

LEGISLATURE OF NEBRASKA  
ONE HUNDRED FIFTH LEGISLATURE  
FIRST SESSION

**LEGISLATIVE BILL 104**

Introduced by Bolz, 29.

Read first time January 06, 2017

Committee: Judiciary

1 A BILL FOR AN ACT relating to health care decisions; to amend sections  
2 20-405, 30-2628, 30-3420, and 83-4,157, Reissue Revised Statutes of  
3 Nebraska, and section 71-4843, Revised Statutes Cumulative  
4 Supplement, 2016; to provide for a surrogate to make health care  
5 decisions; to define terms; to harmonize provisions; and to repeal  
6 the original sections.

7 Be it enacted by the people of the State of Nebraska,

1           Section 1. For purposes of this section and section 2 of this act:

2           (1) Adult means an individual who is nineteen years of age or older;

3           (2) Advance health care directive means an individual instruction, a

4 declaration executed in accordance with the Rights of the Terminally Ill

5 Act, or a power of attorney for health care;

6           (3) Agent means an individual designated in a power of attorney for

7 health care to make a health care decision for the individual granting

8 the power;

9           (4) Capacity means an individual's ability to understand the

10 significant benefits, risks, and alternatives to proposed health care and

11 to make and communicate a health care decision;

12           (5) Guardian means a judicially appointed guardian or conservator

13 having authority to make a health care decision for an individual;

14           (6) Health care means any care, treatment, service, or procedure to

15 maintain, diagnose, or otherwise affect an individual's physical or

16 mental condition;

17           (7) Health care decision means a decision made by an individual, or

18 the individual's agent, guardian, or surrogate, regarding the

19 individual's health care, including:

20           (a) Selection and discharge of health care providers, health care

21 facilities, and health care services;

22           (b) Approval or disapproval of diagnostic tests, surgical

23 procedures, programs of medication, and orders not to resuscitate; and

24           (c) Directions to provide, withhold, or withdraw artificial

25 nutrition and hydration and all other forms of health care;

26           (8) Health care facility means a facility licensed under the Health

27 Care Facility Licensure Act or permitted by law to provide health care in

28 the ordinary course of business;

29           (9) Health care provider means an individual credentialed under the

30 Uniform Credentialing Act or permitted by law to provide health care in

31 the ordinary course of business or practice of a profession;

1       (10) Health care service means an adult day service, a home health  
2 agency, a hospice or hospice service, a respite care service, or a  
3 children's day health service licensed under the Health Care Facility  
4 Licensure Act or permitted by law to provide health care in the ordinary  
5 course of business. Health care service does not include an in-home  
6 personal services agency as defined in section 71-6501;

7       (11) Individual instruction means an individual's direction  
8 concerning a health care decision for the individual;

9       (12) Physician means an individual licensed to practice medicine and  
10 surgery or osteopathic medicine under the Uniform Credentialing Act;

11       (13) Power of attorney for health care means the designation of an  
12 agent under sections 30-3401 to 30-3432 or a similar law of another state  
13 to make health care decisions for the individual granting the power;

14       (14) Primary physician means a physician designated by an individual  
15 or the individual's agent, guardian, or surrogate, to have primary  
16 responsibility for the individual's health care or, in the absence of a  
17 designation or if the designated physician is not reasonably available, a  
18 physician who undertakes the responsibility;

19       (15) Reasonably available means readily able to be contacted without  
20 undue effort and willing and able to act in a timely manner considering  
21 the urgency of the patient's health care needs;

22       (16) State means a state of the United States, the District of  
23 Columbia, the Commonwealth of Puerto Rico, or a territory or insular  
24 possession subject to the jurisdiction of the United States;

25       (17) Supervising health care provider means the primary physician  
26 or, if there is no primary physician or the primary physician is not  
27 reasonably available, the health care provider who has undertaken primary  
28 responsibility for an individual's health care; and

29       (18) Surrogate means an individual, other than a patient's agent or  
30 guardian, authorized under section 2 of this act to make a health care  
31 decision for the patient.

1           Sec. 2. (1) A surrogate may make a health care decision for a  
2 patient who is an adult or emancipated minor if the patient has been  
3 determined by the primary physician to lack capacity and no agent or  
4 guardian has been appointed.

