

SB 74 - AS AMENDED BY THE HOUSE

04/01/2021 1022s
3Jun2021... 1846h

2021 SESSION

21-0857
08/06

SENATE BILL **74**

AN ACT relative to advance directives for health care decisions.

SPONSORS: Sen. Sherman, Dist 24; Sen. Bradley, Dist 3; Sen. Rosenwald, Dist 13; Sen. Whitley, Dist 15; Sen. Prentiss, Dist 5; Sen. Watters, Dist 4; Rep. Marsh, Carr. 8; Rep. Woods, Merr. 23

COMMITTEE: Health and Human Services

ANALYSIS

This bill:

- I. Defines "attending practitioner" and "POLST."
- II. Redefines "near death" as "actively dying."
- III. Further defines the role of a surrogate.
- IV. Repeals the applicability of certain advanced directives.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears ~~[in brackets and struckthrough]~~.
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty One

AN ACT relative to advance directives for health care decisions.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Advance Health Care Directives. Amend RSA 137-J:1-3 to read as follows:

2 137-J:1 Purpose and Policy.

3 I. The state of New Hampshire recognizes that ~~[a person has]~~ **individual persons have**
4 **the** ~~[a]~~ right, founded in the autonomy and sanctity of ~~[the]~~ **a** person, to control the decisions
5 relating to the rendering of ~~[his or her]~~ **their** own medical care. In order that the rights of persons
6 may be respected even after such persons lack the capacity to make health care decisions for
7 themselves, and to encourage communication between patients and their attending ~~[physicians, PAs,~~
8 ~~or APRNs]~~ **practitioners**, the general court declares that the laws of this state shall recognize the
9 right of a competent person to make a written directive:

10 (a) Delegating to an agent **in the durable power of attorney for health care** the
11 authority to make health care decisions on the person's behalf, in the event such person is unable to
12 make those decisions ~~[for himself or herself]~~ **independently**, either due to permanent or temporary
13 lack of capacity to make health care decisions;

14 (b) **Stating the person's wishes in the living will about end of life care and**
15 **providing guidance to the person's agent, surrogate, and/or** ~~[Instructing his or her]~~ attending
16 **practitioner** physician, PA, or APRN to provide, withhold, or withdraw life-sustaining treatment, in
17 ~~the event such person is near death or is permanently unconscious]~~ .

18 II. All persons have a right to make health care decisions **and to refuse health care**
19 **treatments**, including the right to refuse cardiopulmonary resuscitation. It is the purpose of the
20 "Do Not Resuscitate" provisions of this chapter to ensure that the right of a person to self-
21 determination relating to cardiopulmonary resuscitation is protected, and to give direction to
22 emergency services personnel and other health care providers in regard to the performance of
23 cardiopulmonary resuscitation. **Recognizing this right, the refusal of health care treatments**
24 **is not sufficient to demonstrate that a person lacks capacity to make health care decisions.**

25 III. While all persons have a right to make a written directive, not all take advantage of that
26 right, and it is the purpose of the surrogacy provisions of this chapter to ensure that health care
27 decisions can be made in a timely manner by a person's next of kin or loved one without involving
28 court action. This chapter specifies a process to establish a surrogate decision-maker when there is
29 no ~~[valid advance directive]~~ **agent appointed under a durable power of attorney for health**
30 **care** or a guardian, as defined in RSA 464-A, to make health care decisions.

1 *IV. This chapter seeks to simplify and clarify the process by which a person may*
2 *execute a health care advance directive by combining in one form the durable power of*
3 *attorney for health care document and the living will, either of which (or both) may be*
4 *executed by the person. The law recognizes that it is preferable for a person to choose an*
5 *agent under a durable power of attorney for health care document who can make decisions*
6 *in real time and under then existing circumstances regarding health care decisions that*
7 *best reflect the person's values, as articulated orally or in writing by the person. The law*
8 *also recognizes that a person may wish to execute a living will that sets forth their wishes*
9 *about end of life care that would be used by an agent or surrogate as guidance in*
10 *implementing the person's wishes. The law further recognizes that a person may wish to*
11 *grant greater power and authority to their named agent than to a surrogate and honors*
12 *any limitations placed on a surrogate in a person's advance directive.*

13 137-J:2 Definitions. In this chapter:

14 *I. "Actively dying" means an incurable condition caused by injury, disease, or*
15 *illness which is such that death is imminent and the application of life-sustaining*
16 *treatment would, to a reasonable degree of medical certainty only postpone the moment of*
17 *death to another imminent moment, as certified in the principal's medical record by 2*
18 *physicians, or a physician and another attending practitioner who is not under the*
19 *supervision of the certifying physician.*

20 ~~[I.]~~ *II. "Advance directive" means a ~~[directive]~~ document allowing a person to give*
21 *directions and guidance about future medical care ~~[or]~~ and to designate another person to make*
22 *medical decisions if ~~[he or she]~~ the principal should lose the capacity to make health care decisions.*
23 *The term "advance ~~[directives]~~ directive" shall include ~~[living wills and]~~ a durable ~~[powers]~~ power*
24 *of attorney for health care and a living will.*

25 ~~[II.]~~ *III. "Advanced practice registered nurse" or "APRN" means a registered nurse who is*
26 *licensed in good standing in the state of New Hampshire as having specialized clinical qualifications.*

27 ~~[III.]~~ *IV. "Agent" means an adult to whom authority to make health care decisions is*
28 *delegated under ~~[an advance directive]~~ a durable power of attorney for health care.*

29 ~~[IV.]~~ *V. "Attending ~~[physician, PA, or APRN]~~ practitioner" means the physician, physician*
30 *assistant, or advanced practice registered nurse, selected by or assigned to a patient, who has*
31 *primary responsibility for the treatment and care of the patient. If more than one physician,*
32 *physician assistant, or advanced practice registered nurse shares that responsibility, any one of*
33 *those physicians, physician assistants, or advanced practice registered nurses may act as the*
34 *attending ~~[physician, PA, or APRN]~~ practitioner under the provisions of this chapter.*

35 ~~[V.]~~ *VI. "Capacity to make health care decisions" means the ability to understand and*
36 *appreciate generally the nature and consequences of a health care decision, including the significant*
37 *benefits and harms of and reasonable alternatives to any proposed health care. The fact that a*

person has been diagnosed with mental illness, brain injury, or intellectual disability, ***or has declined a recommended medical procedure or therapy***, shall not mean that the person necessarily lacks the capacity to make health care decisions.

~~[VI.]~~ **VII.** "Cardiopulmonary resuscitation" means those measures used to restore or support cardiac or respiratory function in the event of a cardiac or respiratory arrest.

VIII. "Certified in the principal's medical record" means the making of a statement in the medical record, whether such record is written or electronic.

~~[VI-a.]~~ **IX.** "Close friend" means any person ~~[21]~~ 18 years of age or older who presents an affidavit to the attending physician stating that ~~[he or she]~~ **the individual** is a close friend of the patient, is willing and able to become involved in the patient's health care, and has maintained such regular contact with the patient as to be familiar with the patient's activities, health, and religious and moral beliefs. The affidavit shall also state facts and circumstances that demonstrate such familiarity with the patient.

~~[VII.]~~ **X.** "Do not resuscitate identification" means a standardized identification necklace, bracelet, card, ***pink portable Do Not Resuscitate Order, POLST, or other*** written medical order that signifies that a "Do Not Resuscitate Order" has been issued for the principal.

~~[VIII.]~~ **XI.** "Do not resuscitate order" or "DNR order" (also known as "Do not attempt resuscitation order" or "DNAR order") means an order that, in the event of an actual or imminent cardiac or respiratory arrest, chest compression and ~~[ventricular]~~ defibrillation will not be performed, the patient will not be intubated or manually ventilated, and there will be no administration of resuscitation drugs.

~~[IX.]~~ **XII.** "Durable power of attorney for health care" means a document delegating to an agent the authority to make health care decisions executed in accordance with the provisions of this chapter. It shall not mean forms routinely required by health and residential care providers for admissions and consent to treatment.

~~[X.]~~ **XIII.** "Emergency services personnel" means paid or volunteer firefighters, law-enforcement officers, emergency medical technicians, paramedics or other emergency services personnel, providers, or entities acting within the usual course of their professions.

~~[XI.]~~ **XIV.** "Health care decision" means informed consent, refusal to give informed consent, or withdrawal of informed consent to any type of health care, treatment, admission to a health care facility, any service or procedure to maintain, diagnose, or treat an individual's physical or mental condition except as prohibited in this chapter or otherwise by law.

~~[XII.]~~ **XV.** "Health care provider" means ~~[an individual or]~~ **a** facility licensed, certified, or otherwise authorized or permitted by law to administer health care, for profit or otherwise, in the ordinary course of business or professional practice.

