

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF PUBLIC HEALTH

Statutory Authority: 16 Delaware Code, Section 2505A (16 **Del.C.** §2505A)
16 **DE Admin. Code** 4304

FINAL

ORDER

4304 Delaware Medical Orders for Scope of Treatment (DMOST)

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("DHSS") initiated proceedings to adopt the State of Delaware Medical Orders for Scope of Treatment (DMOST, 4304). The DHSS proceedings to adopt regulations were initiated pursuant to 29 **Delaware Code** Chapter 101 and authority as prescribed by 16 **Delaware Code**, §2505A.

On April 1, 2017 (Volume 20, Issue 10), DHSS published in the Delaware *Register of Regulations* its notice of proposed regulations, pursuant to 29 **Delaware Code** Section 10115. It requested that written materials and suggestions from the public concerning the proposed regulations be delivered to DHSS by May 4, 2017, after which time the DHSS would review information, factual evidence and public comment to the said proposed regulations.

Endorsement of the revisions was received from the State Council on Persons with Disabilities, but no comments resulting in changes were received.

FINDINGS OF FACT:

No changes made to the regulations since publication as proposed. The Department finds that the proposed regulations, as set forth in the attached copy should be adopted in the best interest of the general public of the State of Delaware.

THEREFORE, IT IS ORDERED, that the proposed State of Delaware Medical Orders for Scope of Treatment (4304) is adopted and shall become effective September 11, 2017, after publication of the final regulation in the Delaware *Register of Regulations*.

Kara Odom Walker, MD, MPH, MSHS, 8/17/17
DHSS Secretary

4304 Delaware Medical Orders for Scope of Treatment (DMOST)

Purpose:

These DMOST regulations implement 16 **Del.C.** Ch. 25A which authorizes the Division of Public Health/Office of Emergency Medical Services, in conjunction with the Board of Medical Licensure and Discipline, the Delaware EMS Oversight Council, the Delaware State Fire Prevention Commission, and other key groups within the State to develop and implement DMOST regulations and protocol. These regulations, protocol, and form standardize documentation so that Emergency Medical Service (EMS) personnel and all health care providers have a readily recognizable form which sets forth a patient's preferences regarding the provision of and the scope of treatment. The DMOST form allows EMS personnel and other health care providers both to identify and to honor an individual's wishes to the greatest extent possible and to grant individuals the dignity, humanity, and compassion they deserve.

In order for EMS personnel to honor an individual's request related to end-of-life decisions, the EMS provider must have a medical order. The DMOST form serves both as the summary of the individual's advance health care planning decisions and as the medical order.

1.0 Definitions

"Advance Health-Care Directive (AHCD)" means an Advance Health-Care Directive under 16 **Del.C.** Ch. 25, a durable power of attorney for health care decisions, or any individual instruction or power of attorney for health care valid under Delaware law because it is valid in the state where such document was executed or where the individual executing such document was a resident at the time that such document appointing an agent was executed. Said document must have been executed by the individual authorizing the appointed

agent to make decisions about the individual's health care when such individual no longer has decision-making capacity.

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

"Delaware Medical Orders for Scope of Treatment (DMOST)" means a clinical process to facilitate communication between health care professionals and a patient living with serious illness or frailty whose health care practitioner would not be surprised if the patient died within the next year or, if the patient lacks decision-making capacity, the patient's authorized representative. The process encourages shared, informed medical decision-making. The decisions are memorialized on a completed DMOST form, which contains portable medical orders that respect the patient's goals for care with respect to the use of CPR and other life-sustaining treatments and medical interventions. The DMOST form is applicable across health care settings, is reviewable, and the patient controls if it can be voided.

"Department" means the Department of Health and Social Services.

"DMOST form" means the standardized document created by the Department that is identified as an Attachment to these regulations, which:

- Is used on a voluntary basis by a patient living with serious illness or frailty whose health care practitioner would not be surprised if the patient died within the next year;
- Is not an advance health-care directive;
- Is not valid unless it meets the requirements for a completed DMOST form as set forth in 16 Del.C. Ch. 25A;
- Is intended to provide direction to emergency care personnel regarding the use of emergency care and to health care providers regarding the use of life-sustaining treatment by indicating the patient's preferences concerning the scope of treatment, the use of specified interventions, and the intensity of treatment for each intervention;
- Is intended to accompany the patient, and to be honored by all personnel attending the patient, across the full range of possible health care settings, including but not limited to the patient's home, a health care institution, at the scene of a medical emergency, or during transport;
- May be reviewed or voided at any time by a patient with decision-making capacity or, if the patient lacks decision-making capacity, the patient's authorized representative in accordance with the provisions of 16 Del.C. §2511A; and
- Must be signed by a health care practitioner as defined below.

