SD MOST
From Principal to Patient

ADVANCE CARE PLANNING FOR PATIENT WITH TERMINAL CONDITION SDCL 34-12H

Presenters:

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The information and examples herein are intended to facilitate thoughtful and informed discussion and are used for teaching purposes only. The material and comments made by the presenters during the presentation or otherwise do not constitute and should not be treated as legal or medical advice.

- The South Dakota MOST program was developed by LifeCircle South Dakota.
- LifeCircle is a statewide collaboration of institutions, organizations and people committed to improving end-of-life care. The organization is governed by an advisory committee and is based in the Sanford School of Medicine since 1999.

Case Study #1

Patient A is in a permanent vegetative state (PVS) with severe brain damage. She is on a ventilator and artificial nutrition and hydration (ANH).

Patient A has no living will or power of attorney.

Husband directs you to remove both the ventilator and the ANH.
Parents direct you not to.
There are no children.

What will you do?

(PS-husband is an attorney)

State Law ‘pecking order’ SDCL 34-12C-3

- The spouse, if not legally separated;
- An adult child;
- A parent;
- An adult sibling;
- A grandparent or an adult grandchild;
- An adult aunt or uncle, adult cousin, or an adult niece or nephew;
- Close friend.

Case Study #1

Parents inform you that husband has filed for divorce.

Case Study #1

Husband brings girlfriend with to hospital….

Case Study #1

Husband brings girlfriend with to hospital….

… but no longer wants a divorce.

Artificial Respiration Apparatus (Ventilator)

1. In ordinary cases the doctor has the right to act in this manner, but is not bound to do so unless this is the only way of fulfilling another certain moral duty. 2. The doctor, however, has no right independent of the patient. He can act only if the patient explicitly or implicitly, directly or indirectly gives him the permission. 3. The treatment as described in the question constitutes **extraordinary means of preserving life** and so there is no obligation to use them nor to give the doctor permission to use them. 4. The rights and the duties of the family depend on the **presumed will of the unconscious patient** if he or she is of legal age, and the family, too, is bound to use only ordinary means. 5. This case is **not to be considered euthanasia in any way**; that would never be licit. The interruption of attempts at resuscitation, even when it causes the arrest of circulation, is not more than an indirect cause of the cessation of life, and we must apply in this case the **principle of double effect**.

In Re Quinlan, 70 NJ 10 1976;

Artificial Respiration Apparatus (Ventilator)

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In Re Quinlan, 70 NJ 10 1976; **cf Pope Pius XII, 1957**

Artificial Nutrition and Hydration (ANH)

"While Missouri has in effect recognized that, under certain circumstances, a surrogate may act for the patient in electing to withdraw hydration and nutrition **and thus cause death,** it has established a procedural safeguard to assure that the surrogate's action conforms as best it may to the wishes expressed by the patient while competent."

Cruzan v. MO Director of Health, 497 US 261 (1990)

ANH under Living Will

SDCL 34-12D-2

Declaration--Requirements as to execution. A competent adult may at any time execute a declaration governing the withholding or withdrawal of life-sustaining treatment. The declaration shall be signed by the declarant, or another at the declarant's direction, and witnessed by two adult individuals. The signing may be in the presence of a notary public who shall thereafter notarize the declaration. **A declaration shall state the declarant's preferences regarding whether the declarant wishes to receive or not receive artificial nutrition and hydration.** If the declaration does not state the declarant's preferences with respect to artificial nutrition and hydration, whether artificial nutrition and hydration is to be provided, withheld, or withdrawn shall be governed by the law of this state which would apply in the absence of a declaration.

