WEST VIRGINIA CODE CHAPTER 16 ARTICLE 30

WV Legislature

§16-30-1. Short title.

This article may be cited as the "West Virginia Health Care Decisions Act."

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§16-30-2. Legislative findings and purpose.

(a) Purpose. -- The purpose of this article is to ensure that a patient's right to self-determination in health care decisions be communicated and protected; and to set forth a process for private health care decision making for incapacitated adults, including the use of advance directives, which reduces the need for judicial involvement and defines the circumstances under which immunity shall be available for health care providers and surrogate decision makers who make health care decisions.

The intent of the Legislature is to establish an effective method for private health care decision making for incapacitated adults, and to provide that the courts should not be the usual venue for making decisions. It is not the intent of the Legislature to legalize, condone, authorize or approve mercy killing or assisted suicide.

(b) Findings. -- The Legislature hereby finds that:

(1) Common law tradition and the medical profession in general have traditionally recognized the right of a capable adult to accept or reject medical or surgical intervention affecting one's own medical condition;

(2) The application of recent advances in medical science and technology increasingly involves patients who are unconscious or otherwise unable to accept or reject medical or surgical treatment affecting their medical conditions;

(3) Such advances have also made it possible to prolong the dying process artificially through the use of intervening treatments or procedures which, in some cases, offer no hope of medical benefit;

(4) Capable adults should be encouraged to issue advance directives designating their health care representatives so that in the event any such adult becomes unconscious or otherwise incapable of making health care decisions, decisions may be made by others who are aware of such person's own wishes and values; and

(5) The right to make medical treatment decisions extends to a person who is incapacitated at the moment of decision. An incapacitated person who has not made his or her wishes known in advance through an applicable living will, medical power of attorney or through some other means has the right to have health care decisions made on his or her behalf by a person who will act in accordance with the incapacitated person's expressed values and wishes, or, if those values and wishes are unknown, in the incapacitated person's best interests.

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§16-30-3. Definitions.

For the purposes of this article:

“Actual knowledge” means the possession of information of the person’s wishes communicated to the health care provider orally or in writing by the person, the person’s medical power of attorney representative, the person’s health care surrogate, or other individuals resulting in the health care provider’s personal cognizance of these wishes. Constructive notice and other forms of imputed knowledge are not actual knowledge.

“Adult” means a person who is 18 years of age or older, an emancipated minor who has been established as such pursuant to the provisions of §49-4-115 of this code, or a mature minor.

“Advanced nurse practitioner” means a registered nurse with substantial theoretical knowledge in a specialized area of nursing practice and proficient clinical utilization of the knowledge in implementing the nursing process, and who has met the further requirements of the West Virginia Board of Examiners for Registered Professional Nurses rule, advanced practice registered nurse, 19 CSR 7, who has a mutually agreed upon association in writing with a physician, and has been selected by or assigned to the person and has primary responsibility for treatment and care of the person.

“Attending physician” means the physician selected by or assigned to the person who has primary responsibility for treatment and care of the person and who is a licensed physician. If more than one physician shares that responsibility, any of those physicians may act as the attending physician under this article.

“Capable adult” means an adult who is physically and mentally capable of making health care decisions and who is not considered a protected person pursuant to Chapter 44A of this code.

“Close friend” means any adult who has exhibited significant care and concern for an incapacitated person who is willing and able to become involved in the incapacitated person’s health care and who has maintained regular contact with the incapacitated person so as to be familiar with his or her activities, health, and religious and moral beliefs.

“Death” means a finding made in accordance with accepted medical standards of either: (1) The irreversible cessation of circulatory and respiratory functions; or (2) the irreversible cessation of all functions of the entire brain, including the brain stem.

“Guardian” means a person appointed by a court pursuant to chapter 44A of this code who is responsible for the personal affairs of a protected person and includes a limited guardian or a temporary guardian.

“Health care decision” means a decision to give, withhold, or withdraw informed consent to any type of health care, including, but not limited to, medical and surgical treatments, including life-prolonging interventions, psychiatric treatment, nursing care, hospitalization,

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treatment in a nursing home or other facility, home health care, and organ or tissue donation.

“Health care facility” means a facility commonly known by a wide variety of titles, including, but not limited to, hospital, psychiatric hospital, medical center, ambulatory health care facility, physicians’ office and clinic, extended care facility operated in connection with a hospital, nursing home, a hospital extended care facility operated in connection with a rehabilitation center, hospice, home health care, or other facility established to administer health care in its ordinary course of business or practice.

“Health care provider” means any licensed physician, dentist, nurse, physician assistant, paramedic, psychologist, or other person providing medical, dental, nursing, psychological, or other health care services of any kind.

“Incapacity” means the inability because of physical or mental impairment to appreciate the nature and implications of a health care decision, to make an informed choice regarding the alternatives presented, and to communicate that choice in an unambiguous manner.

“Life-prolonging intervention” means any medical procedure or intervention that, when applied to a person, would serve to artificially prolong the dying process. Life-prolonging intervention includes, among other things, nutrition and hydration administered intravenously or through a feeding tube. The term “life-prolonging intervention” does not include the administration of medication or the performance of any other medical procedure considered necessary to provide comfort or to alleviate pain.

“Living will” means a written, witnessed advance directive governing the withholding or withdrawing of life-prolonging intervention, voluntarily executed by a person in accordance with the requirements of §16-30-4 of this code.

“Mature minor” means a person, less than 18 years of age, who has been determined by a qualified physician, a qualified psychologist, or an advanced nurse practitioner to have the capacity to make health care decisions.

“Medical information” or “medical records” means and includes without restriction any information recorded in any form of medium that is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school, or university or health care clearinghouse that relates to the past, present, or future physical or mental health of the person, the provision of health care to the person, or the past, present, or future payment for the provision of health care to the person.

“Medical power of attorney representative” or “representative” means a person, 18 years of age or older, appointed by another person to make health care decisions pursuant to §16-30-6 of this code or similar act of another state and recognized as valid under the laws of this state.

