

State of South Dakota

SEVENTY-NINTH SESSION
LEGISLATIVE ASSEMBLY, 2004

580J0452

SENATE BILL NO. 187

Introduced by: Senators Duenwald, Albers, Apa, Dennert, Diedrich (Larry), Greenfield, Jaspers, Kloucek, Koetzle, Koskan, Moore, Napoli, Olson (Ed), Reedy, Schoenbeck, Sutton (Dan), and Sutton (Duane) and Representatives Kraus, Bartling, Begalka, Davis, Deadrick (Thomas), Frost, Fryslie, Gassman, Hanson, Hennies, Juhnke, Lintz, Madsen, Miles, Novstrup, Olson (Ryan), Pederson (Gordon), Peterson (Jim), Rave, Rhoden, Rounds, Sebert, Teupel, Van Gerpen, Weems, Wick, and Williamson

1 FOR AN ACT ENTITLED, An Act to revise certain provisions regarding living wills.

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

3 Section 1. That § 34-12D-1 be amended to read as follows:

4 34-12D-1. Terms used in this chapter mean:

5 (1) "Attending physician," the physician who has primary responsibility for the overall
6 medical treatment and care of the patient;

7 (2) "Declaration," a writing executed in accordance with the requirements of § 34-12D-2;

8 (3) "Informed consent," consent voluntarily, knowingly, and competently given without
9 any element of force, fraud, deceit, duress, threat, or other form of coercion after
10 conscientious explanation of all information that a reasonable person would consider
11 significant to the decision in a manner reasonably comprehensible to general lay
12 understanding;

13 (4) "Health-care provider," any person who is licensed, certified, or otherwise authorized



1 by the law of this state to administer health care in the ordinary course of business or
2 practice of a profession, including any person employed by or acting for any such
3 authorized person;

4 ~~(4)~~(5) "Life-sustaining treatment," any medical procedure or intervention that, when
5 administered to a qualified patient, will serve only to postpone the moment of death
6 or to maintain the patient in a condition of permanent unconsciousness. The term
7 does not include the provision of appropriate care to maintain comfort, hygiene, and
8 human dignity, the ~~oral administration of food and water~~ provision of nutrition and
9 hydration, or the administration of any medication or other medical procedure
10 deemed necessary to alleviate pain;

11 ~~(6)~~ "Nutrition," sustenance administered by way of the gastrointestinal tract;

12 ~~(5)~~(7) "Person," ~~an~~ any individual, corporation, business trust, estate, trust, limited liability
13 company, partnership, association, joint venture, government, governmental
14 subdivision; or agency, court, public or private agency, or any other legal or
15 commercial entity;

16 ~~(6)~~(8) "Physician," an individual licensed to practice medicine in this state;

17 ~~(7)~~(9) "Qualified patient," an adult individual who has executed a declaration and who has
18 been determined ~~by~~ in the reasonable medical judgment of the attending physician
19 and one other physician to be in a terminal condition;

20 ~~(10)~~ "Reasonable medical judgment," a medical judgment, in accordance with accepted
21 medical standards, that would be made by a reasonably prudent physician,
22 knowledgeable about the case and the treatment possibilities with respect to the
23 medical conditions involved;

24 ~~(8)~~(11) "Terminal condition," an incurable and irreversible condition that, in

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

8 Section 2. That chapter 34-12D be amended by adding thereto a NEW SECTION to read
9 as follows:

10 For the purposes of this Act, a person legally incapable of making health care decisions is
11 any person who:

- 12 (1) Has been declared legally incompetent to make decisions affecting medical treatment
13 or care;
- 14 (2) In the reasonable medical judgment of the attending physician, is unable to make
15 decisions affecting medical treatment or other health care services; or
- 16 (3) Is a minor.

17 Section 3. That chapter 34-12D be amended by adding thereto a NEW SECTION to read
18 as follows:

19 It is presumed that every person legally incapable of making health care decisions has
20 directed health care providers to provide nutrition and hydration to a degree that is sufficient to
21 sustain life unless:

- 22 (1) The person executed a directive in accordance with subdivision 34-12C-1(2) or § 34-
23 12D-2;
- 24 (2) There is clear and convincing evidence that the person, when legally capable of

1 making health care decisions, gave express and informed consent to withhold or
2 withdraw nutrition and hydration in the applicable circumstances;

3 (3) To the extent that, in reasonable medical judgment provision of nutrition and
4 hydration is not medically possible; provision of nutrition and hydration would
5 hasten death; or due to the medical condition of the person legally incapable of
6 making health care decisions, provision of nutrition and hydration would not
7 contribute to sustaining life because the person would be incapable of digesting or
8 absorbing the nutrition and hydration.

9 Section 4. That chapter 34-12D be amended by adding thereto a NEW SECTION to read
10 as follows:

11 No guardian, surrogate, or other person may make a decision on behalf of a person legally
12 incapable of making health care decisions to withhold or withdraw nutrition and hydration from
13 such person except in the circumstances and under the conditions specifically provided for in
14 section 3 of this Act.

15 Section 5. That chapter 34-12D be amended by adding thereto a NEW SECTION to read
16 as follows:

17 A cause of action for injunctive relief may be maintained against any person reasonably
18 believed to be about to violate or is in the course of violating section 4 of this Act, or securing
19 a court determination, notwithstanding the position of a guardian or surrogate, whether there is
20 clear and convincing evidence that the person legally incapable of making health care decisions,
21 when legally capable of such decisions, gave express and informed consent to withhold or
22 withdraw nutrition and hydration in the applicable circumstances.

23 The action may be brought on behalf of the person legally incapable of making health care
24 decisions by the following:

- 1 (1) The spouse, parent, child, or sibling of the person;
- 2 (2) A current or former health care provider of the person;
- 3 (3) A legally appointed guardian of the person;
- 4 (4) The state protection or advocacy agency;
- 5 (5) A public official with appropriate jurisdiction to prosecute or enforce the laws of this
- 6 state.

7 Pending final determination, the court shall direct that nutrition and hydration be provided
8 unless the court determines that subdivision (3) of section 1 of this Act is applicable.

9 Section 6. That § 34-12D-2 be amended to read as follows:

10 34-12D-2. A competent adult may at any time execute a declaration governing the
11 withholding or withdrawal of life-sustaining treatment. The declaration shall be signed by the
12 declarant, or another at the declarant's direction, and witnessed by two adult individuals. The
13 signing may be in the presence of a notary public who shall thereafter notarize the declaration.
14 A declaration shall state the declarant's preferences regarding whether the declarant wishes to
15 receive or not receive ~~artificial~~ nutrition and hydration. If the declaration does not state the
16 declarant's preferences with respect to ~~artificial~~ nutrition and hydration, whether ~~artificial~~
17 nutrition and hydration is to be provided, withheld, or withdrawn shall be governed by the law
18 of this state which would apply in the absence of a declaration.

19 Section 7. That § 34-12D-3 be amended to read as follows:

20 34-12D-3. A declaration may, but need not, be in the following form:

21 **LIVING WILL DECLARATION**

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

1 want to receive.

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

5 This document will remain valid and in effect until and unless you revoke it. Review this
6 document periodically to make sure it continues to reflect your wishes. You may amend or
7 revoke this document at any time by notifying your physician and other health-care providers.
8 You should give copies of this document to your physician and your family. This form is
9 entirely optional. If you choose to use this form, please note that the form provides signature
10 lines for you, the two witnesses whom you have selected and a notary public.

11 TO MY FAMILY, PHYSICIANS, AND ALL THOSE CONCERNED WITH MY CARE:

12 I, _____ willfully and voluntarily make this declaration as a directive to be followed if
13 I am in a terminal condition and become unable to participate in decisions regarding my medical
14 care.

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

16 (Initial only one of the following optional directives if you agree. If you do not agree with
17 any of the following directives, space is provided below for you to write your own directives).

18 ___ NO LIFE-SUSTAINING TREATMENT. I direct that no life-sustaining treatment be
19 provided. If life-sustaining treatment is begun, terminate it.

20 ___ TREATMENT FOR RESTORATION. Provide life-sustaining treatment only if and for
21 so long as you believe treatment offers a reasonable possibility of restoring to me the ability to
22 think and act for myself.

23 ___ TREAT UNLESS PERMANENTLY UNCONSCIOUS. If you believe that I am
24 permanently unconscious and are satisfied that this condition is irreversible, then do not provide

1 me with life-sustaining treatment, and if life-sustaining treatment is being provided to me,
2 terminate it. If and so long as you believe that treatment has a reasonable possibility of restoring
3 consciousness to me, then provide life-sustaining treatment.

4 ___ MAXIMUM TREATMENT. Preserve my life as long as possible, but do not provide
5 treatment that is not in accordance with accepted medical standards as then in effect.

6 ~~(Artificial nutrition and hydration is food and water provided by means of a nasogastric tube or~~
7 ~~tubes inserted into the stomach, intestines, or veins. If you do not wish to receive this form of~~
8 ~~treatment, you must initial the statement below which reads: "I intend to include this treatment,~~
9 ~~among the 'life-sustaining treatment' that may be withheld or withdrawn.")~~

10 With respect to ~~artificial~~ nutrition and hydration, I wish to make clear that

11 (Initial only one)

12 ___ I intend to include this treatment among the "life-sustaining treatment" that nutrition and
13 hydration provided by means of a nasogastric tube or tubes inserted into the stomach, intestines,
14 or veins may be withheld or withdrawn. I fully understand that withholding or withdrawing
15 nutrition and hydration may cause me to die from starvation or dehydration.

16 ___ I do not intend to include this treatment among the "life-sustaining treatment" that
17 nutrition and hydration provided by means of a nasogastric tube or tubes inserted into the
18 stomach, intestines, or veins may be withheld or withdrawn.

19 (If you do not agree with any of the printed directives and want to write your own, or if you want
20 to write directives in addition to the printed provisions, or if you want to express some of your
21 other thoughts, you can do so here).

22 _____

23 _____

24 _____

1 _____
 2 _____
 3 _____

4 Date: _____

5 _____ (your signature)

6 _____

7 (your address) (type or print your signature)

8 The declarant voluntarily signed this document in my presence.

9 Witness _____

10 Address _____

11 Witness _____

12 Address _____

13 On this the _____ day of _____, _____, the declarant,

14 _____, and witnesses _____, and _____ personally

15 appeared before the undersigned officer and signed the foregoing instrument in my presence.

16 Dated this _____ day of _____, _____.

17 _____

18 Notary Public

19 My commission expires: _____.

20 Section 8. That § 34-12D-5 be amended to read as follows:

21 34-12D-5. A declaration becomes operative when the declarant ~~is determined by~~, in the

22 reasonable medical judgment of the attending physician and one other physician, has been

23 determined by these physicians to be in a terminal condition and no longer able to make

24 decisions regarding administration of life-sustaining treatment. If the declaration becomes

- 1 operative, the attending physician and other health-care providers shall act in accordance with
- 2 the declaration or comply with the transfer requirements of § 34-12D-11.