

1999 SENATE HUMAN SERVICES

SB 2320

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2320

Senate Human Services Committee

Conference Committee

Hearing Date FEBRUARY 8, 1999

Tape Number	Side A	Side B	Meter #
1	X		1,657
2	X		315
1		X	3,585
Committee Clerk Signature <i>Barbara Salade, clerk</i>			

Minutes:

The hearing was opened on SB2320.

SENATOR KILZER, sponsor of the bill, introduced the bill. (written testimony)

SENATOR LEE: As a board member for Hospice, are we putting hospice care in jeopardy with this bill. SENATOR KILZER assured her it would not. SENATOR LEE asked about the definition of extraordinary and ordinary means. SENATOR KILZER replied they were talking ordinary means.

SENATOR DEMERS, sponsor of the bill, explained further. In 1989 and 1991 the living will law was passed. The major purpose was so people could express wishes and have them carried out. We cannot go beyond carrying out wishes. She is willing to support amendments. Hospice will not be affected.

CHRIS DODSON, ND Catholic Conference, supports bill in written testimony.

SENATOR DEMERS asked about minors; in one instance a minor was in a vegetable state for 12 years. Is this appropriate for this kind of patient. MR. DODSON answered that in a persistent vegetative state the issue must be addressed.

STACEY PFLIIGER, ND Nurses Assoc., supports bill in written testimony.

SENATOR LEE asked about the amendment; did it add parallelism between 3-4-5. BRUCE LEVI, ND Medical Assoc., reviewed the material from Legislative process from the history; this will clear up language. The amendment was added because bill needs to be cleaned up.

MRS. GARY BENZ, citizen, supports bill, need to keep nutrition and hydration going for all patients.

SHELLY PETERSON, ND Long Term Care Assoc., supports bill. Residents was advanced directive. Family will recognize if the resident is able to make a decision on. There is a choice at that point. 56% have directive under whatever circumstances. Not in the bill is the issue of terminal conditions; eminent death, not a 6 month condition, it will occur very shortly. I would feel more comfortable if there were a sunset in it; only because it will force us to come back to you and say this is what the study concluded. SENATOR DEMERS asked what do you want sunset. MS. PETERSON stated that just the new language should be included in sunset.

AL WOLF, attorney, stated that the amendments of the Right to Life would make it clear.

SENATOR LEE asked if he supports sunset. MR. WOLF said yes, it would assure that this will be addressed next section. SENATOR DEMERS: Where is this amendment supposed to go?

MR. WOLF answered that it goes in the nutrition hydration section 23-06.4-06. It is under the living will statue.

MR. DODSON stated that the bill says you have to be terminally ill and one of these conditions have to exist. SENATOR DEMERS asked why you need this extra language. MR. DODSON; I don't know whether it is needed or not; 6 months ago members of the committee thought it did.

ROGER WETZEL: On the planning committee basically our planning will be from January-August. What are the issues we really need to look at needed to enhance or clarify end of life issues in ND. We are optimistic and anticipate we will receive extra funding from the Robert Johnson Wood Foundation; then to begin to look at implementation and change and recommendation and that will probably be 2 years. We will be identifying issues; are open to input from any sources; looking at task forces. SENATOR DEMERS: What is the connection with the legislature on the task force? MR. WETZEL: SENATOR LEE and

REPRESENTATIVE SVEDGAN.

No opposition to Bill #2320.

The hearing was closed on SB2320.

Discussion resumed on 2320. Terminal condition definition. Sunset clause. Nothing in this chapter permits an agent to consent to the withdrawal of nutrients or hydration. The sunset clause. This provision will expire July 31, 2001 unless renewed. New subsection 6 and new subsection 5 to contain sunset clause.

SENATOR KILZER moved amendments. SENATOR FISCHER seconded them. Roll call vote carried 6-0. SENATOR FISCHER moved DO PASS AS AMENDED. SENATOR LEE seconded it. Roll call vote carried 6-0-0. SENATOR KILZER will carry it.

SB2320 was recalled to committee because of a technical language amendment. The amendment was drawn up by Legislative Council. SENATOR DEMERS moved to recall SB2320.

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Senate Human Services Committee

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SENATOR FISCHER seconded it. Roll call vote carried 6-0-0. SENATOR DEMERS moved to remove existing amendments. SENATOR FISCHER seconded it. SENATOR DEMERS explained the technicality. SENATOR DEMERS moved Legislative Council .0102 amendment. SENATOR KILZER seconded it. Roll call vote carried 6-0-0. SENATOR DEMERS moved a DO PASS AS AMENDED. SENATOR KILZER seconded it. Roll call vote carried 6-0-0. SENATOR KILZER will carry the bill.

Date: 2/8/99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2320

Senate HUMAN SERVICES COMMITTEE Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Amendment

Motion Made By Sen Kilzer Seconded By Sen Fischer

Senators	Yes	No	Senators	Yes	No
Senator Thane	✓				
Senator Kilzer	✓				
Senator Fischer	✓				
Senator Lee	✓				
Senator DeMers	✓				
Senator Mutzenberger	✓				

Total 6 (yes) 0 (no)

Absent 0

Floor Assignment _____

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

subsection 6. + sunset clause
subsection 5- ✓ sunset clause

Date: 7/8/99
Roll Call Vote #: 2

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2220

Senate HUMAN SERVICES COMMITTEE Committee

- Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as amended

Motion Made By Sen Fischer Seconded By Sen Lee

Senators	Yes	No	Senators	Yes	No
Senator Thane	✓				
Senator Kilzer	✓				
Senator Fischer	✓				
Senator Lee	✓				
Senator DeMers	✓				
Senator Mutzenberger	✓				

Total 6 (yes) 0 (no)

Absent 0

Floor Assignment Sen Kilzer

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

REPORT OF STANDING COMMITTEE

SB 2320: Human Services Committee (Sen. Thane, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2320 was placed on the Sixth order on the calendar.

Page 1, line 3, after "patients" insert "; and to provide an expiration date"

Page 1, line 10, replace ", or" with ". This chapter does not permit an agent" and remove "the"

Page 1, line 11, replace "withdrawal" with "withdraw" and replace "withholding of" with "withhold"

Page 2, after line 6, insert:

"SECTION 3. EXPIRATION DATE. This Act is effective until July 31, 2001, and after that date is ineffective."

Renumber accordingly

Date: 2/15/99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2320

Senate HUMAN SERVICES COMMITTEE Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Recall 2320

Motion Made By Sen DeMers Seconded By Sen Fischer

Senators	Yes	No	Senators	Yes	No
Senator Thane	✓				
Senator Kilzer	✓				
Senator Fischer	✓				
Senator Lee	✓				
Senator DeMers	✓				
Senator Mutzenberger	✓				

Total 6 (yes) 0 (no)

Absent 0

Floor Assignment _____

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

Date: 2/15/99
Roll Call Vote #: 2

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2320

Senate HUMAN SERVICES COMMITTEE Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Remove Amendments

Motion Made By Sen DeMers Seconded By Sen Fischer

Senators	Yes	No	Senators	Yes	No
Senator Thane	✓				
Senator Kilzer	✓				
Senator Fischer	✓				
Senator Lee	✓				
Senator DeMers	✓				
Senator Mutzenberger	✓				

Total 6 (yes) 0 (no)

Absent 0

Floor Assignment _____

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

Date: 7/15/99
Roll Call Vote #: 3

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2320

Senate HUMAN SERVICES COMMITTEE Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken 0102 Amendment

Motion Made By Sen DeMers Seconded By Sen Kilzer

Senators	Yes	No	Senators	Yes	No
Senator Thane	✓				
Senator Kilzer	✓				
Senator Fischer	✓				
Senator Lee	✓				
Senator DeMers	✓				
Senator Mutzenberger	✓				

Total 6 (yes) 0 (no)

Absent 0

Floor Assignment _____

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

REPORT OF STANDING COMMITTEE

SB 2320: Human Services Committee (Sen. Thane, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2320 was placed on the Sixth order on the calendar.

