

CHAPTER 530

S.B. No. 1142

AN ACT

relating to surrogate decision making for certain clients of an intermediate care facility serving persons with mental retardation or related conditions.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subtitle D, Title 7, Health and Safety Code, is amended by adding Chapter 597 to read as follows:

CHAPTER 597. CAPACITY OF CLIENTS TO CONSENT TO TREATMENT

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 597.001. *DEFINITIONS. In this chapter:*

(1) "Highly restrictive procedure" means the application of aversive stimuli, exclusionary time-out, physical restraint, or a requirement to engage in an effortful task.

(2) "Client" means a person receiving services in a community-based ICF-MR facility.

(3) "Committee" means a surrogate consent committee established under Section 597.042.

(4) "ICF-MR" has the meaning assigned by Section 531.002.

(5) "Interdisciplinary team" means those interdisciplinary teams defined in the Code of Federal Regulations for participation in the intermediate care facilities for the mentally retarded.

(6) "Major medical and dental treatment" means a medical, surgical, dental, or diagnostic procedure or intervention that:

(A) has a significant recovery period;

(B) presents a significant risk;

(C) employs a general anesthetic; or

(D) in the opinion of the primary physician, involves a significant invasion of bodily integrity that requires the extraction of bodily fluids or an incision or that produces substantial pain, discomfort, or debilitation.

(7) "Psychoactive medication" means any medication prescribed for the treatment of symptoms of psychosis or other severe mental or emotional disorders and that is used to exercise an effect upon the central nervous system for the purposes of influencing and modifying behavior, cognition, or affective state.

(8) "Surrogate decision-maker" means an individual authorized under Section 597.041 to consent on behalf of a client residing in an ICF-MR facility.

Sec. 597.002. *RULES. The board may adopt rules necessary to implement this chapter not later than 180 days after its effective date.*

Sec. 597.003. *EXCEPTIONS. (a) This chapter does not apply to decisions for the following:*

(1) experimental research;

(2) abortion;

(3) sterilization;

(4) management of client funds; and

(5) electroconvulsive treatment.

(b) This chapter does not apply to campus-based facilities operated by the department.

[Sections 597.004 to 597.020 reserved for expansion]

**SUBCHAPTER B. ASSESSMENT OF CLIENT'S CAPACITY;
INCAPACITATED CLIENTS WITHOUT GUARDIANS**

Sec. 597.021. ICF-MR ASSESSMENT OF CLIENT'S CAPACITY TO CONSENT TO TREATMENT. (a) *The board by rule shall require an ICF-MR facility certified in this state to assess the capacity of each adult client without a legal guardian to make treatment decisions when there is evidence to suggest the individual is not capable of making a decision covered under this chapter.*

(b) *The rules must require the use of a uniform assessment process prescribed by board rule to determine a client's capacity to make treatment decisions.*

[Sections 597.022 to 597.040 reserved for expansion]

SUBCHAPTER C. SURROGATE CONSENT FOR ICF-MR CLIENTS

Sec. 597.041. SURROGATE DECISION-MAKERS. (a) *If the results of an assessment conducted in accordance with Section 597.021 indicate that an adult client who does not have a legal guardian or a client under 18 years of age who has no parent, legal guardian, or managing or possessory conservator lacks the capacity to make a major medical or dental treatment decision, an adult surrogate from the following list, in order of descending preference, who has decision-making capacity and who is willing to consent on behalf of the client may consent to major medical or dental treatment on behalf of the client:*

(1) *an actively involved spouse;*

(2) *an actively involved adult child who has the waiver and consent of all other actively involved adult children of the client to act as the sole decision-maker;*

(3) *an actively involved parent or stepparent;*

(4) *an actively involved adult sibling who has the waiver and consent of all other actively involved adult siblings of the client to act as the sole decision-maker; and*

(5) *any other actively involved adult relative who has the waiver and consent of all other actively involved adult relatives of the client to act as the sole decision-maker.*

(b) *Any person who consents on behalf of a client and who acts in good faith, reasonably, and without malice is not criminally or civilly liable for that action.*

(c) *Consent given by the surrogate decision-maker is valid and competent to the same extent as if the client had the capacity to consent and had consented.*

(d) *Any dispute as to the right of a party to act as a surrogate decision-maker may be resolved only by a court of record under Chapter V, Texas Probate Code.*

Sec. 597.042. SURROGATE CONSENT COMMITTEE ESTABLISHED; DEPARTMENTAL SUPPORT. (a) *For cases in which there is no guardian or surrogate decision-maker available, the department shall establish and maintain a list of individuals qualified to serve on a surrogate consent committee.*

