

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. Bunk*)
[By Request of the Executive]

— ● —

Passed *March 1,* 1990

In Effect *From* Passage

ENROLLED
COMMITTEE SUBSTITUTE
FOR

H. B. 4197

(By MR. SPEAKER, MR. CHAMBERS, AND DELEGATE R. BURK)
[By Request of the Executive]

[Passed March 1, 1990; in effect from 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.

§16-30A-1. Short title.

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

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

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

4 (b) *Findings*.—The Legislature hereby finds that:

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

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

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

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

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

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

38 It is the intent of the Legislature to establish an
39 effective method for use of advance directives, and it is
40 also the intent of the Legislature that the courts should
41 not be the usual venue for making such decisions. It is
42 not the intent of the Legislature that the procedures
43 described herein be the only means or form of advance

44 directives concerning the provision of medical treatment
45 or withholding thereof for persons who become incap-
46 able of communicating their desires relating thereto.

§16-30A-3. Medical power of attorney.

1 A medical power of attorney is a springing durable
2 power of attorney by which any person (hereinafter the
3 “principal”) designates another person (hereinafter the
4 “representative”) in writing to make health care
5 decisions for him or her in the event he or she is unable
6 to do so. The instrument shall contain the following
7 words, or words of like import, “THIS MEDICAL
8 POWER OF ATTORNEY SHALL BECOME EFFEC-
9 TIVE ONLY UPON MY INCAPACITY TO GIVE,
10 WITHDRAW OR WITHHOLD INFORMED CON-
11 SENT TO MY OWN MEDICAL CARE.” For purposes
12 of this article “incapacity” or words of like import shall
13 mean the inability, because of physical or mental
14 impairment, to appreciate the nature and implications
15 of a health care decision, to make an informed choice
16 regarding the alternatives presented, and to commun-
17 icate that choice in an unambiguous manner, as
18 determined by two physicians or by one physician and
19 one licensed psychologist, both of whom are licensed to
20 practice in this state, and additionally, have examined
21 the principal. The principal’s attending physician shall
22 be one of those who makes the determination required
23 herein.

§16-30A-4. Powers of representative.

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

4 (b) In exercising the authority under the medical
5 power of attorney, the representative has the duty to act
6 consistently with the desires of the principal either as
7 expressed in such medical power of attorney or which
8 have otherwise been made known to such representative.
9 If the principal’s desires are unknown, then such
10 representative shall act in the best interests of the
11 principal.

12 (c) A medical power of attorney may include a
13 statement of the personal values of the principal and
14 specific instructions to the representative to cover
15 particular circumstances.

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

21 (1) Making decisions relating to medical treatment,
22 surgical treatment, nursing care, medication, hospital-
23 ization, care and treatment in a nursing home or other
24 facility, and home health care;

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

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

30 (4) Employing or discharging medical providers;

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

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

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

42 (8) Enforcing a declaration made pursuant to the
43 West Virginia Natural Death Act, as provided in
44 chapter sixteen, article thirty of this code: *Provided,*
45 That where the provisions of such a declaration and the
46 special directives to the representative hereunder are in
47 conflict, the provisions of the document executed later
48 in time shall control or govern.

49 (e) If proceedings are initiated before a county
50 commission for the appointment of a committee or
51 guardian for the person of the principal subsequent to
52 the execution of a medical power of attorney by the
53 principal, the county commission shall, provided it has
54 notice of a duly executed medical power of attorney,
55 name the representative so designated as committee or
56 guardian of the person for medical decision-making
57 purposes, absent good cause shown against such
58 designation.

§16-30A-5. Successor representative.

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

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

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

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

10 (b) Each witness shall attest that he or she is not: (1)
11 The person who signed the medical power of attorney
12 on behalf of and at the direction of the principal; (2)

13 related to the principal by blood or marriage; (3)
14 entitled to any portion of the estate of the principal
15 according to the laws of intestate succession of the state
16 of the principal's domicile or under any will of the
17 principal or any codicil thereto: *Provided*, That the
18 validity of the medical power of attorney shall not be
19 affected when a witness at the time of witnessing the
20 same was unaware that he or she was named a bene-
21 ficiary of the principal's will; (4) legally responsible for
22 the costs of the principal's medical or other care; (5) the
23 attending physician; or (6) the representative or any
24 successor representative appointed pursuant to this
25 article.

