

HOUSE BILL No. 2849

By Committee on Federal and State Affairs

2-7

9 AN ACT; concerning wards and guardians; relating to the duties and
10 powers of guardians; concerning nutrition and hydration; amending
11 K.S.A. 59-3051 and 59-3075 and repealing the existing sections.
12

13 *Be it enacted by the Legislature of the State of Kansas:*

14 New Section 1. (a) It shall be presumed that every ward incapable
15 of making health care decisions has directed such ward's guardian to
16 direct the ward's health care providers to provide such ward with nutrition
17 or hydration or both to a degree that is sufficient to sustain life.

18 (b) No guardian, court or any other person shall have the authority
19 to make a decision on behalf of a ward who is legally incapable of making
20 health care decisions to withhold or withdraw nutrition or hydration or
21 both from such ward except in the circumstances and under the condi-
22 tions specifically provided for in subsection (c).

23 (c) The presumption established in subsection (a) shall not apply:

24 (1) If, in the reasonable medical judgment of the ward's treating phy-
25 sician, such physician certifies in writing to the guardian that:

26 (A) Provision of nutrition or hydration or both to the ward is not
27 medically possible;

28 (B) provision of nutrition or hydration or both to the ward would
29 hasten death; or

30 (C) the ward would be incapable of digesting or absorbing the nutri-
31 tion or hydration or both so that its provision would not contribute to
32 sustaining the ward's life; or

33 (2) if the ward, when legally capable of making health care decisions,
34 executed, expressly and with informed consent, a written directive spe-
35 cifically authorizing the withholding or withdrawal of nutrition or hydra-
36 tion or both under the ward's current circumstances. Such directive shall
37 include, but not be limited to, a declaration executed pursuant to K.S.A.
38 65-28,101 et seq., and amendments thereto, and a durable power of at-
39 torney for health care decisions executed pursuant to K.S.A. 58-625 et
40 seq., and amendments thereto.

41 (d) Prior to withholding or withdrawing nutrition or hydration or both
42 under subsection (c)(1), such written certification shall be presented to a
43 court of competent jurisdiction and such court shall afford the ward full

1 and complete due process including, but not limited to, the right to court
2 appointed counsel, notice, hearing, subpoena power, discovery and pay-
3 ment of costs for experts if the ward is deemed indigent. At such hearing
4 the guardian shall show, by clear and convincing evidence, that the written
5 certification is objectively true in all that it attests.

6 (e) A cause of action for injunctive relief may be maintained:

7 (1) Against any person who is reasonably believed to be about to
8 violate or who is in the course of violating this section; or

9 (2) to secure a court determination, notwithstanding the position of
10 a guardian, whether there is clear and convincing evidence that the ward
11 legally incapable of making health care decisions, when legally capable of
12 making such decisions, executed expressly and with informed consent, a
13 written directive to withdrawing or withholding hydration or nutrition or
14 both in the applicable circumstances.

15 (f) The action may be brought by any person who is:

16 (1) The spouse, parent, child or sibling of the person;

17 (2) a current or former health care provider of the person;

18 (3) a legally appointed guardian of the person;

19 (4) the state protection and advocacy agency as provided by subsec-
20 tion (a)(10) of K.S.A. 65-5603 or subsection (a)(2)(A) and (B) of K.S.A.
21 74-5515, and amendments thereto; or

22 (5) a public official with appropriate jurisdiction to prosecute or en-
23 force the laws of this state.

24 (g) Pending the final determination of the court, the court shall direct
25 that nutrition or hydration or both be provided such person unless the
26 court determines that subsection (c)(1) is applicable.

27 (h) This section shall be part of and supplemental to the act for ob-
28 taining a guardian or conservator, or both.

29 Sec. 2. K.S.A. 2005 Supp. 59-3051 is hereby amended to read as
30 follows: 59-3051. When used in the act for obtaining a guardian or a
31 conservator, or both:

32 (a) "Adult with an impairment in need of a guardian or a conservator,
33 or both" means a person 18 years of age or older, or a minor who is
34 considered to be of the age of majority pursuant to K.S.A. 38-101, and
35 amendments thereto, or upon whom the rights of majority have been
36 conferred pursuant to K.S.A. 38-108, and amendments thereto, whose
37 ability to receive and evaluate relevant information, or to effectively com-
38 municate decisions, or both, even with the use of assistive technologies
39 or other supports, is impaired such that the person lacks the capacity to
40 manage such person's estate, or to meet essential needs for physical
41 health, safety or welfare, and who is in need of a guardian or a conservator,
42 or both. No person who is being treated by prayer in the practice of the
43 religion of any church which teaches reliance on spiritual means alone

1 through prayer for healing shall be determined to be an adult with an
2 impairment in need of a guardian under this act for that reason alone,
3 nor considered to lack the capacity to meet essential needs for physical
4 health, safety or welfare because of such person's reliance upon such
5 treatment.

