

REFERENCE TITLE: living wills; health care directives

State of Arizona  
House of Representatives  
Forty-ninth Legislature  
First Regular Session  
2009

## **HB 2616**

Introduced by  
Representatives Murphy, Antenori, Barnes, Barto, Burges, Nichols, Senator  
Nelson; Representatives Ash, Court, Crandall, Crump, Driggs, Kavanagh,  
Lesko, Mason, McLain, Quelland, Seel, Tobin, Yarbrough, Senators Gray L,  
Harper, Huppenthal, Melvin, Verschoor

AN ACT

AMENDING SECTIONS 14-5312, 36-3201 AND 36-3206, ARIZONA REVISED STATUTES;  
AMENDING TITLE 36, CHAPTER 32, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING  
SECTIONS 36-3211 AND 36-3212; RELATING TO LIVING WILLS AND HEALTH CARE  
DIRECTIVES.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 14-5312, Arizona Revised Statutes, is amended to  
3 read:

4 14-5312. General powers and duties of guardian

5 A. A guardian of an incapacitated person has the same powers, rights  
6 and duties respecting the guardian's ward that a parent has respecting the  
7 parent's unemancipated minor child, except that a guardian is not liable to  
8 third persons for acts of the ward solely by reason of the guardianship. In  
9 particular, and without qualifying the foregoing, a guardian has the  
10 following powers and duties, except as modified by order of the court:

11 1. To the extent that it is consistent with the terms of any order by  
12 a court of competent jurisdiction relating to detention or commitment of the  
13 ward, the guardian is entitled to custody of the person of the ward and may  
14 establish the ward's place of abode within or without this state.

15 2. If entitled to custody of the ward, the guardian shall make  
16 provision for the care, comfort and maintenance of the ward and, whenever  
17 appropriate, arrange for the ward's training and education. Without regard  
18 to custodial rights of the ward's person, the guardian shall take reasonable  
19 care of the ward's clothing, furniture, vehicles and other personal effects  
20 and commence protective proceedings if other property of the ward is in need  
21 of protection.

22 3. SUBJECT TO THE REQUIREMENTS OF SECTIONS 36-3211 AND 36-3212, a  
23 guardian may give any consents or approvals that may be necessary to enable  
24 the ward to receive medical or other professional care, counsel, treatment or  
25 service.

26 4. If no conservator for the estate of the ward has been appointed,  
27 the guardian may:

28 (a) Institute proceedings to compel any person under a duty to support  
29 the ward or to pay sums for the welfare of the ward to perform such person's  
30 duty.

31 (b) Receive money and tangible property deliverable to the ward and  
32 apply the money and property for support, care and education of the ward, but  
33 the guardian may not use funds from his ward's estate for room and board the  
34 guardian or the guardian's spouse, parent or child has furnished the ward  
35 unless a charge for the service is approved by order of the court made upon  
36 notice to at least one of the next of kin of the ward, if notice is possible.  
37 He must exercise care to conserve any excess for the ward's needs.

38 5. A guardian is required to report the condition of the ward and of  
39 the estate that has been subject to the guardian's possession or control, as  
40 required by the court or court rule.

41 6. If a conservator has been appointed, all of the ward's estate  
42 received by the guardian in excess of those funds expended to meet current  
43 expenses for support, care and education of the ward shall be paid to the  
44 conservator for management as provided in this chapter and the guardian must  
45 account to the conservator for funds expended.

1           7. If appropriate, a guardian shall encourage the ward to develop  
2 maximum self-reliance and independence and shall actively work toward  
3 limiting or terminating the guardianship and seeking alternatives to  
4 guardianship.

5           8. A guardian shall find the most appropriate and least restrictive  
6 setting for the ward consistent with the ward's needs, capabilities and  
7 financial ability.

8           9. A guardian shall make reasonable efforts to secure appropriate  
9 medical and psychological care and social services for the ward.

10          10. A guardian shall make reasonable efforts to secure appropriate  
11 training, education and social and vocational opportunities for his ward in  
12 order to maximize the ward's potential for independence.

13          11. In making decisions concerning his ward, a guardian shall take into  
14 consideration the ward's values and wishes.

15          12. The guardian is authorized to act pursuant to title 36, chapter 32.