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"Parent" means a person who is another person's natural or adoptive mother or father or who has been granted parental rights by valid court order and whose parental rights have not been terminated by a court of law.

"Person" means an individual, corporation, business trust, trust, partnership, association, government, governmental subdivision or agency, or any other legal entity.

"Portable orders for scope of treatment (POST) form" means a standardized form containing orders by a qualified physician, an advanced practice registered nurse, or a physician assistant that details a person's life-sustaining wishes as provided by §16-30-25 of this code.

"Principal" means a person who has executed a living will, medical power of attorney, or combined medical power of attorney and living will.

"Protected person" means an adult who, pursuant to chapter 44A of this code, has been found by a court, because of mental impairment, to be unable to receive and evaluate information effectively or to respond to people, events, and environments to an extent that the individual lacks the capacity to: (1) Meet the essential requirements for his or her health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or (2) manage property or financial affairs to provide for his or her support or for the support of legal dependents without the assistance or protection of a conservator.

"Qualified physician" means a physician licensed to practice medicine who has personally examined the person.

"Qualified psychologist" means a psychologist licensed to practice psychology who has personally examined the person.

"Surrogate decision-maker" or "surrogate" means an individual 18 years of age or older who is reasonably available, to make health care decisions on behalf of an incapacitated person, possesses the capacity to make health care decisions, and is identified or selected by the attending physician or advanced nurse practitioner in accordance with the provisions of this article as the person who is to make those decisions in accordance with the provisions of this article.

"Terminal condition" means an incurable or irreversible condition as diagnosed by the attending physician or a qualified physician for which the administration of life-prolonging intervention will serve only to prolong the dying process.

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§16-30-4. Executing a living will, medical power of attorney, or combined medical power of attorney and living will.

(a) Any competent adult may execute at any time a living will, medical power of attorney, or combined medical power of attorney and living will. A living will, medical power of attorney, or combined medical power of attorney and living will made pursuant to this article shall be: (1) In writing; (2) executed by the principal or by another person in the principal's presence at the principal's express direction if the principal is physically unable to do so; (3) dated; (4) signed in the presence of two or more witnesses eat least 18 years of age; and (5) signed and attested by such witnesses whose signatures and attestations shall be acknowledged before a notary public.

(b) In addition, a witness may not be:

(1) The person who signed the living will, medical power of attorney, or combined medical power of attorney and living will on behalf of and at the direction of the principal;

(2) Related to the principal by blood or marriage;

(3) Entitled to any portion of the estate of the principal under any will of the principal or codicil thereto: *Provided,* That the validity of the living will, medical power of attorney, or combined medical power of attorney and living will may not be affected when a witness at the time of witnessing the living will, medical power of attorney, or combined medical power of attorney and living will was unaware of being a named beneficiary of the principal's will;

(4) Directly financially responsible for the principal's medical care;

(5) The attending physician; or

(6) The principal's medical power of attorney representative or successor medical power of attorney representative.

(c) The following persons may not serve as a medical power of attorney representative or successor medical power of attorney representative:

(1) A treating health care provider of the principal;

(2) An employee of a treating health care provider not related to the principal;

(3) An operator of a health care facility serving the principal; or

(4) Any person who is an employee of an operator of a health care facility serving the principal and who is not related to the principal.

(d) It is the responsibility of the principal or his or her representative to provide for notification to his or her attending physician and other health care providers of the existence

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of the living will, medical power of attorney, or combined medical power of attorney and living will or a revocation of the living will, medical power of attorney, or combined medical power of attorney and living will. An attending physician or other health care provider, when presented with the living will, medical power of attorney, or combined medical power of attorney and living will, or the revocation of a living will, medical power of attorney, or combined medical power of attorney and living will, shall make the living will, medical power of attorney, or combined medical power of attorney and living will, or a copy or revocation of any, a part of the principal's medical records.

(e) At the time of admission to any health care facility, each person shall be advised of the existence and availability of living will, medical power of attorney, and combined medical power of attorney and living will forms and shall be given assistance in completing such forms if the person desires: *Provided,* That under no circumstances may admission to a health care facility be predicated upon a person having completed a living will, medical power of attorney, or combined medical power of attorney and living will.

(f) The provision of living will, medical power of attorney, or combined medical power of attorney and living will forms substantially in compliance with this article by health care providers, medical practitioners, social workers, social service agencies, senior citizens centers, hospitals, nursing homes, personal care homes, community care facilities, or any other similar person or group, without separate compensation, does not constitute the unauthorized practice of law.

(g) The living will may, but need not, be in the following form and may include other specific directions not inconsistent with other provisions of this article. Should any of the other specific directions be held to be invalid, the invalidity may not affect other directions of the living will which can be given effect without the invalid direction and to this end the directions in the living will are severable.

STATE OF WEST VIRGINIA

LIVING WILL

The Kind of Medical Treatment I Want and Don't Want

If I Have a Terminal Condition

Living will made this _____day of _____(month, year).

I,_____, (*Insert your name)*

being of sound mind, willfully and voluntarily declare that I want my wishes to be respected if I am very sick and unable to communicate my wishes for myself. In the absence of my ability to give directions regarding the use of life-prolonging intervention, it is my desire that

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my dying may not be prolonged under the following circumstances:

If I am very sick and unable to communicate my wishes for myself and I am certified by one physician, who has personally examined me, to have a terminal condition, I direct that life-prolonging intervention that would serve solely to prolong the dying process be withheld or withdrawn. I understand that by signing this document I am agreeing to the REMOVAL or REFUSAL of cardiopulmonary resuscitation (CPR), breathing machine (ventilator), dialysis, and medically administered food and fluids, such as might be provided intravenously or by feeding tube. I want to be allowed to die naturally and only be given medications or other medical procedures necessary to keep me comfortable. I want to receive as much medication as is necessary to alleviate my pain. Nevertheless, oral food and fluids, such as may be provided by spoon or by straw, shall be offered as desired and can be tolerated.

