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8-1-2005

## Rights of the Terminally Ill in South Dakota

Cooperative Extension Service  
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### Recommended Citation

Extension Service, Cooperative, "Rights of the Terminally Ill in South Dakota" (2005). *Extension Extra*. Paper 468.  
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## Rights of the Terminally Ill in South Dakota

The South Dakota Legislature passed a law in 1991 recognizing living will declarations. An individual who is of sound mind and is 18 or more years old may make a declaration (living will) that governs the withholding or withdrawing of life-sustaining treatment when he or she is terminally ill.

A federal law, effective December 1, 1991, The Patient Self-Determination Act (PSDA), affects all health care facilities including hospitals, nursing homes, and hospices receiving Medicare or Medicaid. It stipulates that individuals must be given written information at the time of admission about their right under state law to accept or refuse medical treatment and the right to formulate advance directives such as a Living Will and a Durable Power of Attorney for Health Care. The facilities will be responsible for documenting in each individual's medical record whether he or she has executed such an advance directive.

### Definitions

**Attending physician.** The physician who has primary responsibility for treatment and care of the patient.

**Qualified patient.** A patient 18 or more years old who has executed a written declaration according to South Dakota law and who has been determined by the attending physician to be in a terminal condition.

**Life-sustaining treatment.** Any medical procedure or intervention which, when administered to a qualified patient, serves only to postpone the moment of death or to maintain the patient in a condition of permanent unconsciousness.

**Terminal condition.** An incurable and irreversible condition that, in accordance with accepted medical standards, will cause death within a relatively short time if life-sustaining treatment is not administered; or a coma or other condition of permanent unconsciousness that, in accordance with accepted medical standards, will last indefinitely without significant improvement and in which the individual is unable to communicate verbally or nonverbally, demonstrates no purposeful movement or motor ability, and is unable to interact purposefully with environmental stimulation.

**Health care provider.** Any person who is licensed, certified, or otherwise authorized by law to administer health care in the ordinary course of business or practice of a profession, including any person employed by or acting for any such authorized person.

### What is the format of a living will?

A living will is referred to as a "declaration" under South Dakota law. An individual who has made a declaration is a "declarant." As a declarant, you may order the attending physician to withhold or withdraw treatment that would only prolong the process of dying.

Your declaration (living will) must be signed by you and by two adult individuals who serve as witnesses. The signatures do not have to be notarized. You may have another individual sign for you if you are unable to sign it yourself.

Example: John is physically disabled but mentally competent, so he asks his attorney to sign on his behalf

in the presence of two disinterested witnesses. South Dakota law does allow family members to be witnesses, but John chose not to have any relatives as witnesses to avoid potential questions regarding impartiality.

### **When does my declaration (living will) become effective?**

You may make decisions regarding life-sustaining treatment for yourself as long as you are able to do so. Your declaration becomes operative when it is determined by the attending physician and one other physician that you are in a terminal condition and no longer able to make decisions regarding administration of life-sustaining treatment. The declaration will remain operative provided the following two conditions exist: 1) the attending physician determines that you are in a terminal condition; and, 2) you are no longer able to make decisions about the administration of life-sustaining treatment.

An attending physician or health care provider who is furnished a copy of your declaration is required to make it a part of your medical record. When your declaration becomes operative, the attending physician or health care provider is required to follow its provisions. When you name a person as your health care agent, the attending physician or other health care provider is required to follow the health care agent's instructions.

### **What if my attending physician or health care providers are not willing to comply with my living will?**

If this is the case, he or she must take all reasonable steps as promptly and practically as possible to transfer care of you to another physician or health care provider who is willing to comply with your declaration. If the policies of a health care facility preclude compliance with declarations (living wills), that facility must take all reasonable steps to transfer you to a facility in which the provisions can be carried out.

### **How will others know about my declaration (living will)?**

Provide a copy of your living will (declaration) to the attending physician so he or she will be aware of it. Upon determining you are in a terminal condition, the attending physician is required to record this information and the terms of your declaration in your medical record.

Share a copy of your declaration with family members or, at a minimum, let them know its location. You may want to carry a card in your wallet or purse stating the existence of your living will and where it is filed.

