

## **Delaware Medical Orders for scope of Treatment Act: Keeping control of Treatment Decisions**

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And finally Ben has come to the end of his battle with cancer. Nine months have passed since he was diagnosed with a fast growing form of sinus cancer. The oncologist just finished explaining to Ben and his family that there is nothing more he can do and death is certain in the very near future. But the problem is that Ben is suffering terrible facial pain and has exhausted all forms of pain medication. The only remedy now is to undergo surgery to sever key facial nerves to give him relief.

Fifteen years prior to his diagnosis, Ben had executed his estate plan. The plan included an Advanced Healthcare Directive (Advance Directive) and HIPAA release. In his directive, Ben had put in writing that he did not want to receive life sustaining measures should he develop an incurable disease or become permanently unconscious. Delaware law permits a person to determine in advance whether he wants life sustaining measures taken or not if he develops a qualifying condition: permanently unconscious or an incurable disease where death is certain.<sup>1</sup>

The oncologist had included a Do Not Resuscitate (DNR statement) as part of the medical order guiding his treatment at Ben's request. When one enters a medical facility, all treatment is authorized by a standing medical order for treatment. In Delaware a medical order expires as soon as the patient leaves the premises physically. It is not transportable across different treatment venues.

Ben's doctor recommended a neurosurgeon in Philadelphia, PA to perform the surgery to relieve Ben's pain so he could die with dignity and peace. Ben was taken to Philadelphia by ambulance. On the way, he went into cardiac arrest. The ambulance crew resuscitated Ben successfully. He underwent the surgery and died in a hospice facility six weeks later. When the family was advised that Ben was resuscitated, they were shocked. How could this happen? Everyone knew that there was a DNR in place. His advanced directive stated that he did not want to be resuscitated if he developed the very medical condition that he had. What a sad scenario this is. Unfortunately, it is repeated over and over again. The problem is that most physicians view an advanced directive as advisory only and not mandatory.

Only a medical order dictating treatment is mandatory. An advanced directive is not a medical order for treatment. It is a legal document prepared by lawyers as part of the client's estate plan. It is executed well in advance of the client actually developing a qualifying condition. On top of this is that a medical order for treatment expires when the patient leaves the issuing facility. The result of all of this is that there are times when a patient's wishes concerning life sustaining treatment are not carried out.

At least this was the situation in Delaware until recently. The Delaware Legislature enacted the Delaware Medical Orders for Scope of Treatment Act ("DMOST Act") in May 2015, to address the patient's lack of ability to determine the course of treatment in the above circumstances.<sup>2</sup> The DMOST form is critical to making one's current wishes known in the context of failing health.

The DMOST form works in tandem with a patient's Advanced Directive. In an Advance Directive, the patient names a medical agent who will make treatment decisions if the patient cannot. It is executed before the patient develops a qualifying condition. The Directive expresses the patient's wishes at the time of execution. As the patient ages, his wishes may very well change regarding end-of-life treatments.

The DMOST form is there to address the then existing medical condition of a patient with significant health issues. This group of patients is relatively small in relation to the overall senior population. They are sick and have to make treatment decisions effecting the quality and duration of life. So, it is at this point in a person's life that the DMOST form becomes more relevant than the advanced directive concerning life sustaining treatment. The Directive, however, is still critically important in that it names a surrogate to make medical decisions if the patient cannot.

The statutory requirements for a valid and enforceable DMOST form are that it is a statement in writing, signed by the patient in the presence of a healthcare practitioner, setting out the patient's healthcare preferences. It must state that the form was signed after consultation with his healthcare practitioner. The healthcare practitioner must sign the form as well. Furthermore, it must state that the purpose and consequences of signing the form, along with the fact that the form can be amended or terminated at any time, was explained to the patient by the healthcare practitioner.

DMOST means a clinical process to facilitate communication between healthcare professionals and patients living with serious illness or frailty whose healthcare practitioner would not be surprised if they died within the next year or, if the patient lacks decision making capacity, the patient's authorized representative. §2503 A. (c). 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. It is applicable across healthcare settings, is reviewable, and revocable.

The form must address the situation of a patient losing decision making capacity. The form has to provide the patient the option of specifically authorizing his designated agent to modify or void the medical order for treatment. If the agent is not authorized to do so on the form, he may not take such action. Therefore, it is best to directly involve one's medical agent in this clinical process so that person is clear about the patient's wishes concerning treatment options.

The statute provides a mechanism to deal with conflicts concerning a patient's directives (DMOST form or Advanced Healthcare Directive). The last known directive of the patient controls. Where there is a conflict between the form and the patient's advanced directive, the patient's last known verbal or written directive must be followed. The DMOST form, where earlier in time, shall be modified accordingly. Any modifications must take place only after consulting with a healthcare practitioner.

The statute provides that a properly executed DMOST form is to be honored across the full range of treatment settings, including the home and emergency situations. A healthcare practitioner is subject disciplinary action for not following the treatment directives in the form.

As a result of this new statute, Delaware citizens have a new way to control their wishes concerning medical treatment as they age. This is significant in light of the fact that Delaware has the 5th fastest aging population in the nation.

## References

1. 16 Del. Code §2501A(c). Definitions.
2. 16 Del. code §2501A. Delaware Medical Orders for Scope of Treatment

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