6 (b) "Appropriate alternative" means any program or service, or the
7 use of a legal device or representative, which enables a person with an
8 impairment to adequately meet essential needs for physical health, safety
9 or welfare, or to reasonably manage such person's estate. Appropriate
10 alternatives may include, but are not limited to, a power of attorney, a
11 durable power of attorney, a power of attorney for health care decisions,
12 a living will, a trust, a joint tenancy or a representative payee.

13 (c) "Conservatee" means a person who has a conservator.

14 (d) "Conservator" means an individual or a corporation who or which
15 is appointed by the court to act on behalf of a conservatee and who or
16 which is possessed of some or all of the powers and duties set out in
17 K.S.A. 59-3078, and amendments thereto.

18 (e) "Guardian" means an individual or a corporation certified in ac-
19 cordance with K.S.A. 59-3070, and amendments thereto, who or which
20 is appointed by a court to act on behalf of a ward, and who or which is
21 possessed of some or all of the powers and duties set out in K.S.A. 59-
22 3075, amendments thereto. "Guardian" does not mean a "natural guard-
23 ian" unless specified.

24 (f) "In need of a guardian" means a person who because of both an
25 impairment and the lack of appropriate alternatives for meeting essential
26 needs, requires the appointment of a guardian.

27 (g) "In need of a conservator" means a person who because of both
28 an impairment and the lack of appropriate alternatives for managing such
29 person's estate, requires the appointment of a conservator.

30 (h) "Manage such person's estate" means making those determina-
31 tions and taking those actions which are reasonably necessary in order for
32 a person to receive and account for personal or business income, benefits
33 and property, whether real, personal or intangible, and except for reasons
34 of indigency, to purchase or otherwise obtain necessary goods or services,
35 to pay debts and expenses, to sell, exchange or otherwise dispose of prop-
36 erty, and to plan for future accumulation, conservation, utilization, in-
37 vestment, and other disposition of financial resources.

38 (i) "Meet essential needs for physical health, safety or welfare" means
39 making those determinations and taking those actions which are reason-
40 ably necessary in order for a person to obtain or be provided with shelter,
41 sustenance, personal hygiene or health care, and without which serious
42 illness or injury is likely to occur.

43 (j) "Minor" means any person defined by K.S.A. 38-101, and amend-

1 ments thereto, as being within the period of minority.

2 (k) “Minor with an impairment in need of a guardian or a conservator,
3 or both” means a person under 18 years of age who otherwise meets the
4 definition of an “adult with an impairment in need of a guardian or con-
5 servator, or both” and whose impairment is expected to continue beyond
6 the age of 18.

7 (l) “Natural guardian” means both the biological or adoptive mother
8 and father of a minor if neither parent has been found to be an adult with
9 an impairment in need of a guardian or has had parental rights terminated
10 by a court of competent jurisdiction. If either parent of a minor is de-
11 ceased, or has been found to be an adult with an impairment in need of
12 a guardian or has had parental rights terminated by a court of competent
13 jurisdiction, then the other parent shall be the natural guardian, unless
14 also deceased, or found to be an adult with an impairment in need of a
15 guardian, or has had parental rights terminated by a court of competent
16 jurisdiction, in which case no person shall qualify as the natural guardian.

17 (m) “Person who has been previously adjudged as impaired in an-
18 other state” means a person who has been duly adjudged by a court of
19 competent jurisdiction of any other state to be unable to meet essential
20 needs for physical health, safety or welfare or to manage such person’s
21 estate and for whom a guardian or a conservator, or other similarly em-
22 powered fiduciary, has been appointed by that court, but who now resides
23 within Kansas or for whom plans have been made by such person’s guard-
24 ian or other fiduciary to relocate the person to Kansas.

