

Regular Session, 2014

SENATE BILL NO. 302

BY SENATOR MILLS

CIVIL PROCEDURE. Provides relative to medical consent and certain immunities. (8/1/14)

1 AN ACT

2 To amend and reenact R.S. 40:1299.53, relative to persons who may consent to surgical or  
3 medical treatment; to provide relative to an adult friend of certain patients; to provide  
4 relative to circumstances where no person is reasonably available to consent for the  
5 patient; to provide relative to physician discretion; to provide for certain terms,  
6 conditions, and procedures; to provide for certain immunity; and to provide for  
7 related matters.

8 Be it enacted by the Legislature of Louisiana:

9 Section 1. R.S. 40:1299.53 is hereby amended and reenacted to read as follows:

10 §1299.53. Persons who may consent to surgical or medical treatment

11 A. In addition to such other persons as may be authorized and empowered,  
12 any one of the following persons in the following order of priority, if there is no  
13 person in a prior class who is reasonably available, willing, and competent to act, is  
14 authorized and empowered to consent, either orally or otherwise, to any surgical or  
15 medical treatment or procedures including autopsy not prohibited by law which may  
16 be suggested, recommended, prescribed, or directed by a duly licensed physician:

17 (1) Any adult, for himself.

1                   (2) The judicially appointed tutor or curator of the patient, if one has been  
2 appointed.

3                   (3) An agent acting pursuant to a valid mandate, specifically authorizing the  
4 agent to make health care decisions.

5                   (4) The patient's spouse not judicially separated.

6                   (5) An adult child of the patient.

7                   (6) Any parent, whether adult or minor, for his child.

8                   (7) The patient's sibling.

9                   (8) The patient's other ascendants or descendants.

10                  **(9) Upon the inability of any adult to consent for himself and in the**  
11 **absence of any person listed in Paragraphs (2) through (8) of this Subsection,**  
12 **an adult friend of the patient. For purposes of this Subsection to consent, "adult**  
13 **friend" means an adult who has exhibited special care and concern for the**  
14 **patient, who is generally familiar with the patient's health care views and**  
15 **desires, and who is willing and able to become involved in the patient's health**  
16 **care decisions and to act in the patient's best interest. The adult friend shall sign**  
17 **and date an acknowledgment form provided by the hospital or other health care**  
18 **facility in which the patient is located for placement in the patient's records**  
19 **certifying that he or she meets such criteria.**

20                  ~~(9)~~**(10)** Any person temporarily standing in loco parentis, whether formally  
21 serving or not, for the minor under his care and any guardian for his ward.

22                  ~~(10)~~**(11)** A person chosen by the interdisciplinary team, as defined in R.S.  
23 28:451.2, to make recommendations on behalf of an individual with a developmental  
24 disability, as defined in R.S. 28:451.2. The interdisciplinary team shall exercise  
25 discretion in choosing, by majority vote, the family member, friend, or other person  
26 most familiar with the individual or most capable of making the decision at issue.

27                  ~~(11)~~**(12)** A person chosen by an ad hoc team assembled by any interested  
28 person for the purpose of addressing the medical decision at issue for an individual  
29 with a developmental disability.

1 (a) This team shall consist of at least three persons familiar with the  
2 circumstances and needs of the individual, and shall contain representatives from at  
3 least two different services, educational or advocacy agencies serving individuals  
4 with developmental disabilities.

5 (b) The team shall make decisions by majority vote, and no one agency shall  
6 provide a majority of the members.

7 (c) The team shall exercise discretion in choosing the family member, friend,  
8 or other person most familiar with the individual or most capable of making the  
9 decision at issue.

10 B. If there is more than one person within the above named class in  
11 Paragraphs (A)(1) through (9), the consent for surgical or medical treatment shall be  
12 given by a majority of those members of the class available for consultation.

13 C. **If none of the persons listed under Paragraphs (A)(1) through (10) of**  
14 **this Section are reasonably available, then the patient's attending physician**  
15 **shall have the discretion to provide or perform any surgical or medical**  
16 **treatment or procedures, including but not limited to an autopsy, and may also**  
17 **make decisions regarding continued services needed by the patient, including**  
18 **but not limited to approving the placement or transfer of the patient to another**  
19 **facility, without the consent of the patient or other person authorized to consent**  
20 **for the patient. Prior to taking such action, the attending physician shall**  
21 **document in the patient's chart the facts that establish what medical decisions**  
22 **need to be made and why those decisions are needed without undue delay, as**  
23 **well as the steps taken to obtain consent from the patient or another person**  
24 **authorized by law to give consent and then obtain confirmation from another**  
25 **physician, preferably the patient's primary care physician if he is not the**  
26 **attending physician, of the patient's condition and the medical necessity for such**  
27 **action as is appropriate and consistent with the patient's condition and which**  
28 **cannot be omitted without adversely affecting the patient's condition or the**  
29 **quality of medical care rendered. The confirming physician shall personally**

1 examine the patient and document his assessment, findings and  
2 recommendations in the patient's chart prior to the proposed surgical or  
3 medical treatment or procedures being performed. This Subsection shall not  
4 apply to an emergency governed by the provisions of R.S. 40:1299.54.

