

LEGISLATIVE BILL 696

Approved by the Governor February 12, 1992

Introduced by Lindsay, 9; Wesely, 26; Hillman, 48

AN ACT relating to powers of attorney; to state intent; to define terms; to provide for the execution of a power of attorney for health care; to provide procedures, a form, qualifications, limitations, powers, and duties as prescribed; to provide hearings, restrictions on liability, and penalties; to provide an operative date; and to provide severability.
Be it enacted by the people of the State of Nebraska,

Section 1. (1) It is the intent of the Legislature to establish a decisionmaking process which allows a competent adult to designate another person to make health care and medical treatment decisions if the adult becomes incapable of making such decisions.

(2) The Legislature does not intend to encourage or discourage any particular health care or treatment decision or to create any new right or alter any existing right of competent adults to make such decisions, but the Legislature does intend through this act to allow an adult to exercise rights he or she already possesses by means of delegation of decisionmaking authority to a designated attorney in fact.

(3) This act shall not confer any new rights regarding the provision or rejection of any specific medical treatment and shall not alter any existing laws concerning homicide, suicide, or assisted suicide. Nothing in this act shall be construed to condone, authorize, or approve homicide, suicide, or assisted suicide.

Sec. 2. For purposes of this act:

(1) Adult shall mean any person who is nineteen years of age or older or who is or has been married;

(2) Attending physician shall mean the physician, selected by or assigned to a principal, who has primary responsibility for the care and treatment of such principal;

(3) Attorney in fact shall mean an adult properly designated and authorized under this act to make health care decisions for a principal pursuant to a

power of attorney for health care and shall include a successor attorney in fact;

(4) Health care shall mean any treatment, procedure, or intervention to diagnose, cure, care for, or treat the effects of disease, injury, and degenerative conditions;

(5) Health care decision shall include consent, refusal of consent, or withdrawal of consent to health care. Health care decision shall not include (a) the withdrawal or withholding of routine care necessary to maintain patient comfort, (b) the withdrawal or withholding of the usual and typical provision of nutrition and hydration, or (c) the withdrawal or withholding of life-sustaining procedures or of artificially administered nutrition or hydration, except as provided by this act;

(6) Health care provider shall mean an individual or facility licensed, certified, or otherwise authorized or permitted by law to administer health care in the ordinary course of business or professional practice and shall include all facilities defined in section 71-2017.01;

(7) Incapable shall mean the inability to understand and appreciate the nature and consequences of health care decisions, including the benefits of, risks of, and alternatives to any proposed health care or the inability to communicate in any manner an informed health care decision;

(8) Life-sustaining procedure shall mean any medical procedure, treatment, or intervention that (a) uses mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function and (b) when applied to a person suffering from a terminal condition or who is in a persistent vegetative state, serves only to prolong the dying process. Life-sustaining procedure shall not include routine care necessary to maintain patient comfort or the usual and typical provision of nutrition and hydration;

(9) Persistent vegetative state shall mean a medical condition that, to a reasonable degree of medical certainty as determined in accordance with currently accepted medical standards, is characterized by a total and irreversible loss of consciousness and capacity for cognitive interaction with the environment and no reasonable hope of improvement;

(10) Power of attorney for health care shall mean a power of attorney executed in accordance with this act which authorizes a designated attorney in fact to make health care decisions for the principal when the

principal is incapable;

(11) Principal shall mean an adult who, when competent, confers upon another adult a power of attorney for health care;

(12) Reasonably available shall mean that a person can be contacted with reasonable efforts by an attending physician or another person acting on behalf of the attending physician;

(13) Terminal condition shall mean an incurable and irreversible medical condition caused by injury, disease, or physical illness which, to a reasonable degree of medical certainty, will result in death regardless of the continued application of medical treatment including life-sustaining procedures; and

(14) Usual and typical provision of nutrition and hydration shall mean delivery of food and fluids orally, including by cup, eating utensil, bottle, or drinking straw.

