

CHAPTER 239  
HB 1434 – FINAL VERSION

19Mar2014... 0695h  
05/15/14 1719s  
4Jun2014... 1918CofC  
4Jun2014... 2015EBA

2014 SESSION

14-2109  
01/04

HOUSE BILL            ***1434***

AN ACT                relative to surrogate health care decision making by a family member or friend.

SPONSORS:            Rep. Harding, Graf 13; Rep. Suzanne Smith, Graf 8; Rep. Kotowski, Merr 24;  
Rep. Watrous, Merr 16; Rep. Weber, Ches 1; Rep. LeBrun, Hills 32; Sen. Gilmour,  
Dist 12; Sen. Reagan, Dist 17; Sen. Lasky, Dist 13

COMMITTEE:          Health, Human Services and Elderly Affairs

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ANALYSIS

The bill allows a mentally competent adult to make medical decisions for an adult person who lacks health care decision making capacity.

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Explanation:          Matter added to current law appears in ***bold italics***.  
Matter removed from current law appears [~~in brackets and struckthrough.~~]  
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

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STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Fourteen*

AN ACT                    relative to surrogate health care decision making by a family member or friend.

*Be it Enacted by the Senate and House of Representatives in General Court convened:*

1            239:1 New Paragraph; Directives for Medical Decisions. Amend RSA 137-J:1 by inserting after  
2 paragraph II the following new paragraph:

3            III. While all persons have a right to make a written directive, not all take advantage of that  
4 right, and it is the purpose of the surrogacy provisions of this chapter to ensure that health care  
5 decisions can be made in a timely manner by a person's next of kin or loved one without involving  
6 court action. This chapter specifies a process to establish a surrogate decision-maker when there is  
7 no valid advance directive or a guardian, as defined in RSA 464-A, to make health care decisions.

8            239:2 Directives for Medical Decisions; Definitions. Amend RSA 137-J:2, V to read as follows:

9            V. "Capacity to make health care decisions" means the ability to understand and appreciate  
10 generally the nature and consequences of a health care decision, including the significant benefits  
11 and harms of and reasonable alternatives to any proposed health care. ***The fact that a person has***  
12 ***been diagnosed with mental illness, brain injury, or intellectual disability shall not mean***  
13 ***that the person necessarily lacks the capacity to make health care decisions.***

14            239:3 New Paragraph; Directives for Medical Decisions; Definition Added. Amend RSA 137-J:2  
15 by inserting after paragraph VI the following new paragraph:

16            VI-a. "Close friend" means any person 21 years of age or older who presents an affidavit to  
17 the attending physician stating that he or she is a close friend of the patient, is willing and able to  
18 become involved in the patient's health care, and has maintained such regular contact with the  
19 patient as to be familiar with the patient's activities, health, and religious and moral beliefs. The  
20 affidavit shall also state facts and circumstances that demonstrate such familiarity with the patient.

21            239:4 New Paragraph; Directives for Medical Decisions; Definition Added. Amend RSA 137-J:2  
22 by inserting after paragraph XXII the following new paragraph:

23            XXII-a. "Surrogate decision-maker" or "surrogate" means an adult individual who has health  
24 care decision-making capacity, is available upon reasonable inquiry, is willing to make health care  
25 decisions on behalf of a patient who lacks health care decision-making capacity, and is identified by  
26 the attending physician or APRN in accordance with the provisions of this chapter as the person who  
27 is to make those decisions in accordance with the provisions of this chapter.

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1           239:5 Directives for Medical Decisions: Scope and Duration of Agent’s or Surrogate’s Authority.  
2 Amend RSA 137-J:5, II-V to read as follows:

3           II. An agent’s *or surrogate’s* authority under an advance directive shall be in effect only  
4 when the principal lacks capacity to make health care decisions, as certified in writing by the  
5 principal’s attending physician or APRN, and filed with the name of the agent *or surrogate* in the  
6 principal’s medical record. When and if the principal regains capacity to make health care decisions,  
7 such event shall be certified in writing by the principal’s attending physician or APRN, noted in the  
8 principal’s medical record, the agent’s *or surrogate’s* authority shall terminate, and the authority to  
9 make health care decisions shall revert to the principal.

10           III. If the principal has no attending physician or APRN for reasons based on the principal’s  
11 religious or moral beliefs as specified in his or her advance directive, the advance directive may  
12 include a provision that a person designated by the principal in the advance directive may certify in  
13 writing, acknowledged before a notary or justice of the peace, as to the lack of decisional capacity of  
14 the principal. The person so designated by the principal shall not be the agent, or a person ineligible  
15 to be the agent.

