

# Journal of the Senate

THURSDAY, MARCH 19, 2015

Pursuant to the Senate Rules, in the absence of the President, the Senate was called to order by the President *pro tempore*.

## Devotional Exercises

A moment of silence was observed in lieu of devotions.

## Message from the House No. 34

A message was received from the House of Representatives by Ms. Melissa Kucserik, its Second Assistant Clerk, as follows:

Mr. President:

I am directed to inform the Senate that:

The House has passed a House bill of the following titles:

**H. 248.** An act relating to miscellaneous revisions to the air pollution statutes.

In the passage of which the concurrence of the Senate is requested.

The House has considered joint resolutions originating in the Senate of the following titles:

**J.R.S. 18.** Joint resolution providing for a Joint Assembly to vote on the retention of four Superior Judges and two magistrates.

**J.R.S. 19.** Joint resolution relating to weekend adjournment.

And has adopted the same in concurrence.

## Bills Introduced

Senate bills of the following titles were severally introduced, read the first time and referred:

**S. 144.**

By Senator Sears,

An act relating to winter tires on rental cars.

To the Committee on Transportation.

**S. 145.**

By Senators Sears and Champion,

An act relating to expanding eligibility and work incentives for the Medicaid for Working Persons with Disabilities program.

To the Committee on Health & Welfare.

**Bill Referred**

House bill of the following title was read the first time and referred:

**H. 248.**

An act relating to miscellaneous revisions to the air pollution statutes.

To the Committee on Natural Resources & Energy.

**Recess**

The Chair declared a recess until the fall of the gavel.

**Called to Order**

The Senate was called to order by the President *pro tempore*.

**Joint Assembly**

At ten o'clock and thirty minutes in the morning, the hour having arrived for the meeting of the two Houses in Joint Assembly pursuant to:

**J.R.S. 18.** Joint resolution providing for a Joint Assembly to vote on the retention of four Superior Judges and two magistrates.

The Senate repaired to the hall of the House.

Having returned therefrom, at eleven o'clock and fifty-five minutes in the morning, the President assumed the Chair.

**Recess**

On motion of Senator Baruth the Senate recessed until one o'clock in the afternoon.

**Called to Order**

The Senate was called to order by the President *pro tempore*.

**Bill Amended; Third Reading Ordered****S. 44.**

Senator Cummings, for the Committee on Education, to which was referred Senate bill entitled:

An act relating to creating flexibility in early college enrollment numbers.

Reported recommending that the bill ought pass.

Senator Starr, for the Committee on Appropriations, to which the bill was referred, reported recommending that the bill be amended in Sec. 1, 2013 Acts and Resolves No. 77, Section 11 subsection (a) subdivision (3) by adding at the end of the subdivision the following: The Chancellor of the Vermont State Colleges, in consultation with the Presidents of Johnson State College, Lyndon State College, and Castleton State College, shall develop a system to divide the annual number of students enrolled in early college programs fairly among those three colleges and within the total maximum enrollment of 54.

And that when so amended the bill ought to pass.

Thereupon, the bill was read the second time by title only pursuant to Rule 43, the recommendation of amendment was agreed to, and third reading of the bill was ordered.

### **Consideration Postponed**

#### **S. 62.**

Senator Lyons, for the Committee on Health & Welfare, to which was referred Senate bill entitled:

An act relating to surrogate decision making for do-not-resuscitate orders and clinician orders for life-sustaining treatment.