25 (n) “Person in need of an ancillary conservator” means a person not
26 residing within Kansas, who has been duly adjudged by a court of com-
27 petent jurisdiction of another state to be unable to manage such person’s
28 estate and for whom a conservator or other fiduciary of the person’s estate
29 has been appointed by that court, and who has property in Kansas for
30 which a conservator is required.

31 (o) “Proposed ward” means a person for whom a petition for the
32 appointment of a guardian pursuant to K.S.A. 59-3058, 59-3059, 59-3060
33 or 59-3061, and amendments thereto, has been filed.

34 (p) “Proposed conservatee” means a person for whom a petition for
35 the appointment of a conservator pursuant to K.S.A. 59-3058, 59-3059,
36 59-3060, 59-3061 or 59-3062, and amendments thereto, has been filed.

37 (q) “Ward” means a person who has a guardian.

38 (r) The terms defined in K.S.A. 59-2946 and 59-29b46, and amend-
39 ments thereto, have the meanings provided by those statutes.

40 (s) *“Expressly and with informed consent” means consent voluntarily*
41 *given with sufficient knowledge of the subject matter involved, including*
42 *a general understanding of the procedure, the medically acceptable alter-*
43 *native procedures or treatments, and the substantial risks and hazards*

1 *inherent in the proposed treatment or procedures, to enable the person*
2 *giving consent to make an understanding and enlightened decision with-*
3 *out any element of force, fraud, deceit, duress or other form of constraint*
4 *or coercion.*

5 (t) *“Nutrition” means sustenance administered by way of the gastro-*
6 *intestinal tract.*

7 (u) *“Person legally incapable of making health care decisions” or*
8 *“ward legally incapable of making health care decisions” means any per-*
9 *son or ward who:*

10 (A) *Has been declared legally incompetent to make decisions affecting*
11 *medical treatment or care;*

12 (B) *in the reasonable medical judgment of the attending physician, is*
13 *unable to make decisions affecting medical treatment or other health care*
14 *services; or*

15 (C) *is a minor.*

16 (v) *“Reasonable medical judgment” means a medical judgment that*
17 *would be made by a reasonably prudent physician, knowledgeable about*
18 *the case and the treatment possibilities with respect to the medical con-*
19 *ditions involved.*

20 Sec. 3. K.S.A. 59-3075 is hereby amended to read as follows: 59-
21 3075. (a) (1) The individual or corporation appointed by the court to serve
22 as the guardian shall carry out diligently and in good faith, the general
23 duties and responsibilities, and shall have the general powers and au-
24 thorities, provided for in this section as well as any specific duties, re-
25 sponsibilities, powers and authorities assigned to the guardian by the
26 court. In doing so, a guardian shall at all times be subject to the control
27 and direction of the court, and shall act in accordance with the provisions
28 of any guardianship plan filed with the court pursuant to K.S.A. 59-3076,
29 and amendments thereto. The court shall have the authority to appoint
30 counsel for the guardian, and the fees of such attorney may be assessed
31 as costs pursuant to K.S.A. 59-3094, and amendments thereto.

32 (2) A guardian shall become and remain personally acquainted with
33 the ward, the spouse of the ward and with other interested persons as-
34 sociated with the ward and who are knowledgeable about the ward, the
35 ward's needs and the ward's responsibilities. A guardian shall exercise
36 authority only as necessitated by the ward's limitations. A guardian shall
37 encourage the ward to participate in making decisions affecting the ward.
38 A guardian shall encourage the ward to act on the ward's own behalf to
39 the extent the ward is able. A guardian shall encourage the ward to de-
40 velop or regain the skills and abilities necessary to meet the ward's own
41 essential needs and to otherwise manage the ward's own affairs. In making
42 decisions on behalf of the ward, a guardian shall consider the expressed
43 desires and personal values of the ward to the extent known to the guard-

1 ian. A guardian shall strive to assure that the personal, civil and human
2 rights of the ward are protected. A guardian shall at all times act in the
3 best interests of the ward and shall exercise reasonable care, diligence
4 and prudence.

