



STATE OF DELAWARE  
**STATE COUNCIL FOR PERSONS WITH DISABILITIES**  
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**MEMORANDUM**

DATE: April 30, 2013

TO: All Members of the Delaware State Senate  
and House of Representatives

FROM: Ms. Daniese McMullin-Powell, Chairperson  
State Council for Persons with Disabilities

RE: H.B. 42 [Health Care Decisions]

The State Council for Persons with Disabilities (SCPD) has reviewed H.B. 42 which adds adult aunts and uncles to the list of relatives who may act as a surrogate to make health care decisions for an adult patient if the patient lacks capacity and there is no agent or guardian, no prior designated surrogate, the prior designated surrogate is unavailable, or the health-care directive does not address the specific issue. Two amendments placed with the bill allow a close personal friend, if no family members are reasonably available, to act as a patient's surrogate for health care decisions without the necessity of a guardianship appointment by the Court of Chancery. The amendment also requires that an affidavit be executed before a non-family member may act as a surrogate.

The following observations discuss the conflict among overlapping statutes; therefore, SCPD recommends that more comprehensive legislation be prepared to create a uniform standard. Otherwise, health care providers and families are faced with conflicting laws. Such legislation could clearly identify a lengthy sequence of relatives (rather than a technical reference to "next of kin"), address both the effect of a divorce petition and PFA, and clarify whether "step-relatives" are covered. "Step-relatives" are generally not included as "kin". Cf. Title 12 Del.C. §101(1)(4).

As background, Delaware law authorizes a mentally competent individual to designate a surrogate to make health care decisions on the individual's behalf. See Title 16 Del.C. §2507. In the absence of such a designation, or if the designee is not reasonably available, the following relatives may act as a surrogate in descending order or priority:

- a. The spouse, unless a petition for divorce has been filed;
- b. An adult child;
- c. A parent;
- d. An adult sibling;
- e. An adult grandchild;
- f. An adult niece or nephew.

The legislation would add a Par. “g” to read “(a)n adult aunt or uncle.

On its face, the addition of “adult aunt or uncle” would be advantageous since identification of “close” relatives to make health care decisions is sometimes difficult. However, the Delaware Code currently has conflicting authorizations in this context which merit correction through more definitive legislation.

For example, a “competing” statute [16 Del.C. §5530] authorizes the following relatives of residential DDDS clients to consent to elective surgery in the following descending order of priority:

- a. spouse;
- b. an adult child;
- c. a parent;
- d. an adult brother or sister;
- e. an adult grandchild;
- f. an adult aunt or uncle;
- g. an adult niece or nephew;
- h. a grandparent.

This order conflicts with the order in Title 16 Del.C. §2507 and the order created by H.B. 42. Consider the following:

- 1) The DDDS statute disallows any relative acting as a surrogate if there is a PFA or no-contact order issued against the relative [16 Del.C. §5530(e)]. There is no such bar in the “Surrogacy” statute.
- 2) The Surrogacy statute bars a spouse from serving as a surrogate if a petition of divorce has been filed [16 Del.C. §2507(b)(2)a. The DDDS statute has no such bar.
- 3) The DDDS statute and H.B. 42 conflict in the order of precedence between uncles/aunts and nieces/nephews.
- 4) The DDDS statute adds a grandparent to the list of authorized surrogates.

Moreover, other statutes also conflict with both Title 16 Del.C. §§2507 and 5530. Specifically, Title 16 Del.C. §§1121(34) and 1122 authorize the “next of kin” to make health care decisions

for individuals lacking competency in long-term care facilities in the absence of a guardian or representative. There is no definition of “next of kin”. However, consistent with Title 1 Del.C. §302(9) and the attached Wikipedia article on “next of kin”, the sequence of relatives is ostensibly as follows:

- a. children;
- b. parents;
- c. grandchildren;
- d. siblings;
- e. grandparents;
- f. great-grandchildren;
- g. nieces/nephews;
- h. aunts/uncles.

Thank you for your consideration and please contact SCPD if you have any questions regarding our observations on the proposed legislation.

cc: Mr. Brian Hartman, Esq.  
Ms. Deborah Gottschalk, Esq.  
Governor’s Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

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