Reported recommending that the bill be amended by striking out all after the enacting clause and inserting in lieu thereof the following:

Sec. 1. 18 V.S.A. chapter 231 is amended to read:

CHAPTER 231. ADVANCE DIRECTIVES FOR HEALTH CARE AND,  
DISPOSITION OF REMAINS, AND SURROGATE DECISION MAKING

§ 9700. PURPOSE AND POLICY

The ~~state~~ State of Vermont recognizes the fundamental right of an adult to determine the extent of health care the individual will receive, including treatment provided during periods of incapacity and at the end of life. This chapter enables adults to retain control over their own health care through the use of advance directives, including appointment of an agent and directions regarding health care and disposition of remains. During periods of incapacity, the decisions by the agent shall be based on the express instructions, wishes, or beliefs of the individual, to the extent those can be determined. This chapter also allows, in limited circumstances in which a patient without capacity has neither an agent nor a guardian, for a surrogate to provide or withhold consent

on the patient's behalf for a do-not-resuscitate order or clinician order for life-sustaining treatment.

§ 9701. DEFINITIONS

As used in this chapter:

\* \* \*

(17) "Informed consent" means the consent given voluntarily by an individual with capacity, on his or her own behalf or on behalf of another in the role of an agent, guardian, or surrogate, after being fully informed of the nature, benefits, risks, and consequences of the proposed health care, alternative health care, and no health care.

(18) "Interested individual" means:

(A) the principal's or patient's spouse, adult child, parent, adult sibling, adult grandchild, ~~reciprocal beneficiary,~~ or clergy person; or

(B) any adult who has exhibited special care and concern for the principal or patient and who is personally familiar with the principal's or patient's values.

(19) "Life sustaining treatment" means any medical intervention, including nutrition and hydration administered by medical means and antibiotics, which is intended to extend life and without which the principal or patient is likely to die.

\* \* \*

(31) "DNR/COLST" means a do-not-resuscitate order (DNR) or a clinician order for life-sustaining treatment (COLST), or both.

(32) "Surrogate" means an interested individual who provides or withholds, pursuant to subchapter 2 of this chapter, informed consent for a do-not-resuscitate order or a clinician order for life-sustaining treatment.

(33) "Suspend" means to terminate the applicability of all or part of an advance directive for a specific period of time or while a specific condition exists.

~~(32)~~(34) "Patient representative" means the mental health patient representative established by section 7253 of this title.

Subchapter 1. Advance Directives and Disposition of Remains

§ 9702. ADVANCE DIRECTIVE

(a) An adult may do any or all of the following in an advance directive:

\* \* \*

§ 9708. AUTHORITY AND OBLIGATIONS OF HEALTH CARE PROVIDERS, HEALTH CARE FACILITIES, AND RESIDENTIAL CARE FACILITIES REGARDING ~~DO NOT RESUSCITATE DNR ORDERS AND CLINICIAN ORDERS FOR LIFE SUSTAINING TREATMENT~~ COLST

(a) ~~As used in this section, “DNR/COLST” shall mean a do not resuscitate order (“DNR”) and a clinician order for life sustaining treatment (“COLST”) as defined in section 9701 of this title. [Repealed.]~~

\* \* \*

(d) A DNR order must:

- (1) be signed by the patient’s clinician;
- (2) certify that the clinician has consulted, or made an effort to consult, with the patient, and the patient’s agent or guardian, if there is an appointed agent or guardian;

(3) include either:

(A) the name of the patient; agent; guardian, in accordance with 14 V.S.A. § 3075(g); or ~~other individual~~ surrogate giving informed consent for the DNR and the individual’s relationship to the patient; or

(B) certification that the patient’s clinician and one other named clinician have determined that resuscitation would not prevent the imminent death of the patient, should the patient experience cardiopulmonary arrest; and

(4) if the patient is in a health care facility or a residential care facility, certify that the requirements of the facility’s DNR protocol required by section 9709 of this title have been met.

(e) A COLST must:

- (1) be signed by the patient’s clinician; and
- (2) include the name of the patient; agent; guardian, in accordance with 14 V.S.A. § 3075(g); or ~~other individual~~ surrogate giving informed consent for the COLST and the individual’s relationship to the patient.