Sec. 3. (1) A principal may confer a power of attorney for health care thereby designating another competent adult as attorney in fact for health care decisions in accordance with this act. A principal may also designate another competent adult as a successor attorney in fact to serve in place of the original attorney in fact when the original attorney in fact is not reasonably available or is unable or unwilling to serve as an attorney in fact. If, after the authority of a successor attorney in fact has commenced, the original attorney in fact becomes available, able, and willing to serve as attorney in fact, the authority of the successor attorney in fact shall cease and the authority of the original designee shall commence.

(2) There shall be a rebuttable presumption that every adult is competent for purposes of executing a power of attorney for health care unless such adult has been adjudged incompetent or unless a guardian has been appointed for such adult.

Sec. 4. The power of attorney for health care shall (1) be in writing, (2) identify the principal, the attorney in fact, and the successor attorney in fact, if any, (3) specifically authorize the attorney in fact to make health care decisions on behalf of the principal in the event the principal is incapable, (4) show the date of its execution, and (5) be witnessed and signed by at least two adults, each of whom witnesses either the signing and dating of the power of attorney for health care by the principal or the principal's acknowledgment of the signature and date.

Sec. 5. (1) The following shall not qualify

to witness a power of attorney for health care: The principal's spouse, parent, child, grandchild, sibling, presumptive heir, known devisee at the time of the witnessing, attending physician, or attorney in fact; or an employee of a life or health insurance provider for the principal. No more than one witness may be an administrator or employee of a health care provider who is caring for or treating the principal.

(2) Each witness shall make the written declaration in substantially the form prescribed in section 8 of this act.

Sec. 6. None of the following may serve as an attorney in fact:

- (1) The attending physician;
- (2) An employee of the attending physician who is unrelated to the principal by blood, marriage, or adoption;

(3) A person unrelated to the principal by blood, marriage, or adoption who is an owner, operator, or employee of a health care provider in or of which the principal is a patient or resident; and

(4) A person unrelated to the principal by blood, marriage, or adoption if, at the time of the proposed designation, he or she is presently serving as an attorney in fact for ten or more principals.

Sec. 7. At any time when the principal is not incapable, the attorney in fact may withdraw by giving notice to the principal. At any time when the principal is incapable, the attorney in fact may withdraw by giving notice to the attending physician who shall cause the withdrawal to be made a part of the principal's medical records.

Sec. 8. (1) A power of attorney for health care executed on or after January 1, 1993, shall be substantially in the form provided in this subsection.

POWER OF ATTORNEY FOR HEALTH CARE

I appoint _____, whose address is _____, and whose telephone number is _____, as my attorney in fact for health care. I appoint _____, whose address is _____, and whose telephone number is _____, as my successor attorney in fact for health care. I authorize my attorney in fact appointed by this document to make health care decisions for me when I am determined to be incapable of making my own health care decisions. I have read the warning which accompanies this document and understand the consequences of executing a power of attorney for health care.

I direct that my attorney in fact comply with the following instructions or limitations:

I direct that my attorney in fact comply with the following instructions on life-sustaining treatment: (optional)

I direct that my attorney in fact comply with the following instructions on artificially administered nutrition and hydration: (optional)

(Signature of person making designation/date)
DECLARATION OF WITNESSES

We declare that the principal is personally known to us, that the principal signed or acknowledged his or her signature on this power of attorney for health care in our presence, that the principal appears to be of sound mind and not under duress or undue influence, and that neither of us nor the principal's attending physician is the person appointed as attorney in fact by this document.