"Emergency-care provider" means an emergency medical technician, paramedic, or first responder authorized under 16 Del.C. Ch 97.

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

"Health care practitioner" means a physician or an individual licensed and authorized to write medical orders pursuant to 24 Del.C. Ch. 17 and Ch. 19 who is providing care for the patient or overseeing the health care provided to the patient and has completed all training required by the Department for individuals participating in the completion of a DMOST form. Over time, a patient's health care practitioner may change.

"Health care provider" means an individual licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of business or practice of a profession. A health care practitioner is also a health care provider.

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

"Patient" means an individual who is under the care of the health care practitioner or health care provider.

"Patient's authorized representative" or **"authorized representative"** means the individual signing a DMOST form on behalf of a patient without decision-making capacity, who has the highest priority to act for the patient under law, and who has the authority to make decisions with respect to the patient's health care preferences being made on the DMOST form. The health care practitioner shall determine the individual who is the patient's authorized representative by referencing the documentation giving such individual the required authority under law. Based on the documentation provided by such individual as evidence of his or her authority, the patient's authorized representative could be an individual designated by a patient under an advance health-care directive, an agent under a medical durable power of attorney for health care decisions, a guardian of the person appointed pursuant to 12 Del.C. Ch. 39 or Ch. 39A, in accordance with the authority granted by the appointing court, a surrogate appointed under 16 Del.C. Ch. 25, or an individual who is

otherwise authorized under applicable law to make the health care decisions being made by execution of the DMOST form on the patient's behalf, if the patient lacks decision-making capacity.

"Scope of treatment" means those medical interventions, procedures, medications, and treatments that a patient, in consultation with a health care practitioner, has determined are appropriate, necessary, and desired by and for the patient and will always include the provision of comfort measures. A patient may decline life-sustaining treatment.

"Serious illness or frailty" means a condition for which a health care practitioner would not be surprised if a patient died within the next year.

2.0 Form Description

- 2.1 The DMOST form, including instructions for completion and plain language explanation, is published in these regulations. The DHSS documents in these regulations may not be altered.
 - 2.1.1 The patient's identification block has the patient's name (last, first, middle), patient's address of record, patient's phone number, patient's gender, patient's date of birth, and last four digits of the patient's social security number.
 - 2.1.2 The Scope of Treatment sections are Blocks A to D.
 - 2.1.2.1 Section A contains the goals of care. This section is for the patient to draft a goal statement relative to their current treatment plan. This section does not constitute a medical order.
 - 2.1.2.2 Section B contains Cardiopulmonary Resuscitation decision (when the patient has no pulse and/or is not breathing). This section constitutes a medical order.
 - 2.1.2.3 Section C contains Medical Interventions (when patient is breathing and/or has a pulse). This section has four categories to be answered. This section constitutes a medical order.
 - 2.1.2.3.1 Treatment of symptoms only/Comfort Measures Only. Use any medications, including pain medication, by any route, positioning, wound care, and other measures to keep clean, warm, dry, and comfortable. Use of oxygen, oral suctioning and manual treatment of airway obstruction as needed for comfort. Use antibiotics only to promote comfort. Transfer if comfort needs cannot be met in current location.
 - 2.1.2.3.2 Limited Treatment. Includes care described above, and use appropriate medical treatment such as antibiotics and IV fluids, and cardiac monitoring as indicated. Do not use intubation or mechanical ventilations. May use non-invasive airway support that does not require the introduction of instruments into the body [e.g. CPAP, BIPAP] however if clearing the airway with manual techniques is unsuccessful, direct laryngoscopy and the use of Magill Forceps may be used. Generally avoid intensive care and transfer to hospital if ordered for medical interventions or if ordered because comfort needs cannot be met in current location.
 - 2.1.2.3.3 Full Treatment. Includes care described above, and use all appropriate medical and surgical interventions, including intubation, advanced airway interventions, mechanical ventilation, and cardioversion, in an intensive care setting if indicated to support life. Transfer to a hospital, if indicated, including intensive care.
 - 2.1.2.3.4 Other orders. Provide the care stated.
 - 2.1.2.4 Section D contains the blocks to determine the desire for the artificially administered fluids and nutrition.
 - 2.1.2.5 Section E contains information as to whom the DMOST form was discussed with and it contains a signature block where the patient, if they have decision-making capacity, can prohibit an authorized representative from voiding the DMOST form and executing a new DMOST form that changes the treatment choices if the patient loses decision-making capacity.
 - 2.1.3 The Signature. Section F contains the signature areas for the patient/authorized representative/parent and the health care practitioner. To be valid the form must have both required signatures.

