SPONSOR: Sen. Gay & Rep. Baumbach
Rep. Harris

DELAWARE STATE SENATE
152nd GENERAL ASSEMBLY

SENATE BILL NO. 309

AN ACT TO AMEND TITLE 12 AND TITLE 16 OF THE DELAWARE CODE RELATING TO HEALTH-CARE DECISIONS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Chapter 25, Title 16 of the Delaware Code by deleting Chapter 25 in its entirety and by making deletions as shown by strike through and insertions as shown by underline as follows:

Chapter 25. Uniform Health-Care Decisions Act.

§ 2501. Short title.

This chapter may be cited as the Uniform Health-Care Decisions Act (2023).

§ 2502. Definitions.

For purposes of this chapter:

(1) "Advance health-care directive" means a power of attorney for health care, health-care instruction, or both. The term includes an advance mental health-care directive.

(2) "Advance mental health-care directive" means a power of attorney for health care, health-care instruction, or both, created under § 2509 of this title.

(3) "Agent" means an individual appointed under a power of attorney for health care to make a health-care decision for the individual who made the appointment. The term includes a co-agent or alternate agent appointed under § 2520 of this title.

(4) "Capacity" means having capacity under § 2503 of this title.

(5) "Cohabitant" means each of two individuals who have been living together as a couple for at least one year after each became an adult or was emancipated and who are not married to each other or are not domestic partners with each other.

(6) "Default surrogate" means an individual authorized under § 2512 of this title to make a health-care decision for another individual.

(7) "Domestic partner" means an individual in a civil union or domestic partnership that is legally recognized in any state.

(8) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(9) "Family member" means a spouse, domestic partner, adult child, parent, or grandparent, or an adult descendant of a spouse, domestic partner, child, parent, or grandparent.

(10) "Guardian" means a person appointed under other law by a court to make decisions regarding the personal affairs of an individual, which may include health-care decisions. The term does not include a guardian ad litem.

(11) "Health care" means care or treatment or a service or procedure to maintain, monitor, diagnose, or otherwise affect an individual's physical or mental illness, injury, or condition. The term includes mental health care.

(12) "Health-care decision" means a decision made by an individual or the individual's surrogate regarding the individual's health care, including all of the following:

a. Selection or discharge of a health-care professional or health-care institution.

b. Approval or disapproval of a diagnostic test, surgical procedure, medication, therapeutic intervention, or other health care.

c. Direction to provide, withhold, or withdraw artificial nutrition or hydration, mechanical ventilation, or other health care.

(13) "Health-care institution" means a facility or agency licensed, certified, or otherwise authorized or permitted by other law to provide health care in this State in the ordinary course of business.

(14) "Health-care instruction" means a direction, whether or not in a record, made by an individual that indicates the individual's goals, preferences, or wishes concerning the provision, withholding, or withdrawal of health care. The term includes a direction intended to be effective if a specified condition arises.

(15) "Health-care professional" means a physician or other individual licensed, certified, or otherwise authorized or permitted by other law of this State to provide health care in this State in the ordinary course of business or the practice of the physician's or individual's profession.

(16) "Individual" means an adult or emancipated minor.

(17) "Long-term care facility" means as defined in § 1102 of this title.

(18) "Mental health care" means care or treatment or a service or procedure to maintain, monitor, diagnose, or otherwise affect an individual's mental illness or other psychiatric, psychological, or psychosocial condition.

(19) "Nursing home" means a nursing facility as defined in § 1919(a)(1) of the Social Security Act, 42 U.S.C. § 1396r(a)(1) or skilled nursing facility as defined in § 1819(a)(1) of the Social Security Act, 42 U.S.C. § 1395i–3(a)(1).

(20) "Person" means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(21) "Person interested in the welfare of the individual" means any of the following:

a. The individual's surrogate.

b. A family member of the individual.

c. The cohabitant of the individual.

d. A public entity providing health-care case management or protective services to the individual.

e. A person appointed under other law to make decisions for the individual under a power of attorney for finances.

f. A person that has an ongoing personal or professional relationship with the individual, including a person that has provided educational or health-care services or supported decision making to the individual.

(22) "Physician" means an individual authorized to practice medicine under subchapter III, Chapter 17 of Title 24.

(23) "Power of attorney for health care" means a record in which an individual appoints an agent to make health-care decisions for the individual.

(24) "Reasonably available" means being able to be contacted without undue effort and being willing and able to act in a timely manner considering the urgency of an individual's health-care situation. When used to refer to an agent or default surrogate, the term includes being willing and able to comply with the duties under § 2517 of this title in a timely manner considering the urgency of an individual's health-care situation.

(25) "Record" means information either:

a. Inscribed on a tangible medium.

b. Stored in an electronic or other medium and retrievable in perceivable form.

(26) "Responsible health-care professional" means either:

a. A health-care professional designated by an individual or the individual's surrogate to have primary responsibility for the individual's health care or for overseeing a course of treatment.

b. In the absence of a designation under paragraph (26)a. of this section or, if the professional designated under paragraph (26)a. of this section is not reasonably available, a health-care professional who has primary responsibility for overseeing the individual's health care or for overseeing a course of treatment.

(27) "Sign" means, with present intent to authenticate or adopt a record, to either:

a. Execute or adopt a tangible symbol.

b. Attach to or logically associate with the record an electronic symbol, sound, or process.

(28) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(29) "Supported decision making" means assistance, from one or more persons of an individual's choosing, that helps the individual make or communicate a decision, including by helping the individual understand the nature and consequences of the decision. Supported decision making is not limited to assistance provided under a supported decision-making agreement under Chapter 94A of this title.

(30) "Surrogate" means any of the following:

a. An agent.

b. A default surrogate.

c. A guardian authorized to make health-care decisions.

§ 2503. Capacity.

(a) An individual has capacity for the purpose of this chapter if the individual is willing and able to communicate a decision independently or with appropriate services, technological assistance, supported decision making, or other reasonable accommodation and in making or revoking:

(1) A health-care decision, understands the nature and consequences of the decision, including the primary risks and benefits of the decision.

(2) A health-care instruction, understands the nature and consequences of the instruction, including the primary risks and benefits of the choices expressed in the instruction.

(3) An appointment of an agent under a health-care power of attorney or identification of a default surrogate under § 2512(b)(1) of this title, recognizes the identity of the individual being appointed or identified and understands the general nature of the relationship of the individual making the appointment or identification with the individual being appointed or identified.

(b) The right of an individual who has capacity to make a decision about the individual's health care is not affected by whether the individual creates or revokes an advance health-care directive.

§ 2504. Presumption of capacity; overcoming presumption.

(a) An individual is presumed to have capacity to make or revoke a health-care decision, health-care instruction, and power of attorney for health care unless either of the following:

(1) A court has found the individual lacks capacity to do so.

(2) The presumption is rebutted under subsection (b) of this section.

(b) Subject to §§ 2505 and 2506 of this title and subsection (c) of this section, a presumption under subsection (a) of this section may be rebutted by a finding that the individual lacks capacity:

(1) Made on the basis of a contemporaneous examination by any of the following:

a. A physician.

b. A psychologist licensed or otherwise authorized to practice in this State.

c. An individual with training and expertise in the finding of lack of capacity who is licensed or otherwise authorized to practice in this State as:

1. A physician assistant.

2. An advanced practice registered nurse.

3. A licensed clinical social worker.

d. A responsible health-care professional not described in paragraphs (b)(1)a. through (b)(1)c. of this section if both of the following:

1. The individual about whom the finding is to be made is experiencing a health condition requiring a decision regarding health-care treatment to be made promptly to avoid loss of life or serious harm to the health of the individual.

