

NEW HAMPSHIRE STATUTE
TITLE X
PUBLIC HEALTH
CHAPTER 137-J

DURABLE POWER OF ATTORNEY FOR HEALTH CARE

Section 137-J:1

137-J:1 Definitions. – In this chapter:

- I. "Agent" means an adult to whom authority to make health care decisions is delegated under a durable power of attorney for health care.
- II. "Artificial nutrition and hydration" means invasive procedures such as but not limited to the following: nasogastric tubes; gastrostomy tubes; intravenous feeding or hydration; and hyperalimentation. It shall not include the natural ingestion of food or fluids by eating and drinking.
- III. "Attending physician" means the physician, selected by or assigned to a patient, who has primary responsibility for the treatment and care of the patient.
- IV. "Capacity to make health care decisions" means the ability to understand and appreciate the nature and consequences of a health care decision, including the significant benefits and harms of and reasonable alternatives to any proposed health care.
- V. "Durable power of attorney for health care" means a document delegating to an agent the authority to make health care decisions executed in accordance with the provisions of this chapter. It shall not mean forms routinely required by health and residential care providers for admissions and consent to treatment.
- VI. "Health care decision" means consent, refusal to consent, or withdrawal of consent to any care, treatment, admission to a health care facility, any service or procedure to maintain, diagnose, or treat an individual's physical or mental condition except as prohibited in this chapter or otherwise by law.
- VII. "Health care provider" means an individual or facility licensed, certified, or otherwise authorized or permitted by law to administer health care, for profit or otherwise, in the ordinary course of business or professional practice.
- VIII. "Life-sustaining treatment" means procedures without which a person would die, such as but not limited to the following: cardiopulmonary resuscitation, mechanical respiration, kidney dialysis or the use of other external mechanical or technological devices, drugs to maintain blood pressure, blood transfusions, and antibiotics.

IX. "Principal" means a person 18 years of age or older who has executed a durable power of attorney for health care.

X. "Residential care provider" means a "facility" as defined in RSA 161-F:11, V, a "nursing home" as defined in RSA 151-A:1, IV, or any individual or facility licensed, certified or otherwise authorized or permitted by law to operate, for profit or otherwise, a residential care facility for adults, including but not limited to those operating pursuant to RSA 420-D.

Source. 1991, 146:2. 2004, 110:3, eff. July 16, 2004.

Section 137-J:2

137-J:2 Scope and Duration of Authority. –

I. Subject to the provisions of this chapter and any express limitations set forth by the principal in the durable power of attorney for health care, the agent shall have the authority to make any and all health care decisions on the principal's behalf that the principal could make.

II. After consultation with the attending physician and other health care providers, the agent shall make health care decisions in accordance with the agent's knowledge of the principal's wishes and religious or moral beliefs, as stated orally or otherwise communicated by principal to agent, or as contained in the durable power of attorney for health care or in a terminal care document executed pursuant to the provisions of RSA 137-H; or if the principal's wishes are unknown, in accordance with the agent's assessment of the principal's best interests and in accordance with accepted medical practice.

III. Under a durable power of attorney for health care, the agent's authority shall be in effect only when the principal lacks capacity to make health care decisions, as certified in writing by the principal's attending physician and filed in the principal's medical record. When and if a person regains capacity to make such decisions, such event shall be noted in the principal's medical record. A durable power of attorney for health care may include a provision that, if the principal has no attending physician for reasons based on his religious or moral beliefs as specified in the durable power of attorney for health care, a person designated by the principal in the durable power of attorney for health care may certify in writing, acknowledged before a notary or justice of the peace, as to the lack of decisional capacity of the principal. The person so designated by the principal shall not be the agent, or a person ineligible to be the agent.

IV. Notwithstanding that a durable power of attorney for health care is in effect and irrespective of the principal's lack of capacity to make health care decisions at the time, treatment may not be given to or withheld from the principal over the principal's objection. The principal's attending physician shall make reasonable efforts to inform the

principal of any proposed treatment, or of any proposal to withdraw or withhold treatment.

