

# SUBSTITUTE DECISION MAKING

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## IMPORTANT RELEVANT DISCUSSION

"The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.

Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest." -John Stuart Mill, *On Liberty*

"If you want to be free, there is but one way; it is to guarantee an equally full measure of liberty to all your neighbors. There is no other." – Carl Schurz

Our "freedom" to do as we wish has many names. It is called "self-determination," "liberty," "the right to the pursuit of happiness," "freedom of choice", and "personal decision making". As United States citizens we take for granted the fact that we may chart our individual choices, make our own decisions, and put our ideas into action.

The right to make choices and exercise personal preferences is at the heart of our traditions and the basis of our fundamental concept of fairness. However, there are times and circumstances that prevent persons from making decisions about their lives. Over the years, state statutes have been enacted attempting to address these situations. Some allow an individual to share decision making with others voluntarily. Others, like guardianship and conservatorship proscribe methods to do so involuntarily.

The following information sets out a variety of these mechanisms. Each one is unique in its design, application and formality. Note also that not all of the following approaches to substitute decision making require the involvement of a court.

## INTRODUCTION

We regularly do things at direction of, or on the behalf of others.

Usually the direction is oral and activities are to be done in the very near future. At other times we are given the discretion to make the decision for another.

Not many problems with simple, routine tasks:

1. The ramifications are usually not complex;
2. Limited liability issues.

Making important substantive decisions (medical, financial) for another can be a complex process.

1. Documentation
2. Creating record of events.

The two people involved may agree, but:

1. Need to convince a third person who has to respond/act;
2. Need to show authority to do something on behalf of another.

Dynamic may not be a problem in some areas, i.e., parent-child relationship.

Substitute decision making often requires a need to convince others.

Have to use a method that is recognized for its:

1. Clarity of purpose, and,
2. Uniformity of permission/acceptance.

Need to look at several questions:

- Under what authority is this being done? Is it “legal”?
- Who is giving decision-making authority?
- Who is given the authority to make another’s decisions?
- What decisions are being made for another?
- When can decisions be made?
- How is permission conveyed/terminated?

Substitute decision making addressed early in SD legislative history.

Initial territorial and state laws focused on two areas:

1. Conducting business.
2. Conveying property.

Over time, other situations were addressed, i.e., health care, possibility of incapacity, disabling conditions, and end of life decisions.

### ***POWER OF ATTORNEY (SDCL 59-2,7):***

Laws relating to the development and facilitation of business were a prominent part of the first codified territorial laws of 1877. Laws dealing with a concept called “agency” were designed to address a major business problem. Agency law allowed for the arrangement whereby an adult person who had the capacity to contract could give another adult the authority and right to act on his behalf. This law is still in effect today. The person creating the authority is called a “principal”. The person who is given the authority to act on the behalf of another is called an “agent” or an “attorney-in-fact”. While the relationship created is called an agency, it is more often know generally as having a “power of attorney”. There are two distinct “types” of power of attorney.

The first “type” gives authority to an adult to act on behalf of another but is *silent* as to what happens if the person giving the authority becomes incapacitated. South Dakota statutes do not require a specific format to confer this type of authority. It can be given orally or in writing, although certain transactions require it to be in writing. The authority given can be actual (specifically set out by the person giving it – the principal) or ostensible (authority that a third party believes the agent has by the actions of the person giving the authority). The power of attorney can authorize anything that the principal can do legally. The authority to act on behalf of another can be very broad and include the power to sell personal and real property.

The authority of the agent who is able and willing to act on the behalf of the principal in this type of arrangement prior to its expiration is terminated at:

1. The revocation of the agency by the principal;
2. The death of the principal; or
3. The incapacity of the principal to contract.

The second “type” of power of attorney was created in statute in 1977 and is set out at SDCL 59-7-2.1. This expansion changed the agency law to allow for the power of attorney authority to survive the incapacity of the principal in two circumstances.

1. It allows for the authority to continue when the principal is incapacitated.
2. It allows the principal to designate another to become his attorney in fact - agent at the time the principal becomes incapacitated.

The authority for this type of power of attorney *must be in writing and contain specific language* that conveys the intention that the authority is exercisable despite the fact the principal is incapacitated. While a particular form for the document is not required, two suggestions regarding language to be used are given in the statute cited above. The following suggested language addresses two different situations that may arise:

“This power of attorney shall not be affected by disability of the principal.”

“This power of attorney shall become effective upon the disability of the principal.”

This type of power of attorney is usually called a “durable” power of attorney because of the “duration” or continuation of the authority while the person is incapacitated. Sometimes the power created in the second statement above is called a “springing” power of attorney because the authority “springs” up upon the incapacity of the person giving the authority.

The changes in the power of attorney laws in 1977 also gave the principal the authority to use the power of attorney to nominate a guardian or conservator to be considered by the court should proceedings concerning the principal take place (59-7-2.4).

Additional substantive changes to the power of attorney law in 1990 and 2007 expanded the traditional scope of authority the principal can give to another to include personal health care decisions to include admission to and custodial care provided by a licensed health care facility. Using the durable power of attorney, the principal can now give the attorney in fact the broad authority to, consent to, reject, or withdraw consent for medical procedures, treatment or intervention (59-7-2.1) and health care decisions relating to nutrition and hydration (59-7-2.5-2.8).