2. An individual listed in paragraphs (b)(1)a. through (b)(1)c. of this section is not reasonably available.

(2) Made in accordance with accepted standards of the profession and the scope of practice of the individual making the finding and to a reasonable degree of certainty; and

(3) Documented in a record signed by the individual making the finding that includes an opinion of the cause, nature, extent, and probable duration of the lack of capacity.

(c) The finding under subsection (b) of this section may not be made by any of the following:

(1) A family member of the individual presumed to have capacity.

(2) The cohabitant of the individual or a descendant of the cohabitant.

(3) The individual's surrogate, a family member of the surrogate, or a descendant of the surrogate.

(d) If the finding under subsection (b) of this section was based on a condition the individual no longer has or a responsible health-care professional subsequently has good cause to believe the individual has capacity, the individual is presumed to have capacity unless a court finds the individual lacks capacity or the presumption is rebutted under subsection (b) of this section.

§ 2505. Notice of finding of lack of capacity; right to object.

(a) As soon as reasonably feasible, an individual who makes a finding under § 2504(b) of this title shall inform the individual about whom the finding was made or the individual's responsible health-care professional of the finding.

(b) As soon as reasonably feasible, a responsible health-care professional who is informed of a finding under § 2504(b) of this title shall inform the individual about whom the finding was made and the individual's surrogate.

(c) An individual found under § 2504(b) of this title to lack capacity may object to the finding in any of the following ways:

(1) By orally informing a responsible health-care professional.

(2) In a record provided to a responsible health-care professional or the health-care institution in which the individual resides or is receiving care.

(3) By another act that clearly indicates the individual's objection.

(d) If the individual objects under subsection (c) of this section, the finding under § 2504(b) of this title is not sufficient to rebut a presumption of capacity in § 2504(a) of this title and the individual must be treated as having capacity unless any of the following:

(1) The individual withdraws the objection.

(2) A court finds the individual lacks the presumed capacity.

(3) The individual is experiencing a health condition requiring a decision regarding health-care treatment to be made promptly to avoid imminent loss of life or serious harm to the health of the individual.

(4) Subject to subsection (e) of this section, the finding is confirmed by a second finding made by an individual authorized under § 2504(b)(1) of this title who satisfies all of the following:

a. Did not make the first finding.

b. Is not a family member of the individual who made the first finding.

c. Is not the cohabitant of the individual who made the first finding or a descendant of the cohabitant.

d. Paragraphs 2504(b)(2) through (b)(3) of this title.

(e) A second finding that the individual lacks capacity under paragraph (d)(4) of this section is not sufficient to rebut the presumption of capacity if the individual is requesting the provision or continuation of life-sustaining treatment and the finding is being used to make a decision to withhold or withdraw the treatment.

(f) As soon as reasonably feasible, a health-care professional who is informed of an objection under subsection (c) of this section shall do both of the following:

(1) Communicate the objection to a responsible health-care professional.

(2) Document the objection and the date of the objection in the individual's medical record or communicate the objection and the date of the objection to an administrator with responsibility for medical records of the health-care institution providing health care to the individual, who shall document the objection and the date of the objection in the individual's medical record.

§ 2506. Judicial review of finding of lack of capacity.

(a) An individual found under § 2504(b) of this title to lack capacity, a responsible health-care professional, the health-care institution providing health care to the individual, or a person interested in the welfare of the individual may petition the Court of Chancery in the county in which the individual resides or is located to determine whether the individual lacks capacity.

(b) The court in which a petition under subsection (a) of this section is filed shall appoint an attorney ad litem. The court shall hear the petition on an expedited basis. The court shall determine whether the individual lacks capacity on an expedited basis. The court may determine the individual lacks capacity only if the court finds by clear and convincing evidence that the individual lacks capacity.

§ 2507. Health-care instruction.

(a) An individual may create a health-care instruction that expresses the individual's preferences for future health care, including preferences regarding all of the following:

(1) Health-care professionals or health-care institutions.

(2) How a health-care decision will be made and communicated.

(3) Persons that should or should not be consulted regarding a health-care decision.

(4) A person to serve as guardian for the individual if one is appointed.

(5) An individual to serve as a default surrogate.

(b) A health-care professional to whom an individual communicates or provides an instruction under subsection (a) of this section shall document the instruction and the date of the instruction in the individual's medical record or communicate the instruction and date of the instruction to an administrator with responsibility for medical records of the

health-care institution providing health care to the individual, who shall document the instruction and the date of the instruction in the individual's medical record.

(c) A health-care instruction made by an individual that conflicts with an earlier health-care instruction made by the individual, including an instruction documented in a medical order, revokes the earlier instruction to the extent of the conflict.

(d) A health-care instruction may be in the same record as a power of attorney for health care.

§ 2508. Power of attorney for health care.

(a) An individual may create a power of attorney for health care to appoint an agent to make health-care decisions for the individual.

(b) An individual is disqualified from acting as agent for an individual who lacks capacity to make health-care decisions if any of the following apply:

(1) A court finds that the potential agent poses a danger to the individual's well-being, even if the court does not issue a Protection From Abuse order against the potential agent.

(2) The potential agent is an owner, operator, employee, or contractor of a nursing home or long-term care facility in which the individual resides or is receiving care, unless the owner, operator, employee, or contractor is a family member of the individual, the cohabitant of the individual, or a descendant of the cohabitant.

(3) The individual has a pending Protection From Abuse petition against the potential agent.

(4) The individual has a Protection From Abuse order against the potential agent.

(5) The potential agent is the subject of a civil or criminal order prohibiting or limiting contact with the individual.

(c) A health-care decision made by an agent is effective without judicial approval.

(d) A power of attorney for health care must be in a record, signed by the individual creating the power, and signed by an adult witness who satisfies all of the following:

(1) Reasonably believes the act of the individual to create the power of attorney is voluntary and knowing.

(2) Is not the agent appointed by the individual.

(3) Is not the agent's spouse, domestic partner, or cohabitant.

(4) If the individual resides or is receiving care in a nursing home or long-term care facility, is not the owner, operator, employee, or contractor of the nursing home or long-term care facility.

(5) Is present when the individual signs the power of attorney or when the individual represents that the power of attorney reflects the individual's wishes.

(e) A witness under subsection (d) of this section is considered present if the witness and the individual are any of the following:

(1) Physically present in the same location.

(2) Using electronic means that allow for real time audio and visual transmission and communication in real time to the same extent as if the witness and the individual were physically present in the same location.

(3) Able to speak to and hear each other in real time through audio connection if the identity of the individual is personally known to the witness or the witness is able to authenticate the identity of the individual by receiving accurate answers from the individual that enable the authentication.

(f) A power of attorney for health care may include a health-care instruction.

§ 2509. Advance Mental Health-Care Directive

(a) An individual may create an advance health-care directive that addresses only mental health care for the individual. The directive may include a health-care instruction, a power of attorney for health care, or both.

(b) A health-care instruction under this section may include the individual's preferences for mental health care, including preferences regarding any of the following:

(1) General philosophy and objectives regarding mental health care.

(2) Specific goals, preferences, and wishes regarding the provision, withholding, or withdrawal of a form of mental health care, including all of the following:

a. Preferences regarding professionals, programs, and facilities.

b. Admission to a mental-health facility, including duration of admission.

c. Preferences regarding medications.

d. Refusal to accept a specific type of mental health care, including a medication.

e. Preferences regarding crisis intervention.

(c) A power of attorney for health care under this section may appoint an agent to make decisions only for mental health care.

(d) An individual may direct in an advance mental health-care directive that, if the individual is experiencing a psychiatric or psychological event specified in the directive, the individual may not revoke the directive or a part of the directive.

(e) If an advance mental health-care directive includes a direction under subsection (d) of this section, the advance mental health-care directive must be in a record that is separate from any other advance health-care directive created by the

individual and signed by the individual creating the advance mental health-care directive and at least two adult witnesses who satisfy all of the following:

(1) Attest that to the best of their knowledge, the individual understood the nature and consequences of the direction, including its risks and benefits.

