

CHAPTER 190

PROBATE, TRUSTS, AND FIDUCIARIES

SENATE BILL 06-121

BY SENATOR(S) Sandoval;
also REPRESENTATIVE(S) Riesberg, Frangas, and Todd.**AN ACT****CONCERNING SURROGATE DECISION-MAKERS FOR HEALTH CARE BENEFITS.***Be it enacted by the General Assembly of the State of Colorado:***SECTION 1. Legislative declaration.** (1) The general assembly finds and determines that:

(a) On January 1, 2006, the new medicare part D health benefit program became available for persons on medicare to help defray the cost of prescription medications;

(b) Because of the multiplicity of options and the need for medicare recipients to make specific choices among a wide array of providers and levels of coverage, selecting health care benefit coverage under medicare part D is a complex and confusing process for individuals;

(c) The difficulty of making the required choices for medicare part D increases substantially for an individual who has diminished cognitive abilities or other physical or mental limitations and who does not have a legal representative, family member, or friend to assist him or her; and

(d) It is essential that every individual is able to select the most appropriate coverage for his or her unique needs and have the opportunity to file an appeal with his or her chosen benefit plan if necessary.

(2) The general assembly, therefore, declares that it is necessary to define and authorize a category of persons to assist individuals who lack sufficient decisional capacity in making health care benefit decisions for public or private benefits programs and to file any necessary appeals on their behalf.

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

SECTION 2. 15-14-505 (4), Colorado Revised Statutes, is amended, and the said 15-14-505 is further amended BY THE ADDITION OF THE FOLLOWING NEW SUBSECTIONS, to read:

15-14-505. Definitions. As used in sections 15-14-503 to 15-14-509, unless the context otherwise requires:

(4) "Decisional capacity" means the ability to provide informed consent to or refusal of medical treatment, OR THE ABILITY TO MAKE AN INFORMED HEALTH CARE BENEFIT DECISION.

(4.7) "HEALTH CARE BENEFIT DECISION" MEANS ANY DECISION OR ACTION RELATED TO THE APPLICATION, ENROLLMENT, DISENROLLMENT, APPEAL, OR OTHER FUNCTION NECESSARY FOR PRIVATE OR PUBLIC HEALTH CARE BENEFITS THAT DOES NOT CONFLICT WITH ANY KNOWN PREFERENCE OF THE INDIVIDUAL.

(8) "PHYSICIAN OR DESIGNEE" MEANS THE TREATING PHYSICIAN OR A HEALTH CARE PROFESSIONAL UNDER THE SUPERVISION OF THE TREATING PHYSICIAN.

SECTION 3. 15-18.5-101 (1) (a) and (1) (c), Colorado Revised Statutes, are amended to read:

15-18.5-101. Legislative declaration - construction of statute. (1) The general assembly hereby finds, determines, and declares that:

(a) All adult persons have a fundamental right to make their own medical treatment AND HEALTH CARE BENEFIT decisions, including decisions regarding medical treatment, ~~and~~ artificial nourishment and hydration, AND PRIVATE OR PUBLIC HEALTH CARE BENEFITS;

(c) The enactment of legislation to authorize proxy decision-makers to make medical treatment decisions AND SURROGATE DECISION-MAKERS TO MAKE HEALTH CARE BENEFIT DECISIONS on behalf of persons lacking the decisional capacity to provide informed consent to or refusal of medical treatment is appropriate.

SECTION 4. 15-18.5-102 (2), Colorado Revised Statutes, is amended to read:

15-18.5-102. Definitions applicable to medical durable power of attorney - applicability. (2) The provisions of sections 15-14-506 to 15-14-509 shall apply to this article. In addition, proxy decision-makers, SURROGATE DECISION-MAKERS FOR HEALTH CARE BENEFITS, health care providers, and health care facilities shall be subject to the provisions of this article.

