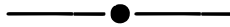


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WEST VIRGINIA LEGISLATURE

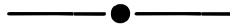
SECOND REGULAR SESSION, 2000



ENROLLED

COMMITTEE SUBSTITUTE
FOR
House Bill No. 4144

(By Delegates Douglas, Martin, Staton,
Fleischauer, Compton, Leach and Trump)



Passed March 10, 2000

In Effect Ninety Days from Passage

ENROLLED

COMMITTEE SUBSTITUTE

FOR

H. B. 4144

(BY DELEGATES DOUGLAS, MARTIN, STATON,
FLEISCHAUER, COMPTON, LEACH AND TRUMP)

[Passed March 10, 2000; in effect ninety days from passage.]

AN ACT to repeal articles thirty-a and thirty-b, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section one, article four-b, chapter sixteen of said code; to amend and reenact article thirty, chapter sixteen of said code; and to amend and reenact section five, article thirty-c, chapter sixteen of said code, all relating to the process for private health care decision making for incapacitated adults; consent for autopsies on bodies of deceased persons; creating the West Virginia Health Care Decisions Act; and consent for do not resuscitate orders.

Be it enacted by the Legislature of West Virginia:

That articles thirty-a and thirty-b, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that section one, article four-b, chapter sixteen of said code be amended and reenacted; that article thirty, chapter sixteen of said code be amended

and reenacted; and that section five, article thirty-c, chapter sixteen of said code be amended and reenacted, all to read as follows:

ARTICLE 4B. AUTOPSIES ON BODIES OF DECEASED PERSONS.

§16-4B-1. Autopsy on body of deceased persons in interest of medical science; who may perform; consent required; who may give consent.

1 In case of the death of any person in the state of West
2 Virginia, except those deaths subject to autopsy being made
3 pursuant to section ten, article twelve, chapter sixty-one of this
4 code, the attending physician, or if there be none, any physician,
5 if he or she deems it advisable in the interest of medical science or
6 future health care of the deceased person's family, may perform
7 or cause to be performed an autopsy on the body of such deceased
8 person without liability therefor, provided consent to such autopsy
9 is first obtained in writing or by telephone, if the telephone
10 authorization is verified by a second person, from one of the
11 following in the priority order stated: (1) The medical power of
12 attorney representative; (2) if there is no medical power of
13 attorney representative, the surviving spouse of deceased; (3) if
14 there be no surviving spouse, then any child of deceased over the
15 age of eighteen years: *Provided*, That the child's permission shall
16 not be valid, if any other child of the deceased over the age of
17 eighteen years objects prior to said autopsy and the objection shall
18 be made known in writing to the physician who is to perform the
19 autopsy; (4) if there be no surviving spouse, nor any child of
20 deceased over the age of eighteen years, then the mother or father
21 of deceased; (5) if there is no mother or father of the deceased, the
22 health care surrogate, if one is appointed; (6) if there be no
23 surviving spouse, nor any child over the age of eighteen years, nor
24 mother or father, then the duly appointed and acting fiduciary of
25 the estate of the deceased; or (7) if there be no surviving spouse,
26 nor any child over the age of eighteen years, nor mother or father,
27 nor duly appointed and acting fiduciary of the estate of deceased,
28 then the person, firm, corporation or agency legally responsible
29 for the financial obligation incurred in disposing of the body of
30 deceased.

31 In the event the medical power of attorney representative, the
32 health care surrogate, spouse, child or parent of deceased be
33 mentally incompetent then the person authorized to consent to
34 such autopsy shall be the next in the order of priority herein above
35 defined.

36 As used in this section, the term “surviving spouse” shall
37 mean any spouse of the deceased who is not legally separated
38 from the deceased immediately prior to the death of the deceased.

ARTICLE 30. WEST VIRGINIA HEALTH CARE DECISIONS ACT.

§16-30-1. Short title.

1 This article may be cited as the “West Virginia Health Care
2 Decisions Act.”

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

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

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

15 (b) *Findings* - The Legislature hereby finds that:

16 (1) Common law tradition and the medical profession in
17 general have traditionally recognized the right of a capable adult

18 to accept or reject medical or surgical intervention affecting one's
19 own medical condition;

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

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

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

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

§16-30-3. Definitions.

1 For the purposes of this article:

2 (a) "Actual knowledge" means the possession of information
3 of the person's wishes communicated to the health care provider
4 orally or in writing by the person, the person's medical power of
5 attorney representative, the person's health care surrogate or other
6 individuals resulting in the health care provider's personal

7 cognizance of these wishes. Constructive notice and other forms
8 of imputed knowledge are not actual knowledge.

