not limited to, a living will or as  
12 recognized under K.S.A. 65-28,101 et seq., and amendments thereto, or  
13 other forms of written statements of a healthcare decision under the laws  
14 of this state or another state.

15 (2) "Agent" means a person designated in a durable power of attorney  
16 for healthcare decisions to make a healthcare decision for the person  
17 granting power.

18 (3) "Attending physician" means a physician selected by or assigned  
19 to a patient who has primary responsibility for any treatment and care of  
20 such patient.

21 (4) "Capacity" means a person's ability to understand any significant  
22 benefits, risks and alternatives to proposed healthcare and make and  
23 communicate a healthcare decision.

24 (5) "Designated surrogate" means a person appointed to make a  
25 healthcare decision for another pursuant to this act if such patient lacks  
26 capacity.

27 (6) "Durable power of attorney for healthcare decisions" means the  
28 same as defined in K.S.A. 58-625, and amendments thereto, and includes a  
29 durable power of attorney for healthcare decisions that is valid under the  
30 laws of this state or another state.

31 (7) "Ethics review process" means a consultation with an ethicist or  
32 ethics committee composed of members that may include clinical and  
33 nonclinical representatives of ethics, healthcare, law, pastoral care, social  
34 work and other related disciplines.

35 (8) "Guardian" means the same as defined in K.S.A. 59-30,101 et

1 seq., and amendments thereto.

2 (9) "Healthcare" means any care, treatment, service or procedure to  
3 maintain, diagnose, treat or otherwise affect a person's physical or mental  
4 condition.

5 (10) "Healthcare decision" means:

6 (A) Consent, refusal of consent or withdrawal of consent to  
7 healthcare;

8 (B) making necessary arrangements at any medical care facility,  
9 psychiatric hospital or treatment facility, hospice, nursing home or similar  
10 institution;

11 (C) employing or discharging a healthcare professional to administer  
12 healthcare necessary for the physical, mental and emotional well-being of  
13 a patient; or

14 (D) requesting, receiving and reviewing any information, verbal or  
15 written, regarding a patient's personal affairs or physical or mental health,  
16 including medical and hospital records, and executing any releases of other  
17 documents that may be required to maintain such information.

18 (11) "Healthcare provider" means the same as defined in K.S.A. 40-  
19 3401(f), and amendments thereto.

20 (12) "Identified surrogate" means a person identified by a supervising  
21 healthcare provider to make a healthcare decision for a patient pursuant to  
22 this act if such patient lacks capacity and a guardian, agent or designated  
23 surrogate has not been appointed.

24 (13) "Medical care facility" means the same as defined in K.S.A. 65-  
25 425, and amendments thereto.

26 (14) "Person" means an individual, firm, partnership, corporation,  
27 company, association or joint-stock association, or the legal successor  
28 thereof.

29 (15) "Personally informing" means a communication by any effective  
30 means from a patient directly to a healthcare provider.

31 (16) "Physician" means a person licensed to practice medicine and  
32 surgery by the state board of healing arts.

33 (17) "Reasonably available" means readily able to be contacted,  
34 including by telephone, without undue effort and willing and able to act in  
35 a timely manner considering the urgency of a patient's healthcare needs.

36 (18) "Supervising healthcare provider" means an attending physician  
37 or, if there is no attending physician or an attending physician is not  
38 reasonably available, a healthcare provider who has undertaken  
39 responsibility for a patient's healthcare.

40 (19) "Surrogate" means a person authorized to make a healthcare  
41 decision for a patient pursuant to this act. Surrogate includes a designated  
42 surrogate and an identified surrogate.

43 (c) Decision making authority for a healthcare decision on behalf of

1 another is set forth in order of preference as follows:

2       (1) (A) *Guardian*. A guardian appointed pursuant to the following  
3 statutes shall have the authority to make a healthcare decision for a patient  
4 in priority over any other decision-maker listed in paragraphs (2) through  
5 (4):

6           (i) K.S.A. 59-30,150, and amendments thereto;

7           (ii) K.S.A. 59-30,133, and amendments thereto, in the case of a  
8 minor; or

9           (iii) K.S.A. 59-30,154, and amendments thereto, with authority to  
10 make personal medical decisions in accordance with K.S.A. 59-30,150,  
11 and amendments thereto.

12       (B) Nothing in this act shall preclude any person, medical care  
13 facility, healthcare provider or designee from pursuing appointment of a  
14 guardian for a patient by a court of competent jurisdiction pursuant to  
15 Kansas law.