ANH under POA

SDCL 59-7-2.7

Comfort care required--Conditions for withdrawal of artificial nutrition or hydration. The attorney-in-fact or agent may not authorize the withholding or withdrawal of comfort care from the principal. The attorney-in-fact or agent **may authorize that artificial nutrition or hydration be withheld or withdrawn if one or more of the following exist**:

(1) Artificial nutrition or hydration is **not needed for comfort care** or the relief of pain and the attending physician reasonably believes that the principal's **death is imminen**t; or

(2) Artificial nutrition or hydration **cannot be physically assimilated** by the principal; or

(3) The **burden** of providing artificial nutrition or hydration **outweighs its benefit**, provided that the determination of burden refers to the provision of artificial nutrition or hydration itself and not to the quality of the continued life of the principal; or

(4) There is **clear and convincing evidence** that the principal expressed the desire that artificial nutrition or hydration be withheld, or refused artificial nutrition or hydration prior to the loss of decisional capacity; or

(5) The **principal expressed in the document** creating the power of attorney that artificial nutrition or hydration be **withheld**; or

(6) The **principal expressly authorized**, in the writing creating the power of attorney, the attorney-in-fact or agent to direct the withholding of artificial nutrition or hydration.

ANH under Healthcare Consent Act

SDCL 34-12C

ANH under Healthcare Consent Act

in discussing removal of ANH

"If one cannot deliberately kill competent patients (assisted suicide/euthanasia), or construe living wills as permitting the deliberate killing of incompetent who have left behind written directives, it would be incongruous indeed for only one class of persons-the incompetent who has not left behind any written instruction-to be subject to intentional instruction by others."

Gorsuch, Neil M., The Future of Assisted Suicide and Euthanasia, Princeton University Press, Copyright 2006, p. 215.

Legal Safeguards?

SDCL 59-7-2.7

(1) Artificial nutrition or hydration is **not needed for comfort care** or the relief of pain and the attending physician reasonably believes that the principal's **death is imminen**t; or

(2) Artificial nutrition or hydration **cannot be physically assimilated** by the principal; or

(3) The **burden** of providing artificial nutrition or hydration **outweighs its benefit**, provided that the determination of burden refers to the provision of artificial nutrition or hydration itself and not to the quality of the continued life of the principal;

Case Study #1

$2 million settlement for events that led to patient's PVS.

Who decides?

Case Study #1

If Patient A had created a SD MOST document we would know whether she wanted a ventilator and ANH

If patient had created a POA, we would likely only know whether she wanted ANH.

We also wouldn't know if she wanted CPR or a DNR (unless she had a Comfort One SDCL 34-12F).

What is SD MOST and Why Should You Care?

Surrogate Decision Making and **Elder Abuse-**

How can we secure our clients wishes at end of life?

- Surrogate motivated by inheritance (Schiavo)
- Surrogate is dependent ‘child’ supported by social security, pension and living in home (ethics committees and law)
- Surrogate not want to lose loved one or burned out with caring for loved one (ethics committees)

Activates an Advance Directive-

- Need to know when SD MOST could override POA and how

Medical **O**rder for **S**cope of **T**reatment

A MOST form is a portable, actionable medical order sheet that helps ensure patient treatment wishes are known and honored and helps prevent initiation of unwanted, disproportionately burdensome extraordinary treatment.

MOST is **not** an advance directive.

An **advance directive** is a legal document and mechanism for naming a durable power of attorney for healthcare (a healthcare agent) and/or a living will (providing general treatment wishes).

Slides taken with permission from SDAHO (South Dakota Association of Healthcare Organizations Power Point found at http://sdaho.org/wp-content/uploads/2019/11/MOST-training-PowerPoint-FINAL-11.11.19.pdf

South Dakota MOST

Legislative Landscape

Guardianship SDCL 29A-5

Living Wills SDCL 34-12D

Healthcare Powers of Attorney SDCL 59-7

Healthcare Consent SDCL 34-12C

Comfort One SDCL 34-12F (transportable DNR orders)

