

## HOUSE BILL No. 2176

By Representative Kinzer

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9 AN ACT concerning wards and guardians; relating to the duties and pow-  
10 ers of guardians; concerning nutrition and hydration; amending K.S.A.  
11 59-3051 and 59-3075 and repealing the existing sections.  
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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 the ward's treating physician certifies in writing that, in the  
25 physician's reasonable medical judgment:

26 (A) Provision of nutrition or hydration or both to the ward would  
27 hasten death; or

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

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

39 (d) Prior to withholding or withdrawing nutrition or hydration or both  
40 under subsection (c)(1), such written certification shall be presented to a  
41 court of competent jurisdiction and such guardian shall show, by clear  
42 and convincing evidence, that the written certification is objectively true  
43 in all that it attests. The court, upon its own motion or upon the motion

1 of any person identified in subsection (f), may afford the ward full and  
2 complete due process including, but not limited to, the right to court  
3 appointed counsel, notice, hearing, subpoena power, discovery and pay-  
4 ment of costs for experts if the ward is deemed indigent.

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

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

8 (2) to secure a court determination, notwithstanding the position of  
9 a guardian, that the ward legally incapable of making health care deci-  
10 sions, when legally capable of making such decisions, executed expressly  
11 and with informed consent, a written directive to withdraw or withhold  
12 hydration or nutrition or both in the applicable circumstances. In any  
13 such action, such directive is presumed valid unless there is clear and  
14 convincing evidence to the contrary.

15 (f) Except as provided in subsection (g), the action may be brought  
16 by any person who is:

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

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

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

20 (4) the state protection and advocacy agency as provided by subsec-  
21 tion (a)(10) of K.S.A. 65-5603 or subsection (a)(2)(A) and (B) of K.S.A.  
22 74-5515, and amendments thereto or 42 U.S.C. 15043, or 42 U.S.C.  
23 10805 or 29 U.S.C. 794e; or

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

26 (g) In any cause of action brought pursuant to subsection (e)(2) by a  
27 person or entity identified in subsection (f)(4) or (f)(5), such person or  
28 entity shall lack standing to bring such action if the ward's treating phy-  
29 sician and all persons identified in subsections (f)(1) and (f)(2), if any,  
30 provide written certification that such physician and such persons do not  
31 contest the legal sufficiency of the ward's informed consent.

32 (h) Pending the final determination of the court, the court shall direct  
33 that nutrition or hydration or both be provided such person unless the  
34 court determines that subsection (c)(1) is applicable.

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

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

40 (a) "Adult with an impairment in need of a guardian or a conservator,  
41 or both" means a person 18 years of age or older, or a minor who is  
42 considered to be of the age of majority pursuant to K.S.A. 38-101, and  
43 amendments thereto, or upon whom the rights of majority have been

1 conferred pursuant to K.S.A. 38-108, and amendments thereto, whose  
2 ability to receive and evaluate relevant information, or to effectively com-  
3 municate decisions, or both, even with the use of assistive technologies  
4 or other supports, is impaired such that the person lacks the capacity to  
5 manage such person's estate, or to meet essential needs for physical  
6 health, safety or welfare, and who is in need of a guardian or a conservator,  
7 or both. No person who is being treated by prayer in the practice of the  
8 religion of any church which teaches reliance on spiritual means alone  
9 through prayer for healing shall be determined to be an adult with an  
10 impairment in need of a guardian under this act for that reason alone,  
11 nor considered to lack the capacity to meet essential needs for physical  
12 health, safety or welfare because of such person's reliance upon such  
13 treatment.

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

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

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

26 (e) "Guardian" means an individual or a corporation certified in ac-  
27 cordance with K.S.A. 59-3070, and amendments thereto, who or which  
28 is appointed by a court to act on behalf of a ward, and who or which is  
29 possessed of some or all of the powers and duties set out in K.S.A. 59-  
30 3075, amendments thereto. "Guardian" does not mean a "natural guard-  
31 ian" unless specified.

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

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

38 (h) "Manage such person's estate" means making those determina-  
39 tions and taking those actions which are reasonably necessary in order for  
40 a person to receive and account for personal or business income, benefits  
41 and property, whether real, personal or intangible, and except for reasons  
42 of indigency, to purchase or otherwise obtain necessary goods or services,  
43 to pay debts and expenses, to sell, exchange or otherwise dispose of prop-

1 erty, and to plan for future accumulation, conservation, utilization, in-  
2 vestment, and other disposition of financial resources.