The law does not mention how the principal is to give instructions to the agent nor detail to be contained in the instructions (59-7-2.1). However, guidelines relating to how the substituted consent is to be used are referenced in the statute including:

1. Decisions are to be made in accordance with accepted medical standards;
2. Recommendations of attending physician (physician determining capacity) should be considered;
3. Expressed decisions of principal in writing/documents creating power of attorney are to be considered;
4. Comfort care cannot be withheld;
5. Artificial nutrition or hydration may be withheld under specific circumstances; and,
6. Best interest of the principal.

The agent may request, receive and review any information regarding the principal's physical or mental health, including legal, medical, and hospital records, execute any release or other documents required to obtain the information. In addition the agent may share the information received with others as deemed appropriate (59-3).

The statutes are also clear that a physician and/or health care providers (as defined in 34-12C-1(5)) acting in reliance on a health care decision by an attorney-in-fact or agent whom the physician and/or health care provider believes in good faith is authorized to make decisions or whom the physician and/or health care provider believes in good faith is not authorized to make decisions and decline to act are not subject to criminal or civil liability or professional discipline. The physician and/or health care provider is also exempt from liability or professional discipline for decisions regarding the principal's decisional capacity.

Laws enacted in 2004 inserted language in the statute to clarify that a durable power of attorney showing a signature of the principal is presumed to be valid and a person may rely on the presumption of validity of a durable power of attorney unless the person has actual knowledge that it was not validly drawn up. It was also clarified all acts done by an agent pursuant to a durable power of attorney have the same effect as having been done by the principal and bind the principal and the principal's successors. In addition, it also clarified that unless the durable power of attorney is terminated, the fact it has not been used does not limit its being used (59-7).

Any person who refuses to accept the authority of the agent to exercise a power granted by a durable power of attorney is liable to the principal and to the principal's heirs, assigns and estate as if the person refused the principal. Liability includes damages and costs, including attorney fees. However, a person who refuses to accept the authority of the agent is not liable if:

1. The person had knowledge of the revocation of the durable power of attorney before the attempted exercise of the power.
2. The duration set out in the durable power of attorney had expired.
3. The person had actual knowledge of the principal's death.
4. The person reasonably believes the durable power of attorney is not valid.
5. The person reasonably believes that the durable power of attorney does not give the agent the authority to do what is requested.
6. The person reasonably believes that what is being requested by the agent is contrary to the wishes of the principal as expressed to the person.

### ***HEALTH CARE CONSENT (SDCL 34-12C):***

In the late 1980's the question of an individual's "right to die" was debated throughout the country in many forums including churches and the courts. Many states looked to their legislatures to clarify the boundaries of personal health care choices. In 1990, the South Dakota legislature recognized that persons may not always have the capacity at the time of need to make health care decisions.

The Health Care Consent Act was passed to address immediate health care needs when other prior arrangements have not been made giving this authority to another. This law allows a designated person to make health care decisions for another under certain circumstances. The law also addresses the problem of when there are persons who have the authority to make decisions but they are not available. The authority to make a health care decision is not "given" by the person affected like a power of attorney nor conferred

by a court like a guardianship, but is created by the operation of the statute. In 2007 the legislature expanded the list of persons who are allowed to make health care decisions to include a close friend.

A health care decision can be made under this statute only for an adult and only when the adult is incapable of giving informed consent to health care. A person is considered incapable of giving informed consent to health care if:

1. A guardian has been appointed with authorization to make health care decisions.
2. The person has been adjudged legally incompetent by the circuit court or the circuit court finds that the person is incapable of making and needs a health care decision.
3. It has been determined in good faith by the attending physician who has primary responsibility for the treatment and care of the patient acting either alone or in consultation with another physician. The determination is effective until a later determination by the physician or circuit court that the person is capable or the diagnosis is no longer valid (34-12C-2).

Absent a durable power of attorney for health care decisions or a guardian with authority to do so or if the attorney in fact or guardian are not available, a health care decision can be made by the following persons in the order stated:

1. The spouse, if not legally separated;
2. An adult child;
3. A parent;
4. An adult sibling;
5. A grandparent or an adult grandchild;
6. An adult aunt or uncle or an adult niece or nephew; and,
7. Close friend.

Any member of the family may delegate his authority to make a decision to another family member of the same or succeeding class.

A person may disqualify any member of his family from making health care decisions for him if it is in writing or is indicated by a notation in the medical record made at the person's direction.

Close friend is defined as any adult who has provided significant care and exhibited concern for the patient, and has maintained regular contact with the patient so as to be familiar with the patient's activities, health, and religious or moral beliefs.

Persons authorized to make a decision under the authority of this statute shall be guided by the express wishes of the incapacitated person, if known, and shall otherwise act in good faith in the person's best interests considering the attending physician's recommendations and may not arbitrarily refuse consent to treatment.

The statute allows anyone who has an interest in the matter to petition the circuit court to determine who has the authority to make health care decisions.

The statute specifically does not permit unlawful medical treatment, change the standards of care or the care and treatment at the Human Services Center and the Developmental Center.

## ***LIVING WILLS (SDCL 34-12D):***

In 1990, the legislature also addressed the question of “end of life” decisions by allowing for a “Living Will” (34-12D-2). A living will document directing the withholding or withdrawal of life-sustaining treatment can be created at any time by a person who:

1. Is a competent adult;
2. Puts the intent in writing;
3. Signs the document or directs it to be signed; and,
4. Has it witnessed by two adults.

