WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1990

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ENROLLED

Com. Sub. for
HOUSE BILL No. 4197

(By Mr. Speaker, Mr. Chambers, & Del. R. Bush)
[By Request of the Executive]

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Passed ............................................. 1990

In Effect ........................................ Passage
AN ACT to amend chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article thirty-a, relating to the adoption of a medical power of attorney act for the state of West Virginia.

Be it enacted by the Legislature of West Virginia:

That chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article thirty-a, to read as follows:

ARTICLE 30A. MEDICAL POWER OF ATTORNEY.


This article may be cited as the “Medical Power of Attorney Act.”

§16-30A-2. Statement of purpose and legislative findings.

(a) Purpose.—It is the purpose of this article to ensure that a patient’s right to self-determination in health care decisions be communicated and protected.

(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 medical hope of 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, the decisions may be made by others who are aware of such person's own wishes and values; and

(5) While providers of services have a duty to respect the known wishes of patients even in the absence of written directives, increased awareness of medical powers of attorney as a vehicle of patient decision making would enhance and protect patient participation in health care decisions.

Therefore, in recognition of a patient's reasonable expectations of dignity and privacy, the Legislature hereby declares that all capable adults shall have the right to have their decisions for medical treatment or diagnostic procedures, including decisions regarding life-prolonging intervention, carried out by the use of advance directives when such adults are no longer able to communicate those decisions.

It is the intent of the Legislature to establish an effective method for use of advance directives, and it is also the intent of the Legislature that the courts should not be the usual venue for making such decisions. It is not the intent of the Legislature that the procedures described herein be the only means or form of advance
directives concerning the provision of medical treatment or withholding thereof for persons who become incapable of communicating their desires relating thereto.

§16-30A-3. Medical power of attorney.

A medical power of attorney is a springing durable power of attorney by which any person (hereinafter the "principal") designates another person (hereinafter the "representative") in writing to make health care decisions for him or her in the event he or she is unable to do so. The instrument shall contain the following words, or words of like import, "THIS MEDICAL POWER OF ATTORNEY SHALL BECOME EFFECTIVE ONLY UPON MY INCAPACITY TO GIVE, WITHDRAW OR WITHHOLD INFORMED CONSENT TO MY OWN MEDICAL CARE." For purposes of this article "incapacity" or words of like import shall mean 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, as determined by two physicians or by one physician and one licensed psychologist, both of whom are licensed to practice in this state, and additionally, have examined the principal. The principal's attending physician shall be one of those who makes the determination required herein.


(a) The desires of a principal having capacity at all times supersede the effect of the medical power of attorney.

(b) In exercising the authority under the medical power of attorney, the representative has the duty to act consistently with the desires of the principal either as expressed in such medical power of attorney or which have otherwise been made known to such representative. If the principal's desires are unknown, then such representative shall act in the best interests of the principal.
(c) A medical power of attorney may include a statement of the personal values of the principal and specific instructions to the representative to cover particular circumstances.

(d) A representative shall have the authority to give, withhold or withdraw informed consent to the health care of the principal, which authority shall include, but not be limited to, the following, unless the principal expressly provides to the contrary:

(1) Making 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;

(2) Permitting or gaining access to all medical records;

(3) Acknowledging receipt of notifications of rights or responsibilities and any applicable rules of medical or health care facilities;

(4) Employing or discharging medical providers;

(5) Making decisions about measures for the relief of pain;

(6) Consenting to, refusing or withdrawing any and all medical treatment or diagnostic procedures, including but not limited to, life-prolonging intervention when in the opinion of two physicians who have examined the principal, one of whom being the principal's attending physician, such life-prolonging intervention offers no medical hope of benefit;

(7) Making decisions about the gift or donation of a body organ or tissue;

(8) Enforcing a declaration made pursuant to the West Virginia Natural Death Act, as provided in chapter sixteen, article thirty of this code: Provided, That where the provisions of such a declaration and the special directives to the representative hereunder are in conflict, the provisions of the document executed later in time shall control or govern.
§16-30A-5. Successor representative.

(a) The principal may appoint one or more successor representatives in the medical power of attorney in the event the original representative named therein is unable, unwilling or disqualified to serve. In such case, the successor representative shall succeed to all duties and powers given to the original representative, unless the principal expressly provides to the contrary.