16           IV. The principal’s attending physician or APRN shall make reasonable efforts to inform the  
17 principal of any proposed treatment, or of any proposal to withdraw or withhold treatment.  
18 Notwithstanding that an advance directive *or a surrogacy* is in effect and irrespective of the  
19 principal’s lack of capacity to make health care decisions at the time, treatment may not be given to  
20 or withheld from the principal over the principal’s objection unless the principal’s advance directive  
21 includes the following statement initialed by the principal, “Even if I am incapacitated and I object to  
22 treatment, treatment may be given to me against my objection.”

23           V. Nothing in this chapter shall be construed to give an agent *or surrogate* authority to:

24           (a) Consent to voluntary admission to any state institution;

25           (b) Consent to a voluntary sterilization; [øø]

26           (c) Consent to withholding life-sustaining treatment from a pregnant principal, unless,  
27 to a reasonable degree of medical certainty, as certified on the principal’s medical record by the  
28 attending physician or APRN and an obstetrician who has examined the principal, such treatment or  
29 procedures will not maintain the principal in such a way as to permit the continuing development  
30 and live birth of the fetus or will be physically harmful to the principal or prolong severe pain which  
31 cannot be alleviated by medication[-]; *or*

32           ***(d) Consent to psychosurgery, electro-convulsive shock therapy, sterilization, or***  
33 ***an experimental treatment of any kind.***

34           239:6 Directives for Medical Decisions; Physician, APRN, and Provider’s Responsibilities.  
35 Amend RSA 137-J:7, I(d) to read as follows:

36           (d) If a physician or an APRN, because of his or her personal beliefs or conscience, is

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1 unable to comply with the terms of the advance directive **or surrogate's decision**, he or she shall  
2 immediately inform the qualified patient, the qualified patient's family, or the qualified patient's  
3 agent. The qualified patient, or the qualified patient's agent or family, may then request that the  
4 case be referred to another physician or APRN.

5 239:7 Directives for Medical Decisions; Physician, APRN, and Provider's Responsibilities.  
6 Amend RSA 137-J:7, II to read as follows:

7 II. An attending physician or APRN who, because of personal beliefs or conscience, is unable  
8 to comply with the advance directive **or the surrogate's decision** pursuant to this chapter shall,  
9 without delay, make the necessary arrangements to effect the transfer of a qualified patient and the  
10 appropriate medical records that document the qualified patient's lack of capacity to make health  
11 care decisions to another physician or APRN who has been chosen by the qualified patient, by the  
12 qualified patient's agent **or surrogate**, or by the qualified patient's family, provided, that pending  
13 the completion of the transfer, the attending physician or APRN shall not deny health care  
14 treatment, nutrition, or hydration which denial would, within a reasonable degree of medical  
15 certainty, result in or hasten the qualified patient's death against the express will of the qualified  
16 patient, the advance directive, or the agent **or surrogate**.

17 239:8 Directives for Medical Decisions; Restrictions on Who May Act as Agent or Surrogate.  
18 Amend the section heading and the introductory paragraph of RSA 137-J:8 to read as follows:

19 137-J:8 Restrictions on Who May Act as Agent **or Surrogate**. A person may not exercise the  
20 authority of **an agent or a surrogate** while serving in one of the following capacities:

21 239:9 Directives for Medical Decisions; Withholding or Withdrawal of Life-Sustaining  
22 Treatment. Amend RSA 137-J:10, I to read as follows:

23 I. In the event a health care decision to withhold or withdraw life-sustaining treatment,  
24 including medically administered nutrition and hydration, is to be made by an agent **or surrogate**,  
25 and the principal has not executed the "living will" of the advance directive, the following additional  
26 conditions shall apply:

27 (a) The principal's attending physician or APRN shall certify in writing that the  
28 principal lacks the capacity to make health care decisions.

29 (b) Two physicians or a physician and an APRN shall certify in writing that the principal  
30 is near death or is permanently unconscious.

31 (c) Notwithstanding the capacity of an agent **or surrogate** to act, the agent **or**  
32 **surrogate** shall make a good faith effort to explore all avenues reasonably available to discern the  
33 desires of the principal including, but not limited to, the principal's advance directive, the principal's  
34 written or spoken expressions of wishes, and the principal's known religious or moral beliefs.

35 239:10 Directives for Medical Decisions; Immunity. Amend RSA 137-J:12, I and II to read as  
36 follows:

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1           I. No person acting as agent pursuant to an advance directive *or as a surrogate* shall be  
2 subjected to criminal or civil liability for making a health care decision on behalf of the principal in  
3 good faith pursuant to the provisions of this chapter and the terms of the advance directive if such  
4 person exercised such power in a manner consistent with the requirements of this chapter and New  
5 Hampshire law.

