WEST VIRGINIA LEGISLATURE

Regular Session, 2002

ENROLLED

SENATE BILL NO. 658

(By Senator Wooton et al)

PASSED March 8, 2002

In Effect ninety days from Passage
ENROLLED

Senate Bill No. 658

(BY SENATORS WOOTON, CALDWELL, HUNTER, KESSLER, MINARD, MITCHELL, OLIVERIO, ROSS, ROWE, DEEM AND FACEMYER)

[Passed March 8, 2002; in effect ninety days from passage.]

AN ACT to amend and reenact sections three, four, five, six, seven, eight, ten, thirteen and twenty-two, article thirty, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article by adding thereto a new section, designated section twenty-five; and to amend and reenact sections three, five, six, seven, eleven and thirteen, article thirty-c of said chapter, all relating to end-of-life care; providing for a standardized physician orders for scope of treatment form; establishing the information required by the form; setting forth procedures for the issuance, use and transfer of the form; amending the qualifications for advanced nurse practitioners who determine the need for and select a surrogate decisionmaker; providing civil and criminal immunity from liability for good faith compliance with do-not-resuscitate orders; allowing person executing medical
power of attorney to specify on medical power of attorney form his or her wishes regarding funeral arrangements, autopsy and organ donation; precluding a medical power of attorney representative or surrogate from cancelling preneed funeral contract executed by deceased incapacitated person before onset of incapacity and paid in full before death; eliminating the language requirements for do-not-resuscitate identification; updating definitions and terms; and establishing effective dates.

Be it enacted by the Legislature of West Virginia:

That sections three, four, five, six, seven, eight, ten, thirteen and twenty-two, article thirty, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that said article be further amended by adding thereto a new section, designated section twenty-five; and that sections three, five, six, seven, eleven and thirteen, article thirty-c of said chapter be amended and reenacted, all to read as follows:

ARTICLE 30. WEST VIRGINIA HEALTH CARE DECISIONS ACT.

§16-30-3. Definitions.

1 For the purposes of this article:

2 (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.

10 (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) "Advanced nurse practitioner" means a registered nurse with substantial theoretical knowledge in a specialized area of nursing practice and proficient clinical utilization of the knowledge in implementing the nursing process, and who has met the further requirements of title 19, legislative rules for West Virginia board of examiners for registered professional nurses, series 7, who has a mutually agreed upon association in writing with a physician and has been selected by or assigned to the person and has primary responsibility for treatment and care of the person.

(d) "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.

(e) "Capable adult" means an adult who is physically and mentally capable of making health care decisions and who is not considered a protected person pursuant to 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 considered 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 nurse practitioner 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 article 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) "Physician orders for scope of treatment (POST) form" means a standardized form containing orders by a qualified physician that details a person's life-sustaining wishes as provided by section twenty-five of this article.

(v) "Principal" means a person who has executed a living will or medical power of attorney.

(w) "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.

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

(y) "Qualified psychologist" means a psychologist licensed to practice psychology who has personally examined the person.
"Surrogate decisionmaker" or "surrogate" means an individual eighteen years of age or older 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 identified or selected by the attending physician or advanced nurse practitioner in accordance with the provisions of this article as the person who is to make those decisions in accordance with the provisions of this article.

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

§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 representa-
tive or successor medical power of attorney representative.

(c) The following persons may not serve as a medical
power of attorney representative or successor medical
power of attorney representative: (1) A treating health
care provider of the principal; (2) an employee of a treating
health care provider not related to the principal; (3) an
operator of a health care facility serving the principal; or
(4) any person who is an employee of an operator of a
health care facility serving the principal and who is not
related to the principal.

(d) It 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 attor-
ney. 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 avail-
ability 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 communicate my wishes for myself. In the absence of my ability to give directions regarding the use of life-prolonging medical intervention, 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 vegetative state be withheld or withdrawn. I want to be allowed to die naturally and only be given medications or other medical procedures necessary to keep me comfortable. I want to receive as much medication as is necessary to alleviate my pain.

I give the following SPECIAL DIRECTIVES OR LIMITATIONS: (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.

Signed

Address

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 respon-
sible 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.

Witness: _______________

DATE

Witness: _______________

DATE

STATE OF

COUNTY OF

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

Given under my hand this ______________ day of 
____________, 20__.

