

LEGISLATURE OF NEBRASKA
ONE HUNDRED SIXTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 247

Introduced by Bolz, 29; Linehan, 39.

Read first time January 14, 2019

Committee:

- 1 A BILL FOR AN ACT relating to advance health care directives; to adopt
- 2 the Advance Mental Health Care Directives Act.
- 3 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 15 of this act shall be known and may be
2 cited as the Advance Mental Health Care Directives Act.

3 Sec. 2. The Legislature finds that:

4 (1) Issues implicated in advance planning for end-of-life care are
5 distinct from issues implicated in advance planning for mental health
6 care;

7 (2) Mental illness is often episodic and periods of incapacity
8 obstruct an individual's ability to give informed consent and impede the
9 individual's access to mental health care;

10 (3) Facilitating advance planning helps (a) prevent unnecessary
11 involuntary commitment and incarceration, (b) improve patient safety and
12 health, and (c) improve mental health care and enable an individual to
13 exercise control over his or her treatment;

14 (4) An acute mental health episode can induce an individual to
15 refuse treatment when the individual would consent to treatment if the
16 individual's judgment were unimpaired;

17 (5) Empowering people to create self-binding, advance mental health
18 care directives to overcome illness-induced treatment refusals protects
19 patient safety, autonomy, and health; and

20 (6) An individual with mental illness has the same right to plan in
21 advance for treatment as an individual planning for end-of-life care.

22 Sec. 3. The Legislature hereby declares that an advance mental
23 health care directive can only accomplish the goals listed in section 2
24 of this act if an individual may use a directive to:

25 (1) Set forth instructions for mental health care, including consent
26 to inpatient mental health treatment, psychotropic medication, or
27 electroconvulsive therapy;

28 (2) Dictate whether the directive is revocable during periods of
29 incapacity and consent to treatment despite illness-induced refusals;

30 (3) Choose the standard by which the directive becomes active;

31 (4) Designate an agent to make mental health care decisions for the

1 individual; and

2 (5) List all health care professionals, mental health care
3 professionals, family, friends, and other interested individuals with
4 whom treatment providers are allowed to communicate if the individual
5 loses capacity.

6 Sec. 4. For purposes of the Advance Mental Health Care Directives
7 Act:

8 (1) Agent means an individual properly designated and authorized
9 under the Advance Mental Health Care Directives Act to make mental health
10 care decisions for a principal pursuant to an advance mental health care
11 directive and includes a successor agent;

12 (2) Capacity means an individual's ability to understand and
13 appreciate the nature and consequences of mental health care decisions,
14 including the benefits and risks of each, and alternatives to any
15 proposed mental health treatment, and to reach an informed decision; and

16 (3) Principal means an individual with capacity who confers upon an
17 agent the powers stated in the advance mental health care directive.

18 Sec. 5. For purposes of the Advance Mental Health Care Directives
19 Act:

20 (1) An individual's decisionmaking capacity is evaluated relative to
21 the demands of a particular mental health care decision; and

22 (2) An individual may lose capacity without being eligible for civil
23 commitment in Nebraska.

24 Sec. 6. An individual with capacity has the right to control
25 decisions relating to his or her mental health care.

26 Sec. 7. (1) An advance mental health care directive shall:

27 (a) Be in writing;

28 (b) Be dated and signed by the principal or the principal's
29 designated representative if the principal is unable to sign;

30 (c) State whether the principal wishes to be able to revoke the
31 directive at any time or whether the directive remains irrevocable during

1 periods of incapacity. Failure to clarify whether the directive is
2 revocable does not render it unenforceable. If the directive fails to
3 state whether it is revocable, the principal may revoke it at any time;

4 (d) Be witnessed in writing by at least two disinterested adults as
5 provided in subsections (3) and (4) of this section; and

6 (e) Be valid upon execution.

7 (2) To be irrevocable, the directive shall state that the directive
8 remains irrevocable during periods of incapacity.

9 (3) No witness may be:

10 (a) A member of the principal's mental health treatment team;

11 (b) Related to the principal by blood, adoption, or marriage;

12 (c) In a romantic or dating relationship with the principal;

13 (d) The agent of the principal or a person designated to make mental
14 health care decisions for the principal; or

15 (e) The owner, operator, employee, or relative of an owner or
16 operator of a treatment facility in which the principal is a patient.