3.0 Mandatory elements of DMOST forms

- 3.1 A DMOST form shall be deemed to be completed and therefore valid for the purposes of this chapter if it:
 - 3.1.1 Contains information indicating the patient's health care preferences;
 - 3.1.2 Has been voluntarily signed by the patient or by another individual subscribing the patient's name in the patient's presence and at the patient's express direction, or, if the patient does not have decision-making capacity, by the patient's authorized representative;
 - 3.1.3 Contains a statement that the DMOST form is being signed after discussion with the patient, or if the patient lacks decision-making capacity, with the patient's authorized representative;

- 3.1.4 Includes the signature of the patient's health care practitioner and the date and time of the health care practitioner's signature;
- 3.1.5 If the DMOST form is not signed by the health care practitioner in the presence of the patient, the DMOST form will also be signed by the health care provider in whose presence the patient or, the patient's authorized representative if the patient does not have decision-making capacity, signed the DMOST form;
- 3.1.6 The DMOST form shall include a statement that the patient or, if the patient does not have decision-making capacity, the patient's authorized representative, has been provided with the plain language explanation explaining the DMOST form, and the consequences of executing the DMOST form, including whether or not the DMOST form may be changed if the patient lacks decision-making capacity.

4.0 Completing a DMOST form.

- 4.1 Completing a DMOST form is always voluntary and cannot be required for any reason.
- 4.2 A DMOST form can only be used by a patient who is living with a serious illness or frailty whose health care practitioner would not be surprised if the patient died within the next year.
- 4.3 The health care practitioner must discuss the DMOST form directly with the patient, or if the patient lacks decision-making capacity, with the patient's authorized representative, prior to completion.
- 4.4 A DMOST form must be signed by a health care practitioner.
- 4.5 Only the DMOST form in these regulations, which contains a watermark, can be recognized as a DMOST form. Copies of signed DMOST forms are legal and valid to the same extent as the original.
- 4.6 If any section of a DMOST form is incomplete, the full treatment described in that section shall be administered to the patient.
- 4.7 The patient may have decision-making capacity but be unable to communicate by speaking or writing. Federal and State laws require that a health care facility provide effective communication for people with communication impairments. In such situations:
 - 4.7.1 The patient can make his or her health care treatment decisions known through any method by which the patient usually communicates so long as the person interpreting the communication understands the method by which the patient is communicating and the substance of the communication; and
 - 4.7.2 The communication must be witnessed by the health care practitioner. How the communication occurred and why it is considered reliable must be documented in the patient's medical record; and
 - 4.7.3 If a patient cannot physically sign a DMOST form but has communicated that he or she wants to sign the DMOST form, someone other than the patient can sign the DMOST form on behalf of the patient.
- 4.8 Delaware law presumes an adult has decision-making capacity unless a physician determines the patient does not.
- 4.9 If a physician determines a patient does not have decision-making capacity, this must be documented in the patient's medical record. If an adult patient does not have decision-making capacity, an authorized representative may sign a DMOST form on behalf of the patient if the authorized representative has the legal authority to do so.
 - 4.9.1 The health care practitioner shall determine if there is an individual who is the patient's authorized representative. This is determined by referencing the documentation giving such individual the required authority under law. The documentation should establish both that the authorized representative is the person named in this role and that the authorized representative has the authority to make decisions with respect to the patient's health care preferences being made on the DMOST form on behalf of the patient.
 - 4.9.2 The hierarchy under Delaware law to act as the authorized representative for an individual without decision-making capacity is as follows:
 - 4.9.2.1 The court-appointed Guardian, only with the appropriate authority;
 - 4.9.2.2 The patient's most recently appointed Agent in an Advance Health-Care Directive or Health Care Power of Attorney, only with the appropriate authority;
 - 4.9.2.3 If there is no Guardian or Agent or if the designated Guardian or Agent is unavailable, or if the patient revoked an Advance Health-Care Directive pursuant to 16 Del.C. §2504, the Surrogate Statute applies and will allow either the individual named by the patient prior to losing decision-making capacity or if none, the individual recognized by the Surrogate Statute, 16 Del.C. §2507, to make decisions with respect to the patient's health care preferences being made on the DMOST form on behalf of the patient.
- 4.10 If the patient is under age 18, and therefore has no decision-making capacity, the hierarchy under Delaware law to act as the authorized representative for such minor patient is as follows, in descending order:
 - 4.10.1 In the absence of a court order to the contrary, the patient's biological or adoptive parents;