V. Nothing in this chapter shall be construed to give an agent authority:

(a) To consent to voluntary admission to any state institution;

(b) To consent to a voluntary sterilization; or

(c) To consent to withholding life-sustaining treatment from a pregnant patient, unless, to a reasonable degree of medical certainty, as certified on the patient's chart by the attending physician and an obstetrician who has examined the patient, such treatment or procedures will not maintain the patient in such a way as to permit the continuing development and live birth of the unborn child or will be physically harmful to the patient or prolong severe pain which cannot be alleviated by medication.

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:3

137-J:3 Use of Statutory Forms. –

I. Every person wishing to execute a durable power of attorney for health care shall be provided with a disclosure statement substantially in the form set forth in RSA 137-J:14 prior to execution. The principal shall be required to sign a statement acknowledging that he has received the disclosure statement and has read and understands its contents.

II. A durable power of attorney for health care executed on or after the effective date of this chapter shall be substantially in the form set forth in RSA 137-J:15.

III. Artificial nutrition and hydration may not be withdrawn or withheld under a durable power of attorney for health care unless there is a clear expression of such power in the document.

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:4

137-J:4 Restrictions on Who May Act as Agent. – A person may not exercise the authority of agent while serving in one of the following capacities:

I. The principal's health care provider.

II. A nonrelative of the principal who is an employee of the principal's health care provider.

III. The principal's residential care provider.

IV. A nonrelative of the principal who is an employee of the principal's residential care provider.

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:5

137-J:5 Execution and Witnesses. – The durable power of attorney for health care shall be signed by the principal in the presence of 2 or more subscribing witnesses, neither of whom shall, at the time of execution, be the agent, the principal's spouse or heir, or a person entitled to any part of the estate of the principal upon death of the principal under a will, trust or other testamentary instrument or deed in existence or by operation of law. No more than one such witness may be the principal's health or residential care provider or such provider's employee. The witness shall affirm that the principal appeared to be of sound mind and free from duress at the time the durable power of attorney for health care was signed and that the principal affirmed that he was aware of the nature of the document and signed it freely and voluntarily. If the principal is physically unable to sign, the durable power of attorney for health care may be signed by the principal's name written by some other person in the principal's presence and at the principal's express direction.

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:6

137-J:6 Revocation. –

I. A durable power of attorney for health care shall be revoked:

(a) By notification by the principal to the agent or to a health or residential care provider orally, or in writing, or by any other act evidencing a specific intent to revoke the power;

(b) By execution by the principal of a subsequent durable power of attorney for health care; or

(c) By the filing of an action for divorce of the principal and spouse, where the spouse is the principal's agent, except when there is an alternate agent designated, in which case the designation of the spouse shall be revoked and the alternate designation shall become effective. Re-execution or re-affirmation of the durable power of attorney for health care following filing for divorce shall make effective the designation of the former spouse as agent under the durable power of attorney.

II. A principal's health or residential care provider who is informed of or provided with a revocation of a durable power of attorney for health care shall immediately record the revocation in the principal's medical record and notify the agent, the attending physician, and staff responsible for the principal's care of the revocation. An agent who becomes aware of such revocation shall inform the principal's health or residential care provider of such revocation.

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:7

137-J:7 Inspection and Disclosure of Medical Information. – Subject to any limitations set forth in the durable power of attorney for health care by the principal, an agent whose authority is in effect may for the purpose of making health care decisions:

I. Request, review, and receive any information, oral or written, regarding the principal's physical or mental health, including, but not limited to, medical and hospital records.

II. Execute any releases or other documents which may be required in order to obtain such medical information.

III. Consent to the disclosure of such medical information.

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:8

137-J:8 Action by Provider. –

I. A principal's health or residential care provider, and employees thereof, having knowledge of the principal's durable power of attorney for health care, shall be bound to follow the directives of the principal's designated agent to the extent they are consistent with this chapter and the durable power of attorney for health care.

II. When the direction of an agent requires an act or omission contrary to the moral or ethical principles or other standards of a health or residential care provider of which the principal is a patient or resident, the care provider shall allow for the transfer of the patient to another facility and shall incur no liability for its refusal to carry out the terms of the direction by the agent, provided that the health or residential care provider shall inform the agent of its decision not to participate in such an act or omission.