16       (2) *Agent*. If a guardian as described in paragraph (1) has not been  
17 appointed, a patient's agent who is authorized to act pursuant to K.S.A. 58-  
18 625, and amendments thereto, or applicable law from another jurisdiction  
19 with authority to act regarding such patient's healthcare decisions, subject  
20 to any limitations, or a patient's healthcare proxy or alternate healthcare  
21 proxy who is authorized to act pursuant to applicable law in another state,  
22 except that the most recent valid authorization under this subsection shall  
23 prevail, shall have the authority to make a healthcare decision for such  
24 patient in priority over any other decision-maker listed in paragraph (3)  
25 and (4).

26       (3) (A) *Designated surrogate*. If an adult or minor patient authorized  
27 to make a healthcare decision under Kansas law does not have a guardian  
28 as described in paragraph (1) or an agent as described in paragraph (2),  
29 such patient may designate any person to act as a surrogate on such  
30 patient's behalf by personally informing such patient's healthcare provider.  
31 A designated surrogate shall have the authority to make a healthcare  
32 decision for such patient in priority over any other decision-maker listed in  
33 paragraph (4)(A).

34       (B) An appointment of a designated surrogate and any amendment to  
35 an existing appointment shall be:

36           (i) In writing;

37           (ii) signed by the appointor or designee in the appointor's presence;  
38 and

39           (iii) witnessed by an adult other than the surrogate.

40       (4) (A) *Identified surrogate*. In the case of a patient who is  
41 persistently unconscious, incompetent or otherwise mentally or physically  
42 incapable of communicating or designating a surrogate as described in  
43 paragraph (3), lacks capacity or is incapable of consenting and does not

1 have a guardian as described in paragraph (1) or an agent as described in  
2 paragraph (2), a supervising healthcare provider or designee, in accordance  
3 with medical care facility policy, shall identify such patient's surrogate  
4 based on the following order of priority, excluding any person disqualified  
5 from exercising such authority under paragraph (8):

6       (i) For an adult patient:

7           (a) Such patient's legal spouse, unless there is a pending divorce  
8 proceeding or such patient and spouse are separated and estranged or in  
9 the process of a divorce;

10          (b) such patient's adult child;

11          (c) such patient's parent;

12          (d) such patient's adult sibling;

13          (e) such patient's other adult relative in order of kinship; and

14          (f) such patient's close friend who has maintained regular contact  
15 with such patient or has sufficient knowledge of such patient as to be  
16 familiar with such patient's personal values. Such close friend shall  
17 execute an affidavit stating specific facts and circumstances documenting  
18 such contact or knowledge, and such affidavit shall constitute *prima facie*  
19 evidence of such contact or knowledge.

20       (ii) For a minor patient:

21           (a) Such minor's parent, foster parent or an individual with written  
22 parental consent *in loco parentis*;

23           (b) such minor's adult sibling; and

24           (c) such minor's grandparent.

25       (B) When there is a dispute among identified surrogates specified in  
26 subparagraph (A)(i) or (ii) who otherwise take priority within the order, a  
27 majority of the identified surrogates may make a healthcare decision for  
28 such patient. In the event that such decision results in a tie, a  
29 recommendation shall be brought through a medical care facility's ethics  
30 review process to assist in the final decision-making. A medical care  
31 facility's ethics review process may also be consulted to identify  
32 reasonable concerns with an identified surrogate or in situations in which a  
33 supervising healthcare provider declines to identify a surrogate as  
34 addressed in subparagraph (C).

35       (C) When a medical care facility's ethics review process is consulted  
36 under subparagraph (B), such medical care facility's ethics review process  
37 shall consider the following criteria in determining the person best  
38 qualified to serve as an identified surrogate:

39           (i) Whether an identified surrogate reasonably appears to be better  
40 able to make a decision, either in accordance with a patient's known  
41 wishes or best interests;

42           (ii) an identified surrogate's regular contact with a patient prior to and  
43 during such patient's incapacitating illness;

