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PLANNING FOR HEALTH CARE DECISIONS

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.

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care providers as to the circumstances under which you want life sustaining treatment to be provided, withheld, or withdrawn.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 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.

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 of treatment from pregnant women.

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?

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 admissions 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.

NOTICE: This brochure is based in South Dakota law and is designed to inform, not to advise. No person should ever apply or interpret any law without the aid of an attorney who knows the facts and may be aware of any changes in the law.