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and thirty-b, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that section one, article four-b, chapter sixteen of said code be amended and reenacted; that article thirty, chapter sixteen of said code be amended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

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

§16-30-1. Short title.

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

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

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

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

(b) Findings - The Legislature hereby finds that:

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

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

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

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

and

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

§16-30-3. Definitions.

For the purposes of this article:

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

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

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

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

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

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

(g) “Death” means a finding made in accordance with accepted medical standards of either: (1) The irreversible cessation of circulatory and respiratory functions; or (2) the irreversible cessation of all functions of the entire brain, including the brain stem.
(h) “Guardian” means a person appointed by a court pursuant to the provisions of chapter forty-four-a of this code who is responsible for the personal affairs of a protected person, and includes a limited guardian or a temporary guardian.

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

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

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

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

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

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

(o) "Mature minor" means a person less than eighteen years of age who has been determined by a qualified physician, a qualified psychologist or an advanced practice nurse in collaboration with a physician to have the capacity to make health care decisions.

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

(q) "Medical power of attorney representative" or "representative" means a person eighteen years of age or older appointed by another person to make health care decisions pursuant to the provisions of section six of this chapter or similar act of another state and recognized as valid under the laws of this state.

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

(s) "Persistent vegetative state" means an irreversible state as diagnosed by the attending physician or a qualified physician in which the person has intact brain stem function but no higher
cortical function and has neither self-awareness or awareness of the surroundings in a learned manner.

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

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

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

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

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

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

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

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

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

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

(1) The person who signed the living will or 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 under any will of the principal or codicil thereto: Provided, That the validity of the living will or medical power of attorney shall not be affected when a witness at the time of witnessing such living will or medical power of attorney was unaware of being a named beneficiary of the principal’s will;

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

(5) The attending physician; or

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

(c) The following persons may not serve as a medical power of attorney representative or successor medical power of attorney
(d) It shall be the responsibility of the principal or his or her representative to provide for notification to his or her attending physician and other health care providers of the existence of the living will or medical power of attorney or a revocation of the living will or medical power of attorney. An attending physician or other health care provider, when presented with the living will or medical power of attorney, or the revocation of a living will or medical power of attorney, shall make the living will, medical power of attorney or a copy of either or a revocation of either a part of the principal’s medical records.

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

(f) The provision of living will or 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.

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

STATE OF WEST VIRGINIA
LIVING WILL

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

Living will made this __________________ day
of __________________ (month, year).

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

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

I give the following SPECIAL DIRECTIVES OR LIMITA-
tions: (Comments about tube feedings, breathing machines,
cardiopulmonary resuscitation, dialysis and mental health
treatment may be placed here. My failure to provide special
directives or limitations does not mean that I want or refuse certain treatments.)

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

I understand the full import of this living will.

I did not sign the principal’s signature above for or at the direction of the principal. I am at least eighteen years of age and am not related to the principal by blood or marriage, entitled to any portion of the estate of the principal to the best of my knowledge under any will of principal or codicil thereto, or directly financially responsible for principal’s medical care. I am not the principal’s attending physician or the principal’s medical power of attorney representative or successor medical power of attorney representative under a medical power of attorney.
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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 Signature of Notary Public

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

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

\[154\] If my representative is unable, unwilling or disqualified to serve, then I appoint

\[156\] (Insert the name, address, area code and telephone number of the person you wish to designate as your successor representative)

\[159\] This appointment shall extend to, but not be limited to, health care decisions relating to medical treatment, surgical treatment, nursing care, medication, hospitalization, care and treatment in a nursing home or other facility, and home health care. The representative appointed by this document is specifically authorized to be granted access to my medical records and other health information and to act on my behalf to consent to, refuse or withdraw any and all medical treatment or diagnostic procedures, or autopsy if my representative determines that I, if able to do so, would consent to, refuse or withdraw such treatment or procedures. Such authority shall include, but not be limited to, decisions regarding the withholding or withdrawal of life-prolonging interventions.