5 (b) A guardian shall have the following general duties, responsibilities,
6 powers and authorities:

7 (1) If the ward is a minor, to have the custody and control of the
8 minor, and to provide for the minor's care, treatment, habilitation, edu-
9 cation, support and maintenance;

10 (2) if the ward is an adult, to take charge of the person of the ward,
11 and to provide for the ward's care, treatment, habilitation, education,
12 support and maintenance;

13 (3) to consider and either provide on behalf of the ward necessary or
14 required consents or refuse the same;

15 (4) to assure that the ward resides in the least restrictive setting ap-
16 propriate to the needs of the ward and which is reasonably available;

17 (5) to assure that the ward receives any necessary and reasonably
18 available medical care, consistent with the provisions of K.S.A. 59-3077,
19 and amendments thereto, when applicable, and any reasonably available
20 nonmedical care or other services as may be needed to preserve the health
21 of the ward or to assist the ward to develop or retain skills and abilities;

22 (6) to promote and protect the comfort, safety, health and welfare of
23 the ward;

24 (7) to make necessary determinations and arrangements for, and to
25 give the necessary consents in regard to, the ward's funeral arrangements,
26 burial or cremation, the performance of an autopsy upon the body of the
27 ward, and anatomical gifts of the ward, subject to the provisions and
28 limitations provided for in K.S.A. 65-2893 and 65-3210 and K.S.A. 65-
29 1734, and amendments thereto; and

30 (8) to exercise all powers and to discharge all duties necessary or
31 proper to implement the provisions of this section.

32 (c) A guardian shall not be obligated by virtue of the guardian's ap-
33 pointment to use the guardian's own financial resources for the support
34 of the ward.

35 (d) A guardian shall not be liable to a third person for the acts of the
36 ward solely by virtue of the guardian's appointment, nor shall a guardian
37 who exercises reasonable care in selecting a third person to provide any
38 medical or other care, treatment or service for the ward be liable for any
39 injury to the ward resulting from the wrongful conduct of that third
40 person.

41 (e) A guardian shall not have the power:

42 (1) To prohibit the marriage or divorce of the ward;

43 (2) to consent, on behalf of the ward, to the termination of the ward's

1 parental rights;

2 (3) to consent to the adoption of the ward, unless approved by the
3 court;

4 (4) to consent, on behalf of the ward, to any psychosurgery, removal
5 of any bodily organ, or amputation of any limb, unless such surgery, re-
6 moval or amputation has been approved in advance by the court, except
7 in an emergency and when necessary to preserve the life of the ward or
8 to prevent serious and irreparable impairment to the physical health of
9 the ward;

10 (5) to consent, on behalf of the ward, to the sterilization of the ward,
11 unless approved by the court following a due process hearing held for
12 the purposes of determining whether to approve such, and during which
13 hearing the ward is represented by an attorney appointed by the court;

14 (6) to consent, on behalf of the ward, to the performance of any
15 experimental biomedical or behavioral procedure on the ward, or for the
16 ward to be a participant in any biomedical or behavioral experiment, with-
17 out the prior review and approval of such by either an institutional review
18 board as provided for in title 45, part 46 of the code of federal regulations,
19 or if such regulations do not apply, then by a review committee estab-
20 lished by the agency, institution or treatment facility at which the pro-
21 cedure or experiment is proposed to occur, composed of members se-
22 lected for the purposes of determining whether the proposed procedure
23 or experiment:

24 (A) Does not involve any significant risk of harm to the physical or
25 mental health of the ward, or the use of aversive stimulants, and is in-
26 tended to preserve the life or health of the ward or to assist the ward to
27 develop or regain skills or abilities; or

28 (B) involves a significant risk of harm to the physical or mental health
29 of the ward, or the use of an aversive stimulant, but that the conducting
30 of the proposed procedure or experiment is intended either to preserve
31 the life of the ward, or to significantly improve the quality of life of the
32 ward, or to assist the ward to develop or regain significant skills or abilities,
33 and that the guardian has been fully informed concerning the potential
34 risks and benefits of the proposed procedure or experiment or of any
35 aversive stimulant proposed to be used, and as to how and under what
36 circumstances the aversive stimulant may be used, and has specifically
37 consented to such;

38 (7) to consent, on behalf of the ward, to the withholding or with-
39 drawal of life-saving or life sustaining medical care, treatment, services
40 or procedures, except:

41 (A) In accordance with the provisions of any declaration of the ward
42 made pursuant to the provisions of K.S.A. 65-28,101 through 65-28,109,
43 and amendments thereto; or