### **What if the declarant in need of life-sustaining treatment is pregnant?**

Life-sustaining treatment cannot be withheld or withdrawn from a declarant known by the attending physician to be pregnant, so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment, unless treatment will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication.

### **If I am terminally ill and unable to give consent in a living will, are there circumstances in which others can give consent to the physician or health care provider to withhold or withdraw treatment?**

You, as the declarant, may designate another individual ("attorney in fact") to make decisions for you about the withholding or withdrawing of life-sustaining treatment. Your attorney in fact must be of sound mind and 18 or more years of age. Choose someone that knows you very well, cares about you, and can make difficult decisions. A spouse or family member who is too emotionally involved may not be the best choice. Whether you choose a spouse, family member, or a friend, choose someone located near you and take time to talk to them about your end-of-life wishes, making sure this person agrees to respect and uphold your wishes.

An attorney-in-fact (one given authority to act on your behalf by way of your execution of a durable power of attorney for health care) may make health care decisions for you in the event of your incapacity. If a guardian has been appointed to you, the guardian may make the decisions on your behalf. If you don't have a living will, a durable power of attorney, or an appointed guardian, South Dakota law states that the authority to make health care decisions may be exercised by the following individuals, in order of priority:

1. the spouse of the individual;
2. an adult child;
3. a parent;
4. an adult sibling;
5. a grandparent or adult grandchild; and
6. an adult aunt or uncle or an adult niece or nephew.

Whenever a third party is making a health care decision on an incapacitated person's behalf, if a written consent, witnessed by two others, is given to the attending physician, he or she may withhold or withdraw life-sustaining treatment from an individual who cannot make that decision because of his or her state of health. The patient must have been determined by the attend-

ing physician to be in a terminal condition and no longer able to make decisions regarding administration of life-sustaining treatment, and the patient must have no effective declaration.

### **When did the law become effective?**

The law concerning living wills became effective on July 1, 1991. A declaration which meets the execution requirements of the jurisdiction where the declarant was then a resident, the execution requirements of the jurisdiction where executed, or the execution requirements of the current law as discussed above, is valid, even if executed prior to July 1, 1991.

### **What if I change my mind and don't want my living will enforced?**

Your declaration (living will) may be revoked at any time either in writing or verbally, without regard to your mental or physical condition. A revocation is effective when communicated to the attending physician or other health care provider. The attending physician or other health care provider must make the revocation a part of the declarant's medical record.

### **Can a living will be required for insurance or before health care is given?**

No. A person may not prohibit or require the execution of a declaration as a condition for being insured for, or receiving, health-care services.

### **What if I wrote a declaration (living will) while residing in another state?**

A declaration which meets the execution requirements of the jurisdiction where the declarant was then a resident, the execution requirements of the jurisdiction where executed, or the execution requirements of current South Dakota law is valid, even if executed prior to July 1, 1991.

### **What if hospital policies prevent acceptance of my declaration (living will) because of the fear of suit?**

A physician or other health-care provider is not subject to civil or criminal liability or to discipline for unprofessional conduct for giving effect to a declaration, absent actual knowledge of its revocation; for determining that a terminal condition does or does not exist; or for declining to give effect to a declaration.

However, a physician or other health-care provider electing for any reason not to participate in the withholding or withdrawal of life-sustaining treatment or who objects to providing such treatment must make a reasonable effort to locate and to transfer the declarant to a physician or health-care provider willing to honor the declaration.

### **What impact does a declaration (living will) have on life insurance?**

The making of a declaration does not affect the sale, purchase, or issuance of a policy of life insurance or annuity, nor does it affect, impair, or modify the terms of an existing policy of life insurance or annuity. A policy of life insurance or annuity is not legally impaired or invalidated by the withdrawal or withholding of life-sustaining treatment from an insured, notwithstanding any term to the contrary.

### **How is a declaration (living will) worded?**

Go over the terminology to be used in your living will until you are clear as to its intent. Are there conditions under which you do not wish to have life-support treatment? If so, to what extent? How does refusal of any life-support treatment affect your religious or personal beliefs?

