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SENATE BILL 714

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

INTRODUCED BY

Cisco McSorley

AN ACT

RELATING TO HEALTH CARE; AMENDING CERTAIN SECTIONS OF THE  
UNIFORM HEALTH-CARE DECISIONS ACT; CLARIFYING AGENT AND  
SURROGATE DUTIES; PROVIDING FOR NONPROFIT ORGANIZATIONS TO  
SERVE AS SURROGATES; CLARIFYING WHO SHALL DETERMINE CAPACITY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 24-7A-2 NMSA 1978 (being Laws 1995,  
Chapter 182, Section 2) is amended to read:

"24-7A-2. ADVANCE HEALTH-CARE DIRECTIVES. - -

A. An adult or emancipated minor, while having  
capacity, has the right to make his or her own health-care  
decisions and may give an individual instruction. The  
individual instruction may be oral or written; if oral, it  
~~must~~ shall be made by personally informing a health-care  
provider. The individual instruction may be limited to take

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1 effect only if a specified condition arises. If an adult or  
2 emancipated minor who is served in a community-based program  
3 for persons with mental illness, developmental disability or  
4 other long-term disability chooses to give an individual  
5 instruction, the individual instruction may, subject to the  
6 individual's consent, be included in the individual's service  
7 plan and be provided to the individual's health-care provider  
8 by the community-based program.

9 B. An adult or emancipated minor, while having  
10 capacity, may execute a power of attorney for health care,  
11 which may authorize the agent to make any health-care decision  
12 the principal could have made while having capacity. The power  
13 [~~must~~] shall be in writing and signed by the principal. The  
14 power remains in effect notwithstanding the principal's later  
15 incapacity under the Uniform Health-Care Decisions Act or  
16 Chapter 45, Article 5 [of the Uniform Probate Code] NMSA 1978.  
17 The power may include individual instructions. Unless related  
18 to the principal by blood, marriage or adoption, an agent may  
19 not be an owner, operator or employee of a health-care  
20 institution at which the principal is receiving care.

21 C. Unless otherwise specified in a power of  
22 attorney for health care, the authority of an agent becomes  
23 effective only upon a determination that the principal lacks  
24 capacity and ceases to be effective upon a determination that  
25 the principal has recovered capacity.

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1           D. Unless otherwise specified in a written advance  
2 health-care directive, a determination that [~~an individual~~] a  
3 person lacks or has recovered capacity or that another  
4 condition exists that affects an individual instruction or the  
5 authority of an agent shall be made according to the provisions  
6 of Section [~~11 of the Uniform Health-Care Decisions Act~~]  
7 24-7A-11 NMSA 1978.

8           E. An agent shall make a health-care decision in  
9 accordance with the principal's individual instructions, if  
10 any, and other wishes to the extent made known to the agent  
11 [~~otherwise~~] by the principal. If the wishes of a principal who  
12 has been determined to lack capacity are unknown or unclear to  
13 the agent, and if the health-care decision that the agent must  
14 make is whether to consent to, withhold or withdraw life-  
15 sustaining treatment for the principal who is not in an  
16 emergency health-care situation, the agent shall make  
17 reasonable efforts to determine the principal's personal  
18 wishes, values and interests. Those efforts shall include, but  
19 are not limited to, communicating with the principal using  
20 methods appropriate to the principal's health-care situation.  
21 If the agent's reasonable efforts to communicate with the  
22 principal do not provide information satisfactory to the agent  
23 to make the health-care decision, the agent shall make  
24 reasonable efforts to communicate with the principal's closest  
25 family members, primary caregiver, if any, or other persons

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1 familiar with the principal, if the agent is aware of such  
2 persons and they are reasonably available. The agent shall  
3 then make the health-care decision in accordance with the  
4 agent's determination of the principal's best interest. In  
5 determining the principal's best interest, the agent shall  
6 consider the principal's personal wishes, values and interests  
7 to the extent known to the agent, whether expressed directly by  
8 the principal or communicated by other persons.

9 F. A health-care decision made by an agent for a  
10 principal is effective without judicial approval.

11 G. A written advance health-care directive may  
12 include the [~~individual's~~] person's nomination of a guardian of  
13 the person. "

14 Section 2. Section 24-7A-5 NMSA 1978 (being Laws 1995,  
15 Chapter 182, Section 5, as amended) is amended to read:

16 "24-7A-5. WHO MAY ACT AS SURROGATE- - DECISIONS BY  
17 SURROGATE. - -

18 A. A surrogate may make a health-care decision for  
19 a patient who is an adult or emancipated minor if the patient  
20 has been determined according to the provisions of Section  
21 24-7A-11 NMSA 1978 to lack capacity and no agent or guardian  
22 has been appointed or the agent or guardian is not reasonably  
23 available.

