



How To Draft a Will for a Small Estate in Delaware
Wednesday, October 21, 2026
9:00 am – 11:00 am
DSBA
Agenda

This is a FREE CLE presentation in preparation for the Wills for Seniors Event sponsored by the Delaware Volunteer Legal Services on Sunday, October 25 at Widener University Delaware Law

8:30 a.m. – 9:00 a.m. – Registration

Presented by: Denise Del Giorno Nordheimer, Esq.

9:00 a.m.- 11:00 a.m. - Wills, Durable Power Of Attorney, Health Care Directive

- A. Meeting with the client: Client Intake Questionnaire
- B. Planning Ahead:
 - a. Burial Wishes
- C. The Will
 - a. Real Property
 - b. Tangible Personal Property
 - c. Specific Bequests
 - d. Executors
 - e. Fiduciary Bonds
 - f. Guardians
 - g. Gifts to Minors
- D. Delaware Durable Power of Attorney
- E. Delaware Health Care Directive

This seminar offers 2.0 credits to Delaware Attorneys. PA and NJ reporting are not available for this free CLE.

Denise D. Nordheimer, Partner Fox Rothschild

Denise translates long-term tax planning and trust and estate administration strategies into effective legal solutions.

She approaches every client with sensitivity, compassion and discretion, tailoring her advice to meet the needs of high-net-worth individuals and their families.

Denise helps establish and amend trusts and guardianships, advising guardians, executors of probate estates and trustees of revocable living trusts and irrevocable trusts on administration issues. In addition, she helps clients resolve estate and trust disputes, including through litigation if necessary.

Drafting Delaware Wills—A DVLS Primer

I. Wills and Trusts

- A. Client Intake: Estate planning is one area of the law that is most likely to create problems at a time when it is too late to do anything other than mitigate damages. When a will is probated, your client is deceased. If critical errors were made in the estate plan it will be too late to correct them. Careful planning is required.
- B. Preparation for meeting with the client. The client should complete an estate planning data form (see samples attached) before meeting with the attorney. It is important for the attorney to know the client's family situation and the ownership and value of the client's assets so the attorney can adequately prepare.
- C. The first meeting with the client – gathering estate planning data. The goal of the first meeting is to make sure that the asset information is complete, to determine the client's family situation and establish the client's dispositive scheme. Many clients will need your advice for matters such as trusts, custodial accounts, and the probate process before they can make decisions concerning their ultimate dispositive provisions.
- D. Recognizing federal estate tax issues. It is important to recognize federal estate tax issues. The federal taxable estate is broadly defined. It includes assets like: life insurance, annuities, individual retirement accounts and tax qualified retirement plans. The Estate Tax is a tax on your right to transfer property at your death. It consists of an accounting of everything you own or have certain interests in at the date of death. The fair market value of these items is used, not necessarily what you paid for them or what their values were when you acquired them. The total of all of these items is your "Gross Estate." The includible property may consist of cash and securities, real estate, insurance, trusts, annuities, business interests and other assets.

Once you have accounted for the Gross Estate, certain deductions (and in special circumstances, reductions to value) are allowed in arriving at your "Taxable Estate." These deductions may include mortgages and other debts, estate administration expenses, property

that passes to surviving spouses and qualified charities. The value of some operating business interests or farms may be reduced for estates that qualify.

After the net amount is computed, the value of lifetime taxable gifts (beginning with gifts made in 1977) is added to this number and the tax is computed. The tax is then reduced by the available unified credit.

Most relatively simple estates (cash, publicly traded securities, small amounts of other easily valued assets, and no special deductions or elections, or jointly held property) do not require the filing of an estate tax return. A filing is required for estates with combined gross assets and prior taxable gifts exceeding in 2022 \$12,060,000 and in 2023 \$12,920,000.

Since January 1, 2011, estates of decedents survived by a spouse may elect to pass any of the decedent's unused exemption to the surviving spouse. This election is made on a timely filed estate tax return for the decedent with a surviving spouse. Note that simplified valuation provisions apply for those estates without a filing requirement absent the portability election.

II. Section 2: Burial and Funeral Expenses

A. Using the Will or a letter of instruction. Disposition of Last Remains There are some things that do not belong in a will. By the time the Will is removed from the decedent's safe deposit box or taken from the decedent's residence, the family will probably already have made many of the decisions regarding the burial and funeral arrangement for the decedent. The client's wishes regarding cremation, the type of funeral to be provided, the choice of a cemetery or mausoleum and perpetual care arrangements are best put in a Disposition of Last Remains 12 Del. C. § 260-270.

In the Disposition of Last Remains, the declarant may specify, any one or more of the following: (1) The disposition to be made of the declarant's last remains; (2) Who may direct the disposition of the declarant's last remains; (3) The ceremonial arrangements to be performed after the declarant's death; (4) Who may direct the ceremonial arrangement after the declarant's death; or (5) The rights, limitations, immunities, and other terms of third parties dealing with the declaration instrument.

III. Section 3: Introductory paragraph of the Will.

The Will should begin with an introductory paragraph that sets forth the name of the testator, the testator's domicile, and the statement that the testator intends for the document to serve as his Last Will and Testament.

IV. Section 4: Tangible personal property.

A. Memorandum provision. 12 Del. C. § 212, provides that:

“A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing:

(1) Must either be in the handwriting of the testator or be signed by the testator and must identify the items and the legatees with reasonable certainty;

(2) Must not be inconsistent with the terms of the will; and

(3) Must not be inconsistent with any other writing permitted by this section unless the writing is dated in which case the writing with the latest date will control.

Notwithstanding the foregoing, in the case of a writing that includes both provisions for dispositions that are consistent with the terms of the will or any other writing permitted by this section and provisions for dispositions that are inconsistent with the terms of the will or any other writing permitted by this section, such writing shall be admissible under this section as evidence of the intended disposition of those items of tangible personal property that would be disposed of by the provisions of the writing that are not inconsistent with the terms of the will or any other writing permitted by this section. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will.”

Since Delaware, unlike Pennsylvania and some other states, allows such a memorandum provision, the provision should always be explained in some detail to the client. A memorandum provision provides flexibility and saves the client and the attorney from

having to execute a Codicil each time the client wishes to change the disposition of her personal effects.

After the memorandum provision, the Will should dispose of the client's other tangible personal property, since a memorandum may never have been written and if written, may not cover all of the client's tangible personal property.

B. Household goods and furnishings.

Household goods and furnishings owned by spouses are usually left to the surviving spouse in the Will, but 12 Del. C. §214 states that

“Solely for the purposes of determining the rights of any person to property of a decedent, it shall be presumed that tangible personal property acquired

(1) By a decedent through gift or inheritance, or

(2) Solely with the funds of the decedent, or

(3) Acquired by the decedent before marriage to the surviving spouse, is the sole property of the decedent notwithstanding that such property consists of household goods or that any such property was subject to joint possession and use by a decedent and the surviving spouse.”

C. Insurance, storage, and shipping of tangibles. Since the executor may not distribute any of the tangible personal property to the beneficiaries designated without having made arrangements for the payment of taxes and costs, the clients should be asked whether the people receiving the tangible personal property are to bear the taxes and costs, or whether the residuary estate is to be responsible for the storage, taxes and insurance attributable to the tangibles. An entirely different group of people may be receiving the tangibles than the residuary estate.

Costs, paid by the executor, will qualify as administration expenses. It is also the general practice in Delaware for the executor, lacking specific instruction otherwise in the Will, to pay shipping costs and deduct them as an administration expense of the estate.

V. SECTION 5: Specific Bequests.

A. Bequests of fixed sums. A Memorandum Provision may not be used to bequeath a

fixed sum of money to an individual or a charity. Such a bequest must actually be placed in the Will.

- B. Bequest of designated property. The client may only have a few items in mind that she wishes to go to specific individuals. In this case, relying on the client to draft a memorandum is probably not wise. The attorney should either prepare the memorandum for signature at the same time as the Will, or include the bequests of the designated property in the Will itself.

"Specific Bequest. I give and bequeath my 1888 antique gold watch to my friend, Joan A. Smith, if she survives me."

- C. Distributable net income considerations. Specifically disposing of the tangible personal property and making other bequests in a separate section of the will avoids hidden tax problems. Internal Revenue Code §663 (a) (1) provides that a specific sum of money or specific property that (1) is paid or credited all at once or in not more than three installments, and (2) is not payable solely from income, will not be treated as a distribution of current income to the person receiving the item of tangible personal property or the bequest. Any other type of distribution from the estate, whether from income or principal, will be treated as a distribution of current income to the beneficiary, to the extent that the estate has distributable net income during that tax period.
- D. Ademption. Ademption is what happens when someone makes a will and leaves someone a particular gift, and that gift is no longer around when the will maker passes away. As an example, if a will maker leaves someone a valuable gold necklace in their will and they sell that necklace before they die, the gift is said to "adeem." Once a gift adeems, it is gone. This can also occur if the gift has changed its form. If a testator leaves someone a property but later sells that property and buys another, the gift of the original property adeems and that person receives nothing. Similarly, if a testator leaves a person a fancy art collection and it is destroyed, so too is the gift.

Unless otherwise provided in the Will, if the specific bequest involves an item that no longer belongs to the client when he dies, the bequest adeems and the beneficiary receives nothing. In *In re Hobson's Estate*, 15 the Court of Chancery described the

rule of ademption, which provides: When the specified item has been conveyed or lost prior to death or its identity has been so substantially changed that it cannot be traced directly to another form, the specific devise or legacy results in an ademption; that is, the specific devise or legacy becomes inoperative, it fails for lack of subject matter to effectuate the devise. See also *Estate of Burke v. Burke*, No. 48, 2017 C.A. No. 10768 (August 24, 2017)

E. Abatement is what happens when certain parts of an estate have to be sold in order to pay debts 12 Del. C. §2317 . See *Getchell v. Rust*, 68 A. 404 (Del.Ch. 1899)

VI. SECTION 6: Real Estate.

- A. Vesting by operation of law. Jointly held real estate (distinguished from tenants in common ownership) passes to the surviving joint tenant at the moment of death. The title to all other real estate owned by the decedent is transferred by the Will. In Delaware, no deed is necessary in order for the real property to descend to the heirs or vest in the devisees. The real estate passing under the Will is subject to divestment (and sale) only if there is an insufficient personal estate to pay the debts of the decedent or the expenses of the administration, including estate taxes and taxes imposed on the income of the estate. In such a case, if the executor has been granted the power to sell in the Will, he may sell the real estate and apply the proceeds to the above-referenced debts and expenses. 12 Del. C. §207.
- B. Direction vs. authorization to sell. Where the client wishes the executor to sell all or a part of the client's real estate, upon his death, and distribute the proceeds in a certain manner or add the proceeds, to the residuary estate, the Will should very specifically direct the executor to do so. Most Wills include an authorization to sell, but do not direct the sale of any particular real estate. The authorization to sell may not be used unless the executor must sell property to pay the estate's taxes and administration expenses and the debts of the decedent.
- C. Description of property. Because 12 Del. C. §207 makes it clear that a Will, will pass title to real property owned by the decedent at the time of his death, regardless of whether the property was acquired after the date of the execution of the Will, it is not necessary to

describe all of the real property in the Will itself. If a parcel of real property is to be specifically devised, then the description of that property becomes critical. Enough detail should be provided so that there is no question about the parcel of real property being devised.

- D. Abatement. If it is necessary to sell assets to pay the debts of the decedent and the administration costs then personal property will be sold prior to real property, and real property that is not specifically devised will be sold before property which is specifically devised. 12 Del. C. §2317.
- E. Life estates. If the client wishes to provide for the use of real property during the remaining life of an individual, rather than devising the property outright to that person, care must be taken to provide enough detail about the ongoing responsibilities of the different parties with regard to the real estate. The Will should specify how the real estate taxes, maintenance, repairs and insurance are to be handled. The Will should also specify what is to happen to the real property at the death of the life tenant or upon the event that the life tenant is no longer willing or able to occupy the real property.
- F. Use of trusts for real estate management. The client may desire to provide lifetime rights in a residence or other parcel of real property and in addition provide a fund with which the maintenance, insurance, taxes, and other expenses relating to the property are to be paid. In such a case, a trust is a useful vehicle. With a trust, the client can be assured that the trustee then serving will have the power to transfer the title to the real property at the end of the life estate.

VII. SECTION 7: Residuary Provisions.

A. Outright distributions.

- 1. Consideration of all contingencies. The residuary clause of a Will provides a convenient "shorthand" method of transferring the bulk of the estate on to the client's designated beneficiaries. However, if the residuary clause is not carefully drafted, there may be results that the client never intended. For example, in Delaware, if a Will does not specifically reference and exercise a power of appointment held by the testator, then the

power of appointment is deemed not to have been exercised for probate and tax purposes. By not mentioning the power in the residuary clause of a Delaware Will you will not cause the power of appointment to be exercised. Other states apply the opposite rule. For example, in Pennsylvania, if a power of appointment is not specifically mentioned, to indicate the testator's intent not to exercise it, then the residuary clause is deemed to exercise it. Since a Delaware testator who holds a power of appointment under a Pennsylvania trust is subject to the Pennsylvania law, the power of appointment question cannot be ignored in the Delaware Will. The following language is suggested if the testator does not intend to exercise Powers of Appointment:

“give, devise and bequeath all the rest, residue and remainder of my property and estate of whatsoever kind and wheresoever situated, other than any property interests over which I may have a power of appointment not specifically designated and exercised in my Will, ...”

Alternatively, if the testator does intend to exercise a Power of Appointment conferred upon him, language similar to the following is suggested:

“SECOND: Exercise of Limited Power of Appointment. I hereby specifically exercise the Limited Power of Appointment granted to me by my late husband, Clinton W. David, in Article FIRST (D) of that certain Trust Agreement dated October 14, 1980, as amended by Complete Amendment to Life Insurance Trust Agreement dated February 15, 1984, between my late husband as Settlor and me as Trustee. I acknowledge that the Power of Appointment conferred upon me by my late husband is a Limited Power of Appointment and that none of the property subject to the Power may be appointed to me, my creditors, my estate or the creditors of my estate. I further direct that none of the property subject to the Power shall be used to satisfy any of my obligations or the obligations of my estate. I direct the Trustee of my late husband's Trust to distribute all the trust assets subject to the Limited Power of Appointment to Robert J. David and to his successors, as Successor Trustee, under a Revocable Trust Agreement entered into by me on October 12, 1990 with me, as Trustee, provided, however, that no power of appointment created in such Revocable Trust Agreement can be validly exercised over the Appointed Property to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of my late husband's death, which is the date of the creation of this Limited Power of Appointment I am now exercising.”