**Artificial nutrition and hydration.** Food and water are provided by means of a nasogastric tube or tubes inserted into the stomach, intestines, or veins. You are asked to determine if this treatment would or would not be included among the "life-sustaining treatment" that may be withheld or withdrawn.

**No life-sustaining treatment.** What do you understand to mean by the phrase "no life-sustaining treatment"? Would it mean that no medical device, procedure, or medication is to be used to keep you alive—medical devices such as those that help you breathe, food and water supplied through a feeding tube, cardiopulmonary resuscitation (CPR), major surgery, blood transfusions, dialysis, antibiotics, or anything else meant to keep you alive? If life-sustaining treatment is begun, do you want it terminated?

**Treatment for restoration.** Would you want life-sustaining treatments only if and for so long as you believe treatment offers a reasonable possibility of restoring to you the ability to think and act for yourself? That is, are life support treatments that would prolong your life only desired if you will have the capacity to think and move under your own power?

Would you be willing to endure the pain and work to regain at least part of your faculties?

**Treat unless permanently unconscious.** If you believe that you may become permanently unconscious (in a coma) and that this condition is irreversible (you are not expected to wake up or recover) and/or if you will have brain damage, do you then desire no life-sustaining treatment? If life-sustaining treatment is being provided, would you desire it be terminated? But, if treatment has a reasonable possibility of restoring consciousness to you, would you then want life-sustaining treatment provided?

**Maximum treatment.** If your doctor and other health care professional, in their professional opinions, believe that you have permanent and severe brain damage, should they continue to preserve your life as long as possible? Should they go beyond treatments that are not in accordance with accepted medical standards as then in effect?

If you have any concerns about the printed directives in the South Dakota suggested living will form and want to write your own new directives or clarify existing directives in addition to the printed provisions, or if you want to express other thoughts, you may do so within the body of the living will document.

South Dakota law states that a declaration directing a physician to withhold or withdraw life-sustaining treatment may, but is not required, to be in the form found on the "living will declaration" printed form. It can be handwritten. An attorney does not have to write it. The declaration does not have to be notarized, but it does have to be signed by the declarant, or another at the declarant's direction, and witnessed by two adult individuals.

#### **Review: LIVING WILL DECLARATION (South Dakota suggested form)**

This is an important legal document. It directs the medical treatment you are to receive in the event you are unable to participate in your own medical decisions and you are in a terminal condition. This document may state what kind of treatment you want or do not want to receive.

This document can control whether you live or die. Prepare this document carefully. If you use this form, read it completely. You may want to seek professional help to make sure the form does what you intend and is completed without mistakes.

This document will remain valid and in effect until and unless you revoke it. Review this document periodically to make sure it continues to reflect your wishes. You may amend or revoke this document at any time by notifying your physician and other health care providers. You should give copies of this document to your physician and your family.

This form is entirely optional. If you choose to use this form, please note that the form provides signature lines for you, the two witnesses whom you have selected, and a notary public.

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*This fact sheet is recommended for reading by all South Dakotans after April 2005. It has been reviewed and approved by the State Bar of South Dakota and South Dakota State University faculty in the College of Nursing and in the Human Development, Consumer and Family Sciences Department, College of Family and Consumer Sciences.*

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ExEx14086, 100 printed August 2005 at \$.095 each. Access at <http://agbiopubs.sdstate.edu/articles/ExEx14086.pdf>

**LIVING WILL DECLARATION**

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.

**LIVING WILL DECLARATION**

(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)

\_\_\_\_\_ (type or print your name)

\_\_\_\_\_ (your address)

The declarant voluntarily signed this document in my presence.

Witness \_\_\_\_\_ (signature)

Address \_\_\_\_\_

Witness \_\_\_\_\_ (signature)

Address \_\_\_\_\_

**(OPTIONAL)** On this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, the declarant,

\_\_\_\_\_,

and witnesses \_\_\_\_\_, and \_\_\_\_\_ personally appeared before the undersigned officer and signed the foregoing instrument in my presence.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_

Notary Public      My commission expires: \_\_\_\_\_.