24 B. An adult or emancipated minor, while having  
25 capacity, may designate any [~~individual~~] person to act as

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1 surrogate by personally informing the supervising health-care  
2 provider. In the absence of a designation or if the designee  
3 is not reasonably available, any member of the following  
4 classes of the patient's family who is reasonably available, in  
5 descending order of priority, may act as surrogate:

6 (1) the spouse, unless legally separated or  
7 unless there is a pending petition for annulment, divorce,  
8 dissolution of marriage or legal separation;

9 (2) ~~[an individual]~~ a person in a long-term  
10 relationship of indefinite duration with the patient in which  
11 the ~~[individual]~~ person has demonstrated an actual commitment  
12 to the patient similar to the commitment of a spouse and in  
13 which the ~~[individual]~~ person and the patient consider  
14 themselves to be responsible for each other's well-being;

15 (3) an adult child;

16 (4) a parent;

17 (5) an adult brother or sister; or

18 (6) a grandparent.

19 C. If none of the ~~[individuals]~~ persons eligible to  
20 act as surrogate under Subsection B of this section is  
21 reasonably available, an adult who has exhibited special care  
22 and concern for the patient, who is familiar with the patient's  
23 personal values and who is reasonably available may act as  
24 surrogate. A nonprofit organization that provides state-funded  
25 guardianship services for persons with disabilities, or

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1 provides protection and advocacy services for persons with  
2 disabilities pursuant to federal law, may serve as a surrogate  
3 for a patient with developmental disabilities, mental illness  
4 or other long-term disabilities if the organization is familiar  
5 with the patient's wishes, interests and values and if the  
6 organization agrees to serve as the surrogate.

7 D. A surrogate shall communicate [~~his~~] the  
8 surrogate's assumption of authority as promptly as practicable  
9 to the patient, to members of the patient's family specified in  
10 Subsection B of this section who can be readily contacted and  
11 to the supervising health-care provider.

12 E. If more than one member of a class assumes  
13 authority to act as surrogate and they do not agree on a  
14 health-care decision and the supervising health-care provider  
15 is so informed, the supervising health-care provider shall  
16 comply with the decision of a majority of the members of that  
17 class who have communicated their views to the provider. If  
18 the class is evenly divided concerning the health-care decision  
19 and the supervising health-care provider is so informed, that  
20 class and all [~~individuals~~] persons having lower priority are  
21 disqualified from making the decision.

22 F. A surrogate shall make a health-care decision in  
23 accordance with the patient's individual instructions, if any,  
24 and other wishes to the extent made known to the surrogate  
25 [~~otherwise~~] by the patient. If the wishes of a patient who has

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1 been determined to lack capacity are unknown or unclear to the  
2 surrogate, the surrogate shall make reasonable efforts to  
3 determine the patient's personal wishes, values and interests.  
4 Those efforts shall include, but are not limited to, reasonable  
5 efforts to communicate with the patient using methods  
6 appropriate to the patient's health-care situation; and, if the  
7 health-care decision that the surrogate must make is to consent  
8 to, withhold or withdraw life-sustaining treatment for a  
9 patient who is not in an emergency health-care situation, the  
10 surrogate shall make reasonable efforts to communicate with the  
11 patient's closest family members, primary caregiver, if any, or  
12 other individuals familiar with the patient, if the surrogate  
13 is aware of such persons and they are reasonably available.  
14 The surrogate shall then make the health-care decision in  
15 accordance with the surrogate's determination of the patient's  
16 best interest. In determining the patient's best interest, the  
17 surrogate shall consider the patient's personal wishes, values  
18 and interests to the extent known to the surrogate, whether  
19 expressed directly by the patient or as communicated by other  
20 persons.

21 G. A health-care decision made by a surrogate for a  
22 patient shall not be made solely on the basis of the patient's  
23 preexisting physical or medical condition or preexisting or  
24 projected disability.

25 H. A health-care decision made by a surrogate for a

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1 patient is effective without judicial approval.

2 I. A patient, at any time, may disqualify any  
3 person, including a member of the patient's family, from acting  
4 as the patient's surrogate by a signed writing or by personally  
5 informing a health-care provider of the disqualification. A  
6 health-care provider who is informed by the patient of a  
7 disqualification shall promptly communicate the fact of  
8 disqualification to the supervising health-care provider and to  
9 any health-care institution at which the patient is receiving  
10 care.

11 J. Unless related to the patient by blood, marriage  
12 or adoption, a surrogate may not be an owner, operator or  
13 employee of a health-care institution at which the patient is  
14 receiving care.

