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# Making Sense of Health Care Directives

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**HOSPICE**  
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# Important Notice

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# Objectives

- Identify circumstances in which a health care directive may be necessary
- Increase cross-discipline competence in understanding the importance of, and assisting in the preparation of health care directives
- Have fun and ask questions!

# Governing Law

- Minnesota – Chapter 145C of Minnesota Statutes
- North Dakota – Chapter 23-06.5 North Dakota Century Code (N.D.C.C.)

# Basic Terminology

- Health Care Agent – Let’s identify them properly!
  - **NORTH DAKOTA** – “Agent” means an adult to whom authority to make a health care decisions is delegated under a health care directive for the individual granting power.
  - **MINNESOTA** – “Health Care Agent” means an individual age eighteen (18) or older who is appointed by a principal in a health care power of attorney to make health care decisions on behalf of the principal
  - **MN/ND** – “Principal” adult who has executed a health care directive



# Common Names for Health Care Directive

- Health Care Directive (we already learned this!)
- Health Care Power of Attorney
- Power of Attorney for Health Care
- Living Will
- Health Care Declaration
- Honoring Choices
- Five Wishes
- Advance Directive

# Health Care Directive v. Power of Attorney

- What's the difference?
  - Health Care Directive deals with health and health related issues
  - Power of Attorney deals with finances and real property
- Words have meaning and matter!
- What does the document say!
  - Just because reading is hard does not mean we do not have to!

# Who Should Get a Health Care Directive?

- Are you over eighteen (18)?
- Do you have capacity?
  - If you answered YES to the above, then

**YOU!**

# What is a Health Care Directive?

- Health Care Directives typically include the following:
  - Health Care Power of Attorney – the appointment of a health care agent to make health care decisions for the principal
  - Health Care Instructions – one or more health care instructions to direct health care providers, others assisting with health care, family members, and the health care agent
- It is important to follow the instructions provided by the principal!
- If the principal has capacity their decision(s) may override the wishes of family/caregivers or the health care directive itself

# Who may MAKE a Health Care Directive?

- An individual age eighteen (18) (i.e. an adult) with capacity to execute a health care directive may make a health care directive
- Capacity – ability to understand and appreciate benefits and harms/risks of health care decisions
  - Remember that decision making capacity can be fluid and may change throughout the day, week, or month

# Requirements for Valid Health Care Directive

- Legally Sufficient Requirements:
  - Be in writing
  - Be dated
  - State the Principal's name
  - Executed by a Principal with capacity
  - (MN) Include health care instruction, a health care power of attorney or both
  - Notarized or Witnessed by two (2) disinterested persons
- A photocopy of a health care directive is presumed to be a true and accurate copy of the executed original

# When is a Health Care Directive Effective?

- When the document is signed
- BUT ...
  - As long as the principal has the capacity to make health care decisions, the health care directive is supplanted with the decisions of the principal
  - The real question is when is the health care directive effective for the health care agent(s)?
    - Health care directive is legally sufficient; and
    - The principal lacks decision-making capacity – generally physicians are making this decision
- There are exceptions depending on the language! A principal may authorize a health care agent to make decisions for the principal even though the principal retains decision making capacity

# Revocation of Health Care Directives

- May be revoked in whole or in part
- Principal must have capacity to revoke
  - Burn, shred, deface, cancel, destroys, etc.
  - Executes a statement
  - Verbally expresses the intent to revoke
  - Executes a subsequent health care directive
- If several health care directives are identified, the most recent health care directive takes precedence

# Who may be Appointed Health Care Agent?

- Principal may appoint an individual 18 years of age or older
- It may NOT be:
  - Individual assigned the task of determining decision-making capacity
  - Health care provider
  - Employee of the principal's health care provider unless
    - Related by blood
    - Marriage or registered domestic partnership (MN)
    - Adoption
- Who will be the best to serve as health care agent requires conversation and thought!

# Special Considerations for Joint Health Care Agents

- Principal may appoint joint health care agents
- Principal may provide instruction regarding process and standards
- Principal may direct rather they act jointly or independently
- Consider providing instruction for disagreements
  - Third party
  - Mediator
  - Tiebreaker provisions

# What Decisions does the Health Care Agent have the Authority to Make?

- Health care decisions
  - Any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a person's physical or mental condition – nutrition, intubation, organ donation (neither MN nor ND may authorize assisted suicide)
- Choose health care providers
- Where Principal lives
- Where Principal receives care and support
- Review or disclose medical records
- Establish personal security safeguards (think visitors)
- Consent to mental health treatment (sometimes intrusive)



# What Decisions does the Health Care Agent have the Authority to Make? (cont.)

- Medical Records:

- A health care agent has the same authority to receive, review, and obtain copies of Principal's medical records as the Principal
- There should absolutely be a reference to the Health Insurance Portability and Accountability Act (HIPAA) – a health care provider may not disclose protected health information (PHI) absent authorization from the Principal

# Responsibilities of Health Care Agent

- Health care agent must act in good-faith consistent with a legally sufficient health care directive
- If there is not sufficient guidance, a health care agent **MUST** act in the best interests of the Principal considering the Principal's overall general health conditions, prognosis, and personal values – this should force us to **THINK** about **WHO** the Principal is appointing
- A health Care agent has a personal obligation to the principal to make health care decisions authorized by the health care directive – but this is not a legal duty to act (see above)

# A Principal's Considerations

- Life-prolonging treatments
  - CPR
  - Pain management
  - Ventilation
  - Dialysis
  - Antibiotics
  - Use of blood products
- End of life
- Mental health
- Faith-based values and beliefs

# A Principal's Considerations (cont.)

- Gender transition
- Organ donation
- Autopsy
- Disposition of remains/funeral
- Reference to other documents
  - Provider Order for Life-Sustaining Treatment (POLST)
  - Do Not Resuscitate (DNR) – this is NOT the same as a health care directive
  - Do Not Intubate (DNI)
- Pregnancy – consider how an individual would like pregnancy to affect health care decision making by agent

# What if a Principal has a Health Care Directive from a Different State?

- It will be legally effective so long as
  - Complies with laws of MN/ND
  - A health care directive cannot override prohibition statutes – i.e. assisted suicide

# What Happens if an Individual Becomes Incapacitated and does not have a Health Care Directive?

- Are there any governing laws?
  - ND – Yes – N.D.C.C. 23-12-13
  - MN – No
    - In MN there is not a surrogacy/informed consent/next-of-kin law, rather a health care directive is necessary to authorize someone to make health care decisions in the event of incapacity
    - In MN, how do we legally rectify this – through the Guardianship process

# Review Health Care Directives Often

- Annually review with doctor and health care agent(s)
- Every five (5) years or so include your estate planning attorney in the review discussion
- Ensure you and your health care agent(s) have originals
- Talk about this often!

# Review Health Care Directives Often (cont.)

- Reviewing is necessary when
  - New diagnosis
  - Change in marital status

# Alternative Resources

- Honoring Choices North Dakota
- North Dakota Department of Health
- Minnesota Department of Health
- Honoring Choices Minnesota
- Minnesota Board of Aging
- Hospice of the Red River Valley Website
- Several good TED Talks

# Quick Review

- How to complete a HCD – it's easy!
  - Identify a trusted individual(s) (i.e. health care agent)
  - Write instructions (e.g. goals, fears, concerns, etc.)
    - You can also state limits on health care
  - Talk to your agent!
  - Sign and date – in presence of two witnesses (disinterested) or notary
  - SHARE with agent(s) and provider(s)

# Quick Review

- HCD puts YOUR wishes about YOUR health care in writing and helps make sure they will be known and followed by family, friends, health care providers and others
- Sometimes decisions must be made when a person is not able to decide or communicate their health care preferences – a HCD communicates YOUR wishes when you're not able to.

Questions?



Thank you!



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