- 1        (iii) an identified surrogate's demonstrated care and concern;
- 2        (iv) an identified surrogate's availability to visit a patient during such
- 3 patient's illness; and
- 4        (v) an identified surrogate's availability to engage in face-to-face
- 5 contact with any healthcare providers for the purpose of fully participating
- 6 in the decision-making process.
- 7        (5) A supervising healthcare provider shall document a designated
- 8 surrogate or identified surrogate in a patient's current clinical record of any
- 9 medical care facility where such patient is receiving healthcare.
- 10       (6) If no person eligible to act under paragraphs (1) through (4) is
- 11 reasonably available, an attending physician may make a healthcare
- 12 decision for a patient, consistent with such patient's advance directive,
- 13 after such attending physician either:
  - 14        (A) Consults with and obtains a recommendation through a medical
  - 15 care facility's ethics review process; or
  - 16        (B) obtains concurrence from a second physician who is not directly
  - 17 involved in such patient's healthcare, does not serve in a capacity of
  - 18 decision-making, influence or responsibility over such attending physician
  - 19 and is not under such attending physician's decision-making, influence or
  - 20 responsibility.
- 21       (7) In the event of a challenge, there shall be a rebuttable presumption
- 22 that a supervising healthcare provider's identification of a surrogate was
- 23 valid. Any person who challenges such identification shall have the burden
- 24 of proving the invalidity of such identification.
- 25       (8) No person who is the subject of a protective order or other court
- 26 order that directs such person to avoid contact with a patient or whom a
- 27 patient has requested not to be involved in decision-making when such
- 28 patient had capacity shall be eligible to serve as such patient's surrogate.
- 29       (9) Regardless of whether a court has appointed a guardian for a
- 30 patient, a patient has appointed an agent pursuant to a durable power of
- 31 attorney for healthcare decisions, a patient has designated a surrogate or a
- 32 surrogate has been identified for a patient pursuant to this act, a patient's
- 33 valid and duly executed advance directive shall control any healthcare
- 34 decision for such patient to which such advance directive applies, and an
- 35 individual acting as a patient's guardian, agent, designated surrogate or
- 36 identified surrogate shall make healthcare decisions for or on behalf of
- 37 such patient that are consistent with such patient's advance directive.
- 38       (10) A surrogate authorized to consent on behalf of a patient under
- 39 this act has the same authority as such patient, and such surrogate shall act
- 40 in good faith and in the best interest of a patient incapable of consenting.
- 41       (11) A healthcare decision made by a surrogate for a patient is
- 42 effective without judicial approval.
- 43       (12) A surrogate shall make a healthcare decision in accordance with

1 any wishes of a patient or other wishes to the extent known to such  
2 surrogate. Otherwise, a surrogate shall make a healthcare decision in  
3 accordance with such surrogate's determination of a patient's best interest  
4 based on such patient's personal values to the extent known to such  
5 surrogate.

6 (13) Unless otherwise specified under the laws of this state or a  
7 patient's advance directive, a surrogate may make all healthcare decisions  
8 for a patient that such patient could make on such patient's own behalf,  
9 except that life-saving or life-sustaining medical care, treatment, services  
10 or treatment, including artificial nutrition and hydration, may be withheld  
11 or withdrawn in behalf of such patient only on certification and  
12 documentation in such patient's current clinical records by:

13 (A) Such patient's attending physician or supervising healthcare  
14 provider; or

15 (B) a second independent physician or medical care facility's ethics  
16 review process indicating that such patient is suffering from a severe  
17 illness and that life-sustaining medical care, including artificial nutrition  
18 and hydration, is objectively medically non-indicated and would only  
19 prolong the dying process.

20 (14) A supervising healthcare provider, in such provider's discretion  
21 or at the request of a person claiming authority as a patient's surrogate,  
22 may also seek the assistance of any other healthcare provider or an ethics  
23 review process of a medical care facility or another medical care entity to  
24 effectuate the provisions of this act and promote the best interests of a  
25 patient.

26 (15) In the event that an identified surrogate is appointed for a patient  
27 at a medical care facility in accordance with this act, any other medical  
28 care facility, psychiatric hospital or treatment facility, hospice, nursing  
29 home or similar institution shall honor such designation for the purposes of  
30 a transfer of such patient.

31 (d) A healthcare provider shall comply with the following:

32 (1) A supervising healthcare provider who makes or is informed of a  
33 determination that a patient lacks or has recovered capacity or that another  
34 condition exists that affects a healthcare decision or the authority of an  
35 agent, guardian or surrogate shall promptly record such determination in  
36 such patient's current clinical record and communicate such determination  
37 to such patient, if possible, and to any person then authorized to make a  
38 healthcare decision for such patient.

39 (2) Except as provided in paragraphs (3) through (5), a healthcare  
40 provider or medical care facility providing care to a patient shall comply  
41 with:

42 (A) Such patient's wishes and with a reasonable interpretation of an  
43 instruction made by a person then authorized to make a healthcare decision

1 for such patient; and

2 (B) a healthcare decision for a patient made by a person then  
3 authorized to make a healthcare decision for such patient to the same  
4 extent as if such healthcare decision had been made by such patient while  
5 having capacity.