Page 1, line 3, after "patients" insert "; to provide an effective date; and to provide an expiration date"

Page 1, line 10, replace ", or" with ". This chapter does not permit an agent" and remove "the"

Page 1, line 11, replace "withdrawal" with "withdraw", replace "withholding of" with "withhold", and replace "had" with ":

a. Made"

Page 1, line 12, remove "made", after "hydration" insert an underscored semicolon, and replace "the patient has" with:

"b. Has"

Page 1, line 14, remove "has" and remove "that"

Page 1, line 16, replace the first "or" with an underscored comma and after "harmful" insert an underscored comma

Page 2, line 1, replace "had made" with ":

a. Made"

Page 2, line 2, after "hydration" insert an underscored semicolon and replace "the patient has" with:

"b. Has"

Page 2, line 3, remove "has"

Page 2, line 4, remove "that"

Page 2, line 5, replace the second "or" with an underscored comma

Page 2, line 6, after "harmful" insert an underscored comma

Page 2, after line 6, insert:

"SECTION 3. EFFECTIVE DATE - EXPIRATION DATE. This Act applies to every durable power of attorney for health care executed after July 31, 1999. This Act is effective until July 31, 2001, and after that date is ineffective."

Renumber accordingly

1999 HOUSE HUMAN SERVICES

SB 2320

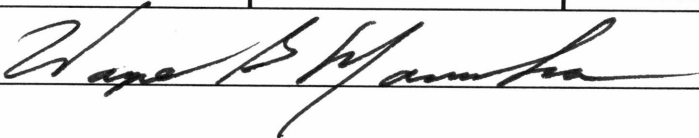
1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2320

House Human Services Committee

Conference Committee

Hearing Date March 2, 1999

Tape Number	Side A	Side B	Meter #
1	x		9.7-end
1		x	0.0-1.3
1		x	18.4-19.1
Committee Clerk Signature 			

Minutes:

Senator Ralph Kilzer, District 47 testified: (Testimony attached)

Rep. ROXANNE JENSEN: What was the Attorney General's opinion that inspired the bill?

Senator Ralph Kilzer: I don't know the details.

Rep. ROBIN WEISZ :The withholding can only occur when the physician says that it would be inappropriate because it could not be assimilated. Senator Ralph Kilzer: Or if the patient has before hand stated that's what they wanted.

Rep. WILLIAM DEVLIN :Asked about the legal requirements to constitute a "valid written Statment"? Senator Ralph Kilzer: Considered that statement to mean a living will.

Senator Judy DEMERS, District 18 testified: Provided some history of the bill. In 1993 three sections of the code were amended to clear up inconsistencies. There was a group in place to study end of life issues during the interim. The Attorney General stated that the same standards

were not being used in living wills, durable power-of-attorney and informed consent laws. This bill will provide this missing consistencies. The removal of valid from the statement clause is acceptable. Requested the committee's support.

CHRISTOPHER DODSON, Executive Director, North Dakota Catholic Conference testifies:

(Testimony attached)

Rep. CLARA SUE PRICE wanted to know if a living will could be used to not decide the issue until later. CHRISTOPHER DODSON responded that any decision can be made in a living will including for the agent to make decisions based on the written statements of based on the agent's understanding of the individual's wishes.

Rep. DALE HENEGAR : Pointed out that there is a difference between the effects of removal of nutrition and hydration on a patient. CHRISTOPHER DODSON acknowledged there is a difference and stated that the termes were used together only for convenience.

Rep. CLARA SUE PRICE questioned whether language used in older living wills and durable powers-of-attorneys could be a problem if the bill is passed. CHRISTOPHER DODSON : Regarding durable powers-of-attorney decisions can be made based on orally stated wishes. We understood that the oral statements could not be used for withholding nutrition or hydration which had to be a written document. The Attorney General disagreed and thus the amendments were added to the bill to clarify this point. Living wills drafted before 1989 are substantially the same form.

STACEY PFLIIGER, Executive Director, North Dakota Right To Life Association testified:

Testimony attached.

AL WOLF, Bismarck Attorney representing Benedictine Health Systems testified: Pointed out that some uniformity is necessary in nursing homes. There are different views particularly in light of the Attorney General's opinion. Relative to oral statements, it is important that it is recognized that if they are permitted through a durable power-of-attorney for medical decisions this does not clear the way for the acceptance of other oral statements for other purposes.

Rep. ROXANNE JENSEN didn't understand the statement about oral statements. AL WOLF stated that he meant that oral statements used through a durable power-of-attorney could be used only if there were no written documentation. Oral statements will not supersede a written document.

Rep. CLARA SUE PRICE asked about the standard procedures used in nursing homes. AL WOLF stated that generally a living will is required on file at admission.

OPPOSITION TO SB2320

MELVIN WEBSTER testified: (Testimony attached)

Rep. TODD PORTER pointed out a difference between the signer of a living will revoking it and taking an oral statement from the durable power of attorney. MELVIN WEBSTER responded that the living will can be revoked orally which points out the recognized validity of oral statements. Usually the decisions are going to be made by close relatives who should be permitted to make these decisions based on what they were told. Rep. TODD PORTER didn't think it was clear in a situation where the children couldn't agree on what the parent wanted relative to withholding nutrition. MELVIN WEBSTER said that he thought health care providers would continue treatment unless there was a clear mandate from the children.

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House Human Services Committee

Bill/Resolution Number 2320

Hearing Date March 2, 1999

Rep. CLARA SUE PRICE wanted to know if the July 31 date on page 2 line 11 was the date signed or executed? MELVIN WEBSTER replied that this was the date signed.

Hearing Closed on SB2320

Rep. CLARA SUE PRICE appointed Rep. ROXANNE JENSEN , Rep. ROBIN WEISZ and Rep. RALPH METCALF to a subcommittee to consider SB2320. The subcommittee was directed to consider how an out-of-state resident be handled.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2320

House Human Services Committee

Conference Committee

Hearing Date March 9, 1999

Tape Number	Side A	Side B	Meter #
1		x	34.7-end
2	x		0.0-1.1
Committee Clerk Signature <i>Dave E. Hansen</i>			

Minutes:

Opened COMMITTEE DISCUSSION on SB2320.

Rep. ROXANNE JENSEN presented the subcommittee findings which included proposed amendments 98334.0301 (attached) as prepared by the Legislative Council staff and moved their acceptance. Rep. RALPH METCALF seconded the motion. Motion passed on voice vote: 13 yes, 0 no, 2 absent.

Rep. ROXANNE JENSEN moved amendment #2 which would add a section on line 5 which would cover the making of an oral statement with the same wording as the previous amendment.

Rep. ROBIN WEISZ seconded the motion. There was discussion concerning the offering of an oral statement and the relationship to a durable power of attorney and a living will. The amendment PASSED on a voice vote: 14 YES, 0 NO, 1 ABSENT.

Page 2

House Human Services Committee

Bill/Resolution Number 2320mar9

Hearing Date March 9, 1999

Rep. ROXANNE JENSEN moved DO PASS AS AMENDED. Rep. ROBIN WEISZ seconded the motion.

Motion PASSED on roll call vote #1: 14 YES, 0 NO, 1 ABSENT.

CARRIER: Rep. ROXANNE JENSEN

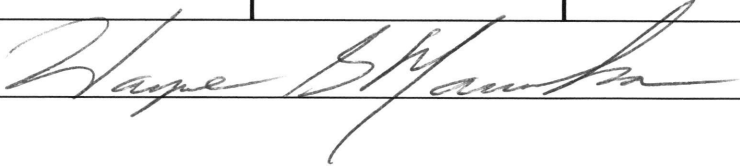
1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2320

House Human Services Committee

Conference Committee

Hearing Date March 17, 1999

Tape Number	Side A	Side B	Meter #
1	x		13.4-44.9
Committee Clerk Signature 			

Minutes:

Opened COMMITTEE DISCUSSION

Rep. ROXANNE JENSEN presented amendments that had been developed by the subcommittee with the help of Mr. CHRISTOPHER DODSON that incorporates new language concerning the durable power of attorney statute. However, the amendments do not address the situation of a comatose person unable to make the decision.

Rep. ROXANNE JENSEN moved the amendments, seconded by Rep. ROBIN WEISZ. There was some discussion with Mr. DODSON concerning the definition of a "written statement" and the definition of "durable power of attorney" as affected by living wills written prior to 1991 and after 1991. It was noted that the amendments could, in some instances, change the interpretation of living wills already in place. If attorneys are doing their jobs, however, people should not be

Page 2

House Human Services Committee
Bill/Resolution Number 2320mar17
Hearing Date March 17, 1999

caught by surprise. After discussion the question was called and the motion PASSED on a voice
vote: 15 YES, 0 NO, 0 ABSENT.