16          13. The guardian of an incapacitated adult who has a developmental  
17 disability as defined in section 36-551 shall seek services that are in the  
18 best interest of the ward, taking into consideration:

19           (a) The ward's age.

20           (b) The degree or type of developmental disability.

21           (c) The presence of other handicapping conditions.

22           (d) The guardian's ability to provide the maximum opportunity to  
23 develop the ward's maximum potential, to provide a minimally structured  
24 residential program and environment for the ward and to provide a safe,  
25 secure, and dependable residential and program environment.

26           (e) The particular desires of the individual.

27          B. Any guardian of a ward for whom a conservator also has been  
28 appointed shall control the custody and care of the ward and is entitled to  
29 receive reasonable sums for the guardian's services and for room and board  
30 furnished to the ward as agreed upon between the guardian and the conservator  
31 if the amounts agreed upon are reasonable under the circumstances. The  
32 guardian may request the conservator to expend the ward's estate by payment  
33 to third persons or institutions for the ward's care and maintenance.

34          Sec. 2. Section 36-3201, Arizona Revised Statutes, is amended to read:

35          36-3201. Definitions

36          In this chapter, unless the context otherwise requires:

37          1. "Agent" means an adult who has the authority to make health care  
38 treatment decisions for another person, referred to as the principal,  
39 pursuant to a health care power of attorney.

40          2. "Artificially administered" means providing food or fluid through a  
41 medically invasive procedure.

42          3. "Attending physician" means a physician who has the primary  
43 responsibility for a principal's health care.

44          4. "Comfort care" means treatment given in an attempt to protect and  
45 enhance the quality of life without artificially prolonging that life.

1           5. "EXPRESS AND INFORMED CONSENT" MEANS CONSENT THAT IS VOLUNTARILY  
2 GIVEN WITH SUFFICIENT KNOWLEDGE OF THE SUBJECT MATTER INVOLVED, INCLUDING A  
3 GENERAL UNDERSTANDING OF THE PROCEDURE, THE MEDICALLY ACCEPTABLE ALTERNATIVE  
4 PROCEDURES OR TREATMENTS AND THE SUBSTANTIAL RISKS AND HAZARDS INHERENT IN  
5 THE PROPOSED TREATMENT OR PROCEDURES, TO ENABLE THE PERSON GIVING CONSENT TO  
6 MAKE AN INFORMED DECISION WITHOUT ANY ELEMENT OF FORCE, FRAUD, DECEIT OR  
7 DURESS OR OTHER FORM OF CONSTRAINT OR COERCION.

8           ~~5-~~ 6. "Health care directive" means a document drafted in substantial  
9 compliance with this chapter, including a mental health care power of  
10 attorney, to deal with a person's future health care decisions.

11           ~~6-~~ 7. "Health care power of attorney" means a written designation of  
12 an agent to make health care decisions that meets the requirements of section  
13 36-3221 and that comes into effect and is durable as provided in section  
14 36-3223, subsection A.

15           ~~7-~~ 8. "Health care provider" means a natural person who is licensed  
16 under title 32, chapter 13, 15, 17 or 25, a hospice as defined in section  
17 36-401 that is licensed under chapter 4 of this title or an organization that  
18 is licensed under this title, that renders health care designed to prevent,  
19 diagnose or treat illness or injury and that employs persons licensed under  
20 title 32, chapter 13, 15, 17 or 25.

21           ~~8-~~ 9. "Interested person" means the patient, a person listed under  
22 section 36-3231, subsection A, a health care provider directly involved in  
23 the patient's medical care or an employee of a health care provider.

24           ~~9-~~ 10. "Living will" means a statement written either by a person who  
25 has not written a health care power of attorney or by the principal as an  
26 attachment to a health care power of attorney and intended to guide or  
27 control the health care treatment decisions that can be made on that person's  
28 behalf.

29           ~~10-~~ 11. "Mental health care power of attorney" means a written  
30 designation of an agency to make mental health care decisions that meets the  
31 requirements of section 36-3281.

32           ~~11-~~ 12. "Physician" means a doctor of medicine licensed pursuant to  
33 title 32, chapter 13 or doctor of osteopathy licensed pursuant to title 32,  
34 chapter 17.

35           ~~12-~~ 13. "Principal" means a person who is the subject of a health care  
36 power of attorney.