2. Survivorship and "per stirpes". A problem often arises when the client believes the Will disposes of all of his property, but some contingency has not been addressed.

The client's property may, therefore, be subject to intestacy. It is the attorney's responsibility to review the beneficiaries of the Will from the standpoint of the question "What would happen to the client's property if all the people mentioned in the Will were to predecease the client?" The use of "per stirpes" will often solve the problem. The use of "per stirpes" will ensure that a designated beneficiary's children or their issue will receive the property if the designated beneficiary has predeceased the testator. However, "per stirpes" does not always solve the problem. For example, if the entire residue of the estate is left to "John Smith, per stirpes" the Will will not necessarily dispose of all of the testator's property. If John were to predecease the testator and leave no issue at all, the entire residuary estate would pass by intestacy which is probably not what the client had in mind. This issue was addressed in part by the addition of Section 2313A in 2006 as it relates to instances where multiple residuary beneficiaries named and at least one residuary beneficiary (or his/her issue) survive. However, if all residuary beneficiaries (and issue when applicable) predecease the Testator, then the residual gift fails.

After the client has told you how she wishes the residue of her estate to pass, you should explore the possible usefulness of "ultimate heirs". The ultimate or contingent heirs may be brothers and sisters, nieces and nephews or charities and religious organizations which the client would want to benefit in the event that the client and his or her spouse is not survived by any issue at all.

3. Anti-lapse statute. Delaware's anti-lapse statute, 12 Del. C. §2313, mitigates the harshness of the common law rule by which legacies and devises were voided and the intent of the testator often times frustrated, if an individual mentioned in the Will predeceased the testator. The most important thing to remember about the anti-lapse statute is that it only "saves" a bequest or devise to a beneficiary if that beneficiary is a grandparent or lineal descendant of a grandparent of the testator. A bequest of \$10,000 "to my friend John Adams," will not pass to the children of John Adams if John Adams has predeceased the testator, since the children of John Adams are not lineal descendants of the testator. If the client's intent is to benefit John Adams or his children, then the term per stirpes must be used. A bequest of

\$10,000 "to my nephew James", on the other hand, would fall under the anti-lapse statute and if the nephew predeceased the testator leaving issue, the issue would take in equal shares per stirpes.

A good practice is to include the condition "should he/she survive me" or *per stirpes* in all testamentary gifts to make the testator's intent clear.

4. Disclaimer. Neither the Delaware nor the Federal statutes require someone to accept a bequest or devise, or a share of the residuary estate. If done in a proper written document, the disclaiming beneficiary will be treated as though he or she predeceased the testator. This is all the more reason to scrutinize the dispositive plan of the client so that no assets will fall outside of the plan in the event that someone predeceases, or disclaims, his or her share. See 12 Del. C. Ch. 6; IRC §2518.

5. Pour-over to Revocable Trusts.

A common estate planning technique involves the use of a "Pour-Over" Will and Revocable Trust. This technique adds flexibility to a client's estate plan and can save estates money in fees to the Register of Wills. However, such Pour-over will and revocable trust plans are more complex than disposition entirely by a Will and are beyond the scope of this presentation.

6. Asset Coordination. There is a substantial malpractice trap with regard to assets that do not pass under the will. These assets include life insurance, individual retirement accounts, annuities, joint property with right of survivorship and any other forms of property ownership which pass by contract or beneficiary designation as opposed to the Will. When a client requests a change in a Will to disinherit a person and provides for different disposition of property, you must be certain to check the beneficiary designation forms and other forms of ownership on assets so that when the decedent dies the assets which do not pass by the Will follow the same dispositive pattern.

VIII. SECTION 8: Minority Trusts.

- A. Purpose. The client is not likely to favor outright distributions to minor children. In the event that both spouses are deceased and survived by children who have not yet attained the age at which the client is willing to have them inherit outright, that child's share should either pass to a custodian, under the Uniform Transfers to Minors Act (UTMA), or to the trustee of a trust created under the Will, or in the trust agreement, to benefit the child until the age of distribution is reached.
- B. Short form Will provision. Some clients may wish fairly extensive trust provisions to benefit children in the event that both spouses die prior to the children attaining majority. Some clients may be willing to have the trust assets pass to a custodian for the benefit of the child, and allow outright distribution at the age of 21. The most appropriate solution is to set forth several options, for the client to choose.
- C. Long Form Trust Provision. The vast majority of couples have, as a primary consideration, the protection of their children in the event that the parents are both deceased prior to the children attaining adulthood. Although the client may insist on immediate division of the trust assets into as many shares as there are surviving children, most clients with young children prefer to have all of the funds remain available to the trustee for the benefit of all of the children, until the youngest child has been educated. Thus, no division of the trust assets is made until the youngest child attains the age of 21 or 22. Until that time, the trustee is given absolute discretion for the payment of income and principal for the benefit of the beneficiaries. After the date of division into separate shares, each beneficiary is often given a mandatory right to the annual trust income. In that case, the trustee is only given continued discretion over distributions of principal.

The trust agreement then specifies the age or ages at which each beneficiary will have the right to withdraw a portion or all of the remaining trust assets. One-third of the principal at the age of 25, one-half of the remaining principal at the age of 30, and the remainder of the assets at 35, is a common stagger provision. Prior to the time that all of the trust assets are withdrawn; the trustee continues to spend the funds remaining in the trust for the health, maintenance, support and education of the beneficiary. The trust agreement can also provide for advancements for such expenses as a wedding, the purchase of a home to be the

beneficiary's primary residence, or expenses incident to the establishment of a profession or business. The trustee is at least authorized to consider such expenditures, but is not required to make them. Clients generally favor this type of flexibility in a trust agreement.

- D. Discretionary Support Trusts. If a client has a child (or other beneficiary) with a disability who receives (or is expected to receive) need-based government benefits (e.g. SSI or Medicaid), receiving an inheritance has the potential to disqualify them from such benefits. In such instances the use of a trust can protect a disabled beneficiary from losing their benefits. The considerations that go into drafting such a trust is beyond the scope of this presentation, however the ability to spot the potential issue is important.

IX. SECTION 9: Payment of Death Taxes, Debts and Administration Expenses.

A. Failure to make provisions.

1. Delaware Inheritance Tax. The Delaware Inheritance Tax has an exemption amount equal to the Federal Estate Tax exemption. See 30 Del. C. § 1501.
2. Federal and State Estate Tax. The Delaware Estate Tax and the U.S. Estate Tax are taxes based on the value of the decedent's estate rather than the share passing to a particular beneficiary. It is therefore necessary to apportion the tax liability for those taxes among the estate beneficiaries unless the decedent's Will makes specific provision for the payment of the taxes. 12 Del. C. §2906. The Delaware Estate and U.S. Estate Tax are required to be apportioned equitably by prorating the tax. 12 Del. C. §2901(a). The taxes are prorated in the proportion that the value of property of each beneficiary bears to the total value of property received by all beneficiaries with allowance for special exemptions to a particular beneficiary. 12 Del. C. §2901(b). The executor is charged with the duty to pay the Delaware and U.S. Estate Tax before making distribution of estate property and may be held personally liable for the failure to do so. 12 Del. C. §2902.
3. Debts and administration expenses. Delaware law establishes the order for the payment of claims against the decedent's estate. 12 Del. C. §2105. After the

payment of all administration expenses, attorney's fees, other fees and commissions the personal representative is required to pay claims against the decedent's estate in the following order: (1) the spouse's allowance under 12 Del. C. §2308; (2) funeral expenses; (3) medical expenses of the decedent's last illness; (4) wages of household and farm employees ,of the decedent accrued for not more than one year; (5) taxes imposed by the state of Delaware; (6) rent for a period not exceeding one year; (7) judgments against the decedent; (8) obligations of record for the payment of money such as mortgages; (9) obligations and contracts under seal; (10) contracts under the hand of the decedent for the payment of money, and the delivery of goods and merchandise.

- B. Abatement Statutes. 12 Del. C. §2317(a) provides that abatement shall be made in the following order if there are insufficient assets of the estate to satisfy all of the bequests made under the Will: (1) property not disposed of by Will'; (2) residuary bequests and devises; (3) general bequests and devises; (4) specific bequests and devises.

Title 12 Del. C. §2317(b) provides that if the Will or the expressed or implied purpose of a devise would be defeated by the order of abatement specified in the statute, then abatement will be carried out in such a manner as to give effect to the intentions of the decedent. Personal property in each class will abate before real property in any such class. 12 Del. C. §2317(a).

- C. Payment from Residuary Estate. The client may have certain intentions regarding tangible personal property and perhaps some specific bequests and devises. Most clients intend that the residue of the estate pass in some consistent manner, after the payment of all necessary expenses. It is necessary to remind the client that if all debts, taxes, fees and other expenses are paid from the residuary estate, which may be passing to different people than the tangible personal property, the specific bequests and the specific devises, the residuary legatees will bear a higher percentage of such debts, taxes and administration expenses than if everything were apportioned according to the total value of the assets which pass. Most clients still want the residuary estate to bear the costs.

X. SECTION 10: Executors and Guardians.

A. Appointment Provisions. A properly drafted Will or Trust Agreement will always appoint at least one, if not more, persons or corporations to serve as the executor or trustee. If the client is hesitant to name more than one favored individual or bank, you should review with the client the statutory provisions for the appointment of a personal representative or trustee in the absence of the availability of a person to serve.

Delaware law provides that the person or persons entitled to serve as the personal representative of the estate of the decedent will be all of the members in the first of the following classes of persons which has a member of that class living and not under any incapacity: (1) spouse of the decedent, (2) children of the decedent, (3) parents of the decedent, (4) siblings of the whole and half-blood of the decedent. 12 Del. C. §1505.

The appointment of a guardian of the person and property of a child, by a person domiciled in Delaware, does not have to be made in the Will itself. The designation of the guardian can be made in a separate document. Other states, such as Pennsylvania, require the designation of the guardian to be in the Will.

Since the Delaware Courts regard the best interest of the child as the overriding factor, the appointment of the parent's choice of guardian will be respected in almost all cases, but the Court reserves the right to approve the designated guardian. A client should be encouraged to discuss the guardianship issue with the person or persons to be named and preferably with the other family members as well.

Clients should also be reminded that if the guardianship issue is brought before the Court, the Court will almost always favor blood relatives of the child over individuals who are not blood relatives. It should also be noted that the Court will generally allow a minor over 14 years of age to choose a guardian and will only take into account a designation by the parent of the parent's choice of guardian, "if there is no just cause to the contrary", to appoint the child's choice. See 12 Del. C. Ch. 39.

B. Compensation.

1. Executors. Chancery Court Rule 192 establishes the basis for the fee without a written

schedule. "reasonable fees" will be allowed.

2. Guardians. A client may be particularly concerned that the guardian the client wishes to appoint for his children may be placed in a difficult financial situation by accepting the appointment. The client may wish to place specific provisions in the Will to authorize or direct the trustee to distribute funds to the guardians in excess of funds specifically for the support of the children, to aid the guardians to purchase a larger home or build an addition on the home, for example, or to take a vacation, with the trustee expending funds for the care of all of the children during the guardian's absence. See 12 Del. C. §3922 (d).

XI. SECTION 11: Fiduciary Bonds.

- A. Delaware law sets forth the general rule that no bond shall be required prior to receiving Letters Testamentary, except: (1) when an executor is appointed to administer an estate under a will which expressly requires such a bond, or (2) when a bond is required by order of the Court of Chancery under §1524. 12 Del. C. §1521-28. Any person having an interest in an estate, or any creditor having a claim against an estate in excess of \$2,000 may make a written demand to the court that the executor post bond. 12 Del. C. §1524. Since most clients would prefer not to place a bonding requirement upon the executor, the Will should specifically so state. If a beneficiary or a creditor is concerned about the security of their interest or claim, they can petition the court for a bond at any time.
- B. Ancillary Administration. Ancillary Administration, for purposes of this discussion, means the administration of tangible personal property or real property owned by a Delaware resident but located in a state other than Delaware at the time of death. Clients will frequently purchase, inherit, or otherwise come to own property located in another state. When this happens and the client dies an ancillary administration will often be required, pursuant to the laws of the foreign state.

It is always wise to specify in the Will that the executor is directed to appoint himself, or any other person that the executor may choose, to serve as the ancillary representative of the estate, and to indicate that it is the testator's intention that the ancillary administrator not be

required to post bond with security in connection with the duties in any jurisdiction in which the executor may be called upon to act. Although this will not necessarily relieve the executor from the necessity of posting bond in another jurisdiction, because of the other jurisdictions controlling statutes regarding the posting of bond, the executor will at least be in a position to argue that no such bond should be required due to the stated intention of the testator.

XII. SECTION 12: Execution Clauses.

A. Statutory Reference. Delaware law sets forth the requisites regarding the execution of a Will. 12 Del. C. §202. Simply put, a Will to be validly executed in Delaware, must be in writing and signed by the testator, or by some person subscribing the testator's name in his presence and by his expressed direction and be attested and subscribed in the testator's presence by two or more credible witnesses. 12 Del. C. §202.

Although a witness who stands to benefit in some way in the decedent's estate is not precluded from being a credible witness to a Will executed in Delaware, there are many jurisdictions in which this still raises a problem. Thus, if there is any question at all as to whether or not the witness may benefit under the testator's Will, that person should not serve as a witness.

On the last page of the Will (prior to the self-proving affidavit), which provides a space for the Will to be dated and signed by the testator, the word "SEAL" should be placed in parentheses at the end of the signature line, and then the following language should be placed before the signature lines of the witnesses.

"Signed, Sealed, Published and Declared by the above-named (Name of Testator) and for his Last Will and Testament, in the presence of us, who, at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses:"

The witnesses should then sign their names and indicate their place of residence.

B. Codicil. Any later Codicil to a will must be executed with the same formalities as the Will itself.

C. Self-Proving Affidavit. All Wills executed in Delaware should now contain a self-proving affidavit pursuant to 12 Del. C. §1305 so that the signature of the testator and the witnesses will be "self proved", and no one will have to be called to prove the signature before the Register of Wills.