17 (4) Each witness shall attest that:

18 (a) The witness was present when the principal signed the directive;

19 (b) The principal did not appear incapacitated or under undue
20 influence or duress when the principal signed the directive; and

21 (c) The principal presented identification or the witness personally
22 knows the principal.

23 (5) A principal may list in the directive health care professionals,
24 mental health care professionals, family, friends, and other interested
25 individuals with whom treatment providers are allowed to communicate if
26 the individual loses capacity.

27 Sec. 8. (1) Unless a principal otherwise designates in the advance
28 mental health care directive, a directive becomes active when the
29 principal loses capacity. Activation is the point at which the directive
30 is used as the basis for decisionmaking and dictates treatment of the
31 principal.

1 (2) The principal may designate in the directive an activation
2 standard other than incapacity by describing the circumstances under
3 which the directive becomes active.

4 (3) Despite activation, a directive does not prevail over
5 contemporaneous preferences expressed by a principal who has capacity.

6 Sec. 9. (1) In an advance mental health care directive, a principal
7 may appoint an agent to make all mental health care decisions for the
8 principal, including decisions to consent on behalf of the principal to
9 inpatient mental health treatment, psychotropic medication, and
10 electroconvulsive therapy.

11 (2) Express authorization to the agent to consent to the principal's
12 inpatient mental health treatment or psychotropic medication is not
13 required to convey authority to an agent to consent to such treatments.
14 The agent may consent to such treatments for the principal if the
15 principal's written grant of authority in the directive is sufficiently
16 broad to encompass these decisions. An agent only has the authority to
17 consent to electroconvulsive therapy for the principal if the principal
18 expressly granted authority to consent to the principal's
19 electroconvulsive therapy.

20 (3) An agent's decisions for the principal must be in good faith and
21 consistent with the principal's instructions expressed in the principal's
22 directive. If the directive fails to address an issue, the agent shall
23 make decisions in accordance with the principal's instructions or
24 preferences otherwise known to the agent. If the agent does not know the
25 principal's instructions or preferences, the agent shall make decisions
26 in the best interests of the principal.

27 (4) If the principal grants the agent authority to make decisions
28 for the principal in circumstances in which the principal still has
29 capacity, the principal's decisions when the principal has capacity
30 override the agent's decisions.

31 (5) Except as otherwise prohibited by law, an agent has the same

1 right as the principal to receive, review, and authorize the use and
2 disclosure of the principal's health care information as is necessary for
3 the agent to carry out the agent's duties for the principal.

4 (6) Health care decisions an agent makes for the principal are
5 effective without judicial approval.

6 (7) When an incapacitated principal refuses inpatient mental health
7 treatment or psychotropic medication, the principal's agent only has the
8 authority to consent to such treatments for the principal if the
9 principal's irrevocable directive expressly authorizes the agent to
10 consent to the applicable treatment.

11 Sec. 10. A principal may not designate as his or her agent in an
12 advance mental health care directive an owner, operator, or employee of a
13 facility at which the principal is receiving care or a relative of such
14 owner or operator unless the designated person is related to the
15 principal by blood, marriage, or adoption.

16 Sec. 11. (1) Except as provided in subsection (2) of this section,
17 in an advance mental health care directive, a principal may issue
18 instructions or appoint an agent to make decisions concerning all aspects
19 of mental health treatment, including:

20 (a) Consent to or refusal of specific types of mental health
21 treatments, including inpatient mental health treatment, psychotropic
22 medication, and electroconvulsive therapy. Consent to electroconvulsive
23 therapy must be express;

24 (b) Preferences concerning treatment facilities and care providers;
25 and

26 (c) Nomination of a guardian for the court to consider if
27 guardianship proceedings commence.

28 (2) A principal may not consent to or authorize an agent to consent
29 to psychosurgery in a directive.

30 Sec. 12. (1) An advance mental health care directive shall remain
31 in effect until it expires according to its terms or until it is revoked

1 by the principal.

2 (2) A principal may revoke a directive even if the principal is
3 incapacitated unless the principal makes the directive irrevocable during
4 periods of incapacity.

5 (3) A principal with capacity or a principal without capacity who
6 did not make his or her directive irrevocable during periods of
7 incapacity may revoke a directive by:

8 (a) A written statement revoking the directive;

9 (b) A subsequent directive that revokes the original directive. If
10 the subsequent directive does not revoke the original directive in its
11 entirety, only inconsistent provisions in the original directive are
12 revoked; or

13 (c) Physical destruction of the directive with the intent that it be
14 revoked.

15 (4) When a principal with capacity consents to treatment that is
16 different than the treatment requested in his or her directive or refuses
17 treatment that the principal requested in his or her directive, this
18 consent or refusal does not revoke the entire directive but is a waiver
19 of the inconsistent provision.

20 Sec. 13. (1) A principal has a right to form a self-binding
21 arrangement for care in an advance mental health care directive. A self-
22 binding arrangement allows the principal to obtain treatment in the event
23 that an acute mental health episode renders the principal incapacitated
24 and induces the principal to refuse treatment. To provide advance consent
25 to inpatient treatment despite the principal's illness-induced refusal,
26 in the directive a principal shall:

27 (a) Make the directive irrevocable pursuant to subsection (2) of
28 section 7 of this act; and

29 (b) Consent to admission to an inpatient treatment facility.

30 (2) If the principal wants administration of psychotropic medication
31 despite the principal's illness-induced refusal of medication, the

1 principal shall expressly consent to psychotropic medication in an
2 irrevocable directive.

3 (3) If the principal forms a self-binding arrangement for treatment
4 but then refuses admission to an inpatient treatment facility despite the
5 directive's instructions to admit:

6 (a) The principal's statements in the directive requesting inpatient
7 treatment upon activation of the directive, combined with activation of
8 the directive, and contemporaneous refusals of treatment requested in the
9 directive create a rebuttable presumption that the principal lacks
10 capacity; and

11 (b) The inpatient treatment facility shall respond as follows:

12 (i) The facility shall, as soon as practicable, obtain the informed
13 consent of the principal's agent, if any is designated;

14 (ii) A physician, physician assistant, advanced practice registered
15 nurse, or any other health care professional licensed to diagnose
16 illnesses and prescribe drugs shall, within twenty-four hours after the
17 principal's arrival at the facility, evaluate the principal to determine
18 whether the principal has capacity and to document in the principal's
19 medical record a summary of findings, evaluations, and recommendations;
20 and

21 (iii) If the evaluating mental health professionals determine the
22 principal lacks capacity, the principal shall be admitted into the
23 inpatient treatment facility pursuant to the principal's directive.

24 Sec. 14. (1) If a principal is admitted into an inpatient treatment
25 facility pursuant to section 13 of this act, the treating mental health
26 professional shall document in the principal's medical records all
27 treatment administered.

28 (2) After thirty-five days from the date of admission, if the
29 principal has not regained capacity or has regained capacity but refuses
30 to consent to remain for additional treatment, the facility shall release
31 the principal during daylight hours unless the principal is detained

1 pursuant to involuntary commitment standards.

2 (3) A principal may specify a shorter amount of time than thirty-
3 five days in the advance mental health care directive if the principal
4 consents to being hospitalized in the directive.

5 (4) If a principal who has been determined to lack capacity
6 continues to refuse inpatient treatment, the principal may seek
7 injunctive relief for release from the facility.

8 Sec. 15. If a principal with an irrevocable advance mental health
9 care directive consenting to inpatient treatment refuses psychotropic
10 medication through words or actions, only a licensed psychiatrist may
11 administer psychotropic medication, and only if:

12 (1) The principal expressly consented to psychotropic medication in
13 the principal's irrevocable directive;

14 (2) The agent, if one was designated, consented to psychotropic
15 medication; and

16 (3) A licensed psychiatrist, physician, physician assistant,
17 advanced practice registered nurse, or any other health care professional
18 licensed to diagnose illnesses and prescribe drugs recommends in writing
19 treatment with the specific psychotropic medication.