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2007 SENATE HUMAN SERVICES

SB 2212

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2212

Senate Human Services Committee

Check here for Conference Committee

Hearing Date: 1-24-07

Recorder Job Number: 1787, 1831

Committee Clerk Signature

*Mary K Monson*

Minutes:

Vice Chairman Senator Erbele opened the hearing on SB 2212 relating to health care directives.

Senator J. Lee (Dist. 13) introduced SB 2212 and reminded the committee that they did a lot of work in the last session on advanced directives etc. With this bill, they are looking at eliminating what is really kind of a redundant requirement for determining the competency of somebody in the hospital or a long term care facility that may need an advance directive. The purpose of this is that it should not assume that everybody who is in the hospital or a long term care facility is not competent.

Christopher Dodson (ND Catholic Conference) testified in support of SB 2212. He distributed to the committee a guide to health care directives, a resource for ND Catholics. Based on the changes made last session this guide was adopted (Attachment #1). If you are in the hospital or nursing home, another form needs to be added (Attachment #2). (Meter 3:25) It is an extra step that people have to go through. The presumption is something that doesn't make sense at this point in time. Why, if you are in a nursing home or hospital, you are not as competent as you are before you walk in to appoint a health care agent and that you need somebody to guide you through it and you have to go through all this extra paperwork. As he did workshops

across the state, some things came to his attention from talking to people in both catholic and non-catholic facilities. First they would ask where is the addendum they have to do. The question they can ask is why. They didn't touch it in the last session because they didn't want to address what they thought were original controversial issues. There was concern about undue influence on hospital and nursing home settings when the first advance directive law was passed.

This is one way to make it simpler. It is something he doesn't think is needed anymore in the law. The first part of the bill simply deletes the requirement and then it deletes that section from the optional form of the statute which is at the very end of the bill.

Senator Warner asked if there is a speaker bureau, speakers that go around conducting seminars to address the types of options you might want to list.

Mr. Dodson said that, as part of the outreach, there is a list of organizations that have information. Also, hospitals are required to do community outreach on advance directives.

Senator Dever asked when a person goes into a nursing home or a hospital, are they required to include the family in that conversation.

Mr. Dodson said they are not required to include family in conversation. They would be encouraged. At the moment they would have to have appointment of an agent explained to them by those designated persons. (Meter 8:25)

Under current law the agent has to accept the appointment. There must be some sort of conversation that goes on.

Bruce Levi (NDMA) testified in support of SB 2212. He distributed a booklet "Advance Health Care Planning Resource Guide for North Dakotans". He explained the undue influence law.

(Meter 11:42) The document signed in the 80's was probably the living will that didn't require a separate explanation. The durable power of attorney, if there was an agent appointed after

1991, then that provision was there. There was concern about the conflicting provisions between the old living will and the durable power of attorney for health care.

He talked about the legislative history (Meter 12:50). This was an issue that was brought up in the matter of life and death project. Last session it was something they decided was a substantive issue. They were just trying to combine the living and the durable power of attorney into one document called the health care directive. He agreed that it seems to be a redundancy. If there is an issue with capacity at the time of execution, that's a separate issue.

People can bring that up later when they are looking at actually implementing the advanced directive.

Senator Warner asked if excluding this language at this point would they create an obstacle to challenge it later, at the moment of the execution.

Mr. Levi wasn't aware of many challenges to the execution of advanced directive, whether somebody had capacity at the time they did it. (Meter 15:10)

There was no opposing testimony.

Senator J. Lee asked for neutral testimony.

Chris Dodson asked if the committee wanted to address the other issue related to the advance directives –guardianship.

Senator J. Lee told him to go ahead.

Mr. Dodson said there were a few other things they discovered during the workshop and one is something he doesn't have a solution for but it can be addressed in this bill if they wanted because it is related. It's not clear under the law as written now whether a person who is appointed as a guardian can execute an advance health care directive on behalf of their ward.

If they can do that, can they appoint someone else to make health care decisions for that ward? There are arguments both ways. The language is not clear. (Meter 17:45)

Senator J. Lee asked if they could come up with some resolution to make this bill better.