26 (c) The following persons may not serve as a repre-
27 sentative or successor representative: (1) A treating
28 health care provider of the principal; (2) an employee
29 of a treating health care provider not related to the
30 principal; (3) an operator of a health care facility
31 serving the principal; or (4) an employee of an operator
32 of a health care facility not related to the principal.

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

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

§16-30A-8. Presumption of validity.

1 If the principal is incapacitated at the time of any
2 health care decision, a medical power of attorney
3 executed in accordance with this article is presumed to
4 be valid. For the purposes of this article, a physician or
5 health care facility may presume, in the absence of
6 actual notice to the contrary, that a principal who
7 executed a medical power of attorney was of sound mind
8 when it was executed. The fact that an individual
9 executed a medical power of attorney is not an indica-
10 tion of the principal's incapacity. In addition, a physi-

11 cian or health care facility may presume, in the absence
12 of actual notice to the contrary, that any witness who
13 executed a medical power of attorney in accordance
14 with this article was qualified to do so.

§16-30A-9. Proof of continuance of medical power of attorney by affidavit.

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

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

1 (a) A physician, licensed health care professional,
2 health facility or employee thereof shall not be subject
3 to criminal or civil liability for good-faith compliance
4 with or reliance upon the directions of the representa-
5 tive in accordance with this article.

6 (b) An attending physician who cannot or will not
7 comply with or act in reliance upon the directions of the
8 representative shall, in conjunction with the represen-
9 tative, cause the transfer of the principal to another
10 physician who will comply with the directions of the
11 representative. Transfer under such circumstances does
12 not constitute abandonment of the principal.

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

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

§16-30A-12. Right to receive information regarding proposed health care; medical records.

1 Except to the extent the right is limited by a medical
2 power of attorney, a representative designated to make
3 health care decisions under a medical power of attorney
4 has the same legal right as the principal to receive
5 information, including information requiring a special
6 release under applicable laws, regarding the proposed
7 health care, to receive and review medical records, and
8 to consent to the disclosure of medical records.

§16-30A-13. Revocation.

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

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

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

14 (c) By a verbal expression of the intent to revoke in
15 the presence of a witness eighteen years of age or older
16 who contemporaneously signs and dates a writing
17 confirming such expression was made. Any verbal
18 revocation shall become effective only upon communica-
19 tion of the revocation to the attending physician by the
20 principal or by a person acting on behalf of the
21 principal. The attending physician shall record, in the
22 patient's medical record, the time, date and place
23 wherein he or she received such notification; or

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

§16-30A-14. Insurance; other laws.

1 (a) The compliance by a health care provider with any

2 direction from a representative that results in the
3 withholding or withdrawal of medical treatment or
4 diagnostic procedures, including life-prolonging inter-
5 vention, from a principal shall not be considered for any
6 purpose homicide, suicide or assisting suicide. A
7 representative's refusal to give consent to, withdrawal
8 or withholding of any such treatment or procedure
9 pursuant to the authority granted by the principal shall
10 not be considered for any purpose as homicide or
11 assisting suicide.

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

§16-30A-15. Preservation of existing rights.

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

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

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

§16-30A-16. Prohibition.

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

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

§16-30A-17. Reciprocity.

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

§16-30A-18. Standard form.

1 A medical power of attorney shall be drafted in the
2 following form or in such form which substantially
3 complies with the requirements set forth herein. The
4 provision of medical power of attorney forms substan-
5 tially in compliance with this article by health care
6 providers, medical practitioners, social workers, social
7 service agencies, senior citizens centers, hospitals,
8 nursing homes, personal care homes, community care
9 facilities or any other similar person or group, without
10 separate compensation, does not constitute the unauth-
11 orized practice of law within this state.

12
13

MEDICAL POWER OF ATTORNEY

14 Dated: _____, 19 ____.

15 I, _____, (insert your name
16 and address), hereby appoint
17 (insert the name, address, area code and telephone
18 number of the person you wish to designate as your
19 representative) as my representative to act on my behalf
20 to give, withhold or withdraw informed consent to
21 health care decisions in the event that I am not able to
22 do so myself. If my representative is unable, unwilling

23 or disqualified to serve, then I appoint
24 _____, as my successor representative.