(b) *The department shall provide the staff and assistance necessary to perform the duties prescribed by this subchapter.*

Sec. 597.043. COMMITTEE MEMBERSHIP. (a) *A surrogate consent committee considering an application for a treatment decision shall be composed of at least three but not more than five members, and consent on behalf of clients shall be based on consensus of the members.*

(b) *A committee considering an application for a treatment decision must consist of individuals who:*

(1) *are not employees of the facility;*

(2) *do not provide contractual services to the facility;*

(3) *do not manage or exercise supervisory control over:*

(A) the facility or the employees of the facility; or

(B) any company, corporation, or other legal entity that manages or exercises control over the facility or the employees of the facility;

(4) do not have a financial interest in the facility or in any company, corporation, or other legal entity that has a financial interest in the facility; and

(5) are not related to the client.

(c) The list of qualified individuals from which committee members are drawn shall include:

(1) health care professionals licensed or registered in this state who have specialized training in medicine, psychopharmacology, or psychology;

(2) persons with mental retardation or parents, siblings, spouses, or children of a person with mental retardation;

(3) attorneys licensed in this state who have knowledge of legal issues of concern to persons with mental retardation or to the families of persons with mental retardation;

(4) members of private organizations that advocate on behalf of persons with mental retardation; and

(5) persons with demonstrated expertise or interest in the care and treatment of persons with mental disabilities.

(d) At least one member of the committee must be an individual listed in Subsection (c)(1) or (5).

(e) A member of a committee shall participate in education and training as required by department rule.

(f) Each committee shall designate a committee chair.

Sec. 597.044. APPLICATION FOR TREATMENT DECISION. (a) If the results of the assessment conducted in accordance with Section 597.021 indicate that a client who does not have a legal guardian or surrogate decision-maker lacks the capacity to make a treatment decision about major medical or dental treatment, psychoactive medication, or a highly restrictive procedure, the ICF-MR facility must file an application for a treatment decision with the department.

(b) An application must be in the form prescribed by the department, must be signed by the applicant, and must:

(1) state that the applicant has reason to believe and does believe that the client has a need for major medical or dental treatment, psychoactive medication, or a highly restrictive procedure;

(2) specify the condition proposed to be treated;

(3) provide a description of the proposed treatment, including the risks and benefits to the client of the proposed treatment;

(4) state the applicant's opinion on whether the proposed treatment promotes the client's best interest and the grounds for the opinion;

(5) state the client's opinion about the proposed treatment, if known;

(6) provide any other information necessary to determine the client's best interests regarding the treatment; and

(7) state that the client does not have a guardian of the person and does not have a parent, spouse, child, or other person with demonstrated interest in the care and welfare of the client who is able and willing to become the client's guardian or surrogate decision-maker.

Sec. 597.045. NOTICE OF REVIEW OF APPLICATION FOR TREATMENT DECISION. (a) On receipt of an application for a treatment decision, the department shall appoint a surrogate consent committee.

(b) The department shall notify pro bono attorney programs if available in the area in which the client resides of the intent to review an application for treatment decision.

(c) *The ICF-MR facility with assistance from the department shall schedule a review of the application.*

(d) *The ICF-MR facility shall send notice of the date, place, and time of the review to the surrogate consent committee, the pro bono attorney program if available in the area in which the client resides, the client who is the subject of the application, the client's parent, spouse, adult child, or other person known to have a demonstrated interest in the care and welfare of the client, and any other person as prescribed by board rule. The ICF-MR facility shall include a copy of the application and a statement of the committee's procedure for consideration of the application, including the opportunity to be heard or to present evidence and to appeal.*

Sec. 597.046. PREREVIEW OF APPLICATION. (a) *Before the date of the review of an application for a treatment decision the committee chair shall review the application to determine whether additional information may be necessary to assist the committee in determining the client's best interest under the circumstances.*

(b) *A committee member may consult with a person who might assist in the determination of the best interest of the client or in learning the personal opinions, beliefs, and values of the client.*

(c) *If a committee that does not include in its membership an individual listed in Section 597.043(c)(1) is to review an application for a treatment decision about psychoactive medication, the committee chair shall consult with a health care professional licensed or registered in this state to assist the committee in the determination of the best interest of the client.*

Sec. 597.047. CONFIDENTIAL INFORMATION. *Notwithstanding any other state law, a person licensed by this state to provide services related to health care or to the treatment or care of a person with mental retardation, a developmental disability, or a mental illness shall provide to the committee members any information the committee requests that is relevant to the client's need for a proposed treatment.*

Sec. 597.048. REVIEW OF APPLICATION. (a) *The committee shall review the application at the time, place, and date provided by the ICF-MR facility in the notice under Section 597.045.*