SECTION 5. Article 18.5 of title 15, Colorado Revised Statutes, is amended BY THE ADDITION OF THE FOLLOWING NEW SECTIONS to read:

15-18.5-104. Surrogate decision-makers for health care benefits. (1) A PROXY DECISION-MAKER FOR MEDICAL TREATMENT SELECTED IN ACCORDANCE WITH SECTION 15-18.5-103 SHALL HAVE AUTHORITY TO MAKE HEALTH CARE BENEFIT DECISIONS ON BEHALF OF AN ADULT PATIENT AND MAY BE KNOWN ADDITIONALLY

AS A SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS.

(2) A COURT OR THE ATTENDING PHYSICIAN MAY MAKE THE DETERMINATION THAT A PERSON LACKS THE DECISIONAL CAPACITY TO MAKE HEALTH CARE BENEFIT DECISIONS. THE ATTENDING PHYSICIAN SHALL MAKE SPECIFIC FINDINGS REGARDING THE CAUSE, NATURE, AND PROJECTED DURATION OF THE PERSON'S LACK OF DECISIONAL CAPACITY REGARDING HEALTH CARE BENEFIT DECISIONS. SUCH DETERMINATION AND FINDINGS SHALL BE DOCUMENTED IN THE PERSON'S MEDICAL RECORD.

(3) UPON A DETERMINATION THAT AN ADULT PATIENT LACKS DECISIONAL CAPACITY TO MAKE HEALTH CARE BENEFIT DECISIONS, THE ATTENDING PHYSICIAN OR HIS OR HER DESIGNEE SHALL MAKE REASONABLE EFFORTS TO NOTIFY THE PATIENT OF THE PATIENT'S LACK OF DECISIONAL CAPACITY. IN ADDITION, THE ATTENDING PHYSICIAN OR HIS OR HER DESIGNEE SHALL MAKE REASONABLE EFFORTS TO LOCATE AS MANY INTERESTED PERSONS AS DEFINED IN THIS SUBSECTION (3) AS PRACTICABLE, AND THE ATTENDING PHYSICIAN MAY RELY ON SUCH INDIVIDUALS TO NOTIFY OTHER FAMILY MEMBERS OR INTERESTED PERSONS. FOR THE PURPOSES OF THIS SECTION, "INTERESTED PERSONS" MEANS THE PATIENT'S SPOUSE; EITHER PARENT OF THE PATIENT; ANY ADULT CHILD, SIBLING, OR GRANDCHILD OF THE PATIENT; OR ANY CLOSE FRIEND OF THE PATIENT. UPON LOCATING AN INTERESTED PERSON, THE ATTENDING PHYSICIAN OR HIS OR HER DESIGNEE SHALL INFORM SUCH PERSON OF THE PATIENT'S LACK OF DECISIONAL CAPACITY AND DETERMINE WHETHER SUCH INTERESTED PERSON IS AVAILABLE, WILLING, AND HAS THE CAPABILITY TO ACT AS A SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS FOR THE PATIENT.

(4) IF A PROXY DECISION-MAKER FOR MEDICAL TREATMENT OR AN INTERESTED PERSON, AS DEFINED IN SUBSECTION (3) OF THIS SECTION, IS UNAVAILABLE, UNWILLING, OR DOES NOT HAVE THE CAPABILITY TO MAKE A HEALTH CARE BENEFIT DECISION ON BEHALF OF A PERSON LACKING THE DECISIONAL CAPACITY TO MAKE A HEALTH CARE BENEFIT DECISION PURSUANT TO THIS SECTION, THEN THE ATTENDING PHYSICIAN OR HIS OR HER DESIGNEE MAY APPOINT A SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS AS DESCRIBED IN SUBSECTION (5) OF THIS SECTION.

(5) THE SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS APPOINTED BY AN ATTENDING PHYSICIAN OR HIS OR HER DESIGNEE MAY BE A PRIVATE INDIVIDUAL OR AN INDIVIDUAL ACTING ON BEHALF OF AN ORGANIZATION, INCLUDING AN EMPLOYEE OF THE ORGANIZATION, WILLING TO VOLUNTARILY ASSUME THE FIDUCIARY RESPONSIBILITY TO MAKE HEALTH CARE BENEFIT DECISIONS IN THE BEST INTERESTS OF THE PERSON WHO LACKS THE DECISIONAL CAPACITY TO MAKE HEALTH CARE BENEFIT DECISIONS. THE APPOINTED SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS SHALL BE FREE OF CONFLICTS SPECIFIED IN SUBSECTION (9) OF THIS SECTION.