9 (b) “Adult” means a person who is eighteen years of age or
10 older, an emancipated minor who has been established as such
11 pursuant to the provisions of section twenty-seven, article seven,
12 chapter forty-nine of this code or a mature minor.

13 (c) “Attending physician” means the physician selected by or
14 assigned to the person who has primary responsibility for treat-
15 ment and care of the person and who is a licensed physician. If
16 more than one physician shares that responsibility, any of those
17 physicians may act as the attending physician under this article.

18 (d) “Advanced practice nurse” means a nurse with substantial
19 theoretical knowledge in a specialized area of nursing practice and
20 proficient clinical utilization of the knowledge in implementing
21 the nursing process pursuant to the provisions of title 19, legisla-
22 tive rules for West Virginia board of examiners for registered
23 professional nurses, series 7.

24 (e) “Capable adult” means a person over the age of eighteen
25 years who is physically and mentally capable of making health
26 care decisions and who has not been deemed a protected person
27 pursuant to the provisions of chapter forty-four-a of this code.

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

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

39 (h) “Guardian” means a person appointed by a court pursuant
40 to the provisions of chapter forty-four-a of this code who is
41 responsible for the personal affairs of a protected person, and
42 includes a limited guardian or a temporary guardian.

43 (i) “Health care decision” means a decision to give, withhold
44 or withdraw informed consent to any type of health care, includ-
45 ing, but not limited to, medical and surgical treatments, including
46 life-prolonging interventions, psychiatric treatment, nursing care,
47 hospitalization, treatment in a nursing home or other facility,
48 home health care and organ or tissue donation.

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

58 (k) “Health care provider” means any licensed physician,
59 dentist, nurse, physician’s assistant, paramedic, psychologist or
60 other person providing medical, dental, nursing, psychological or
61 other health care services of any kind.

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

67 (m) “Life-prolonging intervention” means any medical
68 procedure or intervention that, when applied to a person, would
69 serve to artificially prolong the dying process or to maintain the
70 person in a persistent vegetative state. Life-prolonging interven-
71 tion includes, among other things, nutrition and hydration
72 administered intravenously or through a feeding tube. The term

73 “life-prolonging intervention” does not include the administration
74 of medication or the performance of any other medical procedure
75 deemed necessary to provide comfort or to alleviate pain.

76 (n) “Living will” means a written, witnessed advance directive
77 governing the withholding or withdrawing of life-prolonging
78 intervention, voluntarily executed by a person in accordance with
79 the requirements of section four of this article.

80 (o) “Mature minor” means a person less than eighteen years
81 of age who has been determined by a qualified physician, a
82 qualified psychologist or an advanced practice nurse in collabora-
83 tion with a physician to have the capacity to make health care
84 decisions.

85 (p) “Medical information” or “medical records” means and
86 includes without restriction any information recorded in any form
87 of medium that is created or received by a health care provider,
88 healthcare facility, health plan, public health authority, employer,
89 life insurer, school or university or health care clearinghouse that
90 relates to the past, present or future physical or mental health of
91 the person, the provision of health care to the person, or the past,
92 present or future payment for the provision of health care to the
93 person.

94 (q) “Medical power of attorney representative” or “representa-
95 tive” means a person eighteen years of age or older appointed by
96 another person to make health care decisions pursuant to the
97 provisions of section six of this chapter or similar act of another
98 state and recognized as valid under the laws of this state.

99 (r) “Parent” means a person who is another person’s natural
100 or adoptive mother or father or who has been granted parental
101 rights by valid court order and whose parental rights have not been
102 terminated by a court of law.

103 (s) “Persistent vegetative state” means an irreversible state as
104 diagnosed by the attending physician or a qualified physician in
105 which the person has intact brain stem function but no higher

106 cortical function and has neither self-awareness or awareness of
107 the surroundings in a learned manner.

108 (t) “Person” means an individual, a corporation, a business
109 trust, a trust, a partnership, an association, a government, a
110 governmental subdivision or agency or any other legal entity.

111 (u) “Principal” means a person who has executed a living will
112 or medical power of attorney.

113 (v) “Protected person” means an adult, who, pursuant to the
114 provisions of chapter forty-four-a of this code, has been found by
115 a court, because of mental impairment, to be unable to receive and
116 evaluate information effectively or to respond to people, events
117 and environments to an extent that the individual lacks the
118 capacity to: (1) Meet the essential requirements for his or her
119 health, care, safety, habilitation or therapeutic needs without the
120 assistance or protection of a guardian; or (2) manage property or
121 financial affairs to provide for his or her support or for the support
122 of legal dependents without the assistance or protection of a
123 conservator.