(2) Attest that to the best of their knowledge, the individual made the direction voluntarily and without coercion or undue influence.

(3) Are not the agent appointed by the individual.

(4) Are not the agent's spouse, domestic partner, or cohabitant.

(5) If the individual resides in a nursing home or long-term care facility, are not the owner, operator, employee, or contractor of the nursing home or long-term care facility.

(6) Are physically present in the same location as the individual.

§ 2510. Relationship of advance mental health-care directive and other advance health-care directive.

(a) If a direction in an advance mental health-care directive of an individual conflicts with a direction in another advance health-care directive of the individual, the later direction revokes the earlier direction to the extent of the conflict.

(b) An appointment of an agent to make decisions only for mental health care for an individual does not revoke an earlier appointment of an agent to make other health-care decisions for the individual. A later appointment revokes the authority of an agent under the earlier appointment to make decisions about mental health care unless otherwise specified in the power of attorney making the later appointment.

(c) An appointment of an agent to make health-care decisions for an individual other than decisions about mental health care made after appointment of an agent authorized to make only mental health-care decisions does not revoke the appointment of the agent authorized to make only mental health-care decisions.

§ 2511. Optional form.

The following form may be used to create an advance health-care directive:

ADVANCE HEALTH-CARE DIRECTIVE

HOW YOU CAN USE THIS FORM

You can use this form if you wish to name someone to make health-care decisions for you in case you cannot make decisions for yourself. This is called giving the person a power of attorney for health care. This person is called your Agent.

You can also use this form to state your wishes, preferences, and goals for health care, and to say if you want to be an organ donor after you die.

YOUR NAME AND DATE OF BIRTH

Name:

Date of birth:

PART A: NAMING AN AGENT

This part lets you name someone else to make health-care decisions for you. You may leave any item blank.

1. NAMING AN AGENT

I want the following person to make health-care decisions for me if I cannot make decisions for myself:

Name:

Optional contact information (it is helpful to include information such as address, phone, and email):

2. NAMING AN ALTERNATE AGENT

I want the following person to make health-care decisions for me if I cannot and my Agent is not able or available to make them for me:

Name:

Optional contact information (it is helpful to include information such as address, phone, and email):

3. LIMITING YOUR AGENT'S AUTHORITY

I give my Agent the power to make all health-care decisions for me if I cannot make those decisions for myself, except the following:

(If you do not add a limitation here, your Agent will be able make all health-care decisions that an Agent is permitted to make under State law.)

PART B: HEALTH-CARE INSTRUCTIONS

This part lets you state your priorities for health care and to state types of health care you do and do not want.

1. INSTRUCTIONS ABOUT LIFE-SUSTAINING TREATMENT

This section gives you the opportunity to say how you want your Agent to act while making decisions for you. You may mark or initial each choice. You also may leave any choice blank.

Treatment. Medical treatment needed to keep me alive but not needed for comfort or any other purpose should (mark or initial all that apply):

(____) Always be given to me. (If you mark or initial this choice, you should not mark or initial other choices in this "treatment" section.).

(____) Not be given to me if I have a condition that is not curable and is expected to cause my death soon, even if treated.

(____) Not be given to me if I am unconscious and I am not expected to be conscious again.

(____) Not be given to me if I have a medical condition from which I am not expected to recover that prevents me from communicating with people I care about, caring for myself, and recognizing family and friends.

(____) Other (write what you want or do not want):

Food and liquids. If I can't swallow and staying alive requires me to get food or liquids through a tube or other means for the rest of my life, then food or liquids should (mark or initial all that apply):

(____) Always be given to me. (If you mark or initial this choice, you should not mark or initial other choices in this "food and liquids" section).

(____) Not be given to me if I have a condition that is not curable and is expected to cause me to die soon, even if treated.

(____) Not be given to me if I am unconscious and am not expected to be conscious again.

(____) Not be given to me if I have a medical condition from which I am not expected to recover that prevents me from communicating with people I care about, caring for myself, and recognizing family and friends.

(____) Other (write what you want or do not want):

Pain relief. If I am in significant pain, care that will keep me comfortable but is likely to shorten my life should (mark or initial all that apply):

(____) Always be given to me. (If you mark or initial this choice, you should not mark or initial other choices in this "pain relief" section.)

(____) Never be given to me. (If you mark or initial this choice, you should not mark or initial other choices in this "pain relief" section.)

(____) Be given to me if I have a condition that is not curable and is expected to cause me to die soon, even if treated.

(____) Be given to me if I am unconscious and am not expected to be conscious again.

(____) Be given to me if I have a medical condition from which I am not expected to recover that prevents me from communicating with people I care about, caring for myself, and recognizing family and friends.

(____) Other (write what you want or do not want):

2. MY PRIORITIES

You can use this section to indicate what is important to you, and what is not important to you. This information can help your Agent make decisions for you if you cannot. It also helps others understand your preferences.

You may mark or initial each choice. You also may leave any choice blank.

Staying alive as long as possible even if I have substantial physical limitations is:

(____) Very important

(____) Somewhat important

(____) Not important

Staying alive as long as possible even if I have substantial mental limitations is:

(____) Very important

(____) Somewhat important

(____) Not important

Being free from significant pain is:

(____) Very important

(____) Somewhat important

(____) Not important

Being independent is:

(____) Very important

(____) Somewhat important

(____) Not important

Having my Agent talk with my family before making decisions about my care is:

(____) Very important

(____) Somewhat important

(____) Not important

Having my Agent talk with my friends before making decisions about my care is:

(____) Very important

(____) Somewhat important

(____) Not important

3. OTHER INSTRUCTIONS

You can write in this section more information about your goals, values, and preferences for treatment, including care you want or do not want. You can also use this section to name anyone who you do not want to make decisions for you under any conditions.

PART C: OPTIONAL SPECIAL POWERS AND GUIDANCE

This part lets you give your Agent additional powers, and to provide more guidance about your wishes. You may mark or initial each choice. You also may leave any choice blank.

1. OPTIONAL SPECIAL POWERS

My Agent can do the following things ONLY if I have marked or initialed them below:

(____) Admit me as a voluntary patient to a facility for mental health treatment for up to _____ days (write in the number of days you want like 7, 14, 30 or another number).

(If I do not mark or initial this choice, my Agent MAY NOT admit me as a voluntary patient to this type of facility.)

(____) Place me in a nursing home for more than 100 days even if my needs can be met somewhere else, I am not terminally ill, and I object.

(If I do not mark or initial this choice, my Agent MAY NOT do this.)

2. ACCESS TO MY HEALTH INFORMATION

My Agent may obtain, examine, and share information about my health needs and health care if I am not able to make decisions for myself. If I mark or initial below, my Agent may also do that at any time my Agent thinks it will help me.

(____) I give my Agent permission to obtain, examine, and share information about my health needs and health care whenever my Agent thinks it will help me.

3. FLEXIBILITY FOR MY AGENT

Mark or initial below if you want to give your Agent flexibility in following instructions you provide in this form. If you do not, your Agent must follow the instructions even if your Agent thinks something else would be better for you.

(____) I give my Agent permission to be flexible in applying these instructions if my Agent thinks it would be in my best interest based on what my Agent knows about me.

4. NOMINATION OF GUARDIAN

You can say who you would want as your guardian if you needed one. A guardian is a person appointed by a court to make decisions for someone who cannot make decisions. Filling this out does NOT mean you want or need a guardian. There is no guarantee that the court will appoint the person you want as guardian.

If a court appoints a guardian to make personal decisions for me, I want the court to choose:

(____) My Agent named in this form. If my Agent cannot be a guardian, I want the Alternate Agent named in this form.

