

Sixty-ninth  
Legislative Assembly  
of North Dakota

**FIRST ENGROSSMENT  
with Conference Committee Amendments  
ENGROSSED SENATE BILL NO. 2297**

Introduced by

Senators Roers, Barta, Lee, Sorvaag

Representative O'Brien

1 A BILL for an Act to amend and reenact subsection 3 of section 23-06.5-03 and section  
2 23-12-13 of the North Dakota Century Code, relating to the determination of incapacity and  
3 informed consent of incapacitated patients and minors.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1. AMENDMENT.** Subsection 3 of section 23-06.5-03 of the North Dakota  
6 Century Code is amended and reenacted as follows:

7 3. A health care directive, including the agent's authority, is in effect only when the  
8 principal lacks capacity to make health care decisions, as certified in writing by the  
9 principal's attending physician, psychiatrist, or psychologist and filed in the principal's  
10 medical record, and ceases to be effective upon a determination that the principal has  
11 recovered capacity.

12 **SECTION 2. AMENDMENT.** Section 23-12-13 of the North Dakota Century Code is  
13 amended and reenacted as follows:

14 **23-12-13. PersonsIndividuals authorized to provide informed consent to health care**  
15 **for incapacitated personspatients and minors - Priority.**

16 1. ~~Informed consent for health care for a minor patient or a patient who is determined by~~  
17 ~~a physician to be an incapacitated person, as defined in subsection 2 of section~~  
18 ~~30.1-26-01, and unable to consent may be obtained from a person authorized to~~  
19 ~~consent on behalf of the patient~~For purposes of this section:

20 a. "Incapacitated patient" means an adult unable to understand and appreciate the  
21 nature and consequence of a health care decision, including the benefits, harms,  
22 and reasonable alternatives to proposed health care, and unable to communicate

- 1                    a health care decision, as certified by the patient's attending physician,  
2                    psychiatrist, or psychologist and filed in the patient's medical record.
- 3                    b. "Minor" means an individual under eighteen years of age. Persons  
4                    2. Unless a court of competent jurisdiction determines otherwise, individuals in the  
5                    following classes and in the following order of priority may provide informed consent to  
6                    health care on behalf of thean incapacitated patient:
- 7                    a. ~~The individual, if any, to whom the patient has given a durable power of attorney~~  
8                    ~~that encompasses the authority to make health care decisions, unless a court of~~  
9                    ~~competent jurisdiction specifically authorizes a guardian to make medical~~  
10                    ~~decisions for the incapacitated person;~~
- 11                    b. The appointedA health care agent appointed through a health care directive  
12                    under chapter 23-06.5 or a similar instrument executed in another jurisdiction in  
13                    accordance with the law in that jurisdiction;
- 14                    b. An appointed guardian or custodian of the patient, if any under chapter 30.1-28  
15                    or a similar instrument executed in another jurisdiction in accordance with the law  
16                    in that jurisdiction;
- 17                    e. ~~The patient's~~
- 18                    c. A spouse of the patient who has maintained significant ~~contacts~~contact with the  
19                    incapacitated personpatient;
- 20                    d. ~~Children~~
- 21                    d. A child of the patient who areis at least eighteen years of age and who havehas  
22                    maintained significant ~~contacts~~contact with the incapacitated personpatient;
- 23                    e. ~~Parents~~
- 24                    e. A parent of the patient, including a stepparent who has maintained significant  
25                    ~~contacts~~contact with the incapacitated personpatient;
- 26                    f. ~~Adult brothers and sisters~~
- 27                    f. An adult sibling of the patient who havehas maintained significant  
28                    ~~contacts~~contact with the incapacitated personpatient;
- 29                    g. ~~Grandparents~~
- 30                    g. A grandparent of the patient who havehas maintained significant ~~contacts~~contact  
31                    with the incapacitated personpatient;

- 1           h. Grandchildren
- 2           h. A grandchild of the patient who areis at least eighteen years of age and who
- 3           havehas maintained significant ~~contacts~~contact with the incapacitated-
- 4           personpatient; or
- 5           i. A close relative or friend of the patient who is at least eighteen years of age and
- 6           who has maintained significant ~~contacts~~contact with the ~~incapacitated-~~
- 7           personpatient; or
- 8           j. An interdisciplinary team consisting of at least three health care professionals.
- 9           (1) An interdisciplinary team may include an employee or agent of a health care
- 10           provider treating an incapacitated patient, including a member of the ethics
- 11           committee, provided a member of the team is not directly involved with the
- 12           treatment of the incapacitated patient.
- 13           (2) If consent is provided under this subdivision, a health care provider shall
- 14           continue good faith efforts to identify and locate an individual in a preceding
- 15           level of priority.
- 16        2.3. Unless otherwise determined by court order, a parent may make health care decisions
- 17        for the parent's minor child. Individuals in the following classes and in the following
- 18        order of priority may provide informed consent to health care on behalf of a minor
- 19        patient if a parent is unable to provide informed consent:
- 20        a. A guardian acting under a court order specifically authorizing the guardian to
- 21        make health care decisions for the minor;
- 22        b. An appointed guardian or custodian of the minor;
- 23        c. A noncustodial parent of the minor, including a stepparent who has maintained
- 24        significant contact with the patient;
- 25        d. An adult sibling of the minor who has maintained significant contact with the
- 26        minor;
- 27        e. A grandparent of the minor who has maintained significant contact with the minor;
- 28        f. A close relative or friend of the minor who is at least eighteen years of age and
- 29        who has maintained significant contact with the minor; or
- 30        g. An interdisciplinary team consisting of at least three health care professionals.

1           (1) An interdisciplinary team may include an employee or agent of a health care  
2           provider treating a minor, including a member of the ethics committee,  
3           provided a member of the team is not directly involved with the treatment of  
4           the minor.

5           (2) If consent is provided under this subdivision, a health care provider shall  
6           continue good faith efforts to identify and locate an individual in a preceding  
7           level of priority.

8       4. ~~A physician~~health care provider seeking informed consent for proposed health care for  
9       a ~~minor patient or a patient who is an incapacitated person and~~an incapacitated  
10       patient or a minor who is unable to consent must make reasonable efforts to locate  
11       and secure authorization for the health care from a competent ~~person~~individual in the  
12       first or succeeding class identified in subsection 42 ~~for an incapacitated patient or~~  
13       subsection 3 for a minor. If the ~~physician~~health care provider is unable to locate such  
14       ~~person~~individual, authorization may be given by any ~~person~~individual in the next class  
15       in the order of descending priority. ~~A person~~An individual identified in subsection 42 ~~for~~  
16       an incapacitated patient or subsection 3 for a minor may not provide informed consent  
17       to health care if a ~~person~~an individual of higher priority has refused to give such  
18       authorization.

19       ~~3-5.~~ Before any ~~person~~individual authorized to provide informed consent ~~pursuant to~~under  
20       this section exercises that authority, the ~~person~~individual must first determine in good  
21       faith that the patient, if not incapacitated, would consent to the proposed health care. If  
22       such a determination cannot be made, the decision to consent to the proposed health  
23       care may be made only after determining that the proposed health care is in the  
24       patient's best interests.

25       4. ~~No person~~

26       6. An individual authorized to provide informed consent ~~pursuant to~~in accordance with  
27       this section may not provide consent for sterilization, abortion, or psychosurgery or for  
28       admission to a state mental health facility for a period of more than forty-five days  
29       without a mental health proceeding or other court order.

30       ~~5-7.~~ If a patient who is determined by a physician, psychiatrist, or psychologist to be an  
31       incapacitated ~~person~~patient, or a ~~person~~an individual interested in the patient's

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- 1 welfare, objects to a determination of incapacity made pursuant to in accordance with
- 2 this section, a court hearing pursuant to chapter 30.1-28 must be held to determine the
- 3 issue of incapacity.