~~[XIII.]~~ **XVI.** "Life-sustaining treatment" means any medical procedures or interventions which utilize mechanical or other medically administered means to sustain, restore, or supplant a

vital function ~~[which, in the written judgment of the attending physician, PA, or APRN, would serve only to artificially postpone the moment of death, and where the person is near death or is permanently unconscious]~~. "Life-sustaining treatment" includes, but is not limited to, the following: medically administered nutrition and hydration, mechanical respiration, kidney dialysis, or the use of other external mechanical or technological devices. Life sustaining treatment may include drugs to maintain blood pressure, blood transfusions, and antibiotics. "Life-sustaining treatment" shall not include the administration of medication, natural ingestion of food or fluids by eating and drinking, or the performance of any medical procedure deemed necessary to provide comfort or to alleviate pain.

~~[XIV.] XVII.~~ "Living will" means a ~~[directive]~~ **written statement of guidance that** ~~[which, when duly executed, contains]~~ **sets forth** the express ~~[direction]~~ **wishes of the principal** that **attempts at life sustaining treatment shall be continued or that certain** ~~[no]~~ life-sustaining treatment **shall not** be ~~[given]~~ **attempted** when the ~~[person executing said directive]~~ **principal** has been diagnosed and certified in ~~[writing]~~ **the principal's medical record** by ~~[the]~~ **2 attending** ~~[physician, PA, or APRN]~~ **physicians or a physician and another attending practitioner who is not under the supervision of the certifying physician** to ~~[be near death or permanently unconscious, without hope of recovery from such condition and is unable to actively participate in the decision-making process.]~~ **have lost capacity to make health care decisions and to be permanently unconscious or to suffer from an advanced life-limiting, incurable and progressive condition for which treatment has become excessively burdensome or ineffective for the principal.**

~~[XV.] XVIII.~~ "Medically administered nutrition and hydration" means invasive procedures such as, but not limited to the following: Nasogastric tubes; gastrostomy tubes; intravenous feeding or hydration; and hyperalimentation. It shall not include the natural ingestion of food or fluids by eating and drinking.

~~[XVI.]~~ "Near death" means ~~an incurable condition caused by injury, disease, or illness which is such that death is imminent and the application of life-sustaining treatment would, to a reasonable degree of medical certainty, as determined by 2 physicians, or a physician and a PA, or a physician and an APRN, only postpone the moment of death.]~~

~~[XVII.] XIX.~~ "Permanently unconscious" means a lasting condition, indefinitely without improvement, in which thought, awareness of self and environment, and other indicators of consciousness are absent as determined by an appropriate neurological assessment by a physician in consultation with the attending physician or an appropriate neurological assessment by a physician in consultation with an APRN or PA.

~~[XVIII.] XX.~~ "Physician" means a medical doctor licensed in good standing to practice in the state of New Hampshire pursuant to RSA 329.

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1 ~~[XVIII-a.]~~ **XXI.** "Physician assistant" or "PA" means a physician assistant licensed in good
2 standing to practice in the state of New Hampshire pursuant to RSA 328-D.

3 **XXII. "POLST" means a form that contains a set of emergency medical orders**
4 **signed by an attending practitioner. This order set may contain DNR orders, and,**
5 **although it may be completed in any state under similar title, the DNR and all other orders**
6 **shall conform to New Hampshire law.**

7 ~~[XIX.]~~ **XXIII.** "Principal" means a person 18 years of age or older who has executed an
8 advance directive pursuant to the provisions of this chapter **or a qualified patient who has not**
9 **executed an advance directive and whose health care decisions are made by a surrogate**
10 **appointed pursuant to the provisions of this chapter.**

11 ~~[XX.]~~ **XXIV.** "Qualified patient" means ~~[a]~~ **any** patient who ~~[has executed an advance~~
12 ~~directive in accordance with this chapter and who]~~ has been certified in ~~[writing]~~ **the patient's**
13 **medical record** by the attending ~~[physician, PA, or APRN]~~ **practitioner** to lack the capacity to
14 make health care decisions.

15 ~~[XXI.]~~ **XXV.** "Reasonable degree of medical certainty" means a medical judgment that is
16 made by ~~[a physician, PA, or APRN]~~ **the attending practitioner** who is knowledgeable about the
17 case and the treatment possibilities with respect to the medical conditions involved.

18 ~~[XXII.]~~ **XXVI.** "Residential care provider" means a "facility" as defined in RSA 161-F:11, IV,
19 a "nursing home" as defined in RSA 151-A:1, IV, or any individual or facility licensed, certified, or
20 otherwise authorized or permitted by law to operate, for profit or otherwise, a residential care
21 facility for adults, including but not limited to those operating pursuant to RSA 420-D.

22 ~~[XXII-a.]~~ **XXVII.** "Surrogate decision-maker" or "surrogate" means an adult individual who
23 has health care decision-making capacity, is available upon reasonable inquiry, is willing to make
24 health care decisions on behalf of a patient who lacks health care decision-making capacity, and is
25 identified by the attending ~~[physician, PA, or APRN]~~ **practitioner** in accordance with the provisions
26 of this chapter as the person who is to make those decisions in accordance with the provisions of this
27 chapter.

28 ~~[XXIII.]~~ **XXVIII.** "Witness" means a competent person 18 years or older who is present when
29 the principal signs an advance directive.

30 137-J:3 Freedom From Influence; Notice Required.

31 I. No health care provider or residential care provider, and no health care service plan,
32 insurer issuing disability insurance, self-insured employee welfare benefit plan, or nonprofit hospital
33 service plan shall charge a person a different rate because of the existence or non-existence of an
34 advance directive, ~~[or]~~ do not resuscitate order, **or POLST**, or require any person to execute an
35 advance directive or require the issuance of a do not resuscitate order as a condition of admission to
36 a hospital, nursing home, or residential care home, or as a condition of being insured for, or

receiving, health or residential care services. Health or residential care services shall not be refused because a person is known to have executed an advance directive or have a do not resuscitate order.

II. The execution of an advance directive **or POLST** pursuant to this chapter shall not affect in any manner the sale, procurement, or issuance of any policy of life insurance, nor shall it be deemed to modify the terms of an existing policy of life insurance. No policy of life insurance shall be legally impaired, modified or invalidated in any manner by the withholding or withdrawal of life-sustaining treatment from an insured person notwithstanding any term of the policy to the contrary.

~~III. Any health care provider or residential care provider which does not recognize DNR's or living wills shall post at every place of admission, a notice which shall be a minimum size of 8 1/2" x 11" stating the following in legible print: "This hospital/facility does not honor Do Not Resuscitate (DNR) or Living Will documents."~~

2 Advance Directives. Amend RSA 137-J:5-11 to read as follows:

137-J:5 Scope and Duration of Agent's **and Surrogate's** Authority.

I. Subject to the provisions of this chapter and any express limitations set forth by the principal in ~~[an advance directive]~~ a **durable power of attorney for health care**, the agent **or surrogate** shall have the authority to make any and all health care decisions on the principal's behalf that the principal could make.

II. An agent's ~~[or surrogate's]~~ authority under ~~[an advance directive]~~ a **durable power of attorney for health care or a surrogate's authority** shall be in effect only when the principal lacks capacity to make health care decisions, as certified in ~~[writing]~~ **the principal's medical record** by the principal's attending ~~[physician, PA, or APRN]~~ **practitioner**. ~~[and filed with]~~ The name of the agent or surrogate **shall be indicated** in the principal's medical record. When and if the principal regains capacity to make health care decisions, such event shall be certified in ~~[writing]~~ **the principal's medical record** by the principal's attending ~~[physician, PA, or APRN]~~ **practitioner**, ~~[noted in the principal's medical record]~~, the agent's or surrogate's authority shall terminate, and the authority to make health care decisions shall revert to the principal.

III. If the principal has no attending ~~[physician, PA, or APRN]~~ **practitioner** for reasons based on the principal's religious or moral beliefs as specified in ~~[his or her]~~ **the principal's** advance directive, the advance directive may include a provision that a person designated by the principal in the advance directive may certify in writing, acknowledged before a notary or justice of the peace, as to the **principal's** lack of ~~[decisional]~~ capacity **to make health care decisions** ~~[of the principal]~~. The person so designated by the principal shall not be the agent, or a person ineligible to be the agent.