(____) Other (write who you would want and their contact information):

PART D: ORGAN DONATION

This part lets you donate your organs after you die. You may leave any item blank.

1. DONATION

You may mark or initial only one choice.

(____) I donate my organs, tissues, and other body parts after I die, even if it requires maintaining treatments that conflict with other instructions I have put in this form, EXCEPT for those I list below (list any body parts you do NOT want to donate):

(____) I do not want my organs, tissues, or other body parts donated to anybody for any reason. (If you mark or initial this choice, you should skip the "purpose of donation" section.)

2. PURPOSE OF DONATION

You may mark or initial all that apply. (If you do not mark or initial any of the purposes below, your donation can be used for all of them.)

Organs, tissues, or other body parts that I donate may be used for:

(____) Transplant

(____) Therapy

(____) Research

(____) Education

(____) All of the above

PART E: SIGNATURES

YOUR SIGNATURE

Sign your name:

Today's date:

City/Town/Village and State (optional):

SIGNATURE OF A WITNESS

You need a witness if you are using this form to name an Agent. The witness must be an adult and cannot be the person you are naming as Agent or the Agent's spouse, domestic partner, or someone the Agent lives with as a couple. If you live or are receiving care in a nursing home or long-term care facility, the witness cannot be an employee or contractor of the home or someone who owns or runs the home.

Name of Witness:

Signature of Witness:

(Only sign as a witness if you think the person signing above is doing it voluntarily.)

Date witness signed:

PART F: INFORMATION FOR AGENTS

1. If this form names you as an Agent, you can make decisions about health care for the person who named you when the person cannot make their own.

2. If you make a decision for the person, follow any instructions the person gave, including any in this form.

3. If you do not know what the person would want, make the decision that you think is in the person's best interest. To figure out what is in the person's best interest, consider the person's values, preferences, and goals if you know them or can learn them. Some of these preferences may be in this form. You should also consider any behavior or communication from the person that indicates what the person currently wants.

4. If this form names you as an Agent, you can also get and share the person's health information. But unless the person has said so in this form, you can get or share this information only when the person cannot make decisions about the person's health care.

§ 2512. Default surrogate.

(a) A default surrogate may make a health-care decision for an individual who lacks capacity to make health-care decisions and for whom an agent, or guardian authorized to make health-care decisions, has not been appointed or is not reasonably available.

(b) Unless the individual has an advance health-care directive that indicates otherwise, a member of any of the following classes, in descending order of priority, who is reasonably available and not disqualified under § 2514 of this title, may act as a default surrogate for the individual:

(1) An adult the individual has identified, other than in a power of attorney for health care, to make a health-care decision for the individual if the individual cannot make the decision.

(2) The individual's spouse or domestic partner, unless any of the following:

a. A petition for annulment, divorce, dissolution of marriage, legal separation, or termination has been filed and not dismissed or withdrawn.

b. A decree of annulment, divorce, dissolution of marriage, legal separation, or termination has been issued.

c. The individual and the spouse or domestic partner have agreed in a record to a legal separation.

d. The spouse or domestic partner has deserted the individual for more than 1 year.

(3) The individual's adult child or parent.

(4) The individual's cohabitant.

(5) The individual's adult sibling.

(6) The individual's adult grandchild or grandparent.

(7) An adult not listed in paragraphs (b)(1) through (b)(6) of this section who has assisted the individual with supported decision making routinely during the preceding six months.

(8) The individual's adult stepchild not listed in paragraphs (b)(1) through (b)(7) of this section whom the individual actively parented during the stepchild's minor years and with whom the individual has an ongoing relationship.

(9) An adult not listed in paragraphs (b)(1) through (b)(8) of this section who has exhibited special care and concern for the individual and is familiar with the individual's personal values.

(c) A responsible health-care professional may require an individual who assumes authority to act as a default surrogate to provide a declaration in a record under penalty of perjury stating facts and circumstances reasonably sufficient to establish the authority.

(d) If a responsible health-care professional reasonably determines that an individual who assumed authority to act as a default surrogate is not willing or able to comply with a duty under § 2517 of this title or fails to comply with the duty in a timely manner, the professional may recognize the individual next in priority under subsection (b) of this section as the default surrogate.

(e) A health-care decision made by a default surrogate is effective without judicial approval.

§ 2513. Disagreement among default surrogates.

(a) A default surrogate who assumes authority under § 2512 of this title shall inform a responsible health-care professional if two or more members of a class under § 2512(b) of this title have assumed authority to act as default surrogates and the members do not agree on a health-care decision.

(b) A responsible health-care professional shall comply with the decision of a majority of the members of the class with highest priority under § 2512(b) of this title who have communicated their views to the professional and the professional reasonably believes are acting consistent with their duties under § 2517 of this title.

(c) If a responsible health-care professional is informed that the members of the class who have communicated their views to the professional are evenly divided concerning the health-care decision, the professional shall make a reasonable effort to solicit the views of members of the class who are reasonably available but have not yet communicated their views to the professional. The professional, after the solicitation, shall comply with the decision of a majority of the members who have communicated their views to the professional and the professional reasonably believes are acting consistent with their duties under § 2517 of this title.

(d) If the class remains evenly divided after the effort is made under subsection (c) of this section, the health-care decision must be made as provided by other law of this State regarding the treatment of an individual who is found to lack capacity.

§ 2514. Disqualification to act as default surrogate.

(a) An individual for whom a health-care decision would be made may disqualify another individual from acting as default surrogate for the first individual. The disqualification must be in a record signed by the first individual or communicated verbally or nonverbally to the individual being disqualified, another individual, or a responsible health-care professional. Disqualification under this subsection is effective even if made by an individual who lacks capacity to make an advance directive if the individual clearly communicates a desire that the individual being disqualified not make health-care decisions for the individual.

(b) An individual is disqualified from acting as a default surrogate for an individual who lacks capacity to make health-care decisions if any of the following apply:

(1) A court finds that the potential default surrogate poses a danger to the individual's well-being, even if the court does not issue a Protection from Abuse order against the potential default surrogate.

(2) The potential default surrogate is an owner, operator, employee, or contractor of a nursing home or long-term care facility in which the individual is residing or receiving care unless the owner, operator, employee, or contractor is a family member of the individual, the cohabitant of the individual, or a descendant of the cohabitant.

(3) The potential default surrogate refuses to provide a timely declaration under § 2512(c) of this title.

(4) The individual has a pending Protection From Abuse petition against the potential default surrogate.

(5) The individual has a Protection From Abuse order against the potential default surrogate.

(6) The potential default surrogate is the subject of a civil or criminal order prohibiting or limiting contact with the individual.

§ 2515. Revocation.

(a) An individual may revoke the appointment of an agent, the designation of a default surrogate, or a health-care instruction in whole or in part, unless any of the following:

(1) A court finds the individual lacks capacity to do so.

(2) The individual is found under § 2504(b) of this title to lack capacity to do so and, if the individual objects to the finding, the finding is confirmed under § 2505(d)(4) of this title.

(3) The individual created an advance mental health-care directive that includes the provision under § 2509(d) of this title and the individual is experiencing the psychiatric or psychological event specified in the directive.

(b) Revocation under subsection (a) of this section may be by any act of the individual that clearly indicates that the individual intends to revoke the appointment, designation, or instruction, including an oral statement to a health-care professional.

(c) Except as provided in § 2510 of this title, an advance health-care directive of an individual that conflicts with another advance health-care directive of the individual revokes the earlier directive to the extent of the conflict.

(d) Unless otherwise provided in an individual's advance health-care directive appointing an agent, the appointment of a spouse or domestic partner of an individual as agent for the individual is revoked if any of the following:

(1) A petition for annulment, divorce, dissolution of marriage, legal separation, or termination has been filed and not dismissed or withdrawn.

