

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

House Bill 4481

BY DELEGATE ROHRBACH

[Introduced January 23, 2020; Referred to the
Committee on the Judiciary]

1 A BILL to amend and reenact §16-30-3 and §16-30-4 of the Code of West Virginia, 1931, as
2 amended, all relating to health care decisions; definitions, including redefining the
3 definition of “Life-prolonging intervention”; forms of a living will or medical power of
4 attorney or combined medical power of attorney and living will and specific provisions; and
5 interpretation and application of provisions upon the effective date of enactment.

Be it enacted by the Legislature of West Virginia:

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
3 communicated to the health care provider orally or in writing by the person, the person’s medical
4 power of attorney representative, the person’s health care surrogate, or other individuals resulting
5 in the health care provider’s personal cognizance of these wishes. Constructive notice and other
6 forms of imputed knowledge are not actual knowledge.

7 ~~(b)~~ “Adult” means a person who is 18 years of age or older, an emancipated minor who
8 has been established as such pursuant to the provisions of §49-4-115 of this code, or a mature
9 minor.

10 ~~(c)~~ “Advanced nurse practitioner” means a registered nurse with substantial theoretical
11 knowledge in a specialized area of nursing practice and proficient clinical utilization of the
12 knowledge in implementing the nursing process, and who has met the further requirements of the
13 West Virginia Board of Examiners for registered professional nurses rule, advanced practice
14 registered nurse, 19CSR 7, who has a mutually agreed upon association in writing with a
15 physician, and has been selected by or assigned to the person and has primary responsibility for
16 treatment and care of the person.

17 ~~(d)~~ “Attending physician” means the physician selected by or assigned to the person who
18 has primary responsibility for treatment and care of the person and who is a licensed physician.

19 If more than one physician shares that responsibility, any of those physicians may act as the
20 attending physician under this article.

21 ~~(e)~~ "Capable adult" means an adult who is physically and mentally capable of making
22 health care decisions and who is not considered a protected person pursuant to ~~the provisions of~~
23 chapter 44A of this code.

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

28 ~~(g)~~ "Death" means a finding made in accordance with accepted medical standards of
29 either: (1) The irreversible cessation of circulatory and respiratory functions; or (2) the irreversible
30 cessation of all functions of the entire brain, including the brain stem.

31 ~~(h)~~ "Guardian" means a person appointed by a court pursuant to ~~the provisions of~~ chapter
32 44A of this code who is responsible for the personal affairs of a protected person and includes a
33 limited guardian or a temporary guardian.

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

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

44 ~~(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.

(f) "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~~ does not include the provision of food and fluids by IV, feeding tube, or other artificial methods. 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 §16-30-4 of this code.

(o) "Mature minor" means a person, less than 18 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, 18 years of age or older, appointed by another person to make health care decisions pursuant to the

71 provisions of §16-30-6 of this code or similar act of another state and recognized as valid under
72 the laws of this state.

73 (†) “Parent” means a person who is another person’s natural or adoptive mother or father
74 or who has been granted parental rights by valid court order and whose parental rights have not
75 been terminated by a court of law.

76 (†) “Persistent vegetative state” means ~~an irreversible~~ a chronic state as diagnosed by the
77 attending physician or a qualified physician in which the person has intact brain stem function but
78 no higher cortical function and has neither self-awareness ~~or~~ nor awareness of the surroundings
79 in a learned manner.

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

82 (†) “Physician orders for scope of treatment (POST) form” means a standardized form
83 containing orders by a qualified physician that details a person’s life-sustaining wishes as
84 provided by §16-30-25 of this code.

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

86 (†) “Protected person” means an adult who, pursuant to the provisions of chapter 44A of
87 this code, has been found by a court, because of mental impairment, to be unable to receive and
88 evaluate information effectively or to respond to people, events, and environments to an extent
89 that the individual lacks the capacity to: (1) Meet the essential requirements for his or her health,
90 care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian;
91 or (2) manage property or financial affairs to provide for his or her support or for the support of
92 legal dependents without the assistance or protection of a conservator.

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

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

(z) “Surrogate decisionmaker” or “surrogate” means an individual 18 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.

(aa) “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 or combined medical power of attorney and living will.

(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 18 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~~ may not be affected when a witness at the time of witnessing ~~such~~ the living will or medical power of attorney was unaware of being a named beneficiary of the principal’s will;

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

17 (5) The attending physician; or

18 (6) The principal's medical power of attorney representative or successor medical power
19 of attorney representative.

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

25 (d) It ~~shall be~~ is the responsibility of the principal or his or her representative to provide for
26 notification to his or her attending physician and other health care providers of the existence of
27 the living will or medical power of attorney or a revocation of the living will or medical power of
28 attorney. An attending physician or other health care provider, when presented with the living will
29 or medical power of attorney, or the revocation of a living will or medical power of attorney, shall
30 make the living will, medical power of attorney or a copy of either or a revocation of either a part
31 of the principal's medical records.