6 (3) A healthcare provider or medical care facility may decline to  
7 comply with a healthcare decision if such healthcare decision:

8 (A) Is contrary to a policy of a medical facility that is based on  
9 reasons of conscience; and

10 (B) such policy was timely communicated to a patient or person then  
11 authorized to make a healthcare decision for such patient.

12 (4) A healthcare provider or medical care facility may decline to  
13 comply with a healthcare decision that requires healthcare contrary to  
14 generally accepted healthcare standards applicable to such healthcare  
15 provider or medical care facility.

16 (5) A healthcare provider or medical care facility that declines to  
17 comply with a healthcare decision pursuant to paragraphs (3) or (4) shall:

18 (A) Promptly so inform such patient, if possible, and any person then  
19 authorized to make healthcare decisions for such patient;

20 (B) provide continuing care to such patient until a transfer can be  
21 effected or until a determination has been made that a transfer cannot be  
22 effected; and

23 (C) immediately make all reasonable efforts to assist in the transfer of  
24 such patient to another healthcare provider or medical care facility that is  
25 willing to comply with such healthcare decision, unless such patient or  
26 person then authorized to make a healthcare decision for such patient  
27 refuses assistance.

28 (6) If a transfer cannot be effected pursuant to paragraph (5), a  
29 healthcare provider or medical care facility shall not be compelled to  
30 comply with a healthcare decision pursuant to paragraph (3) or (4). If a  
31 surrogate is unable or unwilling to arrange a transfer to another medical  
32 care facility, a medical care facility refusing to honor a healthcare decision  
33 may intervene to facilitate such transfer.

34 (7) Nothing in this act obligates a medical care facility to honor a  
35 healthcare decision by a surrogate that such medical care facility would  
36 not otherwise honor if such decision had been made by a patient because  
37 such decision is contrary to a formally adopted policy of such medical care  
38 facility that is expressly based on religious belief or sincerely held ethical  
39 or moral conviction central to the operating principles of such medical care  
40 facility. If reasonably possible, such medical care facility may refuse to  
41 honor such decision, whether made by a patient or a surrogate, if such  
42 medical care facility has informed such patient or surrogate of such policy.

43 (8) Nothing in this act obligates a healthcare provider to honor or

1 cooperate with a healthcare decision by a surrogate that such healthcare  
2 provider would not otherwise honor or cooperate with if such decision had  
3 been made by a patient because such decision is contrary to such  
4 healthcare provider's religious belief or sincerely held moral or ethical  
5 conviction. Such healthcare provider shall promptly inform the surrogate  
6 and the patient's medical care facility of such refusal to honor or cooperate  
7 with such decision of such surrogate. In such an event, such medical care  
8 facility shall promptly assist in the transfer of such patient to a healthcare  
9 provider selected by such patient or surrogate or, if such patient or  
10 surrogate does not select a healthcare provider, to a healthcare provider at  
11 such medical care facility or another medical care facility who has  
12 affirmatively indicated that such healthcare provider will honor or  
13 cooperate with such healthcare decision of such patient or surrogate.

14 (e) Notwithstanding any other provision of law to the contrary:

15 (1) A healthcare provider or medical care facility acting in accordance  
16 with this act and with generally accepted healthcare standards applicable  
17 to such healthcare provider or medical care facility is immune from civil  
18 or criminal liability or discipline for unprofessional conduct for:

19 (A) Complying with or relying on a healthcare decision of a person  
20 having apparent authority to make a healthcare decision for a patient,  
21 including a decision to withhold or withdraw healthcare;

22 (B) declining to comply with a healthcare decision of a person based  
23 on a belief that such person then lacked authority;

24 (C) complying with or relying on an advance directive and assuming  
25 that such directive was valid when made and that it had not been revoked  
26 or terminated; or

27 (D) declining to comply with a healthcare decision that requires  
28 healthcare contrary to generally accepted medical standards applicable to  
29 such healthcare provider or medical care facility;

30 (2) a person that is an authorized agent or surrogate under this act is  
31 immune from civil or criminal liability or discipline for unprofessional  
32 conduct for healthcare decisions made in accordance with generally  
33 accepted healthcare standards applicable to or recommended by an  
34 attending physician, supervising healthcare provider or medical care  
35 facility; and

36 (3) a person, attending physician, supervising healthcare provider,  
37 medical care facility or designee is immune from civil or criminal or  
38 criminal liability or discipline for unprofessional conduct for naming or  
39 identifying a surrogate under this act, a healthcare decision made for a  
40 patient or making a determination of capacity under this act if such naming  
41 or identifying, decision-making or determination is made in accordance  
42 with this act.

43 Sec. 2. This act shall take effect and be in force from and after its

1 publication in the statute book.