(6) COMMUNITY AND CHARITABLE ORGANIZATIONS MAY PROVIDE VOLUNTEERS OR EMPLOYEES TO SERVE AS SURROGATE DECISION-MAKERS FOR HEALTH CARE BENEFITS. THE DIVISION OF INSURANCE, ESTABLISHED IN SECTION 10-1-103, C.R.S., SHALL BE AVAILABLE TO PROVIDE ASSISTANCE TO SURROGATE DECISION-MAKERS FOR HEALTH CARE BENEFITS REGARDING MEDICARE BENEFITS. A PHYSICIAN OR HIS OR HER DESIGNEE MAY CONTACT NONPROFIT ENTITIES THAT SERVE THE ELDERLY OR DISABILITY COMMUNITIES FOR ASSISTANCE IN LOCATING AN APPROPRIATE

SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS.

(7) AFTER A PHYSICIAN OR HIS OR HER DESIGNEE LOCATES AN INDIVIDUAL WILLING TO ACT AS THE SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS PURSUANT TO SUBSECTION (3) OF THIS SECTION, THE PHYSICIAN SHALL CERTIFY THE APPOINTMENT IN WRITING ON THE FORM SET FORTH IN SECTION 15-18.5-105.

(8) IF THE SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS, A PROXY DECISION-MAKER FOR MEDICAL TREATMENT, AN INTERESTED PERSON, THE PERSON'S GUARDIAN, OR THE ATTENDING PHYSICIAN BELIEVES THE PATIENT HAS REGAINED DECISIONAL CAPACITY, THEN THE ATTENDING PHYSICIAN SHALL REEXAMINE THE PATIENT AND DETERMINE WHETHER OR NOT THE PATIENT HAS REGAINED SUCH DECISIONAL CAPACITY AND SHALL ENTER THE DECISION AND THE BASIS THEREFOR INTO THE PATIENT'S MEDICAL RECORD AND SHALL NOTIFY THE PATIENT, THE SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS, AND THE PERSON WHO INITIATED THE REDETERMINATION OF DECISIONAL CAPACITY.

(9) A SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS MAY NOT BE AN EMPLOYEE, A CONTRACTOR, OR AN OFFICIAL REPRESENTATIVE OF, OR RECEIVE ANY REMUNERATION OF ANY KIND FROM, A HEALTH CARE PROVIDER, MEDICAL BENEFIT PROVIDER, PHARMACEUTICAL COMPANY, PHARMACY BENEFIT MANAGEMENT COMPANY, PHARMACY, OR ANY PERSON OR ENTITY ENGAGED IN THE SALE OF INSURANCE.

(10) A SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS SHALL HAVE ACCESS TO ALL NECESSARY INFORMATION, INCLUDING BUT NOT LIMITED TO:

(a) PERSONAL HEALTH INFORMATION AS DEFINED BY THE FEDERAL "HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996", 42 U.S.C. SEC. 1320d-7 (a) (2); AND

(b) FINANCIAL INFORMATION NEEDED TO MAKE APPROPRIATE HEALTH CARE BENEFIT DECISIONS; EXCEPT THAT ANY BANK, TRUST COMPANY, SAVINGS AND LOAN ASSOCIATION, CREDIT UNION, OR INSURANCE COMPANY REGULATED UNDER ANY LAWS OF THIS STATE OR THE UNITED STATES AND ANY OFFICER, EMPLOYEE, AGENT OR AFFILIATE OF ANY OF THE FOREGOING ENTITIES SHALL BE EXEMPT FROM ANY REQUIREMENT TO PROVIDE FINANCIAL INFORMATION TO A SURROGATE DECISION-MAKER UNDER THE PROVISIONS OF THIS SECTION.