(2) A decree of annulment, divorce, dissolution of marriage, legal separation, or termination has been issued.

(3) The individual and the spouse or domestic partner have agreed in a record to a legal separation.

(4) The spouse or domestic partner has deserted the individual for more than 1 year.

§ 2516. Validity of advance health-care directive; conflict with other law.

(a) An advance health-care directive created outside this State is valid if it complies with either of the following:

(1) The law of the state specified in the directive or, if a state is not specified, the state in which the individual created the directive.

(2) This chapter.

(b) A person may assume without inquiry that an advance health-care directive is genuine, valid, and still in effect, and may implement and rely on it, unless the person has good cause to believe the directive is invalid or has been revoked.

(c) An advance health-care directive, revocation of a directive, or a signature on a directive or revocation may not be denied legal effect or enforceability solely because it is in electronic form.

(d) Evidence relating to an advance health-care directive, revocation of a directive, or a signature on a directive or revocation may not be excluded in a proceeding solely because the evidence is in electronic form.

(e) This chapter does not affect the validity of an electronic record or signature that is valid under Chapter 12A of Title 6.

(f) If this chapter conflicts with other law of this State relating to the creation, execution, implementation, or revocation of an advance health-care directive, this chapter prevails.

§ 2517. Duties of agent and default surrogate.

(a) An agent or default surrogate has a fiduciary duty to the individual for whom the agent or default surrogate is acting when exercising or purporting to exercise a power under § 2518 of this title.

(b) An agent or default surrogate shall make a health-care decision in accordance with the direction of the individual in an advance health-care directive and other goals, preferences, and wishes of the individual to the extent known or reasonably ascertainable by the agent or default surrogate.

(c) If there is not a direction in an advance health-care directive and the goals, preferences, and wishes of the individual regarding a health-care decision are not known or reasonably ascertainable by the agent or default surrogate, the agent or default surrogate shall make the decision in accordance with the agent's or default surrogate's determination of the individual's best interest.

(d) In determining the individual's best interest under subsection (c) of this section, the agent or default surrogate shall do all of the following:

(1) Give primary consideration to the individual's contemporaneous communications, including verbal and nonverbal expressions.

(2) Consider the individual's values to the extent known or reasonably ascertainable by the agent or default surrogate.

(3) Consider the risks and benefits of the potential health-care decision.

(e) As soon as reasonably feasible, an agent or default surrogate who is informed of a revocation of an advance health-care directive or disqualification of the agent or default surrogate shall communicate the revocation or disqualification to a responsible health-care professional.

§ 2518. Powers of agent and default surrogate.

(a) Except as provided in subsection (c) of this section, the power of an agent or default surrogate commences when the individual is found under § 2504(b) of this title or by a court to lack capacity to make a health-care decision. The power ceases if the individual later is found to have capacity to make a health-care decision, or the individual objects under § 2505(c) of this title to the finding of lack of capacity under § 2504(b) of this title. The power resumes if both of the following:

(1) The power ceased because the individual objected under § 2505(c) of this title.

(2) The finding of lack of capacity is confirmed under § 2505(d)(4) of this title or a court finds that the individual lacks capacity to make a health-care decision.

(b) An agent or default surrogate may request, receive, examine, copy, and consent to the disclosure of medical and other health-care information about the individual if the individual would have the right to request, receive, examine, copy, or consent to the disclosure of the information.

(c) A power of attorney for health care may provide that the power of an agent under subsection (b) of this section commences on appointment.

(d)(1) If no other person is authorized to do so, an agent or default surrogate may do all of the following on behalf of the individual:

a. Apply for public or private health insurance and benefits.

b. File a claim under the individual's insurance and benefits.

c. Appeal a claim under the individual's insurance and benefits, including an internal, administrative, or judicial appeal.

(2) An agent or default surrogate who may act under paragraph (d)(1) of this section does not, solely by reason of the power, have a duty to act under paragraph (d)(1) of this section.

(e) An agent or default surrogate may not consent to voluntary admission of the individual to a facility for mental health treatment unless both of the following:

(1) Voluntary admission is specifically authorized by the individual in an advance health-care directive in a record.

(2) The admission is for no more than the maximum of the number of days specified in the directive or 72 hours, whichever is less.

(f) Except as provided in subsection (g) of this section, an agent or default surrogate may not consent to placement of the individual in a nursing home if the placement is intended to be for more than 100 days if any of the following:

(1) An alternative living arrangement is reasonably feasible.

(2) The individual objects to the placement.

(3) The individual is not terminally ill.

(g) If specifically authorized by the individual in an advance health-care directive in a record, an agent or default surrogate may consent to placement of the individual in a nursing home for more than 100 days even if any of the following:

(1) An alternative living arrangement is reasonably feasible.

(2) The individual objects to the placement.

(3) The individual is not terminally ill.

§ 2519. Limitation on powers.

(a) If an individual has a long-term disability requiring routine treatment by artificial nutrition, hydration, or mechanical ventilation and a history of using the treatment without objection, an agent or default surrogate may not consent to withhold or withdraw the treatment unless any of the following:

(1) The treatment is not necessary to sustain the individual's life or maintain the individual's well-being.

(2) The individual has expressly authorized the withholding or withdrawal in a health-care instruction that has not been revoked.

(3) The individual has experienced a major reduction in health or functional ability from which the individual is not expected to recover, even with other appropriate treatment, and the individual has not done either of the following:

a. Given a direction inconsistent with withholding or withdrawal.

b. Communicated by verbal or nonverbal expression a desire for artificial nutrition, hydration, or mechanical ventilation.

(b) A default surrogate may not make a health-care decision if, under other law of this State, the decision either:

(1) May not be made by a guardian.

(2) May be made by a guardian only if the court appointing the guardian specifically authorizes the guardian to make the decision.

§ 2520. Co-agents; alternate agent.

(a) An individual in a power of attorney for health care may appoint multiple individuals as co-agents. Unless the power of attorney provides otherwise, each co-agent may exercise independent authority.

(b) An individual in a power of attorney for health care may appoint one or more individuals to act as alternate agents if a predecessor agent resigns, dies, becomes disqualified, is not reasonably available, or otherwise is unwilling or unable to act as agent.

(c) Unless the power of attorney provides otherwise, an alternate agent has the same authority as the original agent in either of the following:

(1) At any time the original agent is not reasonably available or is otherwise unwilling or unable to act, for the duration of the unavailability, unwillingness, or inability to act.

(2) If the original agent and all other predecessor agents have resigned or died or are disqualified from acting as agent.

§ 2521. Duties of health-care professional, responsible health-care professional, and health-care institution.

(a) A responsible health-care professional who is aware that an individual has been found to lack capacity to make a decision shall make a reasonable effort to determine if the individual has a surrogate.

(b) If possible before implementing a health-care decision made by a surrogate, a responsible health-care professional as soon as reasonably feasible shall communicate to the individual the decision made and the identity of the surrogate.

(c) A responsible health-care professional who makes or is informed of a finding that an individual lacks capacity to make a health-care decision or no longer lacks capacity, or that other circumstances exist that affect a health-care instruction or the authority of a surrogate, as soon as reasonably feasible, shall do both of the following:

(1) Document the finding or circumstance in the individual's medical record.

(2) If possible, communicate to the individual and the individual's surrogate the finding or circumstance and that the individual may object under § 2505(c) of this title to the finding under § 2504(b) of this title.

(d) A responsible health-care professional who is informed that an individual has created or revoked an advance health-care directive, or that a surrogate for an individual has been appointed, designated, or disqualified, shall do both of the following:

(1) Document the information as soon as reasonably feasible in the individual's medical record.

(2) If evidence of the directive, revocation, appointment, designation, or disqualification is in a record, request a copy and, on receipt, cause the copy to be included in the individual's medical record.