15 K. A supervising health-care provider may require  
16 [~~an individual~~] a person claiming the right to act as surrogate  
17 for a patient to provide a written declaration under penalty of  
18 perjury stating facts and circumstances reasonably sufficient  
19 to establish the claimed authority."

20 Section 3. Section 24-7A-6.1 NMSA 1978 (being Laws 1997,  
21 Chapter 168, Section 13) is amended to read:

22 "24-7A-6.1. DECISIONS FOR UNEMANCIPATED MINORS. --

23 A. Except as otherwise provided by law, a parent or  
24 guardian of an unemancipated minor may make that minor's  
25 health-care decisions.

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1           B. A parent or guardian of an unemancipated minor  
2 shall have the authority to provide, withhold or withdraw life-  
3 sustaining treatment for the unemancipated minor, subject to  
4 the provisions of this section and the standards for surrogate  
5 decision-making for adults provided for in the Uniform Health-  
6 Care Decisions Act.

7           C. Subject to the provisions of Subsection B of  
8 this section, if an unemancipated minor has capacity sufficient  
9 to understand the nature of that unemancipated minor's medical  
10 condition, the risks and benefits of treatment and the  
11 contemplated decision to provide, withhold or withdraw life-  
12 sustaining treatment, that unemancipated minor shall have the  
13 authority to consent to, withhold or withdraw life-sustaining  
14 treatment.

15           D. For purposes of Subsection C of this section, a  
16 determination of the mental and emotional capacity of an  
17 unemancipated minor shall be determined by two qualified  
18 health-care professionals, one of whom shall be the  
19 unemancipated minor's primary physician or, at the request of  
20 the minor or the minor's parent or guardian, another qualified  
21 health-care professional who has personal knowledge of and  
22 experience with the minor and is reasonably available, and the  
23 other of whom shall be a physician [~~that~~] who works with  
24 unemancipated minors of the minor's age in the ordinary course  
25 of that physician's health-care practice. If the unemancipated

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1 minor lacks capacity due to mental illness or developmental  
2 disability, one of the qualified health-care professionals  
3 shall be a person ~~[whose]~~ with training and expertise ~~[aid in~~  
4 ~~the assessment of functional impairment]~~ in mental illness or  
5 developmental disability, as applicable. Nothing in this  
6 subsection shall require a health-care institution to permit a  
7 health-care professional to provide health-care services for or  
8 within the institution if the health-care professional is not  
9 otherwise credentialed or authorized to do so.

10 E. If ~~[the]~~ an unemancipated minor's primary  
11 physician has reason to believe that a parent or guardian of  
12 ~~[an]~~ the unemancipated minor, including a non-custodial parent,  
13 has not been informed of a decision to withhold or withdraw  
14 life-sustaining treatment, the primary physician shall make  
15 reasonable efforts to determine if the uninformed parent or  
16 guardian has maintained substantial and continuous contact with  
17 the unemancipated minor and, if so, shall make reasonable  
18 efforts to notify that parent or guardian before implementing a  
19 decision.

20 F. If there is disagreement regarding the decision  
21 to withhold or withdraw life-sustaining treatment for an  
22 unemancipated minor, the provisions of Section 24-7A-11 NMSA  
23 1978 shall apply.

24 G. For purposes of this section, "unemancipated  
25 minor" means a person ~~[at or]~~ under the age of ~~[fifteen]~~

1 eighteen who is not an emancipated minor. "

2 Section 4. Section 24-7A-9 NMSA 1978 (being Laws 1995,  
3 Chapter 182, Section 9, as amended) is amended to read:

4 "24-7A-9. IMMUNITIES. - -

5 A. A health-care provider or health-care  
6 institution acting in good faith and in accordance with  
7 generally accepted health-care standards applicable to the  
8 health-care provider or health-care institution is not subject  
9 to civil or criminal liability or to discipline for  
10 unprofessional conduct for:

11 (1) complying or attempting to comply with a  
12 health-care decision of a person apparently having authority as  
13 agent, guardian or surrogate to ~~make~~ a health-care decision for  
14 a patient, including a decision to provide, withhold or  
15 withdraw health care or ~~make~~ an anatomical gift;

16 (2) declining to comply with a health-care  
17 decision of a person based on a belief that the person then  
18 lacked the authority to make that health-care decision;

19 (3) complying or attempting to comply with an  
20 advance health-care directive and assuming that the directive  
21 was valid when ~~made~~ and has not been revoked or terminated;

22 (4) declining to comply with a health-care  
23 directive as permitted by Subsection E or F of Section  
24 24-7A-7 NMSA 1978; or

25 (5) complying or attempting to comply with any

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1 other provision of the Uniform Health-Care Decisions Act.

