



Senate Health and Welfare Committee: S.62

March 11, 2015 - Testimony

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I. Background

- Vermont is one of only 6 states that do not have a surrogacy statute. Therefore, it is unclear who can make medical decisions for a patient when the patient lacks capacity, has not appointed a health care agent and/or does not have a guardian.
- Presently, the advance directive statute (18 V.S.A §9708) requires the name of the patient, agent, guardian or *other individual* who is giving informed consent for a DNR/COLST order and the relationship of that person to the patient. The law does not define “other individual” nor does it specify criteria for how that person should make the decision to provide or withhold consent for a DNR/COLST order.
- Legislative concern over both *who* is giving consent and *how* that decision is made prompted inclusion of language in Act 60 (2011) - An act relating to hospice and palliative care to address this issue. Act 60 required the Department of Health to adopt rules specifying the criteria for individuals who are not the patient, agent, or guardian but are giving informed consent for a DNR/COLST order. Act 60 also required that uniform minimum requirements for DNR identification be determined by rule by the Department of Health by July 1, 2012.
- During the rule making process it was determined that two statutory issues needed to be addressed before rules could be promulgated related to surrogate consent for DNR/COLST: immunity for surrogates and access to health information. Additionally, it was recommended by the Department of Health and others from the rule making workgroup that conferring such authority to a surrogate is something that perhaps ought not be addressed through rule, but rather, would be better addressed in statute.
- Due to other legislative priorities, the statutory issue of immunity and access to health information were not addressed, nor was DNR identification. As such the rules for DNR/COLST orders were delayed for several years and ultimately withdrawn.

- In 2014, the Vermont legislature passed Act 127 - An act relating to consent for admission to hospice care and DNR/COLST orders. This legislation addressed surrogate decision-making for consent for hospice care. It allows a family member or person with a known close relationship to a patient to elect hospice care on the patient's behalf, if the patient lacks capacity, does not have an agent or guardian, or the agent or guardian is unavailable. Act 127 also required the Department of Health to adopt by rule by no later than July 1, 2016 criteria for individuals who are not the patient, agent or guardian but are giving informed consent for DNR/COLST.

II. S.62 – An act relating to surrogate decision-making for DNR/COLST

- This bill is intended to address the ambiguity surrounding *other individuals* (surrogates) who are giving consent for DNR/COLST orders as well as to address the original concerns about immunity and access to health information for surrogates who are giving consent for DNR/COLST.
- This bill only addresses the question of surrogate consent for DNR/COLST orders and not surrogate consent for any other medical decisions—a recognized limitation.
- The Vermont Ethics Network is the primary resource for the state for information pertaining to medical decision-making. As such, clarity surrounding surrogate decision-making is needed. This bill reflects a good step in that direction. It establishes a process for determining *who* can make these decisions when a patient lacks capacity, has not appointed a health care agent, or does not have a guardian. It prioritizes substituted judgment (when possible) above best interest as the standard for *how* these decisions should be made. It further establishes substituted judgment as the standard for surrogate decision-making across all health care settings. This is consistent with the decision-making standards set forth for both health care agents and guardians.
- While this bill does not provide a process for surrogate decision-making beyond DNR/COLST, the proposed changes to the advance directive statute in S.62 establish a framework for addressing that question should the legislature choose to address this at some point in the future.
- With regard to DNR identification, the Vermont Ethics Network is recommending that the date of July 1, 2014 remain in the statute so that rule making for DNR identification will proceed and further delays avoided.