SPONSOR: Rep. Barbieri
& Rep. Walker & Sen. Henry

HOUSE OF REPRESENTATIVES
147th GENERAL ASSEMBLY

HOUSE BILL NO. 400

AN ACT TO AMEND TITLE 16 OF THE DELAWARE CODE RELATING TO THE CREATION OF MEDICAL ORDERS FOR SCOPE OF TREATMENT.

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

Section 1. Amend Title 16 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

CHAPTER 25A. DELAWARE MEDICAL ORDERS FOR SCOPE OF TREATMENT ACT

§ 2501A. Short title.

This Chapter shall be known and may be cited as the "Delaware Medical Orders for Scope of Treatment Act" ("DMOST Act").

§ 2502A. Statement of purpose.

(a) An adult individual who has decision-making capacity has the right to refuse medical or surgical treatment in order to allow natural death if such refusal is not contrary to existing public health laws.

(b) An adult individual with decision-making capacity has the right to plan ahead for health-care decisions through an advance health-care directive pursuant to Chapter 25 of this title, and/or through a DMOST form pursuant to this chapter, and to have the wishes expressed in those documents respected, subject to certain limitations, in order to ensure that the right to control decisions about one's own health care is not lost if a patient loses decision-making capacity and is not able to participate actively in making his or her own decisions, either temporarily or permanently.

(c) An advance health-care directive is recommended for every adult whether or not the individual anticipates a period of incapacity.

(d) The DMOST form is separate from and is not an advance health-care directive. It expresses a person's wishes regarding scope of treatment through medical orders. The DMOST form does not require an advance health-care directive.

(e) Data reveal that many individuals may reside or be situated in multiple settings such as home, acute care facility, nursing home, and hospice near the end of life. Changes in such settings require that an easily understood, standardized, portable document be available to communicate the individual's care preferences. A DMOST form provides such a document.

§ 2503A. Definitions.

(a) "Advance health-care directive" means an Advance Health-Care Directive under Chapter 25 of this title, a Durable Power of Attorney for Health Care Decisions, or any individual instruction or power of attorney for health-care valid in the state where such document was executed or where the individual executing such document was a resident at the time that such document was executed that appoints an agent. Said document must have been executed by the individual authorizing the appointed agent to make decisions about the individual's health care when such individual no longer has decision-making capacity.

(b) “Clear and convincing evidence” is evidence showing a high probability of truth of the factual matter at issue.

(c) “Decision-making capacity” means a patient's ability to understand and appreciate the nature and consequences of a particular health-care decision, including the benefits and risks of that decision and alternatives to any proposed health care, and to reach an informed health-care decision.

(d) “Delaware Medical Orders for Scope of Treatment (DMOST)” means a clinical process to facilitate communication between health-care professionals and patients living with serious advanced illness or frailty or, if the patient lacks decision-making capacity, the patient’s authorized representative. The process encourages shared, informed medical decision-making. The result is a DMOST form, which contains portable medical orders that respect the patient’s goals for care in regard to the use of CPR and other medical interventions. The DMOST form is applicable across health-care settings, is reviewable, and is revocable.

(e) “DHSS” means the Department of Health and Social Services.

(f) “DMOST form” means a standardized printed document that is uniquely identifiable and has a uniform format or color, which:

(1) Is used on a voluntary basis by patients who have serious advanced illness or frailty or have a life expectancy of less than one year;

(2) Is not an advance health-care directive;

(3) Is not valid unless it meets the requirements for a completed DMOST form as set forth in this chapter;

(4) Is intended to provide direction to emergency care personnel regarding the use of emergency care and to health-care providers regarding the use of life-sustaining treatment by indicating the patient’s preference concerning the scope of treatment, the use of specified interventions, and the intensity of treatment for each intervention;

(5) Is intended to accompany the patient, and to be honored by all personnel attending the patient, across the full range of possible health-care settings, including but not limited to the patient’s home, a health-care

institution, at the scene of a medical emergency or during transport;

(6) May be reviewed or revoked at any time by a patient with decision-making capacity or, if the patient lacks decision-making capacity, the patient's representative in accordance with the provisions of section 2511A of this chapter; and

(7) Must be signed by a health-care practitioner.

(g) "Emergency care provider" means an emergency medical technician, paramedic, or first responder authorized under Chapter 97 of Title 16.

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

(i) "Health-care practitioner" means a certified physician (24 *Del. C.* Chapter 17, Subchapter III) or an advanced practice nurse (24 *Del. C*. §1902(b)(1)) who is providing care for the patient or overseeing the health care provided to a patient and has completed all training required by DHSS for persons participating in the completion of a DMOST form. Over time, a patient's health-care practitioner may change.

(j) "Health-care provider" means an individual licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of business or practice of a profession and has completed all training required by DHSS for persons participating in the completion of a DMOST form. A health-care practitioner is also a health-care provider.

(k) "Life-sustaining treatment" includes any medical intervention, including procedures, administration of medication, or use of a medical device, that maintains life by sustaining, restoring, or supplanting a vital function. It does not include care provided for the purpose of keeping a patient comfortable.

(l) "Patient" means the person who is under the care of the health-care practitioner or provider.

(m) "Patient's authorized representative" or "authorized representative" means an individual designated by a patient under an advance health-care directive, a surrogate appointed under Chapter 25 of this title, or a person who is otherwise authorized under law to make health-care decisions on the patient's behalf if the patient lacks decision making capacity.

(n) "Physician" means an individual authorized to practice medicine under 24 *Del. C.* Chapter 17, Subchapter III.

(o) "Scope of treatment" means those medical interventions, procedures, medications, treatments that a patient, in consult with a health-care practitioner, has determined are appropriate, necessary and desired by and for the patient and that a patient has determined to refuse or to allow. Scope of treatment always includes respect for the patient and the provision of comfort measures. A patient may decline life-sustaining treatment.

§ 2504A. Duty of patient's authorized representative.

(a) At such time as a patient lacks decision-making capacity, the patient's authorized representative shall make a health-care decision to treat, withdraw, or withhold treatment in accordance with the patient's individual instructions as expressed in an advance health-care directive or DMOST form, if any, and other wishes to the extent known, or, if a guardian appointed pursuant to Chapters 39 and 39A of Title 12, in accordance with the authority granted by the appointing court. The patient's authorized representative shall have the power to make any health-care decision authorized under this chapter unless limited by the order of a court of competent jurisdiction.

(b) If the patient's instructions or wishes are not known or clearly applicable, the authorized representative's decision shall conform as closely as possible to what the patient would have done or intended under the circumstances. To the extent the authorized representative knows or is able to determine, the authorized representative's decision is to take into account, including, but not limited to, the following factors, if applicable:

(1) The patient's personal, philosophical, religious, and ethical values;

(2) The patient's likelihood of regaining decision-making capacity;

(3) The patient's likelihood of death;

(4) The treatment's burdens on and benefits to the patient; and

(5) Reliable oral or written statements previously made by the patient, including, but not limited to, statements made to family members, friends, health-care providers, or religious leaders.

(c) The decision of an authorized representative regarding whether life-sustaining procedures should be provided, withheld, or withdrawn shall not be based on a patient's status either as a person with a pre-existing long term mental or physical disability, or as a person who is economically disadvantaged.

§ 2505A. Powers and duties of Department of Health and Social Services.

(a) The Secretary of the Department of Health and Social Services shall be authorized to promulgate regulations and develop protocols to fulfill the following responsibilities:

(1) Promulgation of a DMOST form and development of the process for completion, modification, and revocation of the DMOST form including training requirements;

(2) Promotion of awareness among health-care practitioners and health-care providers, emergency care providers, and the general public in this State about the option to complete a DMOST form;

(3) Training of emergency care providers about the use and application of a DMOST form;

(4) Development of additional requirements for the completion of a DMOST form that may be applicable in the case of a patient with mental illness or a developmental disability in consultation with organizations that represent persons with mental illness and development disabilities, respectively; and

(5) Ongoing evaluation of the design and use of DMOST forms through the use of such data as the DHSS determines reasonably necessary for that purpose.