SD MOST SDCL 34-12H

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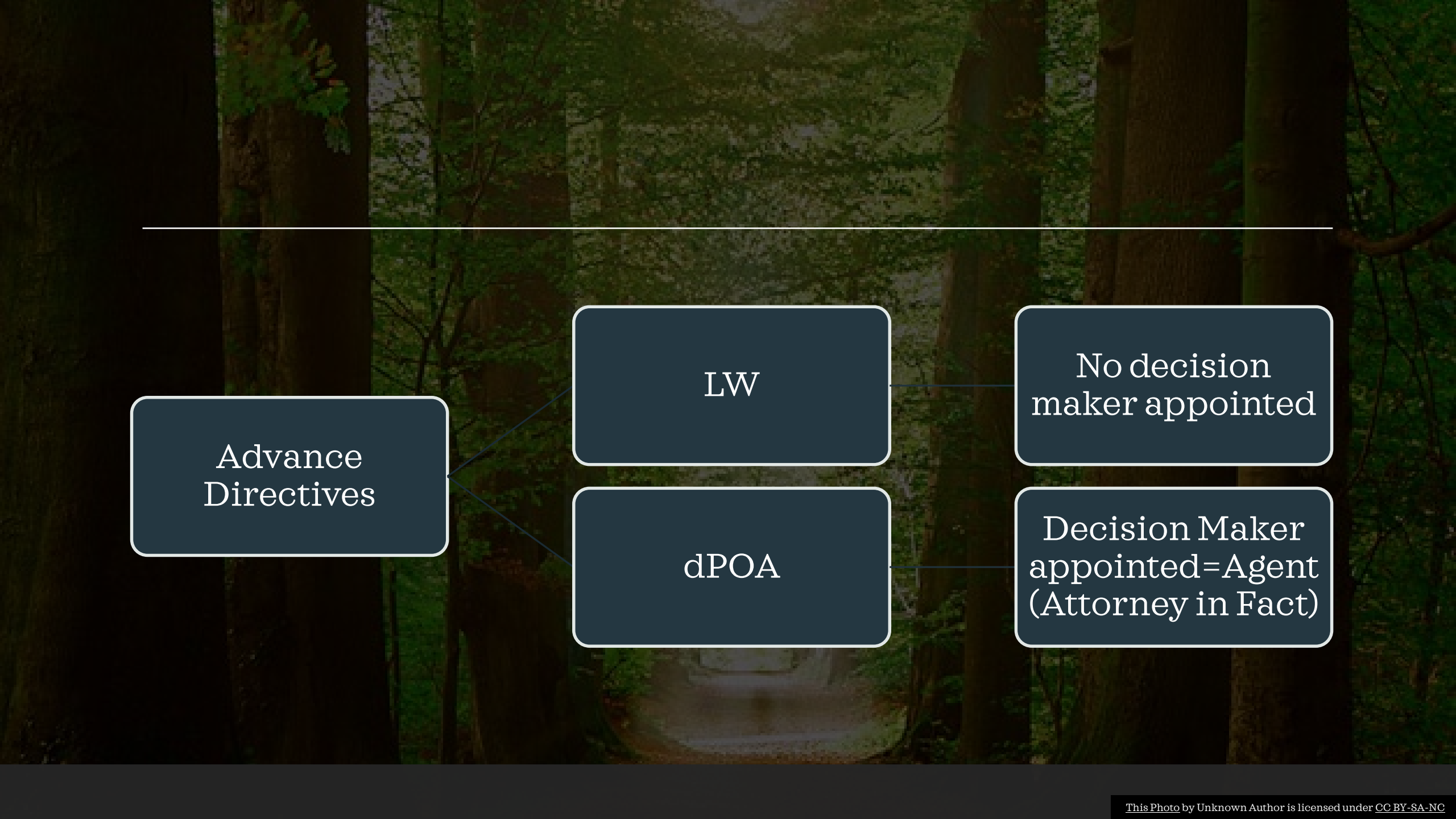
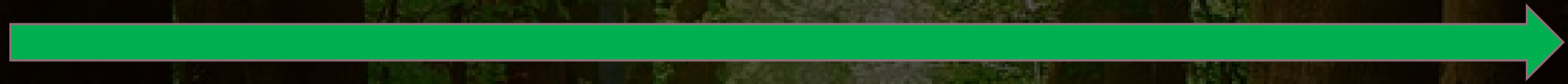
SD MOST SDCL 34-12H