IV. The principal's attending ~~[physician, PA, or APRN]~~ **practitioner** shall make reasonable efforts to inform the principal, **even if the principal has lost capacity**, of any proposed treatment, or of any proposal to withdraw or withhold treatment. **When the principal has lost capacity to make health care decisions and an agent or surrogate is acting on the principal's behalf,**

1 *and the agent or surrogate consents to treatment or withholding of treatment from the*
2 *principal, such treatment may be given or withheld even over the principal's objection,*
3 *unless the principal's durable power of attorney for health care provides otherwise.*

4 ~~[Notwithstanding that an advance directive or a surrogacy is in effect and irrespective of the~~
5 ~~principal's lack of capacity to make health care decisions at the time, treatment may not be given to~~
6 ~~or withheld from the principal over the principal's objection unless the principal's advance directive~~
7 ~~includes the following statement initialed by the principal, "Even if I am incapacitated and I object~~
8 ~~to treatment, treatment may be given to me against my objection."]~~

9 *IV-a. Consent to clinical trials or experimental treatments. Agents and surrogates*
10 *shall have the authority to consent to clinical trials or experimental treatments pursuant*
11 *to the following:*

12 *(a) The clinical trial or experimental treatment must be authorized by an*
13 *institutional review board and be consistent with the relevant state and federal*
14 *regulations, including 45 CFR part 46, subpart A (the "Common Rule"), and 21 CFR parts*
15 *50 and 56, as applicable.*

16 *(b) An agent or surrogate may only give consent that is consistent with*
17 *authority granted in a durable power of attorney for health care. If the durable power of*
18 *attorney for health care does not address authority to give consent to a clinical trial or*
19 *experimental treatment, the agent or surrogate may only give consent that is consistent*
20 *with the authority provided in subparagraph (c).*

21 *(c) Absent a limitation in a durable power of attorney for health care, an agent*
22 *or surrogate may give consent to clinical trials or experimental treatment as follows:*

23 *(1) For purposes of this subsection, "immediately life-threatening diseases or*
24 *conditions" are diseases or conditions that are likely to cause death if treatment is not*
25 *provided promptly. When there is an immediately life-threatening disease or condition,*
26 *consent may be given if:*

27 *(A) There is no alternate method of approved or generally recognized*
28 *therapy available that provides an equal or greater likelihood of saving the life of the*
29 *patient or preventing a permanent or extended impairment of function that is likely to*
30 *substantially limit one or more major life activities, or*

31 *(B) The clinical trial or experimental treatment is not intended to save*
32 *the life of the patient but rather is intended to be beneficial to the patient in terms of*
33 *increasing mobility or reducing pain, distress, or discomfort.*

34 *(2) For purposes of this subsection, "serious diseases or conditions" are*
35 *diseases or conditions that, if left untreated, are likely to result in a permanent or extended*
36 *impairment of function that is likely to substantially limit one or more major life activities.*
37 *When there is a serious disease or condition, consent may be given if:*

(A) *There is no alternate method of approved or generally recognized therapy that is available, and*

(B) *The clinical trial or experimental treatment is intended to prevent or diminish a permanent or extended impairment of function that is likely to substantially limit one or more major life activities, and such impairment is likely to occur if not treated promptly, or be beneficial to the patient in terms of increasing mobility or reducing pain, distress, or discomfort that is likely to substantially limit a major life activity.*

V. Nothing in this chapter shall be construed to give an agent or surrogate authority to:

(a) Consent to voluntary admission to any state institution;

(b) Consent to a voluntary sterilization;

(c) Consent to withholding life-sustaining treatment from a pregnant principal, unless, to a reasonable degree of medical certainty, as certified ~~[on]~~ **in** the principal's medical record by the attending ~~[physician, PA, or APRN]~~ **practitioner** and an obstetrician who has examined the principal, such treatment or procedures will not maintain the principal in such a way as to permit the continuing development and live birth of the fetus or will be physically harmful to the principal or prolong severe pain which cannot be alleviated by medication; or

(d) Consent to psychosurgery~~;~~ **or** electro-convulsive shock therapy ~~[-sterilization, or an experimental treatment of any kind].~~

~~[(e) Notwithstanding the prohibition in subparagraph V(d), for any patient experiencing severe, advanced COVID-19 symptoms or COVID-19 complications who does not have the capacity to consent himself or herself to an experimental treatment, an agent or surrogate shall have the authority to consent to experimental treatments, authorized by an institutional review board, on the patient for COVID-19 symptoms or complications.~~

~~(1) For an agent or surrogate to approve the use of an experimental treatment, approved by an institutional review board, the agent or surrogate must be informed of all risks and side effects and follow all institutional review board instructions regarding consent as if the agent or surrogate were the individual receiving the treatment, including the completion of all consent documentation required by the Food and Drug Administration. An agent or surrogate shall not consent unless the following factors exist:~~

~~(A) The patient is confronted by a life-threatening situation necessitating the use of the experimental treatment; and~~

~~(B) Informed consent cannot be obtained from the patient because of an inability to communicate with, or obtain legally effective consent from, the patient; and~~

~~(C) There is no alternate method of approved or generally recognized therapy available that provides an equal or greater likelihood of saving the life of the patient.~~

~~(2) If a patient has a living will, the agent shall follow the directions of the living will. In addition, if the agent or surrogate has actual knowledge that the patient wished to decline~~

~~the experimental treatment, the agent or surrogate shall not have the authority to consent to treatment.]~~

137-J:6 Requirement to Act in Accordance With Principal's Wishes and Best Interests. After consultation with the attending ~~[physician, PA, or APRN]~~ **practitioner** and other health care providers, the agent or surrogate shall make health care decisions in accordance with the agent's or surrogate's knowledge of the principal's wishes and religious or moral beliefs, as stated orally, **in writing, including but not limited to in the durable power of attorney for health care and the living will**, or otherwise communicated by the principal, or, if the principal's wishes are unknown, in accordance with the agent's or surrogate's assessment of the principal's best interests and in accordance with accepted medical practice.

137-J:7 ~~[Physician, PA, APRN,]~~ **Attending Practitioner** and **Heath Care** Provider's Responsibilities.

I. A qualified patient's attending ~~[physician, PA, or APRN]~~ **practitioner**, or a qualified patient's health care provider or residential care provider, and employees thereof, ~~[having knowledge of the qualified patient's advance directive]~~ shall ~~[be bound to]~~ follow, as applicable, ~~[the dictates of the qualified patient's living will and/or]~~ the directives of a qualified patient's designated agent **or surrogate** to the extent they are consistent with this chapter and the advance directive, and to the extent they are within the bounds of responsible medical practice.

(a) An attending ~~[physician, PA, or APRN]~~ **practitioner**, or other health care provider or residential care provider, who is requested to do so by the principal shall make the principal's advance directive or a copy of such document a part of the principal's medical record.

(b) Any person ~~[having in his or her possession]~~ **who possesses** a duly executed advance directive or a revocation thereof, if it becomes known to that person that the principal executing the same is in such circumstances that the terms of the advance directive might become applicable (such as when the principal becomes a "qualified patient"), shall forthwith deliver an original or copy of the same to the health care provider or residential care provider with which the principal is a patient.

(c) The principal's attending ~~[physician, PA, or APRN]~~ **practitioner**, or any other physician, PA, or APRN, ~~[who is aware of the principal's execution of an advance directive]~~ shall, without delay, take the necessary steps to provide for written verification of the principal's lack of capacity to make health care decisions (in other words, to certify **in the principal's medical record** that the principal is a "qualified patient"), ~~[and/or the principal's near death or permanently unconscious condition, as defined in this chapter and as appropriate to the principal's medical condition,]~~ so that the attending ~~[physician, PA, or APRN]~~ **practitioner** and the principal's agent **or surrogate** may be authorized to act pursuant to this chapter.

~~[(d) If a physician, PA, or an APRN, because of his or her personal beliefs or conscience, is unable to comply with the terms of the advance directive or surrogate's decision, he or she shall immediately inform the qualified patient, the qualified patient's family, or the qualified patient's~~

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1 ~~agent. The qualified patient, or the qualified patient's agent or family, may then request that the~~
2 ~~case be referred to another physician, PA, or APRN.]~~

3 II. An attending [~~physician, PA, or APRN~~] **practitioner** who, because of personal beliefs or
4 conscience, is unable to comply with **a POLST**, the [~~advance directive~~] **principal's living will**
5 **and/or the agent's** or the surrogate's decision pursuant to this chapter shall, without delay, make
6 the necessary arrangements to effect the transfer of a qualified patient and the appropriate medical
7 records that document the qualified patient's lack of capacity to make health care decisions to
8 another [~~physician, PA, or APRN~~] **practitioner** who has been chosen by the qualified [~~patient, by~~
9 ~~the qualified~~] patient's agent or surrogate[, ~~or by the qualified patient's family,~~] provided, that
10 pending the completion of the transfer, the attending [~~physician, PA, or APRN~~] **practitioner** shall
11 not deny health care treatment[, ~~nutrition, or hydration~~] which denial would, within a reasonable
12 degree of medical certainty, result in or hasten the qualified patient's death against the express will
13 of the qualified patient, the **qualified patient's** advance directive, or the agent or surrogate.