(b) Should the representative and the successor representative(s) named in the medical power of attorney be unable, unwilling or disqualified to serve, then the medical power of attorney shall lapse. However, such lapse shall not prevent any advance directives, statement of personal values or specific instructions therein from serving as guidelines for the medical or health care of the principal.

§16-30A-6. Executing a medical power of attorney.

(a) Any person eighteen years of age or older having the capacity to do so may execute a medical power of attorney. A medical power of attorney made pursuant to this article shall be: (1) In writing; (2) signed by the person making the medical power of attorney or by another person in the principal's presence at the principal's express direction; (3) dated; (4) signed in the presence of two or more witnesses at least eighteen years of age; and (5) acknowledged before a notary public.

(b) Each witness shall attest that he or she is not: (1) The person who signed the medical power of attorney 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 according to the laws of intestate succession of the state of the principal's domicile or under any will of the principal or any codicil thereto: Provided, That the validity of the medical power of attorney shall not be affected when a witness at the time of witnessing the same was unaware that he or she was named a beneficiary of the principal's will; (4) legally responsible for the costs of the principal's medical or other care; (5) the attending physician; or (6) the representative or any successor representative appointed pursuant to this article.

(c) The following persons may not serve as a representative or successor 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) an employee of an operator of a health care facility not related to the principal.

§16-30A-7. Nomination of committee or guardian.

A principal may nominate, by a medical power of attorney, the committee or guardian of his person for consideration by the court or county commission if protective proceedings for the principal's person are thereafter commenced. The court or county commission shall make its appointment in accordance with the principal's most recent nomination in a medical power of attorney, except for good cause or disqualification.


If the principal is incapacitated at the time of any health care decision, a medical power of attorney executed in accordance with this article is presumed to be valid. For the purposes of this article, a physician or health care facility may presume, in the absence of actual notice to the contrary, that a principal who executed a medical power of attorney was of sound mind when it was executed. The fact that an individual executed a medical power of attorney is not an indication of the principal's incapacity. In addition, a physi-
cian or health care facility may presume, in the absence of actual notice to the contrary, that any witness who executed a medical power of attorney in accordance with this article was qualified to do so.


When acts are undertaken in good-faith reliance upon a medical power of attorney as prescribed herein, an affidavit given by a representative stating that he or she did not have, at the time of any exercise of such power, knowledge concerning any revocation thereof, shall be considered to be clear and convincing evidence of the validity of the power at that time. This section shall not affect any provision in a medical power of attorney for its termination by expiration of time or occurrence of any event other than express revocation by the principal.

§16-30A-10. Protection of health care providers.

(a) A physician, licensed health care professional, health 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 representative in accordance with this article.

(b) An attending physician who cannot or will not comply with or act in reliance upon the directions of the representative shall, in conjunction with the representative, cause the transfer of the principal to another physician who will comply with the directions of the representative. Transfer under such circumstances does not constitute abandonment of the principal.

§16-30A-11. Medical power of attorney to be made part of the medical records.

A physician or other health care provider who receives a copy of a medical power of attorney or the revocation thereof, shall make it part of the principal’s then current medical record.

§16-30A-12. Right to receive information regarding proposed health care; medical records.
Except to the extent the right is limited by a medical power of attorney, a representative designated to make health care decisions under a medical power of attorney has the same legal right as the principal to receive information, including information requiring a special release under applicable laws, regarding the proposed health care, to receive and review medical records, and to consent to the disclosure of medical records.


A medical power of attorney may be revoked at any time by the principal by any of the following methods:

(a) By destruction thereof, either by the principal or by some person in the principal’s presence and at his or her direction;

(b) By written revocation, signed and dated by the principal or other person acting at the direction of the principal. Such revocation shall become effective only upon communication thereof to the attending physician by the principal or by a person acting on behalf of the principal. The attending physician shall record in the patient’s medical record the time and date when he or she receives notification of the written revocation;

(c) By a verbal expression of the intent to revoke in the presence of a witness eighteen years of age or older who contemporaneously signs and dates a writing confirming such expression 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 patient’s medical record, the time, date and place wherein he or she received such notification; or

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


(a) The compliance by a health care provider with any
direction from a representative that results in the 
withholding or withdrawal of medical treatment or 
diagnostic procedures, including life-prolonging inter-
vention, from a principal shall not be considered for any 
purpose homicide, suicide or assisting suicide. A 
representative's refusal to give consent to, withdrawal 
or withholding of any such treatment or procedure 
pursuant to the authority granted by the principal shall 
not be considered for any purpose as homicide or 
assisting suicide.