The document that is created setting out the person’s wishes is called a living will declaration. While it does not have to follow any particular format it must contain sufficient information regarding the person’s preferences about receiving or not receiving life sustaining treatment, including artificial nutrition and hydration (food and water provided by means of a tube inserted into the stomach or intestine or needle into a vein). If the declaration does not contain specific information addressing a situation, decisions will be governed by state law. However, a living will does not affect the responsibility of any health care provider to provide treatment when necessary to alleviate pain or to provide for the person’s comfort, hygiene, or human dignity (34-12D-9).

The declaration becomes operative when the person with a living will is determined by the attending physician to be in a terminal condition, death is imminent, and the person is no longer able to communicate decisions about medical care.

If the person has more than one declaration or has given a durable power of attorney for health care decisions to another, the “later executed” document will control to the extent that they conflict with earlier executed documents.

A health care provider responsible for the care of the person must follow the declaration to provide for nutrition and hydration under any circumstances as long as it is technically feasible to do so. If the responsible health care provider does not wish to follow a declaration withholding life-sustaining treatment, the health care provider must make a reasonable effort to locate and transfer the person to the care of a health care provider willing to honor the declaration (34-12D-11,12).

The person who has made a living will declaration may revoke it at any time and in any manner without regard to the person’s mental or physical condition (34-12D-8). A revocation is effective upon communication to the health care provider who shall make the revocation part of the person’s medical record.

Health care providers are not required to deviate from reasonable medical standards. Also, they are not liable for their actions including professional disciplinary action for honoring a living will that has been revoked without actual knowledge of the fact, for determining that a terminal condition does or does not exist or for declining to give effect to provisions of a living will dealing with withdrawing or withholding life-sustaining treatment (34-12D-13, 19).

A living will cannot be used to assist in suicide (34-12D-23-29).

The following form is contained within the statute (34-12D-3) and may be considered for use:

LIVING WILL DECLARATION

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

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

TO MY FAMILY, HEALTH CARE PROVIDER, AND ALL THOSE CONCERNED WITH MY CARE:

I, \_\_\_\_ direct you to follow my wishes for care if I am in a terminal condition, my death is imminent, and I am unable to communicate my decisions about my medical care.

With respect to any life-sustaining treatment, I direct the following:

(Initial only one of the following options. If you do not agree with either of the following options, space is provided below for you to write your own instructions.)

\_ If my death is imminent or I am permanently unconscious, I choose not to prolong my life. If life sustaining treatment has been started, stop it, but keep me comfortable and control my pain.

\_ Even if my death is imminent or I am permanently unconscious, I choose to prolong my life.

\_ I choose neither of the above options, and here are my instructions should I become terminally ill and my death is imminent or I am permanently unconscious:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Artificial Nutrition and Hydration: food and water provided by means of a tube inserted into the stomach or intestine or needle into a vein.

With respect to artificial nutrition and hydration, I direct the following:

(Initial only one)

\_ If my death is imminent or I am permanently unconscious, I do not want artificial nutrition and hydration. If it has been started, stop it.

\_ Even if my death is imminent or I am permanently unconscious, I want artificial nutrition and hydration.

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, \_\_\_\_\_, 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: \_\_\_\_\_.

***ADVANCE DIRECTIVES (SDCL 27A-16):***

In 1997, the South Dakota Legislature passed a bill allowing a unique form of personal care authority and responsibility to be given to another. It is called a Mental Health Advance Directive and is used specifically and exclusively for mental health care issues. The legislation was a response to a multi-year effort of exploring ways and arrangements to allow persons to participate to the greatest extent possible in personal decision making choices. The Mental Health Advance Directive is a very clear message by the legislature that individuals with mental health issues when and as appropriate, can and should direct their own care.

The Mental Health Advance Directive uses two documents that are combined to convey the intent of the person who wishes to have assistance with mental health care decisions and to convey the authority to do so. The declaration is the document containing a detailed statement of intent concerning mental health treatment. A power of attorney for mental illness treatment designating an attorney-in-fact is the document that conveys the authority to accomplish the declaration's intent. The terms used in setting up and administering these documents and describing a Mental Health Advance Directive are similar to those used in the typical power of attorney arrangement: the principal is the person giving authority to another



to make decisions; the attorney-in-fact is the person given authority to make decisions; and, the declaration is the document setting out the preferences and instructions of the principal.

Any adult of sound mind may make a declaration of preferences or instructions for mental illness treatment (27A-16-2). There is a presumption that persons are of sufficiently sound mind to create a Mental Health Advance Directive unless they are demonstrably incapable of doing so. Incapable is described in statute as the condition of a person whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person lacks the capacity to make mental illness treatment decisions (27A-16-1(6)). The determination of when a person is incapable is to be made by a court or two physicians.

A person can use the Mental Health Advance Directive to make extensive and detailed treatment decisions including convulsive treatment, treatment of mental illness with psychotropic medication and admission to and retention in a health care facility for not more than thirty days for care or treatment of mental illness (27A-16-1 (7)). The declaration document must be signed by the person giving the authority (principal) in the presence of two witnesses. The two witnesses must be competent adults who personally know the principal and state that the principal appears to be of sound mind and not under duress, fraud or undue influence to make the declaration and agree to comply with the terms and statements in the document (27A-16-4).

The authority to implement the terms and decisions contained in a Mental Health Advance Directive on behalf of the person completing the document is conveyed to another adult using a power of attorney. A person may designate any competent adult to act as the attorney-in-fact to make decisions about mental illness treatment within the scope of the directive. An alternative attorney-in-fact may also be designated to serve if the attorney-in-fact is unable or unwilling to act (27A-16-3). In exercising authority, the attorney-in-fact shall act consistently with the desires of the principal as set out in the declaration or if not known act in good faith according to what the person believes is in the best interests of the principal.