14 III. [~~Medically administered nutrition and hydration and life sustaining treatment shall not~~
15 ~~be withdrawn or withheld under this chapter unless:~~

16 (a) ~~There is a clear expression of such intent in the directive;~~

17 (b) ~~The principal objects pursuant to RSA 137-J:5, IV; or~~

18 (c) ~~Such treatment would have the unintended consequence of hastening death or~~
19 ~~causing irreparable harm as certified by an attending physician and a physician knowledgeable~~
20 ~~about the patient's condition.~~

21 IV. ~~When the direction of an agent or instruction under a living will]~~ **When an agent's or a**
22 **surrogate's decision pursuant to this chapter, or the principal's living will or POLST**
23 requires an act or omission contrary to the moral or ethical principles or other standards of a health
24 care provider or residential care provider of which the principal is a patient or resident, the health
25 care provider shall allow for the transfer of the principal and the appropriate medical records to
26 another health care provider chosen by [~~the principal or by~~] the agent **or surrogate** and shall incur
27 no liability for its refusal to carry out the terms of the direction by the agent **or surrogate**; provided,
28 that, pending the completion of the transfer, the health care provider or residential care provider
29 shall not deny health care treatment, [~~nutrition, hydration, or life sustaining treatment~~] which
30 denial would [~~with~~] **within** a reasonable degree of medical certainty result in or hasten the
31 principal's death against the expressed will of the principal, the principal's advance directive, or the
32 agent **or surrogate**; and further provided, that, the health care provider or residential care provider
33 shall inform the agent **or surrogate** of its decision not to participate in such an act or omission.

34 137-J:8 Restrictions on Who May Act as Agent or Surrogate. A person may not exercise the
35 authority of an agent or a surrogate while serving in one of the following capacities:

36 I. The principal's [~~health care provider~~] **attending practitioner** or [~~residential care~~
37 ~~provider~~] **a person acting under the direct authority of the attending practitioner.**

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1 II. A nonrelative of the principal who is an employee of the principal's health care provider
2 or residential care provider.

3 137-J:9 Confidentiality and Access to Protected Health Information.

4 I. Health care providers, residential care providers, and persons acting for such providers or
5 under their control, shall be authorized to;

6 (a) Communicate to an agent **or surrogate** any medical information about the principal,
7 if the principal lacks the capacity to make health care decisions, necessary for the purpose of
8 assisting the agent **or surrogate** in making health care decisions on the principal's behalf.

9 (b) Provide copies of the principal's advance ~~[directives]~~ **directive** as necessary to
10 facilitate treatment of the principal.

11 II. Subject to any limitations set forth in the ~~[advance-directive]~~ **durable power of**
12 **attorney for health care** by the principal, an agent **or surrogate** whose authority is in effect shall
13 be authorized, for the purpose of making health care decisions, to:

14 (a) Request, review, and receive any information, oral or written, regarding the
15 principal's physical or mental health, including, but not limited to, medical and hospital records.

16 (b) Execute any releases or other documents which may be required in order to obtain
17 such medical information.

18 (c) Consent to the disclosure of such medical information **to a third party**.

19 137-J:10 ~~[Withholding or Withdrawal of Life Sustaining Treatment]~~ **Criminal Act Not**
20 **Construed or Authorized.**

21 I. ~~[In the event a health care decision to withhold or withdraw life-sustaining treatment,~~
22 ~~including medically administered nutrition and hydration, is to be made by an agent or surrogate,~~
23 ~~and the principal has not executed the "living will" of the advance directive, the following additional~~
24 ~~conditions shall apply:~~

25 ~~(a) The principal's attending physician, PA, or APRN shall certify in writing that the~~
26 ~~principal lacks the capacity to make health care decisions.~~

27 ~~(b) Two physicians or a physician and an APRN or PA shall certify in writing that the~~
28 ~~principal is near death or is permanently unconscious.~~

29 ~~(c) Notwithstanding the capacity of an agent or surrogate to act, the agent or surrogate~~
30 ~~shall make a good faith effort to explore all avenues reasonably available to discern the desires of the~~
31 ~~principal including, but not limited to, the principal's advance directive, the principal's written or~~
32 ~~spoken expressions of wishes, and the principal's known religious or moral beliefs.~~

33 II. ~~Notwithstanding paragraph I, medically administered nutrition and hydration and life-~~
34 ~~sustaining treatment shall not be withdrawn or withheld under an advance directive unless:~~

35 ~~(a) There is a clear expression of such intent in the directive;~~

36 ~~(b) The principal objects pursuant to RSA 137-J:5, IV; or~~

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1 ~~(e) Such treatment would have the unintended consequence of hastening death or~~
2 ~~causing irreparable harm as certified by an attending physician and a physician knowledgeable~~
3 ~~about the patient's condition.~~

4 ~~III.]~~ The withholding or withdrawal of life-sustaining treatment pursuant to the provisions
5 of this chapter shall at no time be construed as a suicide or murder for any legal purpose. Nothing in
6 this chapter shall be construed to **legalize**, constitute, condone, authorize, or approve suicide,
7 assisted suicide, mercy killing, or euthanasia, or permit any affirmative or deliberate act or omission
8 to end one's own life or to end the life of another other than ~~[either]~~ to permit the natural process of
9 dying ~~[of a patient near death actively dying or the removal of life-sustaining treatment from a~~
10 ~~patient in a permanently unconscious condition as provided in this chapter]~~. The withholding or
11 withdrawal of life-sustaining treatment in accordance with the provisions of this chapter, however,
12 shall not relieve any individual of responsibility for any criminal acts that may have caused the
13 principal's condition.

14 ~~[IV.]~~ **II.** Nothing in this chapter shall be construed to condone, authorize, or approve:

15 (a) The consent to withhold or withdraw life-sustaining treatment from a pregnant
16 principal, unless, to a reasonable degree of medical certainty, as certified ~~[on]~~ **in** the principal's
17 medical record by the attending ~~[physician, PA, or APRN]~~ **practitioner** and an obstetrician who has
18 examined the principal, such treatment or procedures will not maintain the principal in such a way
19 as to permit the continuing development and live birth of the fetus or will be physically harmful to
20 the principal or prolong severe pain which cannot be alleviated by medication.

21 (b) The withholding or withdrawing of medically administered nutrition and hydration
22 or life-sustaining treatment from a mentally incompetent or developmentally disabled person, unless
23 such person has a validly executed advance directive or such action is authorized by an existing
24 guardianship or other court order, or, in the absence of such directive, authorization, or order, such
25 action is taken in accordance with the ~~[standard]~~ **written** protocol of a health care facility licensed
26 under RSA 151 as applicable to its general patient population.

27 (c) *The use of this chapter to authorize any health care decision rejected by the*
28 *patient based primarily, substantially, or solely on a finding that the patient is not capable*
29 *of making a health care decision because the patient has refused that procedure or*
30 *therapy.*

31 ~~[V.]~~ **III.** Nothing in this chapter shall impair or supersede any other legal right or
32 responsibility which any person may have to effect life-sustaining treatment in any lawful manner;
33 provided, that this paragraph shall not be construed to authorize any violation of RSA 137-J:7~~[-II or~~
34 ~~III]~~.

35 ~~[VI.]~~ **IV.** Nothing in this chapter shall be construed to revoke or adversely affect the
36 privileges or immunities of health care providers or residential care providers and others to provide
37 treatment to persons in need thereof in an emergency, as provided for under New Hampshire law.

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[VII.] V. Nothing in this chapter shall be construed to create a presumption that in the absence of an advance directive, a person wants life-sustaining treatment to be either ~~taken~~ **provided** or withdrawn. This chapter shall also not be construed to supplant any existing rights and responsibilities under the law of this state governing the conduct of ~~[physicians, PAs, or APRNs]~~ **attending practitioners** in consultation with patients, ~~[or their families]~~ **their surrogates**, or legal guardians in the absence of an advance directive.

137-J:11 Liability for Health Care Costs. Liability for the cost of health care provided pursuant to the agent's **or surrogate's** decision shall be the same as if the health care were provided pursuant to the principal's decision.

3 Advance Health Care Directives. Amend RSA 137-J:12 to read as follows:

137-J:12 Immunity.

I. No person acting as agent pursuant to an advance directive or **acting** as a surrogate shall be subjected to criminal or civil liability for making a health care decision on behalf of the principal in good faith pursuant to the provisions of this chapter and the terms of the advance directive, **if any** if such person ~~[exercised]~~ **made** such ~~[power]~~ **decision** in a manner consistent with the requirements of this chapter and New Hampshire law.