Age 18 Death

Living will (terminal condition, death is imminent, and patient lacks capacity)

Durable Power of Attorney (spring in and out during lack of capacity)



Use of MOST

Age 18 — Death

Living will (terminal condition, death is imminent, and patient lacks capacity)

Durable Power of Attorney (spring in and out during lack of capacity)

Medical orders without MOST

Transportable medical order using MOST

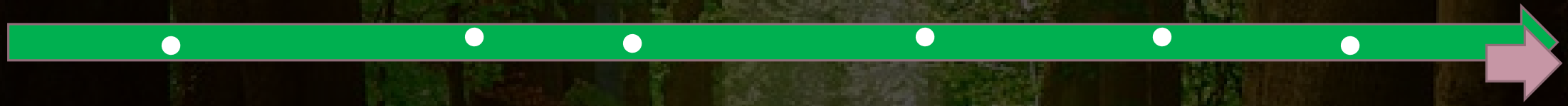
(terminal condition and death is likely to occur within 1 year)

MOST *Activates* the Advance Directives (in the last year)

Age 18 — Death

Living will (terminal condition, death is imminent, and patient lacks capacity)

Durable Power of Attorney (spring in and out during lack of capacity)



Does MOST revoke a POA or LW?

34-12H-8. Conflict between patient's MOST and patient's other directives. If there is a conflict between a patient's MOST and a patient's oral directives or any written directives in an advance health care directive, the health care provider shall treat the patient in accordance with the most recent instruction.

Surrogate Priority

1. Guardian –appointed for the purpose of making healthcare decisions

2. Agent – under a durable POA for healthcare

3. When no one appointed:

- The spouse, if not legally separated;
- An adult child;
- A parent;
- An adult sibling;
- A grandparent or an adult grandchild;
- An adult aunt or uncle, adult cousin, or an adult niece or nephew;
- Close friend.

Medical Provider Responsibilities

A "**Medical provider**" is a physician, physician assistant or certified nurse practitioner designated by a patient or the patient's authorized representative, to have responsibility for the patient's health care.

If there is a conflict between a patient's MOST and a patient's oral directives, or any written directives in an advance health care directive, the medical provider shall treat the patient in accordance with the most recent instruction.

Patients should be aware that a MOST may override the directives contained in their Power Of Attorney or living will if executed prior to the MOST.

If an agent has been appointed under a healthcare power of attorney, the agent shall be the authorized representative under the MOST. The creation of a subsequent MOST by a patient or by an authorized representative does not terminate the agency created under the power of attorney unless the patient specifically states in writing that the agency is terminated.

Case Study #2

Patient B is widowed with 4 adult children. He lacks capacity to make healthcare decisions, is in a terminal condition, and likely to die within 1 year. He is on a ventilator and ANH

Child 1 lives in Sioux Falls, takes dad to his doctors' appointments, and lives with dad. When offered, Child 1 has chosen not to create a MOST but has expressed time and again that he wants full treatment for dad (even excessively burdensome and medically 'futile' treatment).

Child 2 goes to college in Florida but comes back to Sioux Falls to take care of dad while Child 1 is deployed out of the country for 5 months. Child 2 creates a MOST for dad which authorizes removal of all treatment and issues a Do Not Resuscitate order (DNR).
Is this a valid MOST?

Case Study #2

Can Child 1 override the MOST authorized by Child 2?

How could this conflict of surrogates have been resolved? be resolved now?

Sample Language for POA

that might be worthless

1. [Principal gives agent power:] To override any previous advance directives, POLST/MOST forms, or any decisions made by surrogates whom are not authorized hereunder. In the event that a POLST/MOST (or its equivalent) is created by an authorized representative subsequent to this durable power of attorney, the healthcare agent named herein shall be the authorized representative named in the POLST/MOST. If a different authorized representative creates a POLST/MOST, the authority of the healthcare agent named herein supersedes the authority of the authorized representative in the POLST/MOST. Authorized Representative, as used herein, shall mean a person authorized by law to make health care decisions for a patient as per SDCL 34-12H.

2. This Durable Power of Attorney for Healthcare revokes anypreviously created Power of Attorney, Living Will, POLST/MOST or any other form of healthcare directive given by me or by an authorized representative.

LuAnn M. Eidsness, MD, FACP

Why Did South Dakota Pass MOST Legislation?

To promote advance care planning conversations between patients and providers.

To allow for activation of an advance directive by having the patient's trusted provider document the medical orders in their chart.

To establish transportable medical orders to be honored across all levels of care and across state lines.

To join the National POLST Paradigm movement which has already been implemented in 27 states.

MOST Definition

"Medical order for scope of treatment," or "MOST," is a transportable medical order sheet executed by a patient who has been diagnosed with a terminal condition by the patient's medical provider and entered in the patient's medical record that provides direction to health care providers about the patient's goals and preferences regarding the use of medical interventions, including cardiopulmonary resuscitation and other life-sustaining treatment

Medical **O**rder for **S**cope of **T**reatment

MOST is **voluntary.**

It is shared decision-making between patients and health care professionals.

The conversation involves the patient discussing his/her values, beliefs and goals for care, and the health care provider presents the patient's diagnosis, prognosis, and treatment alternatives, including the benefits and burdens of life-sustaining treatment.

Together they reach an informed decision about desired treatment.

South Dakota MOST

MOST Instructions

A MOST form must be completed by a physician, nurse practitioner or physician assistant based on patient's preferences and/or best interests, and medical indications.

South Dakota MOST must be signed and dated by a MD, DO, NP or PA to be valid.

South Dakota MOST must be signed by the patient or the patient's authorized representative.

Use of original form is strongly encouraged. Photocopies and faxes of signed and dated South Dakota MOST forms are legal and valid.

MOST Form - Heading & Explanation

HIPAA PERMITS DISCLOSURE OF SOUTH DAKOTA MOST TO OTHER HEALTH CARE PROVIDERS AS NECESSARY

MEDICAL ORDERS FOR SCOPE OF TREATMENT

SOUTH DAKOTA MOST

FIRST follow these orders, **THEN** contact medical provider. This is a Medical Order Sheet based on the patient's current medical condition and wishes. Any section that does not include an indication of the patient's or authorized representative's preference, is a directive to health care providers to use all necessary and appropriate medical interventions. The South Dakota MOST complements an advance health care directive and is not intended to replace that document.

Does patient have an advance health care directive? Yes ☐ No ☐

LAST NAME _____

FIRST NAME _____

MIDDLE INITIAL _____

DATE OF BIRTH _____
(mm/dd/yyyy)

PATIENT'S DIAGNOSIS OF TERMINAL CONDITION:

_____

_____

_____

GOALS OF CARE:

_____

_____

_____

South Dakota MOST

Section A: Code Status

Check One	**A. CARDIOPULMONARY RESUCITATION (CPR):** PATIENT HAS NO PULSE AND IS NOT BREATHING ☐ CPR/Attempt Resuscitation (requires full intervention in section B) ☐ DNR/Do Not Attempt Resuscitation (Allow Natural Death) When not in cardiopulmonary arrest, follow orders in B, C, D and E

South Dakota MOST

Section B: Medical Interventions

Check One	**B. MEDICAL INTERVENTIONS:** PATIENT HAS PULSE AND IS BREATHING, OR HAS PULSE AND IS NOT BREATHING. ☐ Full Intervention: Treatment Goal: Full intervention including life support measures in the intensive care unit. In addition to treatment described in Comfort Measures and Selective Treatment below, use intubation, advanced airway interventions, and mechanical ventilation as indicated. Transfer to hospital and/or intensive care unit if indicated to meet medical needs. ☐ Selective Treatment: Treatment Goal: Stabilization of medical condition. In addition to treatment described in Comfort Measures below, use medical treatment, IV fluids (hydration) and cardiac monitor as indicated to stabilize medical condition. May use basic airway management techniques and non-invasive positive-airway pressure. Do not intubate. Transfer to hospital if indicated to manage medical needs or comfort. Avoid intensive care if possible. ☐ Comfort Measures Only (Allow Natural Death): Treatment Goal: Maximize comfort through symptom management. Relieve pain and suffering through the use of any medication by any route, positioning, wound care and other measures. Use oxygen, suction and manual treatment of airway obstruction as needed for comfort. Patient prefers no transfer to hospital for life-sustaining treatments. Transfer to hospital only if comfort needs cannot be met in current location. **ADDITIONAL ORDERS:** (e.g. dialysis, etc.) _____ _____ _____ _____