124 (w) “Qualified physician” means a physician licensed to
125 practice medicine who has personally examined the person.

126 (x) “Qualified psychologist” means a psychologist licensed to
127 practice psychology who has personally examined the person.

128 (y) “Surrogate decision maker” or “surrogate” means an adult
129 individual who is reasonably available, is willing to make health
130 care decisions on behalf of an incapacitated person, possesses the
131 capacity to make health care decisions, and is selected by the
132 attending physician or advanced practice nurse in collaboration
133 with the attending physician in accordance with the provisions of
134 this article as the person who is to make those decisions in
135 accordance with the provisions of this article.

136 (z) “Terminal condition” means an incurable or irreversible
137 condition as diagnosed by the attending physician or a qualified

138 physician for which the administration of life-prolonging interven-
139 tion will serve only to prolong the dying process.

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

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

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

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

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

15 (3) Entitled to any portion of the estate of the principal under
16 any will of the principal or codicil thereto: *Provided*, That the
17 validity of the living will or medical power of attorney shall not be
18 affected when a witness at the time of witnessing such living will
19 or medical power of attorney was unaware of being a named
20 beneficiary of the principal's will;

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

23 (5) The attending physician; or

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

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

28 representative: (1) A treating health care provider of the principal;
29 (2) an employee of a treating health care provider not related to
30 the principal; (3) an operator of a health care facility serving the
31 principal; or (4) an employee of an operator of a health care
32 facility not related to the principal.

33 (d) It shall be the responsibility of the principal or his or her
34 representative to provide for notification to his or her attending
35 physician and other health care providers of the existence of the
36 living will or medical power of attorney or a revocation of the
37 living will or medical power of attorney. An attending physician
38 or other health care provider, when presented with the living will
39 or medical power of attorney, or the revocation of a living will or
40 medical power of attorney, shall make the living will, medical
41 power of attorney or a copy of either or a revocation of either a
42 part of the principal's medical records.

43 (e) At the time of admission to any health care facility, each
44 person shall be advised of the existence and availability of living
45 will and medical power of attorney forms and shall be given
46 assistance in completing such forms if the person desires: *Pro-*
47 *vided*, That under no circumstances may admission to a health
48 care facility be predicated upon a person having completed either
49 a medical power of attorney or living will.

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

57 (g) The living will may, but need not, be in the following
58 form, and may include other specific directions not inconsistent
59 with other provisions of this article. Should any of the other
60 specific directions be held to be invalid, such invalidity shall not
61 affect other directions of the living will which can be given effect

62 without the invalid direction and to this end the directions in the
63 living will are severable.

64 **STATE OF WEST VIRGINIA**
65 **LIVING WILL**

**The Kind of Medical Treatment I Want and Don't Want
If I Have a Terminal Condition or
Am In a Persistent Vegetative State**

66 Living will made this _____ day
67 of _____ (month, year).

68 I, _____, being
69 of sound mind, willfully and voluntarily declare that I want my
70 wishes to be respected if I am very sick and not able to communi-
71 cate my wishes for myself. In the absence of my ability to give
72 directions regarding the use of life-prolonging medical interven-
73 tion, it is my desire that my dying shall not be prolonged under the
74 following circumstances:

75 If I am very sick and not able to communicate my wishes for
76 myself and I am certified by one physician who has personally
77 examined me, to have a terminal condition or to be in a persistent
78 vegetative state (I am unconscious and am neither aware of my
79 environment nor able to interact with others,) I direct that
80 life-prolonging medical intervention that would serve solely to
81 prolong the dying process or maintain me in a persistent vegeta-
82 tive state be withheld or withdrawn. I want to be allowed to die
83 naturally and only be given medications or other medical proce-
84 dures necessary to keep me comfortable. I want to receive as much
85 medication as is necessary to alleviate my pain.

86 I give the following SPECIAL DIRECTIVES OR LIMITA-
87 TIONS: (Comments about tube feedings, breathing machines,
88 cardiopulmonary resuscitation, dialysis and mental health
89 treatment may be placed here. My failure to provide special

90 directives or limitations does not mean that I want or refuse
91 certain treatments.)

92
93
94

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

98 I understand the full import of this living will.

99
100 Signed
101
102
103 Address

104 I did not sign the principal's signature above for or at the
105 direction of the principal. I am at least eighteen years of age and
106 am not related to the principal by blood or marriage, entitled to
107 any portion of the estate of the principal to the best of my knowl-
108 edge under any will of principal or codicil thereto, or directly
109 financially responsible for principal's medical care. I am not the
110 principal's attending physician or the principal's medical power
111 of attorney representative or successor medical power of attorney
112 representative under a medical power of attorney.

113
114 Witness DATE

115
116 Witness DATE

117
118 STATE OF

119
120 COUNTY OF

121 I, _____, a Notary Public of said County,
122 do certify that _____, as principal, and
123 _____ and _____, as witnesses,
124 whose names are signed to the writing above bearing date on the
125 _____ day of _____, 2000,
126 have this day acknowledged the same before me.

127 Given under my hand this _____ day of _____,
128 2000.

129 My commission expires: _____

130

131 Signature of Notary Public

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

139 **STATE OF WEST VIRGINIA**
140 **MEDICAL POWER OF ATTORNEY**

141 **The Person I Want to Make Health Care Decisions**
142 **For Me When I Can't Make Them for Myself**

143 Dated: _____, 20_____

144 I, _____, hereby
145 *(Insert your name and address)*

146 appoint as my representative to act on my behalf to give, withhold
147 or withdraw informed consent to health care decisions in the event
148 that I am not able to do so myself.

149 **The person I choose as my representative is:**

150 _____
151 *(Insert the name, address, area code and telephone number of the*
152 *person you wish to designate as your representative)*

153 **The person I choose as my successor representative is:**

154 If my representative is unable, unwilling or disqualified to serve,
155 then I appoint

156 _____
157 *(Insert the name, address, area code and telephone number of the*
158 *person you wish to designate as your successor representative)*

159 This appointment shall extend to, but not be limited to, health
160 care decisions relating to medical treatment, surgical treatment,
161 nursing care, medication, hospitalization, care and treatment in a
162 nursing home or other facility, and home health care. The
163 representative appointed by this document is specifically autho-
164 rized to be granted access to my medical records and other health
165 information and to act on my behalf to consent to, refuse or
166 withdraw any and all medical treatment or diagnostic procedures,
167 or autopsy if my representative determines that I, if able to do so,
168 would consent to, refuse or withdraw such treatment or proce-
169 dures. Such authority shall include, but not be limited to, decisions
170 regarding the withholding or withdrawal of life-prolonging
171 interventions.

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

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

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

190 I am giving the following SPECIAL DIRECTIVES OR
191 LIMITATIONS ON THIS POWER: (Comments about tube
192 feedings, breathing machines, cardiopulmonary resuscitation and
193 dialysis may be placed here. My failure to provide special
194 directives or limitations does not mean that I want or refuse
195 certain treatments.

196
197

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

202 _____
203 Signature of the Principal

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

212 _____
213 Witness DATE

214

215 Witness

DATE

216

217 _____
STATE OF

218

219 COUNTY OF

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

226 Given under my hand this _____ day of _____,
227 20_____.

228 My commission expires: _____.

229

230 Notary Public

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

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

7 (b) If there is a conflict between the person's expressed
8 directives and the decisions of the medical power of attorney
9 representative or surrogate, the person's expressed directives shall
10 be followed.

11 (c) In the event there is a conflict between two advance
12 directives executed by the person, the one most recently com-
13 pleted takes precedence only to the extent needed to resolve the
14 inconsistency.

15 (d) If there is a conflict between the decisions of the medical
16 power of attorney representative or surrogate and the person's best
17 interests as determined by the attending physician when the
18 person's wishes are unknown, the attending physician shall
19 attempt to resolve the conflict by consultation with a qualified
20 physician, an ethics committee, or by some other means. If the
21 attending physician cannot resolve the conflict with the medical
22 power of attorney representative, the attending physician may
23 transfer the care of the person pursuant to subsection (f), section
24 twelve of this article.

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

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

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

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

14 (d) The medical power of attorney representative or surro-
15 gate's authority shall commence upon a determination, made
16 pursuant to section seven of this article, of the incapacity of the

17 adult. In the event the person no longer is incapacitated or the
18 medical power of attorney representative or surrogate is unwilling
19 or unable to serve, the medical power of attorney representative or
20 surrogate's authority shall cease. However, the authority of the
21 medical power of attorney representative or surrogate may
22 recommence if the person subsequently becomes incapacitated as
23 determined pursuant to section seven of this article unless during
24 the intervening period of capacity the person executes an advance
25 directive which makes a surrogate unnecessary or expressly rejects
26 the previously appointed surrogate as his or her surrogate. A
27 medical power of attorney representative or surrogate's authority
28 terminates upon the death of the incapacitated person except with
29 respect to decisions regarding autopsy, funeral arrangements or
30 cremation and organ and tissue donation.