I give the following SPECIAL DIRECTIVES OR LIMITATIONS: (Comments about funeral arrangements, autopsy, mental health treatment, and organ donation may be placed here. My failure to provide special directives or limitations does not mean that I want or refuse certain treatments.)

_____

_____

It is my intention that this living will be honored as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences resulting from such refusal.

I understand the full import of this living will.

_____

Signed

_____

_____

Address

I did not sign the principal's signature above for or at the direction of the principal. I am at least 18 years of age and am not related to the principal by blood or marriage, nor entitled to any portion of the estate of the principal to the best of my knowledge under any will of principal or codicil thereto, nor directly financially responsible for principal's medical care. I am not the principal's attending physician or the principal's medical power of attorney representative or successor medical power of attorney representative under a medical power of attorney.

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_____ _____

Witness DATE

_____ _____

Witness DATE

STATE OF

_____

COUNTY OF

I, _____, a Notary Public of said County, do certify that _____, as principal, and_____ and _____, as witnesses, whose names are signed to the writing above bearing date on the _____ day of _____, 20____, have this day acknowledged the same before me.

Given under my hand this _____ day of _____, 20__.

My commission expires:_____

_____

Notary Public

(h) A medical power of attorney may, but need not, be in the following form, and may include other specific directions not inconsistent with other provisions of this article. Should any of the other specific directions be held to be invalid, such invalidity may not affect other directions of the medical power of attorney which can be given effect without the invalid direction and to this end the directions in the medical power of attorney are severable.

STATE OF WEST VIRGINIA

MEDICAL POWER OF ATTORNEY

The Person I Want to Make Health Care Decisions

For Me When I Can't Make Them for Myself

Dated: _____ , 20_____

I,_____,

(Insert your name)

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hereby appoint as my representative to act on my behalf to give, withhold, or withdraw informed consent to health care decisions in the event that I am unable to do so myself.

The person I choose as my representative is:

_____

_____

(Insert the name, address, area code, and telephone number of the person you wish to designate as your representative. Please insert only one name.)

If my representative is unable, unwilling, or disqualified to serve, then I appoint as my successor representative:

_____

_____

(Insert the name, address, area code, and telephone number of the person you wish to designate as your successor representative. Please insert only one name.)

This appointment shall extend to, but not be limited to, health care decisions relating to medical treatment, surgical treatment, nursing care, medication, hospitalization, care and treatment in a nursing home or other facility, and home health care. The representative appointed by this document is specifically authorized to be granted access to my medical records and other health information and to act on my behalf to consent to, refuse, or withdraw any and all medical treatment or diagnostic procedures, or autopsy if my representative determines that I, if able to do so, would consent to, refuse, or withdraw such treatment or procedures. This authority shall include, but not be limited to, decisions regarding the withholding or withdrawal of life-prolonging interventions.

I appoint this representative because I believe this person understands my wishes and values and will act to carry into effect the health care decisions that I would make if I were able to do so and because I also believe that this person will act in my best interest when my wishes are unknown. It is my intent that my family, my physician, and all legal authorities be bound by the decisions that are made by the representative appointed by this document and it is my intent that these decisions should not be the subject of review by any health care provider or administrative or judicial agency.

It is my intent that this document be legally binding and effective and that this document be taken as a formal statement of my desire concerning the method by which any health care decisions should be made on my behalf during any period when I am unable to make such decisions.

In exercising the authority under this medical power of attorney, my representative shall act

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consistently with my special directives or limitations as stated below.

SPECIAL DIRECTIVES OR LIMITATIONS ON THIS POWER: Comments about tube feedings, breathing machines, cardiopulmonary resuscitation, dialysis, mental health treatment, funeral arrangements, autopsy, and organ donation may be placed here. My failure to provide special directives or limitations does not mean I want or refuse certain treatments.

_____

_____

THIS MEDICAL POWER OF ATTORNEY SHALL BECOME EFFECTIVE ONLY UPON MY INCAPACITY TO GIVE, WITHHOLD, OR WITHDRAW INFORMED CONSENT TO MY OWN MEDICAL CARE.

_____

Signature of the Principal

_____

Address of Principal

I did not sign the principal's signature above. I am at least 18 years of age and am not related to the principal by blood or marriage. I am not entitled to any portion of the estate of the principal or to the best of my knowledge under any will of the principal or codicil thereto, nor legally responsible for the costs of the principal's medical or other care. I am not the principal's attending physician, nor am I the representative or successor representative of the principal.

_____ _____

Witness: DATE

_____ _____

Witness: DATE

_____

STATE OF

_____

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COUNTY OF

I, _____, a Notary Public of said

County, do certify that_____, as principal, and _____ and _____, as witnesses, whose names are signed to the writing above bearing date on the _____ day of _____, 20_____, have this day acknowledged the same before me.

Given under my hand this _____ day of _____, 20____.

My commission expires:_____

_____

Notary Public

(i) A combined medical power of attorney and living will may, but need not, be in the following form, and may include other specific directions not inconsistent with other provisions of this article. Should any of the other specific directions be held to be invalid, the invalidity does not affect other directions of the combined medical power of attorney and living will which can be given effect without the invalid direction and to this end the directions in the combined medical power of attorney and living will are severable.

STATE OF WEST VIRGINIA

COMBINED MEDICAL POWER OF ATTORNEY AND LIVING WILL

The Person I Want to Make Health Care Decisions for Me When I Can't Make

Them for Myself and the Kind of Medical Treatment I Want and Don't Want

If I Have a Terminal Condition

Dated: _____, 20_____

I, _____, (*Insert your name*) hereby appoint as my representative to act on my behalf to give, withhold, or withdraw informed consent to health care decisions in the event that I am unable to do so myself.

The person I choose as my representative is:

_____

_____

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(*Insert the name, address, area code, and telephone number of the person you wish to designate as your representative. Please insert only one name.*)

If my representative is unable, unwilling, or disqualified to serve, then I appoint as my successor representative:

_____

_____

(Insert the name, address, area code, and telephone number of the person you wish to designate as your successor representative. Please insert only one name.)