South Dakota MOST

Section C: Nutrition & Hydration

Check One in Each Column	C. ARTIFICIALLY ADMINISTERED NUTRITION AND HYDRATION:

ALWAYS OFFER FOOD AND FLUIDS BY MOUTH AS TOLERATED.

Based on the Provider's medical judgment:

	YES	NO
1. Will artificially administered nutrition and hydration be unable to prolong life?	☐	☐
2. Will artificially administered nutrition and hydration be more burdensome than beneficial?	☐	☐
3. Will artificially administered nutrition and hydration cause significant physical discomfort?	☐	☐
4. Has patient previously expressed a desire to forgo artificially administered nutrition and hydration by tube?	☐	☐

In order for artificially administered nutrition and hydration to be withheld, there must be a "YES" answer to one or more of questions 1-4 above.

South Dakota MOST

Section D: Informed Consent

Check One	**D. INFORMED CONSENT DISCUSSION:** _____ had an informed consent discussion with patient or authorized representative. Name of Medical Provider (MD, DO, NP or PA) **DISCUSSED WITH:** ☐ Patient ☐ Authorized Representative _____ (Name of Representative)

MOST Form – Basis & Signatures

Check All That Apply	**The basis for these orders is:** ☐ Patient's declaration (can be verbal or nonverbal). ☐ Patient's Authorized Representative (patient without capacity). ☐ Patient's Advance Directive (if indicated, patient has completed an additional document that provides guidance for treatment measures if he /she loses medical decision-making capacity). ☐ Resuscitation would be medically non-beneficial. This form is voluntary and the signatures below indicate that the medical orders are consistent with the patient's medical condition and treatment plan and are the known desires or in the best interests of the patient who is the subject of the document.

PRINT MEDICAL PROVIDER NAME	**MEDICAL PROVIDER SIGNATURE (MANDATORY)**	**MEDICAL PROVIDER PHONE**	**DATE (MANDATORY)**
PRINT PATIENT OR REPRESENTATIVE NAME	**PATIENT OR REPRESENTATIVE SIGNATURE (MANDATORY)**		**DATE (MANDATORY)**
REPRESENTATIVE RELATIONSHIP	**REPRESENTATIVE ADDRESS**	**REPRESENTATIVE PHONE NUMBER**	

South Dakota MOST

Using South Dakota MOST

Any section that does not include an indication of the patient's or authorized representative's preference, is a directive to health care providers to use all necessary and appropriate medical interventions.

Artificial nutrition and hydration is optional when it cannot reasonably be expected to prolong life, would be more burdensome than beneficial, would cause significant physical discomfort, or patient had previously expressed a personal desire to forgo artificial nutrition by tube.

The determination of burden refers to the provision of artificial nutrition or hydration itself and not the quality of continued life of the patient.

A patient with capacity may revoke the South Dakota MOST at any time and request alternate treatment. Additionally, an authorized representative may revoke the MOST only if the MOST was executed by the authorized representative.

If there is a conflict between a patient's MOST and a patient's oral directives, or any written directives in an advance health care directive, the medical provider shall treat the patient in accordance with the most recent instruction.

Review of MOST

A revocation is effective upon communication to the health care provider. A health care provider who is informed of a revocation shall record the date and time of the notification of revocation in the patient's medical record.