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

40 (f) If an incapacitated person previously expressed his or her
41 wishes regarding autopsy, funeral arrangements or cremation,
42 organ or tissue donation, or the desire to make an anatomical gift
43 by a written directive such as a living will, medical power of
44 attorney, donor card, drivers' license or other means, the medical
45 power of attorney representative or surrogate shall follow the
46 person's expressed wishes regarding autopsy, funeral arrange-
47 ments or cremation, organ and tissue donation or anatomical gift.
48 In the absence of any written directives, any decision regarding
49 anatomical gifts shall be made pursuant to the provisions of article
50 nineteen of this chapter.

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

§16-30-7. Determination of incapacity.

1 (a) For the purposes of this article, a person may not be
2 presumed to be incapacitated merely by reason of advanced age
3 or disability. With respect to a person who has a diagnosis of
4 mental illness or mental retardation, such a diagnosis is not a
5 presumption that the person is incapacitated. A determination that
6 a person is incapacitated shall be made by the attending physician,
7 a qualified physician, a qualified psychologist or an advanced
8 practice nurse in collaboration with a physician provided that the
9 advanced practice nurse has personally examined the person.

10 (b) The determination of incapacity shall be recorded contem-
11 poraneously in the person's medical record by the attending
12 physician, a qualified physician, advanced practice nurse or a
13 qualified psychologist. The recording shall state the basis for the
14 determination of incapacity, including the cause, nature and
15 expected duration of the person's incapacity, if these are known.

16 (c) If the person is conscious, the attending physician shall
17 inform the person that he or she has been determined to be
18 incapacitated and that a medical power of attorney representative
19 or surrogate decision maker may be making decisions regarding
20 life-prolonging intervention or mental health treatment for the
21 person.

§16-30-8. Selection of a surrogate.

1 (a) When a person is or becomes incapacitated, the attending
2 physician or the advanced practice nurse in collaboration with the
3 attending physician, with the assistance of other health care
4 providers as necessary, shall select, in writing, a surrogate. The
5 attending physician shall reasonably attempt to determine whether
6 the incapacitated person has appointed a representative under a
7 medical power of attorney in accordance with the provisions of
8 section four of this article, or if the incapacitated person has a
9 court-appointed guardian in accordance with the provisions of
10 article one, chapter forty-four-a of this code. If no representative
11 or court-appointed guardian is authorized or capable and willing
12 to serve, the attending physician or advanced practice nurse is
13 authorized to select a health care surrogate. In selecting a surro-
14 gate, the attending physician or advanced practice nurse must
15 make a reasonable inquiry as to the existence and availability of
16 a surrogate from the following persons:

17 (1) The person's spouse;

18 (2) The person's adult children;

19 (3) The person's parents;

20 (4) The person's adult siblings;

21 (5) The person's adult grandchildren;

22 (6) The person's close friends;

23 (7) Any other person or entity, including, but not limited to,
24 public agencies, public guardians, public officials, public and
25 private corporations and other persons or entities which the
26 department of health and human resources may from time to time
27 designate in rules promulgated pursuant to chapter twenty-nine-a
28 of this code.

29 (b) After inquiring about the existence and availability of a
30 medical power of attorney representative or a guardian as required
31 by subsection (a) of this section, and determining that such

32 persons either do not exist or are unavailable, incapable or
33 unwilling to serve as a surrogate, the attending physician or an
34 advanced practice nurse in collaboration with the attending
35 physician shall select and rely upon a surrogate in the order of
36 priority set forth in subsection (a) of this section, subject to the
37 following conditions:

38 (1) Where there are multiple possible surrogate decision
39 makers at the same priority level, the attending physician or the
40 advanced practice nurse in collaboration with the attending
41 physician shall, after reasonable inquiry, select as the surrogate the
42 person who reasonably appears to be best qualified. The following
43 criteria shall be considered in the determination of the person or
44 entity best qualified to serve as the surrogate:

45 (A) Whether the proposed surrogate reasonably appears to be
46 better able to make decisions either in accordance with the known
47 wishes of the person or in accordance with the person's best
48 interests;

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

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

52 (D) The proposed surrogate's availability to visit the incapaci-
53 tated person during his or her illness; and

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

57 (2) The attending physician or the advanced practice nurse in
58 consultation with the attending physician may select a proposed
59 surrogate who is ranked lower in priority if, in his or her judg-
60 ment, that individual is best qualified, as described in this section,
61 to serve as the incapacitated person's surrogate. The attending
62 physician or the advanced practice nurse shall document in the
63 incapacitated person's medical records his or her reasons for

64 selecting a surrogate in exception to the priority order provided in
65 subsection (a) of this section.