Witnessed By:

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

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

WARNING TO PERSON EXECUTING A POWER OF ATTORNEY FOR HEALTH CARE

This is an important legal document. It creates a power of attorney for health care. Before signing this document you should know these important facts:

(a) This document gives the person you designate as your attorney in fact the power to make health care decisions for you when you are determined to be incapable. Although not necessary and neither encouraged nor discouraged, you may wish to state instructions or wishes and limit the authority of your attorney in fact;

(b) Subject to the limitation stated in subdivision (d) of this document, the person you designate as your attorney in fact has a duty to act consistently with your desires as stated in this document or otherwise made known by you or, if your desires are unknown, to act in a manner consistent with your best interests. The person you designate in this document does, however, have the right to withdraw from this duty at any time;

(c) You may specify that any determination that you are incapable of making health care decisions must be confirmed by a second physician;

(d) The person you designate as your attorney in fact will not have the authority to consent to the withholding or withdrawal of life-sustaining procedures or of artificially administered nutrition or hydration unless you give him or her that authority in this power of attorney for health care or in some other clear and convincing manner;

(e) This power of attorney for health care should be reviewed periodically. It will continue in effect indefinitely unless you exercise your right to revoke it. You have the right to revoke this power of attorney at any time while you are competent by notifying the attorney in fact or your health care provider of the revocation orally or in writing;

(f) Despite any provisions in this power of attorney for health care, you have the right to make health care decisions for yourself as long as you are not incapable of making those decisions; and

(g) If there is anything in this power of attorney for health care you do not understand, you should seek legal advice. This power of attorney for health care will not be valid for making health care decisions 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.

(2) A power of attorney for health care may be included in a durable power of attorney drafted under the Uniform Durable Power of Attorney Act or in any other form if the power of attorney for health care included in such durable power of attorney or any other form fully complies with the terms of section 4 of this act.

(3) A power of attorney for health care executed prior to the operative date of this act shall be effective if it fully complies with the terms of section 4 of this act, except that a notarized acknowledgment shall satisfy the requirement of such section for such power of attorney executed before such date.

(4) A power of attorney for health care which is executed in another state and is valid under the laws of that state shall be valid according to its terms.

Sec. 9. The power of attorney for health care, when its existence becomes known, shall be made a part of the principal's medical record with the attending physician, and if applicable, a copy shall be

filed with any other health care provider in or of which the principal is a patient or resides.

Sec. 10. A power of attorney for health care shall continue in effect until the principal's death, until revoked pursuant to section 20 of this act, or until the attorney in fact and any successor attorney in fact withdraws pursuant to section 7 of this act.

Sec. 11. The authority of the attorney in fact shall commence upon a determination pursuant to section 12 of this act that the principal is incapable of making health care decisions.

Sec. 12. (1) A determination that a principal is incapable of making health care decisions shall be made in writing by the attending physician and any consulting physician, and they shall document the cause and nature of the principal's incapacity. The determination shall be included in the principal's medical record with the attending physician and, when applicable, with the consulting physician and the health care facility in or of which the principal is a patient or resides.

(2) A physician who has been designated a principal's attorney in fact shall not make the determination that the principal is incapable of making health care decisions.

Sec. 13. Notice of a determination that a principal is incapable of making health care decisions shall promptly be given by the attending physician (1) to the principal when there is any indication of the principal's ability to comprehend such notice, (2) to the attorney in fact, and (3) to the health care provider.

Sec. 14. Promptly upon being notified that a determination that the principal is incapable of making health care decisions has or is about to be made, the attorney in fact, if other than the principal's most proximate next of kin and if the principal has not directed otherwise, shall notify the most proximate next of kin and the court-appointed guardian of the principal, if any. The order of notification shall be: (1) The spouse; (2) an adult child; (3) either parent; (4) an adult brother or sister; and (5) the next closest kin.

Sec. 15. If a dispute arises as to whether the principal is incapable, a petition may be filed with the county court in the county in which the principal resides or is located requesting the court's determination as to whether the principal is incapable of making health care decisions. If such a petition is

filed, the court shall appoint a guardian ad litem to represent the principal. The court shall conduct a hearing on the petition within seven days after the court's receipt of the petition. Within seven days after the hearing, the court shall issue its determination. If the court determines that the principal is incapable, the authority, rights, and responsibilities of the principal's attorney in fact shall become effective. If the court determines that the principal is not incapable, the authority, rights, and responsibilities of the attorney in fact shall not become effective.

