

1 TO THE HONORABLE SENATE:

2 The Committee on Health and Welfare to which was referred Senate Bill
3 No. 62 entitled “An act relating to surrogate decision making for
4 do-not-resuscitate orders and clinician orders for life-sustaining treatment”
5 respectfully reports that it has considered the same and recommends that the
6 bill be amended by striking out all after the enacting clause and inserting in
7 lieu thereof the following:

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

9 CHAPTER 231. ADVANCE DIRECTIVES FOR
10 HEALTH CARE AND₂ DISPOSITION OF REMAINS,
11 AND SURROGATE DECISION MAKING

12 § 9700. PURPOSE AND POLICY

13 The ~~state~~ State of Vermont recognizes the fundamental right of an adult to
14 determine the extent of health care the individual will receive, including
15 treatment provided during periods of incapacity and at the end of life. This
16 chapter enables adults to retain control over their own health care through the
17 use of advance directives, including appointment of an agent and directions
18 regarding health care and disposition of remains. During periods of incapacity,
19 the decisions by the agent shall be based on the express instructions, wishes, or
20 beliefs of the individual, to the extent those can be determined. This chapter
21 also allows, in limited circumstances in which a patient without capacity has

1 neither an agent nor a guardian, for a surrogate to provide or withhold consent
2 on the patient’s behalf for a do-not-resuscitate order or clinician order for
3 life-sustaining treatment.

4 § 9701. DEFINITIONS

5 As used in this chapter:

6 * * *

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

12 (18) “Interested individual” means:

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

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

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

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(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

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

4 * * *

5 (d) A DNR order must:

6 (1) be signed by the patient’s clinician;

7 (2) certify that the clinician has consulted, or made an effort to consult,
8 with the patient, and the patient’s agent or guardian, if there is an appointed
9 agent or guardian;

10 (3) include either:

11 (A) the name of the patient; agent; guardian, in accordance with
12 14 V.S.A. § 3075(g); or ~~other individual~~ surrogate giving informed consent for
13 the DNR and the individual’s relationship to the patient; or

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

17 (4) if the patient is in a health care facility or a residential care facility,
18 certify that the requirements of the facility’s DNR protocol required by section
19 9709 of this title have been met.

20 (e) A COLST must:

21 (1) be signed by the patient’s clinician; and

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

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

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

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

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

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

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

19 (h) A clinician who issues a DNR order shall authorize issuance of a DNR
20 identification to the patient. Uniform minimum requirements for DNR

1 identification shall be determined ~~by rule~~ by the Department of Health by rule
2 no later than ~~July 1, 2014~~ January 1, 2016.

3 * * *

4 § 9713. IMMUNITY

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

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

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

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

1 (2) ~~No~~ A funeral director, crematory operator, cemetery official,
2 procurement organization, or any other person acting for or under such
3 person's control, shall, if the director, operator, official, or organization has
4 complied with the provisions of this chapter, not be subject to civil or criminal
5 liability for providing or withholding its services in good faith pursuant to the
6 provisions of an advance directive, whether or not the advance directive has
7 been suspended or revoked.

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

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

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

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

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

8 * * *

9 Subchapter 2. Surrogate Consent

10 § 9731. INFORMED CONSENT BY SURROGATE FOR DNR/COLST

11 ORDER

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

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

1 (B) The owner, operator, employee, agent, or contractor of a
2 residential care facility, health care facility, or correctional facility in which the
3 patient resides at the time the DNR/COLST order is written shall not be
4 considered an interested individual and shall not act as the patient’s surrogate
5 to provide or withhold consent for a DNR/COLST order pursuant to this
6 chapter unless related to the patient by blood, marriage, civil union, or
7 adoption.

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

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

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

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

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

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

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

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

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

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

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

16 (d) The patient’s clinician, health care provider, or residential care provider
17 may rely on the decision of a surrogate identified pursuant to this section as
18 long as the clinician or provider documents in the patient’s medical record that
19 the surrogate has confirmed that one of the following circumstances applies:

20 (1)(A) All interested individuals agree on the decision to provide or
21 withhold consent for a DNR/COLST order, in which case they shall designate

1 one surrogate, as well as an alternate, if available, who is authorized to provide
2 or withhold consent and whose name will be identified on the DNR/COLST
3 form and in the patient's medical record.

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

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

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

16 (e) A surrogate providing informed consent for a DNR/COLST order shall
17 use substituted judgment consistent with the patient's wishes and values and
18 consistent with the parameters described in subsection 9711(d) of this title.
19 The surrogate shall consult with the patient to the extent possible, and with the
20 patient's clinician and any other appropriate health care providers and shall

1 provide or withhold informed consent for a DNR/COLST order by attempting
2 to determine what the patient would have wanted under the circumstances.

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

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

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

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

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

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

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

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

1 § 7306. RESIDENT’S REPRESENTATIVE

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

7 (1) has been adjudicated incompetent;

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

10 (3) exhibits a communication barrier.

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

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

20 (A) the resident’s specific instructions or wishes as expressed to a
21 spouse, adult child, parent, adult sibling, adult grandchild, clergy person,

1 health care provider, or any other adult who has exhibited specific care or
2 concern for the resident; and

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

5 (2) If the resident's representative cannot determine what the resident
6 would have wanted under the circumstances, the representative shall make a
7 determination through an assessment of the resident's best interests. When
8 making a decision for the resident on this basis, the representative shall not
9 authorize the provision or withholding of health care on the basis of the
10 resident's economic status or a preexisting, long-term mental or physical
11 disability.

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

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

17 Sec. 3. RULEMAKING

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

21 Sec. 4. EFFECTIVE DATE

1 This act shall take effect on January 1, 2016.

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4 (Committee vote: 5-0-0)

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Senator Lyons

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FOR THE COMMITTEE