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

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

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

75 (2) There is no other applicable advance directive;

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

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

82 (e) If a person who is ranked as a possible surrogate pursuant
83 to subsection (a) of this section wishes to challenge the selection
84 of a surrogate or the health care decision of the selected surrogate,
85 he or she may seek injunctive relief or may file a petition for
86 review of the selection of, or decision of, the selected surrogate
87 with the circuit court of the county in which the incapacitated
88 person resides or the supreme court of appeals. There shall be a
89 rebuttable presumption that the selection of the surrogate was
90 valid, and the person who is challenging the selection shall have
91 the burden of proving the invalidity of that selection. The chal-
92 lenging party shall be responsible for all court costs and other
93 costs related to the proceeding, except attorneys' fees, unless the
94 court finds that the attending physician or advanced practice nurse
95 acted in bad faith, in which case the person so acting shall be

96 responsible for all costs. Each party shall be responsible for his or
97 her own attorneys' fees.

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

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

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

126 (i) The following persons may not serve as a surrogate: (1) A
127 treating health care provider of the principal; (2) an employee of
128 a treating health care provider not related to the principal; (3) an
129 owner, operator or administrator of a health care facility serving

130 the principal; or (4) an employee of an owner, operator or
131 administrator of a health care facility not related to the principal.

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

1 (a) General standards.

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

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

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

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

12 (b) Assessment of best interests.

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

§16-30-10. Reliance on authority of living will, medical power of attorney representative or surrogate decision maker and protection of health care providers.

1 (a) A physician, licensed health care professional, health care
2 facility or employee thereof shall not be subject to criminal or
3 civil liability for good-faith compliance with or reliance upon the

4 directions of the medical power of attorney representative in
5 accordance with this article.

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

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

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

§16-30-11. Negligence.

1 Nothing in this article shall be deemed to protect a provider
2 from liability for the provider's own negligence in the perfor-
3 mance of the provider's duties or in carrying out any instructions
4 of the medical power of attorney representative or surrogate.
5 Nothing in this article shall be deemed to alter the law of negli-
6 gence as it applies to the acts of any medical power of attorney
7 representative or surrogate or provider, and nothing herein shall be
8 interpreted as establishing a standard of care for health care
9 providers for purposes of the law of negligence.

§16-30-12. Conscience objections.

1 (a) *Health care facilities.*— Nothing in this article shall be
2 construed to require a health care facility to change published

3 policy of the health care facility that is expressly based on
4 sincerely held religious beliefs or sincerely held moral convictions
5 central to the facility's operating principles.

6 (b) *Health care providers.* — Nothing in this article shall be
7 construed to require an individual health care provider to honor a
8 health care decision made pursuant to this article if:

9 (1) The decision is contrary to the individual provider's
10 sincerely held religious beliefs or sincerely held moral convictions; and
11

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

§16-30-13. Interinstitutional transfers.

1 (a) In the event that a person admitted to any health care
2 facility in this state has been determined to lack capacity and that
3 person's medical power of attorney has been declared to be in
4 effect or a surrogate decision maker has been selected for that
5 person all in accordance with the requirements of this article, and
6 that person is subsequently transferred from one health care
7 facility to another, the receiving health care facility may rely upon
8 the prior determination of incapacity and the activation of the
9 medical power of attorney or selection of a surrogate decision
10 maker as valid and continuing until such time as an attending
11 physician, a qualified physician, a qualified psychologist or
12 advanced practice nurse in collaboration with a physician in the
13 receiving facility assesses the person's capacity. Should the
14 reassessment by the attending physician, a qualified physician, a
15 qualified psychologist or an advanced practice nurse in collabora-
16 tion with a physician of the person at the receiving facility result

17 in a determination of continued incapacity, the receiving facility
18 may rely upon the medical power of attorney representative or
19 surrogate decision maker who provided health care decisions at
20 the transferring facility to continue to make all health care
21 decisions at the receiving facility until such time as the person
22 regains capacity. If a person admitted to any health care facility in
23 this state has been determined to lack capacity and the person's
24 medical power of attorney has been declared to be in effect or a
25 surrogate decision maker has been selected for that person all in
26 accordance with the requirements of this article, and that person
27 is subsequently discharged home in the care of a home health care
28 agency or hospice, the home health care agency or hospice may
29 rely upon the prior determination of incapacity. The home health
30 care agency or hospice may rely upon the medical power of
31 attorney representative or health care surrogate who provided
32 health care decisions at the transferring facility to continue to
33 make all health care decisions until such time as the person
34 regains capacity.

