

**CHAPTER 138****( HB 385 )**

AN ACT relating to mental capacity.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔Section 1. KRS 311.631 is amended to read as follows:

- (1) If an adult patient whose physician has determined that he or she does not have decisional capacity has not executed an advance directive, or to the extent the advance directive does not address a decision that must be made, any one (1) of the following responsible parties, in the following order of priority if no individual in a prior class is reasonably available, willing, and competent to act, shall be authorized to make health care decisions on behalf of the patient:
  - (a) The judicially-appointed guardian of the patient, if the guardian has been appointed and if medical decisions are within the scope of the guardianship;
  - (b) The attorney-in-fact named in a durable power of attorney, if the durable power of attorney specifically includes authority for health care decisions;
  - (c) The spouse of the patient;
  - (d) An adult child of the patient, or if the patient has more than one (1) child, the majority of the adult children who are reasonably available for consultation;
  - (e) The parents of the patient;
  - (f) The nearest living relative of the patient, or if more than one (1) relative of the same relation is reasonably available for consultation, a majority of the nearest living relatives; **or**
  - (g) ***An adult friend of the patient who:***
    - 1. Has maintained regular contact with the patient; and***
    - 2. Is familiar with the patient's activities, health, and religious and moral beliefs.***
- (2) In any case in which a health care decision is made under this section, the decision shall be noted in writing in the patient's medical records.
- (3) An individual authorized to consent for another under this section shall act in good faith, in accordance with any advance directive executed by the individual who lacks decisional capacity, and in the best interest of the individual who does not have decisional capacity.
- (4) In any case in which a health care decision is made under this section, hospitalization for psychiatric treatment at a general hospital shall not exceed fourteen (14) consecutive days unless a court order is obtained under KRS Chapter 202A or 202B. For the purposes of this section, a general hospital is one that is not owned or operated by the Commonwealth of Kentucky.
- (5) An individual authorized to make a health care decision under this section may authorize the withdrawal or withholding of artificially-provided nutrition and hydration only in the circumstances as set forth in KRS 311.629(3).

➔Section 2. KRS 504.060 is amended to read as follows:

As used in this chapter, unless the context otherwise requires:

- (1) "Department" means the Department of Corrections;
- (2) ***"Examiner" means a psychologist or psychiatrist who examines, treats, or reports on a defendant's mental condition as required by this chapter;***
- ~~(3)(2)~~ "Forensic psychiatric facility" means a mental institution or facility, or part thereof, designated by the secretary ~~of the Cabinet for Health and Family Services~~ for the purpose and function of providing inpatient evaluation, care, and treatment for mentally ill persons or individuals with an intellectual disability who have been charged with or convicted of a felony;

- (4)(3) "Foreseeable future" means not more than three hundred sixty (360) days;
- (5)(4) "Incompetency to stand trial" means, as a result of mental condition, lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense;
- (6)(5) "Insanity" means, as a result of mental condition, lack of substantial capacity either to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law;
- (7)(6) "Mental illness" means substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors;
- (8)(7) "Individual with an intellectual disability" means an individual with significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period and is a condition which may exist concurrently with mental illness or insanity;
- (9)(8) "Psychiatrist" means a physician licensed pursuant to KRS Chapter 311 who is certified or eligible to apply for certification by the American Board of Psychiatry and Neurology, Inc.;
- (10)(9) "Psychologist" means a person licensed at the doctoral level pursuant to KRS Chapter 319 who has been designated by the Kentucky Board of Examiners of Psychology as competent to perform examinations;
- (11) **"Secretary" means the secretary of the Cabinet for Health and Family Services;**
- (12)(10) "Treatment" means medication or counseling, therapy, psychotherapy, and other professional services provided by or at the direction of psychologists or psychiatrists. "Treatment" shall not include electroshock therapy or psychosurgery; and
- (13)(11) "Treatment facility" means an institution or part thereof, approved by the Cabinet for Health and Family Services, which provides evaluation, care, and treatment for insane or mentally ill persons or individuals with an intellectual disability on an inpatient or outpatient basis~~, or both~~.

➔Section 3. KRS 504.070 is amended to read as follows:

- (1) A defendant who intends to introduce evidence of his **or her**:
  - (a) Mental illness **or intellectual disability bearing on the issue of guilt, punishment, or both**; or
  - (b) Insanity at the time of the offense;
 shall file written notice of his **or her** intention at least **ninety (90)**~~twenty (20)~~ days before trial.
- (2) The prosecution shall be granted reasonable time to move for examination of the defendant, or the court may order an examination on its own motion.
- (3) If the court orders an examination, **the defendant**~~it~~ shall **be examined and his or her mental condition reported, as provided in Section 4 of this Act**~~appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition~~. If it appears the examination will not be completed before the trial date, the court may, on its own motion or on motion of either party, postpone the trial date until after the examination.
- (4) No less than ten (10) days before trial, the prosecution shall file the names and addresses of witnesses it proposes to offer in rebuttal along with reports prepared by its witnesses.