Closed COMMITTEE DISCUSSION.

Reopened COMMITTEE DISCUSSION.

Rep. BLAIR THORESON moved a DO PASS AS AMENDED, seconded by Rep. TODD

PORTER. After discussion the motion PASSED on a roll call vote: 9 YES, 5 NO, 1 ABSENT.

CARRIER: Rep. SALLY SANDVIG.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL 2320

Page one, line 14, delete the words "a valid" and substitute the words "an oral or."

Page two, line 4, delete the words "a valid" and substitute the words "an oral or."

Amend # 1

PROPOSED AMENDMENTS TO SENATE BILL NO. 2320

Page 1, line 14, remove "valid" and remove the second "or"

Page 1, line 15, after "b." insert "Made an oral statement to the agent concerning nutrition or hydration; or

c."

Page 2, line 4, remove "valid"

Renumber accordingly

Amend # 2

ad section line 5 b.

"Made an oral statement to the authorized

VR
3/9/99

HOUSE AMENDMENTS TO SENATE BILL NO. 2320 HUMSER 3/9/99

Page 1, line 14, remove "valid" and remove the second "or"

Page 1, line 15, after "b." insert "Made an oral statement to the agent concerning nutrition or hydration; or

c."

HOUSE AMENDMENTS TO SENATE BILL NO.2320 HUMSER 3/9/99

Page 2, line 4, remove "valid" and remove the second "or"

Page 2, line 5, after "b." insert "Made an oral statement to the authorized person concerning nutrition or hydration; or

c."

Renumber accordingly

Date: 3-9-99
Roll Call Vote #: /

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2320

House Human Services Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number ~~SB2320~~

Action Taken Do Pass As Amended

Motion Made By Rep Jensen Seconded By Rep Weisz

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman	✓		Bruce A. Eckre		
Robin Weisz - Vice Chairman	✓		Ralph Metcalf	✓	
William R. Devlin	✓		Carol A. Niemeier	✓	
Pat Galvin	✓		Wanda Rose	✓	
Dale L. Henegar	✓		Sally M. Sandvig	✓	
Roxanne Jensen	✓				
Amy N. Kliniske	✓				
Chet Pollert	✓				
Todd Porter	✓				
Blair Thoreson	✓				

Total Yes 14 No 0
Absent 1

Floor Assignment Rep Jensen

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

REPORT OF STANDING COMMITTEE

SB 2320, as engrossed: Human Services Committee (Rep. Price, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2320 was placed on the Sixth order on the calendar.

Page 1, line 14, remove "valid" and remove the second "or"

Page 1, line 15, after "b." insert "Made an oral statement to the agent concerning nutrition or hydration; or

c."

Page 2, line 4, remove "valid" and remove the second "or"

Page 2, line 5, after "b." insert "Made an oral statement to the authorized person concerning nutrition or hydration; or

c."

Renumber accordingly

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL 2320

Page 1, line 13, remove "the patient"

Page 1, line 14, remove "Made a valid written statement concerning nutrition or hydration" and insert "The agent is acting pursuant to subdivision (a) of subsection 2 of this section"

Page 1, line 15, after "b.", insert "The patient"

Page 2, line 4, remove "valid"

Page 2, line 4, after "hydration" insert "contained in a declaration executed pursuant to chapter 23-06.4 or a durable power of attorney for health care executed pursuant to chapter 23-06.5"

Page 2, line 10, remove "This Act applies to every durable power of attorney for health care executed after July 31, 1999."

Renumber accordingly

PROPOSED AMENDMENTS TO SENATE BILL 2320

Page 1, line 14, remove “valid”

Page 1, line 14, after “hydration” insert “contained in a declaration executed pursuant to chapter 23-06.4 or a durable power of attorney for health care”

Page 1, after line 14, insert:

“b. Made an oral statement concerning nutrition or hydration to an agent after the execution of a durable power of attorney for health care; or”

Page 2, line 4, remove “valid”

Page 2, line 4, after “hydration” insert “contained in a declaration executed pursuant to chapter 23-06.4 or a durable power of attorney for health care executed pursuant to chapter 23-06.5”

Page 2, line 10, remove “This Act applies to every durable power of attorney for health care executed after July 31, 1999.”

Renumber accordingly

How Section 1 of Engrossed Senate Bill 2320 would read with the amendments:

SECTION 1. AMENDMENT. Subsection 5 of section 23-06.5-03 of the 1997

Supplement to the North Dakota Century Code is amended and reenacted as follows:

5. Nothing in this chapter permits an agent to consent to admission to a mental health facility or state institution for a period of more than forty-five days without a mental health proceeding or other court order, or to psychosurgery, abortion, or sterilization, unless the procedure is first approved by court order. This chapter does not permit an agent to withdraw or withhold nutrition or hydration, or both, unless:
 - a. The agent is acting pursuant to subdivision (a) of subsection 2 of this section; or
 - b. The patient has a terminal condition as defined in subsection 7 of section 23-06.4-02 and the attending physician determined the administration of nutrition or hydration is inappropriate because the nutrition or hydration cannot be physically assimilated by the patient, would be physically harmful, or would cause unreasonable physical pain to the patient.

VK
3/18/99

HOUSE AMENDMENTS TO ENGROSSED SENATE BILL NO. 2320 HUMSER 3/18/99

Page 1, line 3, remove "; to provide an effective date"

Page 1, line 13, remove "the patient"

Page 1, line 14, replace "Made a valid written statement concerning nutrition or hydration" with "The agent is acting pursuant to subdivision a of subsection 2 of this section"

Page 1, line 15, replace "Has" with "The patient has"

HOUSE AMENDMENTS TO ENGROSSED SENATE BILL NO.2320 HUMSER 3/18/99

Page 2, line 4, remove "valid" and after "hydration" insert "contained in a declaration executed pursuant to chapter 23-06.4 or a durable power of attorney for health care executed pursuant to chapter 23-06.5"

Page 2, line 10, remove "**EFFECTIVE DATE -**" and remove "This Act applies to every"

Page 2, line 11, remove "durable power of attorney for health care executed after July 31, 1999."

Renumber accordingly

Date: 3-17-99
 Roll Call Vote #: 4

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. SB 2320

House Human Services Committee

Subcommittee on _____
 or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as Amended

Motion Made By Rep Thoreson Seconded By Rep Pollert

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman		✓	Bruce A. Eckre		✓
Robin Weisz - Vice Chairman		✓	Ralph Metcalf	✓	
William R. Devlin		✓	Carol A. Niemeier	✓	
Pat Galvin	✓		Wanda Rose	✓	
Dale L. Henegar			Sally M. Sandvig	✓	
Roxanne Jensen		✓			
Amy N. Kliniske	✓				
Chet Pollert	✓				
Todd Porter	✓				
Blair Thoreson	✓				

Total Yes 9 No 5
 Absent 1

Floor Assignment Rep Sandvig

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

REPORT OF STANDING COMMITTEE

SB 2320, as engrossed: Human Services Committee (Rep. Price, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (9 YEAS, 5 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2320 was placed on the Sixth order on the calendar.

Page 1, line 3, remove "; to provide an effective date"

Page 1, line 13, remove "the patient"

Page 1, line 14, replace "Made a valid written statement concerning nutrition or hydration" with "The agent is acting pursuant to subdivision a of subsection 2 of this section"

Page 1, line 15, replace "Has" with "The patient has"

Page 2, line 4, remove "valid" and after "hydration" insert "contained in a declaration executed pursuant to chapter 23-06.4 or a durable power of attorney for health care executed pursuant to chapter 23-06.5"

Page 2, line 10, remove "**EFFECTIVE DATE -**" and remove "This Act applies to every"

Page 2, line 11, remove "durable power of attorney for health care executed after July 31, 1999."