(e) Except as provided in subsections (f) and (g) of this section, a health-care professional or health-care institution providing health care to an individual shall comply with all of the following:

(1) A health-care instruction given by the individual regarding the individual's health care.

(2) A reasonable interpretation by the individual's surrogate of an instruction given by the individual.

(3) A health-care decision for the individual made by the individual's surrogate in accordance with §§ 2517 and 2518 of this title to the same extent as if the decision had been made by the individual at a time when the individual had capacity.

(f) A health-care professional or a health-care institution may refuse to provide health care consistent with a health-care instruction or health-care decision if any of the following:

(1) The instruction or decision is contrary to a policy of the health-care institution providing care to the individual that is based expressly on reasons of conscience and the policy was timely communicated to the individual or to the individual's surrogate.

(2) The care would require health care that is not available to the professional or institution.

(3) Compliance with the instruction or decision would require the professional to provide care that is contrary to the professional's religious belief or moral conviction if other law permits the professional to refuse to provide care for that reason.

(4) Compliance with the instruction or decision would require the professional or institution to provide care that is contrary to generally accepted health-care standards applicable to the professional or institution.

(5) Compliance with the instruction or decision would violate a court order or other law.

(g) A health-care professional or health-care institution that refuses to provide care under subsection (f) of this section shall do all of the following:

(1) As soon as reasonably feasible, inform the individual, if possible, and the individual's surrogate of the refusal.

(2) Immediately make a reasonable effort to transfer the individual to another health-care professional or health-care institution that is willing to comply with the instruction or decision.

(3) If care is refused under paragraphs (f)(1) or (f)(2) of this section, provide life-sustaining care and care needed to keep or make the individual comfortable, consistent with accepted medical standards to the extent feasible, until a transfer is made.

(4) If care is refused under paragraphs (f)(3) through (f)(5) of this section, provide life-sustaining care and care needed to keep or make the individual comfortable, consistent with accepted medical standards, until a transfer is made or, if the professional or institution reasonably believes that a transfer cannot be made, for at least 15 days after the refusal.

§ 2522. Decision by Guardian.

(a) A guardian may refuse to comply with a provision of or revoke the individual's advance health-care directive only if the court appointing the guardian issues an order expressly permitting the acts taken by the guardian.

(b) Unless a court orders otherwise, a health-care decision made by an agent appointed by an individual subject to guardianship prevails over a decision of the guardian appointed for the individual.

§ 2523. Immunity.

(a) A health-care professional or health-care institution acting in good faith is not subject to civil or criminal liability or to discipline for unprofessional conduct for any of the following:

(1) Complying with a health-care decision made for an individual by another person if compliance is based on a reasonable belief that the person has authority to make the decision, including a decision to withhold or withdraw health care.

(2) Refusing to comply with a health-care decision made for an individual by another person if the refusal is based on a reasonable belief that the person lacked authority or capacity to make the decision.

(3) Complying with an advance health-care directive based on a reasonable belief that the directive is valid.

(4) Refusing to comply with an advance health-care directive based on a reasonable belief that the directive is not valid, including a reasonable belief that the directive was not made by the individual or, after its creation, was substantively altered by a person other than the individual who created it.

(5) Determining that an individual who otherwise might be authorized to act as an agent or default surrogate is not reasonably available.

(6) Complying with an individual's direction under § 2509(d) of this title.

(b) An agent, default surrogate, or individual with a reasonable belief that the individual is an agent or a default surrogate is not subject to civil or criminal liability or to discipline for unprofessional conduct for a health-care decision made in a good faith effort to comply with § 2517 of this title.

§ 2524. Prohibited conduct; damages.

(a) A person may not do any of the following:

(1) Intentionally falsify, in whole or in part, an advance health-care directive.

(2) Intentionally conceal, deface, obliterate, or delete the directive or a revocation of the directive without consent of the individual who created or revoked the directive for the purpose of frustrating the intent of the individual who created an advance health-care directive or with knowledge that doing so is likely to frustrate the intent.

(3) Intentionally withhold knowledge of the existence or revocation of the directive from a responsible health-care professional or health-care institution providing health care to the individual who created or revoked the directive for the purpose of frustrating the intent of the individual who created an advance health-care directive or with knowledge that doing so is likely to frustrate the intent.

(4) Coerce or fraudulently induce an individual to create, revoke, or refrain from creating or revoking an advance health-care directive or a part of a directive.

(5) Require or prohibit the creation or revocation of an advance health-care directive as a condition for providing health care.

(b) An individual who is the subject of conduct prohibited under subsection (a) of this section, or the individual's estate, has a cause of action against a person that violates subsection (a) of this section for statutory damages of $25,000 or actual damages resulting from the violation, whichever is greater.

(c) Subject to subsection (d) of this section, an individual who makes a health-care instruction, or the individual's estate, has a cause of action against a health-care professional or health-care institution that intentionally violates § 2521 of this title for statutory damages of $50,000 or actual damages resulting from the violation, whichever is greater.

(d) A health-care professional who is an advanced emergency medical technician, emergency medical technician, paramedic, or other first responder authorized under Chapter 97 of this title is not liable under subsection (c) of this section for a violation of § 2521(e) of this title if all of the following:

(1) The violation occurs in the course of providing care to an individual experiencing a health condition for which the professional reasonably believes the care was appropriate to avoid imminent loss of life or serious harm to the individual.

(2) The failure to comply is consistent with accepted standards of the profession of the professional.

(3) The provision of care does not begin in a health-care institution in which the individual resides or was receiving care.

(e) In an action under this section, a prevailing plaintiff may recover reasonable attorney's fees, court costs, and other reasonable litigation expenses.

(f) A cause of action or remedy under this section is in addition to any cause of action or remedy under other law.

§ 2525. Effect of copy; certified physical copy.

(a) A physical or electronic copy of an advance health-care directive, revocation of an advance health-care directive, or appointment, designation, or disqualification of a surrogate has the same effect as the original.

(b) An individual may create a certified physical copy of an advance health-care directive or revocation of an advance health-care directive that is in electronic form by affirming under penalty of perjury that the physical copy is a complete and accurate copy of the directive or revocation.

§ 2526. Judicial relief.

(a) On petition of an individual, the individual's surrogate, a health-care professional or health-care institution providing health care to the individual, or a person interested in the welfare of the individual, the court may:

(1) Enjoin implementation of a health-care decision made by an agent or default surrogate on behalf of the individual, on a finding that the decision is inconsistent with §§ 2517 and 2518 of this title.

(2) Enjoin an agent from making a health-care decision for the individual, on a finding that the individual's appointment of the agent has been revoked or if any of the following apply:

a. The agent is disqualified under § 2508(b) of this title.

b. The agent is unwilling or unable to comply with § 2517 of this title.

c. The agent poses a danger to the individual's well-being.

d. The agent has a pending Protection From Abuse petition filed against them by the individual,

e. The individual has a Protection From Abuse order against the agent.

f. The agent is the subject of a civil or criminal order prohibiting or limiting contact with the individual.

(3) Enjoin another individual from acting as a default surrogate, on a finding that § 2512 of this title was not complied with or if any of the following apply:

a. The other individual is disqualified under § 2514 of this title.

b. The other individual is unwilling or unable to comply with § 2517 of this title.

c. The other individual poses a danger to the first individual's well-being.

d. The other individual has a pending Protection From Abuse petition filed against them by the individual.

e. The individual has a Protection From Abuse order against the other individual.

f. The other individual is subject to a civil or criminal order prohibiting contact with the individual.

(4) Order implementation of a health-care decision made either:

a. By and for the individual.

b. By an agent or default surrogate who is acting in compliance with the powers and duties of the agent or default surrogate.