5           (2) An adult or emancipated minor may designate any individual to  
6 act as surrogate by personally informing the supervising health care  
7 provider. In the absence of a designation, or if the designee is not  
8 reasonably available, any member of the following classes of the  
9 patient's family who is reasonably available, in descending order of  
10 priority, may act as surrogate:

11           (a) The spouse unless legally separated;

12           (b) An adult child;

13           (c) A parent; or

14           (d) An adult brother or sister.

15           (3) If none of the individuals eligible to act as surrogate under  
16 subsection (2) of this section is reasonably available, an adult who has  
17 exhibited special care and concern for the patient, who is familiar with  
18 the patient's personal values, and who is reasonably available may act as  
19 surrogate.

20           (4) A surrogate shall communicate his or her assumption of authority  
21 as promptly as practicable to the members of the patient's family  
22 specified in subsection (2) of this section who can be readily contacted.

23           (5) If more than one member of a class assumes authority to act as  
24 surrogate, if they do not agree on a health care decision, and if the  
25 supervising health care provider is so informed, the supervising health  
26 care provider shall comply with the decision of a majority of the members  
27 of that class who have communicated their views to the provider. If the  
28 class is evenly divided concerning the health care decision and the  
29 supervising health care provider is so informed, that class and all  
30 individuals having lower priority are disqualified from making the  
31 decision.

1       (6) A surrogate shall make a health care decision in accordance with  
2 the patient's individual instructions, if any, and other wishes to the  
3 extent known to the surrogate.

4       Otherwise, the surrogate shall make the decision in accordance with  
5 the surrogate's determination of the patient's best interest. In  
6 determining the patient's best interest, the surrogate shall consider the  
7 patient's personal values to the extent known to the surrogate.

8       (7) A health care decision made by a surrogate for a patient is  
9 effective without judicial approval.

10       (8) An individual at any time may disqualify another, including a  
11 member of the individual's family, from acting as the individual's  
12 surrogate by a signed writing or by personally informing the supervising  
13 health care provider of the disqualification.

14       (9) Unless related to the patient by blood, marriage, or adoption, a  
15 surrogate may not be an owner, operator, or employee of a health care  
16 facility at which the patient is residing or receiving health care or a  
17 facility or an institution of the Department of Correctional Services or  
18 the Department of Health and Human Services to which the patient has been  
19 committed.

20       (10) A supervising health care provider may require an individual  
21 claiming the right to act as surrogate for a patient to provide a written  
22 declaration under penalty of perjury stating facts and circumstances  
23 reasonably sufficient to establish the claimed authority.

24       Sec. 3. Section 20-405, Reissue Revised Statutes of Nebraska, is  
25 amended to read:

26       20-405 A declaration shall become operative when (1) it is  
27 communicated to the attending physician, (2) the declarant is determined  
28 by the attending physician to be in a terminal condition or in a  
29 persistent vegetative state, (3) the declarant is determined by the  
30 attending physician to be unable to make decisions regarding  
31 administration of life-sustaining treatment, and (4) the attending

1 physician has notified a reasonably available member of the declarant's  
2 immediate family or guardian, if any, of his or her diagnosis and of the  
3 intent to invoke the patient's declaration. When the declaration becomes  
4 operative, the attending physician and other health care providers shall  
5 act in accordance with its provisions or comply with section 2 of this  
6 act or the transfer requirements of section 20-409.

7 Sec. 4. Section 30-2628, Reissue Revised Statutes of Nebraska, is  
8 amended to read:

9 30-2628 (a) Except as limited by section 30-2620, a guardian of an  
10 incapacitated person has the same powers, rights, and duties respecting  
11 the guardian's ward that a parent has respecting the parent's  
12 unemancipated minor child, except that a guardian is not liable to third  
13 persons for acts of the ward solely by reason of the parental  
14 relationship. In particular, and without qualifying the foregoing, a  
15 guardian has the following powers and duties, except as may be specified  
16 by order of the court:

17 (1) To the extent that it is consistent with the terms of any order  
18 by a court of competent jurisdiction relating to detention or commitment  
19 of the ward, a guardian is entitled to custody of the person of his or  
20 her ward and may establish the ward's place of abode within this state  
21 or, with court permission, outside of this state. When establishing the  
22 ward's place of abode, a guardian shall make every reasonable effort to  
23 ensure that the placement is the least restrictive alternative. A  
24 guardian shall authorize a placement to a more restrictive environment  
25 only after careful evaluation of the need for such placement. The  
26 guardian may obtain a professional evaluation or assessment that such  
27 placement is in the best interest of the ward.