1 (B) if the ward, prior to the court's appointment of a guardian pur-
2 suant to K.S.A. 59-3067, and amendments thereto, shall have executed a
3 durable power of attorney for health care decisions pursuant to K.S.A.
4 58-629, and amendments thereto, and such shall not have been revoked
5 by the ward prior thereto, and there is included therein any provision
6 relevant to the withholding or withdrawal of life-saving or life-sustaining
7 medical care, treatment, services or procedures, then the guardian shall
8 have the authority to act as provided for therein, even if the guardian has
9 revoked or otherwise amended that power of attorney pursuant to the
10 authority of K.S.A. 58-627, and amendments thereto, or the guardian may
11 allow the agent appointed by the ward to act on the ward's behalf if the
12 guardian has not revoked or otherwise amended that power of attorney;
13 or

14 (C) in the circumstances where the ward's treating physician shall
15 certify in writing to the guardian that the ward is ~~in a persistent vegetative~~
16 ~~state or is suffering from an illness or other medical condition for which~~
17 ~~further treatment, other than for the relief of pain, would not likely pro-~~
18 ~~long the life of the ward other than by artificial means, nor would be likely~~
19 ~~to restore to the ward any significant degree of capabilities beyond those~~
20 ~~the ward currently possesses~~ *comatose and suffering from a severe illness*
21 *such that life sustaining medical care is objectively futile and would only*
22 *prolong the dying process*, and which opinion is concurred in by either a
23 second physician or by any medical ethics or similar committee to which
24 the health care provider has access established for the purposes of re-
25 viewing such circumstances and the appropriateness of any type of phy-
26 sician's order which would have the effect of withholding or withdrawing
27 life-saving or life sustaining medical care, ~~treatment, services or proce-~~
28 ~~dures~~. Such written certification shall be ~~approved by an order issued by~~
29 ~~the court~~ *presented to a court of competent jurisdiction and such court*
30 *shall afford the ward full and complete due process including, but not*
31 *limited to, the right to court appointed counsel, notice, hearing, subpoena*
32 *power, discovery and payment of costs for experts if the ward is deemed*
33 *indigent. At such hearing the guardian shall show, by clear and convinc-*
34 *ing evidence, that the: (1) Written certification is objectively true in all*
35 *that it attests; and (2) that the ward, when legally capable of making*
36 *health care decisions, expressed informed consent to withhold or with-*
37 *draw medical care under the ward's current circumstances. In assessing*
38 *the ward's intent there shall be a presumption in favor of the treatment*
39 *or continued treatment of the ward.*

40 *As used in subsection (e)(7), "medical care" shall not include nutrition*
41 *and hydration. Nutrition or hydration or both may only be withheld or*
42 *withdrawn as permitted by section 1, and amendments thereto;*

43 (8) to exercise any control or authority over the ward's estate, except

1 if the court shall specifically authorize such. The court may assign such
2 authority to the guardian, including the authority to establish certain
3 trusts as provided in K.S.A. 59-3080, and amendments thereto, and may
4 waive the requirement of the posting of a bond, only if:

5 (A) Initially, the combined value of any funds and property in the
6 possession of the ward or in the possession of any other person or entity,
7 but which the ward is otherwise entitled to possess, equals \$10,000 or
8 less; and

9 (B) either the court requires the guardian to report to the court the
10 commencement of the exercising of such authority, or requires the guard-
11 ian to specifically request of the court the authority to commence the
12 exercise of such authority, as the court shall specify; and

13 (C) the court also requires the guardian, whenever the combined
14 value of such funds and property exceeds \$10,000, to:

15 (i) File a guardianship plan as provided for in K.S.A. 59-3076, and
16 amendments thereto, which contains elements similar to those which
17 would be contained in a conservatorship plan as provided for in K.S.A.
18 59-3078, and amendments thereto;

19 (ii) petition the court for appointment of a conservator as provided
20 for in K.S.A. 59-3058, 59-3059 or 59-3060, and amendments thereto; or

21 (iii) notify the court as the court shall specify that the value of the
22 conservatee's estate has equaled or exceeded \$10,000, if the court has
23 earlier appointed a conservator but did not issue letters of conservatorship
24 pending such notification; and

25 (9) to place the ward in a treatment facility as defined in K.S.A. 59-
26 3077, and amendments thereto, except if authorized by the court as pro-
27 vided for therein.

28 (f) The guardian shall file with the court reports concerning the status
29 of the ward and the actions of the guardian as the court shall direct
30 pursuant to K.S.A. 59-3083, and amendments thereto.

31 Sec. 4. K.S.A. 59-3051 and 59-3075 are hereby repealed.

32 Sec. 5. This act shall take effect and be in force from and after its
33 publication in the statute book.