

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State/Territory: South Dakota

REQUIREMENTS FOR ADVANCE DIRECTIVES UNDER STATE PLANS FOR MEDICAL ASSISTANCE

The following is a written description of the law of the State (whether statutory or as recognized by the courts of the State) concerning advance directives. If applicable States should include definitions of living will, durable power of attorney for health care, durable power of attorney, witness requirements, special State limitations on living will declarations, proxy designation, process information and State forms, and identify whether State law allows for a health care provider or agent of the provider to object to the implementation of advance directives on the basis of conscience.

This information regarding the South Dakota statutes on living wills and durable power of attorney for health care was developed by representatives from the South Dakota State Medical Association, the South Dakota Hospital Association, and the State Bar of South Dakota.

Your Right to Choose

Have you ever thought about what would happen if you suddenly became incapable of making your own health care decisions? Who would make the decisions for you? How would they be made?

Patients who are capable of making their own health care decisions have the right to consent, to reject, and to withdraw consent for medical procedures, treatments or interventions. They may say yes, no, or "I will think about it." For patients who are incapable, someone else must make decisions for them. For many patients, this possible loss of control is a concern. Should they try to speak in advance for themselves? Should they try to designate someone else to speak for them? How do they protect and effectively transfer their right to choose to a person whom they know will speak their mind and heart?

Those concerns can be addressed by signing an advance directive - a document that sets out guidelines for your future care. The two most common types of advance directives are the durable power of attorney for health care and the living will. The purpose of this pamphlet is to describe the durable power of attorney for health care and the living will in light of current South Dakota law and medical practice.

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**Frequently Asked Questions About the Durable Power of Attorney
for Health Care and Living Will**

What is a durable power of attorney for health care?

A durable power of attorney for health care is a document that you, the "principal," create by appointing another person, the health care "agent" or "attorney in fact," to make health care decisions for you should you become incapable of making them yourself.

What is a living will?

A living will is a document that gives instructions to your physician and other health care providers as to the circumstances under which you want life sustaining treatment to be provided, withheld, or withdrawn.

Are durable powers of attorney for health care and living wills recognized in South Dakota?

Both are recognized in South Dakota. The durable power of attorney for health care became part of South Dakota law on July 1, 1990, and the living will became part of South Dakota law on July 1, 1991. If you signed a durable power of attorney for health care before July 1, 1990, or if you signed a living will before July 1, 1991, you should have your document reviewed to make certain that it meets current requirements.

Which is better - a durable power of attorney for health care or a living will?

Most experts agree that a durable power of attorney for health care is a far better option than a living will. The durable power of attorney for health care can do for you everything that a living will can do, and may include a statement of your wishes on the subject of life sustaining treatment.

A durable power of attorney for health care has advantages which the living will does not share. With a durable power of attorney for health care, your agent can actively remind your physician of your wishes, something that a written document, such as a living will, cannot do alone. Furthermore, a living will only contains directions as to when and whether you want life sustaining treatment, and it goes into effect only after your attending physician and one other physician have diagnosed you as terminally ill or permanently unconscious. A living will does not address the many other health care decisions that must be made should you become incapable of making of making your own decisions. A durable power of attorney for health care, though, can authorize your agent to make "all" health care decisions. It is in this way far more comprehensive and flexible than a living will. It is valuable and valid for all adults, both young and old.

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If I choose a durable power of attorney for health care, whom should I select as my agent?

First, you need to think carefully about who knows you best and will best be able to speak for you on health care matters. For many, this will be a spouse or a child, but you may name anyone, including a friend. Second, you should consider where the person lives and whether that person could be present when health care decisions need to be made for you. Finally, you should consider naming a second person to act as an agent in the event that your first choice is unavailable or is unwilling to make the decision.

What should I tell the person I have selected?

Ask if he or she is willing to accept the responsibility of being your health care agent. If the person you have selected accepts the responsibility, then discuss the various kinds of health care decisions that may have to be made in your future and what your wishes are.

Can my agent make a decision against my wishes or proper medical practice?

No. The agent must follow your wishes and must consider your physician's recommendations. A decision by your agent must be within the range of accepted medical practice.

Is there an approved form for a durable power of attorney for health care or living will?

There is no approved form for a durable power of attorney for health care. Professional assistance should be sought in all instances. The South Dakota living will statute contains a living will form which you may use. It is not a simple document. You should obtain assistance prior to signing the living will form if you do not understand the form or any of its terms.

Can I use a power of attorney or living will form which I found in a book or which a friend sent me from another state?