3 (i) “Meet essential needs for physical health, safety or welfare” means  
4 making those determinations and taking those actions which are reason-  
5 ably necessary in order for a person to obtain or be provided with shelter,  
6 sustenance, personal hygiene or health care, and without which serious  
7 illness or injury is likely to occur.

8 (j) “Minor” means any person defined by K.S.A. 38-101, and amend-  
9 ments thereto, as being within the period of minority.

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

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

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

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

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

42 (p) “Proposed conservatee” means a person for whom a petition for  
43 the appointment of a conservator pursuant to K.S.A. 59-3058, 59-3059,

- 1 59-3060, 59-3061 or 59-3062, and amendments thereto, has been filed.
- 2 (q) "Ward" means a person who has a guardian.
- 3 (r) The terms defined in K.S.A. 59-2946 and 59-29b46, and amend-  
4 ments thereto, have the meanings provided by those statutes.
- 5 (s) *"Expressly and with informed consent" means consent voluntarily*  
6 *given with sufficient knowledge of the subject matter involved, including*  
7 *a general understanding of the procedure, the medically acceptable alter-*  
8 *native procedures or treatments, and the substantial risks and hazards*  
9 *inherent in the proposed treatment or procedures, to enable the person*  
10 *giving consent to make an understanding and enlightened decision with-*  
11 *out any element of force, fraud, deceit, duress or other form of constraint*  
12 *or coercion.*
- 13 (t) *"Nutrition" means sustenance administered in any manner.*
- 14 (u) *"Hydration" means water or fluid administered in any manner.*
- 15 (v) *"Person legally incapable of making health care decisions" or*  
16 *"ward legally incapable of making health care decisions" means any per-*  
17 *son or ward who:*
- 18 (A) *Has been declared legally unable to make decisions affecting med-*  
19 *ical treatment or care; and*
- 20 (B) *in the reasonable medical judgment of the attending physician, is*  
21 *unable to make decisions affecting medical treatment or other health care*  
22 *services; or*
- 23 (C) *is a minor.*
- 24 (w) *"Reasonable medical judgment" means a medical judgment that*  
25 *would be made by a reasonably prudent physician, knowledgeable about*  
26 *the case and the treatment possibilities with respect to the medical con-*  
27 *ditions involved.*
- 28 Sec. 3. K.S.A. 59-3075 is hereby amended to read as follows: 59-  
29 3075. (a) (1) The individual or corporation appointed by the court to serve  
30 as the guardian shall carry out diligently and in good faith, the general  
31 duties and responsibilities, and shall have the general powers and au-  
32 thorities, provided for in this section as well as any specific duties, re-  
33 sponsibilities, powers and authorities assigned to the guardian by the  
34 court. In doing so, a guardian shall at all times be subject to the control  
35 and direction of the court, and shall act in accordance with the provisions  
36 of any guardianship plan filed with the court pursuant to K.S.A. 59-3076,  
37 and amendments thereto. The court shall have the authority to appoint  
38 counsel for the guardian, and the fees of such attorney may be assessed  
39 as costs pursuant to K.S.A. 59-3094, and amendments thereto.
- 40 (2) A guardian shall become and remain personally acquainted with  
41 the ward, the spouse of the ward and with other interested persons as-  
42 sociated with the ward and who are knowledgeable about the ward, the  
43 ward's needs and the ward's responsibilities. A guardian shall exercise

1 authority only as necessitated by the ward's limitations. A guardian shall  
2 encourage the ward to participate in making decisions affecting the ward.  
3 A guardian shall encourage the ward to act on the ward's own behalf to  
4 the extent the ward is able. A guardian shall encourage the ward to de-  
5 velop or regain the skills and abilities necessary to meet the ward's own  
6 essential needs and to otherwise manage the ward's own affairs. In making  
7 decisions on behalf of the ward, a guardian shall consider the expressed  
8 desires and personal values of the ward to the extent known to the guard-  
9 ian. A guardian shall strive to assure that the personal, civil and human  
10 rights of the ward are protected. A guardian shall at all times act in the  
11 best interests of the ward and shall exercise reasonable care, diligence  
12 and prudence.

