

Making Health Care Decisions in North Dakota:

A Summary of North Dakota Law Regarding Health Care Directives



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Introduction

The Patient Self-Determination Act is a federal law that requires health care providers to educate their patients and the community on issues related to advance directives. The state of North Dakota considers health care directives advance directives.

It requires hospitals, nursing facilities, hospices, home health agencies, and Health Maintenance Organizations (HMO's) certified by Medicare and Medicaid to furnish written information so that patients have the opportunity to express their wishes regarding the use or refusal of medical care, including life-prolonging treatment, nutrition, and hydration.

The federal law takes no stand on what decisions persons should make. It **does not require** persons to execute an advance directive.

This booklet was developed by the Aging Services Division of the North Dakota Department of Human Services to provide you with a written summary of North Dakota law regarding advance directives and health care decision-making authority. **It is not intended to provide specific legal advice regarding these matters; therefore any specific questions should be addressed to an attorney.**

As a competent adult, you have the right to control decisions about your own health care. You have the right to accept or to refuse any treatment, service, or procedure used to diagnose, treat, or care for your physical or mental condition.

You have the right to make your own health care decisions as long as you have the ability to:

1. Understand and appreciate the nature and consequences of a health care decision; and
2. Communicate a health care decision.

Your right to decide includes the right to control the use of medical technology in regard to your health care. Part of your right to make your own medical decisions is your right to decide, based upon your values, the extent to which medical technology should be used and under what circumstances.

Your right to decide also includes the right to make decisions regarding the artificial giving of food and water (nutrition and hydration).

To exercise your right to make your own medical decisions, you should do the following:

1. Make certain you understand your medical treatment options. If you do not understand something or need more information, ask your health care provider or providers. You have the right to an explanation in terms that you understand.
2. If you have ethical or moral concerns about your decisions you should speak to your minister, rabbi, or other advisor, or perhaps members of your family or a close friend.
3. Discuss your desires with your doctor or health care provider. Make sure that your health care provider understands what you want in the event you are unable to make your own medical decisions.

There may come a time when you may be unable to make your own health care decisions. Then your health care providers will look to any prior written advance directives or to family members to make decisions on your behalf.

An optional advance directive form was created by the North Dakota legislature, which can be found beginning on page 21 of this guide. The advance directive form is called a "health care directive," where you either state choices for medical treatment or designate who should make treatment choices if you are unable to make treatment choices or communicate. Other common terms for the health care directive include "living will" or "durable power of attorney for health care."

Health Care Directives

The North Dakota law regarding "health care directives" is found in Chapter 23-06.5 of the North Dakota Century Code.

A health care directive is a legal document that permits you to:

1. Give instructions about any aspect of your health care;
2. Choose a person to make health care decisions for you;
3. Give instructions about specific medical treatments you do or do not want;
4. Give other instructions, including where you wish to die;
or
5. Make an anatomical gift.

Your decision to complete a health care directive is personal and should be based upon your individual values and beliefs.

To complete a health care directive, it must:

1. Be in writing;
2. Be dated;

3. State the name of the person to whom it applies;
4. Be executed by a person with the capacity to understand, make and communicate decisions;
5. Be signed by a person to whom it applies or by another person authorized to sign on behalf of the person to whom it applies;
6. Contain verification of the required signature, either by a notary public or by qualified witnesses; and
7. Include a health care instruction or a power of attorney for health care, or both.

You should provide a copy of your health care directive to your doctor and any other health care providers such as your hospital, nursing facility, hospice, or home health agency. In addition, you may want to give copies of your health care directive to other persons, such as close family members and your attorney, if you have one.

If you choose to execute a health care directive, you may use the optional legal form found in North Dakota Century Code chapter 23-06.5, and beginning on page 21 of this guide.

23-06.5-18. Penalties.

1. A person who, without authorization of the principal, willfully alters or forges a health care directive or willfully conceals or destroys a revocation with the intent and effect of causing a withholding or withdrawal of life-sustaining procedures which hastens the death of the principal is guilty of a class C felony.