There is nothing to prevent you from using such forms, but those forms are unlikely to take into account South Dakota's special requirements.

What are South Dakota's special requirements?

The most important relates to what is known as artificial nutrition and hydration. If you want your agent to have authority to direct the withholding or withdrawal of artificial nutrition and hydration, you must say so in your durable power of attorney for health care. If you sign a living will and prefer that artificial nutrition and hydration not be provided, your living will must say so. There also are special provisions relating to withdrawal or treatment from pregnant women.

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How do I create a durable power of attorney for health care or living will?

Durable powers of attorney for health care and living wills are not simple documents. They should include your special wishes and should be tailored to meet your needs. You should consult with a lawyer. You should visit with your physician about this before or during the time when you are having the document prepared.

What should I do once I have signed a durable power of attorney for health care or living will?

If you sign a durable power of attorney for health care, you should discuss it with the agent you have selected. No matter which document you have chosen, inform your physician, your family, and your religious advisor. You may also want to give copies to each of these individuals but be careful to keep a list; in case you should later decide to revoke your durable power of attorney for health care or living will, you will want to get those copies back.

What if I change my mind after I've created a durable power of attorney for health care or living will?

You can amend or revoke a durable power of attorney for health care or living will at any time while you are still capable of doing so.

If I should be hospitalized or enter a nursing home, how do I know whether the hospital or nursing home will honor my durable power of attorney for health care or living will?

Effective December 1, 1991, a new federal law requires that hospitals, nursing homes, home health agencies, and hospice programs provide their patients and residents with written information on their policies with respect to durable powers of attorney for health care and living wills. Most hospitals and nursing homes will provide this written information during the admission process. You should carefully consider the questions and information set forth in this pamphlet prior to your admission to a hospital or nursing home.

Do It Now

Durable powers of attorney for health care and living wills are like fire insurance. You must do it before the fire. You have the right to have either or both document(s) as long as you are capable of making decisions for yourself. Once you are incapable of making your own decisions, you lose the opportunity to choose someone to speak for you or to make your wishes known about future health care decisions. If that should occur, the health care decisions made for you may not be those that you would choose for yourself. Please don't delay. Do it today.

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TO MY FAMILY, PHYSICIANS, AND ALL THOSE CONCERNED WITH MY CARE:

I, _____ willfully and voluntarily make this declaration as a directive to be followed if I am in a terminal condition and become unable to participate in decisions regarding my medical care.

With respect to any life-sustaining treatment, I direct the following: (Initial only one of the following optional directives if you agree. If you do not agree with any of the following directives, space is provided below for you to write your own directives).

_____ NO LIFE-SUSTAINING TREATMENT. I direct that no life-sustaining treatment be provided. If life-sustaining treatment is begun, terminate it.

_____ TREATMENT FOR RESTORATION. Provide life-sustaining treatment only if and for so long as you believe treatment offers a reasonable possibility of restoring to me the ability to think and act for myself.

_____ TREAT UNLESS PERMANENTLY UNCONSCIOUS. If you believe that I am permanently unconscious and are satisfied that this condition is irreversible, then do not provide me with life-sustaining treatment, and if life-sustaining treatment is being provided to me, terminate it. If and so long as you believe that treatment has a reasonable possibility of restoring consciousness to me, then provide life-sustaining treatment.

_____ MAXIMUM TREATMENT. Preserve my life as long as possible, but do not provide treatment that is not in accordance with accepted medical standards as then in effect.

(Artificial nutrition and hydration is food and water provided by means of a nasogastric tube or tubes inserted into the stomach, intestines, or veins. If you do not wish to receive this form of treatment, you must initial the statement below which reads: "I intend to include this treatment among the 'life-sustaining treatment' that may be withheld or withdrawn.")

With respect to artificial nutrition and hydration, I wish to make clear that: (Initial only one)

_____ I intend to include this treatment among the "life-sustaining treatment" that may be withheld or withdrawn.

_____ I do not intend to include this treatment among the "life-sustaining treatment" that may be withheld or withdrawn.

(If you do not agree with any of the printed directives and want to write your own, or if you want to write directives in addition to the printed provisions, or if you want to express some of your other thoughts, you can do so here.)

Date: _____
(your signature)

(your address)

(type or print your signature)

The declarant voluntarily signed this document in my presence.

Witness _____

Address _____

Witness _____

Address _____

On this the _____ day of _____, _____, the declarant, _____ personally appeared before the undersigned officer and signed the foregoing instrument in my presence.

Dated this _____ day of _____, _____.

Notary Public
My commission expires: _____