

1994 BILL 58

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THE LEGISLATIVE ASSEMBLY OF ALBERTA

BILL 58

ADVANCE DIRECTIVES ACT

MS. HALEY

First Reading

Second Reading

Committee of the Whole

Third Reading

Royal Assent

Bill 58
Ms. Haley

BILL 58

1994

ADVANCE DIRECTIVES ACT

(Assented to , 1994)

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Interpretation . **1(1)** In this Act,

- (a) “agent” means a person appointed in a directive as the agent of the person who made the directive;
- (b) “capable” means having the ability to understand the nature and effect of making or revoking a directive;
- (c) “directive” means a directive made in accordance with this Act;
- (d) “formal patient” means a formal patient as defined in the *Mental Health Act*;
- (e) “health care” means anything that is done for a therapeutic, preventive, palliative, diagnostic or other health-related purpose, and includes nutrition and hydration and in the case of a person who is at least 18 years of age includes personal care;
- (f) “health care decision” means a consent, refusal to consent or withdrawal of consent to health care;
- (g) “health care practitioner” means a person who, pursuant to an enactment, is licensed, certified or registered to provide health care;
- (h) “incapacitated” means not having the capacity to make a health care decision;
- (i) “nearest relative” means, with respect to any person, the person first listed in the following subclauses:
 - (i) spouse;
 - (ii) child;

(iii) parent or guardian;

(iv) sibling;

(v) grandparent;

(vi) grandchild;

(vii) uncle or aunt;

(viii) nephew or niece;

(j) “personal care” means, when directly related to health care, personal hygiene and dress, place of residence, with whom a person lives, the nature and extent of social activities and related matters, participation in educational, vocational and other training, work and related matters, applying for any licence, permit, approval or other consent or authorization required by law, commencing, compromising or settling any legal proceeding that relates to a person but not to the estate of the person, and normal day to day decisions;

(k) “proxy” means a person who is authorized to make health care decisions on behalf of another person;

(l) “psychosurgery” means psychosurgery as defined in the *Mental Health Act*;

(m) “registry” means a registry for directives.

(2) For the purposes of this Act, an agent or proxy is “not available” if the agent or proxy is not able to make a health care decision or if it is not possible for a health care practitioner, within a time that is reasonable in the circumstances, to obtain a health care decision from the agent or proxy.

(3) For the purposes of this Act, a person has capacity to make a health care decision if the person is able to understand the information that is relevant to making the decision and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision.

PART 1

DIRECTIVES

Capability
presumption

2(1) A person who has capacity to make a health care decision is presumed to be capable of making and revoking a directive.

(2) For the purposes of this Act a person who is at least 18 years of age is presumed to have capacity to make a health care decision unless 2 physicians determine otherwise.

(3) Physicians who make a determination under subsection (2) shall make a written record of it.

(4) For the purposes of this Act, a person who is less than 18 years of age is presumed to be capable of making a directive if 2 physicians determine that the person has capacity to make a health care decision, in which case the person is presumed to be capable for 180 days after the determination.

(5) If the person described in subsection (4) makes a directive within 180 days of the determination, it is presumed that the person is capable until 2 physicians determine that the person does not have capacity to make a health care decision.

(6) Physicians who make a determination under subsection (4) that a person has capacity to make a health care decision shall make a written record of the determination, and the physician who first examined the person shall notify that person's parents within 14 days of the determination.

Presumption

3(1) No inference or presumption respecting a person's wishes and instructions respecting health care decisions arises because the person does not have a directive.

(2) No inference or presumption arises because a person does or does not appoint an agent in a directive or does or does not register a directive or a revocation of a directive in the registry.

Directive's contents

4(1) In a directive a person may

(a) provide instructions and information about

(i) health care decisions to be made on his behalf, and

(ii) consents to be given on his behalf under the *Human Tissue Gift Act*;

(b) provide information on his beliefs and values to be considered with respect to health care decisions;

(c) appoint one or more individuals to act as his agent for all or for specified health care decisions and appoint alternates in case any appointed individuals are not available;

- (d) provide directions for resolving any disagreements among proxies;
 - (e) appoint the occupant of an office to act as his agent;
 - (f) name individuals, but not an occupant of an office, who are not to act as his proxy.
- (2) If a directive contains an instruction that is prohibited by law, the instruction is void.