(b) In this chapter, advocacy for the withholding or withdrawal of health care or mental health care from an individual is not itself evidence that an agent or default surrogate, or a potential agent or default surrogate, poses a danger to the individual's well-being.

(c) A proceeding under this section is governed by the rules of the Court of Chancery.

§ 2527. Construction.

(a) This chapter does not authorize mercy killing, assisted suicide, or euthanasia.

(b) This chapter does not affect other law of this state governing treatment for mental illness of an individual involuntarily committed to a designated psychiatric treatment facility or hospital under Chapter 50 of this title.

(c) Death of an individual caused by withholding or withdrawing health care in accordance with this chapter does not constitute a suicide or homicide or legally impair or invalidate a policy of insurance or an annuity providing a death benefit, notwithstanding any term of the policy or annuity.

(d) This chapter does not create a presumption concerning the intention of an individual who has not created an advance health-care directive.

(e) An advance health-care directive created before, on, or after [1 year after the effective date of this Act] must be interpreted in accordance with other law of this State, excluding the State's choice-of-law rules, at the time the directive is implemented.

§ 2528. Uniformity of application and construction.

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

§ 2529. Savings provisions.

(a) An advance health-care directive created before [1 year after the effective date of this Act] is valid if it complies with this chapter or complied at the time of creation with the law of the state in which it was created.

(b) This chapter does not affect the validity or effect of an act done before [1 year after the effective date of this Act].

(c) An individual who assumed authority to act as default surrogate before [1 year after the effective date of this Act] may continue to act as default surrogate until the individual for whom the default surrogate is acting has capacity or the default surrogate is disqualified, whichever occurs first.

§ 2530. Transitional provision.

This chapter applies to an advance health-care directive created before, on, or after [1 year after the effective date of this Act].

Section 2. Amend Part II, Title 16 of the Delaware Code by creating a new Chapter 25B by making deletions as shown by strike through and insertions as shown by underline as follows:

Chapter 25B. Supplement to the Health-Care Decisions Act.

§ 2501B. Definitions.

(a) For purposes of this chapter, the definitions in § 2502 of this title apply.

(b) For purposes of this chapter:

(1) "Acute care" means inpatient health care.

(2) "Certified peer recovery specialist" means as defined in § 10201A of this title.

(3) "Protection and advocacy agency" means the Community Legal Aid Society, Inc., or the successor agency that is designated as the state protection and advocacy system under the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801 et seq.

§ 2502B. Health-care institution authorization to petition for guardianship for an individual to whom the institution is providing care.

(a) A health-care institution may file a petition for the appointment of a guardian for an individual to whom the institution is providing acute care if all of the following:

(1) The health-care institution reasonably believes that there is a basis for appointment of a guardian under § 3901(a)(2) of Title 12.

(2) A surrogate is not reasonably available to make decisions for the individual.

(3) The health-care institution reasonably believes that no less restrictive alternative would meet the individual's needs.

(4) The health-care institution complies with the notice requirements in this section.

(b) A health-care institution shall, no later than 5 business days of making the determinations under paragraphs (a)(1) through (a)(3) of this section, provide written notice stating all of the following:

(1) The health-care institution believes that there is a basis for appointment of a guardian for the individual under § 3901(a)(2) of Title 12.

(2) If a surrogate who is willing and able to make health-care decisions for the individual is not found, then the health-care institution may file a petition for the appointment of a guardian for the individual.

(3) The health-care institution will wait at least 10 business days from postmark date of this notice before filing the petition, unless needed earlier to avoid imminent loss of life or serious harm to the individual.

(c) The notice under subsection (b) of this section must be sent to all of following:

(1) The individual.

(2) A reasonably available individual who could serve as a default surrogate under § 2512 of this title.

(d) A health-care institution may file a petition for the appointment of a guardian for the individual beginning 11 business days from postmark date on the notice under subsection (b) of this section, unless needed earlier to avoid imminent loss of life or serious harm to the individual.

§ 2503B. Advance mental health-care directive awareness.

(a) A health-care institution providing mental health care to an individual shall do all of the following:

(1) Determine whether the individual has an advance mental health-care directive.

(2) Make informational materials about advance mental health-care directives available to the individual.

(3) Prompt the individual to review any existing advance mental health-care directive or to consider creating an advance mental health-care directive.

(4) Assist individuals who express an interest in discussing or creating an advance mental health-care directive by helping them create the directive or by offering resources about how a directive may be created.

(b) Contingent on the provision of funds from the Behavioral Health Consortium, the protection and advocacy agency shall offer training to health-care institutions, health-care professionals, and certified peer recovery specialists about advance mental health-care directives.

(c) As provided in subsection (d) of this section, a health-care institution, health-care professional, and certified peer recovery specialist may assist an individual with creating an advance mental health-care directive.

(d) A health-care institution, health-care professional, or certified peer recovery specialist must attend the training under subsection (b) of this section before assisting an individual with creating an advance mental health-care directive.

(e) If provided in compliance with this section, any assistance that a health-care institution, health-care professional, or certified peer recovery specialist provide an individual with creating an advance mental health-care directive may not be deemed the practice of law.

Section 3. Amend § 3982, Title 12 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3982. Definitions.

For the purposes of this chapter:

(4) The term “last resort’' includes any of the following:

a. Circumstances in which there is no other suitable person ~~related to the individual~~ willing or able to serve as surrogate decision ~~maker~~ maker, guardian, representative payee, or VA fiduciary.

Section 4. Amend § 1014, Title 16 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 1014. Hospital visitation policy.

(b) The duties and rights conferred by this section are in addition to, and not in derogation of, duties and rights otherwise conferred by law, including §§ ~~2508~~ 2521 and 5161 of this title.

Section 5. Amend § 2710, Title 16 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2710. Definitions.

As used in this subchapter:

(2) “Advance health-care directive” means a directive under ~~§ 2503~~ §§ 2507 or 2508 of this title.

Section 6. Amend §3001J, Title 16 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3001J. Definitions.

As used in this chapter:

(1) “Aftercare” means assistance provided by a lay caregiver to a patient in a residence after the patient’s discharge from a hospital that does not require the lay caregiver to be a ~~health-care provider.~~ health-care professional.

(3) ~~“Health-care provider”~~ “Health-care professional” means as defined in § ~~2501~~ 2502 of this title.

Section 7. Amend §3004J, Title 16 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3004J. Training of a lay caregiver.

(e) (1) A discharge plan may include all of the following:

a. Competent training on how to provide aftercare.

b. Medication management guidelines.

c. Aftercare guidelines.

d. Identification of the aftercare tasks that a discharging ~~health care provider~~ health-care professional specifies.

Section 8. Amend § 5183, Title 16 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 5183. Devolution of rights.

Consistent with the nature of each right in § 5182 of this title, the entitlement may devolve to the patient representative. Authority to act on behalf of patients who are minors may be exercised by the minor's parent, guardian, or custodian. Authority to act on behalf of an adult patient may be exercised by a guardian acting within the scope of appointment or through an agent acting pursuant to a valid power of attorney, health-care directive, or similar instrument. In the absence of such authorized representative, if the patient's physician determines that the patient is incapable of exercising rights under this subchapter due to mental or physical incapacity, authority to exercise ~~such rights shall devolve to the patient's next of kin.~~ rights under this subchapter will be determined under § 2512 of this title.

Section 9. Amend § 5530, Title 16 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 5530. Definitions.