\[172\] I appoint this representative because I believe this person understands my wishes and values and will act to carry into effect the health care decisions that I would make if I were able to do so, and because I also believe that this person will act in my best interest when my wishes are unknown. It is my intent that my family, my physician and all legal authorities be bound by the decisions that are made by the representative appointed by this document, and it is my intent that these decisions should not be the subject of review by any health care provider or administrative or judicial agency.
It is my intent that this document be legally binding and effective and that this document be taken as a formal statement of my desire concerning the method by which any health care decisions should be made on my behalf during any period when I am unable to make such decisions.

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

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

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

Signature of the Principal

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 or to the best of my knowledge under any will of the principal or codicil there to, 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
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Witness DATE

STATE OF

COUNTY OF

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

Given under my hand this __________ day of ____________, 20____.

My commission expires: ____________________________

Notary Public

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

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

(b) If there is a conflict between the person’s expressed directives and the decisions of the medical power of attorney representative or surrogate, the person’s expressed directives shall be followed.
(c) In the event there is a conflict between two advance directives executed by the person, the one most recently completed takes precedence only to the extent needed to resolve the inconsistency.

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

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

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

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

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

(d) The medical power of attorney representative or surrogate’s authority shall commence upon a determination, made pursuant to section seven of this article, of the incapacity of the
adult. In the event the person no longer is incapacitated or the medical power of attorney representative or surrogate is unwilling or unable to serve, the medical power of attorney representative or surrogate’s authority shall cease. However, the authority of the medical power of attorney representative or surrogate may recommence if the person subsequently becomes incapacitated as determined pursuant to section seven of this article unless during the intervening period of capacity the person executes an advance directive which makes a surrogate unnecessary or expressly rejects the previously appointed surrogate as his or her surrogate. A medical power of attorney representative or surrogate’s authority terminates upon the death of the incapacitated person except with respect to decisions regarding autopsy, funeral arrangements or cremation and organ and tissue donation.

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

(f) If an incapacitated person previously expressed his or her wishes regarding autopsy, funeral arrangements or cremation, organ or tissue donation, or the desire to make an anatomical gift by a written directive such as a living will, medical power of attorney, donor card, drivers’ license or other means, the medical power of attorney representative or surrogate shall follow the person’s expressed wishes regarding autopsy, funeral arrangements or cremation, organ and tissue donation or anatomical gift. In the absence of any written directives, any decision regarding anatomical gifts shall be made pursuant to the provisions of article nineteen of this chapter.
(g) If a person is incapacitated at the time of the decision to withhold or withdraw life-prolonging intervention, the person’s living will or medical power of attorney executed in accordance with section four of this article is presumed to be valid. For the purposes of this article, a physician or health facility may presume in the absence of actual notice to the contrary that a person who executed a living will or medical power of attorney was a competent adult when it was executed. The fact that a person executed a living will or medical power of attorney is not an indication of the person’s mental incapacity.

§16-30-7. Determination of incapacity.

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

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

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

§16-30-8. Selection of a surrogate.
(a) When a person is or becomes incapacitated, the attending physician or the advanced practice nurse in collaboration with the attending physician, with the assistance of other health care providers as necessary, shall select, in writing, a surrogate. The attending physician shall reasonably attempt to determine whether the incapacitated person has appointed a representative under a medical power of attorney in accordance with the provisions of section four of this article, or if the incapacitated person has a court-appointed guardian in accordance with the provisions of article one, chapter forty-four-a of this code. If no representative or court-appointed guardian is authorized or capable and willing to serve, the attending physician or advanced practice nurse is authorized to select a health care surrogate. In selecting a surrogate, the attending physician or advanced practice nurse must make a reasonable inquiry as to the existence and availability of a surrogate from the following persons:

(1) The person’s spouse;

(2) The person’s adult children;

(3) The person’s parents;

(4) The person’s adult siblings;