Mr. Dodson said they didn't have a position on this issue so if the committee could give them some direction on what they think the answer should be they could come up with the language. But they need a policy direction.

Senator J. Lee closed the hearing on SB 2212 and said they would reconvene for discussion later.

### **Job #1831**

Senator J. Lee, Chairman, opened SB 2212 for discussion. She asked Chris Dodson for some direction on what direction to go with an amendment to allow guardians to assign guardianship to another person.

Mr. Dodson suggested you could say, "all guardians can execute" or you can say "all guardians with medical decision making authority could execute health care directive on behalf of the ward". The most workable might be something like, "unless an order appointing a guardian says otherwise, a guardian with medical decision making authority can execute a health care directive on behalf of the ward."

Senator Warner asked if it is normal for courts to grant that authority.

Mr. Dodson said he doesn't practice that area of law.

The committee discussed the reason for having a guardian and examples were given.

Senator Dever asked if the reason for a person to have a guardian is because there is no one else to speak for him.

Senator J. Lee answered that they have no legal responsibility for that person.

Mr. Dodson said the extent of the guardian should depend on the person's need.

There was discussion on appointing family members as guardian and court appointed guardians and what happens if there is no family or guardian. (Meter 3:30)

Senator Warner talked about reasons for the courts to intervene to appoint one sibling over another as guardian.

Mr. Dodson said it is not clear in the code what the process is if there already is an appointed guardian and they want to turn that authority over to somebody they trust to make a decision for the ward. That's the question, what does that person do?

Senator J. Lee said it is a good thing to clarify. She asked the committee if they agreed with instructing Mr. Dodson and Mr. Levi that their intentions would be that somebody with power to make health care decisions would have the ability to determine if another executor of health directive for the ward could act for the ward.

The committee agreed.

Discussion on SB 2212 was closed

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2212

Senate Human Services Committee

Check here for Conference Committee

Hearing Date: 2-05-07

Recorder Job Number: 2846

Committee Clerk Signature

*Mary K Monson*

Minutes:

Senator J. Lee, Chairman, opened SB 2212 for discussion. She reported that Mr. Boeck, Protection and Advocacy, had concerns about this.

David Boeck said they had a couple of concerns. One was with the bill itself. He didn't know what problem they were solving with it. (Meter 1:00)

Senator J. Lee responded that this was an additional requirement and it is assuming that people in hospitals and long term care facilities weren't competent enough to know what they were signing.

Mr. Boeck said he agreed with that but it doesn't hurt to explain it to them. An advance care document has a tremendous potential for having an effect on the end of your life, not to mention the status of your life before death. It's like signing two documents. (Meter 3:00)

Another issue he had was with the proposed amendments. (Meter 5:30)

Mr. Dodson provided the committee with a proposed amendment the committee had asked him to prepare (Attachment #4) and then explained it (Meter 8:30).

Mr. Boeck said he was concerned about doing this without going back to court.

There was discussion that the judge would probably want to have a hearing. (Meter 10:00)

Mr. Boeck talked about ramifications and gave examples.



Senator J. Lee addressed a situation about someone not capable of making their own decisions throughout his lifetime such a developmentally disabled person. That person would be different from someone who could express his wishes but now has lost his ability.

Mr. Boeck agreed that is different but he wasn't sure there wouldn't be that many people from birth on that couldn't express a difference, maybe not competent to sign a document but still able to verbalize.

Mr. Dodson reminded the committee that they came into this without a position. It was something they discovered. There is a problem out there (Meter 18:20). He assumes that the court looks at all the factors when they appoint a guardian and would determine whether or not a health care directive exists. The law is not clear so if you leave it, you are leaving an unclear law.

Senator J. Lee asked Rodger Wetzell to share his observation.

Mr. Wetzell chaired the Matters of Life and Death State Project. They developed a lot of educational materials on advance directives. They do a huge number of advance directives at St. Alexis. One of the required things they do is they ask every patient that is admitted if they have an advance directive, do you want assistance with one, do you want sample forms?

Most patients have a sense of what they want. In terms of guardianship, health care issues are emergencies (Meter 24:20) and if a person has an accident, a stroke, or maybe they are in the hospital, in a lot of cases somebody needs to make decisions right now. If the guardian is going to be away, is a snowbird, or has moved away, they may want to appoint someone else to make medical decision while they are gone. He talked about a variety of situations where guardianships come into play. He talked about the advantage of appointing rather than letting the process go down the family order and having the courts appoint someone who might not be all that knowledgeable or could care less but is next in line.

Senator J. Lee asked if he was talking about arranging for a co-guardian in the first place or someone to just step in.

Mr. Wetzell said the issue of co-guardian is addressed in many cases. The trouble with co-guardians is -- does it require both or just one and what happens if they disagree.

Senator J. Lee (Meter 28:00) asked how to do that if they think it's a good idea -- to make it work if those people are willing to assume responsibility again when they come back.

Mr. Dodson said he didn't think they needed to change the law because they could write it into an advance directive law. (Meter 28:54)

There was discussion that there are comparable situations with a financial power of attorney.

Senator Dever asked if that was already spelled out in the health care directive.

There was discussion on seeing merit in allowing another person to step in. There was concern that convenience would be elevated to the guardian over the ward's interest -- an assumption that the courts won't know if the second person has the ward's interest at heart.

Senator J. Lee asked Mr. Wetzell if he would comment on the addendum.

Mr. Boeck said he was willing to back off on the stuff that's crossed off the statute. The witness who witnesses the signing of the advanced directive can be the person who says he's competent and knows what he's doing. He thinks the bill, as it is, is fine. He's concerned with the other guardianship issue.

Mr. Wetzell (Meter 38:40) commented on the issue of the additional addendum which requires that if you executed advance directive as a resident of a long term care facility or in the hospital and you want to appoint a health care agent. In addition to reviewing the document asking questions, you might be required to have someone explain the nature and effect of a health care directive. You are assuming that person doesn't understand the nature of effect.

An advance directive cannot be required. (Meter 39:42) He sees this as a duplication for people who go back and forth between the nursing home and the hospital.

The committee spent some time discussing eliminating the duplicated language in this bill.

They also talked about the potential for a guardian to have some flexibility and potential language for an amendment.

Senator J. Lee will have something drafted for the committee to look at for a basis for discussion.

Senator J. Lee closed discussion on SB 2212.

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2212

Senate Human Services Committee

Check here for Conference Committee

Hearing Date: 2-06-07

Recorder Job Number: 2918

Committee Clerk Signature

*Mary K Monson*

Minutes:

Senator J. Lee, Chairman, called the committee to order to resume discussion on SB 2212.

She reported that legislative council had reservations about not having the court involved.

There has to be an annual report to the court by the guardian. Examples were given of turning over health care decision making to another person (Meter :50). If there are families that are not totally functional, this could be a messy deal without that annual court report. There was discussion that if they leave the bill just as it is, it takes care of the addendum issue.

Senator Warner moved a Do Pass on SB 2212. Senator Pomeroy seconded the motion.

The bill just pulls out the additional addendum for switching back and forth from hospital and skilled care facilities.

Roll call vote 6-0-0. Motion carried. Carrier is Senator Warner.

Date: 2-6-07  
Roll Call Vote #: 1

**2007 SENATE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. SB 2212**

Senate HUMAN SERVICES Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass

Motion Made By Sen. Warner Seconded By Sen. Pomeroy

Senators	Yes	No	Senators	Yes	No
Senator Judy Lee, Chairman	✓		Senator Joan Heckaman	✓	
Senator Robert Erbele, V. Chair	✓		Senator Jim Pomeroy	✓	
Senator Dick Dever	✓		Senator John M. Warner	✓	

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Warner

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)  
February 6, 2007 2:40 p.m.

Module No: SR-25-2307  
Carrier: Warner  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

**SB 2212: Human Services Committee (Sen. J. Lee, Chairman) recommends DO PASS**  
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2212 was placed on the  
Eleventh order on the calendar.