35 (b) If a person with an order to withhold or withdraw
36 life-prolonging intervention is transferred from one health care
37 facility to another, the existence of such order shall be communi-
38 cated to the receiving facility prior to the transfer, and the written
39 order shall accompany the person to the receiving facility and
40 shall remain effective until a physician at the receiving facility
41 issues admission orders.

§16-30-14. Insurance.

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

7 (b) The withholding or withdrawal of life-prolonging inter-
8 vention from a principal in accordance with the provisions of this

9 article does not, for any purpose, constitute a suicide and does not
10 constitute the crime of assisting suicide.

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

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

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

1 The withholding or withdrawal of life-prolonging intervention
2 from a person in accordance with the decision of a medical power
3 of attorney representative or surrogate decision maker made
4 pursuant to the provisions of this article does not, for any purpose,
5 constitute assisted suicide or murder. The withholding or with-
6 drawal of life-prolonging intervention from a person in accordance
7 with the decisions of a medical power of attorney representative
8 or surrogate decision maker made pursuant to the provisions of
9 this article, however, shall not relieve any individual of responsi-
10 bility for any criminal acts that may have caused the person's
11 condition. Nothing in this article shall be construed to legalize,
12 condone, authorize or approve mercy killing or assisted suicide.

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

1 (a) The provisions of this article are cumulative with existing
2 law regarding an individual's right to consent to or refuse medical
3 treatment. The provisions of this article shall not impair any
4 existing rights or responsibilities that a health care provider, a

5 person, including a minor or an incapacitated person or a person's
6 family may have in regard to the withholding or withdrawal of
7 life-prolonging intervention, including any rights to seek or
8 forego judicial review of decisions regarding life-prolonging
9 intervention under the common law or statutes of this state.

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

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

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

§16-30-18. Revocation.

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

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

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

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

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

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

27 (c) The grant of a final divorce decree shall act as an auto-
28 matic revocation of the designation of the former spouse to act as
29 a medical power of attorney representative or successor represen-
30 tative.

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

1 (a) An attending physician who has been notified of the
2 existence of a living will executed under this article, without delay
3 after the diagnosis of a terminal condition or persistent vegetative
4 state of the principal, shall take steps as needed to provide for
5 confirmation, written certification and documentation of the
6 principal's terminal condition or persistent vegetative state in the
7 principal's medical record.

8 (b) Once confirmation, written certification and documenta-
9 tion of the principal's terminal condition or persistent vegetative
10 state is made, the attending physician shall verbally or in writing
11 inform the principal of his or her condition or the principal's
12 medical power of attorney representative or surrogate, if the
13 principal lacks capacity to comprehend such information and shall
14 document such communication in the principal's medical record.

15 (c) All inpatient health care facilities shall develop a system
16 to visibly identify a person's chart which contains a living will or
17 medical power of attorney as set forth in this article.

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

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

§16-30-21. Reciprocity.

1 A living will or medical power of attorney executed in another
2 state is validly executed for the purposes of this article if it is
3 executed in compliance with the laws of this state or with the laws
4 of the state where executed.

**§16-30-22. Liability for failure to act in accordance with the direc-
tives of a living will or medical power of attorney or
the directions of a medical power of attorney repre-
sentative or health care surrogate.**

1 (a) A health care provider or health care facility who does not
2 have actual knowledge of a living will or medical power of
3 attorney completed by a person is not civilly or criminally liable
4 for failing to act in accordance with the directives of a principal's
5 living will or medical power of attorney.

6 (b) A health care provider or a health care facility is subject
7 to review and disciplinary action by the appropriate licensing
8 board for failing to act in accordance with a principal's directives
9 in a living will or medical power of attorney, or the decisions of
10 a medical power of attorney representative or health care surro-
11 gate, provided that the provider or facility had actual knowledge
12 of the directives or decisions.

13 (c) Once a principal has been determined to be incapacitated
14 in accordance with the provisions of this article and his or her
15 living will or medical power of attorney has become effective, any
16 health care provider or health care facility which refuses to follow
17 the principal's directives in a living will or medical power of
18 attorney or the decisions of a medical power of attorney represen-
19 tative or health care surrogate, because the principal has asked the
20 health care provider or health care facility not to follow such
21 directions or decisions, shall have two physicians, one of whom
22 may be the attending physician, or one physician and a qualified
23 psychologist, or one physician and an advanced practice nurse in
24 collaboration with a physician, certify that the principal has
25 regained capacity to make the request. If such certification occurs,
26 the provisions of the applicable living will or medical power of
27 attorney, or the statute creating the authority of the health care
28 surrogate shall not apply because the principal has regained
29 decision-making capacity.