2. A person who, without authorization of the principal, willfully alters, forges, conceals, or destroys a health care directive or willfully alters or forges a revocation of a health care directive is guilty of a class A misdemeanor.
3. The penalties provided in this section do not preclude application of any other penalties provided by law.

Health Care Directives Frequently Asked Questions

This section includes a number of commonly asked questions and their answers regarding health care directives.

1. What is a health care directive?

A health care directive is a written declaration that allows you to:

- 1) Give instructions about any aspect of your health care;
- 2) Choose a person to make health care decisions for you;
- 3) Give instructions about specific medical treatments you do or do not want;
- 4) Give other instructions, including where you wish to die; or
- 5) Make an anatomical gift.

2. Who can make a health care directive?

Any competent person 18 years of age or older.

3. Does a health care directive need to be witnessed or notarized?

A health care directive must contain verification of your signature, or the signature of the person authorized by you to sign on your behalf, either by a notary public or two witnesses who are at least eighteen years of age.

The witnesses or notary to your health care directive **cannot** be:

- 1) You;
- 2) Your spouse;
- 3) Related to you by blood, marriage, or adoption;
- 4) Entitled to inherit any part of your estate upon your death; or
- 5) Claimants to any portion of your estate.

4. Does a health care directive need to be in writing?

Yes. To be legally sufficient in North Dakota, a health care directive must be in writing.

5. How do I know that my wishes will be carried out?

Your doctor or health care provider is responsible for ensuring that your wishes are carried out. If your doctor or health care provider is unwilling to comply with your wishes, then he or she must notify the agent of their unwillingness to comply, document the notification in your medical record, and take all reasonable steps to transfer your care to another doctor or health care provider who is willing to comply.

6. Can I revoke my health care directive?

Yes. As long as you remain competent you can revoke your health care directive in any one of three ways:

- 1) By signing and dating a piece of paper stating you revoke your health care directive;
- 2) By physically destroying the health care directive or having someone else destroy it in your presence and with your permission or instruction; or
- 3) By stating orally that you wish to revoke the health care directive.

Your revocation is effective as soon as you communicate it to your doctor or health care provider, and must be made a part of your medical record.

7. Can I be required to sign a health care directive?

No. No one may discriminate against you because you have or have not signed a health care directive.

8. After I have signed a health care directive, what should I do with it?

It is a good idea to talk about your health care directive with your doctor and other health care providers, and your family, since your doctor will probably consult them in the event you are unable to make your own health care decisions. Copies should be given to your agent, doctor, any other health care providers, and members of your family.

9. What if I have a health care directive, living will, or durable power of attorney which was written years ago?

The statute governing health care directives in North Dakota was effective on August 1, 2005. If you signed a health care directive, living will, or durable power of attorney before August 1, 2005, it will remain in effect if it complied with the law in effect at the time you completed the directive. However, you may wish to execute a new health care directive since the new form is more detailed and will probably provide your family and health care provider with much more guidance on what kind of care you want in specific situations.

10. Can I include directions authorizing the withdrawal or withholding of nutrition and/or hydration in my health care directive?

Yes. North Dakota law requires that nutrition and hydration or both must be withdrawn, withheld, or administered if the patient has previously declared **in writing** the patient's desire that nutrition or hydration be withdrawn, withheld, or administered.

11. What does "health care decision" mean?

It means to consent to, refuse to consent to, withdraw consent to, or request any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition. This includes:

- 1) Selection and discharge of health care providers and institutions;
- 2) Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate;

- 3) Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care; and
- 4) Establishing where to live and receive care and support when those choices relate to health care needs.

12. What if I have questions about any medical treatment or medical terms?

You should talk to your doctor or some other medical professional that can tell you about various kinds of medical treatments, services, procedures, or life-sustaining care.

13. What is an agent?

An agent is an adult that you give the authority to make health care decisions for you, as provided in your health care directive.

14. Who should I appoint as my agent?

Your agent should be someone you know and trust, who knows how you feel about medical treatment, who understands your beliefs and values, and who is willing to carry out your wishes. Certain people **cannot** act as your agent though. These people are:

- 1) Your health care provider;
- 2) A non-relative who is employed by your health care provider;
- 3) Your long-term care services provider; or
- 4) A non-relative who is employed by your long-term care services provider.

15. Should I appoint an alternate agent?

The appointment of an alternate agent is not required, but it is a good safeguard if something should happen to your original agent.

16. What kind of health care decisions can my agent make for me?

Your agent will have the authority to make any and all health care decisions on your behalf that you could make yourself, with two exceptions:

- 1) Your agent cannot make a decision if you limit his or her authority to make such a decision on your behalf; or
- 2) Your agent cannot make a decision if the law prohibits him or her from making such a decision on your behalf.

17. What kind of instructions can I give my agent?

You may give very general instructions or be quite specific. You are not required to give your agent any instructions. If you do not give your agent any instructions, your agent will make decisions based upon your values as determined by your agent. If your agent is unable to determine what you would have decided, your agent must make decisions based upon what he or she believes to be best for you under the circumstances.

18. What are my agent's responsibilities in carrying out my wishes?

Your agent is required to follow your wishes as contained in your health care directive, if you have one, or as stated orally. If your wishes are unknown, your agent is required

to make health care decisions for you based on what he or she feels is in your best interest.

19. Is my doctor or health care provider required to follow my agent's decisions?

Not in all circumstances. A health care provider may administer health care necessary to keep you alive, despite your agent's decision to withhold or withdraw health care. A health care provider may also withhold health care if he or she determines it to be contrary to reasonable medical standards, despite your agent's decision to provide health care. In these instances, the health care provider may not be subjected to civil or criminal liability or be considered to have engaged in unprofessional conduct if he or she took reasonable steps to:

- 1) Notify your agent of their unwillingness to comply;
- 2) Document the notification in your medical records; and
- 3) Arrange to transfer your care to another health care provider willing to comply with your agent's decision.

20. When does a health care directive become effective?

A health care directive is effective when all of the following occur:

- 1) You have executed a health care directive;
- 2) Your agent, if any, has accepted the position as agent in writing; **and**
 - a) Your doctor has certified, in writing, that you lack the capacity to make health care decisions. You lack capacity to make health care decisions when you do not have the ability to understand and

appreciate the nature and consequences of a health care decision, including the significant benefits and harms of proposed health care, or reasonable alternatives to that health care; **or**

- b) You have given authority for medical decision making to your agent. In this case, your doctor has declared you incompetent.

21. Can I still make my own health care decisions after I have signed a health care directive?

Yes. You will be able to make your own health care decisions as long as you are capable of doing so. Your advance directive only takes effect when you become incapacitated; or when the conditions you have identified in the directive are met.

22. Where should I keep my health care directive?

The original signed copy should be given to your agent or you should keep it where it is immediately available to your agent and your alternate agent, your doctor, and any other health care provider.

23. Is my agent or alternate agent liable for my health care costs?

No. The liability for the cost of your health care is the same as if you made the decision yourself.

24. Can my agent or alternate agent withdraw?

Yes. An agent or alternate agent may withdraw by giving you notice **prior** to the time you are determined to lack capacity to make health care decisions. **After** such time, your agent or alternate agent may withdraw by giving notice to your doctor.

25. When does my agent's authority end?

An agent's authority to make decisions on your behalf generally ends in five circumstances:

- 1) Upon your death;
- 2) In the situation where your health care directive takes effect when you become incapacitated, if you later regain capacity to make your own health care decisions;
- 3) If your agent withdraws;
- 4) If you revoke the agent's authority; or
- 5) If a court takes away your agent's authority to make health care decisions for you.

26. Can I instruct my agent to withhold or withdraw nutrition and/or hydration?

Yes. Nutrition or hydration or both must be withdrawn, withheld, or administered if you have previously declared your wishes in writing. However, there are limitations to this directive, as noted in question 19.

27. Can I authorize my agent to donate my body organs?

Yes. If you desire to donate your body organs after your death, you may specify your gift in your health care directive. You may make a gift of:

- 1) Any needed organs and tissues, and/or;
- 2) Specified organs or tissue.