Signing a directive

5(1) A directive must be written and the person who makes the directive must

- (a) sign it in the presence of a witness who is not appointed in the directive as an agent, or
 - (b) direct another person to sign it on his behalf while he and another witness are present, in which case neither the person signing nor the witness may be an agent appointed in the directive.
- (2) A directive made by a person who is less than 18 years of age must meet the requirements of subsection (1) and must be accompanied by a statement that the person has capacity to make a health care decision signed by 2 physicians within 180 days prior to the making of the determination.

Registry

6 If a registry is established by regulation a person may register a directive or a revocation of a directive in accordance with the regulations.

Revoking, terminating a directive

7(1) A person who has capacity to make a health care decision may revoke his directive

- (a) by a later directive that contradicts an earlier directive,
- (b) by a document that is hand-written by the person, that is signed but not witnessed and that expresses an intention to revoke all or part of the directive,
- (c) by destroying at least one of the original signed copies with the intention to revoke all original signed copies of the directive,
- (d) by directing another person to destroy at least one of the original signed copies, with the intention to revoke all

original signed copies of the directive, in the presence of the person who made the directive, or

- (e) by giving oral instructions to revoke the directive if 2 or more persons who are at least 18 years of age are present and witness the instructions.

(2) If a person has made a directive in which his spouse is appointed as an agent and subsequently the marriage is terminated by divorce or is found to be void or declared a nullity by a court, the appointment is terminated unless the directive states otherwise.

PART 2

INCAPACITATED PERSONS' HEALTH CARE

Division 1

Determining the Proxy

Proxy selected **8(1)** A proxy must be at least 18 years of age, have capacity to make a health care decision and be the person or member of a category first listed in the following clauses:

- (a) the agent the person has appointed in his directive,
- (b) a guardian appointed under the *Dependent Adults Act*, if any, or if the incapacitated person is a formal patient, the patient's guardian under the *Mental Health Act*, if any,
- (c) the incapacitated person's nearest relative, or
- (d) the Public Guardian under the *Dependent Adults Act* or, if the person is less than 18 years of age, a director under the *Child Welfare Act*.

(2) If a proxy is not available the next available person or member of a category of persons referred to in subsection (1) becomes the proxy.

(3) If a person or member of a category listed in subsection (1) prior to a proxy becomes available and that person informs the health care practitioner and the proxy that he is available, that person becomes the proxy.

(4) Notwithstanding subsections (1) to (3), if a proxy is not willing to make a health care decision on behalf of an incapacitated person, that person may no longer act as the proxy of the incapacitated person.

(5) Notwithstanding subsections (1) to (3), if a person has indicated in a directive that he does not wish an individual to act as his proxy, that individual may not act as the proxy.

More than one proxy

9(1) Subject to any directions in a person's directive, if more than one person in a category is qualified to act as a proxy, the decision of the majority prevails, and in the absence of a majority decision, the next available person or member of a category of persons referred to in section 8 becomes the proxy.

(2) If more than one person is qualified to act as a proxy, the persons must designate one person from among themselves to communicate their health care decisions to the health care practitioner, and the practitioner may assume that the person is communicating the health care decision of the majority of the proxies unless the practitioner has reasonable grounds to believe that it is not so.

(3) If the proxies fail to designate a person under subsection (2), the next available person or member of a category of persons determined in accordance with section 8 becomes the proxy.

Out-of-province directives

10(1) For the purposes of this Act, a directive that is made outside Alberta has the same effect as though it were made in Alberta in accordance with this Act if

(a) it meets the requirements of section 5, or

(b) it was made under and meets the requirements for making a directive established by the legislation of

(i) the jurisdiction where the directive was made, or

(ii) the jurisdiction where the person who made the directive was habitually resident at the time the directive was made.

(2) A person may rely on a certificate from an individual purporting to be a lawyer in the jurisdiction where a directive was made or where the person who made the directive was habitually resident that certifies that the directive meets the requirements of the jurisdiction for making a directive.