6           II. No health care provider or residential care provider, or any other person acting for the  
7 provider or under the provider's control, shall be subjected to civil or criminal liability or be deemed  
8 to have engaged in unprofessional conduct for:

9           (a) Any act or intentional failure to act, if the act or intentional failure to act is done  
10 pursuant to the dictates of an advance directive, the directives of the principal's agent *or surrogate*,  
11 and the provisions of this chapter, and said act or intentional failure to act is done in good faith and  
12 in keeping with reasonable medical standards pursuant to the advance directive *or a surrogacy*  
13 and in accordance with this chapter; or

14           (b) Failure to follow the directive of an agent *or surrogate* if the health care provider or  
15 residential care provider or other such person believes in good faith and in keeping with reasonable  
16 medical standards that such directive exceeds the scope of or conflicts with the authority of the agent  
17 *or surrogate* under this chapter or the contents of the principal's advance directive; provided, that  
18 this subparagraph shall not be construed to authorize any violation of RSA 137-J:7, II or III.

19           239:11 Directives for Medical Decisions; Revocation. Amend RSA 137-J:15 to read as follows:

20           137-J:15 Revocation.

21           I. An advance directive *or surrogacy* consistent with the provisions of this chapter shall be  
22 revoked:

23           (a) By written revocation delivered to the agent *or surrogate* or to a health care  
24 provider or residential care provider expressing the principal's intent to revoke, signed and dated by  
25 the principal; by oral revocation in the presence of 2 or more witnesses, none of whom shall be the  
26 principal's spouse or heir at law; or by any other act evidencing a specific intent to revoke the power,  
27 such as by burning, tearing, or obliterating the same or causing the same to be done by some other  
28 person at the principal's direction and in the principal's presence;

29           (b) By execution by the principal of a subsequent advance directive;

30           (c) By the filing of an action for divorce, legal separation, annulment or protective order,  
31 where both the agent and the principal are parties to such action, except when there is an alternate  
32 agent designated, in which case the designation of the primary agent shall be revoked and the  
33 alternate designation shall become effective. Re-execution or written re-affirmation of the advance  
34 directive following a filing of an action for divorce, legal separation, annulment, or protective order  
35 shall make effective the original designation of the primary agent under the advance directive; or

36           (d) By a determination by a court under RSA 506:7 that the agent's authority has been



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1           (j) The guardian of the patient’s estate.

2           II. The physician or APRN may identify a surrogate from the list in paragraph I if the  
3 physician or APRN determines he or she is able and willing to act, and determines after reasonable  
4 inquiry that neither a legal guardian, health care agent under a durable power of attorney for health  
5 care, nor a surrogate of higher priority is available and able and willing to act. The surrogate  
6 decision-maker, as identified by the attending physician or APRN, may make health care decisions  
7 for the patient. The surrogacy provisions of this chapter shall take effect when the decision-maker  
8 names are recorded in the medical record. The physician or APRN shall have the right to rely on  
9 any of the above surrogates if the physician or APRN believes after reasonable inquiry that neither a  
10 health care agent under a durable power of attorney for health care or a surrogate of higher priority  
11 is available or able and willing to act.

12           137-J:36 Determining Priority Among Multiple Surrogates.

13           I. Where there are multiple surrogate decision-makers at the same priority level in the  
14 hierarchy, it shall be the responsibility of those surrogates to make reasonable efforts to reach a  
15 consensus as to their decision on behalf of the patient regarding any health care decision. If 2 or  
16 more surrogates who are in the same category and have equal priority indicate to the attending  
17 physician or APRN that they disagree about the health care decision at issue, a majority of the  
18 available persons in that category shall control, unless the minority or any other interested party  
19 initiates guardianship proceedings in accordance with RSA 464-A. There shall not be a recognized  
20 surrogate when a guardianship proceeding has been initiated and a decision is pending. The person  
21 initiating the petition for guardianship shall immediately provide written notice of the initiation of  
22 the guardianship proceeding to the health care facility where the patient is being treated. This  
23 process shall not preempt the care of the patient. No health care provider or other person shall be  
24 required to seek appointment of a guardian.

25           II. After a surrogate has been identified, the name, address, telephone number, and  
26 relationship of that person to the patient shall be recorded in the patient’s medical record.