II. No health care provider or residential care provider, or any other person acting for the provider or under the provider's control, shall be subjected to civil or criminal liability or be deemed to have engaged in unprofessional conduct for:

(a) Any act or intentional failure to act, if the act or intentional failure to act is done pursuant to the dictates of an advance directive, the directives of the principal's agent or surrogate, ~~and/or~~ the provisions of this chapter, and said act or intentional failure to act is done in good faith and in keeping with reasonable medical standards pursuant to the advance directive or a surrogacy and in accordance with this chapter; or

(b) Failure to follow the directive of an agent or surrogate if the health care provider or residential care provider or other such person believes in good faith and in keeping with reasonable medical standards that such directive exceeds the scope of or conflicts with the authority of the agent or surrogate under this chapter or the contents of the principal's advance directive; provided, that this subparagraph shall not be construed to authorize any violation of RSA 137-J:7~~[, II or III]~~.

III. Nothing in this section shall be construed to establish immunity for the failure to exercise due care in the provision of services or for actions contrary to the requirements of this chapter or other laws of the state of New Hampshire.

IV. For purposes of this section, "good faith" means honesty in fact in the conduct of the transaction concerned.

4 Advance Health Care Directives; Use of Statutory Forms. Amend RSA 137-J:13, I to read as follows:

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1 I. Every person wishing to execute an advance directive shall be provided with a disclosure
2 statement substantially in the form set forth in RSA 137-J:19 prior to execution. ~~[The principal shall~~
3 ~~be required to sign a statement acknowledging that he or she has received the its contents.]~~

4 5 Advance Health Care Directives; Execution and Witnesses; Revocability. Amend RSA 137-
5 J:14-15 to read as follows:

6 137-J:14 Execution and Witnesses.

7 I. The advance directive shall be signed by the principal in the presence of either of the
8 following:

9 (a) Two or more subscribing witnesses, neither of whom shall, at the time of execution,
10 be the agent **or surrogate**, the principal's spouse or heir at law, or a person entitled to any part of
11 the estate of the principal upon death of the principal under a will, trust, or other testamentary
12 instrument or deed in existence or by operation of law, or attending ~~[physician, PA, or APRN]~~
13 **practitioner**, or person acting under the direction or control of the attending ~~[physician, PA, or~~
14 ~~APRN]~~ **practitioner**. No more than one such witness may be the principal's health or residential
15 care provider or such provider's employee. The witnesses shall affirm that the principal appeared to
16 be of sound mind and free from duress at the time the advance directive was signed and that the
17 principal affirmed ~~[that he or she was aware]~~ **awareness** of the nature of the document and signed
18 it freely and voluntarily; or

19 (b) A notary public or justice of the peace, who shall acknowledge the principal's
20 signature pursuant to the provisions of ~~[RSA 456 or RSA 456-A]~~ **RSA 456-B**.

21 II. If the principal is physically unable to sign, the advance directive may be signed by
22 **another person who signs** the principal's name ~~[written by some other person]~~ in the principal's
23 **physical** presence and at the principal's express direction.

24 ~~[III. A principal's decision to exclude or strike references to PAs or APRNs and the powers~~
25 ~~granted to PAs or APRNs in his or her advance directive shall be honored.]~~

26 137-J:15 Revocation.

27 I. An advance directive ~~[or surrogacy]~~ consistent with the provisions of this chapter shall be
28 revoked:

29 (a) By written revocation delivered to the agent or surrogate or to a health care provider
30 or residential care provider expressing the principal's intent to revoke, signed and dated by the
31 principal; by oral revocation in the presence of 2 or more witnesses, none of whom shall be ~~[the~~
32 ~~principal's spouse or heir at law]~~ **a person disqualified from acting as a witness under RSA**
33 **137-J:14, I(a)**; or by any other act evidencing a specific intent to revoke the power, such as by
34 burning, tearing, or obliterating the same or causing the same to be done by some other person at
35 the principal's direction and in the principal's **physical** presence;

36 (b) By execution by the principal of a subsequent advance directive; or

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(c) By the filing of an action for divorce, legal separation, annulment or protective order, where both the agent ***and/or the surrogate***, and the principal are parties to such action, except when there is an alternate agent designated, in which case the designation of the primary agent shall be revoked and the alternate designation shall become effective. Re-execution or written re-affirmation of the advance directive following a filing of an action for divorce, legal separation, annulment, or protective order shall make effective the original designation of the primary agent under the advance directive.

(d) [Repealed.]

II. A principal's health or residential care provider who is informed of or provided with a revocation of an advance directive or surrogacy shall immediately record the revocation, and the time and date when ~~[he or she received the revocation]~~ ***the revocation was received***, in the principal's medical record and notify the agent, the attending ~~[physician, PA, or APRN]~~ ***practitioner***, and staff responsible for the principal's care of the revocation. An agent~~[-or surrogate]~~ who becomes aware of such revocation shall inform the principal's health or residential care provider of such revocation. Revocation shall become effective upon communication to the attending ~~[physician, PA, or APRN]~~ ***practitioner***.

6 Advance Health Care Directives; Reciprocity. Amend RSA 137-J:17 to read as follows:

137-J:17 Reciprocity. ***A DNR, POLST, durable power of attorney for health care, [An advance directive,] living will, or similar document executed in another state, and valid according to the laws of the state where it was executed, shall be as effective in this state as it would have been if executed according to the laws of this state provided, that this paragraph shall not be construed to authorize any violation of this chapter.***

7 Advance Health Care Directives. RSA 137-J:19-20 are repealed and reenacted to read as follows:

137-J:19 Advance Directive; Disclosure Statement.

The disclosure statement which must accompany an advance directive shall be in substantially the following form:

AN ADVANCE DIRECTIVE IS A LEGAL DOCUMENT. YOU SHOULD KNOW THESE FACTS BEFORE SIGNING IT.

- This form allows you to choose who you want to make decisions about your health care when you cannot make decisions for yourself. This person is called your “agent”. You should consider choosing an alternate in case your agent is unable to act.
- Agents must be 18 years old or older. They should be someone you know and trust. They cannot be anyone who is caring for you in a health care or residential care setting.
- This form is an “advance directive” that defines a way to make medical decisions in the future, when you are not able to make decisions for yourself. It is not a medical order (e.g., it is not in and of itself a DNR (do not resuscitate order or (POLST)).

1 • You will always make your own decisions until your medical practitioner examines you and
2 certifies that you can no longer understand or make a decision for yourself. At that point, your
3 “agent” becomes the person who can make decisions for you. If you get better, you will make your
4 own healthcare decisions again.

5 • With few exceptions(*), when you are unable to make your own medical decisions, your agent will
6 make them for you, unless you limit your agent's authority in Part I.B of the durable power of
7 attorney form. Your agent can agree to start or stop medical treatment, including near the end of
8 your life. Some people do not want to allow their agent to make some decisions. Examples of what
9 you might write in include: “I do NOT want my agent . . .

10 - to ask for or agree to stop life-sustaining treatment (such as breathing machines, medically-
11 administered nutrition and/or hydration (tube feeding), kidney dialysis, other mechanical devices,
12 blood transfusions, and certain drugs).”

13 - to ask for or to agree to a Do Not Resuscitate Order (DNR order).”

14 - to agree to treatment even if I object to it in the moment, after I have lost the ability to make
15 health care decisions for myself.”

16 • The law allows your agent to put you in a clinical trial (medical study) or to agree to new or
17 experimental treatment that is meant to benefit you if you have a disease or condition that is
18 immediately life-threatening or if untreated, may cause a serious disability or impairment (for
19 example new treatment for a pandemic infection that is not yet proven). You may change this by
20 writing in the durable power of attorney for health care form:

21 ○ “I want my agent to be able to agree to medical studies or experimental treatment in any
22 situation.” or

23 ○ “I don’t want to participate in medical studies or experimental treatment even if the treatment
24 may help me or I will likely die without it.”

25 • Your agent must try to make the best decisions for you, based on what you have said or written in
26 the past. Tell your agent that you have appointed them as your healthcare decision maker. Talk to
27 your agent about your wishes.

28 • In the “living will” section of the form, you can write down wishes, values, or goals as guidance for
29 your agent, surrogate, and/or medical practitioners in making decisions about your medical
30 treatment.

31 • You do not need a lawyer to complete this form, but feel free to talk to a lawyer if you have
32 questions about it.

33 • You must sign this form in the physical presence of 2 witnesses or a notary or justice of the peace
34 for it to be valid. The witnesses cannot be your agent, spouse, heir, or anyone named in your will,
35 trust or who may otherwise receive your property at your death, or your attending medical
36 practitioner or anyone who works directly under them. Only one witness can be employed by your
37 health or residential care provider.

