

Senate Bill 239

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SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Establishes process to determine consent of resident of residential care facility or adult foster home to individually based limitation of certain rights.

A BILL FOR AN ACT

1
2 Relating to consent to individually based limitations.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1. Section 2 of this 2017 Act is added to and made a part of ORS 443.400 to**
5 **443.455.**

6 **SECTION 2. (1) If a resident of a residential care facility, including but not limited to an**
7 **assisted living facility, is found to be incapable of providing or withholding consent to an in-**
8 **dividually based limitation, the residential care facility may obtain a decision regarding con-**
9 **sent from the first of the following, in the following order, who can be located upon**
10 **reasonable effort by the residential care facility and who is willing to serve as the resident's**
11 **legal representative for the sole purpose of determining consent to an individually based**
12 **limitation:**

13 (a) **A guardian or other legally appointed representative of the resident who is authorized**
14 **to make health care decisions;**

15 (b) **The resident's spouse;**

16 (c) **An adult designated by the others listed in this subsection, if no person listed in this**
17 **subsection objects to the designation;**

18 (d) **A majority of the adult children of the resident who can be located;**

19 (e) **Either parent of the resident;**

20 (f) **A majority of the adult siblings of the resident who can be located; or**

21 (g) **Any adult relative or adult friend of the resident.**

22 (2) **A legal representative identified under subsection (1) of this section to consent or**
23 **withhold consent to an individually based limitation shall make a determination that reflects**
24 **the legal representative's good faith understanding of the resident's best interest and of what**
25 **the resident would have wanted if the resident were capable of making the determination.**

26 (3) **If none of the persons identified under subsection (1) of this section are available or**
27 **can be reasonably located, the residential care facility shall form a committee as described**
28 **in this subsection to make a determination regarding consent to an individually based limi-**
29 **tation on behalf of the resident. A determination by the committee under this subsection**
30 **requires assent by a majority of the members of the committee. The committee shall consist**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 of the following individuals as are available and can be reasonably located and may not in-
2 clude fewer than three members:

3 (a) A representative of the residential care facility;

4 (b) A representative of the office of the Long Term Care Ombudsman;

5 (c) The resident's Medicaid case manager or the case manager's designee;

6 (d) The resident's attending physician, nurse practitioner or other independent health
7 care provider; and

8 (e) A licensed health care provider with knowledge of the resident's wishes and best in-
9 terests.

10 (4)(a) If a committee formed under subsection (3) of this section makes a determination
11 by majority assent, and the decision is not unanimous, a member of the committee who
12 disagrees with the determination may seek review of the decision from an objective third
13 party individual with experience and expertise relevant to the resident's health condition,
14 status and circumstances. If the objective third party is a health care provider, the health
15 care provider must examine the resident. If the objective third party disagrees with the de-
16 termination of the committee, the objective third party shall present a written report to the
17 committee describing the reasons for the disagreement. Upon receipt of a written report, the
18 committee shall convene in a timely manner to reconsider its original determination. The
19 committee is not required to reverse its original determination. The residential care facility
20 may implement the original determination of the committee pending review by an objective
21 third party and reconsideration of the decision.

22 (b) The process for a committee formed under subsection (3) of this section to make a
23 determination regarding consent to an individually based limitation may not be repeated for
24 the same individually based limitation unless all members of the committee agree orally or
25 in writing.

26 (5)(a) If the residential care facility is unable to obtain a determination regarding consent
27 to an individually based limitation from the legal representative under subsection (2) of this
28 section or the committee under subsection (3) of this section in a sufficiently timely manner
29 to protect the safety of the resident, the residential care facility may impose an individually
30 based limitation immediately. The residential care facility shall document and make available
31 upon request the basis for this finding. An emergency individually based limitation imposed
32 under this subsection must be limited to as short a period as possible to maintain the safety
33 of the resident but may not be imposed for longer than 10 business days from the date the
34 individually based limitation is imposed, unless the resident's Medicaid case manager or a
35 representative of the office of the Long Term Care Ombudsman agrees, either orally or in
36 writing, to extend the individually based limitation.

37 (b) Notwithstanding paragraph (a) of this subsection, an emergency individually based
38 limitation may not be imposed under this subsection for more than 30 business days.

39 (6) The residential care facility shall provide timely written notice of a finding that the
40 resident is incapable and of procedures established by the Department of Human Services to
41 appeal the incapacity determination to the resident and the resident's legal representative,
42 if a legal representative is identified under subsection (1) of this section.

43 (7) If a legal representative or a committee makes a determination under subsection (2)
44 or (3) of this section, or if an individually based limitation is imposed under subsection (4)
45 of this section, the residential care facility shall notify the office of the Long Term Care

1 Ombudsman and the resident’s Medicaid case manager of the determination or imposition
 2 of an individually based limitation within seven business days of the determination or im-
 3 position.