Sec. 16. A determination that a principal is incapable of making health care decisions shall not be construed as a finding that the principal is incapable for any other purpose.

Sec. 17. (1) When the authority conferred by a power of attorney for health care has commenced, the attorney in fact, subject to any instructions and limitations set forth in the power of attorney for health care or elsewhere, shall make health care decisions on the principal's behalf, except that the attorney in fact shall not have authority (a) to consent to any act or omission to which the principal could not consent under law, (b) to make any decision when the principal is known to be pregnant that will result in the death of the principal's unborn child and it is probable that the unborn child will develop to the point of live birth with continued application of health care, or (c) to make decisions regarding withholding or withdrawing a life-sustaining procedure or withholding or withdrawing artificially administered nutrition and hydration except as provided under section 18 of this act.

(2) The attorney in fact shall have priority over any person other than the principal to act for the principal in all health care decisions, except that the attorney in fact shall not have the authority to make any health care decision unless and until the principal has been determined to be incapable of making health care decisions pursuant to section 12 of this act.

(3) The attorney in fact shall not be personally responsible for the cost of health care provided to the principal.

(4) Except to the extent that the right is limited by the power of attorney for health care, an attorney in fact shall have the same right as the principal to receive information regarding the proposed health care, to receive and review medical and clinical

records, and to consent to the disclosures of such records, except that the right to access such records shall not be a waiver of any evidentiary privilege.

(5) Notwithstanding a determination pursuant to section 12 that the principal is incapable of making health care decisions, when a principal objects to the determination or to a health care decision made by an attorney in fact, the principal's objection or decision shall prevail unless the principal is determined by a county court to be incapable of making health care decisions.

(6) No health care provider shall be required to accept health care decisions from an attorney in fact until such health care provider has received a signed original or a photostatic copy of a signed original power of attorney for health care.

Sec. 18. (1) In exercising authority under the power of attorney for health care, an attorney in fact shall have a duty to consult with medical personnel, including the attending physician, and thereupon to make health care decisions (a) in accordance with the principal's wishes as expressed in the power of attorney for health care or as otherwise made known to the attorney in fact or (b) if the principal's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the principal's best interests, with due regard for the principal's religious and moral beliefs if known.

(2) Notwithstanding subdivision (1)(b) of this section, the attorney in fact shall not have the authority to consent to the withholding or withdrawing of a life-sustaining procedure or artificially administered nutrition or hydration unless (a) the principal is suffering from a terminal condition or is in a persistent vegetative state and (b) the power of attorney for health care explicitly grants such authority to the attorney in fact or the intent of the principal to have life-sustaining procedures or artificially administered nutrition or hydration withheld or withdrawn under such circumstances is established by clear and convincing evidence.

(3) In exercising any decision, the attorney in fact shall have no authority to withhold or withdraw consent to routine care necessary to maintain patient comfort or the usual and typical provision of nutrition and hydration.

Sec. 19. (1) Before acting upon a health care decision made by an attorney in fact, other than those decisions made at or about the time of the initial

determination, the attending physician shall confirm that the principal continues to be incapable. The confirmation shall be stated in writing and shall be included in the principal's medical records. The notice requirements set forth in sections 13 and 14 of this act shall not apply to the confirmation required by this subsection.

(2) If the attending physician determines that the principal is no longer incapable, the authority of the attorney in fact shall cease unless otherwise directed by the principal, but it shall recommence if the principal subsequently becomes incapable as determined pursuant to section 12 of this act.

Sec. 20. (1) A power of attorney for health care or a health care decision made by an attorney in fact may be revoked at any time by a principal who is competent and in any manner by which the principal is able to communicate his or her intent to revoke. Revocation shall be effective upon communication to the attending physician, the health care provider who shall promptly inform the attending physician of the revocation, or the attorney in fact who shall promptly inform the attending physician of the revocation.