My commission expires: ______________________

Notary Public

(h) A medical power of attorney may, but need not, be in 
the following form and may include other specific direc-
tions 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 medical power of attorney which can be given effect 
without invalid direction and to this end the directions in 
the medical power of attorney are severable.
STATE OF WEST VIRGINIA
MEDICAL POWER OF ATTORNEY

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

Dated: ____________________, 20___

I, ____________________________, hereby

(Insert your name and address)

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

The person I choose as my representative is:

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

The person I choose as my successor representative is:

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

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

This appointment shall extend to, but not be limited to,
health care decisions relating to medical treatment,
surgical treatment, nursing care, medication, hospitaliza-
tion, care and treatment in a nursing home or other
facility, and home health care. The representative ap-
pointed 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.

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, dialysis, funeral arrangements, autopsy and organ donation may be placed here. My failure to provide special directives or limitations does not mean that I want or refuse certain treatments.)
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 thereto, or legally responsible for the costs of the principal's medical or other care. I am not the principal's attending physician, nor am I the representative or successor representative of the principal.

Witness: ____________________________ DATE

Witness: ____________________________ DATE

STATE OF ____________________________

COUNTY OF ____________________________

I, ____________________________, a Notary Public of said County, do certify that ____________________________, as principal, 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, the physician orders for scope of treatment form and the decisions of the medical power of attorney representative or surrogate, the person’s expressed directives shall be followed.

(c) 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 (b), 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. Provided, That the medical power of attorney representative or surrogate has no authority after the death of the incapacitated person to invalidate or revoke a preneed funeral contract executed by the incapacitated person in accordance with the provisions of article fourteen, chapter forty-seven of this code prior to the onset of the incapacity.
and either paid in full before the death of the incapacitated person or collectible from the proceeds of a life insurance policy specifically designated for that purpose.

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

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

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

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

(1) The person's spouse;
(2) The person's adult children;
(3) The person's parents;
(4) The person's adult siblings;
(5) The person's adult grandchildren;
(6) The person's close friends;
(7) Any other person or entity, including, but not limited to, public agencies, public guardians, public officials, public and private corporations and other persons or entities which the department of health 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 nurse practitioner shall select and rely upon a surrogate in the order of priority set forth in subsection (a) of this section, subject to the following conditions:

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

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

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

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

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

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

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

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

(d) A health care provider or health care facility may rely upon the decisions of the selected surrogate if the provider believes, after reasonable inquiry, that:
(1) A guardian or representative under a valid, applicable medical power of attorney is unavailable, incapable or unwilling to serve;

(2) There is no other applicable advance directive;

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

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

(e) If a person who is ranked as a possible surrogate pursuant to subsection (a) of this section wishes to challenge the selection of a surrogate or the health care decision of the selected surrogate, he or she may seek injunctive relief or may file a petition for review of the selection of, or decision of, the selected surrogate with the circuit court of the county in which the incapacitated person resides or the supreme court of appeals. There shall be a rebuttable presumption that the selection of the surrogate was valid and the person who is challenging the selection shall have the burden of proving the invalidity of that selection. The challenging party shall be responsible for all court costs and other costs related to the proceeding, except attorneys' fees, unless the court finds that the attending physician or advanced nurse practitioner acted in bad faith, in which case the person so acting shall be responsible for all costs. Each party shall be responsible for his or her own attorneys' fees.

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

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

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

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

§16-30-10. Reliance on authority of living will, physician orders for scope of treatment form, 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) A health care provider, health care facility or employee thereof shall not be subject to criminal or civil liability for good-faith compliance with or reliance upon the orders in a physician orders for scope of treatment form.

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

(e) An attending physician who cannot comply with the living will 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 or medical power of attorney of the principal. Transfer under these circumstances does 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 decisionmaker has been selected for that person all in accordance with the
requirements of this article and that person is subsequently transferred from one health care facility to another, the receiving health care facility may rely upon the prior determination of incapacity and the activation of the medical power of attorney or selection of a surrogate decisionmaker as valid and continuing until such time as an attending physician, a qualified physician, a qualified psychologist or advanced nurse practitioner in the receiving facility assesses the person’s capacity. Should the reassessment by the attending physician, a qualified physician, a qualified psychologist or an advanced nurse practitioner at the receiving facility result in a determination of continued incapacity, the receiving facility may rely upon the medical power of attorney representative or surrogate decisionmaker who provided health care decisions at the transferring facility to continue to make all health care decisions at the receiving facility until such time as the person regains capacity.