2 B. [~~An individual~~] A person acting as agent,  
3 guardian or surrogate under the Uniform Health-Care Decisions  
4 Act is not subject to civil or criminal liability or to  
5 discipline for unprofessional conduct for health-care decisions  
6 made in good faith."

7 Section 5. Section 24-7A-11 NMSA 1978 (being Laws 1995,  
8 Chapter 182, Section 11, as amended) is amended to read:

9 "24-7A-11. CAPACITY--HOW CAPACITY DETERMINED. --

10 A. The Uniform Health-Care Decisions Act does not  
11 affect the right of [~~an individual~~] a person to make health-  
12 care decisions while having capacity to do so.

13 B. [~~An individual~~] A person is presumed to have  
14 capacity to make a health-care decision, to give or revoke an  
15 advance health-care directive and to designate a surrogate.

16 C. Unless otherwise specified in a written advance  
17 health-care directive, a determination that [~~an individual~~] a  
18 person lacks or has recovered capacity or that another  
19 condition exists that affects an individual instruction or the  
20 authority of an agent shall be made by two qualified health-  
21 care professionals, one of whom shall be the individual's  
22 primary physician or, at the request of the individual or the  
23 individual's guardian, another qualified health-care  
24 professional who has personal knowledge of and experience with  
25 the individual and is reasonably available. At least one of

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1 the two qualified health-care professionals shall be a  
2 physician. If the lack of capacity is determined to exist  
3 because of mental illness or developmental disability, one of  
4 the qualified health-care professionals shall be a person  
5 ~~[whose]~~ with training and expertise ~~[aid]~~ in ~~[the assessment of~~  
6 ~~functional impairment]~~ mental illness or developmental  
7 disability, as applicable. Nothing in this subsection shall be  
8 construed to require a health-care institution to permit a  
9 health-care professional to provide health-care services for or  
10 within the institution if the health-care professional is not  
11 otherwise credentialed or authorized to do so.

12 D. ~~[An individual]~~ A person shall not be determined  
13 to lack capacity solely on the basis that the ~~[individual]~~  
14 person chooses not to accept the treatment recommended by a  
15 health-care provider.

16 E. ~~[An individual]~~ A person, at any time, may  
17 challenge a determination that the ~~[individual]~~ person lacks  
18 capacity by a signed writing or by personally informing a  
19 health-care provider of the challenge. A health-care provider  
20 who is informed by the ~~[individual]~~ person of a challenge shall  
21 promptly ~~communicate~~ the fact of the challenge to the  
22 supervising health-care provider and to any health-care  
23 institution at which the ~~[individual]~~ person is receiving care.  
24 Such a challenge shall prevail unless otherwise ordered by the  
25 court in a proceeding brought pursuant to the provisions of

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1 Section 24-7A-14 NMSA 1978.

2 F. A determination of lack of capacity under the  
3 Uniform Health-Care Decisions Act shall not be evidence of  
4 incapacity under the provisions of Chapter 45, Article 5 [~~of~~  
5 ~~the Uniform Probate Code~~] NMSA 1978. "

6 Section 6. Section 24-7A-14 NMSA 1978 (being Laws 1995,  
7 Chapter 182, Section 14, as amended) is amended to read:

8 "24-7A-14. JUDICIAL RELIEF. --

9 A. On petition of a patient, the patient's agent,  
10 guardian or surrogate, a health-care provider or health-care  
11 institution involved with the patient's care [~~an individual~~] or  
12 a person described in Subsection B or C of Section 24-7A-5 NMSA  
13 1978, the district court may enjoin or direct a health-care  
14 decision or order other equitable relief. A proceeding [~~under~~]  
15 pursuant to this section is governed by the Rules of Civil  
16 Procedure for the District Courts.

17 B. If a guardian ad litem is appointed for a  
18 patient by the court, the guardian ad litem shall:

19 (1) meet with and, if possible, interview the  
20 patient prior to the hearing;

21 (2) communicate with persons involved with or  
22 knowledgeable about the patient, such as relatives, caregivers,  
23 health-care professionals or others;

24 (3) examine whether procedures called for  
25 under the Uniform Health-Care Decisions Act have been followed;

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(4) represent the patient's wishes, if known;

and

(5) if the patient's wishes are unclear or unknown, represent the patient's best interest."

Section 7. Section 24-7A-17 NMSA 1978 (being Laws 1995, Chapter 182, Section 17) is amended to read:

"24-7A-17. SHORT TITLE. -- ~~[Sections 1 through 17 of this act]~~ Chapter 24, Article 7A NMSA 1978 may be cited as the "Uniform Health-Care Decisions Act". "