



## Who Makes Your Health Care Decisions When You are Incapacitated?

### 1. HOW CAN THE NEW MEXICO UNIFORM HEALTH CARE DECISIONS ACT ASSIST YOU IF YOU LOSE THE ABILITY TO MAKE DECISIONS?

The law that controls who can make health care decisions for you is called the New Mexico Uniform Health Care Decisions Act. For simplicity, in this document we will call this law “the Act.”

The first part of the Act sets the rules for appointing a person of your choice to make health care decisions for you, if a time comes when you can no longer make those decisions yourself.

You can appoint a person by completing a simple form called a Power of Attorney for Health Care, and also known as an Advance Health Care Directive. In this document, we will call this form a “Directive.”

The person you name in your Directive is called your “Agent.” Naming a person you trust, in advance, helps make sure you get the care you want.

Having an Agent who you trust to make decisions helps to make sure you get the type of medical care you want. It helps your doctors and health care providers by allowing them to rely on one person to make decisions for you. It helps prevent confusion and disagreement between your family members.

Your Directive also allows you to make some important health care decisions in advance. Although it may be hard to think about these types of decisions when you are still healthy, it is best to make these important health care decisions before becoming sick or hurt. After all, you may not be able to tell people what your choices are if you are very ill.

The Act includes a standard version of the Directive form you can download and use. Your hospital may have their own versions of this form. You only need to complete one Directive.

When you complete your Directive, you can either give your Agent the power to start making decisions for you right away, or you can give them that power only when you are unable to make health care decisions for yourself (when you are “incapacitated.”)

An advantage of having a Directive become effective immediately is that it can be used in event of emergencies or when a person is unable to make health care decisions but has not yet been found “incapacitated.” If you choose to make it effective immediately, you can still make decisions for yourself, and your Agent does not get to make choices for you that you disagree with.

## **2. WHAT IS INCAPACITY?**

“Incapacity” is the legal word we use when a person cannot understand the consequences of their medical situation. They are not capable of making an informed decision about medical care. For example: a person who is unconscious cannot make decisions. They are “incapacitated.” A person with dementia might not be able to understand what is happening to them. They might be incapacitated.

The Act says that a person is incapacitated when two qualified health care professionals decide they can no longer make decisions. One of these is supposed to be the patient’s primary care provider. If a person cannot make decisions because of a mental illness or developmental disability, one of the two health care professionals saying they are incapacitated should be an expert in their type of illness.

The supervising health care practitioner where you get your medical care should promptly put into your medical record that they found you incapacitated, and they should tell you about any decisions made about your care. They should tell you who is making the decisions for you.

If your doctors say you are incapacitated but you disagree, you can challenge them by writing and signing a letter that says you disagree, or by telling the supervising health care practitioner where you are getting care that you disagree. When you challenge the decision that you are incapacitated, your health care providers are supposed to honor your wishes and decisions unless a court tells them otherwise.

Remember, a Directive allows you to state many important health care choices in advance, so that if you become incapacitated later, your wishes for health care are clear.

### **3. WHAT HAPPENS IF YOU DON'T HAVE AN AGENT?**

If you are incapacitated and you have not completed a Directive, then the second part of the Act tells your doctors which people they can listen to for decisions about your care.

Under the Act, a person called a “Surrogate” will be selected from the following categories. If more than one person from the list is willing to take on this responsibility, the person higher on the list will be the Surrogate:

1. Spouse
2. Significant other
3. Adult child
4. Parent
5. Adult sibling
6. Grandparent
7. An adult who has exhibited special care and concern for you who is familiar with your values

A surrogate can only make decisions for you if you have been found to be incapacitated.

If more than one member of the same group on the list of potential surrogates (for example, more than one of your Adult Children) claim to act as your Surrogate, then the decision of the majority is controlling. If the group splits evenly on a decision, then the Act says all members of that group and any people ranked lower on the list will be not be able to make decisions for you.

A health care provider may not be your surrogate unless they are related to you by blood, marriage or adoption.

The supervising health care practitioner may choose to require your Surrogate to provide a sworn statement that shows facts that makes it clear they are legally acting as Surrogate.

Remember, a Directive allows you to name, in advance, the specific person you want to make your health care decisions if you are incapacitated later. When you have an Agent, there is no need for a Surrogate.

### **4. WHAT DOES A SURROGATE OR AN AGENT DO?**

Health care decisions can be very serious. They can include choices about surgery or major medical treatments. Someone may have to decide whether to provide life-sustaining treatment. Someone may have to choose which doctors or hospitals to go to, which nursing home to place you in, and all other health-related decisions. Appointing an

Agent makes sure you have someone you really trust making these decisions, rather than whoever volunteers and happens to be closest to the top of the list.

If you are incapacitated but still conscious and able to understand, your Agent or Surrogate should promptly tell you about the decisions they make about your care. They also need to tell your supervising health care practitioner and your family members.

Your Agent or Surrogate must make health care decisions for the you in line with what they know about your health care wishes. If they really do not know what your wishes were, then they must act in your best interest, taking into account what they do know about your values.

Even if you are incapacitated, you can disqualify a person from being your Surrogate by writing and signing a letter saying you do not want them in that role. You can also disqualify them by personally notifying the supervising health care professional.

Likewise, you can revoke your Directive at any time, even after you are found incapacitated. This is done in writing or orally by notifying the main health care practitioner or the supervising health care practitioner where care is provided.

Remember, if you have a Directive, your Agent can speak for you and communicate your health care choices based on the instructions you gave in your Directive while you were able to make health care decisions.

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