27           III. Any surrogate who becomes unavailable or unable or unwilling to act for any reason may  
28 be replaced by applying the provisions of RSA 137-J:35 in the same manner as for the initial choice  
29 of surrogate.

30           IV. In the event an individual of a higher priority to an identified surrogate becomes  
31 available and is willing and able to be the surrogate, the individual with higher priority may be  
32 identified as the surrogate. In the event an individual in a higher, a lower, or the same priority level  
33 or a health care provider seeks to challenge the priority or ability of the surrogate or the life-  
34 sustaining treatment decision of the recognized surrogate decision-maker, the challenging party may  
35 initiate guardianship proceedings in accordance with RSA 464-A.

36           137-J:37 Limitations of Surrogacy.

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1           I. A surrogate shall not be identified over the express objection of the patient, and a  
2 surrogacy shall terminate if at any time a patient for whom a surrogate has been appointed  
3 expresses objection to the continuation of the surrogacy.

4           II. No physician or APRN shall be required to identify a surrogate, and may, in the event a  
5 surrogate has been identified, revoke the surrogacy if the surrogate is unwilling or unable to act.

6           III. A physician or APRN may, but shall not be required to, initiate guardianship  
7 proceedings or encourage a family member or friend to seek guardianship in the event a patient is  
8 determined to lack capacity to make health care decisions and no guardian, agent under a health  
9 care power of attorney, or surrogate has been appointed or named.

10          IV. Nothing in this chapter shall be construed to require a physician or APRN to treat a  
11 patient who the physician or APRN reasonably believes lacks health care decision-making capacity  
12 and for whom no guardian, agent, or surrogate has been appointed.

13          V. The surrogate may make health care decisions for a principal to same extent as an agent  
14 under a durable power of attorney for health care for up to 90 days after being identified in RSA 137-  
15 J:35, I, unless the principal regains health care decision-making capacity or a guardian is appointed  
16 or patient is determined to be near death, as defined in RSA 137-J:2, XVI. The authority of the  
17 surrogate shall terminate after 90 days.

18          239:13 Durable Power of Attorney; Disclosure Statement. Amend RSA 137-J:19 to read as  
19 follows:

20          137-J:19 Durable Power of Attorney; Disclosure Statement. The disclosure statement which  
21 must accompany a durable power of attorney for health care shall be in substantially the following  
22 form:

23 **INFORMATION CONCERNING THE DURABLE POWER OF ATTORNEY FOR HEALTH CARE**

24          **THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING IT, YOU SHOULD**  
25 **KNOW THESE IMPORTANT FACTS:**

26          Except if you say otherwise in the directive, this directive gives the person you name as your  
27 health care agent the power to make any and all health care decisions for you when you lack the  
28 capacity to make health care decisions for yourself (in other words, you no longer have the ability to  
29 understand and appreciate generally the nature and consequences of a health care decision,  
30 including the significant benefits and harms of and reasonable alternatives to any proposed health  
31 care). “Health care” means any treatment, service or procedure to maintain, diagnose or treat your  
32 physical or mental condition. Your health care agent, therefore, will have the power to make a wide  
33 range of health care decisions for you. Your health care agent may consent (in other words, give  
34 permission) , refuse to consent, or withdraw consent to medical treatment, and may make decisions  
35 about withdrawing or withholding life-sustaining treatment. Your health care agent cannot consent  
36 to or direct any of the following: commitment to a state institution, sterilization, or termination of



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1 treatment if you are pregnant and if the withdrawal of that treatment is deemed likely to terminate  
2 the pregnancy, unless the treatment will be physically harmful to you or prolong severe pain which  
3 cannot be alleviated by medication.

4 You may state in this directive any treatment you do not want, or any treatment you want to be  
5 sure you receive. Your health care agent's power will begin when your doctor certifies that you lack  
6 the capacity to make health care decisions (in other words, that you are not able to make health care  
7 decisions). If for moral or religious reasons you do not want to be treated by a doctor or to be  
8 examined by a doctor to certify that you lack capacity, you must say so in the directive and you must  
9 name someone who can certify your lack of capacity. That person cannot be your health care agent  
10 or alternate health care agent or any person who is not eligible to be your health care agent. You  
11 may attach additional pages to the document if you need more space to complete your statement.

12 ~~[If you want to give your health care agent power to withhold or withdraw medically~~  
13 ~~administered nutrition and hydration, you must say so in your directive. Otherwise, your health~~  
14 ~~care agent will not be able to direct that.]~~ Under no conditions will your health care agent be able to  
15 direct the withholding of food and drink that you are able to eat and drink normally.