**Division 2
Health Care Decisions**

Incapacitated
person

11(1) If a health care practitioner wishes to provide health care to a person who appears to be at least 18 years of age and whom 2 physicians have determined to be incapacitated, the health care practitioner must make a reasonable attempt to determine whether the person has a directive and a proxy who is available to make health care decisions on his behalf.

(2) If a health care practitioner wishes to provide health care to a person who is less than 18 years of age, who has a directive and whom 2 physicians have determined to be incapacitated, the health care practitioner must make a reasonable attempt to determine whether the person has a proxy who is available to make health care decisions on his behalf.

(3) A proxy may make a health care decision on behalf of a person described in subsection (1) or (2) while the person remains incapacitated.

(4) For the purposes of this Act, in an emergency a health care practitioner may provide health care to a person described in subsection (1) or (2) that is necessary to preserve the person's life or health without obtaining the proxy's consent if the delay involved in obtaining consent from a proxy would probably pose a significant risk to the person.

(5) In providing health care pursuant to subsection (4), the health care practitioner may not act contrary to any known health care instructions, whether or not they are contained in the person's directive.

Proxy's guide
for decisions

12(1) When making a health care decision on behalf of an incapacitated person, a proxy shall

- (a)** follow any relevant and unambiguous instructions in the person's directive and, in the absence of such instructions, not act inconsistently with what the proxy believes would be the person's instructions based on the person's known beliefs and values, and
- (b)** if the proxy does not know what the person's instructions would be, make the health care decision that the proxy believes to be in the person's best interests.

(2) In determining what is in a person's best interests the proxy shall consider

- (a) whether the health of the person will be or is likely to be improved by the health care;
- (b) whether the person's condition will deteriorate or is likely to deteriorate without the health care;
- (c) whether the anticipated benefit from the health care outweighs the risk of harm to the person;
- (d) whether the health care is the least restrictive and least intrusive health care that meets the requirements of clauses (a), (b) and (c).

(3) A proxy may consent to the following on behalf of an incapacitated person only if the person's directive contains clear instructions that enable the proxy to do so:

- (a) health care if its primary purpose is for research;
- (b) psychosurgery;
- (c) sterilization that is not medically necessary to protect the person's health;
- (d) removal of tissue from the person's body while the person is alive
 - (i) for transplantation to another person who is alive, or
 - (ii) for medical education or research purposes.

Person notified about proxy

13 If a health care practitioner has an incapacitated person as a patient, the practitioner shall advise that person that health care decisions will be made on the person's behalf by a proxy or in accordance with section 11(4).

Court review

14(1) A person, and any member of a category of persons, referred to in section 8 and any person who the Court determines has a valid interest may apply to the Court of Queen's Bench, by originating notice, to have

- (a) the determination of whether a person has capacity to make a health care decision reviewed,
- (b) the validity of a directive determined,
- (c) the determination of who is entitled to act as proxy reviewed, and

(d) a proxy's health care decision reviewed.

(2) The originating notice shall be served on the proxy, the incapacitated person and any other persons that the Court may direct.

(3) The Court may make a determination as to whether a person has capacity to make a health care decision and whether a directive is valid.

(4) If the Court considers that the proxy's health care decision is unreasonable having regard to the criteria set out in section 12, it may

(a) rescind the proxy's decision,

(b) substitute its own health care decision based on the criteria set out in section 12, and

(c) direct that the next available proxy, as determined in accordance with section 8, make the health care decision.

(5) The Court may make an order

(a) stating that a person may no longer act as a proxy if the Court considers that the person is likely to continue to make unreasonable health care decisions or that the person is unsuitable to act as a proxy, and

(b) designating who, as determined in accordance with section 8, is to act as proxy.

Court's advice **15(1)** A proxy may apply to the Court of Queen's Bench for advice and directions.

(2) An application under subsection (1) may be made ex parte if the judge considers it proper in the circumstances.

Health information **16(1)** Notwithstanding the *Freedom of Information and Protection of Privacy Act* and any other enactment respecting the disclosure of confidential health information, but subject to any limitation set out in a directive, a proxy has the right to be provided with all the health care information and records relevant to the health care decision that the person for whom he acts as proxy would have if the person had the capacity to make a health care decision.

(2) A proxy may use the contents of the health care information and records described in subsection (1) only to carry out the powers and duties of a proxy.