(5) The person’s adult grandchildren;

(6) The person’s close friends;

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

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

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

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

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

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

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

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

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

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

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

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

(2) There is no other applicable advance directive;

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

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

(e) If a person who is ranked as a possible surrogate pursuant to subsection (a) of this section wishes to challenge the selection of a surrogate or the health care decision of the selected surrogate, he or she may seek injunctive relief or may file a petition for review of the selection of, or decision of, the selected surrogate with the circuit court of the county in which the incapacitated person resides or the supreme court of appeals. There shall be a rebuttable presumption that the selection of the surrogate was valid, and the person who is challenging the selection shall have the burden of proving the invalidity of that selection. The challenging party shall be responsible for all court costs and other costs related to the proceeding, except attorneys’ fees, unless the court finds that the attending physician or advanced practice nurse acted in bad faith, in which case the person so acting shall be
(f) If the attending physician or advanced practice nurse is advised that a person who is ranked as a possible surrogate pursuant to the provisions of subsection (a) of this section has an objection to a health care decision to withhold or withdraw a life-prolonging intervention which has been made by the selected surrogate, the attending physician or advanced practice nurse shall document the objection in the medical records of the patient. Once notice of an objection or challenge is documented, the attending physician or advanced practice nurse shall notify the challenging party that the decision shall be implemented in seventy-two hours unless the attending physician receives a court order prohibiting or enjoining the implementation of the decision as provided in subsection (e) of this section. In the event that the incapacitated person has been determined to have undergone brain death and the selected surrogate has authorized organ or tissue donation, the decision shall be implemented in twenty-four hours unless the attending physician receives a court order prohibiting or enjoining the implementation of the decision as provided in subsection (e) of this section.

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

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

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

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

(a) General standards.

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

1. In accordance with the person’s wishes, including religious and moral beliefs; or

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

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

(b) Assessment of best interests.

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

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

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

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

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

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


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

§16-30-12. Conscience objections.

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

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

1. The decision is contrary to the individual provider’s sincerely held religious beliefs or sincerely held moral convictions; and

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

§16-30-13. Interinstitutional transfers.

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

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


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

(b) The withholding or withdrawal of life-prolonging inter-
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 mur­
der.

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

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

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

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

§16-30-18. Revocation.

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

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

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

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

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

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

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

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

(b) Once confirmation, written certification and documentation of the principal’s terminal condition or persistent vegetative state is made, the attending physician shall verbally or in writing inform the principal of his or her condition or the principal’s medical power of attorney representative or surrogate, if the principal lacks capacity to comprehend such information and shall document such communication in the principal’s medical record.
(c) All inpatient health care facilities shall develop a system to visibly identify a person’s chart which contains a living will or medical power of attorney as set forth in this article.

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

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

§16-30-21. Reciprocity.

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

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

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

(b) A health care provider or a health care facility is subject to review and disciplinary action by the appropriate licensing board for failing to act in accordance with a principal’s directives in a living will or medical power of attorney, or the decisions of a medical power of attorney representative or health care surrogate, provided that the provider or facility had actual knowledge of the directives or decisions.
(c) Once a principal has been determined to be incapacitated in accordance with the provisions of this article and his or her living will or medical power of attorney has become effective, any health care provider or health care facility which refuses to follow the principal’s directives in a living will or medical power of attorney or the decisions of a medical power of attorney representative or health care surrogate, because the principal has asked the health care provider or health care facility not to follow such directions or decisions, shall have two physicians, one of whom may be the attending physician, or one physician and a qualified psychologist, or one physician and an advanced practice nurse in collaboration with a physician, certify that the principal has regained capacity to make the request. If such certification occurs, the provisions of the applicable living will or medical power of attorney, or the statute creating the authority of the health care surrogate shall not apply because the principal has regained decision-making capacity.

§16-30-23. Prohibition.

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

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

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

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

(1) A do not resuscitate order in accordance with the provisions of this article has been issued for that person;

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

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

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