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- 1 • Give copies of the completed form to your agent, your medical providers, and your lawyer.
- 2 * Exceptions: Your agent may not stop you from eating or drinking as you want. They also cannot
- 3 agree to voluntary admission to a state institution; voluntary sterilization; withholding life-
- 4 sustaining treatment if you are pregnant, unless it will severely harm you; or psychosurgery.

5 137-J:20 Advance Directive; Durable Power of Attorney and Living Will Forms. An advance

6 directive in its individual "Durable Power of Attorney for Health Care" and "Living Will" components

7 shall be in substantially the following form:

8

9 **NEW HAMPSHIRE ADVANCE DIRECTIVE FORM**

10 Name (Principal's Name): _____

11 DOB: _____

12 Address: _____

13

14 **I. DURABLE POWER OF ATTORNEY FOR HEALTH CARE**

15 The durable power of attorney for healthcare form names your agent(s) and, if you wish, sets limits

16 on what your agent can decide.

17 I choose the following person(s) as agent(s) if I have lost capacity to make health care decisions

18 (cannot make health care decisions for myself).

19 (If you choose more than one person, they will become your agent in the order written, unless you

20 indicate otherwise.)

21 **A. Choosing Your Agent:**

22 Agent: I appoint _____, of _____, and whose phone number is _____ to be my

23 agent to make health care decisions for me.

24 Alternate Agent: If the person above is not able, willing, or available, I appoint _____, of

25 _____, and whose phone number is _____ to be my alternate agent.

26 If no one listed above can make decisions for you, a surrogate will be assigned in the order written in

27 law (spouse, adult child, parent, sibling, etc.), and will have the same powers as an agent. If there is

28 no surrogate, a court appointed guardian may be assigned.

29 **B. Limiting Your Agent's Authority or Providing Additional Instructions**

30 When you can no longer make your own health care decisions, your agent will be able to make

31 decisions for you. Please review the Disclosure Statement that is attached to this advance directive

32 for examples of how you may want to advise your agent. You may write in limits or additional

33 instructions below or attach additional pages.

34 _____

35 _____

36 *I have attached ____ additional pages titled "Additional wishes for my Durable Power of Attorney for*

37 *Health Care" to express my wishes.*

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1
2 **II. LIVING WILL**

3 If you would like to provide written guidance to your agent, surrogate, and/or medical practitioners
4 in making decisions about life sustaining medical treatment if you cannot make your own decisions,
5 you may complete the options below.

6 **CHOOSE ITEM A OR B. Initial your choice:**

7 If I suffer from an advanced life-limiting, incurable and progressive condition:

8 _____ A. I wish to have all attempts at life-sustaining treatment (within the limits of generally
9 accepted health care standards) to try to extend my life as long as possible, no matter what burdens,
10 costs or complications may occur.

11 **OR**

12 _____ B. I do NOT wish to have any life-sustaining treatment attempted that I would consider to
13 be excessively burdensome or that would not have a reasonable hope of benefit for me. I wish to
14 receive only those forms of life-sustaining treatment that I would not consider to be excessively
15 burdensome AND that have a reasonable hope of benefit for me. The following are situations that I
16 would consider excessively burdensome: (Cross out and initial any of the below statements # 1-4 if
17 you **disagree**.)

18 1. I do not wish to have life-sustaining treatment attempted if I am actively dying (medical
19 treatment will only prolong my dying).

20 2. I do not wish to have life-sustaining treatment attempted if I become permanently unconscious
21 with no reasonable hope of recovery.

22 3. I do not wish to have life-sustaining treatment attempted if I suffer from an advanced life-
23 limiting, incurable and progressive condition and if the likely risks and burdens of treatment would
24 outweigh the expected benefits.

25 4. Other situations that I would consider excessively burdensome if I suffer from an advanced life-
26 limiting, incurable and progressive condition: (*I have attached __ additional pages titled "Living Will*
27 *Burdens"*):

28 _____
29 _____

30 In these situations, I wish for comfort care only. I understand that stopping or starting treatments
31 to achieve my comfort, including stopping medically-administered nutrition and hydration, may be a
32 way to allow me to die when the treatments would be excessively burdensome for me.

33
34 **III. SIGNATURE**

35 I have received, reviewed, and understood the disclosure statement, and I have completed the
36 durable power of attorney for health care and/or living will consistent with my wishes. I have
37 attached __ pages to better express my wishes.

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1 Signed this ____ day of _____, 20__

2 Principal's Signature: _____

3 (If you are physically unable to sign, this advance directive may be signed by someone else writing
4 your name in your physical presence at your direction.)

5 THIS ADVANCE DIRECTIVE MUST BE SIGNED BY TWO WITNESSES OR A NOTARY PUBLIC
6 OR A JUSTICE OF THE PEACE.

7 We declare that the principal appears to be of sound mind and free from duress at the time this
8 advance directive is signed and that the principal affirms that the principal is aware of the nature of
9 the directive and is signing it freely and voluntarily.

10 Witness: _____ Address (city/state): _____

11 Witness: _____ Address (city/state): _____

12 STATE OF NEW HAMPSHIRE

13 COUNTY OF _____

14 The foregoing advance directive was acknowledged before me this ____ day of _____, 20__, by
15 _____ (the "Principal").

16 _____

17 Notary Public/Justice of the Peace

18 My commission expires:

19 8 Advance Health Care Directives; Civil Action. Amend RSA 137-J:22 to read as follows:

20 137-J:22 Civil Action.

21 I. The principal or any person who is a near relative of the principal, or who is a responsible
22 adult who is directly interested in the principal by personal knowledge and acquaintance, including,
23 but not limited to a guardian, social worker, physician, or member of the clergy, may file an action in
24 the probate court of the county where the principal is located at the time:

25 (a) Requesting that ~~[the authority granted to an agent by]~~ an advance directive be
26 revoked on the grounds that the principal was not of sound mind or was under duress, fraud, or
27 undue influence when the advance directive was executed, and shall have all the rights and
28 remedies provided by RSA 564-E:116 which shall apply to directives executed under this chapter and
29 persons acting pursuant to this chapter.

30 (b) Challenging the right of any agent **or surrogate** who is acting or who proposes to act
31 as such pursuant to this chapter and naming another person, who agrees to so act, to be appointed
32 guardian over the person of the principal for the sole purpose of making health care decisions, as
33 provided for in RSA 464-A.

34 II. A copy of any such action shall be given in hand to the principal's attending ~~[physician,~~
35 ~~PA, or APRN]~~ **practitioner** and, as applicable, to the principal's health care provider or residential
36 care provider. To the extent they are not irreversibly implemented, health care decisions made by a
37 challenged agent **or surrogate** shall not thereafter be implemented without an order of the probate

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1 court or a withdrawal or dismissal of the court action; provided, that this paragraph shall not be
2 construed to authorize any violation of RSA 137-J:7~~[, II or III]~~.

3 III. The probate court in which such a petition is filed shall hold a hearing as expeditiously
4 as possible.

5 9 Advance Health Care Directives. Amend RSA 137-J:25-29 to read as follows:

6 137-J:25 Presumed Consent to Cardiopulmonary Resuscitation; Health Care Providers and
7 Residential Care Providers Not Required to Expand to Provide Cardiopulmonary Resuscitation.

8 I. Every person shall be presumed to consent to the administration of cardiopulmonary
9 resuscitation in the event of cardiac or respiratory arrest, unless one or more of the following
10 conditions, of which the health care provider or residential care provider has actual knowledge,
11 apply:

12 (a) A do not resuscitate order in accordance with the provisions of this chapter has been
13 issued for that person;

14 (b) A completed advance directive for that person is in effect, pursuant to the provisions
15 of this chapter, in which the person indicated~~[that he or she does not wish]~~ **a wish not** to receive
16 cardiopulmonary resuscitation, or ~~[his or her]~~ **the principal's** agent **or surrogate** has determined
17 that the person would not wish to receive cardiopulmonary resuscitation;

18 (c) A person who lacks capacity to make health care decisions is ~~[near death]~~ **actively**
19 **dying** and admitted to a health care facility, and the person's agent **or surrogate** is not available
20 and the facility has made diligent efforts to contact the agent **or surrogate** without success, or the
21 person's agent **or surrogate** is not legally capable of making health care decisions for the person,
22 and the attending ~~[physician, PA, or APRN]~~ **practitioner** and a physician knowledgeable about the
23 patient's condition, have determined that the provision of cardiopulmonary resuscitation would be
24 contrary to accepted medical standards and would cause unnecessary harm to the person, and the
25 attending ~~[physician, PA, or APRN]~~ **practitioner** has completed a do not resuscitate order; or

26 (d) A person is under treatment solely by spiritual means through prayer in accordance
27 with the tenets and practices of a recognized church or religious denomination by a duly accredited
28 practitioner thereof.