This appointment shall extend to, but not be limited to, health care decisions relating to medical treatment, surgical treatment, nursing care, medication, hospitalization, care and treatment in a nursing home or other facility, and home health care. The representative appointed by this document is specifically authorized to be granted access to my medical records and other health information and to act on my behalf to consent to, refuse, or withdraw any and all medical treatment or diagnostic procedures, or autopsy if my representative determines that I, if able to do so, would consent to, refuse, or withdraw such treatment or procedures. Such authority shall include, but not be limited to, decisions regarding the withholding or withdrawal of life-prolonging interventions, subject to the special directives and limitations as stated below:

1. IN A TERMINAL CONDITION: If I am very sick and unable to communicate my wishes for myself and I am certified by one physician, who has personally examined me, to have a terminal condition, I direct that life-prolonging intervention that would serve solely to prolong the dying process be withheld or withdrawn. Thus, if a physician has determined that I am in a terminal condition, I understand that completing this form would mean that I refuse cardiopulmonary resuscitation (CPR). It also means that I refuse or request the removal of a breathing machine (ventilator), dialysis, and medically administered food and fluids, such as might be provided intravenously or by feeding tube. I want to be allowed to die naturally and only be given medications or other medical procedures necessary to keep me comfortable. I want to receive as much medication as is necessary to alleviate my pain. Nevertheless, oral food and fluids, such as may be provided by spoon or by straw, shall be offered as desired and can be tolerated.

2. OTHER Living Will SPECIAL DIRECTIVES OR LIMITATIONS ON THIS POWER: (Comments about mental health treatment, funeral arrangements, autopsy, and organ donation may be placed here. My failure to provide special directives or limitations does not mean that I want or refuse certain treatments.)

_____

_____

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_____

_____

_____

In exercising the authority under this medical power of attorney, my representative shall act consistently with my special directives or limitations as stated in this advance directive.

3. NOT IN A TERMINAL CONDITION: Medical Power of Attorney Special Directives or Limitations on this Power: (Comments about tube feedings, breathing machines, cardiopulmonary resuscitation, dialysis, mental health treatment, funeral arrangements, autopsy and organ donation may be placed here. My failure to provide special directives or limitations does not mean that I want or refuse certain treatments.)

_____

_____

_____

_____

_____

I appoint this representative because I believe this person understands my wishes and values and will act to carry into effect the health care decisions that I would make if I were able to do so, and because I also believe that this person will act in my best interest when my wishes are unknown. It is my intent that my family, my physician, and all legal authorities be bound by the decisions that are made by the representative appointed by this document, and it is my intent that these decisions should not be the subject of review by any health care provider or administrative or judicial agency.

It is my intent that this document be legally binding and effective and that this document be taken as a formal statement of my desire concerning the method by which any health care decisions should be made on my behalf during any period when I am unable to make such decisions.

THIS MEDICAL POWER OF ATTORNEY SHALL BECOME EFFECTIVE ONLY UPON MY INCAPACITY TO GIVE, WITHHOLD, OR WITHDRAW INFORMED CONSENT TO MY OWN MEDICAL CARE.

_____

Signature of the Principal

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_____

Address of Principal

I did not sign the principal's signature above. I am at least 18 years of age and am not related to the principal by blood or marriage. I am not entitled to any portion of the estate of the principal or to the best of my knowledge under any will of the principal or codicil thereto, nor legally responsible for the costs of the principal's medical nor other care. I am not the principal's attending physician, nor am I the representative or successor representative of the principal.

Witness _____ DATE _____

Witness _____ DATE _____

STATE OF _____

COUNTY OF _____

I, _____, a Notary Public of said county, do certify that_____, as principal, and _____ and _____, as witnesses, whose names are signed to the writing above bearing date on the _____ day of _____, 20___, have this day acknowledged the same before me.

Given under my hand this _____ day of _____, 20___.

My commission expires:_____

_____

Signature of Notary Public

(j) Any and all living will, medical power of attorney, and combined medical power of attorney and living will documents executed pursuant to §16-30-3 and §16-30-4 of this code, before the effective date of the amendments to these sections, remain in full force and effect. This section is effective for a living will, medical power of attorney, or combined medical power of attorney and living will document executed, amended, or adjusted on or after January 1, 2023. Accordingly, all health care facilities and health care providers using a living will, medical power of attorney, or combined medical power of attorney and living will form referenced in §16-30-4 of this code shall update their forms on or before January 1, 2023.

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§16-30-5. Applicability and resolving actual conflict between advance directives.

(a) The provisions of this article which directly conflict with the written directives contained in a living will, medical power of attorney, or combined medical power of attorney and living will executed prior to the effective date of this statute may not apply. An expressed directive contained in a living will, medical power of attorney, or combined medical power of attorney and living will by any other means the health care provider determines to be reliable shall be followed.

(b) If there is a conflict between the person's expressed directives, the portable orders for scope of treatment form, and the decisions of the medical power of attorney representative or surrogate, the person's expressed directives shall be followed.

(c) If there is a conflict between two advance directives executed by the person, the one most recently completed takes precedence only to the extent needed to resolve the inconsistency.

(d) If there is a conflict between the decisions of the medical power of attorney representative or surrogate and the person's best interests as determined by the attending physician when the person's wishes are unknown, the attending physician shall attempt to resolve the conflict by consultation with a qualified physician, an ethics committee, or by some other means. If the attending physician cannot resolve the conflict with the medical power of attorney representative, the attending physician may transfer the care of the person pursuant §16-30-12(b) of this code.

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§16-30-6. Private decision-making process; authority of living will, medical power of attorney representative and surrogate.

(a) Any capable adult may make his or her own health care decisions without regard to guidelines contained in this article.

(b) Health care providers and health care facilities may rely upon health care decisions made on behalf of an incapacitated person without resort to the courts or legal process, if the decisions are made in accordance with the provisions of this article.