(a) "Alternative decision maker" is a person identified to make decisions for an individual in that individual's best interest. In the absence of an assigned legal guardian of person or applicable ~~advanced~~ advance health-care directive, power of attorney, or similar legal instrument, a default surrogate may be determined under § 2512 of this title. ~~any member of the following classes of the patient's family who is reasonably available, in the descending order of priority, may act as alternative decision maker and shall be recognized as such by the supervising health-care provider:~~

~~(1) The spouse;~~

~~(2) An adult child;~~

~~(3) A parent;~~

~~(4) An adult brother or sister;~~

~~(5) An adult grandchild;~~

~~(6) An adult aunt or uncle;~~

~~(7) An adult niece or nephew; or~~

~~(8) A grandparent.~~

Section 10. Amend § 9403A, Title 16 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 9403A. Definitions.

For the purposes of this chapter:

(4) "Health-care institution" means as "health-care institution" ~~as~~ is defined in § ~~2501~~ 2502 of this title.

(5) "Health-care provider" means ~~"health-care provider" as~~ as "health-care professional" is defined in § ~~2501~~ 2502 of this title.

Section 11. Amend § 9706, Title 16 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 9706. Office of Medical Services – Additional functions.

(h) The Director of Public Health shall have the authority to promulgate rules for EMS provider recognition and compliance with an advance health-care directive that has become effective pursuant to § ~~2503(c)~~ 2518(a) of this title, or Delaware Medical Orders for Scope of Treatment and those from other states that have become effective pursuant to Chapter 25A of this title, and shall seek input and review from the Board of Medical Licensure and Discipline, the Delaware EMS Oversight Council and the Delaware State Fire Prevention Commission. For purposes of this subsection, "EMS provider" shall mean providers certified by the Delaware State Fire Commission or the Board of Medical Licensure and Discipline. EMS providers acting in accordance with the regulations promulgated hereunder shall be immune from criminal or civil liability pursuant to ~~§ 2510~~ §§ 2523 and 2524(d) of this title.

Section 12. This Act is effective immediately and is to be implemented 1 year from the date of the Act's enactment.

SYNOPSIS

This Act adopts the Uniform Health-Care Decisions Act of 2023 (UHCDA 2023) to supersede the Uniform Health-Care Decisions Act of 1993, which Delaware enacted in 1996. The UHCDA 2023 was authored by the Uniform Law Commission (ULC) and was developed in a multiyear collaborative and non-partisan process to modernize and expand on the 1993 version of the act.

The UHCDA 2023 maintains processes to address how health-care decisions can be made by or on behalf of individuals who lack capacity, including:

(1) Allowing individuals to appoint agents to make health-care decisions for them should they become unable to make those decisions for themselves.

(2) Allowing individuals to provide their health-care professionals and agents with instructions about their values and priorities regarding their health care and to indicate medical treatment they do or do not wish to receive.

(3) Authorizing certain people to make health-care decisions for individuals incapable of making their own decisions, but who have not appointed agents.

(4) Setting forth agent, default surrogate, and health-care professional rights and duties.

The UHCDA 2023 reflects substantial changes in how health care is delivered, increases in non-traditional familial relationships and living arrangements, the proliferation of the use of electronic documents, the growing use of separate advance directives exclusively for mental health care, and other recent developments. Some updates to the Act include:

(1) Removal of administrative barriers that make the creation of an advance health-care directive more difficult.

(2) Addition of provisions to guide determinations of incapacity, which is important because an agent's or default surrogate's (surrogate's) authority to make health-care decisions for a patient typically commences when the patient lacks capacity to make decisions. The Act modernizes the definition of capacity so that it accounts for the functional abilities of an individual and clarifies that the individual may lack capacity to make one decision but retains capacity to make other decisions.

(3) Authorizing the use of advance directives exclusively for mental health care.

(4) Modernizing default surrogate provisions that allow family members and certain other people close to a patient to make decisions in the event the patient lacks capacity and has not appointed a health-care agent. The new default surrogate provisions update the priority list in the 1993 Act to reflect a broader array of relationships and family structures. They also provide additional options to address disagreements among default surrogates who have equal priority.

(5) Clarifying the duties and powers of surrogates. For example, to reduce the likelihood that an individual's health-care needs will go unmet due to financial barriers, the Act authorizes a surrogate to apply for health insurance for a patient who does not have another fiduciary authorized to do so.

(6) Modernizing the optional model form to be readily understandable and accessible to diverse populations. The form gives individuals the opportunity to readily share information about their values and goals for medical care. Thus, it addresses a common concern raised by health-care professionals in the context of advance planning: that instructions included in advance directives often focus exclusively on preferences for particular treatments, and do not provide health-care professionals or surrogates with the type of information about patients' goals and values that could be used to make value-congruent decisions when novel or unexpected situations arise. The form addresses these concerns by providing options for individuals to indicate goals and values, in addition to specific treatment preferences.

This Act also adopts some of the optional provisions suggested by the ULC, including that an agent or surrogate has limited ability to consent to the long-term placement of an individual in a nursing home without express authorization. Specifically, without express authorization, the agent or surrogate may not consent to the placement for more than 100 days over the individual's contemporaneous objection unless (1) no alternative living arrangement is reasonably feasible or (2) the individual is terminally ill. The ULC suggested 100 days in recognition that the federal Medicare program covers up to 100 days of nursing home care for qualified beneficiaries.

This Act does not authorize mercy killing, assisted suicide, or euthanasia.

In addition to style changes throughout, this Act makes some modifications to the UHCDA 2023 that are consistent with Act and should not disrupt uniform interpretation. These modifications include:

(1) Revising language to conform to Delaware court practices.

(2) Providing surrogates with the authority to file insurance or benefit claims on behalf of the individual and to appeal such outcomes, in addition to the UHCDA 2023 allowance for a surrogate to apply for insurance or benefits on behalf of the individual. As under the UHCDA 2023, a surrogate does not have the duty to perform these actions and may only do so if no other fiduciary is authorized to do so.

(3) Creating an additional disqualification that disallows a potential surrogate from serving if the individual has a pending Protection From Abuse petition against the potential surrogate, the individual has a Protection From Abuse order against the potential surrogate, or the potential surrogate is the subject of a civil or criminal order prohibiting or limiting contact with the individual.

Section 2 of this Act adds a new Chapter 25B to the Delaware Code. Chapter 25B will contain Delaware-specific supplements to the UHCDA 2023. These Delaware-specific additions are being placed within their own chapter to promote uniform interpretation of the UHCDA 2023. Chapter 25B includes § 2502B, which relates to health-care institution authorization to petition for guardianship for an individual to whom the institution is providing care. Section 2502B reinforces the work of the Non-Acute Medical Guardianship Task Force, created by Senate Concurrent Resolution No. 30 by the 150th General Assembly. That task force's work resulted in the current § 2519 of Title 16, which offers a process and timeline whereby health-care institutions can take steps to help obtain a guardianship for patients who no longer require acute care and can be transferred to another type of health-care setting. While § 2502B retains the ability for a health-care institution to address the discharge of long-term stay patients without an authorized decisionmaker, it modifies the powers in the current § 2519 by doing all of the following:

(1) Allowing health-care institutions to petition of the appointment of a guardian in instances beyond where an individual no longer needs acute care.

(2) Reiterating that the health-care institution may only petition if they believe there is no less restrictive alternative that will meet the individual's needs.

(3) Streamlining notice requirements and changing who must receive these notices so that a health-care institution does not send a notice if there is a reasonably available surrogate. If there is a reasonably available surrogate and there is a dispute between the surrogate and the health-care institution about the treatment or level of care needed by an individual, then the parties should seek judicial relief under § 2526 of the UHCDA 2023 as opposed to using the guardianship process.

The new Chapter 25B also contains a provision to encourage public awareness and use of advance mental health-care directives.

Sections 3 through 11 of this Act update the Delaware Code in light of the adoption of the UHCDA 2023 by updating internal citations, updating terms to match the terms used in the UHCDA 2023, and ensuring a consistent list of default surrogate decisionmakers.

This Act is effective immediately and is to be implemented 1 year from the date of enactment.

Author: Senator Gay