25 This appointment shall extend to (but not be limited
26 to) decisions relating to medical treatment, surgical
27 treatment, nursing care, medication, hospitalization,
28 care and treatment in a nursing home or other facility,
29 and home health care. The representative appointed by
30 this document is specifically authorized to act on my
31 behalf to consent to, refuse or withdraw any and all
32 medical treatment or diagnostic procedures, if my
33 representative determines that I, if able to do so, would
34 consent to, refuse or withdraw such treatment or
35 procedures. Such authority shall include, but not be
36 limited to, the withholding or withdrawal of life-
37 prolonging intervention when in the opinion of two
38 physicians who have examined me, one of whom is my
39 attending physician, such life-prolonging intervention
40 offers no medical hope of benefit.

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

52 It is my intent that this document be legally binding
53 and effective. In the event that the law does not
54 recognize this document as legally binding and effective,
55 it is my intent that this document be taken as a formal
56 statement of my desire concerning the method by which
57 any health care decisions should be made on my behalf
58 during any period when I am unable to make such
59 decisions.

60 In exercising the authority under this medical power
61 of attorney, my representative shall act consistently with
62 my special directives or limitations as stated below.

63 SPECIAL DIRECTIVES OR LIMITATIONS ON
64 THIS POWER: (If none, write "none.")

65

66

67

68 THIS MEDICAL POWER OF ATTORNEY SHALL
69 BECOME EFFECTIVE ONLY UPON MY INCAPAC-
70 ITY TO GIVE, WITHHOLD OR WITHDRAW IN-
71 FORMED CONSENT TO MY OWN MEDICAL
72 CARE.

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

76 X _____
77 Signature of Principal

78 I did not sign the principal's signature above. I am
79 at least eighteen years of age and am not related to the
80 principal by blood or marriage. I am not entitled to any
81 portion of the estate of the principal according to the
82 laws of intestate succession of the state of the principal's
83 domicile or to the best of my knowledge under any will
84 of the principal or codicil thereto, or legally responsible
85 for the costs of the principal's medical or other care. I
86 am not the principal's attending physician, nor am I the
87 representative or successor representative of the
88 principal.

89 WITNESS: DATE:

90

91 WITNESS: DATE:

92

93 STATE OF _____,

94 COUNTY OF _____, to-wit:

95 I, _____, a Notary Public

96 of said County, do certify that _____,

97 as principal, and _____ and
98 _____, as witnesses, whose names are
99 signed to the writing above bearing date on the
100 _____ day of _____, 19 _____, have this
101 day acknowledged the same before me.

102 Given under my hand this _____ day of
103 _____, 19 _____.

104 My commission expires: _____

105

106

Notary Public

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

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

7 (b) The secretary of health and human resources shall
8 publish, and may revise from time to time, guidelines
9 concerning the manner of execution and revocation of
10 medical powers of attorney while a person is a patient
11 in a health care facility. The guidelines shall (1) inform
12 patients of their right to execute a medical power of
13 attorney concerning their health care; (2) assure patients
14 that their decision concerning the execution of a medical
15 power of attorney will not be used to deny them
16 admission to or continued stay at the health care facility;
17 (3) inform patients of their right to revoke such medical
18 power of attorney at any time; and (4) address such
19 other matters as the secretary may consider appropriate.
20

§16-30A-20. Severability.

1 The provisions of this article are severable and if any
2 provision, section or part thereof shall be held invalid,
3 unconstitutional or inapplicable to any person or

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4 circumstance, such invalidity, unconstitutionality or
5 inapplicability shall not affect or impair any other
6 remaining provisions contained herein.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Frederick L Parker
Chairman Senate Committee

Bernard V. Kelly
Chairman House Committee

Originating in the House.

Takes effect from passage.

Harold E. Holmes
Clerk of the Senate

Donald L. Kopp
Clerk of the House of Delegates

Hett Bennett
President of the Senate

W. G. Chad
Speaker of the House of Delegates

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

W. Gaston Caperton
Governor

PRESENTED TO In.

GOVERNOR

Date 3/7/90

Time 10:30 AM

RECEIVED

1930 MAR 10 PM 1:58

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE