

# State of South Dakota

SEVENTY-SECOND SESSION  
LEGISLATIVE ASSEMBLY, 1997

549A0761

## SENATE BILL NO. 241

Introduced by: Senators Flowers, Reedy, and Rounds and Representatives Fischer-Clemens,  
Haley, Lucas, and Schrempp

1 FOR AN ACT ENTITLED, An Act to provide for a declaration of preferences and power of  
2 attorney for mental health treatment decisions.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. Terms used in this Act mean:

- 5 (1) "Attending physician," the physician who has the primary responsibility for the mental  
6 health treatment of a person;
- 7 (2) "Attorney-in-fact," any person designated by a principal through a power of attorney  
8 to make decisions about mental health treatment for the principal in accordance with  
9 a declaration for mental health treatment;
- 10 (3) "Declaration for mental health treatment," or "declaration," any document declaring  
11 preferences or instructions regarding mental health treatment;
- 12 (4) "Power of attorney for mental health treatment," any document that authorizes an  
13 attorney-in-fact to make a decision about mental health treatment or to consent to  
14 mental health treatment on behalf of its principal;
- 15 (5) "Health care facility," a health care facility as defined in § 34-12-1.1 and the Human

1 Services Center;

2 (6) "Incapable," the condition of a person whose ability to receive and evaluate  
3 information effectively or to communicate decisions is impaired to such an extent that,  
4 in the opinion of the court or in the opinion of two physicians, the person currently  
5 lacks the capacity to make mental health treatment decisions;

6 (7) "Mental health treatment," convulsive treatment, treatment of mental illness with  
7 psychotropic medication, and admission to and retention in a health care facility for  
8 not more than thirty days for care or treatment of mental illness;

9 (8) "Principal," any person who gives authority to an attorney-in-fact to make decisions  
10 about mental health treatment for the person.

11 Section 2. Any adult of sound mind may make a declaration of preferences or instructions  
12 for mental health treatment. The preferences or instructions may include consent to or refusal  
13 of mental health treatment. A declaration for mental health treatment continues in effect for  
14 three years or until revoked, whichever is first. If a declaration for mental health treatment has  
15 been invoked and is in effect on the date that the declaration is to expire, the declaration remains  
16 effective until the principal is no longer incapable.

17 Section 3. By means of a power of attorney for mental health treatment, any adult of sound  
18 mind may designate a competent adult to act as attorney-in-fact to make decisions about mental  
19 health treatment. An alternative attorney-in-fact may also be designated to act as attorney-in-fact  
20 if the original designee is unable or unwilling to act at any time. The authority of an attorney-in-  
21 fact and any alternative attorney-in-fact continues under the power of attorney for mental health  
22 treatment for three years, until it is revoked by the principal, or until the attorney-in-fact  
23 withdraws, whichever is first. If an attorney-in-fact is acting for the principal on the date the  
24 power of attorney is to expire, the power of attorney remains in effect until the principal is no  
25 longer incapable.

1 An attorney-in-fact who has accepted the appointment in writing may make decisions about  
2 mental health treatment on behalf of the principal only when the principal is incapable. The  
3 decisions must be consistent with any desires the principal has expressed in the declaration for  
4 mental health treatment.

5 Section 4. A declaration and power of attorney for mental health treatment is effective only  
6 if it is signed by the principal and two competent adult witnesses. The witnesses shall attest that  
7 the principal is known to them, that the principal signed the declaration and power of attorney  
8 for mental health treatment in their presence, and that the principal appears to be of sound mind  
9 and not under duress, fraud, or undue influence. No person specified in section 16 of this Act  
10 may act as witnesses.

11 Section 5. A declaration and a power of attorney for mental health treatment shall be filed  
12 with the principal's attending physician or other mental health treatment provider, and they  
13 remain valid until they expire or are revoked. The physician or provider shall continue to obtain  
14 the principal's informed consent to all mental health treatment decisions if the principal is capable  
15 of providing informed consent or refusal. The physician or provider shall act in accordance with  
16 the declaration and with the informed consent of the attorney-in-fact if the principal is found to  
17 be incapable.

18 Section 6. The attorney-in-fact may not make mental health treatment decisions unless the  
19 principal is incapable. The attorney-in-fact is not, as a result of acting in that capacity, personally  
20 liable for the cost of treatment provided to the principal.

21 Section 7. Except to the extent that the right is limited by the declaration or any federal law,  
22 an attorney-in-fact has the same right as the principal to receive information regarding the  
23 proposed mental health treatment and to receive, review, and consent to disclosure of medical  
24 records relating to that treatment. The right of access does not waive any evidentiary privilege.