PART 3

MISCELLANEOUS

Protection
from liability

17(1) No action lies against a proxy for anything done or omitted to be done in good faith while carrying out the powers and duties of a proxy in accordance with this Act.

(2) No action lies against a health care practitioner who makes a reasonable attempt in good faith to determine whether a patient has a proxy who is available and fails to correctly determine who is the proxy.

(3) No action lies against a health care practitioner who, while following generally accepted standards of health care practice, administers or refrains from administering health care to a person in good faith, in accordance with a health care decision made by a proxy or in accordance with section 11.

No
disentitlement

18 If a proxy has acted in good faith, a health care decision made by the proxy with respect to an incapacitated person does not affect the proxy's or his spouse's entitlement to the following:

(a) a disposition under the will of the person for whom he acted as proxy;

(b) the proceeds of an insurance policy on the life of the person for whom he acted as proxy;

(c) a share under the *Intestate Succession Act* of the estate of the person for whom he acted as proxy.

Offence

19 Any person who, without the consent of the person who made or revoked a directive, wilfully conceals or alters the directive or the revocation of the directive is guilty of an offence and liable to a fine of not more than \$10 000.

Regulations

20(1) The Lieutenant Governor in Council may make regulations respecting a registry and the registration of directives and of revocations of directives.

(2) The Minister may make regulations respecting forms for the purposes of this Act.

Amends RSA
1980 cA-24

21 *Section 13(2) of the Alberta Health Care Insurance Act is amended by adding “and” at the end of clause (b) and adding the following after clause (b):*

- (c) if the information relates to a health care decision to be made by a proxy as defined in the *Advance Directives Act* on behalf of an incapacitated person as defined in the *Advance Directives Act*.

Amends SA
1984 cC-8.1

22 *The Child Welfare Act is amended by adding the following before section 14:*

Proxy duties

13.1(1) If a determination is made under section 8 of the *Advance Directives Act* that a director is the proxy of an incapacitated person, a director may exercise the powers and duties of a proxy under that Act without applying to the Court for an order.

- (2) For the purposes of this section, “proxy” means a proxy as defined in the *Advance Directives Act*.

Amends RSA
1980 cD-32

23 *The Dependent Adults Act is amended*

(a) *in section 1*

(i) *by adding the following after clause (d):*

(d.01) “directive” means a directive as defined in the *Advance Directives Act*;

(ii) *in clause (h) by striking out “and” at the end of subclause (iv), adding “and” at the end of subclause (v) and adding the following after subclause (v):*

(vi) health care as defined in the *Advance Directives Act*;

(iii) *by adding the following after clause (k.1):*

(k.2) “proxy” means a proxy as defined in the *Advance Directives Act*;

(b) *in section 3(2) by adding the following after clause (e.1):*

(e.2) the proxy of the person in respect of whom the application is made if the proxy is not the applicant or a person served pursuant to this subsection,

(c) *in section 7*

(i) *in subsection (1) by renumbering clause (a) as clause (a.1) and adding the following before clause (a.1):*

(a) he will follow the health care instructions contained in the dependent adult's directive, if any, and not act inconsistently with the known beliefs and values of the dependent adult,

(ii) *by adding the following after subsection (1.1):*

(1.2) When making an appointment under subsection (1), the Court may consider whether an agent as defined in the *Advance Directives Act* may be appointed as a guardian of the dependent adult.

(d) *in section 10(2)(h) by adding "not inconsistent with the health care instructions contained in the dependent adult's directive, if any, not inconsistent with the known beliefs and values of the dependent adult and" after "that is";*

(e) *in section 11 by renumbering clause (a) as clause (a.1) and by adding the following before clause (a.1):*

(a) in accordance with the health care instructions contained in the dependent adult's directive, if any, and not inconsistent with the dependent adult's known beliefs and values,

(f) *in section 12*

(i) *in subsection (2) by striking out "or by an order of the Court" and substituting ", by an order of the Court or by the Advance Directives Act";*

(ii) *by adding the following after subsection (2):*

(3) If the Public Guardian is a proxy under section 8 of the *Advance Directives Act*, the Public Guardian may exercise the powers and duties of a proxy under that Act without applying to the Court for an order.