(f) ~~The Department of Health shall adopt by rule on or before July 1, 2016, criteria for individuals who are not the patient, agent, or guardian, but who are giving informed consent for a DNR/COLST order. The rules shall include the following:~~

~~(1) other individuals permitted to give informed consent for a DNR/COLST order who shall be a family member of the patient or a person with a known close relationship to the patient; and~~

~~(2) parameters for how decisions should be made, which shall include at a minimum the protection of a patient's own wishes in the same manner as in section 9711 of this title. [Repealed.]~~

(g) A patient's clinician issuing a DNR/COLST order shall:

(1) place a copy of the completed DNR/COLST order in the patient's medical record; and

(2) provide instructions to the patient as to the appropriate means of displaying the DNR/COLST order.

(h) A clinician who issues a DNR order shall authorize issuance of a DNR identification to the patient. Uniform minimum requirements for DNR identification shall be determined ~~by rule~~ by the Department of Health by rule no later than ~~July 1, 2014~~ January 1, 2016.

\* \* \*

#### § 9713. IMMUNITY

(a) No individual acting as an agent ~~or~~ guardian, or surrogate shall be subjected to criminal or civil liability for making a decision in good faith pursuant to the terms of an advance directive, or DNR order, or COLST order and the provisions of this chapter.

(b)(1) No health care provider, health care facility, residential care facility, or any other person acting for or under such person's control shall, if the provider or facility has complied with the provisions of this chapter, be subject to civil or criminal liability for:

(A) providing or withholding treatment or services in good faith pursuant to the direction of a principal or patient, the provisions of an advance directive, a DNR order, a COLST order, a DNR identification, the consent of a principal or patient with capacity or of the principal's or patient's agent ~~or~~ guardian, or surrogate, or a decision or objection of a principal or patient; or

(B) relying in good faith on a suspended or revoked advance directive, suspended or revoked DNR order, or suspended or revoked COLST order, unless the provider or facility knew or should have known of the suspension, or revocation.

(2) ~~Not~~ A funeral director, crematory operator, cemetery official, procurement organization, or any other person acting for or under such person's control, shall, if the director, operator, official, or organization has complied with the provisions of this chapter, not be subject to civil or criminal liability for providing or withholding its services in good faith pursuant to the

provisions of an advance directive, whether or not the advance directive has been suspended or revoked.

(3) Nothing in this subsection shall be construed to establish immunity for the failure to follow standards of professional conduct and to exercise due care in the provision of services.

(c) No employee shall be subjected to an adverse employment decision or evaluation for:

(1) ~~providing~~ Providing or withholding treatment or services in good faith pursuant to the direction of a principal or patient, the provisions of an advance directive, a DNR order, a COLST order, a DNR identification, the consent of the principal or patient with capacity or principal's or patient's agent ~~or~~, guardian, ~~or surrogate~~, a decision or objection of a principal or patient, or the provisions of this chapter. This subdivision shall not be construed to establish a defense for the failure to follow standards of professional conduct and to exercise due care in the provision of services;

(2) ~~relying~~ Relying on an amended, suspended, or revoked advance directive, unless the employee knew or should have known of the amendment, suspension, or revocation; ~~or~~.

(3) ~~providing~~ Providing notice to the employer of a moral or other conflict pursuant to subdivision 9707(b)(3) of this title, so long as the employee has provided ongoing health care until a new employee or provider has been found to provide the services.

\* \* \*

#### Subchapter 2. Surrogate Consent

#### § 9731. INFORMED CONSENT BY SURROGATE FOR DNR/COLST ORDER

(a)(1) One or more interested individuals may be eligible to act as the surrogate for an adult without capacity in order to provide or withhold informed consent for a do-not-resuscitate order or clinician order for life-sustaining treatment pursuant to this subchapter. Only one surrogate may act at a time.

(2)(A) A patient's health care provider shall not be considered an interested individual and shall not serve as a patient's surrogate to provide or withhold informed consent for a DNR/COLST order pursuant to this chapter unless related to the patient by blood, marriage, civil union, or adoption.