The declaration and power of attorney are filed with the principal's treatment provider. The declaration itself does not waive notice and consent requirements to the person with a Mental Health Advance Directive or the attorney-in-fact that are the ordinary part of appropriate medical standards. If the provider of services is unwilling to comply with the declaration, the provider may withdraw from providing treatment consistent with the exercise of independent medical judgment (27A-16-11).

A Mental Health Advance Directive is effective for three years from the time it is signed and witnessed unless revoked sooner by the principal or attorney-in-fact withdraws. The attorney-in-fact who has accepted the appointment may make decisions only when the principle is incapable (27A-16-3). A directive and power of attorney for mental health treatment can be revoked in whole or in part at any time by communicating the revocation to the attending physician or provider (27A-16-13). An attorney-in-fact may withdraw from the obligations set out in a directive by giving written notice to the principal or if the principal is incapable, to the provider. If the attorney-in-fact has a change of mind the attorney-in-fact may rescind the withdrawal by signing a new acceptance form (27A-16-17).

The attorney-in-fact is not subject to criminal prosecution, civil liability, or professional disciplinary action for any action taken in good faith based on a declaration (27A-16-9,14). A provider who administers or does not administer in accordance to and in good faith reliance on the validity of the declaration and the consent of the attorney-in-fact is not subject to criminal prosecution, civil liability or disciplinary action.

Because of conflict of interest issues the statute sets out persons and entities that cannot participate as attorneys-in-fact in or witnesses for a Mental Health Advance Directive. Attending physicians or providers

or employees of providers if unrelated cannot be attorneys-in-fact and attending physicians or providers, owners or operators of patient's facility/residence and persons related to the principal by blood, marriage, or adoption cannot be witnesses (27A-16-15, 16).

A person may not be required to use or refrain from using a declaration in order to purchase insurance, as a condition for receiving mental or physical health services, or as a condition of discharge from a health care facility (27A-16-10).

A physician or provider may provide the principal different treatment than that proscribed in a declaration if the person is committed to the Human Services Center or the differing treatment is ordered by a court (27A-16-12).

Guidance on the content of an advance directive and cautionary information directed to the individual who is considering creating an advance directive are contained in the statute. The declaration and power of attorney for mental illness treatment must be in substantially the following form (SDCL 27A-16-18):

## DECLARATION AND POWER OF ATTORNEY FOR MENTAL HEALTH TREATMENT

I, \_\_\_\_\_, being an adult of sound mind, willfully and voluntarily make this declaration for mental illness treatment to be followed if it is determined by a court or by two physicians that my ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that I lack the capacity to consent to mental illness treatment. Mental illness treatment means convulsive treatment, treatment of mental illness with psychotropic medication, and admission to and retention in a health care facility for up to thirty days.

I understand that I may become incapable of giving informed consent for mental illness treatment due to the symptoms of a diagnosed mental disorder. These symptoms may include:

\_\_\_\_\_  
\_\_\_\_\_

### PSYCHOTROPIC MEDICATIONS

If I become incapable of giving informed consent for mental illness treatment, my wishes regarding psychotropic medications are as follows:

\_\_\_\_\_ I consent to the administration of psychotropic medications.

Comments:

\_\_\_\_\_  
\_\_\_\_\_

### CONVULSIVE TREATMENT

If I become incapable of giving informed consent for mental illness treatment, my wishes regarding convulsive treatment are as follows:

\_\_\_\_\_ I consent to the administration of convulsive treatment.

Comments:

\_\_\_\_\_  
\_\_\_\_\_

ADMISSION TO AND RETENTION IN FACILITY

If I become incapable of giving informed consent for mental illness treatment, my wishes regarding admission to and retention in a health care facility for mental illness treatment are as follows:

\_\_\_\_\_ I consent to being admitted to a health care facility for mental illness treatment.

This directive does not provide consent to retain me in a facility for more than thirty days.

Comments:

\_\_\_\_\_  
\_\_\_\_\_

ADDITIONAL REFERENCES OR INSTRUCTIONS

\_\_\_\_\_  
POWER OF ATTORNEY FOR MENTAL HEALTH TREATMENT

I hereby appoint the following person to act as my attorney-in-fact to make decisions regarding my mental illness treatment if I become incapable of giving informed consent for that treatment:

NAME \_\_\_\_\_  
ADDRESS \_\_\_\_\_  
TELEPHONE NUMBER \_\_\_\_\_

If the person named refuses or is unable to act on my behalf or if I revoke that person's authority to act as my attorney-in-fact, I authorize the following person to act as my attorney-in- fact:

NAME \_\_\_\_\_  
ADDRESS \_\_\_\_\_  
TELEPHONE NUMBER \_\_\_\_\_

My attorney-in-fact is authorized to make decisions that are consistent with the wishes I have expressed in my declaration for mental illness treatment or, if not expressed, as are otherwise known to my attorney-in-fact. If my wishes are not expressed and are not otherwise known by my attorney-in-fact, my attorney-in-fact is to act in what he or she believes to be my best interests.