(g) *in section 15(2) by adding the following after clause (e.1):*

(e.2) the dependent adult's proxy, if any, unless he is the applicant or a person served pursuant to this subsection,

(h) *by repealing section 20.1;*

(i) *in section 22(2) by adding the following after clause (e.1):*

(e.2) a proxy of the person in respect of whom the application is made if he is not the applicant or a person served pursuant to this subsection,

(j) in section 68(2)

(i) by adding the following after clause (a.1):

(a.2) the proxy of the person in respect of whom the order is made,

(ii) in clause (b) by adding “or (a.2)” after “to clause (a)”.

Amends RSA
1980 cH-11

24 *The Hospitals Act is amended in section 40(5) by adding the following after clause (a):*

(a.01) divulge any diagnosis, record or information to a proxy as defined in the *Advance Directives Act* that relates to a health care decision to be made by the proxy on behalf of the patient,

Amends RSA
1980 cH-12

25 *The Human Tissue Gift Act is amended*

(a) in section 1 by adding the following after clause (a):

(a.1) “directive” means a directive as defined in the *Advance Directives Act*;

(a.2) “proxy” means a proxy as defined in the *Advance Directives Act*;

(b) in section 3 by adding the following after subsection (2):

(2.1) A proxy may consent to the removal forthwith of tissue from a living person’s body and its implantation in another living body if the person’s directive states that the consent may be given.

(2.2) Notwithstanding subsection (2.1), if a consent was given under that subsection by a person who was not the proxy or if the directive does not state that the consent may be given, the consent is valid for the purposes of this Act if the person who acted on it had no reason to believe that the person was not the proxy or that the directive did not state that the consent could be given.

(c) in section 5(1)

- (i) *by renumbering clause (a) as clause (a.1);*
- (ii) *by adding the following before clause (a.1):*
 - (a) *his proxy, or*
- (iii) *in clause (a.1) by adding “if none, or if none is readily available,” before “his spouse”;*
- (iv) *in clauses (g), (h) and (i) by adding “proxy,” before “spouse”.*

Amends SA
1992 cM-13.1

26 *The Mental Health Act is amended*

(a) in section 1

- (i) *by adding the following after clause (b):*
 - (b.1) *“directive” means a directive as defined in the Advance Directives Act;*
- (ii) *by adding the following after clause (i):*
 - (i.1) *“proxy” means a proxy as defined in the Advance Directives Act;*

(b) in section 17(6) by adding the following after clause (a):

- (a.1) *to a person’s proxy if the diagnosis, record or information relates to a health care decision to be made by the proxy on behalf of the person,*

(c) in section 27(3) by adding “his proxy and” after “objects,”;

(d) in section 28

- (i) *in subsection (1) by renumbering clause (a) as clause (a.1) and by adding the following before clause (a.1):*
 - (a) *the formal patient’s proxy,*
- (ii) *in subsection (3) by adding “in accordance with the health care instructions in the formal patient’s directive, if any, not inconsistent with the formal patient’s known beliefs and values and in” after “believes to be”;*

(e) in section 29

(i) in subsection (3) by adding the following after clause (a):

(a.1) the proposed treatment is in accordance with the health care instructions in the formal patient's directive, if any, and not inconsistent with the formal patient's known beliefs and values, and

(ii) in subsection (5) by striking out "section," and substituting "section but subject to subsection (6),";

(iii) by adding the following after subsection (5):

(6) A proxy of a formal patient who for the purposes of the *Advance Directives Act* is incapacitated may consent to psychosurgery on behalf of the formal patient if the formal patient's directive states that his proxy may consent on the patient's behalf to psychosurgery.

(f) in section 38(1) by adding "his proxy," before "his guardian";

(g) in section 40(1)(a), (2)(a) and (3) by adding ", his proxy" before "and his guardian";

(h) in section 42 by repealing clause (c) and substituting the following:

(c) administration of the proposed treatment is consistent with section 29(3),

Amends SA
1984 cP-27.1

27 *The Public Health Act* is amended in section 63(4) by adding the following after clause (b):

(b.1) to a person's proxy as defined in the *Advance Directives Act* if the information relates to a health care decision to be made by the proxy on behalf of the person;

Coming into
force

28 *This Act comes into force on Proclamation.*