Renumber accordingly

1999 SENATE HUMAN SERVICES

SB 2320

CONFERENCE COMMITTEE

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2320CC

Senate Human Services Committee

Conference Committee

Hearing Date MARCH 26, 1999

Tape Number	Side A	Side B	Meter #
2	X		
3/29/99 1	X		
Committee Clerk Signature <i>Carol K. Sejchuk</i>			

Minutes:

The conference committee on SB2320 was called to order by SENATOR KILZER. Roll call: SENATOR KILZER, SENATOR LEE, SENATOR DEMERS, REPRESENTATIVE JENSEN, REPRESENTATIVE WEISZ, REPRESENTATIVE METCALF. REPRESENTATIVE JENSEN offered an explanation of the House amendments. Catholic Conference and Right to Life brought them in. REPRESENTATIVE WEISZ further explained that the CHRIS DOBSON amendments were agreed to by Right to Life. SENATOR DEMERS stated that if we say we can go back and take agents we wouldn't need to have the effective date. If we are saying all agents are effective agents regardless of being written or not the effective date is not necessary. REPRESENTATIVE WEISZ answered that the durable power had authority to make all decisions. Now could a change in the informed consent make a difference? SENATOR

DEMERS: I'm changing my mind that we don't need the effective date. REPRESENTATIVE

WEISZ moved the House recede from House amendments. SENATOR DEMERS second.

SENATOR DEMERS requested talking to the Attorney General.

The committee was adjourned until after the call of the chair.

The committee reconvened on 3/29/99. Roll call was taken with all participants present.

BETH BAUMSTARK, Attorney general's office, explained exactly what the House amendments did. This is the way it is now. An agent is able to use prior oral statements the wishes of the patient to determine health care. Bill does not change when in a non terminal condition.

SENATOR DEMERS questioned the word written in House Amendment on page 1, line 14.

MS. BAUMSTARK answered that page 1, line 15 does not pertain to this subsection, but pertains to subsection 12-06.5-03. Section 2 of the bill deals with informed consent. This broadens what the senate initially passed. If you don't have a durable power of attorney or living will and in a non-terminal state, spouse and children cannot make a decision on nutrition or hydration. SENATOR DEMERS asked if this changed what is currently in law? MS.

BAUMSTARK: Yes, it is adding the requirement for a written statement. Now, they can decide what they would have wanted from whatever source, if they can't determine it then it would be based on what they determine to be in your best interests. SENATOR LEE: What we do is we are requiring a written document where we were not before. MS. BAUMSTARK: If you have a durable power, it is not required. The House amendments make this a better bill than when it left the Senate. Overall it is still limiting. SENATOR DEMERS: Did we change what the House did with the effective date? MS. BAUMSTARK: The House took it out cause it was not

needed. REPRESENTATIVE JENSEN: Would you tell me more of what we've done under the

informed consent act. MS. BAUMSTARK: Under the Informed Consent Statute right now, if you don't have a living will or durable power of attorney your statutory agent can make any health care decisions on your behalf that you couldn't make yourself. They can base this on what you believe you would have wanted. If they can't do that they can make a decision on what they believe are your best interests. It is kind of wide open in terms of what they can do if you are incapacitated. Under this bill with the House amendment they may not make a decision relating to withdrawing or withholding nutrition or hydration unless you'd made a written statement in either durable power of attorney for health care or in a living will. SENATOR LEE gave the example of someone falling off the dock at a lake. The person is resuscitated but will not make it. MS. BAUMSTARK: Under this bill nothing can be done. If there is no brain activity the person would be declared dead. If there is brain stem activity - no choice but to continue hydration and nutrition. SENATOR DEMERS gave a definition of brain dead.

REPRESENTATIVE WEISZ stated that we are somewhat restricting the durable power of attorney.

Discussion was held. SENATOR LEE moved to reconsider actions from last Thursday, Mar 26. The motion was seconded by SENATOR DEMERS. Roll call vote carried 6-0-0. SENATOR DEMERS: Perhaps we could put written or oral statement concerning nutrition or hydration and eliminate the reference to the specific document. REPRESENTATIVE WEISZ: That is exactly what the House did, but the amendments were defeated on the House floor.

STACY PFLEIGER, Right to Life Assoc. offered several suggestions. REPRESENTATIVE PRICE, Chairperson of House Human Services Committee, commented on the situation.

SENATOR LEE expressed concern with the Government delving into decision making that

Page 4

Senate Human Services Committee

Bill/Resolution Number SB2320CC

Hearing Date MARCH 26, 1999

should not be taken from me. It is not right to say families will make decisions without knowledge. SENATOR DEMERS moved to accept House amendments for Sect 1 & 3. Reject section 2. Reamend line 4 - a period concerning nutrition and hydration. SENATOR LEE seconded it. Discussion. Roll call vote carried 6-0-0. SENATOR KILZER will carry the bill.

Date 3/26/99

Roll call vote # 1

Please type or use black pen to complete

1997 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. SB 2320

Senate _____ Committee _____

Subcommittee on _____ (Identify or

Conference Committee Human Services (check where appropriate)

Legislative Council Amendment Number _____

Action Taken Recede from House Amendment & Further Amend

Motion Made By Rep Weisz Seconded By Sen De Mesa

Senators	Yes	No	Representatives	Yes	No
<u>Kibbe</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Jensen</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>Lee</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Weisz</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>De Mesa</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Metcalf</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Total 6 0
(Yes) (No)

Absent 0

Floor Assignment _____

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

page 1 line 13 - 14 - 15
Page 2 line 4

DO NOT USE HIGHLIGHTER ON ANY FORMS

Date 3/29/99

Roll call vote # 1

Please type or use black pen to complete

1997 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. SB2320

DO NOT USE HIGHLIGHTER ON ANY FORMS

Senate _____ Committee _____

Subcommittee on _____ (Identify or check where appropriate)
Conference Committee Human Services

Legislative Council Amendment Number _____

Action Taken Reverse the decision made by Conference Committee on Mar 26, 99

Motion Made By Sen. Lu Seconded By Sen. DeMaso

Senators	Yes	No	Representatives	Yes	No
<u>Kilger</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Jensen</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>Lu</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Wing</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>DeMaso</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Mittaby</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
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_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

Total 6 0
(Yes) (No)

Absent _____

Floor Assignment _____

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

Date 3/29/99

Roll call vote # 2

Please type or use black pen to complete

1997 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. SB2320

Senate _____ Committee _____

Subcommittee on _____ (Identify or

Conference Committee Human Services (check where appropriate)

Legislative Council Amendment Number _____

Action Taken Accept House Amendments to Section 1 and 3. Reject House Amendments to Section 2 and further amend Section 2.

Motion Made By Sen. De Mew

Seconded By Sen. Lee

Senators	Yes	No	Representatives	Yes	No
<u>Kilger</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Jensen</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>Lee</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Weiss</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>De Mew</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Mitsky</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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_____	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
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Total 6 0
(Yes) (No)

Absent 0

Floor Assignment Sen. Kilger

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

Recommend DO Pass as amended by the Conference Committee.

DO NOT USE HIGHLIGHTER ON ANY FORMS

(Bill Number) SB 2320 (, as (re)engrossed):

Your Conference Committee

For the Senate:

For the House:

Sen Kilgus P
Sen Lee P
Sen DeMoss P

Rep Jensen P
Rep Weisz P
Rep Metcalf P

[] recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)
723/724 725/726 S724/H726 S723/H725
the (Senate/House) amendments on (SJ/HJ) page(s) _____ - _____

[] and place _____ on the Seventh order.
727

[], adopt (further) amendments as follows, and place
_____ on the Seventh order:

[] having been unable to agree, recommends that the committee be discharged
and a new committee be appointed. 690/515

((Re)Engrossed) _____ was placed on the Seventh order of business on the
calendar.

DATE: ____/____/____

CARRIER: _____

LC NO. _____ of amendment

LC NO. _____ of engrossment

Emergency clause added or deleted _____

Statement of purpose of amendment _____

(1) LC (2) LC (3) DESK (4) COMM.

REPORT OF CONFERENCE COMMITTEE

SB 2320, as engrossed: Your conference committee (Sens. Kilzer, Lee, DeMers and Reps. Jensen, Weisz, Metcalf) recommends that the **HOUSE RECEDE** from the House amendments on SJ page 797, adopt amendments as follows, and place SB 2320 on the Seventh order:

That the House recede from its amendments as printed on page 797 of the Senate Journal and page 877 of the House Journal and that Engrossed Senate Bill No. 2320 be amended as follows:

Page 1, line 3, remove "; to provide an effective date"

Page 1, line 13, remove "the patient"

Page 1, line 14, replace "Made a valid written statement concerning nutrition or hydration" with "The agent is acting pursuant to subdivision a of subsection 2"

Page 1, line 15, replace "Has" with "The patient has"

Page 2, line 4, remove "valid" and after "written" insert "or oral"

Page 2, line 10, remove "**EFFECTIVE DATE -**" and remove "This Act applies to every"

Page 2, line 11, remove "durable power of attorney for health care executed after July 31, 1999."