(b) The making of a medical power of attorney 
pursuant to this article may not affect in any manner 
the sale, procurement or issuance of any policy of life 
insurance, nor may it modify the terms of any existing 
policy of life insurance. No policy of life insurance may 
be legally impaired or invalidated in any manner by the 
withholding or withdrawal of life-prolonging interven-
tion from an insured principal, notwithstanding any 
provision of the policy to the contrary.


(a) Any durable power of attorney that was executed 
in accordance with the provisions of chapter thirty-nine, 
article four of this code prior to the effective date of this 
article and which expressly delegates to the attorney in 
fact named therein any health care decisions by and on 
behalf of the principal is hereby recognized as a valid 
grant of authority, as though it were executed in 
compliance with the provisions of this article.

(b) Subsequent to the effective date of this article, an 
instrument made in accordance with chapter thirty-
nine, article four of this code and also in accordance 
with the terms of this article shall be effective to 
authorize the exercise of health care decision-making 
and other authority as provided in such instrument.

(c) This article creates no presumption concerning the 
intention of an individual who has not executed a 
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.

(a) Nothing in this article may be construed to condone, authorize or approve mercy killing or to permit any affirmative or deliberate act or omission to end a human life other than to permit the natural process of dying.

(b) Under no circumstances may the presence or absence of a medical power of attorney be used to deny a patient admission to a health care facility.

§16-30A-17. Reciprocity.

A durable power of attorney executed in another state is validly executed for purposes of this article if it is executed in compliance with the laws of this state or the laws of the state where executed and expressly delegates health care decisions.


A medical power of attorney shall be drafted in the following form or in such form which substantially complies with the requirements set forth herein. The provision of medical power of attorney 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 within this state.

MEDICAL POWER OF ATTORNEY

Dated: ____________, 19 ___.

I, ____________________________, (insert your name and address), hereby appoint (insert the name, address, area code and telephone number of the person you wish to designate as your representative) 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 not able to do so myself. If my representative is unable, unwilling
or disqualified to serve, then I appoint
__________, as my successor representative.

This appointment shall extend to (but not be limited
to) 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 act on my
behalf to consent to, refuse or withdraw any and all
medical treatment or diagnostic procedures, 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, the withholding or withdrawal of life-
prolonging intervention when in the opinion of two
physicians who have examined me, one of whom is my
attending physician, such life-prolonging intervention
offers no medical hope of benefit.

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 interests 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. In the event that the law does not
recognize this document as legally binding and effective,
it is my intent 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 consistently with
my special directives or limitations as stated below.
SPECIAL DIRECTIVES OR LIMITATIONS ON THIS POWER: (If none, write “none.”)

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

These directives shall supersede any directives made in any previously executed document concerning my health care.

____________
Signature of Principal

I did not sign the principal's signature above. I am at least eighteen 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 according to the laws of intestate succession of the state of the principal's domicile or to the best of my knowledge under any will of the principal or codicil thereto, or 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 ____________,
COUNTY OF ____________, to-wit:
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 _____________, 19 ____, have this
day acknowledged the same before me.

Given under my hand this ________________ day of
______________, 19 ___.

My commission expires: ________________.

Notary Public

§16-30A-19. Public education; guidelines for execution in
health care facilities.

(a) The secretary of health and human resources, no
later than one year after the effective date of this article,
shall develop and implement a statewide educational
effort to inform the public of the option to execute a
medical power of attorney and of patients’ rights to
participate in and direct health care decisions.

(b) The secretary of health and human resources shall
publish, and may revise from time to time, guidelines
concerning the manner of execution and revocation of
medical powers of attorney while a person is a patient
in a health care facility. The guidelines shall (1) inform
patients of their right to execute a medical power of
attorney concerning their health care; (2) assure patients
that their decision concerning the execution of a medical
power of attorney will not be used to deny them
admission to or continued stay at the health care facility;
(3) inform patients of their right to revoke such medical
power of attorney at any time; and (4) address such
other matters as the secretary may consider approp-
riate.


The provisions of this article are severable and if any
 provision, section or part thereof shall be held invalid,
 unconstitutional or inapplicable to any person or
circumstance, such invalidity, unconstitutionality or
inapplicability shall not affect or impair any other
remaining provisions contained herein.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Frederick L. Fisher
Chairman Senate Committee

Bernard W. Kelly
Chairman House Committee

Originating in the House.

Takes effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 13th day of March, 1990.

Governor