\_\_\_\_\_  
(Signature of Principal/Date)

AFFIRMATION OF WITNESSES

We affirm that the principal is personally known to us, that the principal has read the accompanying Notice to Person Making a Declaration and Power of Attorney for Mental Illness Treatment or has had the notice read and explained, that the principal signed or acknowledged the principal's signature on this declaration and power of attorney for mental illness treatment in our presence, that the principal appears to be of sound mind and not under duress, fraud, or undue influence, that neither of us is:

A person appointed as an attorney-in-fact by this document;

The principal's attending physician or mental health service provider or a relative of the physician or provider;

The owner or operator or a relative of an owner or operator of a facility in which the principal is a patient or resident; or

A person related to the principal by blood, marriage, or adoption.

Witnessed by:

\_\_\_\_\_  
(Signature of Witness/Date) (Printed Name of Witness)

\_\_\_\_\_  
(Signature of Witness/Date) (Printed Name of Witness)

#### ACCEPTANCE OF APPOINTMENT AS ATTORNEY-IN-FACT

I accept this appointment and agree to serve as attorney-in-fact to make decisions about mental illness treatment for the principal. I understand that I have a duty to act in a manner that is consistent with the desires of the principal as expressed in this appointment. I understand that this document gives me authority to make decisions about mental illness treatment only while the principal is incapable, as determined by a court or two physicians. I understand that the principal may revoke this declaration in whole or in part at any time and in any manner if the principal is capable.

\_\_\_\_\_  
(Signature of Attorney-in-fact/Date) (Printed name)

\_\_\_\_\_  
(Signature of Alternative Attorney-in-fact/Date) (Printed name)

#### NOTICE TO PERSON MAKING A DECLARATION AND POWER OF ATTORNEY FOR MENTAL ILLNESS TREATMENT

This is an important legal document. It creates a declaration for mental illness treatment and names an attorney-in-fact and an alternative attorney-in-fact to make mental health treatment decisions for you if you become incapable. Before signing this document, you should know these important facts:

This document allows you to make decisions in advance about three types of mental illness treatment: psychotropic medication, convulsive therapy, and short-term (up to thirty days) admission to a treatment facility. It is very important that you declare your instructions carefully and review this document regularly. The instructions that you include in this declaration will be followed only if a court or two physicians believe that you are incapable of making treatment decisions. Otherwise, you will be considered capable to give consent for the treatments.

You may also appoint a person as your attorney-in-fact to make these treatment decisions for you if you become incapable. Preference shall be given to immediate family members in the following order: spouse, parent, adult child, and sibling. It is important that your attorney-in-fact be knowledgeable about mental illness issues and the decisions you have made. The person you appoint has a duty to act in a manner that is consistent with your desires as stated in this document. If your desires are not stated or otherwise made known to the attorney-in-fact, the attorney-in-fact has a duty to act in a manner consistent with what the person in good faith believes to be your best interest. For the appointment to be effective, the person you appoint must accept the appointment in writing. The person also has the right to withdraw from acting as your attorney-in-fact at any time.

This document will continue in effect for three years unless you become incapable of participating in mental illness treatment decisions. If this occurs, the directive will continue in effect until you are no longer incapable.

You have the right to revoke this document in whole or in part at any time you have not been determined to be incapable. **YOU MAY NOT REVOKE THIS DECLARATION AND POWER OF ATTORNEY WHEN YOU ARE CONSIDERED INCAPABLE BY A COURT OR TWO PHYSICIANS.** A revocation is effective when it is communicated to your attending physician or other mental health care provider.

If there is anything in this document that you do not understand, you should ask a lawyer to explain it to you. This declaration will not be valid unless it is signed by two qualified witnesses who are personally known to you and who are present when you sign or acknowledge your signature.

### ***GUARDIANSHIP AND CONSERVATORSHIP (SDCL 29A-5):***

Historically, persons with disabilities and those perceived to have disabilities are often viewed as less than human. At best, they have been perceived as needing varying amounts of assistance. Most often, they are considered as unable to make any decision. As a result, they have usually been denied the opportunity to make even the most basic choices about themselves and their lives. This restriction has been done by social and legal conventions that societies developed and nurtured over the centuries. In western cultures, the circumstances and fairness of taking away a person's ability to make meaningful decisions and the process used to invade that right and direct another's life is the focus and purpose of the guardianship process.

Guardianship is found in state law. There are no federal statutes creating or directing the conduct of a guardianship. In South Dakota, the guardianship laws are found in Title 29A of the South Dakota Codified Laws (SDCL).

#### **Historical Sources:**

Taking care of persons who cannot care for themselves has ancient origins. Every major religious tradition has referenced a duty to look out for persons with disabilities. Some attach penalties for not doing so. Early cultures expected the extended family to take care of their own. The formality of such arrangements and contingencies when the family was not available varied widely. Many of the ancient practices have come down to us today as part of our legal system.

Taking control of another because the person did not act the same as other people was recognized as early as 449 BC in Rome. Families could do this without a formal court proceeding. Later, Roman courts assumed the responsibility to designate a person named in a will of another who had control over the affairs of a person to continue with the control. Accountability of the designated person was to the heirs and others, not the court.

In medieval England, where our legal tradition has its roots, the duty to take care of the person and property of one who could not do so began in the intricacies of the feudal system. The local lord of the manor and later the king had the duty to protect the property and person. Distinctions were made between a person who was mentally retarded and mentally ill. This affected how the person's property was dealt with during life and at the person's death. A distinction between caring for the person and managing the property and possessions of the person developed. By the seventeenth century, the king's authority to manage the affairs of persons had been transferred to an officer of the court called a chancellor. A hearing system developed to review the need for

protection and to delegate the responsibility of care to others. Often a family member or friend would receive payment for the service of caring for another person.