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

37 (f) The provision of living will or medical power of attorney forms substantially in
38 compliance with this article by health care providers, medical practitioners, social workers, social
39 service agencies, senior citizens centers, hospitals, nursing homes, personal care homes,
40 community care facilities or any other similar person or group, without separate compensation,
41 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 the~~ invalidity shall may 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~~ may not be prolonged under the following circumstances:

If I am very sick and not able to communicate my wishes for myself and (1) 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.)

Oral fluids and nutrition must be offered as tolerated. If I become unable to safely accept oral fluids and nutrition, I desire the following measures to be taken in regard to providing artificially administered fluids and nutrition, for example 1V's or feeding tubes (initial ONE choice below):

I DO WISH to receive food and fluids provided artificially, for example as provided by IV or feeding tube, unless my body becomes incapable of absorbing and processing such, or unless the provision causes complications that worsen my health conditions.

I DO NOT WISH to receive food and fluids provided artificially, for example by IV or feeding tube. I understand that refusal of such food and fluids may hasten or even cause my death.

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 18 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.

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 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 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; Please do not insert more than one name.)

The person I choose as my successor representative is: (Please do not insert more than one name)

If my representative is unable, unwilling or disqualified to serve, then I appoint: (Please do not insert more than one name)

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

(Only one name is to be listed on the lines above)

146

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

156 I appoint this representative because I believe this person understands my wishes and
157 values and will act to carry into effect the health care decisions that I would make if I were able to
158 do so and because I also believe that this person will act in my best interest when my wishes are
159 unknown. It is my intent that my family, my physician and all legal authorities be bound by the
160 decisions that are made by the representative appointed by this document and it is my intent that
161 these decisions should not be the subject of review by any health care provider or administrative
162 or judicial agency.

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

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

169 I am giving the following SPECIAL DIRECTIVES OR LIMITATIONS ON THIS POWER:
170 (Comments about tube feedings, breathing machines, cardiopulmonary resuscitation, dialysis,
171 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.)

Oral fluids and nutrition must be offered as tolerated. If I become unable to safely accept oral fluids and nutrition, I desire the following measures to be taken in regard to providing artificially administered fluids and nutrition, for example 1V's or feeding tubes (initial ONE choice below):

I DO WISH to receive food and fluids provided artificially, for example as provided by IV or feeding tube, unless my body becomes incapable of absorbing and processing such, or unless the provision causes complications that worsen my health conditions,

I DO NOT WISH to receive food and fluids provided artificially, for example by IV or feeding tube. I understand that refusal of such food and fluids may hasten or even cause my death.

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

**The Person I Want to Make Health Care Decisions For Me When I Can't Make
Them for Myself And The Kind of Medical Treatment I Want and Don't Want
If I Have a Terminal Condition or Am In a Persistent Vegetative State**

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. Please do not insert more than one name.*).

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

(*Insert the name, address, area code and telephone number of the person you wish to
designate as your successor representative. Please do not insert more than one name.*).

(Only one name is to be listed on the lines above)

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

250 interventions.

251 I appoint this representative because I believe this person understands my wishes and
252 values and will act to carry into effect the health care decisions that I would make if I were able to
253 do so, and because I also believe that this person will act in my best interest when my wishes are
254 unknown. It is my intent that my family, my physician and all legal authorities be bound by the
255 decisions that are made by the representative appointed by this document, and it is my intent that
256 these decisions should not be the subject of review by any health care provider or administrative
257 or judicial agency.

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

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

264 I am giving the following SPECIAL DIRECTIVES OR LIMITATIONS ON THIS POWER:
265 (Comments about tube feedings, breathing machines, cardiopulmonary resuscitation, dialysis,
266 mental health treatment, funeral arrangements, autopsy, and organ donation may be placed here.
267 My failure to provide special directives or limitations does not mean that I want or refuse certain
268 treatments).

269 (1) If I am very sick and not able to communicate my wishes for myself and (1) I am
270 certified by one physician who has personally examined me, to have a terminal condition, or (2) I
271 am certified by two physicians, each of whom has personally examined me, to be in a persistent
272 vegetative state (I am ~~unconscious and am~~ neither aware of my environment nor able to interact
273 with others,) I direct that life-prolonging medical intervention that would serve solely to prolong
274 the dying process or maintain me in a persistent vegetative state be withheld or withdrawn. I want
275 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.

(2).

Other directives: _____

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 18 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 _____ 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:_____

Signature of Notary Public

(j) Living will or medical power of attorney forms executed pursuant to §16-30-3 and §16-30-4 of this code, before the effective date of the amendments to these sections, are not affected by these amendments, nor invalidated by the amendments and shall be interpreted with the former definition of “life-prolonging intervention”. Living will forms executed after the effective date of these amendments shall be interpreted under the new definition of “life-prolonging intervention” even though the living will form has not been updated to show the various choices to be initialed. Patients who have signed living will forms after the effective date of these amendments, by default or in the absence of a specific option not to receive them having been initialed, may receive artificially provided food and fluids.

NOTE: The purpose of this bill is to redefine certain definitions, including the definition of “Life-prolonging intervention”. The forms of a living will or medical power of attorney or combined medical power of attorney and living will, with specific provisions are changed. And, an interpretation and application of provisions upon the effective date of enactment is stated.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.