

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 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?

Once 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, and your family. You may also want to give copies to each person 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 ask for those copies to be returned to you.

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 making decisions.

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 admission 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 today

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. Do it now.

What happens if I do nothing?

In the absence of a durable power of attorney for health care or living will, and in the event it is determined you are incapacitated or incapable of giving informed consent to make health care decisions, then those health care decisions may be made by family members in the following order: your spouse unless you are legally separated; an adult child; a parent; an adult sibling; a grandparent or an adult grandchild; an adult aunt or uncle, adult cousin, or an adult niece or nephew; a close friend. Any person authorized to make a health care decision shall be guided by your express wishes, if known, and shall otherwise act in good faith, in your best interests, and may not arbitrarily refuse consent.

This brochure is based on 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.

To find an attorney licensed in South Dakota, contact the South Dakota State Bar Association.
www.statebarofsouthdakota.com

Contact Us

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Planning for Health Care Decisions



Your Right to Choose

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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? What decisions would 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 effectively transfer their right to choose to a person whom they know will speak their mind and heart?

Those concerns can be addressed by preparing 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 based on current South Dakota law and medical practice.

Frequently Asked Questions

Durable Power of Attorney for Health Care and Living Will

What is a durable power of attorney for health care?

A durable power of attorney for health care is a document whereby you, the “principal,” appoint another person, the health care “agent” or “attorney in fact,” to make health care decisions for you should you become incapable of making decisions yourself.

What is a living will?

A living will is a document where you give 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. See South Dakota Codified Law (SDCL) 59-7-2.1 for durable power of attorney for healthcare, and SDCL chapter 34-12D for living will.

Which should I have—a durable power of attorney for health care, a living will or both?

It depends on the circumstances. A living will is directed to your physician. It informs your physician of the medical treatment you wish to either receive or not receive in the event you are in a terminal condition and unable to participate in your own medical decisions. You can also direct whether you want nutrition and hydration (food and water). It becomes effective when your attending physician determines that you are in a terminal condition, death is imminent, and you are no longer able to communicate decisions about your medical care.

A durable power of attorney for health care can be broader in scope than a living will. For example it can authorize your agent to make “all” health care decisions. It can include decisions related to what type of health care facility you wish to reside in, if and when the time comes, the types of medical treatment you wish to receive or not receive, and can authorize others to complete paperwork related to insurance, claims, eligibility for financial assistance and related items. Plus, it can include all of the directives contained in a living will.

You can have both a durable power of attorney for health care and a living will. Copies of the living will should be given to the hospital and doctor or medical clinic. Your agent should be given a copy of your durable power of attorney.

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 you know and trust the most and who 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, 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 legal assistance should be sought in all instances. The South Dakota living will statute (SDCL 34-12D-3) contains a sample form which may be used. You should obtain assistance prior to signing the living will form if you do not understand the form or language.

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 other forms, but those forms may not take into account South Dakota’s special requirements. If you have a power of attorney and/or a living will, those documents should be reviewed by a licensed attorney to ensure that they reflect current laws.

What are South Dakota’s special requirements?

The most important requirement relates to what is known as artificial nutrition and hydration. If you want your agent or physician to have authority to direct the withholding or withdrawal of artificial nutrition and hydration (food or water), you must say so in your durable power of attorney for health care or living will. There also are special provisions relating to withdrawal of treatment from pregnant women.