25 Section 8. In exercising authority under the declaration, the attorney-in-fact shall act

1 consistently with the desires of the principal as expressed in the declaration. If the principal's  
2 desires are not expressed in the declaration and are not otherwise known by the attorney-in-fact,  
3 the attorney-in-fact shall act in what the attorney-in-fact in good faith believes to be the best  
4 interests of the principal.

5 Section 9. An attorney-in-fact is not subject to criminal prosecution, civil liability, or  
6 professional disciplinary action for any action taken in good faith pursuant to a declaration for  
7 mental health treatment.

8 Section 10. A person may not be required to execute or to refrain from executing a  
9 declaration as a criterion for insurance, as a condition for receiving mental or physical health  
10 services, or as a condition of discharge from a health care facility.

11 Section 11. Upon being presented with a declaration and a power of attorney for mental  
12 health treatment, an attending physician or other provider shall make the declaration and power  
13 of attorney a part of the principal's medical record. When acting under authority of a declaration  
14 and power of attorney, a physician or provider shall comply with them to the fullest extent  
15 possible, consistent with reasonable medical practice, the availability of treatments requested, and  
16 applicable law.

17 If the physician or other provider is unwilling at any time to comply with the declaration and  
18 power of attorney, the physician or provider may withdraw from providing treatment consistent  
19 with the exercise of independent medical judgment. A physician or provider who withdraws shall  
20 promptly notify the principal and the attorney-in-fact and shall document the notification in the  
21 principal's medical record.

22 Section 12. The attending physician or provider may subject the principal to mental health  
23 treatment in a manner contrary to the principal's wishes as expressed in a declaration for mental  
24 health treatment only if the principal is committed to the Human Services Center pursuant to §  
25 23A-46-10 and treatment is authorized by the circuit court or in cases of emergency endangering

1 life or health. A declaration does not limit any authority either to take a person into custody or  
2 to admit, retain, or treat a person in a health care facility.

3 Section 13. A principal who is capable may revoke a declaration and power of attorney for  
4 mental health treatment in whole or in part at any time. A revocation is effective when a capable  
5 principal communicates the revocation to the attending physician or other provider. The  
6 attending physician or other provider shall note the revocation in the principal's medical record.

7 Section 14. An attending physician or other provider who administers or does not administer  
8 mental health treatment according to and in good faith reliance on the validity of a declaration  
9 and with the informed consent of the attorney-in-fact is not subject to criminal prosecution, civil  
10 liability, or professional disciplinary action resulting from a subsequent finding of a declaration's  
11 invalidity.

12 Section 15. None of the following may serve as attorney-in-fact:

- 13 (1) The attending physician or other mental health treatment provider or an employee of  
14 the physician or provider if the physician, provider, or employee is unrelated to the  
15 principal by blood, marriage, or adoption; or  
16 (2) An owner, operator, or employee of a health care facility in which the principal is a  
17 patient or resident if the owner, operator, or employee is unrelated to the principal by  
18 blood, marriage, or adoption.

19 Section 16. None of the following may serve as a witness to the signing of a declaration and  
20 power of attorney for mental health treatment:

- 21 (1) The attending physician or mental health treatment provider or a relative of the  
22 physician or provider;  
23 (2) An owner or operator or a relative of an owner or operator of a health care facility  
24 in which the principal is a patient or resident; or  
25 (3) A person related to the principal by blood, marriage, or adoption.

1 Section 17. An attorney-in-fact may withdraw by giving notice to the principal. If the  
 2 principal is incapable, the attorney-in-fact may withdraw by giving notice to the attending  
 3 physician or mental health treatment provider. The attending physician or provider shall note the  
 4 withdrawal in the principal's medical record.

5 A person who has withdrawn under the provisions of this section may rescind the withdrawal  
 6 by executing an acceptance after the date of the withdrawal. The acceptance shall be in the same  
 7 form as provided by section 18 of this Act for accepting an appointment as attorney-in-fact. A  
 8 person who rescinds a withdrawal shall give notice to the principal if the principal is capable or  
 9 to the principal's attending physician or mental health treatment provider if the principal is  
 10 incapable.