- 4.10.2 A court-appointed permanent guardian or guardian of the person under 13 **Del.C.** Ch. 23;
- 4.10.3 The Division of Family Services (DFS) with an order from a court of appropriate jurisdiction when the DFS holds legal custody or parental rights, after the DFS exercises reasonable efforts to contact and secure consent from the patient's biological or adoptive parents;
- 4.10.4 A caregiver acting under an Affidavit of Relative Caregiver under 13 **Del.C.** §§707 and 708.

5.0 Modifying and Voiding Information on a Completed DMOST form

- 5.1 Any changes or alterations to the information on the completed DMOST form voids the form.
- 5.2 The content of a completed DMOST form can only be modified by voiding the current DMOST form and completing a new DMOST form.
- 5.3 A patient with decision-making capacity may, at any time, void his or her completed DMOST form or otherwise request alternative treatment to the treatment that was ordered on the DMOST form in any manner that indicates the patient's intent to void the DMOST form.
- 5.4 If a patient does not have decision-making capacity, an authorized representative may void and/or request a new DMOST form, based on the known wishes of the patient, or if unknown, the patient's best interest, if the authorized representative has the legal authority to do so and is not prohibited from doing so on the existing DMOST form completed by the patient.

6.0 Field Termination

Nothing in these regulations shall affect the authority of EMS providers to do the paramedic field termination of resuscitation protocol as approved by the Delaware Board of Medical Licensure and Discipline.

7.0 DMOST Protocol

- 7.1 The Division of Public Health, in consultation with the Board of Medical Licensure and Discipline and the Delaware Fire Prevention Commission, shall develop and publish a protocol for EMS providers to comply with the requirements of this regulation.
- 7.2 Copies of a valid DMOST form are valid to the same extent as the original.

8.0 Conflicts

- 8.1 In the event of a disagreement between the patient's authorized representative and the patient's health care practitioner concerning the patient's decision-making capacity or the appropriate interpretation and application of the terms of a completed DMOST form regarding the patient's course of treatment, the parties:
 - 8.1.1 May seek to resolve the disagreement by means of procedures and practices established by the health care institution, including, but not limited to, consultation with an institutional ethics committee, or with an individual designated by the health care institution for this purpose; or
 - 8.1.2 May seek resolution by a court of competent jurisdiction.
- 8.2 A health care provider involved in the patient's care or an administrator of a health care institution may seek to resolve a disagreement concerning the appropriate interpretation and application of the terms of a completed DMOST form to the patient's course of treatment in the same manner as set forth in 8.1.
- 8.3 In the event of conflicting directives, the patient's scope of treatment shall be governed by the latest directive available.
 - 8.3.1 If the treatment directives of a later Advance Health-Care Directive conflict with the patient's directives on a DMOST form, a health care practitioner shall be informed so that the DMOST form can be modified or voided in order to reflect that patient's later directive.
 - 8.3.2 If there is a conflict between the patient's expressed oral or written directives, the DMOST form, or the decisions of the patient's authorized representative, the patient's last expressed oral or written directives shall be followed and, if necessary, a new DMOST form shall be prepared and executed to reflect those directives.
- 8.4 Any individual or entity may petition the Court of Chancery for appointment of a guardian of the person of a patient if that individual or entity has good reason to believe that the withdrawal or withholding of health care in a particular case:
 - 8.4.1 Is contrary to the most recently expressed wishes of a patient;
 - 8.4.2 Is predicated on an incorrect assessment of the patient's decision-making capacity;
 - 8.4.3 Is being proposed pursuant to a DMOST form that has been falsified, forged, or coerced;