4 (8)(a) A legal representative is not subject to civil or criminal liability or in violation of
 5 any professional oath, affirmation or standard of care for any determination the legal rep-
 6 resentative made in good faith under subsection (2) of this section.

7 (b) Members of a committee formed under subsection (3) of this section to make a de-
 8 termination regarding consent to an individually based limitation are not subject to civil or
 9 criminal liability, disciplinary action for violation of any professional oath, affirmation or
 10 standard of care or administrative disciplinary action arising from a determination the
 11 committee made in good faith.

12 (c) A residential care facility acting in accordance with determination regarding consent
 13 to an individually based limitation made by a legal representative under subsection (2) of this
 14 section or by a committee under subsection (3) of this section, or acting pursuant to a failure
 15 of the legal representative or committee to make a determination, is not subject to civil or
 16 criminal liability or administrative disciplinary action arising from good faith reliance on the
 17 determination or the failure to make a determination.

18 (d) A health care provider who makes a determination regarding incapacity under this
 19 section is not subject to civil or criminal liability, or in violation of any professional oath,
 20 affirmation or standard of care for any determination the health care provider made in good
 21 faith.

22 (9) A finding of incapacity under this section does not create a presumption of incapacity
 23 or incompetence for any other purpose.

24 (10) As used in this section:

25 (a) “Health care provider” means a person licensed, certified or otherwise authorized or
 26 permitted by the law of this state to administer health care in the ordinary course of busi-
 27 ness or practice of a profession, and includes a clinical social worker licensed under ORS
 28 675.530.

29 (b) “Incapable” means that in the opinion of the resident’s attending physician, or of a
 30 licensed nurse practitioner or licensed physician assistant who has provided care to the
 31 resident in the previous six months, the resident lacks the ability to make and communicate
 32 health care decisions to residential care providers and health care providers, including com-
 33 munication through persons familiar with the resident’s manner of communicating if those
 34 persons are available.

35 (c) “Individually based limitation” means a limitation to the resident’s right to:

36 (A) Live under a legally enforceable agreement with protections substantially equivalent
 37 to landlord-tenant laws;

38 (B) Access food, freely and with support, at any time;

39 (C) Have visitors of the resident’s choosing at any time;

40 (D) Have a lockable door in the resident’s unit, which may be locked by the resident;

41 (E) Choose a roommate when sharing a unit;

42 (F) Furnish and decorate the resident’s unit according to an agreement between the
 43 resident and the residential care facility;

44 (G) Control the resident’s schedule and activities, freely and with support; and

45 (H) Privacy in the resident’s unit.

1 **SECTION 3.** Section 4 of this 2017 Act is added to and made a part of ORS 443.705 to
2 443.825.

3 **SECTION 4.** (1) If a resident of an adult foster home is found to be incapable of providing
4 or withholding consent to an individually based limitation, the adult foster home may obtain
5 a decision regarding consent from the first of the following, in the following order, who can
6 be located upon reasonable effort by the adult foster home and who is willing to serve as the
7 resident's legal representative for the sole purpose of determining consent to an individually
8 based limitation:

9 (a) A guardian or other legally appointed representative of the resident who is authorized
10 to make health care decisions;

11 (b) The resident's spouse;

12 (c) An adult designated by the others listed in this subsection, if no person listed in this
13 subsection objects to the designation;

14 (d) A majority of the adult children of the resident who can be located;

15 (e) Either parent of the resident;

16 (f) A majority of the adult siblings of the resident who can be located; or

17 (g) Any adult relative or adult friend of the resident.

18 (2) A legal representative identified under subsection (1) of this section to consent or
19 withhold consent to an individually based limitation shall make a determination that reflects
20 the legal representative's good faith understanding of the resident's best interest and of what
21 the resident would have wanted if the resident were capable of making the determination.

22 (3) If none of the persons identified under subsection (1) of this section are available or
23 can be reasonably located, the adult foster home shall form a committee as described in this
24 subsection to make a determination regarding consent to an individually based limitation on
25 behalf of the resident. A determination by the committee under this subsection requires
26 assent by a majority of the members of the committee. The committee shall consist of the
27 following individuals as are available and can be reasonably located and may not include
28 fewer than three members:

29 (a) A representative of the adult foster home;

30 (b) A representative of the office of the Long Term Care Ombudsman;

31 (c) The resident's Medicaid case manager or the case manager's designee;

32 (d) The resident's attending physician, nurse practitioner or other independent health
33 care provider; and

34 (e) A licensed health care provider with knowledge of the resident's wishes and best in-
35 terests.

