

## Health Care Advance Directives Statutory Changes July 30, 2021

NHARCH – Fall Convention  
Looking Ahead  
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1

## NHLA - Justice in Aging Law Project

- Serves individuals age 60 and older
- Types of cases we handle:
  - Housing/Property Taxes
  - Public Benefits (e.g., Medicaid, Social Security, Food Stamps, Unemployment Compensation, etc.)
  - Consumer Debt
  - Financial Exploitation
  - Long-Term Care (e.g., nursing home/assisted living residents rights, transfer/discharge from facility)

2

## NHLA - Fair Housing Project

- The Fair Housing Project investigates complaints and assists victims of housing discrimination to help them gain protections and remedies
- Engages in systemic advocacy by providing training throughout the state on fair housing topics and advocating for legal and policy change
- Operates a Testing Program to identify and root out unlawful housing discrimination
- The Fair Housing Project is funded through grants from the U.S. Department of Housing and Urban Development (HUD)

3

## NHLA Justice in Aging Law Project and Fair Housing Project

- No strict financial guidelines
- We assist the most socially and economically disadvantaged people
- Justice in Aging - Call our toll-free number: 1-888-353-9944
- Fair Housing Project – Call our toll-free number: 1-800-921-1115
- Can also apply online at [www.nhlegalaid.org](http://www.nhlegalaid.org)

4

## Accessing Home and Community Based Services

- Grant funded through HUD
- Promote Home and Community Based Services as an alternative to nursing facility through community education, outreach and policy advocacy
- Barrier to accessing home care includes lack of power of attorney documents

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5

## Barrier to Accessing Care

### **Lack of Assistance for Individuals with Limited or No Capacity to Make Medical and Financial Decisions**

- Medically compromised and isolated applicants for Home and Community Based Services unable to maneuver the complex application process.
- Impacts individuals: (i) with reduced capacity who decline home care services due to impaired insight regarding personal limitations; (ii) with legal capacity to execute power of attorney documents but who do not have documents in place; and (iii) without capacity to execute power of attorney documents.
- **Without timely intervention (e.g., execution of power of attorney documents, and education for agents serving under health care and financial power of attorney documents), these individuals may ultimately require emergency hospital services, and guardianship.**

6

## Advance Directives

- A document allowing a person to give directions about future care and designate another individual (agent) to make decisions, if that person (principal) should lose capacity;
- Includes durable power of attorney for health care (DPOAHC) and living will;
- RSA 137-J – Written Directives for Medical Decision Making for Adults without Capacity - includes instruction on appointment surrogates, DNR, and POLST

7

## The Challenges

- Not Everyone has executed Advance Directives  
Options are surrogate or guardian
- Family members (agents) are under stress and perhaps not prepared to make decisions
- The law changed as of July 30, 2021, so now you may see both the old statutory form and the current statutory form.

8

## RSA 137-J - Changes Effective July 30, 2021

- Purpose of Changes-Simplify, Clarify and Update;
- Definitions – Added, eliminated and modified certain terms
- Surrogacy – Clarified and expanded
- Changed the limits of authority of the decision maker (agent/surrogate)
- DNR – Clarified and expanded use of certain “forms”
- Living Will – Not a separate form

9

## RSA 137-J:2 Definitions

- Added Attending Practitioner – Eliminated repetition of physician, ARNP, PA;
- Replaced Near Death with Actively Dying;
- Clarified “Certify in Medical Record” includes electronic record;
- Added POLST – Physician Orders for Life Sustaining Treatment; and
- Clarified Living Will to be a written statement of guidance about end of life wishes

10

### RSA 137-J:5 - Scope/Duration of Authority

- 1) Surrogate has the same authority as agent under HCPOA unless limited in a HCPOA document and term is 180 (not 90) days
- 2) Scope of Authority
 

With some exceptions, agent has authority unless a limit is stated in the document, previously assumed agent had no authority unless authority was granted in the document:

  - Objection to Treatment
  - Nutrition and Hydration
  - DNR

11

### RSA 137-J:5 - Scope/Duration of Authority

- 3) Limits on the Agent/Surrogate the same:
  - Agent/Surrogate has no authority to:
    - Commit to a state institution
    - Voluntarily Sterilization
    - Terminate treatment for pregnant principal unless treatment is likely to terminate the pregnancy, or would be physically harmful or cause severe pain
  - Authority is limited to health care decisions
  - Added a new section on authority to consent to clinical trials/experimental treatment

12

## RSA 137-J:5 - Scope/Duration of Authority

4) Clinical trials/Experimental Treatment if:  
Specifically allowed in the HCPOA document  
OR

There is an immediate life-threatening condition  
and

(A) There is no alternate method of saving the life of the patient or preventing an impairment of function that is likely to substantially limit one or more major life activities, or

(B) The treatment is not intended to save the life of the patient but rather is beneficial by increasing mobility or reducing pain, distress, or discomfort.

13

## RSA 137-J:26 Issuance of DNR Orders

New law allows the form of the DNR to include:

- Standard Form
- Portable DNR
- DNR Bracelet
- DNR contained in POLST form

14

## Living Will

- Current form Living Will is not a separate document, but in Section II of HCPOA Form
- Provides guidance about treatment if actively dying or permanently unconscious
- If there is a conflict between HCPOA and Living Will, the HCPOA controls

15

## Most Provisions of RSA 137-J are the Same

- When and how activated
- Freedom from influence
- Agent must act in accordance with Principal's wishes, if unknown best interests
- Who may act as an agent
- Execution
- Revocation
- Reciprocity with other states

16



## Resources

- Advance Care Planning Guide:  
Foundation for Healthy Communities  
[www.healthynh.org](http://www.healthynh.org)
- The Conversation Project:  
<https://theconversationproject.org/>
- American Bar Association Planning Tool Kit:  
[https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2020-tool-kit-hcap.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-tool-kit-hcap.pdf)

17

## Questions



18