(2) The creation by the principal of written wishes or instructions about health care or limitations upon the attorney in fact's authority shall not revoke a power of attorney for health care unless such wishes, instructions, or limitations expressly provide otherwise.

(3) Upon learning of the revocation of the power of attorney for health care, the attending physician shall cause the revocation to be made a part of the principal's medical records.

(4) Unless the power of attorney for health care provides otherwise, execution of a valid power of attorney for health care shall revoke any previously executed power of attorney for health care.

(5) Unless the power of attorney for health care provides otherwise, a power of attorney for health care shall supersede:

(a) Any conflicting preexisting directive;
(b) Any guardianship proceedings under the Nebraska Probate Code to the extent the proceedings involve the right to make health care decisions for the protected person; and

(c) Any conservatorship proceedings under the Nebraska Probate Code to the extent the proceedings involve the right to make health care decisions for the protected person.

(6) A decree of divorce or legal separation entered into pursuant to sections 42-347 to 42-380 may specify whether the choice of the principal's spouse as attorney in fact under a power of attorney for health care shall be revoked or remain effective. If the decree does not specify whether the choice of the spouse as the principal's attorney in fact for health care is revoked or remains effective, the choice of the principal's spouse as attorney in fact for health care shall be deemed revoked upon entry of the decree.

(7) The revocation of a power of attorney for health care shall not revoke or terminate the authority as to the attorney in fact or other person who acts in good faith under the power of attorney for health care and without actual knowledge of the revocation. An action taken without knowledge of the revocation, unless the action is otherwise invalid or unenforceable, shall bind the principal and his or her heirs, devisees, and personal representatives.

Sec. 21. (1) A petition may be filed for any one or more of the following purposes:

(a) To determine whether the power of attorney for health care is in effect or has been revoked or terminated;

(b) To determine whether the acts or proposed acts of the attorney in fact are consistent with the wishes of the principal as expressed in the power of attorney for health care or otherwise established by clear and convincing evidence or, when the wishes of the principal are unknown, whether the acts or proposed acts of the attorney in fact are clearly contrary to the best interests of the principal;

(c) To declare that the power of attorney for health care is revoked upon a determination that the attorney in fact made or proposed to make a health care decision for the principal that authorized an illegal act or omission; or

(d) To declare that the power of attorney for health care is revoked upon a determination by the court of both of the following: (i) That the attorney in fact has violated, failed to perform, or is unable to perform the duty to act in a manner consistent with the wishes of the principal or, when the desires of the principal are unknown, to act in a manner that is in the best interests of the principal; and (ii) that at the time of the determination by the court, the principal lacks the capacity to revoke the power of attorney for health care.

(2) A petition under this section shall be

filed with the county court of the county in which the principal resides or is located.

Sec. 22. A petition under section 15 or 21 of this act may be filed by any of the following:

- (1) The principal;
- (2) The attorney in fact;
- (3) The spouse, parent, sibling, or adult child of the principal;
- (4) A close adult friend of the principal;
- (5) The guardian of the principal;
- (6) The conservator of the principal;
- (7) The attending physician or other health care provider; or
- (8) Any other interested party.

Sec. 23. (1) An attorney in fact shall not be guilty of any criminal offense, subject to any civil liability, or in violation of any professional oath or code of ethics or conduct for any action taken in good faith pursuant to a power of attorney for health care.

(2) No attending physician or health care provider acting or declining to act in reliance upon the decision made by a person whom the attending physician or health care provider in good faith believes is the attorney in fact for health care shall be subject to criminal prosecution, civil liability, or professional disciplinary action. Nothing in this act, however, shall limit the liability of an attending physician or health care provider for a negligent act or omission in connection with the medical diagnosis, treatment, or care of the principal.

(3) Subsection (2) of this section shall not limit the liability of a health care provider for a negligent act or omission in connection with the medical diagnosis, treatment, or care of the principal.