(b) *A person notified under Section 597.045 is entitled to be present and to present evidence personally or through a representative.*

(c) *The committee may take testimony or review evidence from any person who might assist the committee in determining a client's best interest.*

(d) *Formal rules of evidence do not apply to committee proceedings.*

(e) *If practicable, the committee shall interview and observe the client before making a determination of the client's best interest, and in those cases when a client is not interviewed, the reason must be documented in the client's record.*

(f) *At any time before the committee makes its determination of a client's best interest under Section 597.049, the committee chair shall suspend the review of the application for not more than five days if any person applies for appointment as the client's guardian of the person in accordance with the Texas Probate Code.*

Sec. 597.049. DETERMINATION OF BEST INTEREST. (a) *The committee shall make a determination, based on clear and convincing evidence, of whether the proposed treatment promotes the client's best interest and a determination that:*

(1) *a person has not been appointed as the guardian of the client's person before the sixth day after proceedings are suspended under Section 597.048(f); or*

(2) *there is a medical necessity, based on clear and convincing evidence, that the determination about the proposed treatment occur before guardianship proceedings are completed.*

(b) *In making its determination of the best interest of the client, the committee shall consider fully the preference of the client as articulated at any time.*

(c) *According to its determination of the client's best interest, the committee shall consent or refuse the treatment on the client's behalf.*

(d) *The committee shall determine a date on which the consent becomes effective.*

(e) *A person serving on a committee who consents or refuses to consent on behalf of a client and who acts in good faith, reasonably, and without malice is not criminally or civilly liable for that action.*

Sec. 597.050. NOTICE OF DETERMINATION. (a) *The committee shall issue a written opinion containing each of its determinations and a separate statement of the committee's findings of fact.*

(b) *The committee shall send a copy of the committee's opinion to:*

- (1) *each person notified under Section 597.045;*
- (2) *the director of the client's ICF-MR facility; and*
- (3) *the department.*

Sec. 597.051. EFFECT OF COMMITTEE'S DETERMINATION. *This chapter does not limit the availability of other lawful means of obtaining a client's consent for medical treatment.*

Sec. 597.052. SCOPE OF CONSENT. (a) *The committee or the surrogate decision-maker may consent to the release of records related to the client's condition or treatment to facilitate treatment to which the committee or surrogate decision-maker has consented.*

(b) *The interdisciplinary team may consent to psychoactive medication subsequent to the initial decision for administration of psychoactive medication made by a surrogate consent committee.*

(c) *Unless another decision-making mechanism is provided for by law, a client, a client's authorized surrogate decision-maker if available, or the client's interdisciplinary team may consent to decisions which involve risk to client protection and rights not specifically reserved to surrogate decision-makers or surrogate consent committees.*

Sec. 597.053. APPEALS. (a) *A person notified under Section 597.045 may appeal the committee's decision by filing a petition in the probate court or court having probate jurisdiction for the county in which the client resides or in Travis County. The person must file the appeal not later than the 15th day after the effective date of the committee's determination.*

(b) *If the hearing is to be held in a probate court in which the judge is not a licensed attorney, the person filing the appeal may request that the proceeding be transferred to a court with a judge who is licensed to practice law in this state. The probate court judge shall transfer the case after receiving the request, and the receiving court shall hear the case as if it had been originally filed in that court.*

(c) *A copy of the petition must be served on all parties of record in the proceedings before the committee.*

(d) *After considering the nature of the condition of the client, the proposed treatment, and the need for timely medical attention, the court may issue a temporary restraining order to facilitate the appeal. If the order is granted, the court shall expedite the trial.*

Sec. 597.054. PROCEDURES. (a) *Each ICF-MR shall develop procedures for the surrogate consent committees in accordance with the rules adopted under Section 597.002.*

(b) *A committee shall phase in, during the three-year period immediately following the effective date of this chapter, its initial review process for applications for treatment decisions regarding adult clients who do not have legal guardians and who are receiving psychoactive medication.*

(c) *A committee is not subject to the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes), the open meetings law, Chapter 271, Acts of the 60th Legislature, Regular Session, 1967 (Article 6252-17, Vernon's Texas Civil Statutes), or the open records law, Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252-17a, Vernon's Texas Civil Statutes).*

Sec. 597.055. EXPIRATION. *This chapter expires August 31, 1997.*

SECTION 2. *The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the*

constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed the Senate on April 28, 1993: Yeas 31, Nays 0; passed the House on May 21, 1993, by a non-record vote.

Approved June 8, 1993.

Effective Aug. 30, 1993, 90 days after date of adjournment.