11 Section 18. A declaration and power of attorney for mental health treatment shall be in  
 12 substantially the following form:

13 DECLARATION AND POWER OF ATTORNEY  
 14 FOR MENTAL HEALTH TREATMENT

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

22 I understand that I may become incapable of giving or withholding informed consent for  
 23 mental health treatment due to the symptoms of a diagnosed mental disorder. These symptoms  
 24 may include:

25 \_\_\_\_\_

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2

PSYCHOTROPIC MEDICATIONS

3

If I become incapable of giving or withholding informed consent for mental health treatment,

4

my wishes regarding psychotropic medications are as follows:

5

\_\_\_\_\_ I consent to the administration of the following medications:

6

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7

\_\_\_\_\_ I do not consent to the administration of the following medications:

8

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Conditions or limitations:

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11

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12

CONVULSIVE TREATMENT

13

If I become incapable of giving or withholding informed consent for mental health treatment,

14

my wishes regarding convulsive treatment are as follows:

15

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

16

\_\_\_\_\_ I do not consent to the administration of convulsive treatment.

17

Conditions or limitations:

18

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19

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20

ADMISSION TO AND RETENTION IN FACILITY

21

If I become incapable of giving or withholding informed consent for mental health treatment,

22

my wishes regarding admission to and retention in a health care facility for mental health

23

treatment are as follows:

24

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

25

\_\_\_\_\_ I do not consent to being admitted to a health care facility for mental health

1 treatment.

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

3 Conditions or limitations:

4 \_\_\_\_\_  
5 \_\_\_\_\_

6 ADDITIONAL REFERENCES OR INSTRUCTIONS

7 \_\_\_\_\_  
8 \_\_\_\_\_  
9 \_\_\_\_\_

10 POWER OF ATTORNEY FOR MENTAL HEALTH TREATMENT

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

14 NAME \_\_\_\_\_

15 ADDRESS \_\_\_\_\_

16 TELEPHONE NUMBER \_\_\_\_\_

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

20 NAME \_\_\_\_\_

21 ADDRESS \_\_\_\_\_

22 TELEPHONE NUMBER \_\_\_\_\_

23 My attorney-in-fact is authorized to make decisions that are consistent with the wishes I have  
24 expressed in my declaration for mental health treatment or, if not expressed, as are otherwise  
25 known to my attorney-in-fact. If my wishes are not expressed and are not otherwise known by

1 my attorney-in-fact, my attorney-in-fact is to act in what he or she believes to be my best  
2 interests.

3 \_\_\_\_\_

4 (Signature of Principal/Date)

5 AFFIRMATION OF WITNESSES

6 We affirm that the principal is personally known to us, that the principal signed or  
7 acknowledged the principal's signature on this declaration and power of attorney for mental  
8 health treatment in our presence, that the principal appears to be of sound mind and not under  
9 duress, fraud, or undue influence, that neither of us is:

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

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

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

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

16 Witnessed by:

17 \_\_\_\_\_

18 (Signature of Witness/Date)

(Printed Name of Witness)

19 \_\_\_\_\_

20 (Signature of Witness/Date)

(Printed Name of Witness)

21 ACCEPTANCE OF APPOINTMENT AS ATTORNEY-IN-FACT

22 I accept this appointment and agree to serve as attorney-in-fact to make decisions about  
23 mental health treatment for the principal. I understand that I have a duty to act in a manner that  
24 is consistent with the desires of the principal as expressed in this appointment. I understand that  
25 this document gives me authority to make decisions about mental health treatment only while the

1 principal is incapable, as determined by a court or two physicians. I understand that the principal  
 2 may revoke this declaration in whole or in part at any time and in any manner if the principal is  
 3 capable.

4 \_\_\_\_\_

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

6 \_\_\_\_\_

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

8 NOTICE TO PERSON MAKING A DECLARATION AND  
 9 POWER OF ATTORNEY FOR MENTAL HEALTH TREATMENT

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

14 This document allows you to make decisions in advance about three types of mental health  
 15 treatment: psychotropic medication, convulsive therapy, and short-term (up to thirty days)  
 16 admission to a treatment facility. The instructions that you include in this declaration will be  
 17 followed only if a court or two physicians believe that you are incapable of making treatment  
 18 decisions. Otherwise, you will be considered capable to give or withhold consent for the  
 19 treatments.

20 You may also appoint a person as your attorney-in-fact to make these treatment decisions  
 21 for you if you become incapable. The person you appoint has a duty to act in a manner that is  
 22 consistent with your desires as stated in this document. If your desires are not stated or  
 23 otherwise made known to the attorney-in-fact, the attorney-in-fact has a duty to act in a manner  
 24 consistent with what the person in good faith believes to be your best interest. For the  
 25 appointment to be effective, the person you appoint must accept the appointment in writing. The

1 person also has the right to withdraw from acting as your attorney-in-fact at any time.

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

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

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