(11) A SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS SHALL MAKE DECISIONS THAT ARE IN THE BEST INTERESTS OF THE PERSON ON WHOSE BEHALF THE DECISIONS ARE MADE.

(12) ANY ENTITY, INCLUDING A FINANCIAL ENTITY, THAT RELIES IN GOOD FAITH ON A CERTIFICATE OF APPOINTMENT OF A SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS RECEIVED DIRECTLY FROM THE ATTENDING PHYSICIAN OR HIS OR HER DESIGNEE SHALL BE IMMUNE FROM LIABILITY FOR ACTIONS TAKEN ON THE BASIS OF SAID CERTIFICATE.

(13) A SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS SHALL BE IMMUNE FROM LIABILITY FOR DECISIONS MADE IN GOOD FAITH.

(14) AN ATTENDING PHYSICIAN, HEALTH CARE PROVIDER, OR HEALTH CARE FACILITY THAT ACTS IN SUBSTANTIAL COMPLIANCE WITH THIS SECTION SHALL NOT BE SUBJECT TO CIVIL OR CRIMINAL LIABILITY OR REGULATORY SANCTION RELATING TO THE SELECTION OR ACTIONS OF A SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS.

(15) NOTHING IN THIS SECTION SHALL BE CONSTRUED AS REQUIRING A SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS TO MAKE A DECISION OR FROM PROHIBITING AN INDIVIDUAL FROM CONSULTING ANOTHER PERSON OR ENTITY TO OBTAIN ASSISTANCE IN MAKING A HEALTH CARE BENEFIT DECISION.

15-18.5-105. Statutory form for certificate of appointment of surrogate decision-makers for health care benefits. THE FOLLOWING STATUTORY FORM FOR CERTIFICATE OF APPOINTMENT OF SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS IS LEGALLY SUFFICIENT:

CERTIFICATE OF APPOINTMENT OF A SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS

(1) I, (NAME OF ATTENDING PHYSICIAN), THE ATTENDING PHYSICIAN, CERTIFY THAT (NAME OF PERSON FOR WHOM DECISIONS ARE BEING MADE) LACKS THE DECISIONAL CAPACITY TO MAKE HEALTH CARE BENEFIT DECISIONS. I FURTHER CERTIFY THAT I HAVE MADE THE NECESSARY DOCUMENTATION TO THE MEDICAL RECORD.

(2) I, (NAME OF ATTENDING PHYSICIAN), THE ATTENDING PHYSICIAN OR DESIGNEE, HEREBY APPOINT (NAME OF SURROGATE), (DRIVER'S LICENSE NUMBER OR STATE ID NUMBER) AS THE SURROGATE DECISION-MAKER FOR HEALTH CARE BENEFITS ON BEHALF OF (NAME OF PERSON FOR WHOM DECISIONS ARE BEING MADE), (ADDRESS, CITY, STATE) PURSUANT TO SECTION 15-18.5-104, C.R.S.

(3) (NAME OF SURROGATE) SHALL HAVE ACCESS TO ALL NECESSARY PERSONAL HEALTH INFORMATION AS DEFINED BY THE FEDERAL HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND ANY FINANCIAL INFORMATION NECESSARY TO MAKE APPROPRIATE HEALTH CARE BENEFIT DECISIONS ON BEHALF OF (NAME OF PERSON FOR WHOM DECISIONS ARE BEING MADE), AS PROVIDED FOR IN SECTION 15-18.5-104, C.R.S. (NAME OF SURROGATE) SHALL MAKE SUCH DECISIONS IN THE BEST INTERESTS OF (NAME OF PERSON FOR WHOM DECISIONS ARE BEING MADE).

EXECUTED THIS _____ DAY OF _____, ____.

(ATTENDING PHYSICIAN)
(BUSINESS ADDRESS)
(BUSINESS PHONE)
(BUSINESS FAX)

SECTION 6. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 4, 2006