13 (b) A guardian shall have the following general duties, responsibili-  
14 ties, powers and authorities:

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

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

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

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

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

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

32 (7) to make necessary determinations and arrangements for, and to  
33 give the necessary consents in regard to, the ward's funeral arrangements,  
34 burial or cremation, the performance of an autopsy upon the body of the  
35 ward, and anatomical gifts of the ward, subject to the provisions and  
36 limitations provided for in K.S.A. 65-2893 and 65-3210 and K.S.A. 65-  
37 1734, and amendments thereto; and

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

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

43 (d) A guardian shall not be liable to a third person for the acts of the

1 ward solely by virtue of the guardian's appointment, nor shall a guardian  
2 who exercises reasonable care in selecting a third person to provide any  
3 medical or other care, treatment or service for the ward be liable for any  
4 injury to the ward resulting from the wrongful conduct of that third  
5 person.

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

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

8 (2) to consent, on behalf of the ward, to the termination of the ward's  
9 parental rights;

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

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

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

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

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

36 (B) involves a significant risk of harm to the physical or mental health  
37 of the ward, or the use of an aversive stimulant, but that the conducting  
38 of the proposed procedure or experiment is intended either to preserve  
39 the life of the ward, or to significantly improve the quality of life of the  
40 ward, or to assist the ward to develop or regain significant skills or abilities,  
41 and that the guardian has been fully informed concerning the potential  
42 risks and benefits of the proposed procedure or experiment or of any  
43 aversive stimulant proposed to be used, and as to how and under what

1 circumstances the aversive stimulant may be used, and has specifically  
2 consented to such;

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

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

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

22 (C) in the circumstances where the ward's treating physician shall  
23 certify in writing to the guardian that, *in the physician's reasonable med-*  
24 *ical judgment*, the ward is ~~in a persistent vegetative state or is suffering~~  
25 ~~from an illness or other medical condition for which further treatment,~~  
26 ~~other than for the relief of pain, would not likely prolong the life of the~~  
27 ~~ward other than by artificial means, nor would be likely to restore to the~~  
28 ~~ward any significant degree of capabilities beyond those the ward cur-~~  
29 ~~rently possesses comatose and suffering from a severe illness such that life~~  
30 ~~sustaining medical care is objectively futile and would only prolong the~~  
31 ~~dying process~~, and which opinion is concurred in by either a second phy-  
32 sician or by any medical ethics or similar committee to which the health  
33 care provider has access established for the purposes of reviewing such  
34 circumstances and the appropriateness of any type of physician's order  
35 which would have the effect of withholding or withdrawing life-saving or  
36 life sustaining medical care, ~~treatment, services or procedures~~. Such writ-  
37 ten certification shall be ~~approved by an order issued by the court pre-~~  
38 ~~sented to a court of competent jurisdiction and such court shall afford the~~  
39 ~~ward full and complete due process including, but not limited to, the right~~  
40 ~~to court appointed counsel, notice, hearing, subpoena power, discovery~~  
41 ~~and payment of costs for experts if the ward is deemed indigent. At such~~  
42 ~~hearing the guardian shall show, by clear and convincing evidence, that~~  
43 ~~the: (1) Written certification is objectively true in all that it attests; and~~



1 (2) that the ward, when legally capable of making health care decisions,  
2 expressed informed consent to withhold or withdraw medical care under  
3 the ward's current circumstances. In assessing the ward's intent there  
4 shall be a presumption in favor of the treatment or continued treatment  
5 of the ward.

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

9 (8) to exercise any control or authority over the ward's estate, except  
10 if the court shall specifically authorize such. The court may assign such  
11 authority to the guardian, including the authority to establish certain  
12 trusts as provided in K.S.A. 59-3080, and amendments thereto, and may  
13 waive the requirement of the posting of a bond, only if:

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

18 (B) either the court requires the guardian to report to the court the  
19 commencement of the exercising of such authority, or requires the guard-  
20 ian to specifically request of the court the authority to commence the  
21 exercise of such authority, as the court shall specify; and

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

24 (i) File a guardianship plan as provided for in K.S.A. 59-3076, and  
25 amendments thereto, which contains elements similar to those which  
26 would be contained in a conservatorship plan as provided for in K.S.A.  
27 59-3078, and amendments thereto;

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

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

34 (9) to place the ward in a treatment facility as defined in K.S.A. 59-  
35 3077, and amendments thereto, except if authorized by the court as pro-  
36 vided for therein.

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

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

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