Informed Health Care Consent Law

This law can be found in Section 23-12-13 of the North Dakota Century Code.

The informed health care consent law establishes a priority list of persons who are authorized to provide consent for minors or persons who are incapacitated and, therefore, unable to make or communicate their own medical decisions. This law is particularly useful when a person does not have a health care directive.

The law applies to two groups of people: 1) minors, and 2) adults who are incapacitated. You are considered a minor if you are under age eighteen. You are considered incapacitated if you are unable to make or communicate responsible decisions regarding personal matters such as medical treatment.

This law requires that a person who is authorized to provide informed consent on your behalf must first determine that you would have consented to the proposed health care if you were able. If such a determination cannot be made, the authorized person may consent only after determining that the proposed health care is in your best interests.

Informed Health Care Consent Law Frequently Asked Questions

This section includes a number of commonly asked questions and their answers regarding Informed Health Care Consent Law.

1. If I have a signed health care directive, does this law apply?

Possibly. If your health care directive is ambiguous or does not address a specific health care decision, this law will determine who may make such a decision for you.

2. If I have designated an agent in my health care directive, will this law apply?

Possibly. There is an interaction between the law applicable to health care agents and the Informed Health Care Consent law. The interaction arises from the fact that the Informed Health Care Consent law provides that any person you give authority to act as your agent under a health care directive has highest priority to make health care decisions for you if you become incapacitated.

3. At what point would the law authorize another person to make my health care decisions?

A doctor must first determine that you are unable to make or communicate responsible health care decisions before anyone would be authorized to make health care decisions for you.

Keep in mind, however, you also have the option of having your advance directive take effect when the conditions in the directive are met that would allow someone else to make health care decisions for you.

4. Who is authorized by law to make health care decisions?

The law authorizes the persons in the following categories, in the order listed, to make your health care decisions if you are either a minor or if your doctor determines that you are unable to make or communicate responsible decisions about your health care:

- 1) Your agent under a health care directive, or durable power of attorney, which gives the agent authority to make health care decisions for you, unless a court specifically authorizes a guardian to make medical decisions for you;
- 2) Your court-appointed guardian or custodian, if any;
- 3) Your spouse, if he or she has maintained significant contacts with you;
- 4) Any of your children who are at least eighteen years old and have maintained significant contacts with you;
- 5) Your parents, including a stepparent, who has maintained significant contacts with you;
- 6) Your adult brothers and sisters who have maintained significant contacts with you;
- 7) Your grandparents who have maintained significant contacts with you;
- 8) Your grandchildren who are at least eighteen years old and who have maintained significant contacts with you;
or
- 9) A close relative or friend who is at least eighteen years of age and who has maintained significant contacts with

you.

5. What happens if a person in a higher category refuses to consent to the proposed health care?

No one in the lower category may provide consent to the proposed health care if someone in a higher category has refused to consent to the proposed health care.

6. Is it necessary for everyone in a particular category to consent to the proposed health care?

No. A physician seeking informed consent for proposed health care must only receive the consent of one competent person in the highest-ranking category.

7. Are there any guidelines which must be followed by the person authorized to give consent to health care?

Yes. Before giving consent, an authorized person must determine that you would have consented to such health care if you were able to do so. If the authorized person is unable to make this determination, he or she may only consent to the proposed health care if he or she feels the health care is in your best interest.

8. Are there any health care decisions the law does not permit anyone to make?

Yes. Even individuals that are authorized to provide informed health care consent if you are a minor or incapacitated may not consent for you to receive any of the following treatments or procedures:

- 1) Sterilization;
- 2) Abortion;

- 3) Psychosurgery; or
- 4) Admission to a state mental health facility (state hospital) for a period of more than forty-five days, unless a court order is obtained.

9. What if I or someone interested in my welfare objects to my doctor's conclusion that I am unable to make my own health care decisions?

If you or someone interested in your welfare objects to a doctor's decision that you are unable to make or communicate health care decisions, a court hearing must be held to determine whether you are able to make your own health care decisions.