37           ~~13-~~ 14. "Surrogate" means a person authorized to make health care  
38 decisions for a patient by a power of attorney, a court order or the  
39 provisions of section 36-3231.

40           Sec. 3. Section 36-3206, Arizona Revised Statutes, is amended to read:

41           36-3206. Enforcement or challenge of a directive or decision;  
42                                   judicial proceedings

43           A. An interested person may file a verified petition with the superior  
44 court to determine the validity or effect of a health care directive or the  
45 decision of a surrogate.

- 1           B. The petition shall include the following information:
- 2           1. The name and current location of the patient and any surrogate
- 3 authorized to make decisions for the patient.
- 4           2. The name and address of any health care provider known by the
- 5 petitioner to be providing health care to the principal.
- 6           3. A description or a copy of the health care directive.
- 7           4. The judicial relief sought by the petitioner.
- 8           C. On the filing of the petition the court shall enter a temporary
- 9 order directing compliance with section 36-3203, subsection E. Notice of
- 10 this order shall be provided by personal service on the surrogate, the
- 11 patient, the health care providers immediately responsible for the patient's
- 12 care and other persons the court requires to be notified.
- 13           D. The court shall review the petition, any other pleadings on file
- 14 and any evidence offered by the petitioner to determine if it should order
- 15 temporary orders without a further hearing. The court may enter a temporary
- 16 order directing the provision or the withholding of specific medical
- 17 treatment pending a further hearing if the court determines that there is
- 18 reasonable cause to believe that health care decisions are being made by a
- 19 surrogate or a health care provider that derogate the patient's wishes or, if
- 20 the patient's wishes are not known, the patient's best interests.
- 21           E. The court shall schedule and conduct a hearing within five working
- 22 days of the filing of a petition. Notice shall be provided by personal
- 23 service on the surrogate, the patient, the health care providers immediately
- 24 responsible for the patient's care, and other persons the court requires to
- 25 be notified.
- 26           F. On the filing of the petition the court may:
- 27           1. Appoint an attorney for the patient if it appears that this is in
- 28 the patient's best interests.
- 29           2. Appoint an investigator as provided under section 14-5308 or a
- 30 physician, or both, to evaluate the patient and submit a written report to
- 31 the court before the hearing.
- 32           3. Enter other temporary orders that the court determines are
- 33 necessary and appropriate to protect the wishes or the best interests of the
- 34 patient, including an order exercising the power of a guardian or appointing
- 35 a temporary guardian as provided under section 14-5310.
- 36           G. A person filing a petition under this section is not required to
- 37 post a bond unless the court determines that a bond is necessary to protect
- 38 the interests of any party.
- 39           H. On notice and a hearing, the court may enter appropriate orders to
- 40 safeguard the wishes of the patient. If the court is unable to determine
- 41 those wishes, the court may enter appropriate orders to safeguard the
- 42 patient's best interest. These orders may include:
- 43           1. Appointing a surrogate if the procedural requirements of title 14,
- 44 chapter 5, article 3 have been met.

1           2. Removing an agent or any other surrogate and appointing a  
2 successor.

3           3. Directing compliance with the terms of the patient's health care  
4 directive, including the provisional removal or withholding of treatment if  
5 the court finds that this conforms with the patient's wishes or, if the  
6 patient's wishes are not known, is in the patient's best interest.

7           4. Directing the transfer of the patient to a suitable facility or to  
8 the care of a health care provider who is willing to comply with the  
9 patient's wishes.

10          5. Assessing court costs and attorney fees against a party found to  
11 have proceeded in bad faith.

12           I. Notwithstanding a person's incapacity, the court may deny a  
13 petition to appoint a guardian for that person based on the existence of a  
14 valid and unrevoked health care directive.

15           J. A WITHDRAWAL OF FOOD OR FLUID SHALL NOT TAKE PLACE UNTIL AFTER ALL  
16 APPEALS OR JUDICIAL REVIEWS HAVE BEEN EXHAUSTED.

17           ~~J.~~ K. A guardian appointed pursuant to this section is immune from  
18 civil and criminal liability to the same extent as any other surrogate  
19 pursuant to section 36-3203, subsection D.