36 (4)(a) If a committee formed under subsection (3) of this section makes a determination
37 by majority assent, and the decision is not unanimous, a member of the committee who
38 disagrees with the determination may seek review of the decision from an objective third
39 party individual with experience and expertise relevant to the resident's health condition,
40 status and circumstances. If the objective third party is a health care provider, the health
41 care provider must examine the resident. If the objective third party disagrees with the de-
42 termination of the committee, the objective third party shall present a written report to the
43 committee describing the reasons for the disagreement. Upon receipt of a written report, the
44 committee shall convene in a timely manner to reconsider its original determination. The
45 committee is not required to reverse its original determination. The adult foster home may

1 **implement the original determination of the committee pending review by an objective third**
2 **party and reconsideration of the decision.**

3 **(b) The process for a committee formed under subsection (3) of this section to make a**
4 **determination regarding consent to an individually based limitation may not be repeated for**
5 **the same individually based limitation unless all members of the committee agree orally or**
6 **in writing.**

7 **(5)(a) If the adult foster home is unable to obtain a determination regarding consent to**
8 **an individually based limitation from the legal representative under subsection (2) of this**
9 **section or the committee under subsection (3) of this section in a sufficiently timely manner**
10 **to protect the safety of the resident, the adult foster home may impose an individually based**
11 **limitation immediately. The adult foster home shall document and make available upon re-**
12 **quest the basis for this finding. An emergency individually based limitation imposed under**
13 **this subsection must be limited to as short a period as possible to maintain the safety of the**
14 **resident but may not be imposed for longer than 10 business days from the date the indi-**
15 **vidually based limitation is imposed, unless the resident's Medicaid case manager or a rep-**
16 **resentative of the office of the Long Term Care Ombudsman agrees, either orally or in**
17 **writing, to extend the individually based limitation.**

18 **(b) Notwithstanding paragraph (a) of this subsection, an emergency individually based**
19 **limitation may not be imposed under this subsection for more than 30 business days.**

20 **(6) The adult foster home shall provide timely written notice of a finding that the resi-**
21 **dent is incapable and of procedures established by the Department of Human Services to**
22 **appeal the incapacity determination to the resident and the resident's legal representative,**
23 **if a legal representative is identified under subsection (1) of this section.**

24 **(7) If a legal representative or a committee makes a determination under subsection (2)**
25 **or (3) of this section, or if an individually based limitation is imposed under subsection (4)**
26 **of this section, the adult foster home shall notify the office of the Long Term Care Om-**
27 **budsman and the resident's Medicaid case manager of the determination or imposition of an**
28 **individually based limitation within seven business days of the determination or imposition.**

29 **(8)(a) A legal representative is not subject to civil or criminal liability or in violation of**
30 **any professional oath, affirmation or standard of care for any determination the legal rep-**
31 **resentative made in good faith under subsection (2) of this section.**

32 **(b) Members of a committee formed under subsection (3) of this section to make a de-**
33 **termination regarding consent to an individually based limitation are not subject to civil or**
34 **criminal liability, disciplinary action for violation of any professional oath, affirmation or**
35 **standard of care or administrative disciplinary action arising from a determination the**
36 **committee made in good faith.**

37 **(c) An adult foster home acting in accordance with determination regarding consent to**
38 **an individually based limitation made by a legal representative under subsection (2) of this**
39 **section or by a committee under subsection (3) of this section, or acting pursuant to a failure**
40 **of the legal representative or committee to make a determination, is not subject to civil or**
41 **criminal liability or administrative disciplinary action arising from good faith reliance on the**
42 **determination or the failure to make a determination.**

43 **(d) A health care provider who makes a determination regarding incapacity under this**
44 **section is not subject to civil or criminal liability, or in violation of any professional oath,**
45 **affirmation or standard of care for any determination the health care provider made in good**

1 **faith.**

2 (9) A finding of incapacity under this section does not create a presumption of incapacity
3 or incompetence for any other purpose.

4 (10) As used in this section:

5 (a) "Health care provider" means a person licensed, certified or otherwise authorized or
6 permitted by the law of this state to administer health care in the ordinary course of busi-
7 ness or practice of a profession, and includes a clinical social worker licensed under ORS
8 675.530.

9 (b) "Incapable" means that in the opinion of the resident's attending physician, or of a
10 licensed nurse practitioner or licensed physician assistant who has provided care to the
11 resident in the previous six months, the resident lacks the ability to make and communicate
12 health care decisions to residential care providers and health care providers, including com-
13 munication through persons familiar with the resident's manner of communicating if those
14 persons are available.

15 (c) "Individually based limitation" means a limitation to the resident's right to:

16 (A) Live under a legally enforceable agreement with protections substantially equivalent
17 to landlord-tenant laws;

18 (B) Access food, freely and with support, at any time;

19 (C) Have visitors of the resident's choosing at any time;

20 (D) Have a lockable door in the resident's unit, which may be locked by the resident;

21 (E) Choose a roommate when sharing a unit;

22 (F) Furnish and decorate the resident's unit according to an agreement between the
23 resident and the adult foster home;

24 (G) Control the resident's schedule and activities, freely and with support; and

25 (H) Privacy in the resident's unit.
26