Renumber accordingly

Engrossed SB 2320 was placed on the Seventh order of business on the calendar.

1999 TESTIMONY
SB 2320



*Representing the Diocese of Fargo
and the Diocese of Bismarck*

Christopher T. Dodson
Executive Director and
General Counsel

To: Senate Human Services Committee
From: Christopher T. Dodson, Executive Director
Subject: Senate Bill 2320 (Relating to Withdrawal of Nutrition and Hydration from Incapacitated Persons)
Date: February 8, 1999

The North Dakota Catholic Conference supports Senate Bill 2320 to provide consistent safeguards for incapacitated persons.

Some background on this legislation will help shed light as to why we need this bill. In 1989, the state passed the Uniform Rights of the Terminally Ill Act (Chapter 23-06.4), permitting written declarations (living wills) for the care of terminally ill incapacitated persons. In 1991, the state passed an act to allow durable powers of attorney for health care (Chapter 23--06.5). Also in 1991, the state passed Section 23-12-13, providing a list of persons authorized to provide informed consent to health care decisions for incapacitated or minor patients.

In 1993, working through the North Dakota Consensus Council, various interested parties, including the North Dakota Catholic Conference, worked on legislation to address inconsistencies or unanswered questions concerning the three legislative schemes. Among the provisions passed in 1993 was an amendment to the living will statute providing that, absent a written declaration concerning the withdrawal of nutrition and hydration, nutrition and hydration could be withdrawn if the attending physician determines that the administration of nutrition or hydration is inappropriate because the nutrition and hydration cannot be physically assimilated by the patient or would be physically harmful or would cause unreasonable pain to the patient. (N.D.C.C. § 23-06.4-06.1.)

These safeguards serve an important purpose. When an incapacitated patient has not made a valid statement regarding nutrition and hydration the state has a legitimate interest in protecting against inappropriate removal of nutrition and hydration. The safeguards do not prohibit the removal of nutrition and hydration, but carefully balance the need to protect the incapacitated patient with the health of the patient should the burden of receiving nutrition and hydration outweigh any benefits.

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It was the belief of the North Dakota Catholic Conference and several other parties involved in drafting the legislation that this section provided the only conditions for removing nutrition and hydration if no written directive permitting such withdrawal existed. This last summer, it came to the attention of the North Dakota Catholic Conference that some persons interpreted the statutes differently. To get some clarification, the Attorney General was asked to provide an opinion on the matter. The Attorney General issued her opinion on January 6, 1999.

The Attorney General's opinion is that the provision passed in 1993 (Section 23-06.4-06.1) provides the requirements for withdrawing nutrition and hydration *only* for terminally ill patients who have executed a living will but made no statement in that living will regarding nutrition and hydration. The section does not apply to other situations.

The purpose of SB 2230 is to apply the safeguards to other situations. As it stands now, for patients without a living will there is:

- No requirement that the patient be terminally ill;
- No requirement that nutrition and hydration (a) can no longer be physically assimilated, (b) be physically harmful, or (c) cause unreasonable physical pain;
- No requirement that patient be in a persistent vegetative state;
- No requirement that incapacity be considered permanent or even long-term; and
- If the patient is a minor for whom informed consent is given, no requirement that the patient be incapacitated.

Attached to this testimony is a chart showing how the conditions for withholding or withdrawing nutrition and hydration differ depending upon the circumstances of the patient.

It should be noted that the Attorney General based her opinion that the safeguards did not apply to non-living will situations on construction on the statute. The opinion recognizes that the U.S. Supreme Court held in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), that states can establish safeguards by restricting when nutrition and hydration can be withdrawn. Moreover, if safeguards, like those in Section 23-06.4-06.1, could not apply to non-living will situations for constitutional reasons, Section 23-06.4-06.1 itself would not withstand constitutional

scrutiny. The Attorney General, however, did not question the constitutionality of Section 23-06.4-06.1.

Senate Bill 2230 addresses the problem by repeating the safeguard provision passed in 1993 in the durable power of attorney for health care statute and the informed consent statute. As a result, all incapacitated persons that did not make a living will statement regarding nutrition and hydration would have the same protection under the law. This has the added benefit of providing some consistency and less confusion for health care providers.

We recognize that arguments could be made that the safeguards are too restrictive or too weak. We believe that those arguments that we should address at a slower pace through the newly formed task force on end-of-life care. Meanwhile, we feel that the state must establish consistent safeguards according to the criteria set in 1993. Without those safeguards, the law provides some persons with less protection from abuse than others. This is contrary to the intent of the legislation passed in 1993 and contrary to society's duty to protect the life and dignity of the most vulnerable among us.

We urge a **Do Pass** recommendation on Senate Bill 2230.

Conditions for Withdrawing Nutrition and Hydration from Incapacitated Patients under North Dakota Law

Patient with a Valid Living Will Directing Removal of Nutrition and Hydration:

- If in a terminal condition.

Patient with a Valid and Operative* Living Will with No Statement Regarding Nutrition or Hydration:

- If in a terminal condition, AND
- Physician determines that nutrition and hydration is inappropriate because
 - (a) it cannot be physically assimilated; or
 - (b) it would be physically harmful, or
 - (c) it would cause unreasonable physical pain.

* A living will is only operative if the patient is incapacitated *and* terminally ill. If not operative, the same conditions for informed consent situations apply.

Patient with a Durable Power of Attorney for Health Care (and no written statement):

- If agent acts in accordance with patient's wishes, OR
- If wishes unknown, if in accordance with agent's assessment of the patient's best interests.

Patient with Someone Authorized to Provide Informed Consent:

- If agent acts in accordance with patient's wishes, OR
- If wishes unknown, if in accordance with agent's assessment of the patient's best interests.

(Same conditions as for patient with a durable power of attorney for health care.)



North Dakota Right to Life Association

Testimony Before The SENATE HUMAN SERVICES COMMITTEE

Regarding SENATE BILL 2320

February 8, 1999

Chairman Thane, members of the committee, I am Stacey Pflieger, Executive Director of the North Dakota Right To Life Association. I am here today in support of SB 2320 relating to withdrawing or withholding nutrition and hydration from incapacitated patients.

In North Dakota, we care about our family, friends, and neighbors. We pride ourselves on the quality of our medical care. When the legislature passed laws regarding advanced directives, such as living wills and durable power of attorney for healthcare, it extended that care and compassion by saying that only in certain circumstances would we let someone die by withholding or withdrawing food and water.

As an example, subsection 3 of Section 23-06.4-06.1 of the 1997 Supplement to the North Dakota Century Code reads:

In the absence of a written statement concerning nutrition or hydration, nutrition or hydration, or both, may be withdrawn or withheld if the attending physician has determined that the administration of nutrition or hydration is inappropriate because the nutrition or hydration cannot be physically assimilated by the patient or would be physically harmful or would cause unreasonable physical pain to the patient.

Most people reading this would conclude that there are three circumstances under which nutrition and/or hydration could be withdrawn or withheld. They are:

1. Because the nutrition or hydration cannot be physically assimilated;
2. Because the nutrition or hydration would be physically harmful to the patient; or
3. Because the nutrition or hydration would cause unreasonable physical pain to the patient.

However, the Attorney General sees something else here. In her recent opinion, page 7 footnote 4, she says that because the wording does not say 'only' in these cases can nutrition and/or hydration be withheld or withdrawn, these are merely examples and are not to be taken literally.

Because the circumstances are listed, we believe the legislature did intend to be very specific about when nutrition and/or hydration can be withdrawn or withheld.

Let me briefly describe for you the effects a person may encounter from the lack of food and water. It begins with a dry mouth leading to parched, cracked lips and hollow cheeks. As the dehydration and starvation process continues nose bleeds begin and skin hangs loosely from a very thin, frail individual. As the end draws nearer, he or she experiences the stomach drying out, the brain cells drying out, the respiratory tract drying out, and eventually the major organs begin to fail including the heart, lungs, and brain.