In colonial America, care for persons determined incompetent was the responsibility of the family.

If no family was available, persons fell under the indigent laws and were left on their own to survive. After the Revolutionary War much attention was given to establish rules and procedures to handle the person's property. Little attention was given to the care, comfort and wellbeing of the individual. South Dakota followed this trend from the inception of its guardianship statutes in the early territorial law codes. The law set out processes to handle the property of the individual but paid little attention to the individual.

#### 1993 Guardianship revisions:

Over the years the South Dakota guardianship statutes underwent many changes as new issues were addressed through legislation. The changes and additions were not always uniform and often led to confusion and apparent inconsistencies. Some of the terminology used to describe the person who needed protection became very archaic and appeared insensitive. In the late 1980's the South Dakota Legislature conducted a summer study and decided a complete revision of the statutes was in order. The State Bar of South Dakota sponsored a writing committee that drafted the revisions and prepared a bill. The bill passed the legislature in 1993 and took effect in July of that year. The law is located at South Dakota Codified Laws at 29A-5.

The 1993 guardianship revisions introduced a number of new concepts and significant changes. These included:

1. A clear distinction between care of the person and management of property.
2. Elimination of pejorative terminology.
3. Encouragement of alternatives to guardianship and conservatorship.
4. Authorization of limited guardians and conservators.
5. Authorization of temporary guardians and conservators.
6. Encouragement of participation of protected person in decision making.
7. Requirement for a more complete information upon which decisions are made.
8. Protection of rights of person alleged to need protection.
9. Requirement for annual personal status reports.

#### South Dakota Guardianship Statutes:

A list of clarifying definitions is set out at SDCL 29A-5-102.

Minor- any individual under eighteen years of age.

Person alleged to need protection- any individual for whom the appointment of a guardian or conservator is being sought other than for reasons of minority.

Protected Person- any individual for whom a guardian or conservator has been appointed other than for reasons of minority.

Guardian- one appointed by the court to be responsible for the personal affairs of a minor or protected person, but does not include one who is only a guardian ad litem.

Conservator- one appointed by the court to be responsible for managing the estate and financial affairs of a minor or protected person.

Interested person- individual who is the subject of a guardianship or conservatorship proceeding, and any entity, public agency, or other individual with an interest in the proceeding either generally or as to a particular matter.

Limited Guardian- one appointed by the court who has only those responsibilities for the personal affairs of a minor or protected person as are specified in the order of appointment.

Limited Conservator- one appointed by the court who has only those responsibilities for managing the estate and financial affairs of a minor or protected person as are specified in the order of appointment.

Court Representative- any individual appointed by the court to make investigations and recommendations as required by statute or as ordered by the court.

Although not contained in the definition sections, the statutes at SDCL 29A-5-210 and 315 allow for a "temporary guardian" and "temporary conservator".

Appointment is for six months (minor) or ninety days with one ninety day extension (adult) or less and must be based upon showing the court:

1. The need exists (and in the case of a minor it would be in the minor's best interest).
2. Adherence to the regular procedures would cause significant harm.
3. No other entity or individual appears to have the authority to act or is unwilling to act or has ineffectively exercised authority on behalf of the person in need of protection.

Also not defined are "joint" and "successor" guardians and conservators. These are additional guardians or conservators that may be appointed.

Joint guardians/conservators are additional persons appointed at the time the court orders the guardianship/conservatorship.

A joint guardian or conservator equally shares in the responsibility, management and all other tasks related to the guardianship/conservatorship unless otherwise specifically stated.

A majority of joint guardians must concur in the decisions unless power is conferred to another or authorized by the court. (SDCL 29A-5-416)

Successor guardians/conservators may be appointed prior to or at the time there is a vacancy.

If appointed prior to a vacancy, the successor can immediately assume the office upon the termination of the predecessor's appointment and has the same powers and duties.

The successor guardian/conservator must file the acceptance of office and required bond within sixty days of assuming office. (SDCL 29A-5-502)

#### Guardianship/Conservatorship Types:

Often guardianship and conservatorship are described as or referred to as a "type" or a "kind" of guardianship or conservatorship such as:

Minor: Person under the age of 18. (SDCL 29A-5-200)

Adult: Person over the age of 18. (SDCL 29A-5-300)

Limited:	Responsibilities limited to those specified by the court. (SDCL 29A-5-314)
Temporary:	Responsibilities limited to a specific period of time not to exceed six months for a minor (SDCL 29A-5-210) and 180 days for an adult (SDCL 29A-5-315).
Joint:	Appointed with another to be guardian or conservator. (SDCL 29A-5-502)
Successor:	Assumes powers, duties of office upon termination of predecessor. (SDCL 29A-5-502)
Co-guardian, co-conservator:	Same as a joint guardian or joint conservator. (29A-5-504)

The "types" or "kinds" of guardians are not mutually exclusive. For example, an adult who is found to be a person in need of protection for the purposes of making immediate medical decisions may have a limited temporary guardianship jointly held by more than one person to provide assistance during an operation and convalescence. Or a minor may need the very temporary assistance of a conservator to help with the handling of an insurance settlement on the minor's sole behalf.

#### Who May Become a Guardian or Conservator?:

Any of the following classes of person or entities may petition for guardianship or conservatorship provided they are capable of providing an active and suitable program and are not providing substantial direct care services or financial assistance to the minor or protected person other than the services connected with the office being held.