➔Section 4. KRS 504.080 is amended to read as follows:

- (1) (a) **The court may order a defendant to be examined on an outpatient basis when the defendant:**
  1. **Is believed to be incompetent to stand trial;**
  2. **Intends to assert a defense of insanity at the time of the commission of the offense; or**
  3. **Intends to introduce evidence of mental illness or intellectual disability bearing on the issue of guilt, punishment, or both.**
- (b) **The examination shall be done by an examiner from a treatment facility designated by the secretary to perform evaluations required by this chapter.**
- (c) **If the examiner concludes that inpatient examination is needed, the court may order the defendant be:**

1. ***Committed to a forensic psychiatric facility or its designee for no more than thirty (30) days for further examination; and***
  2. ***Treated for his or her mental condition subject to the availability of the facility, if necessary***~~[A court may commit a defendant to a treatment facility or forensic psychiatric facility for up to thirty (30) days so that a psychologist or psychiatrist can examine, treat, and report on the defendant's mental condition, except that if the defendant is charged with a felony and it is determined that inpatient examination or treatment is required, the defendant shall be committed to a forensic psychiatric facility unless the secretary of the Cabinet for Health and Family Services or the secretary's designee determines that the defendant shall be examined and treated in another Cabinet for Health and Family Services facility].~~
- (2) (a) ~~[Reports on a defendant's mental condition prepared under this chapter shall be filed ]~~***No later than***~~[Within] ten (10) days after~~~~[of] the examination, the examiner shall issue and deliver a report prepared under this chapter consistent with the terms of the referring court order.~~
  - (b) ***The court shall order the report be filed under seal, with notice of filing to all parties, and shall schedule the case for a status conference or hearing no more than thirty (30) days after the filing of the report.***
  - (3) The defendant shall be present at any hearing on his ***or her*** mental condition unless he ***or she*** waives ~~the~~~~[his]~~ right to be present.
  - (4) The ***examiner***~~[examining psychologist or psychiatrist]~~ shall appear at any hearing on ***the*** defendant's mental condition unless the defendant waives his ***or her*** right to have ***the examiner***~~[him]~~ appear.
  - (5) ***An examiner***~~[A psychologist or psychiatrist]~~ retained by the defendant shall be permitted to participate in any examination under this chapter.
  - (6) The Cabinet for Health and Family Services, if the cabinet or its agent or employee does not provide the examination, shall pay a reasonable fee to any ***examiner***~~[psychologist or psychiatrist]~~ ordered to examine, treat, ~~or~~~~[and]~~ report on a defendant's mental condition.
  - (7) The termination of criminal proceedings under this chapter is not a bar to the institution of civil commitment proceedings.

➔Section 5. KRS 504.100 is amended to read as follows:

- (1) If upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall ***order the defendant to be examined and his or her mental condition reported, as provided in Section 4 of this Act***~~[appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition].~~
- (2) The report of the ***examiner***~~[psychologist or psychiatrist]~~ shall state whether or not he ***or she*** finds the defendant incompetent to stand trial. If ***the examiner***~~[he]~~ finds the defendant is incompetent, the report shall state:
  - (a) Whether there is a substantial probability of ***the defendant***~~[his]~~ attaining competency in the foreseeable future; and
  - (b) What type treatment ***the examiner recommends, including whether it should be provided by a***~~[and what type] treatment facility or forensic psychiatric facility~~~~[the examiner recommends].~~

- (3) ~~[After the filing of a report (or reports),]~~***In accordance with subsection (2) of Section 4 of this Act, the court shall schedule the case for a status conference or***~~[hold] a hearing~~ ***no more than thirty (30) days after the filing of the report***~~[to determine whether or not the defendant is competent to stand trial].~~

➔Section 6. KRS 504.110 is amended to read as follows:

- (1) If the court finds the defendant incompetent to stand trial but there is a substantial probability the defendant will attain competency in the foreseeable future, it shall commit the defendant to a treatment facility or a forensic psychiatric facility and order the defendant to submit to treatment for sixty (60) days or until the psychologist or psychiatrist treating him or her finds the defendant competent to stand trial, whichever occurs first, except that if the defendant is charged with a felony, he or she shall be committed to a forensic psychiatric facility unless the secretary~~[of the Cabinet for Health and Family Services]~~ or the secretary's designee determines that the defendant shall be treated in another Cabinet for Health and Family Services

facility. Within ten (10) days of that time, the court shall hold another hearing to determine whether or not the defendant is competent to stand trial.

- (2) If the court finds the defendant incompetent to stand trial and there is no substantial probability he or she will attain competency in the foreseeable future:
  - (a) The Commonwealth's attorney's office serving the county of criminal prosecution shall immediately petition the Circuit Court that found the defendant incompetent to stand trial or, if the finding was by a District Court, the Circuit Court in the county of criminal prosecution, to initiate an involuntary commitment proceeding under KRS 202C.010, 202C.020, 202C.030, 202C.040, and 202C.050 if the defendant is charged with a capital offense, a Class A felony, a Class B felony resulting in death or serious physical injury, or a violation of KRS 510.040 or 510.070; or
  - (b) The court shall conduct an involuntary hospitalization proceeding under KRS Chapter 202A or 202B if the defendant is charged with an offense not listed in paragraph (a) of this subsection.
- (3) A defendant who is the subject of an involuntary commitment proceeding under KRS 202C.010, 202C.020, 202C.030, 202C.040, and 202C.050 shall be committed to a forensic psychiatric facility unless the secretary~~of the Cabinet for Health and Family Services~~ or the secretary's designee determines that the defendant shall be treated in another Cabinet for Health and Family Services facility, during the pendency of the proceeding.
- (4) If the court finds the defendant competent to stand trial, the court shall continue the proceedings against the defendant.

➔Section 7. This Act may be cited as Seth's Law.

**Signed by Governor April 9, 2024.**