20          Sec. 4. Title 36, chapter 32, article 1, Arizona Revised Statutes, is  
21 amended by adding sections 36-3211 and 36-3212, to read:

22          36-3211. Presumption of food and fluid sufficient to sustain  
23 life; requirements

24           A. IN THE ABSENCE OF A VALID LIVING WILL OR POWER OF ATTORNEY, IT IS  
25 PRESUMED THAT EVERY PATIENT HAS DIRECTED THE PATIENT'S HEALTH CARE PROVIDERS  
26 TO PROVIDE THE PATIENT WITH FOOD AND FLUID TO A DEGREE THAT IS SUFFICIENT TO  
27 SUSTAIN LIFE INCLUDING, IF NECESSARY, BY WAY OF THE GASTROINTESTINAL TRACT OR  
28 INTRAVENOUSLY.

29           B. A GUARDIAN, SURROGATE, PUBLIC OR PRIVATE AGENCY OR COURT OR ANY  
30 OTHER PERSON DOES NOT HAVE THE AUTHORITY TO MAKE A DECISION ON BEHALF OF A  
31 PATIENT TO WITHHOLD OR WITHDRAW FOOD OR FLUID EXCEPT IN THE CIRCUMSTANCES AND  
32 UNDER THE CONDITIONS SPECIFICALLY PRESCRIBED IN SECTION 36-3212.

33           C. A PERSON MAY NOT AUTHORIZE THE WITHDRAWAL OF FOOD OR FLUID THAT THE  
34 PATIENT MAY INGEST THROUGH NATURAL MEANS.

35          36-3212. Exceptions to presumption of food and fluid sufficient  
36 to sustain life

37          THE PRESUMPTION PURSUANT TO SECTION 36-3211 DOES NOT APPLY:

38           1. TO THE EXTENT THAT, IN REASONABLE MEDICAL JUDGMENT:

39           (a) THE PROVISION OF FOOD OR FLUID IS NOT MEDICALLY POSSIBLE.

40           (b) THE PROVISION OF FOOD OR FLUID WOULD HASTEN DEATH.

41           (c) BECAUSE OF THE MEDICAL CONDITION OF THE PATIENT, THE PATIENT WOULD  
42 BE INCAPABLE OF DIGESTING OR ABSORBING THE FOOD OR FLUID SO THAT ITS  
43 PROVISION WOULD NOT CONTRIBUTE TO SUSTAINING THE PATIENT'S LIFE OR PROVIDE  
44 PHYSICAL COMFORT TO THE PATIENT.

1           2. IF THE PATIENT EXECUTED A LIVING WILL PURSUANT TO THIS CHAPTER THAT  
2 EXPRESSLY AUTHORIZES THE WITHDRAWAL OR WITHHOLDING OF FOOD OR FLUID.

3           3. IF THE PATIENT EXECUTED A HEALTH CARE POWER OF ATTORNEY PURSUANT TO  
4 THIS CHAPTER, SUBJECT TO ANY LIMITATION ON THE AUTHORITY OF THE AGENT  
5 INDICATED BY EXPRESS LANGUAGE IN THE POWER OF ATTORNEY.

6           4. IF THERE IS CLEAR AND CONVINCING EVIDENCE OF BOTH OF THE FOLLOWING:

7           (a) THAT THE PATIENT IS IN A PERSISTENT OR PERMANENT VEGETATIVE STATE  
8 AND THE EVIDENCE THAT THE PATIENT IS IN A PERSISTENT OR PERMANENT VEGETATIVE  
9 STATE IS SUPPORTED BY THE INDEPENDENT OPINION OF A PHYSICIAN WHO IS LICENSED  
10 PURSUANT TO TITLE 32, CHAPTER 13 OR 17 AND WHO IS A SPECIALIST IN NEUROLOGY.

11           (b) THAT THE PATIENT, WHEN LEGALLY CAPABLE AND COMPETENT OF MAKING  
12 HEALTH CARE DECISIONS, GAVE EXPRESS AND INFORMED CONSENT TO THE WITHDRAWAL OR  
13 WITHHOLDING OF FOOD OR FLUID IN THE APPLICABLE CIRCUMSTANCES.

14           Sec. 5. Short title

15           Sections 36-3211 and 36-3212, Arizona Revised Statutes, as added by  
16 this act, may be cited as "Jesse's Law".