1. An adult individual;
2. A public agency or nonprofit corporation;
3. The Department of Human Services and the Department of Social Services, only if there is no individual, nonprofit corporation, or public agency to become guardian or a bank or trust company to become conservator.
4. A bank or trust company authorized to exercise trust powers or to engage in trust business in the state may become a conservator. No other individual or entity whose interest is that of creditor may be appointed guardian or conservator. (SDCL 29A-5-110)

#### Procedures for Becoming a Guardian or Conservator (Adult, SDCL 29A-5-300):

The appointment of a guardian or conservator for an adult involves the following steps:

1. Filing of a petition including an evaluation report with the court in the proper county.
2. Setting a hearing date no later than 60 days from the date of filing the petition.
3. Giving notice of the hearing to the person alleged to need protection and others as required.
4. Filing a statement of the financial resources of the person alleged to need protection.
5. Determination by the court whether an attorney or court representative will be appointed.
6. Holding the hearing where the following determinations will be made:
  - a. Whether the person meets the criteria to have a guardian or conservator appointed.
  - b. Whether a guardian or conservator will be appointed and what type.
  - c. Whether the proposed guardian or conservator is eligible for appointment.



- d. Whether a bond will be required.
7. Entry of order of appointment by the court and filing of acceptance by guardian/conservator.
8. Issuance of letters of office to the guardian or conservator with specifics if limited.
9. Mailing of appointment with statement of termination rights to the protected person and to those given notices of the hearing based on the petition.
10. If applicable, filing of non-resident guardian or conservator naming resident agent.

**Contents of Petition/Evaluation:**

The petition to the court seeking guardianship lays the groundwork for everything that follows. It must contain sufficient information for the court to make initial determinations, such as to appoint an attorney or court representative and later findings and orders. The following information must be included in the petition.

1. Information relating to the petitioner, person for whom the guardianship or conservatorship is sought and nearest relatives.
2. Identity of any agents designated under a power of attorney and a copy of any document.
3. Statement whether the incapacity of the person will prevent attendance at the hearing and the reasons why.
4. Statement as to the type of guardianship or conservatorship requested, i.e., limited.
5. Information regarding any individual or entity nominated by the person to act as guardian or conservator for the court's consideration to give a preference to act if qualified.
6. Information regarding any acting guardian or conservator wherever located.
7. Information on the specific areas of protection if a limited guardianship or conservatorship is being sought.
- 8.

An evaluation report on the condition of the person alleged in need of protection must be filed with the petition or as directed by the court unless the petition was brought on the basis the person is an absentee. The purpose of the evaluation is to have sufficient information submitted to the court to determine whether the person needs a guardianship or conservatorship. The evaluation also provides to the court an idea of whether the provision of additional services would avoid the necessity of an appointment. It also assists in helping the guardian or conservator to begin planning for the needs of the person by reviewing aspects of the person's life including medications. In addition, it helps the court determine whether the person will be able to attend the hearing. The following information must be provided in the evaluation report.

1. Nature, type and extent of the person's incapacity and cognitive and functional limitations.
2. Evaluations of the person's mental and physical condition, adaptive behavior and social skills.
3. Descriptions of services person is receiving for health care, safety, habilitation and therapeutic needs or services person is receiving for the management of the person's estate and financial affairs depending on whether a guardianship or conservatorship is sought.
4. Opinion on whether the appointment of a guardian or conservatorship is needed and the reasons for the type and scope.

5. Opinion on why attendance at the hearing would be detrimental to the person if the petition states the person will not be able to attend the hearing due to the person's incapacity.
6. Statement whether the person is on medications that may affect the person's attendance at the hearing.
7. Information relating to who did the evaluation, when it was done and, if done longer than three months prior to the date of filing the petition, a statement that there has been no material change in the condition of the person.

#### Responsibilities of Guardian/Conservator:

The statutes require the guardian to be active and knowledgeable.

1. The guardian is to maintain sufficient contact with the protected person to know of the person's capabilities, limitations, needs and opportunities.
2. The guardian is to make decisions regarding the protected person's support, care, health, habilitation, therapeutic treatment, and if not inconsistent with another order, determine residence.
3. The protected person is anticipated and expected to participate in decision making to the extent possible.
  - a. The guardian is to be guided in his activities only by the limitations of the protected person.
  - b. If feasible the guardian is to encourage the protected person to participate, act on own behalf and develop or regain capacity to manage personal affairs.
  - c. The guardian is to consider the express desires of the protected person.
  - d. The guardian is to always act in the person's best interests.

The conservator has the same responsibilities as the guardian with respect to involving the protected person in decision making to the greatest extent possible and take into consideration the expressed desires and personal values and act in the person's best interests. In addition the conservator is to handle the fiduciary aspects of the person.

1. The conservator is to apply the income and principal of the estate as needed for the protected person's support, care, health, and if applicable, habilitation or therapeutic needs.
2. The conservator is also empowered to provide support to any legal dependant of the person who are unable to support themselves and are in need of support.

#### Guardian/Conservator Reports:

The statutes require the guardian and conservator to prepare and file with the court regular, specific and detailed reports on activities undertaken on behalf of the protected person.

The guardian reports may be brief and are to contain the following information.

1. The current mental, physical and social condition of the protected person.
2. The living arrangements during the reporting period.
3. The medical, educational, vocational and other professional services provided to the protected person and the guardian's opinion as to the adequacy of the protected person's care.
4. A summary of the guardian's visits with and activities on behalf of the protected person.
5. If the person is in an institution, whether the guardian agrees with the current treatment or habilitation plan.