(c) The medical power of attorney representative or surrogate shall have the authority to release or authorize the release of an incapacitated person's medical records to third parties and make any and all health care decisions on behalf of an incapacitated person, except to the extent that a medical power of attorney representative's authority is clearly limited in the medical power of attorney.

(d) The medical power of attorney representative or surrogate's authority shall commence upon a determination, made pursuant to section seven of this article, of the incapacity of the adult. In the event the person no longer is incapacitated or the medical power of attorney representative or surrogate is unwilling or unable to serve, the medical power of attorney representative or surrogate's authority shall cease. However, the authority of the medical power of attorney representative or surrogate may recommence if the person subsequently becomes incapacitated as determined pursuant to section seven of this article unless during the intervening period of capacity the person executes an advance directive which makes a surrogate unnecessary or expressly rejects the previously appointed surrogate as his or her surrogate. A medical power of attorney representative or surrogate's authority terminates upon the death of the incapacitated person except with respect to decisions regarding autopsy, funeral arrangements or cremation and organ and tissue donation: Provided, That the medical power of attorney representative or surrogate has no authority after the death of the incapacitated person to invalidate or revoke a preneed funeral contract executed by the incapacitated person in accordance with the provisions of article fourteen, chapter forty-seven of this code prior to the onset of the incapacity and either paid in full before the death of the incapacitated person or collectible from the proceeds of a life insurance policy specifically designated for that purpose.

(e) The medical power of attorney representative or surrogate shall seek medical information necessary to make health care decisions for an incapacitated person. For the sole purpose of making health care decisions for the incapacitated person, the medical power of attorney representative or surrogate shall have the same right of access to the incapacitated person's medical information and the same right to discuss that information with the incapacitated person's health care providers that the incapacitated person would have if he or she was not incapacitated.

(f) If an incapacitated person previously expressed his or her wishes regarding autopsy, funeral arrangements or cremation, organ or tissue donation or the desire to make an

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anatomical gift by a written directive such as a living will, medical power of attorney, donor card, driver's license or other means, the medical power of attorney representative or surrogate shall follow the person's expressed wishes regarding autopsy, funeral arrangements or cremation, organ and tissue donation or anatomical gift. In the absence of any written directives, any decision regarding anatomical gifts shall be made pursuant to the provisions of article nineteen of this chapter.

(g) If a person is incapacitated at the time of the decision to withhold or withdraw life-prolonging intervention, the person's living will or medical power of attorney executed in accordance with section four of this article is presumed to be valid. For the purposes of this article, a physician or health facility may presume in the absence of actual notice to the contrary that a person who executed a living will or medical power of attorney was a competent adult when it was executed. The fact that a person executed a living will or medical power of attorney is not an indication of the person's mental incapacity.

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§16-30-7. Determination of incapacity.

(a) For the purposes of this article, a person may not be presumed to be incapacitated merely by reason of advanced age or disability. With respect to a person who has a diagnosis of mental illness or intellectual disability, such a diagnosis is not a presumption that the person is incapacitated. A determination that a person is incapacitated shall be made by the attending physician, a physician, a qualified psychologist, a physician's assistant, or an advanced practice registered nurse who has personally examined the person.

(b) The determination of incapacity shall be recorded contemporaneously in the person's medical record by the attending physician, a physician, a physician's assistant, an advanced practice registered nurse or a qualified psychologist. The recording shall state the basis for the determination of incapacity, including the cause, nature, and expected duration of the person's incapacity, if these are known.

(c) If the person is conscious, the attending physician, psychologist, physician's assistant, or advanced practice registered nurse shall inform the person that he or she has been determined to be incapacitated and that a medical power of attorney representative or surrogate decision-maker may be making decisions regarding life-prolonging intervention or mental health treatment for the person.

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§16-30-8. Selection of a surrogate.

(a) When a person is or becomes incapacitated, the attending physician or the advanced nurse practitioner with the assistance of other health care providers as necessary, shall select, in writing, a surrogate. The attending physician or advanced nurse practitioner shall reasonably attempt to determine whether the incapacitated person has appointed a representative under a medical power of attorney, in accordance with the provisions of section four of this article, or if the incapacitated person has a court-appointed guardian in accordance with the provisions of article one, chapter forty-four-a of this code. If no representative or court-appointed guardian is authorized or capable and willing to serve, the attending physician or advanced nurse practitioner is authorized to select a health care surrogate. In selecting a surrogate, the attending physician or advanced nurse practitioner must make a reasonable inquiry as to the existence and availability of a surrogate from the following persons:

(1) The person's spouse;

(2) The person's adult children;

(3) The person's parents;

(4) The person's adult siblings;

(5) The person's adult grandchildren;

(6) The person's close friends;

(7) Any other person or entity, including, but not limited to, public agencies, public guardians, public officials, public and private corporations and other persons or entities which the Department of Health may from time to time designate in rules promulgated pursuant to chapter twenty-nine-a of this code.

(b) After inquiring about the existence and availability of a medical power of attorney representative or a guardian as required by subsection (a) of this section and determining that such persons either do not exist or are unavailable, incapable or unwilling to serve as a surrogate, the attending physician or an advanced nurse practitioner shall select and rely upon a surrogate in the order of priority set forth in subsection (a) of this section, subject to the following conditions:

(1) Where there are multiple possible surrogate decisionmakers at the same priority level, the attending physician or the advanced nurse practitioner shall, after reasonable inquiry, select as the surrogate the person who reasonably appears to be best qualified. The following criteria shall be considered in the determination of the person or entity best qualified to serve as the surrogate:

(A) Whether the proposed surrogate reasonably appears to be better able to make decisions

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either in accordance with the known wishes of the person or in accordance with the person's best interests;

(B) The proposed surrogate's regular contact with the person prior to and during the incapacitating illness;

(C) The proposed surrogate's demonstrated care and concern;

(D) The proposed surrogate's availability to visit the incapacitated person during his or her illness; and

(E) The proposed surrogate's availability to engage in face-to-face contact with health care providers for the purpose of fully participating in the decision-making process;

(2) The attending physician or the advanced nurse practitioner may select a proposed surrogate who is ranked lower in priority if, in his or her judgment, that individual is best qualified, as described in this section, to serve as the incapacitated person's surrogate. The attending physician or the advanced nurse practitioner shall document in the incapacitated person's medical records his or her reasons for selecting a surrogate in exception to the priority order provided in subsection (a) of this section.