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

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

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

1. The physician orders for scope of treatment shall be
   continued without change;

2. The physician orders for scope of treatment form
   shall be voided and a new form issued; or

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

§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.

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

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

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

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

(a) No later than the first day of July, two thousand
three, the secretary of the department of health and human
resources shall implement the statewide distribution of
standardized physician orders for scope of treatment
(POST) forms.

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

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

(2) The signature of the qualified physician;

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

(4) The signature of the person or his or her guardian, medical power of attorney representative, or surrogate acknowledging agreement with the orders of the qualified physician; and

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

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

ARTICLE 30C. DO-NOT-RESUSCITATE ACT.

§16-30C-3. Definitions.

1 As used in this article, unless the context clearly requires otherwise, the following definitions apply:

(a) “Attending physician” means the physician selected by or assigned to the person who has primary responsibility for treatment or 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
evening physician under the provisions of this article.

(b) "Cardiopulmonary resuscitation" means those
measures used to restore or support cardiac or respiratory
function in the event of a cardiac or respiratory arrest.

(c) "Do-not-resuscitate identification" means a stan-
dardized identification necklace, bracelet, card or physi-
cian orders for scope of treatment form as set forth in this
article that signifies that a do-not-resuscitate order has
been issued for the possessor.

(d) "Do-not-resuscitate order" means an order issued by
a licensed physician that cardiopulmonary resuscitation
should not be administered to a particular person.

(e) "Emergency medical services personnel" means paid
or volunteer firefighters, law-enforcement officers,
emergency medical technicians, paramedics or other
emergency services personnel, providers or entities acting
within the usual course of their professions.

(f) "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 interven-
tions, nursing care, hospitalization, treatment in a nursing
home or other extended care facility, home health care and
the gift or donation of a body organ or tissue.

(g) "Health care facility" means a facility established to
administer and provide health care services and which is
commonly known by a wide variety of titles, including, but
not limited to, hospitals, medical centers, ambulatory
health care facilities, physicians' offices and clinics,
extended care facilities operated in connection with
hospitals, nursing homes and extended care facilities
operated in connection with rehabilitation centers.
(h) "Health care provider" means any physician, dentist, nurse, paramedic, psychologist or other person providing medical, dental, nursing, psychological or other health care services of any kind.

(i) "Home" means any place of residence other than a health care facility and includes residential board and care homes.

(j) "Incapacity" or words of like import 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.

(k) "Physician orders for scope of treatment (POST) form" means a standardized form containing orders by a qualified physician that details a person's life-sustaining wishes as provided by section twenty-five, article thirty of this chapter.

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

(m) "Representative" means a person designated by a principal to make health care decisions in accordance with article thirty-a of this chapter.

(n) "Surrogate decisionmaker" or "surrogate" means an individual eighteen years of age or older 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 identified or selected by the attending physician or advanced nurse practitioner in accordance with applicable provisions of article thirty of this chapter as the person or persons who is to make decisions pursuant to this article: Provided, That a representative named in the incapacitated person's medical power of attorney, if such document has been
completed, shall have priority over a surrogate
decisionmaker.

(o) "Trauma" means blunt or penetrating bodily injuries
from impact which occur in situations, including, but not
limited to, motor vehicle collisions, mass casualty inci-
dents and industrial accidents.

§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.

(4) A completed physician orders for scope of treatment
form in which a qualified physician has ordered do not
resuscitate.

(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 resuscita-
§16-30C-6. Issuance of a do-not-resuscitate order; order to be written by a physician.

(a) An attending physician may issue a do-not-resuscitate order for persons who are present in or residing at home or in a health care facility if the person, representative or surrogate has consented to the order. A do-not-resuscitate order shall be issued in writing in the form as described in this section for a person not present or residing in a health care facility. For persons present in health care facilities, a do-not-resuscitate order shall be issued in accordance with the policies and procedures of the health care facility or in accordance with the provisions of this article.

(b) Persons may request their physicians to issue do-not-resuscitate orders for them.

(c) The representative or surrogate decisionmaker may consent to a do-not-resuscitate order for a person with incapacity. A do-not-resuscitate order written by a physician for a person with incapacity with the consent of the representative or surrogate decisionmaker is valid and shall be respected by health care providers.