- 8.4.4 Is being considered without knowledge of a voided completed DMOST form which has been unlawfully concealed, destroyed, altered, or cancelled; or
- 8.4.5 Is based on a patient's status either as an individual with a pre-existing long-term mental or physical disability, or as an individual who is economically disadvantaged.
- 8.5 A health care institution, health care practitioner, or health care provider acting in good faith and in accordance with generally accepted health care standards applicable to the health care institution, health care practitioner, or health care provider is not subject to civil or criminal liability or to discipline for unprofessional conduct for:
 - 8.5.1 Complying with a DMOST form signed by a health care practitioner apparently having authority to make a DMOST for a patient, including a decision to withhold or withdraw health care;
 - 8.5.2 Declining to comply with a DMOST form based on a belief that the health care practitioner then lacked authority to sign a DMOST;
 - 8.5.3 Complying with a DMOST form and assuming that the DMOST form was valid when made and has not been modified or voided;
 - 8.5.4 Providing life-sustaining treatment in an emergency situation when the existence of a DMOST form is unknown; or
 - 8.5.5 Declining to comply with a DMOST form because the DMOST form is contrary to the conscience or good faith medical judgment of the health care practitioner or the written policies of the health care institution.

9.0 Data Collection/Program Evaluation

- 9.1 The Division of Public Health shall provide appropriate information, education and training on the DMOST regulations to EMS personnel.
- 9.2 The Division of Public Health shall monitor the use of DMOST forms presented to EMS providers.
- 9.3 The Division of Public Health shall take such measures as are necessary to assure individual confidentiality.

10.0 Reciprocity

- 10.1 A DMOST form transfers with a patient and the medical orders indicated on a DMOST form are valid in every health care setting in Delaware. Copies of a valid DMOST form are valid to the same extent as the original.
- 10.2 A document executed in another state, which meets the requirements of this regulation for a DMOST form, the requirements of the state where such document was executed, or the state where the patient was a resident at the time the document was executed, shall be deemed to be valid for the purposes of 16 Del.C. Ch. 25A to the same extent as a DMOST form valid under that chapter.

Delaware Medical Orders for Scope of Treatment (DMOST)

DMOST is a process for documenting treatment choices. The DMOST form is voluntary. It is a portable, standardized Medical Order that will be recognized and followed by Delaware health care providers.

The DMOST conversation is an opportunity to understand the likely course of your health and medical condition, so that you may make informed choices that are appropriate and reflect what you want. If you choose, you may invite loved ones to join this conversation.

Q. What is DMOST?

A. 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.

Q. Who is it for?

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

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

A. 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.

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

A. 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 location.

Q. Can someone else make DMOST decisions for me?

A. You make health care decisions for yourself as long as you have decision-making capacity. You have the right to change your authorized representative at any time while you have decision-making capacity.

If a physician determines that a person lacks decision-making capacity, an authorized representative can sign a DMOST form on behalf of that person. A DMOST form does not change the decision-maker designated by an Advance Health Care Directive, a Health Care Power of Attorney document, a guardian of the person appointed by a Court, or Delaware law on health care surrogates.

If you have capacity and complete a DMOST form, you can sign on the form saying that if you lose capacity, your authorized representative cannot void the form you signed.

Q. What if I change my mind?

A. If your condition or your choices change, you or your authorized representative should void (cancel) your DMOST form and request a new DMOST be completed with your new choices. You can void a DMOST form if you change your mind but do not want to create a new one. You may not make any changes to the content of the DMOST form. If you want to change your DMOST form you must void your previous form and complete a new one with your health care practitioner. If your DMOST form does not agree with your advance directive, the most recent document will be followed.

Q. Must I do this?

A. The DMOST form is always voluntary and can be voided at any time. A health care organization is prohibited from requiring you to complete a DMOST form for any reason, including as part of a person's admission to a health care facility.

It is important to understand that this DMOST form contains medical orders. It will be followed by health care providers. For example, if you choose "Do Not Attempt Resuscitation," and your heart stops, no attempt will be made to restart your heart. If you choose "Intubate/Use Artificial ventilation," then you may be placed on a breathing machine with a tube in your throat and transferred to an intensive care setting in a hospital.

Q. What will happen to my choices if I travel out of state?

A. Many states, including all the states in our region, currently use a form similar to the DMOST form. Forms from those states which are valid under the Delaware law will be honored in Delaware. DMOST forms will be honored in other states which have reciprocity.

Link to PDF of DMOST form

<http://regulations.delaware.gov/register/september2017/4304 DMOST form.pdf>

7 DE Reg. 85 (07/01/03)

15 DE Reg. 211 (08/01/11)

19 DE Reg. 637 (01/01/16)

19 DE Reg. 922 (04/01/16)

21 DE Reg. 233 (09/01/17) (Final)