When these laws were passed, we believed the policy for North Dakota would not allow for someone to be starved or dehydrated to death except in specific circumstances. However, in light of the Attorney General's opinion, we feel that the clarifications introduced in SB 2320 need to be made to prevent this type of inhumane death from occurring in North Dakota.

In addition, I would like to propose the attached amendment to SB 2320. SB 2320 adds clarification to subsection 5 (durable power of attorney) and subsection 4 (informed consent). This amendment would simply add parallelism to subsection 3 (pertaining to living wills). This amendment would allow for the language to be clarified and reinforced throughout Chapter 23-06.4 the Uniform Rights of Terminally Ill Act.

North Dakotans really do care about and for the elderly, the disabled, the terminally ill, and the incapacitated. I urge this committee give SB 2320 a do pass recommendation.

At this time I would be available for any questions you may have.



North Dakota Right to Life Association

PROPOSED AMENDMENT

SB 2320

SECTION 3. Amendment. Subsection 3 of section 23-06.4-06.1 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

3. In the absence of a written statement concerning nutrition or hydration, nutrition or hydration, or both, may be withdrawn or withheld if only if the patient has a terminal condition and only if the attending physician has determined that the administration of nutrition or hydration is inappropriate because the nutrition or hydration cannot be physically assimilated by the patient or would be physically harmful or would cause unreasonable physical pain to the patient.

TESTIMONY ON SB 2320

Prepared by Senator Ralph Kilzer

March 2, 1999

Madam Chairman, Mr. Vice Chairman, and members of the House Human Services Committee. For the record, my name is Ralph Kilzer, Senator from District 47 which is Northwest Bismarck. I appear before you this morning as the prime sponsor of SB 2320. It's great to be back home among my friends at the House Human Services Committee. I had the high pleasure of serving on this committee during the 55th Legislative Assembly.

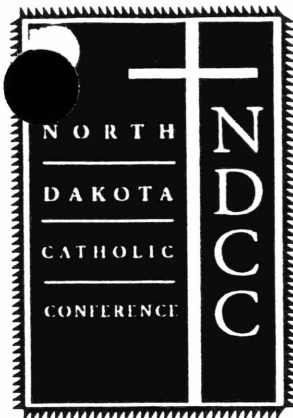
SB 2320 was prepared after an Attorney General's opinion and is brought forward at the request of the North Dakota Catholic Conference. There will be further testimony.

The bill states that nutrition and hydration may be withheld only if the patient had made a valid written statement requesting such withdrawal or withholding. The bill also states such withdrawal or withholding can also be done if the patient has a terminal condition, and the attending physician has determined that the administration of nutrition and hydration is inappropriate because the nutrition or hydration cannot be physically assimilated or would be harmful or would cause unreasonable pain. That is what is covered in Section 1 of the bill.

Section 2 states that a person authorized to provide informed consent may not provide consent to withdraw or withhold nutrition or hydration except under the same circumstances listed in Section 1.

Section 3 puts a sunset clause on this legislation of July 31, 2001. The reason for the sunset clause is that there is a taskforce working on end-of-life issues. It is anticipated that this taskforce will have further recommendations in this arena, particularly with the issues regarding durable power of attorney, living will, and other issues that intertwine with this nutrition and hydration necessities.

I would be happy to attempt to respond to any questions that you might have.



*Representing the Diocese of Fargo
and the Diocese of Bismarck*

Christopher T. Dodson
Executive Director and
General Counsel

To: House Human Services Committee
From: Christopher T. Dodson, Executive Director
Subject: Senate Bill 2320 (Relating to Withdrawal of Nutrition and Hydration from Incapacitated Persons)
Date: March 2, 1999

The North Dakota Catholic Conference supports Senate Bill 2320 to provide consistent safeguards for incapacitated persons.

Some background on this legislation will help shed light as to why we need this bill. In 1989, the state passed the Uniform Rights of the Terminally Ill Act (Chapter 23-06.4), permitting written declarations (living wills) for the care of terminally ill¹ incapacitated persons. In 1991, the state passed an act to allow durable powers of attorney for health care (Chapter 23--06.5). Also in 1991, the state passed Section 23-12-13, providing a list of persons authorized to provide informed consent to health care decisions for incapacitated or minor patients. In 1993, with the assistance of the North Dakota Consensus Council, various interested parties, including the North Dakota Catholic Conference, worked on legislation to address inconsistencies or unanswered questions concerning the three legislative schemes.

One of the issues that arose was whether the state should allow nutrition and hydration to be withheld or withdrawn from a patient that did not direct such action through a living will or a document for a durable power of attorney for health care. The Legislature chose to allow such actions under certain circumstances. A provision was placed in the living will statute providing that, absent a written declaration concerning the withdrawal of nutrition and hydration, nutrition and hydration can be withdrawn if the attending physician determines that the administration of nutrition or hydration is inappropriate because the nutrition and hydration either (1) cannot be physically assimilated by the patient, or (2) would be physically harmful, or (3) would cause unreasonable physical pain to the patient. (N.D.C.C. § 23-06.4-06.1.)

¹ A terminally ill patient is one with a "terminal condition." Terminal condition" means an incurable or irreversible condition that, without the administration of life-prolonging treatment, will result, in the opinion of the attending physician, in imminent death. The term does not include any form of senility, Alzheimer's disease, mental retardation, mental illness, or chronic mental or physical impairment, including comatose conditions that will not result in imminent death. (N.D.C.C. § 23-06.4-02(7).)

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These safeguards serve an important purpose. When an incapacitated patient has not made a valid statement regarding nutrition and hydration, the state has a legitimate interest in protecting against inappropriate removal of nutrition and hydration. The safeguards do not prohibit the removal of nutrition and hydration, but carefully balance the need to protect the incapacitated patient with the health of the patient should the burden of receiving nutrition and hydration outweigh any benefits.

It was the belief of the North Dakota Catholic Conference and several other parties involved in drafting the legislation that this section provided the only conditions for removing nutrition and hydration if no written directive permitting such withdrawal existed. This last summer, it came to the attention of the North Dakota Catholic Conference that some persons interpreted the statutes differently. To get some clarification, the Attorney General was asked to provide an opinion on the matter. The Attorney General issued her opinion on January 6, 1999.

The Attorney General's opinion is that the provision passed in 1993 (Section 23-06.4-06.1) provides the requirements for withdrawing nutrition and hydration *only* for terminally ill patients who have executed a living will but made no statement in that living will regarding nutrition and hydration. The section does not apply to other situations.

The purpose of SB 2230 is to apply the safeguards to other situations. As it stands now, for patients without a living will there is:

- No requirement that the patient be terminally ill;
- No requirement that nutrition and hydration (a) can no longer be physically assimilated, (b) be physically harmful, or (c) cause unreasonable physical pain;
- No requirement that patient be in a persistent vegetative state;
- No requirement that incapacity be considered permanent or even long-term; and
- If the patient is a minor for whom informed consent is given, no requirement that the patient be incapacitated.

Attached to this testimony is a chart showing how the conditions for withholding or withdrawing nutrition and hydration differ depending upon the circumstances of the patient.

It should be noted that the Attorney General based her opinion that the safeguards did not apply to non-living will situations on construction on the statute. The opinion recognizes that the U.S. Supreme Court held in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), that states can establish safeguards by restricting when nutrition and hydration can be withdrawn. Moreover, if safeguards, like those in Section 23-06.4-06.1, could not apply to non-living will situations for constitutional reasons, Section 23-06.4-06.1 itself would not withstand constitutional scrutiny. The Attorney General, however, did not question the constitutionality of Section 23-06.4-06.1.

Senate Bill ²³²⁰~~2230~~ addresses the problem by repeating the safeguard provision passed in 1993 in the durable power of attorney for health care statute and the informed consent statute. As a result, all incapacitated persons that did not make a living will statement regarding nutrition and hydration would have the same protection under the law. This has the added benefit of providing some consistency and less confusion for health care providers.