(B) The owner, operator, employee, agent, or contractor of a residential care facility, health care facility, or correctional facility in which the

patient resides at the time the DNR/COLST order is written shall not be considered an interested individual and shall not act as the patient's surrogate to provide or withhold consent for a DNR/COLST order pursuant to this chapter unless related to the patient by blood, marriage, civil union, or adoption.

(b) A surrogate may provide or withhold informed consent only if all of the following conditions are met:

(1) the patient's clinician determines that the patient lacks capacity to provide informed consent;

(2) the patient has not appointed an agent through an advance directive;

(3) the patient has not indicated in an advance directive that the interested individual or individuals seeking to serve as surrogate should not be consulted on health care decisions or otherwise provided instructions in an advance directive contrary to allowing such individual or individuals to serve as surrogate;

(4) the patient does not have a guardian who is authorized to make health care decisions; and

(5) the patient does not object to the surrogate providing or withholding consent for a DNR/COLST order, even if the patient lacks capacity.

(c)(1) A surrogate shall be an interested individual who is designated by the patient by personally informing the patient's clinician. If the patient designates a surrogate to the clinician orally, the clinician shall document the designation in the patient's medical record at the time the designation is made.

(2) If the patient has not designated a surrogate pursuant to subdivision (1) of this subsection, or if the surrogate designated by the patient is not reasonably available or is unwilling to serve, then a surrogate shall be an interested individual who is:

(A) willing to provide or withhold informed consent for a DNR/COLST order for the patient in accordance with the patient's wishes and values, if known; and

(B) willing and available to consult with the patient's clinician.

(3) Notwithstanding the provisions of subdivisions (1) and (2) of this subsection, an individual shall not serve as a surrogate over the patient's objection, even if the patient lacks capacity.

(d) The patient's clinician, health care provider, or residential care provider may rely on the decision of a surrogate identified pursuant to this section as



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long as the clinician or provider documents in the patient's medical record that the surrogate has confirmed that one of the following circumstances applies:

(1)(A) All interested individuals agree on the decision to provide or withhold consent for a DNR/COLST order, in which case they shall designate one surrogate, as well as an alternate, if available, who is authorized to provide or withhold consent and whose name will be identified on the DNR/COLST form and in the patient's medical record.

(B) All interested individuals agree that a specific interested individual may make the decision regarding whether to provide or withhold consent for a DNR/COLST order, in which case they shall designate the individual as the surrogate, as well as an alternate, if available, who is authorized to provide or withhold consent and whose name will be identified on the DNR/COLST form and in the patient's medical record.

(C) The surrogate or alternate, if applicable, is not reasonably available, in which case the clinician shall consult the interested individuals to request designation of another surrogate and alternate.

(2) If at any time the interested individuals are unable to agree on the designation of a surrogate, any interested individual may file a petition for guardianship in the Probate Division of the Superior Court.

(e) A surrogate providing informed consent for a DNR/COLST order shall use substituted judgment consistent with the patient's wishes and values and consistent with the parameters described in subsection 9711(d) of this title. The surrogate shall consult with the patient to the extent possible, and with the patient's clinician and any other appropriate health care providers and shall provide or withhold informed consent for a DNR/COLST order by attempting to determine what the patient would have wanted under the circumstances.

(f) The patient's clinician shall make reasonable efforts to inform the patient of any proposed treatment, or of any proposal to withhold or withdraw treatment, based on the decisions made by the surrogate.

(g) If the patient's clinician determines that the patient no longer lacks capacity and the DNR/COLST order was based on informed consent provided by a surrogate, the clinician shall seek the informed consent of the patient for any DNR/COLST order, which shall supersede the surrogate's consent.

(h) A surrogate shall have the same rights as a patient with capacity would have to the following, to the extent that it is related to providing or withholding informed consent for a DNR/COLST order:

(1) request, receive, review, and copy any oral or written information regarding the patient's physical or mental health, including medical and hospital records;

(2) participate in any meetings, discussions, or conferences concerning health care decisions related to the patient;

(3) consent to the disclosure of health care information; and

(4) file a complaint on behalf of the patient regarding a health care provider, health care facility, or residential care facility.

Sec. 2. 33 V.S.A. § 7306 is amended to read:

§ 7306. RESIDENT'S REPRESENTATIVE

(a) ~~The~~ Except as provided in subsection (b) of this section, the rights and obligations established under this chapter shall devolve to a resident's reciprocal beneficiary, guardian, next of kin, sponsoring agency, or representative payee (except when the facility itself is a representative payee) if the resident:

(1) has been adjudicated incompetent;

(2) has been found by his or her physician to be medically incapable of understanding or exercising the rights granted under this chapter; or

(3) exhibits a communication barrier.

(b) Notwithstanding the provisions of subsection (a) of this section, consent for a do-not-resuscitate order or a clinician order for life-sustaining treatment shall be provided or withheld only by the resident, by the resident's guardian or agent, or by a surrogate designated pursuant to 18 V.S.A. chapter 231, subchapter 2.

(c)(1) A resident's representative identified in subsections (a) and (b) of this section shall make decisions for the resident by attempting to determine what the resident would have wanted under the circumstances. In making the determination, the resident's representative shall consider the following:

(A) the resident's specific instructions or wishes as expressed to a spouse, adult child, parent, adult sibling, adult grandchild, clergy person, health care provider, or any other adult who has exhibited specific care or concern for the resident; and

(B) the representative's knowledge of the resident's personal preferences, values, or religious or moral beliefs.

(2) If the resident's representative cannot determine what the resident would have wanted under the circumstances, the representative shall make a

determination through an assessment of the resident's best interests. When making a decision for the resident on this basis, the representative shall not authorize the provision or withholding of health care on the basis of the resident's economic status or a preexisting, long-term mental or physical disability.

(3) When making a determination under this section, representatives shall not consider their own interests, wishes, values, or beliefs.

(d) Notwithstanding the provisions of subsection (a) of this section, the facility shall make every reasonable effort to communicate the rights and obligations established under this chapter directly to the resident.

### Sec. 3. RULEMAKING

The Department of Disabilities, Aging, and Independent Living shall amend its nursing home rules to comply with 33 V.S.A. § 7306 as amended by this act.

### Sec. 4. EFFECTIVE DATE

This act shall take effect on January 1, 2016.

And that when so amended the bill ought to pass.

Thereupon, the bill was read the second time by title only pursuant to Rule 43, and pending the question, Shall the bill be amended as recommended by the Committee on Health and Welfare?, on motion of Senator Baruth consideration was postponed until tomorrow.

### **Bills Passed**

Senate bills of the following titles were severally read the third time and passed:

**S. 66.** An act relating to persons who are deaf or hard of hearing.

**S. 122.** An act relating to miscellaneous changes to laws related to motor vehicles, motorboats, and other vehicles.

### **Message from the House No. 35**

A message was received from the House of Representatives by Ms. Melissa Kucserik, its Second Assistant Clerk, as follows:

Mr. President:

I am directed to inform the Senate that:

The House has passed House bills of the following titles:

**H. 20.** An act relating to licensed alcohol and drug abuse counselors as participating providers in Medicaid.

**H. 25.** An act relating to natural burial grounds.

**H. 105.** An act relating to disclosure of sexually explicit images without consent.

**H. 128.** An act relating to the use of results-based accountability common language in Vermont law.

**H. 217.** An act relating to potable water or wastewater system permits for a change in use of a building.

**H. 241.** An act relating to rulemaking on emergency involuntary procedures.

**H. 269.** An act relating to the transportation and disposal of excavated development soils legally categorized as solid waste.

**H. 304.** An act relating to making miscellaneous amendments to Vermont's retirement laws.

**H. 306.** An act relating to unemployment compensation.

In the passage of which the concurrence of the Senate is requested.

### **Adjournment**

On motion of Senator Baruth, the Senate adjourned until eleven o'clock and thirty minutes in the morning.