XIII. Section 13: Lifetime Documents.

Wills and Trusts are valuable tools for managing and disposing of a decedent's assets. However, a good estate plan should also involve consideration of problems which will affect the client at some time during the client's lifetime such as a mental or physical disability or life threatening illness. These issues are addressed through durable powers of attorney and Delaware Advance Health-Care directives.

A. Delaware Durable Power of Attorney a Durable Power of Attorney will permit someone to manage the property of an infirmed or disabled person without the expense and delay required by a court ordered guardianship. Effective October 1, 2010, Delaware enacted Delaware Durable Personal Power of Attorney Act at 12 Del. C. Chapter 49A. (See attached). The statute is not retroactive, Durable Powers of Attorney signed before October 1, 2010, are still valid; and the form is not mandatory.

B. Delaware Advance Health-Care Directive

see end for recently enacted updates

C. DMOST

a. What is DMOST?

The Delaware Medical Orders for Scope of Treatment (DMOST) form is a portable medical order form. It allows you to make choices about life-sustaining treatments, including among other treatments, CPR

(resuscitation) and artificial nutrition. You may request full treatment,

limited treatment, or comfort care only.

b. Who is it for?

A DMOST form can be used by a person with a serious illness or frailty, whose health-care practitioner would not be surprised if they died within the next year.

c. When should it be discussed and signed? Who signs it?

A DMOST form is completed after a conversation you have with a health care practitioner. It is signed by you and a physician (MD or DO), an advanced practice registered nurse (APRN), or a physician assistant (PA). The physician/APRN/PA signature makes the choices into portable medical orders.

d. Who is required to follow the wishes documented on the DMOST form?

These orders will be followed by health care providers in any setting (ambulance, long-term care facility, emergency room, hospital, hospice, home, assisted living facility, etc.). It travels with you and is honored when you move to a new setting.

XIV. Section 14:

A. Delaware's Fiduciary Access to Digital Assets and Digital Accounts Act ("Digital Assets Act") took effect January 1, 2015. 12 Del. C. Ch. 50. The Act applies to fiduciaries under Wills, Trusts, and Powers of Attorney. The Act is broad and covers every imaginable type of digital account or asset. Under the act, custodians of such digital property are required to give access to certain fiduciaries.

1. Wills under the Digital Assets Act. Under the Act, unless a Will states otherwise, an executor is entitled to access the decedent's digital assets and digital accounts. Accordingly, if a testator does not wish for their executor to have such access, then they should include a provision in their will restricting access. 12 Del. C. § 5005 (c)(1).

2. Powers of Attorney under the Digital Assets Act. Unlike wills, agents under a power of attorney do not have access to the digital assets and accounts of the principal unless such authority is explicitly granted in the

power of attorney document. 12 Del. C. § 5005 (c)(3).

B. Supportive Decision Making DE Code at Title 16, section 94A (2016)

1. The State of Delaware has created an option to assist people in making decisions, when that person can still make decisions, but may need some help because of physical or cognitive disability. Every person has a right to make their own choices, but some may need help. There are several options available in Delaware for assistance with decision-making in personal life, with health-care, or financial decisions.

- These options include having someone act as a Surrogate Decision Maker (16 Del.C. §2507) for health care decisions;
- act as Advanced Health Care Directive Agent (16 Del.C. §2500 et seq.) for health care decisions; or
- act as Power of Attorney for some or all financial matters (12 Del.C. §49A-101 et seq.).
- Alternately, a court can appoint a guardian (12 Del.C. §3901 et seq.).

Supported Decision Making is different from these options. Supported Decision Making allows a person to continue to make their own decisions by enabling others to help them. They may help them by gathering information for them, or by sitting with them at a doctor's appointment and taking notes or listening with them to what the doctor is saying, so that they can explain it to them again.

2. HOW TO EXPLAIN SUPPORTED DECISION MAKING (SDM)?

SDM is just a fancy way of describing how we all make choices. We all need help in making decisions, every single day. When you don't understand, you probably ask a friend or a family member to help you understand what's going on and what you need to do. Before you pick a supporter, or become a supporter, and make an agreement, you should think about the type of decisions you or the person you support need help with, and how you or the supporter will help.

a) HOW TO CREATE AN AGREEMENT AND APPOINT A SUPPORTER? You can create an agreement by using a form which spells out what type of assistance is needed, and what the supporter has permission to do. The form is your agreement, which must be in writing. It must also be dated, and signed by two people who are not the named supporter for you, the principal, or an employee or agent of a supporter. The people who act as witnesses must also be able to understand the method of communication you use.

b) WHO CAN ACT AS A SUPPORTER? You can choose the person you want to help you, whether it is a neighbor, a friend, or a family member. The person must be over 18 years of age. The only people who **cannot** be a supporter for you are:

- i. People you work for, or who work for you (unless they are an immediate family member);
- ii. A person who already gets paid to provide you support services, unless you are actually paying them to be a supporter (and only a supporter), or unless they are an immediate family member; or
- iii. Someone you have a protection from abuse order against, or who has to stay away from you due to a Court order.

c) WHO WITNESSES THE AGREEMENT?

The 2 adult witnesses required may not be: a supporter for the principal, an employee or agent of a supporter named in the supported decision- making agreement, or any person who does not understand the type of communication the principal uses, unless an individual who understands the principal's means of communication is present to assist during the execution of the supported decision-making agreement

XV. Section 15: Ethics

All of the Delaware Rules of Professional Conduct apply to the wills and estates practice. However, Rule 1.7 is of particular importance as it is a frequent consideration in drafting estate planning documents. Rule 1.7 prohibits simultaneously representing two or more clients who are directly adverse or where there is a significant risk that representation of each client amongst multiple clients will be materially limited by the lawyer's responsibilities towards the others.

Estate planning lawyers routinely meet with a married couple together and write documents for both of them. There is a potential conflict between two spouses. For instance, one spouse may wish to disinherit the other and request that the lawyer not disclose to the other this wish. If the would-be-disinherited spouse knew of this wish, it is likely to affect his or her wishes with regard to distribution under his or her will.

Fortunately, Rule 1.7 has an exception for instances where a lawyer believes he or she can competently and diligently represent both clients. If the situation otherwise fits the exception under Rule 1.7 (b) (1) – (4), the lawyer should request that the clients waive the potential conflict between them (in writing) so that the lawyer may work with them together. Of course, if the potential conflict between two spouses becomes an actual conflict the lawyer will then be unable to continue the joint representation.

TITLE 16

Health and Safety

Regulatory Provisions Concerning Public Health

CHAPTER 25. Uniform Health-Care Decisions Act [Effective Sept. 30, 2025].

§ 2501. Short title [Effective Sept. 30, 2025].

This chapter may be cited as the “Uniform Health-Care Decisions Act (2023).”

§ 2502. Definitions [Effective Sept. 30, 2025].

For purposes of this chapter:

(1)“Advance health-care directive” means a power of attorney for health care, health-care instruction, or both. The term includes an advance mental health-care directive.

(2)“Advance mental health-care directive” means a power of attorney for health care, health-care instruction, or both, created under § 2509 of this title.

(3)“Agent” means an individual appointed under a power of attorney for health care to make a health-care decision for the individual who made the appointment. The term includes a co-agent or alternate agent appointed under § 2520 of this title.

(4) “Capacity” means having capacity under § 2503 of this title.

(5)“Cohabitant” means each of 2 individuals who have been living together as a couple for at least 1 year after each became an adult or was emancipated and who are not married to each other or are not domestic partners with each other.

(6)“Default surrogate” means an individual authorized under § 2512 of this title to make a health-care decision for another individual.

(7)“Domestic partner” means an individual in a civil union or domestic partnership that is legally recognized in any state.

(8)“Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(9)“Family member” means a spouse, domestic partner, adult child, parent, or grandparent, or an adult descendant of a spouse, domestic partner, child, parent, or grandparent.

(10)“Guardian” means a person appointed under other law by a court to make decisions regarding the personal affairs of an individual, which may include health-care decisions. The term does not include a guardian ad litem.

(11) “Health care” means care or treatment or a service or procedure to maintain, monitor, diagnose, or otherwise affect an individual’s physical or mental illness, injury, or condition. The term includes mental health care.

(12)“Health-care decision” means a decision made by an individual or the individual’s surrogate regarding the individual’s health care, including all of the following:

- a. Selection or discharge of a health-care professional or health-care institution.
- b. Approval or disapproval of a diagnostic test, surgical procedure, medication, therapeutic intervention, or other health care.
- c. Direction to provide, withhold, or withdraw artificial nutrition or hydration, mechanical ventilation, or other health care.

(13)“Health-care institution” means a facility or agency licensed, certified, or otherwise authorized or permitted by other law to provide health care in this State in the ordinary course of business.

(14)“Health-care instruction” means a direction, whether or not in a record, made by an individual that indicates the individual’s goals, preferences, or wishes concerning the provision, withholding, or withdrawal of health care. The term includes a direction intended to be effective if a specified condition arises.

(15)“Health-care professional” means a physician or other individual licensed, certified, or otherwise authorized or permitted by other law of this State to provide health care in this State in the ordinary course of business or the practice of the physician’s or individual’s profession.

(16) “Individual” means an adult or emancipated minor.

(17) “Long-term care facility” means as defined in § 1102 of this title.

(18)“Mental health care” means care or treatment or a service or procedure to maintain, monitor, diagnose, or otherwise affect an individual’s mental illness or other psychiatric, psychological, or psychosocial condition.

(19)“Nursing home” means a “nursing facility” as defined in § 1919(a)(1) of the Social Security Act, 42 U.S.C. § 1396r(a)(1) or “skilled nursing facility” as defined in § 1819(a)(1) of the Social Security Act, 42 U.S.C. § 1395i-3(a)(1).

(20)“Person” means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(21) “Person interested in the welfare of the individual” means any of the following:

- a. The individual’s surrogate.
- b. A family member of the individual.
- c. The cohabitant of the individual.
- d. A public entity providing health-care case management or protective services to the individual.
- e. A person appointed under other law to make decisions for the individual under a power of attorney for finances.
- f. A person that has an ongoing personal or professional relationship with the individual, including a person that has provided educational or health-care services or supported decision making to the individual.

(18)“Physician” means an individual authorized to practice medicine under subchapter III, Chapter 17 of Title 24.

(19)“Power of attorney for health care” means a record in which an individual appoints an agent to make health-care decisions for the individual.

(20)“Reasonably available” means being able to be contacted without undue effort and being willing and able to act in a timely manner considering the urgency of an individual’s health-care situation. When used to refer to an agent or default surrogate, the term includes being willing and able to comply with the duties under § 2517 of this title in a timely manner considering the urgency of an individual’s health-care situation.

(25) “Record” means information either:

- a. Inscribed on a tangible medium.

b. Stored in an electronic or other medium and retrievable in perceivable form.

(26) “Responsible health-care professional” means either:

a. A health-care professional designated by an individual or the individual’s surrogate to have primary responsibility for the individual’s health care or for overseeing a course of treatment.

b. In the absence of a designation under paragraph (26)a. of this section or, if the professional designated under paragraph (26)a. of this section is not reasonably available, a health-care professional who has primary responsibility for overseeing the individual’s health care or for overseeing a course of treatment.

(27) “Sign” means, with present intent to authenticate or adopt a record, to either:

a. Execute or adopt a tangible symbol.

b. Attach to or logically associate with the record an electronic symbol, sound, or process.

(28) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(29) “Supported decision making” means assistance, from 1 or more persons of an individual’s choosing, that helps the individual make or communicate a decision, including by helping the individual understand the nature and consequences of the decision. Supported decision making is not limited to assistance provided under a supported decision-making agreement under Chapter 94A of this title.

(30) “Surrogate” means any of the following:

a. An agent.

b. A default surrogate.

c. A guardian authorized to make health-care decisions.

§ 2503. Capacity [Effective Sept. 30, 2025].

(a) An individual has capacity for the purpose of this chapter if the individual is willing and able to communicate a decision independently or with appropriate services,

technological assistance, supported decision making, or other reasonable accommodation and in making or revoking:

(1) A health-care decision, understands the nature and consequences of the decision, including the primary risks and benefits of the decision.

(2) A health-care instruction, understands the nature and consequences of the instruction, including the primary risks and benefits of the choices expressed in the instruction.

(3) An appointment of an agent under a health-care power of attorney or identification of a default surrogate under § 2512(b)(1) of this title, recognizes the identity of the individual being appointed or identified and understands the general nature of the relationship of the individual making the appointment or identification with the individual being appointed or identified.

(b) The right of an individual who has capacity to make a decision about the individual's health care is not affected by whether the individual creates or revokes an advance health-care directive.

§ 2504. Presumption of capacity; overcoming presumption [Effective Sept. 30, 2025].

(a) An individual is presumed to have capacity to make or revoke a health-care decision, health-care instruction, and power of attorney for health care unless either of the following:

(1) A court has found the individual lacks capacity to do so.

(2) The presumption is rebutted under subsection (b) of this section.

(b) Subject to §§ 2505 and 2506 of this title and subsection (c) of this section, a presumption under subsection (a) of this section may be rebutted by a finding that the individual lacks capacity:

(1) Made on the basis of a contemporaneous examination by any of the following individuals who must be licensed or otherwise authorized to practice in this State and must have training and expertise in the finding of lack of capacity:

a. A physician.

b. A psychologist.

c. A physician assistant.

d. An advanced practice registered nurse.

e. A licensed clinical social worker.

f. A responsible health-care professional not described in paragraphs

(b)(1)a. through (b)(1)e. of this section if both of the following:

1. The individual about whom the finding is to be made is experiencing a health condition requiring a decision regarding health-care treatment to be made promptly to avoid loss of life or serious harm to the health of the individual.

2. An individual listed in paragraphs (b)(1)a. through (b)(1)e. of this section is not reasonably available.

(2) Made in accordance with accepted standards of the profession and the scope of practice of the individual making the finding and to a reasonable degree of certainty; and

(3) Documented in a record signed by the individual making the finding that includes an opinion of the cause, nature, extent, and probable duration of the lack of capacity.

(c) The finding under subsection (b) of this section may not be made by any of the following:

- (1) A family member of the individual presumed to have capacity.

- (2) The cohabitant of the individual or a descendant of the cohabitant.

- (3) The individual's surrogate, a family member of the surrogate, or a descendant of the surrogate.

(d) If the finding under subsection (b) of this section was based on a condition the individual no longer has or a responsible health-care professional subsequently has good cause to believe the individual has capacity, the individual is presumed to have capacity unless a court finds the individual lacks capacity or the presumption is rebutted under subsection (b) of this section.