Sec. 24. Subject to sections 17 and 20 of this act, nothing in this act shall affect any right a person may otherwise have to make health care decisions on behalf of another.

Sec. 25. By executing a power of attorney for health care, a principal shall not waive his or her right to routine hygiene, nursing, and comfort care and the usual and typical provision of nutrition and hydration.

Sec. 26. In following the decision of an attorney in fact, a health care provider shall exercise the same independent medical judgment that the health care provider would exercise in following the decision of the principal if the principal were not incapable.

Sec. 27. (1) Nothing in this act shall

obligate a health care provider organization to honor a health care decision by an attorney in fact that the health care provider organization would not honor if the decision had been made by the principal because the decision is contrary to a formally adopted policy of the health care provider organization that is expressly based on religious beliefs or sincerely held ethical or moral convictions central to the operating principles of the health care provider organization. The health care provider organization may refuse to honor the decision whether made by the principal or by the attorney in fact if the health care provider organization has informed the principal or the attorney in fact of such policy, if reasonably possible. If the attorney in fact is unable or unwilling to arrange a transfer to another health care facility, the health care provider organization may intervene to facilitate such a transfer.

(2) Nothing in this act shall obligate an individual as a health care provider to honor or cooperate with a health care decision by an attorney in fact that the individual would not honor or cooperate with if the decision had been made by the principal because the decision is contrary to the individual's religious beliefs or sincerely held moral or ethical convictions. The individual health care provider shall promptly inform the attorney in fact and the health care provider organization of his or her refusal to honor or cooperate with the decision of the attorney in fact. In such event, the health care provider organization shall promptly assist in the transfer of responsibility for the principal to another individual health care provider who is willing to honor the decision of the attorney in fact.

Sec. 28. (1) No person shall be required to execute or to refrain from executing a power of attorney for health care as a criterion for insurance or as a condition for receiving health care.

(2) No person authorized to engage in the business of insurance in this state, medical care corporation, health care corporation, health maintenance organization, other health care plan, or legal entity that is self-insured and provides benefits to its employees or members shall do any of the following because of the execution or implementation of a power of attorney for health care or because of the failure or refusal to execute or implement a power of attorney for health care: (a) Refuse to provide or continue coverage to any person; (b) limit or increase the amount of coverage available to any person; (c) charge a person a

different rate; (d) consider the terms of an existing policy of life or health insurance to have been breached or modified; or (e) invoke a suicide or intentional death exemption or exclusion in a policy covering the person.

(3) Nothing in this act shall be intended to impair or supersede any federal statute.

(4) Except as provided in section 8 of this act and subsection (4) of section 20 of this act, nothing in this act shall impair or supersede any durable power of attorney in effect prior to the operative date of this act.

Sec. 29. The fact that a person has not appointed an attorney in fact or has not provided the attorney in fact with specific health care instructions shall create no presumptions regarding the person's wishes about health care.

Sec. 30. (1) It shall be a Class II felony for a person to willfully sign or alter without authority or to otherwise alter, forge, conceal, or destroy a power of attorney for health care or to willfully conceal or destroy a revocation with the intent and effect of causing a withholding or withdrawing of life-sustaining procedures or artificially administered nutrition or hydration which hastens the death of the principal.

(2) It shall be a Class I misdemeanor for a person without the authorization of the principal to willfully alter, forge, conceal, or destroy a power of attorney for health care or a revocation of a power of attorney for health care.

(3) A physician or other health care provider who willfully prevents the transfer of a principal in accordance with section 27 of this act shall be guilty of a Class I misdemeanor.

Sec. 31. For purposes of making health care decisions, an attempted suicide by the principal shall not be construed as any indication of the principal's wishes with regard to health care.

Sec. 32. Health care providers shall be entitled to assume the validity of a power of attorney for health care executed in this state until given actual notice to the contrary.

Sec. 33. This act shall become operative on January 1, 1993.

Sec. 34. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions