North Dakota Catholic Conference

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To: Senate Human Services Committee
From: Christopher Dodson, General Counsel
Date: February 4, 2025
Re: Senate Bill 2297 - Informed Consent for Incapacitated Individuals

The North Dakota Catholic Conference does not oppose amending the informed consent statute to include an interdisciplinary team to the the list of who can provide informed consent for an incapacitated individual. However, we have concerns about other parts of the bill could have unintended consequences.

In order by line number:

Page 1, lines 13-15:

The existing language states that the first person of priority to give informed consent is: "The individual, if any, to whom the patient has given a durable power of attorney that encompasses the authority to make health care decisions . . ." The bill adds "or has been identified as an agent in a health care directive with the authority to make health care decisions . . ."

This new language merely restates the existing language in a different way. Under North Dakota law, the only way an individual can have a "durable power of attorney that encompasses the authority to make health care decisions" is through a health care directive that appoints an agent. Moreover, an agent appointed through a health care directive, by definition, has a durable power of attorney to make health care decisions. See N.D.C.C. Section 23-06.5-03.

There was discussion in 2005 about changing the language in Section 23-12-13 - the section before you - to replace "durable power of attorney that encompasses the authority to make health care decisions" with language using "health care directive" and "agent," but there were some who thought that using new language would be interpreted as excluding health care decision-making authority that was given under the pre-2005 law, which used "durable power of attorney for health care."

The existing language is sufficient. If, however, the committee wants to replace the old language with new language, the new language should be revised to "identified as an agent in a health care directive." The words "with the authority to make health care decisions" are superfluous and should not be used. An agent appointed through a health care directive, by definition, has authority to make health care decisions for the principal (patient).

While the use of repetitive and superfluous language may seem benign, North Dakota courts apply the maxim that the legislature does not engage in an idle act. In other words, the presumption is that when the legislature amends an existing law it intends to change the law. No change is necessary in this section of the law, but the bill's language signals that the legislature intends to change the law.

Page 1, lines 16-17:

This new language on these two lines creates three problems.

Firstly, under the existing language a health care agent has priority over a guardian unless the court order appointing the guardian authorizes the guardian to make health care decisions for the patient/ward. This accords with Section 23-06.5-13(1) of the health care directive law: "Unless a court of competent jurisdiction determines otherwise, the appointment of an agent in a health care directive executed pursuant to this chapter takes precedence over any authority to make medical decisions granted to a guardian pursuant to chapter 30.1-28."

Rather than giving priority to a guardian who has legal authority to make health care decisions, the proposed language would appear to require the court's order to specifically say that has priority over a health care directive. That would limit the scope of which guardians would be given priority over a health care agent and create confusion for those guardians who are given general health care decision authority.

If the language is intended to make clear that guardians with clear health care decision-making authority have priority over health care agents, the language is unnecessary. The law already provides for that.

Secondly, the proposed language is problematic in that it appears to require the court order to direct the guardian to ignore a health care directive in all respects. A health care directive becomes invalid only under rare circumstances. A guardian, even one who is given health care decision-making authority, has an obligation to follow the instructions and wishes expressed in a valid health care directive.

Subsection 3 of Section 23-12-13 states: "Before any person authorized to provide informed consent pursuant to this section exercises that authority, the person must first determine in good faith that the patient, if not incapacitated, would consent to the proposed health care. If such a determination cannot be made, the decision to consent to the proposed health care may be made only after determining that the proposed health care is in the patient's best interests."

The primary reason for a health care directive is to give the decision-maker at any level of priority direction as to whether the patient would consent to the proposed health care. A guardian is not, and should not, be excused from this obligation.

Thirdly, the proposed language on line 17 uses “durable power of attorney” instead of “durable power of attorney for health care.” They are two different things. Only a durable power of attorney for health care authorizes a person to make health care decisions for an incapacitated person.

Finally, with regards to the addition of an interdisciplinary team, the language implies that an interdisciplinary team would only be used when the patient is incapacitated. The section, however, also applies to who can provide informed consent for a minor who is not incapacitated. We suggest that “In the case of an incapacitated individual,” be added at the beginning of Page 2, line 11.

In summary, the North Dakota Catholic Conference does not oppose adding an interdisciplinary team to the end of the list of who can provide informed consent for health care. We ask, however, that the committee address the identified language problems.