28 (2) If entitled to custody of his or her ward, a guardian shall make  
29 provision for the care, comfort, and maintenance of his or her ward and,  
30 whenever appropriate, arrange for the ward's training and education.  
31 Without regard to custodial rights of the ward's person, a guardian shall

1 take reasonable care of his or her ward's clothing, furniture, vehicles,  
2 and other personal effects and commence protective proceedings if other  
3 property of his or her ward is in need of protection.

4 (3) A guardian may give any consents or approvals that may be  
5 necessary to enable the ward to receive medical, psychiatric,  
6 psychological, or other professional care, counsel, treatment, or  
7 service. When making such medical or psychiatric decisions, the guardian  
8 shall consider and carry out the intent of the ward expressed prior to  
9 incompetency to the extent allowable by law. Notwithstanding this  
10 provision or any other provision of the Nebraska Probate Code, the ward  
11 may authorize the release of financial, medical, and other confidential  
12 records pursuant to sections 20-161 to 20-166.

13 (4) If no conservator for the estate of the ward has been appointed,  
14 a guardian shall, within thirty days after appointment, prepare and file  
15 with the appointing court a complete inventory of the ward's estate  
16 together with the guardian's oath or affirmation that the inventory is  
17 complete and accurate so far as the guardian is informed. The guardian  
18 shall mail a copy thereof by first-class mail to the ward, if the ward  
19 can be located and has attained the age of fourteen years, and to all  
20 other interested persons as defined in section 30-2601. The guardian  
21 shall file with the court a certificate of mailing showing that copies  
22 were sent to all interested persons by first-class mail along with a form  
23 to send back to the court that indicates if such person wants to continue  
24 receiving notifications about the proceedings. The guardian shall keep  
25 suitable records of the guardian's administration and exhibit the same on  
26 request of any interested person. To the extent a guardian, who has not  
27 been named a conservator, has possession or control of the ward's estate,  
28 the guardian shall file with the court an updated inventory every year  
29 along with a certificate of mailing showing that copies were sent to all  
30 interested persons and, if a bond has been required, to the bonding  
31 company by first-class mail.

1 (5) If no conservator for the estate of the ward has been appointed,  
2 a guardian may:

3 (i) Institute proceedings to compel any person under a duty to  
4 support the ward or to pay sums for the welfare of the ward to perform  
5 such person's duty;

6 (ii) Receive money and tangible property deliverable to the ward and  
7 apply the money and property for support, care, and education of the  
8 ward; but a guardian may not use funds from his or her ward's estate for  
9 room and board which the guardian or the guardian's spouse, parent, or  
10 child has furnished the ward unless a charge for the service is approved  
11 by order of the court made upon notice to at least one of the next of kin  
12 of the ward, if notice is possible. A guardian must exercise care to  
13 conserve any excess for the ward's needs; and

14 (iii) Exercise a settlor's powers with respect to revocation,  
15 amendment, or distribution of trust property when authorized by a court  
16 acting under the authority of subsection (f) of section 30-3854. In  
17 acting under the authority of subsection (f) of section 30-3854, the  
18 court shall proceed in the same manner as provided under subdivision (3)  
19 of section 30-2637.

20 (6) A guardian is required to report the condition of his or her  
21 ward and of the estate which has been subject to the guardian's  
22 possession or control, at least every year and as required by the court  
23 or court rule. The court shall receive from any interested person, for a  
24 period of thirty days after the filing of the guardian's report, any  
25 comments with regard to the need for continued guardianship or amendment  
26 of the guardianship order. If the court has reason to believe that  
27 additional rights should be returned to the ward or assigned to the  
28 guardian, the court shall set a date for a hearing and may provide all  
29 protections as set forth for the original finding of incapacity and  
30 appointment of a guardian.

31 (7) If a conservator has been appointed, all of the ward's estate



1 received by the guardian in excess of those funds expended to meet  
2 current expenses for support, care, and education of the ward must be  
3 paid to the conservator for management as provided in the Nebraska  
4 Probate Code, and the guardian must account to the conservator for funds  
5 expended.

6 (b) Any guardian of one for whom a conservator also has been  
7 appointed shall control the custody and care of the ward and is entitled  
8 to receive reasonable sums for the guardian's services and for room and  
9 board furnished to the ward as agreed upon between the guardian and the  
10 conservator if the amounts agreed upon are reasonable under the  
11 circumstances. The guardian may request the conservator to expend the  
12 ward's estate by payment to third persons or institutions for the ward's  
13 care and maintenance.

14 (c) Nothing in subdivision (a)(3) of this section or in any other  
15 part of this section shall be construed to alter the decisionmaking  
16 authority of a surrogate under section 2 of this act or an attorney in  
17 fact designated and authorized under sections 30-3401 to 30-3432 to make  
18 health care decisions pursuant to a power of attorney for health care.

19 Sec. 5. Section 30-3420, Reissue Revised Statutes of Nebraska, is  
20 amended to read:

21 30-3420 (1) A power of attorney for health care or a health care  
22 decision made by an attorney in fact may be revoked at any time by a  
23 principal who is competent and in any manner by which the principal is  
24 able to communicate his or her intent to revoke. Revocation shall be  
25 effective upon communication to the attending physician, the health care  
26 provider who shall promptly inform the attending physician of the  
27 revocation, or the attorney in fact who shall promptly inform the  
28 attending physician of the revocation.

29 (2) The creation by the principal of written wishes or instructions  
30 about health care or limitations upon the attorney in fact's authority  
31 shall not revoke a power of attorney for health care unless such wishes,

1 instructions, or limitations expressly provide otherwise.

2 (3) Upon learning of the revocation of the power of attorney for  
3 health care, the attending physician shall cause the revocation to be  
4 made a part of the principal's medical records.

5 (4) Unless the power of attorney for health care provides otherwise,  
6 execution of a valid power of attorney for health care shall revoke any  
7 previously executed power of attorney for health care.

8 (5) Unless the power of attorney for health care provides otherwise,  
9 a power of attorney for health care shall supersede:

10 (a) Any conflicting preexisting directive;

11 (b) Any guardianship proceedings under the Nebraska Probate Code to  
12 the extent the proceedings involve the right to make health care  
13 decisions for the protected person; and

14 (c) Any conservatorship proceedings under the Nebraska Probate Code  
15 to the extent the proceedings involve the right to make health care  
16 decisions for the protected person.

17 (6) A decree of divorce or legal separation entered into pursuant to  
18 sections 42-347 to 42-380 may specify whether the choice of the  
19 principal's spouse as attorney in fact under a power of attorney for  
20 health care shall be revoked or remain effective. If the decree does not  
21 specify whether the choice of the spouse as the principal's attorney in  
22 fact for health care is revoked or remains effective, the choice of the  
23 principal's spouse as attorney in fact for health care shall be deemed  
24 revoked upon entry of the decree.

25 (7) The revocation of a power of attorney for health care shall not  
26 revoke or terminate the authority as to the attorney in fact or other  
27 person who acts in good faith under the power of attorney for health care  
28 and without actual knowledge of the revocation. An action taken without  
29 knowledge of the revocation, unless the action is otherwise invalid or  
30 unenforceable, shall bind the principal and his or her heirs, devisees,  
31 and personal representatives.

1       (8) A surrogate making a health care decision under section 2 of  
2 this act revokes a power of attorney for health care unless the principal  
3 specifically states that the power of attorney for health care remains  
4 effective.

5       Sec. 6. Section 71-4843, Revised Statutes Cumulative Supplement,  
6 2016, is amended to read:

7       71-4843 (a) For purposes of this section:

8       (1) Advance health care directive means a power of attorney for  
9 health care or a record signed or authorized by a prospective donor  
10 containing the prospective donor's direction concerning a health care  
11 decision for the prospective donor;

12       (2) Declaration means a record signed by a prospective donor  
13 specifying the circumstances under which life-sustaining treatment may be  
14 withheld or withdrawn from the prospective donor; and

15       (3) Health care decision means any decision regarding the health  
16 care of the prospective donor.

17       (b) If a prospective donor has a declaration or advance health care  
18 directive and the terms of the declaration or directive and the express  
19 or implied terms of a potential anatomical gift are in conflict with  
20 regard to the administration of measures necessary to ensure the medical  
21 suitability of a part for transplantation or therapy, the prospective  
22 donor's attending physician and prospective donor shall confer to resolve  
23 the conflict. If the prospective donor is incapable of resolving the  
24 conflict, an agent acting under the prospective donor's declaration or  
25 directive, or, if none or the agent is not reasonably available, a  
26 surrogate acting under section 2 of this act or another person authorized  
27 by law other than the Revised Uniform Anatomical Gift Act to make health  
28 care decisions on behalf of the prospective donor, shall act for the  
29 donor to resolve the conflict. The conflict must be resolved as  
30 expeditiously as possible. Information relevant to the resolution of the  
31 conflict may be obtained from the appropriate procurement organization

1 and any other person authorized to make an anatomical gift for the  
2 prospective donor under section 71-4832. Before resolution of the  
3 conflict, measures necessary to ensure the medical suitability of the  
4 part from a prospective donor may not be administered if it is determined  
5 that the administration of those measures would not provide the  
6 prospective donor with appropriate end-of-life care or it can be  
7 anticipated by reasonable medical judgment that such measures would cause  
8 the prospective donor's death other than by the prospective donor's  
9 underlying pathology. If the conflict is not resolved expeditiously, the  
10 direction of the declaration or advanced directive controls.

11 Sec. 7. Section 83-4,157, Reissue Revised Statutes of Nebraska, is  
12 amended to read:

13 83-4,157 The medical director shall:

14 (1) Coordinate all clinical services;

15 (2) Participate in the selection and supervision of all clinical  
16 staff employed by or under contract with the department, including  
17 medical doctors, physician assistants, pharmacists, pharmacy technicians,  
18 registered nurses, licensed practical nurses, advanced practice  
19 registered nurses practicing under and in accordance with their  
20 respective certification acts, mental health practitioners, alcohol and  
21 drug counselors, laboratory technicians, physical therapists,  
22 optometrists, audiologists, dentists, dental assistants, and dental  
23 hygienists;

24 (3) Maintain and preserve the medical records of health care  
25 services;

26 (4) Approve the purchasing of all necessary medical supplies and  
27 medical equipment for the department;

28 (5) Recommend all necessary programs for the preservice, inservice,  
29 and continuing medical training and education of the health care staff  
30 and other relevant staff of the department, including training  
31 specifically designed to promote prompt and effective responses by all

1 staff of the department to medical emergencies;

2 (6) Develop and implement condition-specific medical treatment  
3 protocols that ensure compatibility with a community standard of health  
4 care, including protocols addressing the: (a) Treatment of  
5 gastrointestinal bleeds; (b) detection and treatment of all communicable  
6 diseases; (c) treatment of gender-specific problems; (d) treatment of  
7 diabetes; (e) treatment of hypertension; (f) treatment of headaches; (g)  
8 utilization of surgical procedures; (h) control of infection; (i)  
9 provision of dental care; (j) provision of age-specific and gender-  
10 specific routine health maintenance; (k) means by which inmates obtain  
11 access to health care services; (l) use of prescribed drugs, devices, or  
12 biologicals for the purpose of pain management; (m) referral of patients  
13 to medical specialists not in the employ of the department; ~~and~~ (n)  
14 initiation, observance, and termination of do not resuscitate orders  
15 initiated pursuant to the Rights of the Terminally Ill Act; and (o)  
16 selection of a surrogate under section 2 of this act to make health care  
17 decisions for inmates;

18 (7) Develop and implement a system of general discharge planning for  
19 the health care services to be received by inmates who are soon to be  
20 released from the custody of the department and who have chronic health  
21 care problems;

22 (8) Develop and implement a comprehensive health care services plan;

23 (9) Develop and implement an internal credentialing program for the  
24 employment and retention of the health care staff of the department based  
25 on a community standard of health care; and

26 (10) Develop and implement an internal peer review and quality  
27 assurance program based upon a community standard of health care.

28 Sec. 8. Original sections 20-405, 30-2628, 30-3420, and 83-4,157,  
29 Reissue Revised Statutes of Nebraska, and section 71-4843, Revised  
30 Statutes Cumulative Supplement, 2016, are repealed.