(b) The Secretary of the Department of Health and Social Services shall be authorized to seek the imposition of civil monetary penalties under this chapter.

§ 2506A. Powers and duties of the Department of State.

The Secretary of State shall be authorized to promulgate regulations and develop protocols for the education of all health-care providers under its licensing or certification jurisdiction.

§ 2507A. Delaware Health Information Network.

The Delaware Health Information Network (DHIN) shall be authorized to create an electronic registry to maintain and store executed DMOST forms and make them available to emergency-care providers, health-care providers and health-care institutions. The DHIN shall have the authority to establish a reasonable fee structure sufficient to maintain the operation of the electronic registry.

§ 2508A. Obligation to treat.

A health-care practitioner, health-care provider, health-care institution, or emergency-care provider shall treat a patient who has a completed DMOST form in accordance with the directions and options indicated in such DMOST form, except as otherwise provided in this chapter.

§ 2509A. Mandatory elements of DMOST form.

A DMOST form shall be deemed to be completed, and therefore valid for the purposes of this chapter if it:

(1) Contains information indicating a patient's health-care preferences;

(2) Has been voluntarily signed by a patient or by another person subscribing the patient's name in the patient's presence and at the patient's express direction, or, if the patient does not have decision-making capacity, by the patient's authorized representative;

(3) Includes the signature of the patient's health-care practitioner and the date of that signature; and

(4) Meets any other requirements established by regulation to implement this chapter.

§ 2510A. Recognition of medical orders from other states

A document executed in another state, which meets the requirements of this chapter for a DMOST form or the requirements of the state where such document was executed, shall be deemed to be valid for the purposes of this Act to the same extent as a DMOST valid under this chapter.

§ 2511A. Modification or revocation of DMOST form.

(a) A patient with decision-making capacity, may, at any time, modify or revoke his or her completed DMOST form or otherwise request alternative treatment to the treatment that was ordered on the DMOST form.

(b) If the orders in a patient's completed DMOST form regarding the use of any intervention specified therein conflict with the patient's more recent oral or written directive to the patient's health-care practitioner, the health-care practitioner shall honor the more recent directive from the patient in accordance with the provisions of subsection (d) of this section.

(c) The patient's authorized representative may, at any time after the patient loses decision-making capacity and after consultation with the patient's health-care practitioner, request the health-care practitioner to modify or revoke the completed DMOST form, or otherwise request alternative treatment to the treatment that was ordered on the DMOST form, as the patient's authorized representative deems necessary to reflect the patient's health status or goals of care, unless the patient expressly limits the authorized representative's authority. The DMOST form shall provide the patient with the option to authorize or not to authorize the patient's authorized representative to revoke or modify the patient's completed DMOST form if the patient who has a completed DMOST form loses decision-making capacity. If the patient indicates on the form that the authorized representative is not authorized to revoke or modify the patient's completed DMOST form, the patient's authorized representative may not do so.

(d) An oral or written request by a patient or the patient's authorized representative to modify or revoke a patient's completed DMOST form, in accordance with the provisions of this section, shall be acknowledged and effectuated once the patient's health-care practitioner has signed the DMOST form attesting to that request for modification or revocation.

(e) If the DMOST form was executed by the patient's authorized representative, the patient's authorized representative may, at any time, execute, modify or revoke the DMOST form after consultation with the patient's health-care practitioner.

§ 2512A. Resolution of conflicts

(a) In the event of a disagreement between the patient's authorized representative and the patient's health-care practitioner concerning the patient's decision-making capacity or the appropriate interpretation and application of the terms of a completed DMOST form regarding the patient's course of treatment, the parties:

(1) May seek to resolve the disagreement by means of procedures and practices established by the health care institution, including, but not limited to, consultation with an institutional ethics committee, or with a person designated by the health care institution for this purpose; or

(2) May seek resolution by a court of competent jurisdiction.

(b) A health-care provider involved in the patient's care or an administrator of a health-care institution may seek to resolve a disagreement concerning the appropriate interpretation and application of the terms of a completed DMOST form to the patient's course of treatment in the same manner as set forth in subsection (a) of this section.

§ 2513A. Conflicting directives.

(a) The patient's scope of treatment shall be governed by the latest directive available.

(b) If the treatment directives of a later advance health-care directive conflict with the patient's directives on a DMOST form, a health care practitioner shall be informed so that the DMOST form can be modified or revoked in order to reflect that patient's later directive.

(c) If there is a conflict between the patient's expressed oral or written directives, the DMOST form, or the decisions of the patient's authorized representative, the patient's last expressed oral or written directives shall be followed and, if necessary, a new DMOST form shall be prepared.

§ 2514A. Safeguards.

Any person may petition the Court of Chancery for appointment of a guardian of a patient if that person has good reason to believe that the withdrawal or withholding of health care in a particular case:

(1) Is contrary to the most recent expressed wishes of a patient;

(2) Is predicated on an incorrect assessment of the patient's decision-making capacity;

(3) Is being proposed pursuant to a DMOST form that has been falsified, forged or coerced;

(4) Is being considered without knowledge of a revocation which has been unlawfully concealed, destroyed, altered, or cancelled; or

(5) Is based on a patient's status either as a person with a pre-existing long term mental or physical disability, or as a person who is economically disadvantaged.

§ 2515A. Immunity

A health-care institution or a health care practitioner acting in good faith and in accordance with generally accepted health-care standards applicable to the health-care institution or health care practitioner is not subject to civil or criminal liability or to discipline for unprofessional conduct for:

(1) Complying with a DMOST signed by a health care practitioner apparently having authority to make a DMOST for a patient, including a decision to withhold or withdraw health care;

(2) Declining to comply with a DMOST based on a belief that the health care practitioner then lacked authority to sign a DMOST;

(3) Complying with a DMOST and assuming that the DMOST was valid when made and has not been revoked or terminated;

(4) Providing life-sustaining treatment in an emergency situation when the existence of a DMOST is unknown; or

(5) Declining to comply with a DMOST because the DMOST is contrary to the conscience or good faith medical judgment of the health care practitioner or the written policies of the health-care institution.

§ 2516A. Assumptions and presumptions.

(a) Neither the execution of a DMOST form under this chapter nor the fact that health care is withheld or withdrawn from a patient in accordance therewith shall, for any purpose, constitute a suicide.

(b) The completion of a DMOST form pursuant to this chapter shall not restrict, inhibit nor impair in any manner the sale, procurement, or issuance of any policy of life insurance, nor shall it be deemed or presumed to modify the terms of an existing policy of life insurance. No policy of life insurance shall be legally impaired or invalidated in any manner by the withholding or withdrawal of health care from an insured patient, notwithstanding any term of the policy to the contrary.

(c) No health-care institution, health-care provider, health care service plan, insurer issuing disability insurance, self-insured employee welfare benefit plan, nonprofit hospital service plan, or any other type of direct or indirect provider of health-care benefits or services, shall require any person to execute a DMOST form as a condition to being insured, to receiving care, or to being admitted to a health-care institution in order to receiving health-care services.

§ 2517A. Penalties.

(a) A health-care provider who fails to act in accordance with the requirements of this chapter is subject to discipline for professional misconduct.

(b) A health-care institution that intentionally fails to act in accordance with the requirements of this chapter shall be liable for a civil penalty of not more than $1,000 for each offense. For the purposes of this subsection, each violation shall constitute a separate offense.

(c) An emergency-care provider subject to regulation by the DHSS who intentionally fails to act in accordance with the requirements of this chapter is subject to such disciplinary measures as the Secretary of DHSS deems necessary and consistent with the DHSS's statutory authority.