§16-30-23. Prohibition.

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

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

1 For persons with psychiatric mental illness, mental retardation
2 or addiction who have been determined by their attending
3 physician or a qualified physician to be incapacitated, a second
4 opinion by a qualified physician or qualified psychologist that the
5 person is incapacitated is required before the attending physician
6 is authorized to select a surrogate. The requirement for a second
7 opinion shall not apply in those instances in which the medical
8 treatment to be rendered is not for the person's psychiatric mental
9 illness.

ARTICLE 30C. DO NOT RESUSCITATE ACT.

**§16-30C-5. Presumed consent to cardiopulmonary resuscitation;
health care facilities not required to expand to
provide cardiopulmonary resuscitation.**

1 (a) Every person shall be presumed to consent to the adminis-
2 tration of cardiopulmonary resuscitation in the event of cardiac or
3 respiratory arrest, unless one or more of the following conditions,
4 of which the health care provider has actual knowledge, apply:

5 (1) A do not resuscitate order in accordance with the provi-
6 sions of this article has been issued for that person;

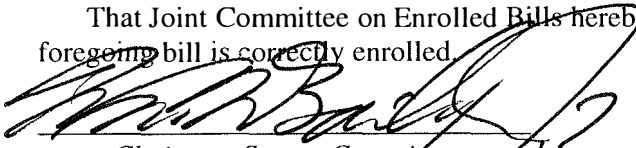
7 (2) A completed living will for that person is in effect,
8 pursuant to the provisions of article thirty of this chapter, and the
9 person is in a terminal condition or a persistent vegetative state; or

10 (3) A completed medical power of attorney for that person is
11 in effect, pursuant to the provisions of article thirty of this chapter,
12 in which the person indicated that he or she does not wish to
13 receive cardiopulmonary resuscitation, or his or her representative
14 has determined that the person would not wish to receive
15 cardiopulmonary resuscitation.

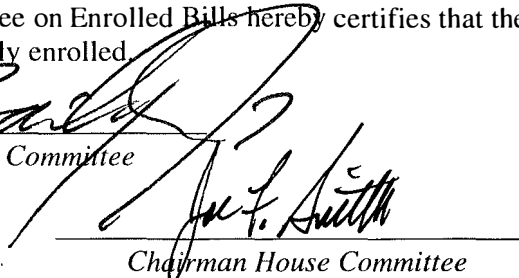
16 (b) Nothing in this article shall require a nursing home,
17 personal care home, hospice, or extended care facility operated in
18 connection with hospitals to institute or maintain the ability to
19 provide cardiopulmonary resuscitation or to expand its existing
20 equipment, facilities or personnel to provide cardiopulmonary
21 resuscitation: *Provided*, That if a health care facility does not
22 provide cardiopulmonary resuscitation, this policy shall be
23 communicated in writing to the person, representative or surrogate
24 decision maker prior to admission.

Enr. Com. Sub. for H. B. 4144] 34

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



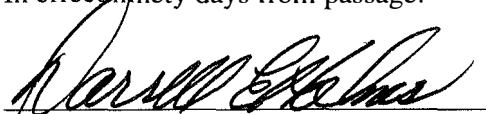
Chairman Senate Committee



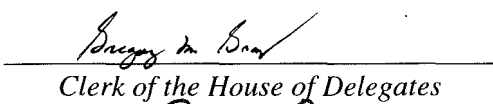
Chairman House Committee

Originating in the House.

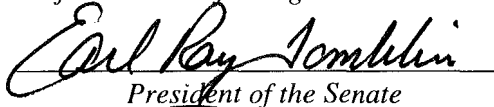
In effect ninety days from passage.



Clerk of the Senate



Clerk of the House of Delegates

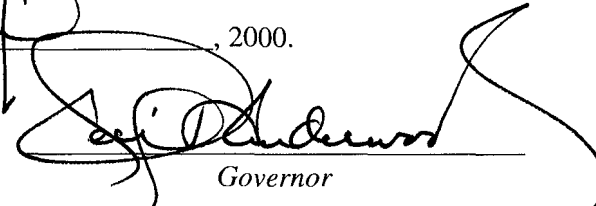


President of the Senate



Speaker of the House of Delegates

The within approved this the 4th
day of April, 2000.



Governor

PRESENTED TO THE

GOVERNOR/

Date 3/31/10

Time 4:25pm