(c) The surrogate is authorized to make health care decisions on behalf of the incapacitated person without a court order or judicial involvement.

(d) A health care provider or health care facility may rely upon the decisions of the selected surrogate if the provider believes, after reasonable inquiry, that:

(1) A guardian or representative under a valid, applicable medical power of attorney is unavailable, incapable or unwilling to serve;

(2) There is no other applicable advance directive;

(3) There is no reason to believe that such health care decisions are contrary to the incapacitated person's religious beliefs; and

(4) The attending physician or advanced nurse practitioner has not received actual notice of opposition to any health care decisions made pursuant to the provisions of this section.

(e) If a person who is ranked as a possible surrogate pursuant to subsection (a) of this section wishes to challenge the selection of a surrogate or the health care decision of the selected surrogate, he or she may seek injunctive relief or may file a petition for review of the selection of, or decision of, the selected surrogate with the circuit court of the county in which the incapacitated person resides or the Supreme Court of Appeals. There shall be a rebuttable presumption that the selection of the surrogate was valid and the person who is challenging the selection shall have the burden of proving the invalidity of that selection. The challenging party shall be responsible for all court costs and other costs related to the

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proceeding, except attorneys' fees, unless the court finds that the attending physician or advanced nurse practitioner acted in bad faith, in which case the person so acting shall be responsible for all costs. Each party shall be responsible for his or her own attorneys' fees.

(f) If the attending physician or advanced nurse practitioner is advised that a person who is ranked as a possible surrogate pursuant to the provisions of subsection (a) of this section has an objection to a health care decision to withhold or withdraw a life-prolonging intervention which has been made by the selected surrogate, the attending physician or advanced nurse practitioner shall document the objection in the medical records of the patient. Once notice of an objection or challenge is documented, the attending physician or advanced nurse practitioner shall notify the challenging party that the decision shall be implemented in seventy-two hours unless the attending physician receives a court order prohibiting or enjoining the implementation of the decision as provided in subsection (e) of this section. In the event that the incapacitated person has been determined to have undergone brain death and the selected surrogate has authorized organ or tissue donation, the decision shall be implemented in twenty-four hours unless the attending physician receives a court order prohibiting or enjoining the implementation of the decision as provided in said subsection.

(g) If the surrogate becomes unavailable for any reason, the surrogate may be replaced by applying the provisions of this section.

(h) If a person who ranks higher in priority relative to a selected surrogate becomes available and willing to be the surrogate, the person with higher priority may be substituted for the identified surrogate unless the attending physician determines that the lower-ranked person is best qualified to serve as the surrogate.

(i) The following persons may not serve as a surrogate: (1) A treating health care provider of the person who is incapacitated; (2) an employee of a treating health care provider not related to the person who is incapacitated; (3) an owner, operator or administrator of a health care facility serving the person who is incapacitated; or (4) any person who is an employee of an owner, operator or administrator of a health care facility serving the person who is incapacitated and who is not related to that person.

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§16-30-9. Medical power of attorney representative and health care surrogate decision-making standards.

(a) General standards.

The medical power of attorney representative or the health care surrogate shall make health care decisions:

(1) In accordance with the person's wishes, including religious and moral beliefs; or

(2) In accordance with the person's best interests if these wishes are not reasonably known and cannot with reasonable diligence be ascertained; and

(3) Which reflect the values of the person, including the person's religious and moral beliefs, to the extent they are reasonably known or can with reasonable diligence be ascertained.

(b) Assessment of best interests.

An assessment of the person's best interests shall include consideration of the person's medical condition, prognosis, the dignity and uniqueness of every person, the possibility and extent of preserving the person's life, the possibility of preserving, improving or restoring the person's functioning, the possibility of relieving the person's suffering, the balance of the burdens to the benefits of the proposed treatment or intervention and such other concerns and values as a reasonable individual in the person's circumstances would wish to consider.

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§16-30-10. Reliance on authority of living will; physician orders for scope of treatment form, medical power of attorney representative or surrogate decisionmaker; and protection of health care providers.

(a) A physician, licensed health care professional, health care facility, or employee thereof shall not be subject to criminal or civil liability for good-faith compliance with or reliance upon the directions of the medical power of attorney representative in accordance with this article.

(b) A health care provider shall not be subject to civil or criminal liability for surrogate selection or good-faith compliance and reliance upon the directions of the surrogate in accordance with the provisions of this article.

(c) A health care provider, health care facility, or employee thereof shall not be subject to criminal or civil liability for good-faith compliance with or reliance upon the orders in a portable orders for scope of treatment form.

(d) No health care provider or employee thereof who in good faith and pursuant to reasonable medical standards causes or participates in the withholding or withdrawing of life-prolonging intervention from a person pursuant to a living will or combined medical power of attorney and living will made in accordance with this article shall, as a result thereof, be subject to criminal or civil liability.

(e) An attending physician who cannot comply with the living will, medical power of attorney, or combined medical power of attorney and living will of a principal pursuant to this article shall, in conjunction with the medical power of attorney representative, health care surrogate, or other responsible person, effect the transfer of the principal to another physician who will honor the living will, medical power of attorney, or combined medical power of attorney and living will of the principal. Transfer under these circumstances does not constitute abandonment.

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§16-30-11. Negligence.

Nothing in this article shall be deemed to protect a provider from liability for the provider's own negligence in the performance of the provider's duties or in carrying out any instructions of the medical power of attorney representative or surrogate. Nothing in this article shall be deemed to alter the law of negligence as it applies to the acts of any medical power of attorney representative or surrogate or provider, and nothing herein shall be interpreted as establishing a standard of care for health care providers for purposes of the law of negligence.

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§16-30-12. Conscience objections.

(a) Health care facilities. -– Nothing in this article shall be construed to require a health care facility to change published policy of the health care facility that is expressly based on sincerely held religious beliefs or sincerely held moral convictions central to the facility's operating principles.

(b) Health care providers. -– Nothing in this article shall be construed to require an individual health care provider to honor a health care decision made pursuant to this article if:

(1) The decision is contrary to the individual provider's sincerely held religious beliefs or sincerely held moral convictions; and

(2) The individual health care provider promptly informs the person who made the decision and the health care facility of his or her refusal to honor the decision. In such event, the medical power of attorney representative or surrogate decision maker shall have responsibility for arranging the transfer of the person to another health care provider. The individual health care provider shall cooperate in facilitating such transfer, and a transfer under these circumstances shall not constitute abandonment.

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§16-30-13. Interinstitutional transfers.

(a) If a person admitted to any health care facility in this state has been determined to lack capacity and that person's medical power of attorney has been declared to be in effect or a surrogate decisionmaker has been selected for that person all in accordance with the requirements of this article and that person is subsequently transferred from one health care facility to another, the receiving health care facility may rely upon the prior determination of incapacity and the activation of the medical power of attorney or selection of a surrogate decisionmaker as valid and continuing until such time as an attending physician, a qualified physician, a qualified psychologist, or advanced nurse practitioner in the receiving facility assesses the person's capacity. Should the reassessment by the attending physician, a qualified physician, a qualified psychologist, or an advanced nurse practitioner at the receiving facility result in a determination of continued incapacity, the receiving facility may rely upon the medical power of attorney representative or surrogate decisionmaker who provided health care decisions at the transferring facility to continue to make all health care decisions at the receiving facility until such time as the person regains capacity.

(b) If a person admitted to any health care facility in this state has been determined to lack capacity and the person's medical power of attorney has been declared to be in effect or a surrogate decisionmaker has been selected for that person all in accordance with the requirements of this article and that person is subsequently discharged home in the care of a home health care agency or hospice, the home health care agency or hospice may rely upon the prior determination of incapacity. The home health care agency or hospice may rely upon the medical power of attorney representative or health care surrogate who provided health care decisions at the transferring facility to continue to make all health care decisions until such time as the person regains capacity.

(c) If a person with an order to withhold or withdraw life-prolonging intervention is transferred from one health care facility to another, the existence of such order shall be communicated to the receiving facility prior to the transfer and the written order shall accompany the person to the receiving facility and shall remain effective until a physician at the receiving facility issues admission orders.

(d) If a person with portable orders for scope of treatment form is transferred from one health care facility to another, the health care facility initiating the transfer shall communicate the existence of the portable orders for scope of treatment form to the receiving facility prior to the transfer. The portable orders for scope of treatment form shall accompany the person to the receiving facility and shall remain in effect. The form shall be kept at the beginning of the patient's transfer records unless otherwise specified in the health care facility's policy and procedures. After admission, the portable orders for scope of treatment form shall be reviewed by the attending physician and one of three actions shall be taken:

(1) The portable orders for scope of treatment form shall be continued without change;

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(2) The portable orders for scope of treatment form shall be voided and a new form issued; or

(3) The portable orders for scope of treatment form shall be voided without a new form being issued.

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§16-30-14. Insurance.

(a) No policy of life insurance or annuity or other type of contract that is conditioned on the life or death of the person, shall be legally impaired or invalidated in any manner by the withholding or withdrawal of life-prolonging intervention from a person in accordance with the provisions of this article, notwithstanding any terms of the policy to the contrary.

(b) The withholding or withdrawal of life-prolonging intervention from a principal in accordance with the provisions of this article does not, for any purpose, constitute a suicide and does not constitute the crime of assisting suicide.

(c) The making of a living will or medical power of attorney pursuant to this article does not affect in any manner the sale, procurement or issuance of any insurance policy nor does it modify the terms of an existing policy.

(d) No health care provider or health care service plan, health maintenance organization, insurer issuing disability insurance, self-insured employee welfare benefit plan, nonprofit medical service corporation or mutual nonprofit hospital service corporation shall require any person to execute a living will or medical power of attorney as a condition for being insured for or receiving health care services.

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§16-30-15. Withholding of life support not assisted suicide or murder.

The withholding or withdrawal of life-prolonging intervention from a person in accordance with the decision of a medical power of attorney representative or surrogate decision maker made pursuant to the provisions of this article does not, for any purpose, constitute assisted suicide or murder. The withholding or withdrawal of life-prolonging intervention from a person in accordance with the decisions of a medical power of attorney representative or surrogate decision maker made pursuant to the provisions of this article, however, shall not relieve any individual of responsibility for any criminal acts that may have caused the person's condition. Nothing in this article shall be construed to legalize, condone, authorize or approve mercy killing or assisted suicide.

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§16-30-16. Preservation of existing rights and relation to existing law; no presumption.

(a) The provisions of this article are cumulative with existing law regarding an individual's right to consent to or refuse medical treatment. The provisions of this article shall not impair any existing rights or responsibilities that a health care provider, a person, including a minor or an incapacitated person or a person's family may have in regard to the withholding or withdrawal of life-prolonging intervention, including any rights to seek or forego judicial review of decisions regarding life-prolonging intervention under the common law or statutes of this state.

(b) This article creates no presumption concerning the intention of an individual who has not executed a living will or medical power of attorney to consent to, refuse or withdraw any and all medical treatment or diagnostic procedures, including, but not limited to, life-prolonging intervention.

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§16-30-17. No abrogation of common law doctrine of medical necessity.

Nothing in this article shall be construed to abrogate the common law doctrine of medical necessity.

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§16-30-18. Revocation.

(a) A living will or medical power of attorney may be revoked at any time only by the principal or at the express direction of the principal by any of the following methods:

(1) By being destroyed by the principal or by some person in the principal's presence and at his or her direction;

(2) By a written revocation of the living will or medical power of attorney signed and dated by the principal or person acting at the direction of the principal. Such revocation shall become effective only upon delivery of the written revocation to the attending physician by the principal or by a person acting on behalf of the principal.

The attending physician shall record in the principal's medical record the time and date when he or she receives notification of the written revocation; or

(3) By a verbal expression of the intent to revoke the living will or medical power of attorney in the presence of a witness eighteen years of age or older who signs and dates a writing confirming that such expression of intent was made. Any verbal revocation shall become effective only upon communication of the revocation to the attending physician by the principal or by a person acting on behalf of the principal. The attending physician shall record, in the principal's medical record, the time, date and place of when he or she receives notification of the revocation.

(b) There is no criminal or civil liability on the part of any person for failure to act upon a revocation made pursuant to this section unless that person has actual knowledge of the revocation.

(c) The grant of a final divorce decree shall act as an automatic revocation of the designation of the former spouse to act as a medical power of attorney representative or successor representative.

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§16-30-19. Physician's duty to confirm, communicate, and document terminal condition; medical record identification.

(a) An attending physician who has been notified of the existence of a living will or combined medical power of attorney and living will executed under this article, without delay after the diagnosis of a terminal condition of the principal, shall take steps as needed to provide for confirmation, written certification, and documentation of the principal's terminal condition in the principal's medical record.

(b) Once confirmation, written certification, and documentation of the principal's terminal condition is made, the attending physician shall verbally or in writing inform the principal of his or her condition or the principal's medical power of attorney representative or surrogate, if the principal lacks capacity to comprehend such information and shall document such communication in the principal's medical record.

(c) All inpatient health care facilities shall develop a system to visibly identify a person's chart which contains a living will or medical power of attorney, combined medical power of attorney and living will, or a portable order for scope of treatment as set forth in this article.

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§16-30-20. Living wills previously executed.

A living will executed prior to the effective date of this article and which expressly provides for the withholding or withdrawal of life-prolonging intervention or for the termination of life-sustaining procedures in substantial compliance with the provisions of section four of this article is hereby recognized as a valid living will, as though it were executed in compliance with the provisions of this article.

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§16-30-21. Reciprocity.

A living will medical power of attorney, mental health advance directive, medical orders (portable orders for scope of treatment or do-not-resuscitate card), or similar advance directive or medical orders form executed in another state is validly executed for the purposes of this article if it is executed in compliance with the laws of this state or with the laws of the state where executed.

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§16-30-22. Liability for failure to act in accordance with the directives of a living will or medical power of attorney or the directions of a medical power of attorney representative or health care surrogate.

(a) A health care provider or health care facility without actual knowledge of a living will or medical power of attorney completed by a person is not civilly or criminally liable for failing to act in accordance with the directives of a principal's living will or medical power of attorney.

(b) A health care provider or a health care facility is subject to review and disciplinary action by the appropriate licensing board for failing to act in accordance with a principal's directives in a living will or medical power of attorney, or the decisions of a medical power of attorney representative or health care surrogate: Provided, That the provider or facility had actual knowledge of the directives or decisions.

(c) Once a principal has been determined to be incapacitated in accordance with the provisions of this article and his or her living will or medical power of attorney has become effective, any health care provider or health care facility which refuses to follow the principal's directives in a living will or medical power of attorney or the decisions of a medical power of attorney representative or health care surrogate, because the principal has asked the health care provider or health care facility not to follow such directions or decisions, shall have two physicians, one of whom may be the attending physician, or one physician and a qualified psychologist, or one physician and an advanced nurse practitioner, certify that the principal has regained capacity to make the request. If such certification occurs, the provisions of the applicable living will or medical power of attorney, or the statute creating the authority of the health care surrogate shall not apply because the principal has regained decision-making capacity.

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§16-30-23. Prohibition.

Under no circumstances may the presence or absence of a living will or medical power of attorney be used to deny a person admission to a health care facility.

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§16-30-24. Need for a second opinion regarding incapacity for persons with psychiatric mental illness, intellectual disability or addiction.

For persons with psychiatric mental illness, intellectual disability or addiction who have been determined by their attending physician or a qualified physician to be incapacitated, a second opinion by a qualified physician or qualified psychologist that the person is incapacitated is required before the attending physician is authorized to select a surrogate. The requirement for a second opinion does not apply in those instances in which the medical treatment to be rendered is not for the person's psychiatric mental illness.

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§16-30-25. Portable orders for scope of treatment form.

(a) The Secretary of the Department of Health shall implement the statewide distribution of standardized portable orders for scope of treatment (POST) forms.

(b) Portable orders for scope of treatment forms shall be standardized forms used to reflect orders by a qualified physician, an advanced practice registered nurse, or a physician assistant for medical treatment of a person in accordance with that person's wishes or, if that person's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with that person's best interest. The form shall be bright pink in color to facilitate recognition by emergency medical services personnel and other health care providers and shall be designed to provide for information regarding the care of the patient, including, but not limited to, the following:

(1) The orders of a qualified physician, an advanced practice registered nurse, or a physician assistant regarding cardiopulmonary resuscitation, level of medical intervention in the event of a medical emergency, use of antibiotics, and use of medically administered fluids and nutrition and the basis for the orders;

(2) The signature of the qualified physician, an advanced practice registered nurse, or a physician assistant;

(3) Whether the person has completed an advance directive or had a guardian, medical power of attorney representative, or surrogate appointed;

(4) The signature of the person or his or her guardian, medical power of attorney representative, or surrogate acknowledging agreement with the orders of the qualified physician, an advanced practice registered nurse, or a physician assistant; and

(5) The date, location, and outcome of any review of the portable orders for scope of treatment form.

(c) The portable orders for scope of treatment form shall be kept as the first page in a person's medical record in a health care facility unless otherwise specified in the health care facility's policies and procedures and shall be transferred with the person from one health care facility to another.

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