2007 HOUSE HUMAN SERVICES

SB 2212

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2212

House Human Services Committee

Check here for Conference Committee

Hearing Date: March 14, 2007

Recorder Job Number: 5059

Committee Clerk Signature

*Judy Schock*

Minutes:

**Chairman Price:** We will open the hearing on SB 2212.

**Senator Judy Lee, District 13 West Fargo:** The bill is related to health care directives. This addresses a redundant form that has been required for folks going into long term care or hospitals. One does not necessarily have to be incompetent to be in a setting like that. There is extra paper work involved for parties involved in the health care facilities and long term care facilities. Don't see any danger to people in deleting the additional requirements that is covered in 2212 so that the kinds of directives that are established might carry through without that sort of house keeping stamp of approval on it that is required at this time with the additional paper work. In 2308 also talks about health care directives, we used to call them living wills and powers of attorney for health care. They are combined into one form now. Our goal would be to encourage people to sign health directives, it is also important for young people to do this. There are times someone may be seriously ill and is competent and capable but struggling with making with making decisions on behalf of themselves. That is what 2308 talks about. They could designate someone to make those decisions for them in that situation.

**Representative Weisz:** We did do a lot of work on those bills, and we just don't need to clutter up those directives. We need to feel comfortable about the coverage.



**Senator Lee:** Based on the long term care association, and others it is a little extra hassle, but they don't see any additional benefits and I think they will be able to review from their professional division. The people who came in and spoke to the senate are responsible people representing responsible organizations who care about the patients they are serving in their facilities. They thought there was no benefit in the additional form. Deleting it would make life a bit simpler for everyone with the same protection.

**Christopher Dodson, Executive Director ND Catholic Conference:** See attached testimony, and guide to health care directives and addendum for hospitals and long term care facilities. This became so popular we created a non catholic one too. Everything is there that is legally required.

**Rep. Porter:** If an individual currently has the health care director that does not have the addendum filled out. By passing this law, will that than make it possible inside the health care facility that their existing document is okay, or will they have to go back and revisit their original now that we have changed the law.

**Mr. Dodson:** The requirement for the addendum only applies inside the facility. If they did this at home or a lawyers office and brought it to the facility it is good.

**Bruce Levi Executive Director of ND Medical Association:** See attached testimony, and booklet on directives. One of the things provided in our uniform acts that we rely on was the restrictions we have on who can be an agent. We have restrictions in the law now. I like the catholic directive; it is much shorter than ours.

**Shelly Peterson with ND Long Term Care association:** We appreciate what Christopher Dodson, and Bruce Levi have done, and we encourage your adoption of this legislation.

**Chairman Price** any one else to testify for SB 2212? If not we will close the hearing on SB 2212.

**Chairman Price:** Committee take out SB 2212 and we will act on the bill.

**Representative Kaldor:** I have recently gone through this with my aunt, and found it really frustrating for her. I would like to commend Mr. Levi and Dodson for their efforts. I make a motion for a do pass, seconded by **Representative Porter**. The vote was taken with 11 yeas, 0 nays, and 1 absent. **Representative Schneider** will carry the bill to the floor.

Date: 3/14  
Roll Call Vote #: 1

**2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. "Click here to type Bill/Resolution No."**

House HUMAN SERVICES S.B. 2212 Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken As Pas

Motion Made By Rep. Baldo Seconded By Rep. Porter

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairman	<input checked="" type="checkbox"/>		Kari L Conrad	<input checked="" type="checkbox"/>	
Vonnie Pietsch - Vice Chairman	<input checked="" type="checkbox"/>		Lee Kaldor	<input checked="" type="checkbox"/>	
Chuck Damschen			Louise Potter	<input checked="" type="checkbox"/>	
Patrick R. Hatlestad	<input checked="" type="checkbox"/>		Jasper Schneider	<input checked="" type="checkbox"/>	
Curt Hofstad	<input checked="" type="checkbox"/>				
Todd Porter	<input checked="" type="checkbox"/>				
Gerry Uglem	<input checked="" type="checkbox"/>				
Robin Weisz	<input checked="" type="checkbox"/>				

Total (Yes) 11 "Click here to type Yes Vote" No 0 "Click here to type No Vote"

Absent 1

Floor Assignment Rep. Schneider

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**SB 2212: Human Services Committee (Rep. Price, Chairman) recommends DO PASS**  
(11 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2212 was placed on the  
Fourteenth order on the calendar.