We recognize that arguments could be made that the safeguards are too restrictive or too weak. We believe that those arguments that we should address at a slower pace through the newly formed task force on end-of-life care, "Life Matters." Moreover, as this committee knows, there is a chance that a legislative interim committee will study the matter before the next session. Meanwhile, we feel that the state must establish consistent safeguards according to the criteria set in 1993. Without those safeguards, the law provides some persons with less protection from abuse than others. This is contrary to the intent of the legislation passed in 1993 and contrary to society's duty to protect the life and dignity of the most vulnerable among us.

We urge a **Do Pass** recommendation on Senate Bill ²³²⁰~~2230~~.

Conditions for Withdrawing Nutrition and Hydration from Incapacitated Patients under North Dakota Law

Patient with a Valid Living Will Directing Removal of Nutrition and Hydration:

- If in a terminal condition.

Patient with a Valid and Operative* Living Will with No Statement Regarding Nutrition or Hydration:

- If in a terminal condition, AND
- Physician determines that nutrition and hydration is inappropriate because

(a) it cannot be physically assimilated; or

(b) it would be physically harmful, or

(c) it would cause unreasonable physical pain.

* A living will is only operative if the patient is incapacitated *and* terminally ill. If not operative, the same conditions for informed consent situations apply.

Patient with a Durable Power of Attorney for Health Care (and no written or oral statement):

- If agent acts in accordance with patient's wishes, OR
- If wishes unknown, if in accordance with agent's assessment of the patient's best interests.

Patient with Someone Authorized to Provide Informed Consent:

- If agent acts in accordance with patient's wishes, OR
- If wishes unknown, if in accordance with agent's assessment of the patient's best interests.

(Same conditions as for patient with a durable power of attorney for health care.)



North Dakota Right to Life Association

Testimony Before The HOUSE HUMAN SERVICES COMMITTEE

Regarding SENATE BILL 2320

March 2, 1999

Chairman Price, members of the committee, I am Stacey Pflieger, Executive Director of the North Dakota Right To Life Association. I am here today in support of SB 2320 relating to withdrawing or withholding nutrition and hydration from incapacitated patients.

In North Dakota, we care about our family, friends, and neighbors. We pride ourselves on the quality of our medical care. When the legislature passed laws regarding advanced directives, such as living wills and durable power of attorney for healthcare, it extended that care and compassion by saying that only in certain circumstances would we let someone die by withholding or withdrawing food and water.

As an example, subsection 3 of Section 23-06.4-06.1 of the 1997 Supplement to the North Dakota Century Code reads:

In the absence of a written statement concerning nutrition or hydration, nutrition or hydration, or both, may be withdrawn or withheld if the attending physician has determined that the administration of nutrition or hydration is inappropriate because the nutrition or hydration cannot be physically assimilated by the patient or would be physically harmful or would cause unreasonable physical pain to the patient.

Most people reading this would conclude that there are three circumstances under which nutrition and/or hydration could be withdrawn or withheld. They are:

1. Because the nutrition or hydration cannot be physically assimilated;
2. Because the nutrition or hydration would be physically harmful to the patient; or
3. Because the nutrition or hydration would cause unreasonable physical pain to the patient.

However, the Attorney General sees something else here. In her recent opinion, page 7 footnote 4, she says that because the wording does not say 'only' in these cases can nutrition and/or hydration be withheld or withdrawn, these are merely examples and are not to be taken literally.

Because the circumstances are listed, we believe the legislature did intend to be very specific about when nutrition and/or hydration can be withdrawn or withheld.

Let me briefly describe for you the effects a person may encounter from the lack of food and water. It begins with a dry mouth leading to parched, cracked lips and hollow cheeks. As the dehydration and starvation process continues nose bleeds begin and skin hangs loosely from a very thin, frail individual. As the end draws nearer, he or she experiences the stomach drying out, the brain cells drying out, the respiratory tract drying out, and eventually the major organs begin to fail including the heart, lungs, and brain.

When these laws were passed, we believed the policy for North Dakota would not allow for someone to be starved or dehydrated to death except in specific circumstances. However, in light of the Attorney General's opinion, we feel that the clarifications introduced in SB 2320 need to be made to prevent this type of inhumane death from occurring in North Dakota.

North Dakotans really do care about and for the elderly, the disabled, the terminally ill, and the incapacitated. I urge this committee give SB 2320 a do pass recommendation.

At this time I would be available for any questions you may have.

Apposed

**TESTIMONY OF MELVIN WEBSTER REGARDING SB2320
BEFORE THE HUMAN SERVICES COMMITTEE OF THE
NORTH DAKOTA HOUSE OF REPRESENTATIVES**

My name is Melvin Webster; I am an attorney with a private practice in Bismarck, ND. A portion of my practice is devoted to estate and probate including preparation and advice regarding advance directives—popularly known as living wills and health care powers of attorney.

I suggest that the word “valid” be deleted in line 14, page one and in line 4, page two. The living will statute itself does not use the word “valid.” See NDCC 23-06.4-06.1(3). What is meant by a “valid written statement”? Would a handwritten document, signed and dated by the patient be sufficient? Paragraphs 4(a) and 4(b) of the health care durable power of attorney form invite the principal to make statements of their personal desires regarding life-prolonging treatment and special provisions and/or limitations regarding health care directives. Are these valid written statements? Would a handwritten document signed by the principal be a valid written statement? The fact that it is a statement of what the principal wishes should be sufficient.

Although the engrossed bill grandfathers in existing durable health care durable powers of attorney in which the principal has not made a written statement, it does not address the concerns of those who have relied on the informed health care consent statute, NDCC 23-12-13. This statute establishes a priority list of surrogate/proxy decision-makers. The proxy decision-maker is required to first attempt to determine what the patient, if not incapacitated, would have decided. Very frequently the only evidence available is the prior oral statements of the patient. It is estimated that less than 15% of competent adults have signed either a health care durable power of attorney or a living will.

Although I encourage my client to put their wishes in writing, some of them say, “that isn’t necessary my Husband, Wife, Son or Daughter—they know what I want.” These relatives probably do know what the patient wanted even if it was never reduced to a formalized writing. How many in this room have a “valid written statement concerning nutrition or hydration? The primary concern should be to ensure that the desires of the patient are respected and recognized.

Therefore, I request that the engrossed bill be amended to recognize written statements and oral statements made by the patient regarding nutrition and hydration.

Apposed

TESTIMONY OF MELVIN WEBSTER OPPOSING SB2320
BEFORE THE HUMAN SERVICES COMMITTEE OF THE NORTH DAKOTA
HOUSE OF REPRESENTATIVES

My name is Melvin Webster. I am an attorney with a private practice in Bismarck, ND. A portion of my practice is devoted to estate and probate, including preparation and advice concerning advance directives—popularly known as living wills and healthcare powers of attorney.

I oppose SB2320 for the following reasons:

Section one of the bill amends the healthcare durable power of attorney statute to require a **valid written statement** concerning nutrition or hydration before the agent would be permitted to withdraw nutrition or hydration unless the patient were in a terminal condition. “**Terminal condition**” is defined in the “living will” statute (NDCC 23-06.4-02(7)) as an incurable or irreversible condition that will result in imminent death. Comatose conditions that will not result in imminent death are specifically excluded.

Most of my clients who sign a durable power of attorney do so because they are most concerned about the treatment that will be administered to them if they are in a coma or a permanent vegetative state from which they will not recover. Under those conditions 99.9% do not want life prolonging treatment, including nutrition and/or hydration. Unless a patient has a terminal condition that will result in imminent death, this bill prohibits the person’s agent from withholding or withdrawing either nutrition or hydration unless the patient has previously made a **valid written statement**.

It is estimated that less than 15% of competent adults have any type of advance directives—a durable power of attorney or living will. What is a valid written statement under North Dakota law? A strong argument could be made that only a statement that meets the requirements of N.D.C.C. 23-06.4-03 -- the statutory living will form—is a valid written statement. Yet, paragraphs 4a and 4b of the durable power of attorney statute invite the principal to make statements of their personal desires regarding life prolonging treatment and special provisions and/or limitations regarding health care decisions. I doubt that many of them are

aware of the fact that the statute specifically states that nutrition and hydration are not life-prolonging treatment. The living will statute itself does not use the adjective “**valid.**” Subsection 23-06.4-06.1(2) states that “nutrition or hydration, or both must be withdrawn or withheld or administered...” if the patient has made a written statement. Again, I ask, what is a valid written statement? Would a handwritten document, signed and dated by the patient, be sufficient even if it is not witnessed in accord with the durable power of attorney statute? Even if it does not meet the witnessing requirements of the living will statute? This is certainly an unanswered legal question in North Dakota. One might ask that since North Dakota law recognizes handwritten wills which dispose of property, why not recognize all evidence of the patient’s intent when it comes to nutrition or hydration.