(d) A person who intentionally or knowingly commits any of the following acts is guilty of a class G felony:

(1) Concealing, canceling, defacing, obliterating, or withholding personal knowledge of a completed DMOST form or a modification or revocation thereof, without the patient's consent, or if the patient lacks decision-making capacity, without the consent of the patient's authorized representative;

(2) Falsifying or forging a completed DMOST form or a modification or revocation thereof; or

(3) Coercing or fraudulently inducing the completion of a DMOST form or a modification or revocation thereof by a patient or, if a patient lacks decision-making capacity, by a patient's authorized representative.

(e) Any organization that is a health-care provider, health-care institution, or "person" as defined in Section 102(1), of Title 18 who intentionally or knowingly requires or prohibits the completion of a DMOST form or a modification or revocation thereof as a condition of coverage under any policy of health or life insurance, or an annuity, or a public benefits program, or as a condition of the provision of health care is guilty of a class A misdemeanor for each and every act or violation, and may be subject to suspension or revocation of such person's authority to do business in Delaware.

(f) The provisions of this section shall not be construed to repeal any sanctions applicable under any other law.

(g) The Superior Court shall have jurisdiction over all civil monetary penalties and offenses under this chapter.

§ 2518A. Capacity.

(a) An adult individual is presumed to have capacity to make a health-care decision and to execute, modify or revoke a DMOST.

(b) A determination that a patient lacks decision-making capacity must be made by a physician.

§ 2519A. Severability.

The provisions of this chapter are severable, and if any word, phrase, clause, sentence, section, or provision of this chapter is for any reason held to be unconstitutional, the decision of the court shall not affect or impair any of the remaining provisions of this chapter. It is hereby declared as the legislative intent that this chapter would have been adopted had such unconstitutional word, phrase, clause, sentence, section or provision thereof not been included herein.

§ 2520A. Effect of copy.

A copy of a DMOST form or revocation of a DMOST form has the same effect as the original.

Section 2. Amend § 2501, Title 16 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

(h) "Health-care decision" shall mean a decision made by an individual or the individual's agent, surrogate or guardian regarding the individual's health care, including:

(1) Selection and discharge of health-care providers and health-care institutions;

(2) Acceptance or refusal of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; ~~and~~

(3) Directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care~~.~~ ; and

(4) Execution of a DMOST pursuant to Chapter 25A of this title.

Section 3. Amend §9706, Title 16 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

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

~~(1) The regulation shall define prehospital advanced care directive procedures to be used for terminally ill patients only.~~

~~(2) All sections of the regulation will insure that processes are in compliance with Chapter 25 of this title, the "Delaware Death with Dignity Act." The regulations shall include, but not be limited to, the following:~~

~~a. The allowable content of prehospital advanced care directives, to include:~~

~~1. Option A (Advanced Life Support) -- Maximal (Restorative) Care Before Arrest, then prehospital advanced care directive; or~~

~~2. Option B (Basic Life Support) -- Limited (Palliative) Care Only Before Arrest, then prehospital advanced care directive;~~

~~b. Methods of identification describing the methods that can be used by persons electing to enact a prehospital advanced care directive. The properly enacted Delaware Prehospital Advanced Care Directive Form must be present; however, voluntary use of a Medic Alert prehospital advanced care directive bracelet or necklace may be worn and/or a designation on a person's driver's license or state-issued identification card pursuant to § 2718(c) of Title 21 to indicate the presence of the form;~~

~~c. Methods of revocation of prehospital advanced care directive describing how a prehospital advanced care directive can be revoked per Chapter 25 of this title; and~~

~~d. Reciprocity to allow Delaware EMS providers to recognize prehospital advanced care directives from neighboring states for persons in Delaware.~~

Section 4. This Act shall take effect upon the adoption of regulations by DHSS or by June 30, 2015, whichever shall first occur.

SYNOPSIS

Section 1 of this Bill adds a provision to the Health-Care Decisions statute authorizing a medical order which is transportable, standardized, and implements a patient's end-of-life care preferences. In order to implement that statute, adjustments are made in Section 2 to the existing advance-care directive statute, and in Section 3 to the statute governing Emergency Medical Services. Section 3 also makes a technical name change within Chapter 97 that was overlooked in a 2003 change to Chapter 97 and adds reference to DMOST in Public Health's rule writing authority.