2007 TESTIMONY

SB 2212

## A Guide to Health Care Directives

A Resource for North Dakota Catholics from the North Dakota Catholic Conference

Recent events and a changes in North Dakota's law have generated increased interest in advance directives – legal documents that give instructions for future health care decisions. To assist Catholics of the state who wish to have an advance directive, the North Dakota Catholic Conference has prepared A Catholic Health Care Directive that meets the state's legal requirements and reflects Church's teaching and the recommendations of church, health care, and community leaders. This Guide answers some basic questions about the law, Church teaching, and completing a health care directive.

**What is an advance directive? What is a "living will," a "durable power of attorney for health care," and a "health care directive?"**

A "living will" usually means a document in which a person states *only* his or her health care wishes to be followed when the person is no longer able to make or communicate decisions.

A "durable power of attorney for health care" usually means a document in which a person appoints someone to make health care decisions on his or her behalf if the person is no longer able to make or communicate decisions.

"Advance directive" usually means a living will, a durable power of attorney for health care, or a combination of the two.

"Health care directive" is what North Dakota state law now calls any advance directive. The new law went into effect August 1, 2005.

**Why would I want a health care directive?**

By completing a health care directive you can help make sure that your wishes for health care decisions are followed when you are not able to communicate those wishes on your own behalf. In addition, an advance directive could greatly help your family and friends during what may be a difficult time.

**What happens if I don't have a health care directive?**

In North Dakota, if you have not appointed a health care agent and you are unable to make or communicate health care decisions, state law will determine who may make health care decisions for you. The law authorizes persons in the following categories, *in the order listed*, to make

decisions: your health care agent unless a court specifically authorizes a guardian to make decisions for you; your court-appointed guardian or custodian, your spouse, any of your children, your parents, your adult brothers and sisters, your grandparents, your adult grandchildren, and an adult friend or close relative. No one in a lower category may make the decision if someone in a higher category has refused to consent.

When making a health care decision, the authorized person must determine that you would have consented to such health care if you were able to do so. If the person is unable to make this determination, he or she may only consent to the proposed health care if it is in your best interests.

**Do I need to use a special form?**

No. North Dakota law has an *optional* health care directive form, but there are many other different forms available that meet legal requirements in North Dakota. In fact, it is not necessary to use a pre-printed form at all.

Any written statement that meets these requirements can serve as a legal health care directive in North Dakota:

- States the name of the person to whom it applies;
- Includes a health care directive, the appointment of an agent, or both;
- Is signed and dated by the person to whom it applies or by another person authorized to sign on behalf of the person to whom it applies;
- Is executed by the person with the capacity to understand, make, and communicate decisions; and
- Contains verification of the required signature, either by a notary public or by qualified witnesses.

If you are Catholic, the North Dakota Catholic Conference suggests that you consider the *Catholic Health Care Directive* form. If the form is not attached to this document, you can get one by calling the conference at 1-888-419-1237 or by downloading it at [ndcatholic.org](http://ndcatholic.org)

**Do I need an attorney? Will this cost me anything?**

No. It is not necessary to have an attorney provide or fill out the form. However, you should contact an attorney if you have legal questions regarding advance care planning. Advance directive forms are available from a number of sources for no charge, including the North Dakota Catholic Conference.

**I already have a living will. Do I need to do a new one?**

No. Valid advance directives completed before the new law went into effect (August 1, 2005) will still be honored. However, if your old advance directive is just a living will (contains only instructions), you should consider completing a new advance directive.