5 D.(1) When no contact people are included in the individual's records,  
6 in order to justify a finding that none of the authorized persons listed under  
7 Paragraphs (A)(1) through (9) of this Section are reasonably available, the  
8 patient's attending physician shall document the following in the patient's  
9 record:

10 (a) That he or a representative of the attending physician or facility has  
11 inquired of, or has made a documented good-faith effort to inquire of, the  
12 following entities regarding the existence of any advance directive made by the  
13 patient and the availability of information that would enable the physician to  
14 contact any person listed under Paragraphs (A)(2) through (9) of this Section:

15 (i) The Louisiana Secretary of State's Living Will Registry.

16 (ii) The patient's primary care physician or any known provider of  
17 medical treatment or services received by the patient in the previous one  
18 hundred and eighty days.

19 (iii) Any known facility in which the patient has resided in the last one  
20 hundred and eighty days.

21 (b) That no advance directive or other information that would enable  
22 the physician to contact an authorized individual to consent is available.

23 (2) When names of potentially authorized persons are listed in the  
24 individual's records or are obtained through efforts under this Subsection, in  
25 order to justify a finding that none of the authorized persons listed under  
26 Paragraphs (A)(1) through (9) of this Section are reasonably available, the  
27 patient's attending physician shall document in the patient's record the name  
28 of each potentially authorized person that he or a representative of the  
29 physician or facility attempted to contact, the manner and date of the attempted

1           **contact, and the result of the attempted contact.**

2           E. For an individual with a developmental disability, competency to act for  
3 the purpose of this Section shall be determined in accordance with principles set  
4 forth in R.S. 28:454.3, including capacity to consent and legally adequate consent.

5           ~~D.F.~~ F. Consent to surgical or medical treatment for an individual with a  
6 developmental disability will be implied where an emergency, as defined in R.S.  
7 40:1299.54, exists.

8           G. No hospital or other health care facility, physician, health care  
9 provider, or other person or entity shall be subject to criminal prosecution or  
10 civil liability or be deemed to have engaged in unprofessional conduct as to the  
11 issue of consent only, based upon the reliance in good faith on any direction or  
12 decision by any person reasonably believed to be authorized and empowered to  
13 consent under Paragraphs (A)(1) through (9) even if death or injury to the  
14 patient ensues except for liability for medical malpractice as to the provision or  
15 performance of the surgical or medical treatment, not with regard to the  
16 question of consent under R.S. 40:1299.39 et seq., or R.S. 40:1299.41 et. seq.  
17 Each hospital or other health care facility, physician, health care provider, or  
18 other person or entity, who acts in good-faith reliance on any such direction or  
19 decision shall be protected and released to the same extent as though such  
20 person had interacted directly with the patient as a fully competent person.

21           H. Any physician attending or confirming, who, in accordance with  
22 Subsection C of this Section, provides or performs any surgical or medical  
23 treatment or procedure, including but not limited to an autopsy, or who makes  
24 decisions regarding continued services, including but not limited to approving  
25 the transfer or placement of the patient, without the consent of the patient or  
26 other person authorized to consent for the patient, shall not be subject to  
27 criminal prosecution or civil liability or be deemed to have engaged in  
28 unprofessional conduct as a result of the decision to perform, or the actual  
29 performance of, such treatment or procedure, or with regard to any decisions

1        pertaining to continued services, including but not limited to decisions  
 2        regarding the transfer or placement of the patient as to the issue of consent  
 3        only, even if death or injury to the patient ensues, except for liability for medical  
 4        malpractice as to the provision or performance of the surgical or medical  
 5        treatment, not with regard to the question of consent under R.S. 40:1299.39 et  
 6        seq., or R.S. 40:1299.41 et. seq. Furthermore, no hospital or other health care  
 7        facility, health care provider or other person or entity acting under the  
 8        direction of a physician shall be subject to criminal prosecution or civil liability,  
 9        or be deemed to have engaged in unprofessional conduct as a result of any  
 10       treatment, procedures, continued services, transfer, or placements that were  
 11       performed in accordance with Subsection C of this Section, as to the issue of  
 12       consent only, even if death or injury to the patient ensues, except for liability for  
 13       medical malpractice as to the provision or performance of the surgical or  
 14       medical treatment, not with regard to the question of consent under R.S.  
 15       40:1299.39 et seq., or R.S. 40:1299.41 et. seq.

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The original instrument was prepared by Julie J. Baxter. The following digest, which does not constitute a part of the legislative instrument, was prepared by Tammy Crain-Waldrop.

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#### DIGEST

Mills (SB 302)

Present law provides for the designation of certain persons who may consent to surgical or medical treatment.

Proposed law adds as one of the persons who may consent to surgical or medical treatment when any adult is unable to consent for himself, and in the absence of the availability of any other person designated to consent under present law, an adult friend. Further defines an adult friend and how such adult friend shall be recognized as authorized to consent for the patient.

Proposed law provides that if none of those persons designated under present law are reasonably available, then the patient's attending physician shall have the discretion to provide or perform any surgical or medical treatment or procedures, including but not limited to an autopsy, and may also make decisions regarding continued services needed by the patient, including but not limited to approving the placement or transfer of the patient to another facility, without the consent of the patient or other person authorized to consent for the patient.

Proposed law further provides that prior to taking such action, the attending physician shall document in the patient's chart the facts that establish what medical decisions need to be made and why those decisions are needed without undue delay, as well as the steps taken to

obtain consent from the patient or another person authorized by law to give consent and then obtain confirmation from another physician, preferably the patient's primary care physician if he is not the attending physician, of the patient's condition and the medical necessity for such action as is appropriate and consistent with the patient's condition and which cannot be omitted without adversely affecting the patient's condition or the quality of medical care rendered. Proposed law further provides that the confirming physician shall personally examine the patient and document his assessment, findings and recommendations in the patient's chart prior to the proposed surgical or medical treatment or procedures being performed.

Proposed law provides that proposed law shall not apply to an emergency governed by present law.

Proposed law further provides that when no contact people are included in the patient's records, in order to justify a finding that none of the authorized persons listed under proposed law are reasonably available, the patient's attending physician shall document the following in the patient's record:

- (1)(a) That he or a representative of the attending physician or facility has inquired of, or has made a documented good-faith effort to inquire of the following entities regarding the existence of any advance directive made by the patient and the availability of information that would enable the physician to contact any person listed under proposed law:
  - (i) The Louisiana Secretary of State's Living Will Registry.
  - (ii) The patient's primary care physician or any known provider of medical treatment or services received by the patient in the previous 180 days.
  - (iii) Any known facility in which the patient has resided in the last 180 days.
- (b) That no advance directive or other information that would enable the physician to contact an authorized individual to consent is available.
- (2) When names of potentially authorized persons are listed in the individual's records or are obtained through efforts under proposed law, in order to justify a finding that none of the authorized persons listed under proposed law are reasonably available the patient's attending physician shall document in the patient's record the name of each potentially authorized person that he or a representative of the physician or facility attempted to contact, the manner and date of the attempted contact, and the result of the attempted contact.

Proposed law provides that no hospital or other health care facility, physician, health care provider, or other person or entity shall be subject to criminal prosecution or civil liability or be deemed to have engaged in unprofessional conduct as to the issue of consent only, based upon the reliance in good-faith on any direction or decision by any person reasonably believed to be authorized and empowered to consent under present law even if death or injury to the patient ensues, except for liability for medical malpractice as to the provision or performance of the surgical or medical treatment, not with regard to the question of consent under R.S. 40:1299.39, et seq. or R.S. 40:1299.41, et seq.

Proposed law further provides that each hospital or other health care facility, physician, health care provider, or other person or entity, who acts in good-faith reliance on any such direction or decision shall be protected and released to the same extent as though such person had interacted directly with the patient as a fully competent person.

Proposed law provides that any physician attending or confirming, who, in accordance with proposed law of this Section, provides or performs any surgical or medical treatment or procedure, including but not limited to an autopsy, or who makes decisions regarding continued services, including but not limited to approving the transfer or placement of the

patient, without the consent of the patient or other person authorized to consent for the patient, shall not be subject to criminal prosecution or civil liability or be deemed to have engaged in unprofessional conduct as a result of the decision to perform, or the actual performance of, such treatment or procedure, or with regard to any decisions pertaining to continued services, including but not limited to decisions regarding the transfer or placement of the patient as to the issue of consent only, even if death or injury to the patient ensues, except for liability for medical malpractice as to the provision or performance of the surgical or medical treatment, not with regard to the question of consent under R.S. 40:1299.38, et seq., or R.S. 40:1299.41, et seq.

Proposed law further provides that no hospital or other health care facility, health care provider or other person or entity acting under the direction of a physician shall be subject to criminal prosecution or civil liability, or be deemed to have engaged in unprofessional conduct as a result of any treatment, procedures, continued services, transfer, or placements that were performed in accordance with proposed law above, as to the issue of consent only, even if death or injury to the patient ensues, except for liability for medical malpractice as to the provision or performance of the surgical or medical treatment, not with regard to the question of consent under R.S. 40:1299.39, et seq., or R.S. 40:1299.41, et seq.

Effective August 1, 2014.

(Amends R.S. 40:1299.53)

#### Summary of Amendments Adopted by Senate

##### Committee Amendments Proposed by Senate Committee on Judiciary A to the original bill

1. Adds as one of the authorized persons to consent when a person is unable to consent to surgical or medical treatment the addition of an "adult friend" of the patient. Defines an adult friend of the patient and how such an adult friend shall be recognized as authorized to consent for the patient.
2. Changes the procedure and documentation requirements by which an attending physician may consult another physician. Provides that preferably the second physician should be the patient's primary care physician.
3. Adds certain requirements for documentation by the patient's attending physician when no contact people are included in the patient's records, in order to justify a finding that no authorized persons are available.
4. Limits certain immunities to the issue of consent only, not to include liability for medical malpractice as to the provision or performance of the surgical or medical treatment.

##### Senate Floor Amendments to engrossed bill

1. Clarifies language and makes technical changes.