(d) A parent may consent to a do-not-resuscitate order for his or her minor child, provided that a second physician who has examined the child concurs with the opinion of the attending physician that the provision of cardiopulmonary resuscitation would be contrary to accepted medical standards. If the minor is between the ages of sixteen and eighteen and, in the opinion of the attending physician, the minor is of sufficient maturity to
28 understand the nature and effect of a do-not-resuscitate
29 order, then no such order shall be valid without the
30 consent of such minor. In the event of a conflict between
31 the wishes of the parents or guardians and the wishes of
32 the mature minor, the wishes of the mature minor shall
33 prevail. For purposes of this section, no minor less than
34 sixteen years of age shall be considered mature. Nothing
35 in this article shall be interpreted to conflict with the
36 provisions of the child abuse prevention and treatment act
37 and implementing regulations at 45 CFR 1340. In the
38 event conflict is unavoidable, federal law and regulation
39 shall govern.

40 (e) If a surrogate decisionmaker is not reasonably
41 available or capable of making a decision regarding a do-
42 not-resuscitate order, an attending physician may issue a
43 do-not-resuscitate order for a person with incapacity in a
44 health care facility: Provided, That a second physician
45 who has personally examined the person concurs in the
46 opinion of the attending physician that the provision of
47 cardiopulmonary resuscitation would be contrary to
48 accepted medical standards.

49 (f) For persons not present or residing in a health care
50 facility, the do-not-resuscitate order shall be noted on a
51 physician orders for scope of treatment form or in the
52 following form on a card suitable for carrying on the
53 person:

Do-Not-Resuscitate Order

"As treating physician of ______________________ and a
1 licensed physician, I order that this person SHALL NOT
BE RESUSCITATED in the event of cardiac or respiratory
arrest. This order has been discussed with__________
or his/her representative __________________________ or
his/her surrogate decisionmaker ____________________ who
has given consent as evidenced by his/her signature below.

Physician Name_____________________________
§16-30C-7. Compliance with a do-not-resuscitate order.

(a) Health care providers shall comply with the do-not-resuscitate order when presented with one of the following:

(1) A do-not-resuscitate order completed by a physician on a form as specified in section six of this article;

(2) Do-not-resuscitate identification as set forth in section thirteen of this article;

(3) A do-not-resuscitate order for a person present or residing in a health care facility issued in accordance with the health care facility's policies and procedures; or

(4) A physician orders for scope of treatment form in which a qualified physician has documented a do-not-resuscitate order.

(b) Pursuant to this article, health care providers shall respect do-not-resuscitate orders for persons in health care facilities, ambulances, homes, and communities within this state.
§16-30C-11. Interinstitutional transfers.

If a person with a do-not-resuscitate order is transferred from one health care facility to another health care facility, the health care facility initiating the transfer shall communicate the existence of a do-not-resuscitate order to the receiving facility prior to the transfer. The written do-not-resuscitate order, the do-not-resuscitate card as described in section six of this article or the physician orders for scope of treatment form shall accompany the person to the health care facility receiving the person and shall remain effective until a physician at the receiving facility issues admission orders. The do-not-resuscitate card or the physician orders for scope of treatment form shall be kept as the first page in the person's transfer records.


(a) The secretary of the department of health and human resources, no later than the first day of July, one thousand nine hundred ninety-four, shall implement the statewide distribution of do-not-resuscitate forms as described in section six of this article.

(b) Do-not-resuscitate identification as set forth in this article may consist of either a medical condition bracelet or necklace with the inscription of the patient's name, date of birth in numerical form and "WV do-not-resuscitate" on it. Such identification shall be issued only upon presentation of a properly executed do-not-resuscitate order form as set forth in section six of this article, a physician orders for scope of treatment form in which a qualified physician has documented a do-not-resuscitate order, or a do-not-resuscitate order properly executed in accordance with a health care facility's written policy and procedure.

(c) The secretary of the department of health and human resources, no later than the first day of July, one
thousand nine hundred ninety-four, shall be responsible for establishing a system for the distribution of the do-not-resuscitate identification bracelets and necklaces.

(d) The secretary of the department of health and human resources, the first day of July, one thousand nine hundred ninety-four, shall develop and implement a statewide educational effort to inform the public of their right to accept or refuse cardiopulmonary resuscitation and to request their physician to write a do-not-resuscitate order for them.
Enr. S. B. No. 658]

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

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect, ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within is approved this the 3rd Day of... 2002.

Governor
PRESENTED TO THE
GOVERNOR

Date: 3/19/02
Time: 3:15