Living wills completed under the old law are legally binding only if you lack capacity *and* face imminent death. Under the new law, your wishes will be followed even if you are not facing imminent death.

Also, if you have any advance directive, it should include the appointment of a health care agent. Take this opportunity to complete a new health care directive that appoints a health care agent.

**I already have an advance directive, but want a new one. What do I do?**

Validly executing a new health care directive automatically revokes any older advance directive. Inform everyone who might have a copy of that old document that it is no longer valid and that you have a new health care directive.

**Should I appoint a health care agent or just write down my wishes?**

Although Catholics are not morally obligated to have any type of advance directive, the North Dakota Catholic Conference recommends that, if you have any advance directive, it should include the appointment of a health care agent.

Written instructions alone are only as good as your ability to accurately predict every possible future medical condition and every future medical treatment option. In addition, without a health care agent, the person interpreting those instructions may be someone who does not truly know what you wanted.

By appointing a health care agent, you can make sure that someone who cares about you will apply your wishes and personal beliefs to the health care choices at hand – just as you would do. Even if you appoint a health care agent, you can still give written health care instructions to direct, guide, and even limit the actions of your agent.

**Who can be my agent?**

In North Dakota, your agent must be 18 years of age or older and must accept the appointment in writing. Talk beforehand to the person you wish to appoint. Find out if the person is willing to accept the responsibility. Tell the person about your wishes and preferences for care. Be sure the person is willing and able to follow your wishes.

**What should I do with my health care directive?**

Provide a copy of your health care directive to your doctor and any other health care providers such as your hospital, nursing facility, hospice, or home health agency. In addition, you may want to give copies of your health care directive to other persons, such as close family members, your priest, and your attorney, if you have one.

**What fundamental principles should guide a Catholic, and indeed any person, who is thinking about health care decisions?**

1. *Human life is a precious gift from God.* This truth should inform all health care decisions. Every person has a duty to preserve his or her life and to use it for God's glory.
2. *We have the right to direct our own care and the responsibility to act according to the principles of Catholic moral teaching.* Each person has a right to clear and accurate information about a proposed course of treatment and its consequences, so that the person can make an informed decision about whether to receive or not receive the proposed treatment.
3. *Suicide, euthanasia, and acts that intentionally and directly would cause death by deed or omission, are never morally acceptable.*
4. *Death is a beginning, not an end.* Death, being conquered by Christ, need not be resisted by any and every means and a person may refuse medical treatment that is *extraordinary*. A treatment is extraordinary when it offers little or no hope of benefit and cannot be provided without undue burden, expense, or pain.
5. *There should be a strong presumption in favor of providing a person with nutrition (food) and hydration (water), even if medically assisted.* Providing nutrition and hydration should be considered ordinary care since it serves a life-preserving purpose and the means of supplying food and water are relatively simple and - barring complications - generally without pain. Exceptional situations may exist in which this is not the case, such as when a person is no longer able to assimilate nourishment, or when death is so imminent that withholding or withdrawing food and water will not be the actual cause of death. In no case should food or water be removed with the intent to cause death.
6. *We have the right to comfort and to seek relief from pain.* Although our faith teaches that we can find meaning in suffering, no one is obligated to experience pain. A person has a right to pain relief and comfort care, even if the method or treatment *indirectly* and *unintentionally* shortens life. However, it is not right to deprive the dying person of consciousness without a serious reason.

**Is this all there is to know about making ethical health care decisions?**

No. These statements are only some basic principles. Some situations, such as pregnancy or organ donation, involve other principles. Understanding and applying these principles to specific cases can be difficult. At times, your bishop or the Pope may provide clarification on the Church's teaching and guidance for specific situations.

For additional resources and information on making ethical health care decisions, contact:

*Fargo Diocese Respect Life Office*  
(701-356-7910)

web site: [www.fargodiocese.org](http://www.fargodiocese.org)

*Bismarck Diocese Pastoral Center*  
(701-222-3035)

*North Dakota Catholic Conference*  
(1-888-419-1237; 701-223-2519)

web site: [ndcatholic.org](http://ndcatholic.org)