§ 2505. Notice of finding of lack of capacity; right to object [Effective Sept. 30, 2025].

(a) As soon as reasonably feasible, an individual who makes a finding under § 2504(b) of this title shall inform the individual about whom the finding was made or the individual's responsible health-care professional of the finding.

(b) As soon as reasonably feasible, a responsible health-care professional who is informed of a finding under § 2504(b) of this title shall inform the individual about whom the finding was made and the individual's surrogate.

(c) An individual found under § 2504(b) of this title to lack capacity may object to the finding in any of the following ways:

- (1) By orally informing a responsible health-care professional.
- (2) In a record provided to a responsible health-care professional or the health-care institution in which the individual resides or is receiving care.
- (3) By another act that clearly indicates the individual's objection.

(d) If the individual objects under subsection (c) of this section, the finding under § 2504(b) of this title is not sufficient to rebut a presumption of capacity in § 2504(a) of this title and the individual must be treated as having capacity unless any of the following:

- (1) The individual withdraws the objection.
- (2) A court finds the individual lacks the presumed capacity.
- (3) The individual is experiencing a health condition requiring a decision regarding health-care treatment to be made promptly to avoid imminent loss of life or serious harm to the health of the individual.
- (4) Subject to subsection (e) of this section, the finding is confirmed by a second finding made by an individual authorized under § 2504(b)(1) of this title who satisfies all of the following:
 - a. Did not make the first finding.
 - b. Is not a family member of the individual who made the first finding.
 - c. Is not the cohabitant of the individual who made the first finding or a descendant of the cohabitant.
 - d. Paragraphs 2504(b)(2) through (b)(3) of this title.
- (e) A second finding that the individual lacks capacity under paragraph (d)(4) of this section is not sufficient to rebut the presumption of capacity if the individual is requesting the provision or continuation of life-sustaining treatment and the finding is being used to make a decision to withhold or withdraw the treatment.
- (f) As soon as reasonably feasible, a health-care professional who is informed of an objection under subsection (c) of this section shall do both of the following:

- (1) Communicate the objection to a responsible health-care professional.
- (2) Document the objection and the date of the objection in the individual's medical record or communicate the objection and the date of the objection to an administrator with responsibility for medical records of the health-care institution providing health care to the individual, who shall document the objection and the date of the objection in the individual's medical record.

§ 2506. Judicial review of finding of lack of capacity [Effective Sept. 30, 2025].

(a) An individual found under § 2504(b) of this title to lack capacity, a responsible health-care professional, the health-care institution providing health care to the individual, or a person interested in the welfare of the individual may petition the Court of Chancery in the county in which the individual resides or is located to determine whether the individual lacks capacity.

(b) The court in which a petition under subsection (a) of this section is filed shall appoint an attorney ad litem. The court shall hear the petition on an expedited basis. The court shall determine whether the individual lacks capacity on an expedited basis. The court may determine the individual lacks capacity only if the court finds by clear and convincing evidence that the individual lacks capacity.

§ 2507. Health-care instruction [Effective Sept. 30, 2025].

(a) An individual may create a health-care instruction that expresses the individual's preferences for future health care, including preferences regarding all of the following:

- (1) Health-care professionals or health-care institutions.
- (2) How a health-care decision will be made and communicated.
- (3) Persons that should or should not be consulted regarding a health-care decision.
- (4) A person to serve as guardian for the individual if 1 is appointed.
- (5) An individual to serve as a default surrogate.

(b) A health-care professional to whom an individual communicates or provides an instruction under subsection (a) of this section shall document the instruction and the date of the instruction in the individual's medical record or communicate the instruction and date of the instruction to an administrator with responsibility for medical records of the

health-care institution providing health care to the individual, who shall document the instruction and the date of the instruction in the individual's medical record.

(c) A health-care instruction made by an individual that conflicts with an earlier health-care instruction made by the individual, including an instruction documented in a medical order, revokes the earlier instruction to the extent of the conflict.

(d) A health-care instruction may be in the same record as a power of attorney for health care.

§ 2508. Power of attorney for health care [Effective Sept. 30, 2025].

(a) An individual may create a power of attorney for health care to appoint an agent to make health-care decisions for the individual.

(b) An individual is disqualified from acting as agent for an individual who lacks capacity to make health-care decisions if any of the following apply:

(1) A court finds that the potential agent poses a danger to the individual's well-being, even if the court does not issue a protection from abuse order against the potential agent.

(2) The potential agent is an owner, operator, employee, or contractor of a nursing home or long-term care facility in which the individual resides or is receiving care, unless the owner, operator, employee, or contractor is a family member of the individual, the cohabitant of the individual, or a descendant of the cohabitant.

(3) The individual has a pending protection from abuse petition against the potential agent.

(4) The individual has a protection from abuse order against the potential agent.

(5) The potential agent is the subject of a civil or criminal order prohibiting or limiting contact with the individual.

(a) A health-care decision made by an agent is effective without judicial approval.

(b) A power of attorney for health care must be in a record, signed by the individual creating

the power, and signed by an adult witness who satisfies all of the following:

(1) Reasonably believes the act of the individual to create the power of attorney is voluntary and knowing.

(2) Is not the agent appointed by the individual.

(3) Is not the agent's spouse, domestic partner, or cohabitant.

(4) If the individual resides or is receiving care in a nursing home or long-term care facility, is not the owner, operator, employee, or contractor of the nursing home or long-term care facility.

(5) Is present when the individual signs the power of attorney or when the individual represents that the power of attorney reflects the individual's wishes.

(e) A witness under subsection (d) of this section is considered present if the witness and the individual are any of the following:

(1) Physically present in the same location.

(2) Using electronic means that allow for real time audio and visual transmission and communication in real time to the same extent as if the witness and the individual were physically present in the same location.

(3) Able to speak to and hear each other in real time through audio connection if the identity of the individual is personally known to the witness or the witness is able to authenticate the identity of the individual by receiving accurate answers from the individual that enable the authentication.

(e) A power of attorney for health care may include a health-care instruction.

§ 2509. Advance mental health-care directive [Effective Sept. 30, 2025].

(a) An individual may create an advance health-care directive that addresses only mental health care for the individual. The directive may include a health-care instruction, a power of attorney for health care, or both.

(b) A health-care instruction under this section may include the individual's preferences for mental health care, including preferences regarding any of the following:

(1) General philosophy and objectives regarding mental health care.

(2) Specific goals, preferences, and wishes regarding the provision, withholding, or withdrawal of a form of mental health care, including all of the following:

a. Preferences regarding professionals, programs, and facilities.

b. Admission to a mental-health facility, including duration of admission.

c. Preferences regarding medications.

d. Refusal to accept a specific type of mental health care, including a medication.

e. Preferences regarding crisis intervention.

(c) A power of attorney for health care under this section may appoint an agent to make decisions only for mental health care.

(d) An individual may direct in an advance mental health-care directive that, if the individual is experiencing a psychiatric or psychological event specified in the directive, the individual may not revoke the directive or a part of the directive.

(e) If an advance mental health-care directive includes a direction under subsection (d) of this section, the advance mental health-care directive must be in a record that is separate from any other advance health-care directive created by the individual and signed by the individual creating the advance mental health-care directive and at least 2 adult witnesses who satisfy all of the following:

- (1) Attest that to the best of their knowledge, the individual understood the nature and consequences of the direction, including its risks and benefits.
- (2) Attest that to the best of their knowledge, the individual made the direction voluntarily and without coercion or undue influence.
- (3) Are not the agent appointed by the individual.
- (4) Are not the agent's spouse, domestic partner, or cohabitant.
- (5) If the individual resides in a nursing home or long-term care facility, are not the owner, operator, employee, or contractor of the nursing home or long-term care facility.
- (6) Are physically present in the same location as the individual.

§ 2510. Relationship of advance mental health-care directive and other advance health-care directive [Effective Sept. 30, 2025].

(a) If a direction in an advance mental health-care directive of an individual conflicts with a direction in another advance health-care directive of the individual, the later direction revokes the earlier direction to the extent of the conflict.

(b) An appointment of an agent to make decisions only for mental health care for an individual does not revoke an earlier appointment of an agent to make other health-care decisions for the individual. A later appointment revokes the authority of an agent under the earlier appointment to make decisions about mental health care unless otherwise specified in the power of attorney making the later appointment.

(c) An appointment of an agent to make health-care decisions for an individual other than decisions about mental health care made after appointment of an agent authorized to

make only mental health-care decisions does not revoke the appointment of the agent authorized to make only mental health-care decisions.

§ 2511. Optional form [Effective Sept. 30, 2025].

The following form may be used to create an advance health-care directive:

ADVANCE HEALTH-CARE DIRECTIVE

HOW YOU CAN USE THIS FORM

You can use this form if you wish to name someone to make health-care decisions for you in case you cannot make decisions for yourself. This is called giving the person a power of attorney for health care. This person is called your Agent.

You can also use this form to state your wishes, preferences, and goals for health care, and to say if you want to be an organ donor after you die.

YOUR NAME AND DATE OF BIRTH

Name:

Date of birth:

PART A: NAMING AN AGENT

This part lets you name someone else to make health-care decisions for you. You may leave any item blank.

____ 1. NAMING AN AGENT

____ I want the following person to make health-care decisions for me if I cannot make decisions for myself:

____ Name:

____ Optional contact information (it is helpful to include information such as address, phone, and email):

____ 2. NAMING AN ALTERNATE AGENT

____ I want the following person to make health-care decisions for me if I cannot and my Agent is not able or available to make them for me:

____ Name:

____ Optional contact information (it is helpful to include information such as address, phone, and email):

____ 3. LIMITING YOUR AGENT'S AUTHORITY

____ I give my Agent the power to make all health-care decisions for me if I cannot make those decisions for myself, except the following:

____ (If you do not add a limitation here, your Agent will be able make all health-care decisions that an Agent is permitted to make under State law.)

PART B: HEALTH-CARE INSTRUCTIONS

This part lets you name someone else to make health-care decisions for you. You may leave any item blank. This part lets you state your priorities for health care and to state types of health care you do and do not want.

____ 1. INSTRUCTIONS ABOUT LIFE-SUSTAINING TREATMENT

____ This section gives you the opportunity to say how you want your Agent to act while making decisions for you. You may mark or initial each choice. You also may leave any choice blank.

____ Treatment. Medical treatment needed to keep me alive but not needed for comfort or any other purpose should (mark or initial all that apply):

____ (____) Always be given to me. (If you mark or initial this choice, you should not mark or initial other choices in this “treatment” section.)

____ (____) Not be given to me if I have a condition that is not curable and is expected to cause my death soon, even if treated.

____ (____) Not be given to me if I am unconscious and I am not expected to be conscious again.

____ (____) Not be given to me if I have a medical condition from which I am not expected to recover that prevents me from communicating with people I care about, caring for myself, and recognizing family and friends.

____ (____) Other (write what you want or do not want):

____ Food and liquids. If I can’t swallow and staying alive requires me to get food or liquids through a tube or other means for the rest of my life, then food or liquids should (mark or initial all that apply):

____ (____) Always be given to me. (If you mark or initial this choice, you should not mark or initial other choices in this “food and liquids” section).

____ (____) Not be given to me if I have a condition that is not curable and is expected to cause me to die soon, even if treated.

____ (____) Not be given to me if I am unconscious and am not expected to be conscious again.

____ (____) Not be given to me if I have a medical condition from which I am not expected to recover that prevents me from communicating with people I care about, caring for myself, and recognizing family and friends.

____ (____) Other (write what you want or do not want):

____ (____) Pain relief. If I am in significant pain, care that will keep me comfortable but is likely to shorten my life should (mark or initial all that apply):

____ (____) Always be given to me. (If you mark or initial this choice, you should not mark or initial other choices in this “pain relief” section.)

_____ (____) Never be given to me. (If you mark or initial this choice, you should not mark or initial other choices in this “pain relief” section.)

_____ (____) Be given to me if I have a condition that is not curable and is expected to cause me to die soon, even if treated.

_____ (____) Be given to me if I am unconscious and am not expected to be conscious again.

_____ (____) Be given to me if I have a medical condition from which I am not expected to recover that prevents me from communicating with people I care about, caring for myself, and recognizing family and friends.

_____ (____) Other (write what you want or do not want):

____ 2. MY PRIORITIES

_____ You can use this section to indicate what is important to you, and what is not important to you. This information can help your Agent make decisions for you if you cannot. It also helps others understand your preferences.

_____ You may mark or initial each choice. You also may leave any choice blank.

_____ Staying alive as long as possible even if I have substantial physical limitations is:

_____ (____) Very important

_____ (____) Somewhat important

_____ (____) Not important

_____ Staying alive as long as possible even if I have substantial mental limitations is:

_____ (____) Very important

_____ (____) Somewhat important

_____ (____) Not important

_____ Being free from significant pain is:

_____ (____) Very important

_____ (____) Somewhat important

_____ (____) Not important

_____ Being independent is:

_____ (____) Very important

_____ (____) Somewhat important

_____ (____) Not important

_____ Having my Agent talk with my family before making decisions about my care is:

_____ (____) Very important

_____ (____) Somewhat important

_____ (____) Not important

_____ Having my Agent talk with my friends before making decisions about my care is:

_____ (____) Very important

_____ (____) Somewhat important

_____ (____) Not important

____ 3. OTHER INSTRUCTIONS

_____ You can write in this section more information about your goals, values, and preferences for treatment, including care you want or do not want. You can also use this section to name anyone who you do not want to make decisions for you under any conditions.

PART C: OPTIONAL SPECIAL POWERS AND GUIDANCE

This part lets you give your Agent additional powers, and to provide more guidance about your wishes. You may mark or initial each choice. You also may leave any choice blank.

____ 1. OPTIONAL SPECIAL POWERS

_____ My Agent can do the following things ONLY if I have marked or initialed them below:

_____ (____) Admit me as a voluntary patient to a facility for mental health treatment for up to _____ days (write in the number of days you want like 7, 14, 30 or another number).

_____ (If I do not mark or initial this choice, my Agent MAY NOT admit me as a voluntary patient to this type of facility.)

_____ (____) Place me in a nursing home for more than 100 days even if my needs can be met somewhere else, I am not terminally ill, and I object.

_____ (If I do not mark or initial this choice, my Agent MAY NOT do this.)

____ 2. ACCESS TO MY HEALTH INFORMATION

_____ My Agent may obtain, examine, and share information about my health needs and health care if I am not able to make decisions for myself. If I mark or initial below, my Agent may also do that at any time my Agent thinks it will help me.

_____ (____) I give my Agent permission to obtain, examine, and share information about my health needs and health care whenever my Agent thinks it will help me.

____ 3. FLEXIBILITY FOR MY AGENT

_____ Mark or initial below if you want to give your Agent flexibility in following instructions you provide in this form. If you do not, your Agent must follow the instructions even if your Agent thinks something else would be better for you.

_____ (____) I give my Agent permission to be flexible in applying these instructions if my Agent thinks it would be in my best interest based on what my Agent knows about me.

____ 4. NOMINATION OF GUARDIAN

____ You can say who you would want as your guardian if you needed one. A guardian is a person appointed by a court to make decisions for someone who cannot make decisions. Filling this out does NOT mean you want or need a guardian. There is no guarantee that the court will appoint the person you want as guardian.

____ If a court appoints a guardian to make personal decisions for me, I want the court to choose:

____ (____) My Agent named in this form. If my Agent cannot be a guardian, I want the Alternate Agent named in this form.

____ (____) Other (write who you would want and their contact information):

PART D: ORGAN DONATION

This part lets you donate your organs after you die. You may have already indicated a decision on your driver's license, identification card, or in another registry. You may leave any item blank.

____ 1. DONATION

____ You may mark or initial only one choice. Leave this "donation" section blank if you do not want to include your decision here.

____ (____) I donate my organs, tissues, and other body parts after I die, even if it requires maintaining treatments that conflict with other instructions I have put in this form, EXCEPT for those I list below (list any body parts you do NOT want to donate):

____ (____) I do not want my organs, tissues, or other body parts donated to anybody for any reason. (If you mark or initial this choice, you should skip the "purpose of donation" section.)

____ 2. PURPOSE OF DONATION

____ You may mark or initial all that apply. (If you do not mark or initial any of the purposes below, your donation can be used for all of them.)

____ Organs, tissues, or other body parts that I donate may be used for:

____ (____) Transplant

____ (____) Therapy

____ (____) Research

____ (____) Education

____ (____) All of the above

PART E: SIGNATURES

YOUR SIGNATURE

____ Sign your name:

____ Today's date:

____ City/Town/Village and State (optional):

SIGNATURE OF A WITNESS

____ You need a witness if you are using this form to name an Agent. The witness must be an adult and cannot be the person you are naming as Agent or the Agent's spouse, domestic partner, or someone the Agent lives with as a couple. If you live or are receiving care in a nursing home or long-term care facility, the witness cannot be an employee or contractor of the home or someone who owns or runs the home.

____ Name of Witness:

____ Signature of Witness:

____ (Only sign as a witness if you think the person signing above is doing it voluntarily.)

____ Date witness signed:

PART F: INFORMATION FOR AGENTS

1. If this form names you as an Agent, you can make decisions about health care for the person who named you when the person cannot make their own.
 2. If you make a decision for the person, follow any instructions the person gave, including any in this form.
 3. If you do not know what the person would want, make the decision that you think is in the person's best interest. To figure out what is in the person's best interest, consider the person's values, preferences, and goals if you know them or can learn them. Some of these preferences may be in this form. You should also consider any behavior or communication from the person that indicates what the person currently wants.
 4. If this form names you as an Agent, you can also get and share the person's health information. But unless the person has said so in this form, you can get or share this information only when the person cannot make decisions about the person's health care.
- [70 Del. Laws, c. 392, § 3; 70 Del. Laws, c. 186, § 1; 79 Del. Laws, c. 204, § 1; 84 Del. Laws, c. 467, § 1;](#)

§ 2512. Default surrogate [Effective Sept. 30, 2025].

(a) A default surrogate may make a health-care decision for an individual who lacks capacity to make health-care decisions and for whom an agent, or guardian authorized to make health-care decisions, has not been appointed or is not reasonably available.

(b) Unless the individual has an advance health-care directive that indicates otherwise, a member of any of the following classes, in descending order of priority, who is reasonably available and not disqualified under § 2514 of this title, may act as a default surrogate for the individual:

- (1) An adult the individual has identified, other than in a power of attorney for health care, to make a health-care decision for the individual if the individual cannot make the decision.
- (2) The individual's spouse or domestic partner, unless any of the following:
 - a. A petition for annulment, divorce, dissolution of marriage, legal separation, or termination has been filed and not dismissed or withdrawn.
 - b. A decree of annulment, divorce, dissolution of marriage, legal separation, or termination has been issued.
 - c. The individual and the spouse or domestic partner have agreed in a record to a legal separation.
 - d. The spouse or domestic partner has deserted the individual for more than 1 year.
- (3) The individual's adult child or parent.
- (4) The individual's cohabitant.
- (5) The individual's adult sibling.
- (6) The individual's adult grandchild or grandparent.
- (7) An adult not listed in paragraphs (b)(1) through (b)(6) of this section who has assisted the individual with supported decision making routinely during the preceding 6 months.
- (8) The individual's adult stepchild not listed in paragraphs (b)(1) through (b)(7) of this section whom the individual actively parented during the stepchild's minor years and with whom the individual has an ongoing relationship.
- (9) An adult not listed in paragraphs (b)(1) through (b)(8) of this section who has exhibited special care and concern for the individual and is familiar with the individual's personal values.

(c) A responsible health-care professional may require an individual who assumes authority to act as a default surrogate to provide a declaration in a record under penalty of perjury stating facts and circumstances reasonably sufficient to establish the authority.

(d) If a responsible health-care professional reasonably determines that an individual who assumed authority to act as a default surrogate is not willing or able to comply with a duty under § 2517 of this title or fails to comply with the duty in a timely manner, the professional may recognize the individual next in priority under subsection (b) of this section as the default surrogate.

(e) A health-care decision made by a default surrogate is effective without judicial approval.

§ 2513. Disagreement among default surrogates [Effective Sept. 30, 2025].

(a) A default surrogate who assumes authority under § 2512 of this title shall inform a responsible health-care professional if 2 or more members of a class under § 2512(b) of this title have assumed authority to act as default surrogates and the members do not agree on a health-care decision.

(b) A responsible health-care professional shall comply with the decision of a majority of the members of the class with highest priority under § 2512(b) of this title who have communicated their views to the professional and the professional reasonably believes are acting consistent with their duties under § 2517 of this title.

(c) If a responsible health-care professional is informed that the members of the class who have communicated their views to the professional are evenly divided concerning the health-care decision, the professional shall make a reasonable effort to solicit the views of members of the class who are reasonably available but have not yet communicated their views to the professional. The professional, after the solicitation, shall comply with the decision of a majority of the members who have communicated their views to the professional and the professional reasonably believes are acting consistent with their duties under § 2517 of this title.

(d) If the class remains evenly divided after the effort is made under subsection (c) of this section, the health-care decision must be made as provided by other law of this State regarding the treatment of an individual who is found to lack capacity.

§ 2514. Disqualification to act as default surrogate [Effective Sept. 30, 2025].

(a) An individual for whom a health-care decision would be made may disqualify another individual from acting as default surrogate for the first individual. The disqualification must be in a record signed by the first individual or communicated verbally or nonverbally to the individual being disqualified, another individual, or a responsible health-care professional. Disqualification under this subsection is effective even if made by an individual who lacks capacity to make an advance directive if the individual clearly communicates a desire that the individual being disqualified not make health-care decisions for the individual.

(b) An individual is disqualified from acting as a default surrogate for an individual who lacks capacity to make health-care decisions if any of the following apply:

- (1) A court finds that the potential default surrogate poses a danger to the individual's well-being, even if the court does not issue a protection from abuse order against the potential default surrogate.
- (2) The potential default surrogate is an owner, operator, employee, or contractor of a nursing home or long-term care facility in which the individual is residing or receiving care unless the owner, operator, employee, or contractor is a family member of the individual, the cohabitant of the individual, or a descendant of the cohabitant.
- (3) The potential default surrogate refuses to provide a timely declaration under § 2512(c) of this title.
- (4) The individual has a pending protection from abuse petition against the potential default surrogate.
- (5) The individual has a protection from abuse order against the potential default surrogate.
- (6) The potential default surrogate is the subject of a civil or criminal order prohibiting or limiting contact with the individual.

§ 2515. Revocation [Effective Sept. 30, 2025].

(a) An individual may revoke the appointment of an agent, the designation of a default surrogate, or a health-care instruction in whole or in part, unless any of the following:

- (1) A court finds the individual lacks capacity to do so.
- (2) The individual is found under § 2504(b) of this title to lack capacity to do so and, if the individual objects to the finding, the finding is confirmed under § 2505(d)(4) of this title.
- (3) The individual created an advance mental health-care directive that includes the provision under § 2509(d) of this title and the individual is experiencing the psychiatric or psychological event specified in the directive.

(a) Revocation under subsection (a) of this section may be by any act of the individual that clearly indicates that the individual intends to revoke the appointment, designation, or instruction, including an oral statement to a health-care professional.

(b) Except as provided in § 2510 of this title, an advance health-care directive of an individual that conflicts with another advance health-care directive of the individual revokes the earlier directive to the extent of the conflict.

(d) Unless otherwise provided in an individual's advance health-care directive appointing an agent, the appointment of a spouse or domestic partner of an individual as agent for the individual is revoked if any of the following:

- (1) A petition for annulment, divorce, dissolution of marriage, legal separation, or termination has been filed and not dismissed or withdrawn.
- (2) A decree of annulment, divorce, dissolution of marriage, legal separation, or termination has been issued.
- (3) The individual and the spouse or domestic partner have agreed in a record to a legal separation.
- (4) The spouse or domestic partner has deserted the individual for more than 1 year.

§ 2516. Validity of advance health-care directive; conflict with other law [Effective Sept. 30, 2025].

(a) An advance health-care directive created outside this State is valid if it complies with either of the following:

- (1) The law of the state specified in the directive or, if a state is not specified, the state in which the individual created the directive.
- (2) This chapter.

(b) A person may assume without inquiry that an advance health-care directive is genuine, valid, and still in effect, and may implement and rely on it, unless the person has good cause to believe the directive is invalid or has been revoked.

(c) An advance health-care directive, revocation of a directive, or a signature on a directive or revocation may not be denied legal effect or enforceability solely because it is in electronic form.

(d) Evidence relating to an advance health-care directive, revocation of a directive, or a signature on a directive or revocation may not be excluded in a proceeding solely because the evidence is in electronic form.

(e) This chapter does not affect the validity of an electronic record or signature that is valid under Chapter 12A of Title 6.

(f) If this chapter conflicts with other law of this State relating to the creation, execution, implementation, or revocation of an advance health-care directive, this chapter prevails.

§ 2517. Duties of agent and default surrogate [Effective Sept. 30, 2025].

(a) An agent or default surrogate has a fiduciary duty to the individual for whom the agent or default surrogate is acting when exercising or purporting to exercise a power under § 2518 of this title.

(b) An agent or default surrogate shall make a health-care decision in accordance with the direction of the individual in an advance health-care directive and other goals, preferences, and wishes of the individual to the extent known or reasonably ascertainable by the agent or default surrogate.

(c) If there is not a direction in an advance health-care directive and the goals, preferences, and wishes of the individual regarding a health-care decision are not known or reasonably ascertainable by the agent or default surrogate, the agent or default surrogate shall make the decision in accordance with the agent's or default surrogate's determination of the individual's best interest.

(d) In determining the individual's best interest under subsection (c) of this section, the agent or default surrogate shall do all of the following:

- (1) Give primary consideration to the individual's contemporaneous communications, including verbal and nonverbal expressions.
- (2) Consider the individual's values to the extent known or reasonably ascertainable by the agent or default surrogate.
- (3) Consider the risks and benefits of the potential health-care decision.

(e) As soon as reasonably feasible, an agent or default surrogate who is informed of a revocation of an advance health-care directive or disqualification of the agent or default surrogate shall communicate the revocation or disqualification to a responsible health-care professional.

§ 2518. Powers of agent and default surrogate [Effective Sept. 30, 2025].

(a) Except as provided in subsection (c) of this section, the power of an agent or default surrogate commences when the individual is found under § 2504(b) of this title or by a court to lack capacity to make a health-care decision. The power ceases if the individual later is found to have capacity to make a health-care decision, or the individual objects under § 2505(c) of this title to the finding of lack of capacity under § 2504(b) of this title. The power resumes if both of the following:

- (1) The power ceased because the individual objected under § 2505(c) of this title.
- (2) The finding of lack of capacity is confirmed under § 2505(d)(4) of this title or a court finds that the individual lacks capacity to make a health-care decision.

(b) An agent or default surrogate may request, receive, examine, copy, and consent to the disclosure of medical and other health-care information about the individual if the individual would have the right to request, receive, examine, copy, or consent to the disclosure of the information.

(c) A power of attorney for health care may provide that the power of an agent under subsection (b) of this section commences on appointment.

(d)(1) If no other person is authorized to do so, an agent or default surrogate may do all of the following on behalf of the individual:

- a. Apply for public or private health insurance and benefits.
- b. File a claim under the individual's insurance and benefits.
- c. Appeal a claim under the individual's insurance and benefits, including an internal, administrative, or judicial appeal.

(2) An agent or default surrogate who may act under paragraph (d)(1) of this section does not, solely by reason of the power, have a duty to act under paragraph (d)(1) of this section.

(e) An agent or default surrogate may not consent to voluntary admission of the individual to a facility for mental health treatment unless both of the following:

- (1) Voluntary admission is specifically authorized by the individual in an advance health-care directive in a record.
- (2) The admission is for no more than the maximum of the number of days specified in the directive or 72 hours, whichever is less.

(e) Except as provided in subsection (g) of this section, an agent or default surrogate may not consent to placement of the individual in a nursing home if the placement is intended to be for more than 100 days if any of the following:

- (1) An alternative living arrangement is reasonably feasible.
- (2) The individual objects to the placement.
- (3) The individual is not terminally ill.

(g) If specifically authorized by the individual in an advance health-care directive in a record, an agent or default surrogate may consent to placement of the individual in a nursing home for more than 100 days even if any of the following:

- (1) An alternative living arrangement is reasonably feasible.

- (2) The individual objects to the placement.
- (3) The individual is not terminally ill.

§ 2519. Limitation on powers [Effective Sept. 30, 2025].

(a) If an individual has a long-term disability requiring routine treatment by artificial nutrition, hydration, or mechanical ventilation and a history of using the treatment without objection, an agent or default surrogate may not consent to withhold or withdraw the treatment unless any of the following:

- (1) The treatment is not necessary to sustain the individual's life or maintain the individual's well-being.
- (2) The individual has expressly authorized the withholding or withdrawal in a health-care instruction that has not been revoked.
- (3) The individual has experienced a major reduction in health or functional ability from which the individual is not expected to recover, even with other appropriate treatment, and the individual has not done either of the following:

- a. Given a direction inconsistent with withholding or withdrawal.
- b. Communicated by verbal or nonverbal expression a desire for artificial nutrition, hydration, or mechanical ventilation.

(b) A default surrogate may not make a health-care decision if, under other law of this State, the decision either:

- (1) May not be made by a guardian.
- (2) May be made by a guardian only if the court appointing the guardian specifically authorizes the guardian to make the decision.

§ 2520. Co-agents; alternate agent [Effective Sept. 30, 2025].

(a) An individual in a power of attorney for health care may appoint multiple individuals as co-agents. Unless the power of attorney provides otherwise, each co-agent may exercise independent authority.

(b) An individual in a power of attorney for health care may appoint 1 or more individuals to act as alternate agents if a predecessor agent resigns, dies, becomes disqualified, is not reasonably available, or otherwise is unwilling or unable to act as agent.

(c) Unless the power of attorney provides otherwise, an alternate agent has the same authority as the original agent in either of the following:

(1) At any time the original agent is not reasonably available or is otherwise unwilling or unable to act, for the duration of the unavailability, unwillingness, or inability to act.

(2) If the original agent and all other predecessor agents have resigned or died or are disqualified from acting as agent.

§ 2521. Duties of health-care professional, responsible health-care professional, and health-care institution [Effective Sept. 30, 2025].

(a) A responsible health-care professional who is aware that an individual has been found to lack capacity to make a decision shall make a reasonable effort to determine if the individual has a surrogate.

(b) If possible before implementing a health-care decision made by a surrogate, a responsible health-care professional as soon as reasonably feasible shall communicate to the individual the decision made and the identity of the surrogate.

(c) A responsible health-care professional who makes or is informed of a finding that an individual lacks capacity to make a health-care decision or no longer lacks capacity, or that other circumstances exist that affect a health-care instruction or the authority of a surrogate, as soon as reasonably feasible, shall do both of the following:

(1) Document the finding or circumstance in the individual's medical record.

(2) If possible, communicate to the individual and the individual's surrogate the finding or circumstance and that the individual may object under § 2505(c) of this title to the finding under § 2504(b) of this title.

(d) A responsible health-care professional who is informed that an individual has created or revoked an advance health-care directive, or that a surrogate for an individual has been appointed, designated, or disqualified, shall do both of the following:

(1) Document the information as soon as reasonably feasible in the individual's medical record.

(2) If evidence of the directive, revocation, appointment, designation, or disqualification is in a record, request a copy and, on receipt, cause the copy to be included in the individual's medical record.

(e) Except as provided in subsections (f) and (g) of this section, a health-care professional or health-care institution providing health care to an individual shall comply with all of the following:

- (1) A health-care instruction given by the individual regarding the individual's health care.
- (2) A reasonable interpretation by the individual's surrogate of an instruction given by the individual.
- (3) A health-care decision for the individual made by the individual's surrogate in accordance with §§ 2517 and 2518 of this title to the same extent as if the decision had been made by the individual at a time when the individual had capacity.

(f) A health-care professional or a health-care institution may refuse to provide health care consistent with a health-care instruction or health-care decision if any of the following:

- (1) The instruction or decision is contrary to a policy of the health-care institution providing care to the individual that is based expressly on reasons of conscience and the policy was timely communicated to the individual or to the individual's surrogate.
- (2) The care would require health care that is not available to the professional or institution.
- (3) Compliance with the instruction or decision would require the professional to provide care that is contrary to the professional's religious belief or moral conviction if other law permits the professional to refuse to provide care for that reason.
- (4) Compliance with the instruction or decision would require the professional or institution to provide care that is contrary to generally accepted health-care standards applicable to the professional or institution.
- (5) Compliance with the instruction or decision would violate a court order or other law.

(g) A health-care professional or health-care institution that refuses to provide care under subsection (f) of this section shall do all of the following:

- (1) As soon as reasonably feasible, inform the individual, if possible, and the individual's surrogate of the refusal.
- (2) Immediately make a reasonable effort to transfer the individual to another health-care professional or health-care institution that is willing to comply with the instruction or decision.
- (3) If care is refused under paragraph (f)(1) or (f)(2) of this section, provide life-sustaining care and care needed to keep or make the individual comfortable,

consistent with accepted medical standards to the extent feasible, until a transfer is made.

(4) If care is refused under paragraphs (f)(3) through (f)(5) of this section, provide life-sustaining care and care needed to keep or make the individual comfortable, consistent with accepted medical standards, until a transfer is made or, if the professional or institution reasonably believes that a transfer cannot be made, for at least 15 days after the refusal.

§ 2522. Decision by guardian [Effective Sept. 30, 2025].

(a) A guardian may refuse to comply with a provision of or revoke the individual's advance health-care directive only if the court appointing the guardian issues an order expressly permitting the acts taken by the guardian.

(b) Unless a court orders otherwise, a health-care decision made by an agent appointed by an individual subject to guardianship prevails over a decision of the guardian appointed for the individual.

[70 Del. Laws, c. 392, § 3](#); [79 Del. Laws, c. 371, § 13](#); [84 Del. Laws, c. 467, § 1](#);

§ 2523. Immunity [Effective Sept. 30, 2025].

(a) A health-care professional or health-care institution acting in good faith is not subject to civil or criminal liability or to discipline for unprofessional conduct for any of the following:

(1) Complying with a health-care decision made for an individual by another person if compliance is based on a reasonable belief that the person has authority to make the decision, including a decision to withhold or withdraw health care.

(2) Refusing to comply with a health-care decision made for an individual by another person if the refusal is based on a reasonable belief that the person lacked authority or capacity to make the decision.

(3) Complying with an advance health-care directive based on a reasonable belief that the directive is valid.

(4) Refusing to comply with an advance health-care directive based on a reasonable belief that the directive is not valid, including a reasonable belief that the directive was not made by the individual or, after its creation, was substantively altered by a person other than the individual who created it.

(5) Determining that an individual who otherwise might be authorized to act as an agent or default surrogate is not reasonably available.

(6) Complying with an individual's direction under § 2509(d) of this title.

(b) An agent, default surrogate, or individual with a reasonable belief that the individual is an agent or a default surrogate is not subject to civil or criminal liability or to discipline for unprofessional conduct for a health-care decision made in a good faith effort to comply with § 2517 of this title.

(c) This section must not be construed to provide immunity for health care that does not meet the generally accepted health-care standards applicable to the health-care professional or institution.

§ 2524. Prohibited conduct; damages [Effective Sept. 30, 2025].

(a) A person may not do any of the following:

(1) Intentionally falsify, in whole or in part, an advance health-care directive.

(2) Intentionally conceal, deface, obliterate, or delete the directive or a revocation of the directive without consent of the individual who created or revoked the directive for the purpose of frustrating the intent of the individual who created an advance health-care directive or with knowledge that doing so is likely to frustrate the intent.

(3) Intentionally withhold knowledge of the existence or revocation of the directive from a responsible health-care professional or health-care institution providing health care to the individual who created or revoked the directive for the purpose of frustrating the intent of the individual who created an advance health-care directive or with knowledge that doing so is likely to frustrate the intent.

(4) Coerce or fraudulently induce an individual to create, revoke, or refrain from creating or revoking an advance health-care directive or a part of a directive.

(5) Require or prohibit the creation or revocation of an advance health-care directive as a condition for providing health care.

(a) An individual who is the subject of conduct prohibited under subsection (a) of this section, or the individual's estate, has a cause of action against a person that violates subsection (a) of this section for statutory damages of \$25,000 or actual damages resulting from the violation, whichever is greater.

(c) Subject to subsection (d) of this section, an individual who makes a health-care instruction, or the individual's estate, has a cause of action against a health-care professional or health-care institution that intentionally violates § 2521 of this title for statutory damages of \$50,000 or actual damages resulting from the violation, whichever is greater.

(d) A health-care professional who is an advanced emergency medical technician, emergency medical technician, paramedic, or other first responder authorized under Chapter 97 of this title is not liable under subsection (c) of this section for a violation of § 2521(e) of this title if all of the following:

(1) The violation occurs in the course of providing care to an individual experiencing a health condition for which the professional reasonably believes the care was appropriate to avoid imminent loss of life or serious harm to the individual.

(2) The failure to comply is consistent with accepted standards of the profession of the professional.

(3) The provision of care does not begin in a health-care institution in which the individual resides or was receiving care.

(e) In an action under this section, a prevailing plaintiff may recover reasonable attorneys' fees, court costs, and other reasonable litigation expenses.

(f) A cause of action or remedy under this section is in addition to any cause of action or remedy under other law.

§ 2525. Effect of copy; certified physical copy [Effective Sept. 30, 2025].

(a) A physical or electronic copy of an advance health-care directive, revocation of an advance health-care directive, or appointment, designation, or disqualification of a surrogate has the same effect as the original.

(b) An individual may create a certified physical copy of an advance health-care directive or revocation of an advance health-care directive that is in electronic form by affirming under penalty of perjury that the physical copy is a complete and accurate copy of the directive or revocation.

§ 2526. Judicial relief [Effective Sept. 30, 2025].

(a) On petition of an individual, the individual's surrogate, a health-care professional or health-care institution providing health care to the individual, or a person interested in the welfare of the individual, the court may:

(1) Enjoin implementation of a health-care decision made by an agent or default surrogate on behalf of the individual, on a finding that the decision is inconsistent with §§ 2517 and 2518 of this title.

(2) Enjoin an agent from making a health-care decision for the individual, on a finding that the individual's appointment of the agent has been revoked or if any of the following apply:

- a. The agent is disqualified under § 2508(b) of this title.
- b. The agent is unwilling or unable to comply with § 2517 of this title.
- c. The agent poses a danger to the individual's well-being.
- d. The agent has a pending protection from abuse petition filed against them by the individual,
- e. The individual has a protection from abuse order against the agent.
- f. The agent is the subject of a civil or criminal order prohibiting or limiting contact with the individual.

(3) Enjoin another individual from acting as a default surrogate, on a finding that § 2512 of this title was not complied with or if any of the following apply:

- a. The other individual is disqualified under § 2514 of this title.
- b. The other individual is unwilling or unable to comply with § 2517 of this title.
- c. The other individual poses a danger to the first individual's well-being.
- d. The other individual has a pending protection from abuse petition filed against them by the individual.
- e. The individual has a protection from abuse order against the other individual.
- f. The other individual is subject to a civil or criminal order prohibiting contact with the individual.

(4) Order implementation of a health-care decision made either:

- a. By and for the individual.
- b. By an agent or default surrogate who is acting in compliance with the powers and duties of the agent or default surrogate.

(b) In this chapter, advocacy for the withholding or withdrawal of health care or mental health care from an individual is not itself evidence that an agent or default surrogate, or a potential agent or default surrogate, poses a danger to the individual's well-being.

(c) A proceeding under this section is governed by the rules of the Court of Chancery.

§ 2527. Construction [Effective Sept. 30, 2025].

(a) This chapter does not authorize mercy killing, assisted suicide, or euthanasia.

(b) This chapter does not affect other law of this State governing treatment for mental illness of an individual involuntarily committed to a designated psychiatric treatment facility or hospital under Chapter 50 of this title.

(c) Death of an individual caused by withholding or withdrawing health care in accordance with this chapter does not constitute a suicide or homicide or legally impair or invalidate a policy of insurance or an annuity providing a death benefit, notwithstanding any term of the policy or annuity.

(d) This chapter does not create a presumption concerning the intention of an individual who has not created an advance health-care directive.

(e) An advance health-care directive created before, on, or after September 30, 2025, must be interpreted in accordance with law of this State, excluding the State's choice-of-law rules, at the time the directive is implemented.

§ 2528. Uniformity of application and construction [Effective Sept. 30, 2025].

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

§ 2529. Savings provisions [Effective Sept. 30, 2025].

(a) An advance health-care directive created before September 30, 2025, is valid if it complies with this chapter or complied at the time of creation with the law of the state in which it was created.

(b) This chapter does not affect the validity or effect of an act done before September 30, 2025.

(c) An individual who assumed authority to act as default surrogate before September 30, 2025, may continue to act as default surrogate until the individual for whom the default surrogate is acting has capacity or the default surrogate is disqualified, whichever occurs first.

§ 2530. Transitional provision [Effective Sept. 30, 2025].

This chapter applies to an advance health-care directive created before, on, or after September 30, 2025.

REVOCATION OF TRANSFER ON DEATH DEED

NOTICE TO OWNER: You are encouraged to read and understand the requirements for completing and recording this form. Consider seeking legal advice to ensure this deed meets your needs and complies with Delaware law. This deed must be recorded with the Recorder of Deeds before your death to be effective.

**Parcel
Number:** _____

**Prepared By &
Return to:**
(Name/Address)

PART A - OWNER(S)/GRANTOR INFORMATION

Name of Owner(s):		Name of Owner(s):	
Address		Address	
City		City	
State	Zip	State	Zip

PART B – PROPERTY INFORMATION *Please attach legal description from the most recent deed

Parcel Number:		County:	
Address			
City	State	Zip	
Deed Book & Page Number/Instrument Number:			

PART C – TOD INSTRUMENT NUMBER *Please attach legal description from the most recent deed:

Deed Book & Page Number/Instrument #:

PART D - REVOCATION: I REVOKE ALL MY PREVIOUS TRANSFERS OF THIS PROPERTY BY TRANSFER ON DEATH DEED *(All parties must sign – Please use additional pages if more owners are listed)

Owner(s)/Grantor's Signature & Date

Owner(s)/Grantor's Printed
Name/Title

Owner(s)/Grantor's Signature & Date

Owner(s)/Grantor's Printed
Name/Title

SIGNATURES OF WITNESSES TO THIS REVOCATION: We hereby affirm that we witnessed the signing of this deed by the owner or owners identified herein, and that, to the best of our knowledge, each was of sound mind and memory at the time of execution and acted free from undue influence or coercion by any person, including the undersigned witnesses. The witnesses and notary public cannot be relatives or beneficiaries of the Owner(s) or named Beneficiaries.

First Witness Name		Second Witness Name	
Address		Address	
City		City	
State	Zip	State	Zip
Signature & Date		Signature & Date	

ACKNOWLEDGEMENT: State of _____, County of _____

BE IT REMEMBERED, that on this ____ day of _____, 20 __, before me, the undersigned Notary Public, personally appeared _____, known to me (or satisfactorily proven) to be the Owner(s)/Grantor(s) whose name(s) are subscribed to this instrument, and acknowledged that they executed the same for the purposes therein contained. On the same date, also personally appeared _____ and _____, known to me (or satisfactorily proven) to be the two witnesses whose signatures appear on this instrument, and they acknowledged that they witnessed the execution of the deed by the Owner(s)/Grantor(s).

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

My Commission Expires: _____

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

How do I use this form to revoke a Transfer on Death (TOD) deed? Complete all required sections of this form. Sign it in front of a notary. Then record the form with the Recorder of Deeds in every county where the property is located. The revocation has no effect unless it is signed, notarized, and recorded prior to your death.

Is the “legal description” of the property necessary? Yes. The Recorder of Deeds cannot accept the form without a complete legal description.

How do I find “legal description of the property? The legal description is usually on the deed you received when you acquired the property. If you have misplaced your deed or did not receive a copy, you may obtain one from the Recorder of Deeds office in the county where the property is located. Copies are typically available online for a fee, or you may visit the Recorder of Deeds office in person to request a copy.

How do I “record” the form? Submit the completed and notarized form to the Recorder of Deeds office in the county where the property is located. Recording places, the revocation into the official land records. If the property spans more than one county, the revocation must be recorded in each county. Revocation is not effective until the form is recorded.

I am being pressured to complete this form. What should I do? This form should only be completed voluntarily. Do not complete or sign this form under pressure or undue influence. If you feel pressured, you may wish to speak with a trusted family member or friend. For guidance on your rights, it is recommended that you consult an attorney.

Do I need to tell the beneficiaries about the revocation of the TOD deed? No. There is no legal requirement to notify beneficiaries. However, many owners choose to inform beneficiaries to avoid confusion, disputes, or misunderstandings later. Notifying beneficiaries is often recommended, but the decision is yours.

I have other questions about this form. What should I do? This form is not designed to fit everyone’s needs in every situation. The Recorder of Deeds cannot provide legal advice. Because estate planning needs vary, it is highly recommended that you consult an attorney to determine how this revocation may affect your overall estate plan.

TITLE 25

Property

General Provisions

CHAPTER 2. Uniform Real Property Transfer on Death Act

§ 201. Short title.

This chapter may be cited as the “Uniform Real Property Transfer on Death Act.”

[85 Del. Laws, c. 212, § 1](#);

§ 202. Definitions.

For purposes of this chapter:

(1) “Beneficiary” means an individual that receives property under a transfer on death deed. “Grantee” has a corresponding meaning.

(2) “Designated beneficiary” means an individual designated to receive property in a transfer on death deed.

(3) a. “Joint owner” means an individual who owns property concurrently with 1 or more other individuals with a right of survivorship.

b. “Joint owner” includes a joint tenant and tenant by the entirety.

c. “Joint owner” does not include a tenant in common.

(4) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(5) “Property” means an interest in real property located in this State which is transferable on the death of the owner.

(6) “Transfer on death deed” means a deed authorized under this chapter.

(7) “Transferor” means an individual who makes a transfer on death deed. “Grantor” has a corresponding meaning.

[85 Del. Laws, c. 212, § 1](#);

§ 203. Applicability.

This chapter applies to a transfer on death deed made before, on, or after December 4, 2025, by a transferor dying on or after December 4, 2025.

[85 Del. Laws, c. 212, § 1;](#)

§ 204. Nonexclusivity.

This chapter does not affect any method of transferring property otherwise permitted under the law of this State.

[85 Del. Laws, c. 212, § 1;](#)

§ 205. Transfer on death deed authorized.

An individual may transfer property to 1 or more beneficiaries effective at the transferor's death by a transfer on death deed.

[85 Del. Laws, c. 212, § 1;](#)

§ 206. Transfer on death deed revocable.

A transfer on death deed is revocable even if the transfer on death deed or another instrument contains a contrary provision.

[85 Del. Laws, c. 212, § 1;](#)

§ 207. Transfer on death deed nontestamentary.

A transfer on death deed is nontestamentary.

[85 Del. Laws, c. 212, § 1;](#)

§ 208. Capacity of transferor.

The capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a will.

[85 Del. Laws, c. 212, § 1;](#)

§ 209. Requirements.

A transfer on death deed must meet all of the following:

- (1) Except as otherwise provided in paragraphs (2) and (3) of this section, contain the essential elements and formalities of a properly recordable inter vivos deed, including notarization of all signatures required under this section.
- (2) Be witnessed by 2 individuals, at least 1 of whom must not be a beneficiary.
- (3) State that the transfer to the designated beneficiary is to occur at the transferor's death.
- (4) Be recorded before the transferor's death in the public records in the office of the recorder of deeds of the county where the property is located.

[85 Del. Laws, c. 212, § 1;](#)

§ 210. Notice, delivery, acceptance, consideration not required.

A transfer on death deed is effective without any of the following:

- (1) Notice or delivery to, or acceptance by, the designated beneficiary during the transferor's life.
- (2) Consideration.

[85 Del. Laws, c. 212, § 1;](#)

§ 211. Revocation by instrument authorized; revocation by act not permitted.

(a) Subject to subsection (b) of this section, an instrument is effective to revoke a recorded transfer on death deed, or any part of it, only if the instrument meets all of the following:

(1) Is 1 of the following:

- a. A transfer on death deed that revokes the transfer on death deed or part of the transfer on death deed expressly or by inconsistency.

b. An instrument of revocation that expressly revokes the transfer on death deed or part of the transfer on death deed.

c. An inter vivos deed that expressly revokes the transfer on death deed or part of the transfer on death deed.

(2) Is acknowledged by the transferor after the acknowledgment of the transfer on death deed being revoked and recorded before the transferor's death in the public records in the office of the recorder of deeds of the county where the transfer on death deed is recorded.

(3) Is witnessed by 2 individuals.

(b) If a transfer on death deed is made by more than 1 transferor, all of the following applies:

(1) Revocation by 1 transferor does not affect the transfer on death deed as to the interest of another transferor.

(2) A transfer on death deed of joint owners is revoked only if the transfer on death deed is revoked by all of the living joint owners.

(c) After a transfer on death deed is recorded, the transfer on death deed may not be revoked by a revocatory act on the transfer on death deed.

(d) This section does not limit the effect of an inter vivos transfer of the property.

[85 Del. Laws, c. 212, § 1;](#)

§ 212. Effect of transfer on death deed during transferor's life.

During a transferor's life, a transfer on death deed does not do any of the following:

(1) Affect an interest or right of the transferor or any other owner, including the right to transfer or encumber the property.

(2) Affect an interest or right of a transferee, even if the transferee has actual or constructive notice of the transfer on death deed.

(3) Affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the transfer on death deed.

(4) Affect the transferor's or designated beneficiary's eligibility for any form of public assistance.

- (5) Create a legal or equitable interest in favor of the designated beneficiary.
- (6) Subject the property to claims or process of a creditor of the designated beneficiary.

[85 Del. Laws, c. 212, § 1;](#)

§ 213. Effect of transfer on death deed at transferor's death.

(a) Except as otherwise provided in the transfer on death deed or in this section, on the death of the transferor, the following rules apply to property that is the subject of a transfer on death deed and owned by the transferor at death:

(1) Subject to paragraph (a)(2) of this section, the interest in the property is transferred to the designated beneficiary in accordance with the transfer on death deed.

(2) The interest of a designated beneficiary is contingent on the designated beneficiary surviving the transferor. The interest of a designated beneficiary that fails to survive the transferor lapses.

(3) Subject to paragraph (a)(4) of this section, concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship.

(4) If the transferor has identified 2 or more designated beneficiaries to receive concurrent interests in the property, the share of 1 which lapses or fails for any reason is transferred to the other, or to the others in proportion to the interest of each in the remaining part of the property held concurrently.

(b) Subject to Chapter 1 of this title, a beneficiary takes the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. For purposes of this subsection and Chapter 1 of this title, the recording of the transfer on death deed is deemed to have occurred at the transferor's death.

(c) (1) If a transferor is a joint owner and is survived by 1 or more other joint owners, the property that is the subject of a transfer on death deed belongs to the surviving joint owner or owners with right of survivorship.

(2) If a transferor is a joint owner and is the last surviving joint owner, the transfer on death deed is effective.

(d) A transfer on death deed transfers property without covenant or warranty of title even if the transfer on death deed contains a contrary provision.

[85 Del. Laws, c. 212, § 1;](#)

§ 214. Disclaimer.

A beneficiary may disclaim all or part of the beneficiary's interest as provided by Chapter 6 of Title 12.

[85 Del. Laws, c. 212, § 1;](#)

§ 215. Liability for creditor claims and statutory allowances.

(a) To the extent that the transferor's probate estate is insufficient to satisfy an allowed claim against the estate or a statutory allowance to a surviving spouse or child, the estate may enforce the liability against property transferred at the transferor's death by a transfer on death deed.

(b) If more than 1 property is transferred by 1 or more transfer on death deeds, the liability under subsection (a) of this section is apportioned among the properties in proportion to their net values at the transferor's death.

(c) A proceeding to enforce the liability under this section must be commenced not later than 8 months after the transferor's death.

[85 Del. Laws, c. 212, § 1;](#)

§ 216. Optional form of transfer on death deed.

The following form may be used to create a transfer on death deed. The other sections of this chapter govern the effect of this or any other instrument used to create a transfer on death deed.

(front of form) REVOCABLE TRANSFER ON DEATH DEED

NOTICE TO OWNER

You should carefully read all information on the other side of this form. You May Want to Consult a Lawyer Before Using This Form.

This form must be recorded before your death, or it will not be effective.

IDENTIFYING INFORMATION

Owner or Owners Making This Deed as Grantor or Grantors:

_____ Printed name _____ Mailing address

_____ Printed name _____ Mailing address

Legal description of the property:

PRIMARY BENEFICIARY/GRANTEE

I designate the following beneficiary if the beneficiary survives me.

_____ Printed name _____ Mailing address

ALTERNATE BENEFICIARY/GRANTEE — Optional

If my primary beneficiary does not survive me, I designate the following alternate beneficiary if that beneficiary survives me.

_____ Printed name _____ Mailing address

TRANSFER ON DEATH

At my death, I transfer my interest in the described property to the beneficiaries as designated above.

Before my death, I have the right to revoke this deed by recording a completed revocation form or other instrument of revocation in the public records in the office of the Recorder of Deeds.

I acknowledge that the instruction to transfer of property to the beneficiary/grantee in this deed controls over any contrary instruction in my will that is prepared before or after this deed.

I acknowledge that if my probate estate is insufficient to satisfy an allowed claim against the estate or a statutory allowance to a surviving spouse or child, the estate may enforce the liability against property transferred at my death by this deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS DEED

____ Printed Name & Signature _____ Date

____ Printed Name & Signature _____ Date

SIGNATURES OF WITNESSES TO THIS DEED

We do now hereby swear and affirm that we are signing our names to this instrument with the belief and knowledge that the owner or owners, was or were, at the time of signing of sound mind and memory, and free from any undue influence or coercion by any parties, including us as witnesses.

____ Printed Name & Signature _____ Mailing Address _____ Date _____

____ Printed Name & Signature _____ Mailing Address _____ Date _____

ACKNOWLEDGMENT

(insert acknowledgment for deed here)

(back of form) COMMON QUESTIONS ABOUT THE USE OF THIS FORM

What does the Transfer on Death (TOD) deed do? When you die, this deed transfers the described property, subject to any liens or mortgages (or other encumbrances) on the property at your death. Probate is not required. The TOD deed has no effect until you die. You can revoke it at any time. You are also free to transfer the property to someone else during your lifetime. If you do not own any interest in the property when you die, this deed will have no effect.

Which controls at my death, my will or the TOD deed? The TOD deed controls over a contrary instruction in a will.

How do I make a TOD deed? Complete this form. Have it acknowledged before a notary public or other individual authorized by law to take acknowledgments. Record the form in each county where any part of the property is located. The form has no effect unless it is acknowledged and recorded before your death.

Is the “legal description” of the property necessary? Yes.

How do I find the “legal description” of the property? This information may be on the deed you received when you became an owner of the property. This information may also be available in the office of the recorder of deeds for the county where the property is located. If you are not absolutely sure, consult a lawyer.

Can I change my mind before I record the TOD deed? Yes. If you have not yet recorded the deed and want to change your mind, simply tear up or otherwise destroy the deed.

How do I “record” the TOD deed? Take the completed and acknowledged form to the office of the recorder of deeds of the county where the property is located. Follow the instructions given by the recorder of deeds to make the form part of the official property

records. If the property is in more than one county, you should record the deed in each county.

Can I later revoke the TOD deed if I change my mind? Yes. You can revoke the TOD deed. No one, including the beneficiaries, can prevent you from revoking the deed.

How do I revoke the TOD deed after it is recorded? There are three ways to revoke a recorded TOD deed: (1) Complete and acknowledge a revocation form, and record it in each county where the property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same property to someone else, and record it in each county where the property is located. (3) Transfer the property to someone else during your lifetime by a recorded deed that expressly revokes the TOD deed. You may not revoke the TOD deed by will.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

Do I need to tell the beneficiaries about the TOD deed? No, but it is recommended. Secrecy can cause later complications and might make it easier for others to commit fraud.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, you are encouraged to consult a lawyer.

[85 Del. Laws, c. 212, § 1](#);

§ 217. Optional form of revocation.

The following form may be used to create an instrument of revocation under this chapter. The other sections of this chapter govern the effect of this or any other instrument used to revoke a transfer on death deed.

(front of form) REVOCATION OF TRANSFER ON DEATH DEED

NOTICE TO OWNER

This revocation must be recorded before you die or it will not be effective. This revocation is effective only as to the interests in the property of owners who sign this revocation.

IDENTIFYING INFORMATION

Owner or Owners of Property Making This Revocation as Grantor or Grantors:

_____ Printed name _____ Mailing address

_____ Printed name _____ Mailing address

Legal description of the property:

REVOCATION

I revoke all my previous transfers of this property by transfer on death deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS REVOCATION

____ Printed Name & Signature _____ Date

____ Printed Name & Signature _____ Date

SIGNATURES OF WITNESSES TO THIS DEED

We do now hereby swear and affirm that we are signing our names to this instrument with the belief and knowledge that the owner or owners, was or were, at the time of signing of sound mind and memory, and free from any undue influence or coercion by any parties, including us as witnesses.

____ Printed Name & Signature _____ Mailing Address _____ Date

____ Printed Name & Signature _____ Mailing Address _____ Date

ACKNOWLEDGMENT

(insert acknowledgment here)

(back of form) COMMON QUESTIONS ABOUT THE USE OF THIS FORM

How do I use this form to revoke a Transfer on Death (TOD) deed? Complete this form. Have it acknowledged before a notary public or other individual authorized to take acknowledgments. Record the form in the public records in the office of the recorder of deeds of each county where the property is located. The form must be acknowledged and recorded before your death or it has no effect.

Is the “legal description” of the property necessary? Yes.

How do I find the “legal description” of the property? This information may be on the TOD deed. It may also be available in the office of the recorder of deeds for the county where the property is located. If you are not absolutely sure, consult a lawyer.

How do I “record” the form? Take the completed and acknowledged form to the office of the recorder of deeds of the county where the property is located. Follow the instructions

given by the recorder of deeds to make the form part of the official property records. If the property is located in more than one county, you should record the form in each of those counties.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

Do I need to tell the beneficiaries about the revocation of the TOD deed? No, but it is recommended. Secrecy can cause later complications and might make it easier for others to commit fraud.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, consult a lawyer.

[85 Del. Laws, c. 212, § 1;](#)

§ 218. Form for notice of death of transferor; filing of transferor's death certificate; beneficiary right to obtain transferor's death certificate; executor or administrator inventorying of and access to property transferred by transfer on death deed; failure to file not invalidating.

(a) A Register of Wills may adopt a form to be used by a beneficiary to provide notice of the death of a transferor whose property has transferred to the beneficiary by transfer on death deed.

(b) A beneficiary may present a transferor's death certificate to a Register of Wills for filing with a form adopted under subsection (a) of this section or for filing to otherwise establish a transferor's death.

(c) Notwithstanding the general prohibition of disclosure of a death certificate under § 3110 of Title 16, and consistent with the allowance for disclosure of protected health information when provided by statute under § 1212(a) of Title 16, the Office of Vital Statistics shall provide to a beneficiary a certified copy of a transferor's death certificate.

(d) If a probate estate is opened with a Register of Wills for the transferor, property transferred to a beneficiary by transfer on death deed must be inventoried in accordance with § 1905 of Title 12. If a probate estate is not opened for the transferor, an inventory form does not need to be filed with a Register of Wills.

(e) By and through letters testamentary or of administration, the person designated as an executor or administrator shall have authority to access and safeguard personal property of

the transferor held by the transferor at the time of death on real property titled in the transferor's own name transferred at the transferor's death by transfer on death deed.

(f) A valid transfer on death deed transfers the real property immediately on the transferor's death. Failure to file a notice form, death certificate, or inventory form under this section does not invalidate an otherwise valid transfer on death deed.

[85 Del. Laws, c. 212, § 1;](#)

§ 219. Jurisdiction.

The Chancery Court has jurisdiction over challenges to the validity or revocation of a transfer on death deed.

[85 Del. Laws, c. 212, § 1;](#)

§ 220. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

[85 Del. Laws, c. 212, § 1;](#)

§ 221. Relation to Electronic Signatures in Global and National Commerce Act.

This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., but does not modify, limit, or supersede § 101(c) of that act, 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in § 103(b) of that act, 15 U.S.C. § 7003(b).

[85 Del. Laws, c. 212, § 1;](#)

[85 Del. Laws, c. 212, § 1;](#)

- [Delaware General Assemb](#)



Our website www.kentcountytide.gov/My-Government/Departments/Deeds-Office/Transfer-on-Death-Deeds contains helpful information about the Transfer on Death Deed (TODD), including low-cost legal resources. The back of the TODD form also includes useful questions and answers. Please review these carefully. My staff are not attorneys and cannot advise you on whether a TODD is right for you.

We see two common problems that often require a second trip to our office:

1. Notary not putting witness names in the blanks provided

The notary must include the names of your two witnesses in the wording before the notarial certification. The notary will witness you and the two witnesses sign, and the witnesses must also witness you signing. This requirement is unusual for notaries, so please explain it to them. If this is not done correctly, you will need to return to the notary.

2. Name differences from the last recorded deed

If the names on your TODD are different from the names on your most recent recorded deed (due to marriage, divorce, death of a spouse, etc.), we need an explanation. If you are working with an attorney, ask them to add a "being clause" explaining the change

If you are completing the form yourself, include the Register of Wills folio number under the name of a deceased spouse. If you cannot find the folio number in the Kent County PRIDE database, please visit the Register of Wills to register the death and update the tax records.

I understand it is inconvenient to make multiple trips to our office, but taking extra time now can prevent serious problems later. With a regular deed, you are alive to answer questions. When your TODD takes effect, you are not. Unresolved issues could force your heirs to go to court.

Please remember we never replace, change, or remove deeds. All deeds — including TODDs— remain permanently in the property chain of title and are visible in our public database.

I worked hard to help bring the Transfer on Death Deed Act into law. I want to make sure your TODD is completed correctly so your property passes to your heirs as you intended, without unnecessary complications. Please find instructions on completing the form on the reverse.

A handwritten signature in cursive script that reads "Eugenia Thornton".

Hon. Eugenia Thornton
Recorder

TRANSFER ON DEATH DEED FORM INSTRUCTIONS

PARCEL ID: Enter the full 25-character tax parcel number of the property. This number is on property tax statements, your current deed, and the **Property Search** webpage. (<https://www.kentcountyde.gov/Residents/Deeds-and-Property-Records>)

PREPARED BY AND RETURN TO: Provide a self-addressed, stamped envelope if you want it mailed back to you. Alternatively, leave a number to call for pick up.

PART A – OWNER(S)/GRANTOR INFORMATION: Use the name from the current recorded deed and MAILING address. If there is a name change from the current recorded deed due to divorce, marriage, and other name changes, explain it in Part A¹. For deaths, use the **address** field to write **DECEASED** and in the **city** field write the Register of Wills document number² (**IS - #**), (**WS - #**), or (**File #**) (Use Property Search link in paragraph one) Attorneys³ may add a “being clause” to document name change.

PART B – PRIMARY BENEFICIARY/GRANTEE INFORMATION: Use full printed legal names and address, not nicknames. Must be a person, not a trust, charity, business, Life Estate.

ALTERNATE BENEFICIARY/GRANTEE INFORMATION: Same as for primary. NOTE: No alternate grantee will inherit until *all* primaries have died.

PART C – PROPERTY INFORMATION: Provide the parcel number, county, and the address of the property. Include the deed book, page, *and* instrument/document number, found on the current recorded deed. **Attach a copy of the legal description** found in the current recorded deed, starting with **ALL** or **BEGINNING**. We can help in our office.

PART D – TRANSFER ON DEATH: Signatures: All joint owners(s)/Grantor’s³ signatures must have the signer’s name printed next to the signature.

WITNESS TO THIS DEED: Two witnesses are required⁴. This must be done *before* the document is brought in for Recording. Witnesses will provide the full printed name, address, signature, and date. The notary will name the witnesses in the acknowledgement section.

ACKNOWLEDGEMENT: Owner(s)/Grantor(s) and Witnesses ***MUST*** sign the document in the presence of a notary before the document is submitted for recording.

RECORDING FEE: \$88 for the first 5 pages and \$10 for each additional page⁵. Check, cash, or money order only.

¹ Or wherever it can fit. We give you a free 5th page to use, if needed.

² You must obtain this number before recording the TODD.

³ For individuals who own a portion of a property, a TODD may be one option to consider for that share. When property is owned jointly as tenants in common, some people use a Will to address their portion. This is general information and not a substitute for legal or professional advice.

⁴ Only one of the witnesses can be a beneficiary to the property and the **Notary** cannot be a witness.

⁵ Only record the TODD; do not record the instruction page or the Question-and-Answer page.

TRANSFER ON DEATH DEED (REVOCABLE)

NOTICE TO OWNER: You are encouraged to read and understand the requirements for completing and recording this form. Consider seeking legal advice to ensure this deed meets your needs and complies with Delaware law. This deed must be recorded with the Recorder of Deeds before your death to be effective.

Parcel Number: _____

**Prepared By &
Return to:**
(Name/Address) _____

PART A - OWNER(S)/GRANTOR INFORMATION

Name of Owner(s):		Name of Owner(s):	
Address		Address	
City		City	
State	Zip	State	Zip

PART B – BENEFICIARY/GRANTEE INFORMATION

Beneficiary Name		Beneficiary Name	
Address		Address	
City		City	
State	Zip	State	Zip

ALTERNATE BENEFICIARY/GRANTEE INFORMATION (OPTIONAL) *If no primary beneficiary survives me, I designate the following alternate beneficiary

Beneficiary Name		Beneficiary Name	
Address		Address	
City		City	
State	Zip	State	Zip

PART C – PROPERTY INFORMATION: You must attach a legal description of the Property to this Transfer-on-Death Deed as an Exhibit that is hereby incorporated by reference

Parcel Number:		County:	
Address			
City	State	Zip	
Deed Book & Page Number/Instrument Number:			

PART D - TRANSFER ON DEATH: Upon my death, my interest in the property described herein shall transfer to the beneficiary or beneficiaries designated in this deed. Prior to my death, I retain the full right to revoke this deed by recording a duly executed revocation instrument in the official records of the Recorder of Deeds. **I acknowledge that the transfer instructions in this deed shall take precedence over any conflicting provisions contained in my will, whether executed before or after this deed.** I further understand that if my probate estate is insufficient to satisfy an allowed claim against the estate or to provide any statutory allowance to a surviving spouse or child, the estate may enforce such liability against the property transferred under this deed. The witnesses and notary public cannot be relatives or beneficiaries of the Owner(s) or named Beneficiaries.

Owner(s)/Grantor's Signature & Date

Owner(s)/Grantor's Printed Name/Title

Owner(s)/Grantor's Signature & Date

Owner(s)/Grantor's Printed Name/Title

WITNESS TO THIS DEED: We hereby affirm that we witnessed the signing of this deed by the owner or owners identified herein, and that, to the best of our knowledge, each was of sound mind and memory at the time of execution and acted free from undue influence or coercion by any person, including the undersigned witnesses.

First Witness Name		Second Witness Name	
Address		Address	
City		City	
State	Zip	State	Zip
Signature & Date		Signature & Date	

ACKNOWLEDGEMENT: State of _____, County of _____

BE IT REMEMBERED, that on this ____ day of _____, 20__, before me, the undersigned Notary Public, personally appeared _____, known to me (or satisfactorily proven) to be the Owner(s)/Grantor(s) whose name(s) are subscribed to this instrument, and acknowledged that they executed the same for the purposes therein contained.

On the same date, also personally appeared _____ and _____, known to me (or satisfactorily proven) to be the two witnesses whose signatures appear on this instrument, and they acknowledged that they witnessed the execution of the deed by the Owner(s)/Grantor(s).

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

My Commission Expires: _____

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

What does the Transfer on Death (TOD) deed do? A TOD deed allows property to pass directly to the person you name as beneficiary upon your death. This means the property does not go through probate. However, the property is still subject to any mortgages, liens, or other claims that exist at that time. The deed does nothing while you are alive — you remain the owner and can sell, mortgage, or make otherwise permissible changes to the property at any time. If you no longer own the property at the time of your death, the TOD deed has no effect.

Which controls at my death, my will or the TOD deed? If you have both a will and a TOD Deed, the TOD deed takes precedence. Even if your will gives different instructions, this deed determines who receives the described property upon your death.

How do I make a TOD deed? You must complete this form in full, sign it, and have it properly notarized. The deed must then be recorded with the Recorder of Deeds in each county where the property is located. The deed has no effect unless it is signed, notarized, and recorded prior to your death. (Example: If live in lower Smyrna and part of your property is in New Castle County and Kent County you will need to file this in both counties)

Is the “legal description” of the property necessary? Yes. The Recorder of Deeds cannot accept the form without a complete legal description.

How do I find the “legal description” of the property? The legal description is usually on the deed you received when you acquired the property. If you have misplaced your deed or did not receive a copy, you may obtain one from the Recorder of Deeds office in the county where the property is located. Copies are typically available online for a fee, or you may visit the Recorder of Deeds office in person to request a copy.

Can I change my mind before I record the TOD deed? Yes. If the deed has not been recorded, you may destroy it. Once the deed has been recorded, additional steps are required to revoke it. A Revocation of TOD Deed must be completed, notarized, and recorded with the Recorder of Deeds in the county where the property is located.

How do I “record” the TOD deed? Submit the completed, signed and notarized form to the Recorder of Deeds office in the county where the property is located. If the property spans more than one county, the deed must be recorded in each county. When this document is recorded, it becomes part of the official land records for your property.

Can I later revoke the TOD deed if I change my mind? Yes. The property owner may revoke the deed at any time during their lifetime. Beneficiaries have no authority to prevent revocation.

How do I revoke the TOD deed after it is recorded? A: There are three methods:

1. Complete, notarize, and record a revocation form.
2. Complete, notarize, and record a new TOD deed for the same property.
3. Transfer the property during your lifetime through a new recorded deed that expressly revokes the TOD deed.

Can I revoke a TOD deed through my will? No. A will does not override or revoke a TOD deed.

I am being pressured to complete this form. What should I do? This form should only be completed voluntarily. Do not complete or sign this form under pressure or undue influence. If you feel pressured, you may wish to speak with a trusted family member or friend. For guidance on your rights, you should consult an attorney.

Do I need to tell the beneficiaries about the TOD deed? No. There is no legal requirement to notify beneficiaries. However, some owners choose to share this information to avoid confusion or disputes in the future. Notifying beneficiaries can help ensure that they are aware of your intentions, but the decision is entirely up to you.

I have other questions about this form. What should I do? This form is not designed to fit everyone’s needs in every situation. The Recorder of Deeds cannot provide legal advice. Because estate planning needs vary, it is highly recommended that you consult an attorney to determine how this form may affect your overall estate plan.