6. A recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship.
7. Any other information requested by the court or useful in the opinion of the guardian.
8. Compensation requested and reasonable and necessary expenses incurred by the guardian.

The conservator's annual reports are called accountings and are to contain the following information.

1. Listing of receipts, disbursements and distributions from the estate under the conservator's control during the period covered by the accounting.
2. Inventory of the estate.
3. The services being provided to the protected person.
4. Significant actions taken by the conservator during the reporting period.
5. A recommendation as to the need to continue the conservatorship and any recommended changes in the scope of the conservatorship.
6. Any other information requested by the court or useful in the opinion of the conservator.
7. Compensation requested and reasonable and necessary expenses incurred by the conservator.

#### Rights of the Minor and Protected Person:

The guardian and conservator statutes compliment the lengthy rights provisions contained in the bill of rights section of the Protection and Advocacy for Individuals with Mental Illness Act (42 USC 10801), as amended and the statement on the Rights of the Developmentally Disabled contained in the Developmental Disabilities Assistance and Bill of Rights Act (42 USC 6000) as amended.

In addition to the rights of the minor and protected person set out in the sections dealing with the responsibilities of the guardian and conservator, the statutes also further specify certain rights at SDCL 29A-5-118.

1. The appointment of a guardian or conservator of a protected person does not constitute a general finding of legal incompetence unless the court so orders.
2. The protected person retains all rights that have not been granted to the guardian or conservator.
3. Without prior authorization by the court, the guardian or conservator may not.
  - a. Change the residence of the minor or protected person to another state.
  - b. Terminate or consent to a termination of the minor's or protected person's parental rights.
  - c. Initiate a change in the minor's or protected person's marital status.
  - d. Revoke or amend a durable power of attorney of which the protected person is a principal.

#### Liability of Guardian or Conservator:

A guardian is not liable for the acts of the minor or protected person unless the guardian is personally negligent. The guardian is not required to expend personal resources on the minor's or protected person's behalf solely because of the guardianship.

A conservator is not personally liable in conducting the affairs of the office as long as transactions conform to requirements set out at SDCL 29A-5-415 and the conservator has not been personally negligent.

### Modification, Termination, Resignation and Renewal of Guardian or Conservator:

The guardian's or conservator's authority may cease as the result of changed circumstance such as death or reaching the age of majority or by court action through modification, termination, resignation and renewal. (SDCL 29A-5-501 et.seq.)

A guardianship and conservatorship of a minor terminates upon the minor's death, reaching 18 years of age or if jurisdiction is transferred to another state. In addition the guardianship of a minor automatically terminates upon the minor's adoption or marriage. Also, a court, following a hearing may order a termination if it finds the need for a guardian or conservator no longer exists.

The guardianship of a protected person may be modified upon a petition to a court by the protected person, guardian, an interested person or on the court's own motion.

1. The court can modify the type of appointment and the areas of protection, management, or assistance previously granted to the limited guardian.
2. Modification, which can include termination, may be ordered if:
  - a. The protected person is no longer in need of the assistance or protection of a guardian or conservator.
  - b. The extent of protection, management or assistance previously granted is either excessive or insufficient considering the current need.
  - c. The protected person's understanding or capacity to manage the estate and financial affairs or to provide for health, care, safety has so changed as to warrant such action.
  - d. No suitable guardian or conservator can be secured who is willing to exercise the assigned duties.
3. The court has the discretion to appoint an attorney for the protected person, a court representative and an individual to conduct evaluations as appropriate.
4. The protected person has the same rights at a modification hearing as at a hearing on a petition for appointment of guardian.

The guardianship of a protected person shall terminate:

1. Upon the death of the protected person.
2. If jurisdiction is transferred to another state.
3. If ordered by the court following a hearing.

A guardian may petition the court for permission to resign. Absent good cause the court may not grant permission without a willing successor guardian.

Any interested person may petition to, or the court on its own motion may remove a guardian or conservator if the guardian or conservator;

1. Avoids a service of process or notice.
2. Is acting under letters of guardianship secured by material misrepresentation or mistake, whether fraudulent or innocent.
3. Has an incapacity or illness, including substance abuse, which affects fitness for office, or is adjudged to be a protected person in this or any other jurisdiction.
4. Is convicted of a crime, which reflects fitness for office.

5. Wastes or mismanages the estate, unreasonably withholds distributions or makes distributions in a negligent or profligate manner, or otherwise abuses powers or fails to discharge duties.
6. Neglects the care and custody of the minor, the protected person or legal dependents.
7. Has an interest adverse to the faithful performance of duties such that there is a substantial risk that the guardian or conservator will fail to properly perform those duties.
8. Fails to file reports or accountings when required, or fails to comply with any court order.
9. Acts in a manner that threatens the personal or financial security of a co-guardian or co-conservator or endangers the surety on or fails to file a required bond.
10. Becomes incapable of or unsuitable for the duties or is not acting in the best interests of the minor or protected person or the estate even though without fault.

**Note:** The following publications were used to prepare the guardianship/conservatorship section:

*Handbook for South Dakota Guardians and Conservators*, by David M. English and Kimberly Wolff, South Dakota Guardianship Program, May 1996.

*The South Dakota Guardianship and Conservatorship Act*, South Dakota State Bar, Committee on Continuing Legal Education, June, 1993.)

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