A new **South Dakota MOST** form should be completed if the patient wishes to make any substantive change to treatment goal(s) (e.g. reversal of prior directive). When completing a new form, the old form must be properly voided and retained in the medical record. To void the **South Dakota MOST** form, draw line through sections A through D and write "VOID" in large letters. This must be signed and dated.

REVIEW OF THIS SOUTH DAKOTA MOST FORM

REVIEW DATE AND TIME	REVIEWER	LOCATION OF REVIEW	REVIEW OUTCOME
			☐ No Change ☐ Form Voided and New Form Completed
			☐ No Change ☐ Form Voided and New Form Completed
			☐ No Change ☐ Form Voided and New Form Completed
			☐ No Change ☐ Form Voided and New Form Completed
			☐ No Change ☐ Form Voided and New Form Completed

South Dakota MOST

Summary of SD MOST

- ✓It is an advance care planning tool.
- ✓Although a MOST is **NOT** an advance directive, a MOST:
  - complements the patient's advance directive(s);
  - is not intended to replace a patient's advance directive(s); and
  - translates the patient's wishes expressed in advance directives into actionable medical orders.
- ✓A MOST is a portable, actionable medical order sheet. In this way, it is like the SD Comfort One order. However, a MOST covers more treatment choices than the SD Comfort One order.

South Dakota MOST

- ✓A MOST is only for patients who have a terminal condition as defined by SD law.
- ✓A MOST is created through relationship and dialogue between the medical provider and patient or patient representative. It involves the patient discussing his/her values, beliefs and goals for care.
- ✓In order to be valid, a MOST must be signed by both the medical provider and patient or patient representative.
- ✓A MOST articulates the manner in which a patient would like to live during the course of his or her terminal condition by stating the patient's goals and wishes.

South Dakota MOST

- ✓A MOST helps ensure that a patient's goals and wishes are known and honored by the patient's loved ones and medical providers.
- ✓A MOST helps ensure the provision of reverent care and appropriate medical treatment that support the patient's goals and wishes throughout the patient's life and during the process of natural death.
- ✓A MOST helps prevent the use of medical interventions that are unwanted, ineffective, burdensome and/or do not support the patient's goals and wishes.
- ✓A MOST is voluntary and should never be mandatory.

South Dakota MOST

- ✓A patient who has created a MOST may amend or revoke the MOST at any time.
- ✓A MOST involves informed, shared decision-making between patients and medical providers.
- ✓The medical provider presents the patient's diagnosis, prognosis, and treatment alternatives.
- ✓Through relationship and dialogue, the medical provider and patient together make informed decisions about desired and medically appropriate treatments.

South Dakota MOST

- ✓A MOST allows patients to make decisions consistent with the United States Conference of Catholic Bishops *Ethical and Religious Directives for Catholic Health Care Services (ERDs)*.
- ✓A MOST allows all patients to make medically and legally appropriate decisions consistent with their religious traditions, values, beliefs and goals.
- ✓A MOST requires that all measures to improve the patient's comfort—including food and fluid by mouth as tolerated—are always provided.
- ✓The patient may have both a durable power of attorney for health care and a MOST. In fact, the MOST document states that the MOST complements and is not intended to replace the patient's advance directive.

South Dakota MOST

- ✓The patient may have both a living will and a MOST. The living will is an advance directive expressing the patient's wishes about the use of life-sustaining treatment in the event of a terminal condition. The MOST can translate the wishes expressed in a living will into an actionable medical order. Furthermore, the MOST encourages dialogue about and actionable medical orders for treatments in addition to life-sustaining treatment.
- ✓A MOST is not about how patients want to die; it is about how patients wish to live. A MOST is a response to ensuring reverent, medically appropriate, and patient-focused care and treatment during a terminal condition and at the end-of-life.

More information can be found at https://sdaho.org/most/

The MOST form, as promulgated by the SD Department of Health, can be found at https://doh.sd.gov/providers/most/

(please note that this is a resource for providers. Patients are not to fill out this form on their own as it needs to be ordered by an MD, DO, NP, or PA similar to the Comfort One document)