16 Your agent shall be directed by your written instructions in this document when making  
17 decisions on your behalf, and as further guided by your medical condition or prognosis. Unless you  
18 state otherwise in the directive, your agent will have the same power to make decisions about your  
19 health care as you would have made, if those decisions by your health care agent are made consistent  
20 with state law.

21 It is important that you discuss this directive with your doctor or other health care providers  
22 before you sign it, to make sure that you understand the nature and range of decisions which could  
23 be made for you by your health care agent. If you do not have a health care provider, you should talk  
24 with someone else who is knowledgeable about these issues and can answer your questions. Check  
25 with your community hospital or hospice for trained staff. You do not need a lawyer's assistance to  
26 complete this directive, but if there is anything in this directive that you do not understand, you  
27 should ask a lawyer to explain it to you.

28 The person you choose as your health care agent should be someone you know and trust, and he  
29 or she must be at least 18 years old. If you choose your health or residential care provider (such as  
30 your doctor, advanced practice registered nurse, or an employee of a hospital, nursing home, home  
31 health agency, or residential care home, other than a relative), that person will have to choose  
32 between acting as your health care agent or as your health or residential care provider, because the  
33 law does not allow a person to do both at the same time.

34 You should consider choosing an alternate health care agent, in case your health care agent is  
35 unwilling, unable, unavailable or not eligible to act as your health care agent. Any alternate health  
36 care agent you choose will then have the same authority to make health care decisions for you.

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1           You should tell the person you choose that you want him or her to be your health care agent.  
2           You should talk about this directive with your health care agent and your doctor or advanced  
3           practice registered nurse and give each one a signed copy. You should write on the directive itself  
4           the people and institutions who will have signed copies. Your health care agent will not be liable for  
5           health care decisions made in good faith on your behalf.

6           EVEN AFTER YOU HAVE SIGNED THIS DIRECTIVE, YOU HAVE THE RIGHT TO MAKE  
7           HEALTH CARE DECISIONS FOR YOURSELF AS LONG AS YOU ARE ABLE TO DO SO, AND  
8           TREATMENT CANNOT BE GIVEN TO YOU OR STOPPED OVER YOUR CLEAR OBJECTION.  
9           You have the right to revoke the power given to your health care agent by telling him or her, or by  
10          telling your health care provider, orally or in writing, that you no longer want that person to be your  
11          health care agent.

12          YOU HAVE THE RIGHT TO EXCLUDE OR STRIKE REFERENCES TO APRN'S IN YOUR  
13          ADVANCE DIRECTIVE AND IF YOU DO SO, YOUR ADVANCE DIRECTIVE SHALL STILL BE  
14          VALID AND ENFORCEABLE.

15          Once this directive is executed it cannot be changed or modified. If you want to make changes,  
16          you must make an entirely new directive.

17          THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS IT IS SIGNED IN THE  
18          PRESENCE OF A NOTARY PUBLIC OR JUSTICE OF THE PEACE OR TWO (2) OR MORE  
19          QUALIFIED WITNESSES, WHO MUST BOTH BE PRESENT WHEN YOU SIGN AND WHO WILL  
20          ACKNOWLEDGE YOUR SIGNATURE ON THE DOCUMENT. THE FOLLOWING PERSONS  
21          MAY NOT ACT AS WITNESSES:

22          \_\_\_The person you have designated as your health care agent;

23          \_\_\_Your spouse or heir at law;

24          \_\_\_Your attending physician or APRN, or person acting under the direction or control of the  
25          attending physician or APRN;

26          ONLY ONE OF THE TWO WITNESSES MAY BE YOUR HEALTH OR RESIDENTIAL CARE  
27          PROVIDER OR ONE OF YOUR PROVIDER'S EMPLOYEES.

28          239:14 Directives for Medical Decisions; Requirement to Act in Accordance With Principal's  
29          Wishes and Best Interests. Amend RSA 137-J:6 to read as follows:

30          137-J:6 Requirement to Act in Accordance With Principal's Wishes and Best Interests. After  
31          consultation with the attending physician or APRN and other health care providers, the agent **or**  
32          **surrogate** shall make health care decisions in accordance with the agent's **or surrogate's**  
33          knowledge of the principal's wishes and religious or moral beliefs, as stated orally or otherwise  
34          communicated by the principal, or, if the principal's wishes are unknown, in accordance with the  
35          agent's **or surrogate's** assessment of the principal's best interests and in accordance with accepted  
36          medical practice.

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1           239:15 Effective Date. This act shall take effect January 1, 2015.

2    Approved: July 21, 2014

3    Effective Date: January 1, 2015