The current durable power of attorney statute requires that the agent make decisions **first, according to principal’s oral or written wishes and the principal’s religious or moral beliefs.** What is wrong with that? That is the basic principal of individual autonomy that we all cherish. If the agent cannot determine the principal’s wishes, then the agent is required to make a health care decision based on the **best interests** of the principal. This is the same standard that is used in the informed consent statute NDCC23-12-13. It is a standard that protects the rights of individuals to make their own health care decisions and provides protection for vulnerable persons.

Section three of the bill grandfathers in those health care powers of attorney signed prior to the effective date of the bill. The motivation to provide a shelter for those people who relied on the plain language of the statute is commendable; however, imagine the confusion in health care facilities. Now they will have to determine and be aware of the differences between those health care powers of attorney signed before July 31,1999, and those signed after that date and, of course, remember that those differences evaporate on July 31,2001.

What about those persons who have relied on the **INFORMED CONSENT STATUTE NDCC 23-12-13?** Presently that statute permits the proxy decision-maker to make any decision that the principal could make before becoming

incapacitated. Although I encourage my client to put their wishes in writing, some have chosen to rely on the plain language of the statute. Unfortunately some of these persons are no longer competent and do not have the mental capacity to sign either a durable power of attorney or living will.

What about those persons who unfortunately have never had the capacity to make such a decision? Courts have held that persons mental deficiency retain the right to refuse life prolonging treatment even though that right must be exercised by a surrogate decision-maker such

The United States Supreme Court upheld the right of the state of Missouri to require clear and convincing evidence before permitting the parents of Nancy Cruzan to withdraw nutrition and hydration. However, I think it is doubtful that a state can do more than that. In that decision and subsequent decisions, the Court identified a constitutionally protected liberty interest to refuse unwanted medical treatment including life prolonging treatment. It is also quite clear that the administration of nutrition and hydration are life prolong treatment.

The old cliché that states, "death and taxes are inevitable." I realize that the legislature may find it necessary to raise my taxes. However, each of us or the persons we have selected should be able to make our own choices regarding end of life medical intervention without legislative interference. I realize that nutrition and hydration carry a symbolic value for some persons, even though it is administered through tubes inserted through my mouth, nose, stomach or blood vessels. I respect the right of these persons to make their own choices. I ask that my right to make my choices also be respected and recognized. Please vote "do not pass" on Senate Bill 2320.

Melvin L. Webster



*Representing the Diocese of Fargo
and the Diocese of Bismarck*

Christopher T. Dodson
Executive Director and
General Counsel

To: House Human Services Committee
From: Christopher T. Dodson, Executive Director
Subject: Amendments to Senate Bill 2320
Date: March 8, 1999

Here are some comments regarding amendments to Senate Bill 2320 (withdrawal of nutrition and hydration.) Please consider them in your discussions. Also attached is a set of proposed amendments addressing some of the issues raised in testimony.

Written Statements

The only written statements that should be allowed are durable powers of attorney for health care and living wills.

Three reasons:

- **Durable powers of attorney for health care and living wills are inherently more reliable than other written statements.** The durable powers of attorney for health care and living will statutes contain several mechanisms to ensure that the patient's true wishes are contained in the statements.
- **North Dakota law recognizes only two types of written statements -- living wills and durable powers of attorney for health care.** The legislature addressed the issue in 1989, 1991, and 1993. In each case it rejected a policy of allowing any written statement.
- **Allowing any written statement concerning nutrition and hydration reverses long-standing state policy favoring greater, not lesser, restrictions on matters concerning nutrition and hydration.** The durable power of attorney for health care statute permits an agent to rely on only two types of written statements -- a durable power of attorney for health care and a living will. (N.D.C.C. § 23-06.5-03) If SB 2320 were revised to allow any written statement for withdrawing nutrition or hydration, it would, at best contradict another part of the statute. At worse, it would allow any written statement for nutrition and hydration while allowing only a durable power of attorney for health care or a living will for all other types of health care procedures.

This would be contrary to the Uniform Rights of the Terminally Ill Act and the purpose of SB 2320. North Dakota law has always treated nutrition and hydration with greater scrutiny than other types of procedures. For example, there is a presumption in North Dakota law that nutrition and hydration are in the best interests of the patient. This is not the case with other types of procedures. If any written statement were allowed it would reverse North Dakota policy by placing less restrictions on nutrition and hydration procedures than on other types of procedures.

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Oral Statements

Oral statements should be allowed only in the durable power of attorney for health care context and only if made to the agent. We prefer a requirement that the statement be made to the agent after the execution of a durable power of attorney for health care.

Effective Date

If oral statements are allowed in the durable power of attorney for health care statute, there is no need for the effective date on page 2, line 10 of the engrossed bill. Deleting it would eliminate confusion.

Engrossed Senate bill 2320 takes away a person's right to direct that feeding tubes or ~~interveineous~~ feedings not be used to sustain their lives unless the person has made a "valid written statement concerning nutrition or hydration".

Section one of the bill deals with the durable power of attorney for health care and provides that the person holding the durable power of attorney for health care may not prevent the installation of a feeding tube or IV unless the patient had made a valid written statement stating he did not want them. It does not matter that the spouse, adult child, parent, or other holder of the durable power of attorney knows without doubt that the patient did not believe in feeding tubes or IVs or would not have wanted to have them used. It doesn't matter that the holder of the durable power of attorney for health care has heard the patient say a dozen times that he would not want those steps taken if he were ever in a condition where he could not eat or be fed food orally. Unless the patient had, at a time when he was still capable of writing, made a written statement regarding his wishes, the feeding tubes would need to be installed or IVs given if the person could not otherwise be fed and hydrated.

Section two deals with persons authorized to provide informed consent to health care for someone who is incapacitated. Under the statute, in most cases this would be the spouse, the adult children, or the parents of the patient, in that order. Again it does not matter that the spouse or adult children have heard the patient expound for years on his or her views on artificial feeding methods or that they know without any doubt what the patient would choose if he or she were able to do so. **The patient's wishes do not matter.** Unless the patient, at a time when he was still able to do so, had made a written statement concerning his wishes, the doctors would be required to implant a feeding tube or begin interveineous feedings.

It could be argued that anyone who had strong feelings on what they wanted would have described their wishes in writing before anything happened to them. An accident resulting in our being incapacitated could happen at any moment. Unfortunately we are not usually given advance notice that now is the time we must sit down and put our wishes in writing.

How many of you, or your parents, or your children, or grandparents, or other relatives or friends have taken the time or gone to the expense of having an attorney draw up a durable power of attorney for health care, a living will or other "valid written statement" detailing that they do not wish to have feeding tubes or other artificial feedings if they are in a coma and the doctor's give little or no hope of coming out of the coma or state that in all likelihood the person will remain in a permanent vegetative state?

Most of us believe that it won't happen to us. Our families (or even our doctor) know what we would want. Why do we need to sit down and write it all out. Well, **if this bill passes, it won't matter that you've told your family how you feel or that they know your wishes or even your religious views on the matter.** Unless you have made a "valid written statement" concerning the issue, the family has no say in the matter. The feeding tubes must be inserted or IVs begun if you are unable to otherwise eat or be fed.

Likewise, your doctor has no choice. The only situation in which your doctor could refrain from using artificial feeding methods if you had not made a "valid written statement" is if you have a terminal condition and the doctor determines that the nutrition or hydration "would be physically harmful" or would cause you unreasonable physical pain. If you do not have a terminal condition, but are in a permanent vegetative state, the doctor would have no choice at all.

Is this what we want for our families and friends? For ourselves? To need to pay an attorney to make sure that we have a "valid written statement"? Of course we could write out a durable power of attorney for health care or a living will without hiring an attorney. But what about those who have a tragic accident or stroke before they are able to get it down? Do we really want to subject them and their families to the endless expense and heartache that can come from artificial feeding and hydration if we know that is not what they would have wanted? Do we really want to increase the cost of medical care and have our health insurance rates skyrocket due to this state mandate?