29 (e) **The application of cardiopulmonary resuscitation would clearly be**
30 **medically futile based on accepted medical standards.**

31 II. Nothing in this section shall be construed to revoke any statute, regulation, or law
32 otherwise requiring or exempting a health care provider or residential care provider from instituting
33 or maintaining the ability to provide cardiopulmonary resuscitation or expanding its existing
34 equipment, facilities, or personnel to provide cardiopulmonary resuscitation.

35 137-J:26 Issuance of a Do Not Resuscitate Order; Order to be Written by the Attending
36 ~~[Physician, PA, or APRN]~~ **Practitioner**.

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I. An attending [~~physician, PA, or APRN~~] **practitioner** may issue a do not resuscitate order for a person if the person, or the person's agent **or surrogate**, has consented to the order. A do not resuscitate order shall be issued in writing in the form as described in this section for a person not present or residing in a health care facility. For persons present in health care facilities, a do not resuscitate order shall be issued in accordance with the policies and procedures of the health care facility and in accordance with the provisions of this chapter.

II. A person [~~may request that his or her~~] **may request that their** attending [~~physician, PA, or APRN~~] **practitioner** issue a do not resuscitate order for the person.

III. [~~An agent may consent to a do not resuscitate order for a person who lacks the capacity to make health care decisions if the advance directive signed by the principal grants such authority.~~] A do not resuscitate order written by the attending [~~physician, PA, or APRN~~] **practitioner** for such a person with the consent of the agent **or surrogate** is valid and shall be respected by health care providers and residential care providers.

IV. If an agent **or surrogate** is not reasonably available and the facility has made diligent efforts to contact the agent **or surrogate** without success, or the agent **or surrogate** is not legally capable of making a decision regarding a do not resuscitate order, an attending [~~physician, PA, or APRN~~] **practitioner** may issue a do not resuscitate order for a person who lacks capacity to make health care decisions, who is [~~near death~~] **actively dying**, and who is admitted to a health care facility if a second [~~physician~~] **practitioner** who has personally examined the person concurs in the opinion of the attending [~~physician, PA, or APRN~~] **practitioner** that the provision of cardiopulmonary resuscitation would be contrary to accepted medical standards and would cause unnecessary harm to the person.

V. [~~For persons not present or residing in a health care facility, the do not resuscitate order shall be noted on a medical orders form or in substantially the following form on a card suitable for carrying on the person:~~

Do Not Resuscitate Order

As attending physician, PA, or APRN of _____ and as a licensed physician, physician assistant or advanced practice registered nurse, I order that this person **SHALL NOT BE RESUSCITATED** in the event of cardiac or respiratory arrest.

This order has been discussed with _____ (or, if applicable, with his/ her agent,) _____, who has given consent as evidenced by his/her signature below. Attending physician, PA, or APRN

Name

Attending physician, PA, or APRN Signature

Address

Person Signature

Address

Agent Signature (if applicable)

1 _____
2 Address _____] *The do not resuscitate order shall be reflected in at least one*
3 *of the following forms:*

4 (a) *Forms issued in accordance with the policies and procedures of the health*
5 *care facility in compliance with this chapter if applicable;*

6 (b) *A portable DNR (P-DNR); medical orders form documenting the patient's*
7 *name and signed by an attending practitioner and that clearly documents the DNR order;*
8 *DNR bracelet or necklace worn by a patient, and inscribed with the patient's name, date of*
9 *birth (in numerical form), and "NH DNR" or "NH Do not resuscitate"; and POLST*
10 *constitutes a DNR if it states "This will constitute a DNR Order, and no separate DNR*
11 *Order will be required."*

12 VI. ~~[For persons residing in a health care facility, the do not resuscitate order shall be~~
13 ~~reflected in at least one of the following forms:~~

14 ~~(a) Forms required by the policies and procedures of the health care facility in~~
15 ~~compliance with this chapter;~~

16 ~~(b) The do not resuscitate card as set forth in paragraph V; [or~~

17 ~~(c)] The medical orders form in compliance with this chapter.] **Portable DNR and**~~
18 ~~**POLST (that indicates Do Not Resuscitate) forms are transferable, valid medical orders**~~
19 ~~**throughout this state.**~~

20 137-J:27 Compliance With a Do Not Resuscitate Order.

21 I. Health care providers and residential care providers shall comply with the do not
22 resuscitate order when presented with one of the following:

23 (a) A do not resuscitate order *or POLST that indicates Do Not Resuscitate*
24 *completed by the attending [physician, PA, or APRN] practitioner on a form as specified in RSA*
25 *137-J:26;*

26 (b) A do not resuscitate order *or POLST indicating Do Not Resuscitate* for a person
27 present or residing in a health care facility issued in accordance with the health care facility's
28 policies and procedures in compliance with the chapter; or

29 (c) A medical orders *or POLST* form on which the attending ~~[physician, PA, or APRN]~~
30 *practitioner* has documented a do not resuscitate order in compliance with this chapter.

31 (d) Do not resuscitate identification as set forth in RSA 137-J:33.

32 II. Pursuant to this chapter, health care providers shall respect do not resuscitate orders for
33 persons in health care facilities, ambulances, homes, and communities within this state.

34 137-J:28 Protection of Persons Carrying Out in Good Faith a Do Not Resuscitate Order;
35 Notification of Agent *or Surrogate* by Attending ~~[Physician, PA, or APRN]~~ *Practitioner* Refusing
36 to Comply With Do Not Resuscitate *or POLST* Order.

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I. No health care provider or residential care provider, or any other person acting for the provider or under the provider's control, shall be subjected to criminal or civil liability, or be deemed to have engaged in unprofessional conduct, for carrying out in good faith a do not resuscitate **or POLST** order authorized by this chapter on behalf of a person as instructed by the person, or the person's agent **or surrogate**, or for those actions taken in compliance with the standards and procedures set forth in this chapter.

II. No health care provider or residential care provider, or any other person acting for the provider or under the provider's control, or other individual who witnesses a cardiac or respiratory arrest shall be subjected to criminal or civil liability for providing cardiopulmonary resuscitation to a person for whom a do not resuscitate order has been issued; provided, that such provider or individual:

(a) Reasonably and in good faith is unaware of the issuance of a do not resuscitate order; or

(b) Reasonably and in good faith believed that consent to the do not resuscitate order has been revoked or canceled.

III.(a) Any attending [~~physician, PA, or APRN~~] **practitioner** who, because of personal beliefs or conscience, refuses to issue a do not resuscitate order at a person's request or to comply with a do not resuscitate **or POLST** order issued pursuant to this chapter shall take reasonable steps to advise promptly the person or agent **or surrogate** of the person that such attending [~~physician or APRN~~] **practitioner** is unwilling to effectuate the order. The attending [~~physician, PA, or APRN~~] **practitioner** shall thereafter at the election of the person or agent **or surrogate** permit the person or agent **or surrogate** to obtain another attending [~~physician, PA, or APRN~~] **practitioner**.

(b) If [~~a physician, PA, or APRN~~] **an attending practitioner**, because of [~~his or her~~] **the practitioner's** personal beliefs or conscience, is unable to comply with the terms of a do not resuscitate **or POLST** order, [~~he or she~~] **the practitioner** shall immediately inform the person, the person's agent **or surrogate**.^[7] **The person** or the person's [~~family. The person, the person's~~] agent^[7] **or surrogate**^[7] [~~or the person's family~~] may then request that the case be referred to another [~~physician, PA, or APRN~~] **practitioner**, as set forth in RSA 137-J:7^[7] [~~II and III~~].

137-J:29 Revocation **or Suspension** of Do Not Resuscitate **or POLST** Order.

I. At any time a [~~person in a~~] **principal admitted as an inpatient or outpatient to a** health care facility may revoke [~~his or her previous request for or consent to~~] a do not resuscitate **or POLST** order by making either a written, oral, or other act of communication to the attending [~~physician, PA, or APRN~~] **practitioner** or other professional staff of the health care facility.

II. At any time a [~~person~~] **principal** residing [~~at home~~] **outside a health care facility** may revoke [~~his or her~~] **the principal's** do not resuscitate **or POLST** order by destroying such order and removing do not resuscitate identification on^[7] [~~his or her~~] **the principal's** person **or by**

1 *making either a written, oral, or other act of communication to a healthcare provider that*
 2 *is present with the principal.* ~~[The person is responsible for notifying his or her attending~~
 3 ~~physician, PA, or APRN of the revocation.]~~

4 III. At any time, *in accordance with RSA 137-J:6*, an agent *or surrogate* may revoke ~~[his~~
 5 ~~or her consent to]~~ a do not resuscitate *or POLST* order for a ~~[person]~~ *principal* who lacks capacity
 6 to make health care decisions who is admitted to a health care facility by *making either a written,*
 7 *oral, or other act of communication to the attending practitioner or other professional*
 8 *staff at the health care facility* ~~[notifying the attending physician, PA, or APRN or other~~
 9 ~~professional staff of the health care facility of the revocation of consent in writing, or by orally~~
 10 ~~notifying the attending physician, PA, or APRN in the presence of a witness 18 years of age or older].~~

11 IV. At any time, *in accordance with RSA 137-J:6*, an agent *or surrogate* may revoke ~~[his~~
 12 ~~or her consent]~~ *a do not resuscitate or POLST order for* a ~~[person]~~ *principal* who lacks capacity
 13 to make health care decisions who is residing ~~[at home]~~ *outside a health care facility* by
 14 destroying such order and removing do not resuscitate identification from the ~~[person]~~ *principal's*
 15 *person, or by making either written, oral, or other act of communication to a healthcare*
 16 *provider that is present with the principal.* The agent is responsible for notifying the person's
 17 attending ~~[physician, PA, or APRN]~~ *practitioner* of the revocation.

18 V. The attending ~~[physician, PA, or APRN]~~ *practitioner* who is informed of or provided
 19 with a revocation of consent pursuant to this section shall immediately cancel *or suspend* the do not
 20 resuscitate *or POLST* order *in the principal's medical record* if the ~~[person]~~ *principal* is in a
 21 health care facility and notify the professional staff of the health care facility responsible for the
 22 ~~[person's]~~ *principal's* care of the revocation, *suspension, or* ~~[-and]~~ cancellation. Any professional
 23 staff of the health care facility who is informed of or provided with a revocation of consent pursuant
 24 to this section shall immediately notify the attending ~~[physician, PA, or APRN]~~ *practitioner* of such
 25 revocation.

26 ~~[VI. Only a physician, physician assistant, or advanced practice registered nurse may cancel~~
 27 ~~the issuance of a do not resuscitate order.]~~

28 10 Not Suicide or Murder. Amend RSA 137-J:30 to read as follows:

29 137-J:30 Not Suicide or Murder. The withholding of cardiopulmonary resuscitation from a
 30 person in accordance with the provisions of this chapter shall not, for any purpose, constitute suicide
 31 or murder. The withholding of cardiopulmonary resuscitation from a person in accordance with the
 32 provisions of this chapter, however, shall not relieve any individual of responsibility for any criminal
 33 acts that may have caused the person's condition. Nothing in this chapter shall be construed to
 34 legalize, *constitute*, condone, authorize, or approve *suicide, assisted suicide*, mercy killing, or
 35 ~~[assisted suicide]~~ *euthanasia*.

36 11 Advance Health Care Directives; Preservation of Existing Rights. Amend RSA 137-J:32, I to
 37 read as follows:

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1 I. Nothing in this chapter shall impair or supersede any legal right or legal responsibility
2 which any person may have to effect the withholding of cardiopulmonary resuscitation in any lawful
3 manner. In such respect, the provisions of this chapter are cumulative; provided, that this
4 paragraph shall not be construed to authorize any violation of RSA 137-J:7 [~~II or III~~].

5 12 Advance Health Care Directives; Surrogate Decision Making. Amend RSA 137-J:35 to read
6 as follows:

7 137-J:35 Surrogate Decision-making.

8 I. When a patient lacks capacity to make health care decisions, the [~~physician, PA, or APRN~~]
9 **attending practitioner** shall make a reasonable inquiry pursuant to 137-J:7 as to whether the
10 patient has a valid [~~advance directive~~] **durable power of attorney for health care** and, to the
11 extent that the patient has designated an agent, whether such agent is available, willing and able to
12 act. When no health care agent is authorized and available, the health care provider shall make a
13 reasonable inquiry as to the availability of possible surrogates listed under this paragraph. A
14 surrogate decision-maker may make medical decisions on behalf of a patient without court order or
15 judicial involvement in the following order of priority:

16 (a) The patient's spouse, or civil union partner or common law spouse as defined by RSA
17 457:39 **if the principal were currently deceased**, unless there is a divorce proceeding, separation
18 agreement, or restraining order limiting that person's relationship with the patient.

19 (b) Any adult son or daughter of the patient.

20 (c) Either parent of the patient.

21 (d) Any adult brother or sister of the patient.

22 (e) Any adult grandchild of the patient.

23 (f) Any grandparent of the patient.

24 (g) Any adult aunt, uncle, niece, or nephew of the patient.

25 (h) A close friend of the patient.

26 (i) The agent with financial power of attorney or a conservator appointed in accordance
27 with RSA 464-A.

28 (j) The guardian of the patient's estate.

29 II. The [~~physician, PA, or APRN~~] **attending practitioner** may identify a surrogate from
30 the list in paragraph I if the [~~physician, PA, or APRN~~] **attending practitioner** determines [~~he or~~
31 ~~she~~] **the surrogate** is able and willing to act, and determines after reasonable inquiry that neither a
32 legal guardian, health care agent under a durable power of attorney for health care, nor a surrogate
33 of higher priority is available and able and willing to act. The surrogate decision-maker, as
34 identified by the attending [~~physician, PA, or APRN~~] **practitioner**, may make health care decisions
35 for the patient, **in accordance with RSA 137-J:6**. The surrogacy provisions of this chapter shall
36 take effect when the decision-maker names are recorded in the medical record. The [~~physician, PA,~~
37 ~~or APRN~~] **attending practitioner** shall have the right to rely on any of the above surrogates if the

1 ~~[physician, PA, or APRN]~~ **attending practitioner** believes after reasonable inquiry that neither a
2 health care agent under a durable power of attorney for health care or a surrogate of higher priority
3 is available or able and willing to act.

4 13 Advance Health Care Directives. Amend RSA 137-J:36, I to read as follows:

5 I. Where there are multiple surrogate decision-makers at the same priority level in the
6 hierarchy, it shall be the responsibility of those surrogates to make reasonable efforts to reach a
7 consensus as to their decision on behalf of the patient regarding any health care decision. If 2 or
8 more surrogates who are in the same category and have equal priority indicate to the attending
9 ~~[physician, PA, or APRN]~~ **practitioner** that they disagree about the health care decision at issue, a
10 majority of the available persons in that category shall control, unless the minority or any other
11 interested party initiates guardianship proceedings in accordance with RSA 464-A. There shall not
12 be a recognized surrogate when a guardianship proceeding has been initiated and a decision is
13 pending. The person initiating the petition for guardianship shall immediately provide written
14 notice of the initiation of the guardianship proceeding to the health care facility where the patient is
15 being treated. This process shall not preempt the care of the patient. No health care provider or
16 other person shall be required to seek appointment of a guardian.

17 14 Advance Health Care Directives; Limitations on Surrogacy. Amend RSA 137-J:37 to read as
18 follows:

19 137-J:37 Limitations of Surrogacy.

20 I. A surrogate shall not be identified over the express objection of the patient, and a
21 surrogacy shall terminate if at any time a patient for whom a surrogate has been appointed
22 expresses objection to the continuation of the surrogacy.

23 II. No ~~[physician, PA, or APRN]~~ **attending practitioner** shall be required to identify a
24 surrogate, and may, in the event a surrogate has been identified, revoke the surrogacy if the
25 surrogate is unwilling or unable to act.

26 III. ~~[A physician, PA, or APRN]~~ **An attending practitioner** may, but shall not be required
27 to, initiate guardianship proceedings or encourage a family member or friend to seek guardianship in
28 the event a patient is determined to lack capacity to make health care decisions and no guardian,
29 agent under a health care power of attorney, or surrogate has been appointed or named.

30 IV. Nothing in this chapter shall be construed to require ~~[a physician, PA, or APRN]~~ **an**
31 **attending practitioner** to treat a patient who the ~~[physician, PA, or APRN]~~ **practitioner**
32 reasonably believes lacks health care decision-making capacity and for whom no guardian, agent, or
33 surrogate has been appointed.

34 V. The surrogate may make health care decisions for a principal to **the** same extent as an
35 agent under a durable power of attorney for health care for up to ~~[90]~~ **180** days after being identified
36 in RSA 137-J:35, I~~[, unless]~~. **The authority of the surrogate shall terminate if** the principal
37 regains **the capacity to make** health care ~~[decision-making capacity]~~ **decisions** or a guardian is

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1 appointed ~~[or patient is determined to be near death, as defined in RSA 137-J:2, XVI]~~. The authority
2 of the surrogate shall terminate after [90] **180** days, ***unless the patient is determined to be***
3 ***actively dying***.

4 15 Repeal. RSA 137-J:34, relative to applicability of certain advance directives, is repealed.

5 16 Effective Date.

6 I. Section RSA 137-J:5 IV-a as inserted by section 2 of this act shall take effect July 1, 2021.

7 II. The remainder of this act shall take effect upon its passage.

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