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:9

137-J:9 Freedom From Influence. – No health care provider or residential care provider, and no health care service plan, insurer issuing disability insurance, self-insured employee welfare benefit plan, or nonprofit hospital service plan shall charge a person a different rate because of the existence or non-existence of a durable power of attorney for health care or require any person to execute a durable power of attorney for health care as a condition of admission to a hospital, nursing home, or residential care home, or as a condition of being insured for, or receiving health or residential care. Health or residential care shall not be refused because a person has executed a durable power of attorney for health care.

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:10

137-J:10 Reciprocity. – Nothing in this chapter limits the enforceability of a durable power of attorney for health care or similar instrument executed in another state or jurisdiction in compliance with the law of that state or jurisdiction. However, any exercise of power under such a foreign durable power of attorney or similar instrument shall be restricted by and in compliance with the requirements of this chapter and the laws of the state of New Hampshire.

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:11

137-J:11 Immunity. –

I. No person acting as agent pursuant to a durable power of attorney for health care shall be subjected to criminal or civil liability for making a health care decision in good faith pursuant to the terms of the durable power of attorney for health care and the provisions of this chapter, if such person exercised such power in a manner consistent with the requirements of this chapter and New Hampshire law.

II. No health or residential care provider, or any other person acting for the provider or under the provider's control, shall be subjected to civil or criminal liability or be deemed to have engaged in unprofessional conduct, for any act or intentional failure to act done in good faith, if the act or intentional failure to act is done pursuant to the dictates of the durable power of attorney for health care, the directives of the patient's agent, and the provisions of this chapter, or for failure to follow such directive if the health or residential care provider believes in good faith that such directive exceeds the scope of or conflicts with the contents of the principal's durable power of attorney for health care. Nothing in this section shall be construed to establish immunity for the failure to exercise due care in the provision of services or for actions contrary to the requirements of this chapter or other laws of the state of New Hampshire.

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:12

137-J:12 Effect of Appointment of Guardian; Inconsistency. –

I. On motion filed in connection with a petition for appointment of a guardian or on petition of a guardian if one has been appointed, the probate court shall consider whether the authority of an agent designated pursuant to a durable power of attorney for health care should be suspended or revoked. In making its determination, the probate court shall take into consideration the preferences of the principal as expressed in the durable power of attorney for health care. No such consideration shall change the procedures or burden of proof involved in the guardianship process as otherwise provided by law or procedures. In such consideration, the durable power of attorney for health care and agent appointed shall be presumed to be in the best interest of the principal and valid, absent clear and convincing evidence to the contrary.

II. To the extent that a durable power of attorney for health care conflicts with a terminal care document executed in accordance with RSA 137-H, the durable power of attorney for health care shall control.

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:13

137-J:13 Liability for Health Care Costs. – Liability for the cost of health care provided pursuant to the agent's decision shall be the same as if the health care were provided pursuant to the principal's decision.

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:14

137-J:14 Durable Power of Attorney; Disclosure Statement. – The disclosure statement which must accompany a durable power of attorney for health care shall be in substantially the following form:

INFORMATION CONCERNING THE DURABLE POWER OF ATTORNEY FOR HEALTH CARE

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT YOU SHOULD KNOW THESE IMPORTANT FACTS:

Except to the extent you state otherwise, this document gives the person you name as your agent the authority to make any and all health care decisions for you when you are no longer capable of making them yourself. "Health care" means any treatment, service or procedure to maintain, diagnose or treat your physical or mental condition. Your agent, therefore, can have the power to make a broad range of health care decisions for you. Your agent may consent, refuse to consent, or withdraw consent to medical treatment and may make decisions about withdrawing or withholding life-sustaining treatment. Your agent cannot consent or direct any of the following: commitment to a state institution, sterilization, or termination of treatment if you are pregnant and if the withdrawal of that treatment is deemed likely to terminate the pregnancy unless the failure to withhold the treatment will be physically harmful to you or prolong severe pain which cannot be alleviated by medication.

You may state in this document any treatment you do not desire, except as stated above, or treatment you want to be sure you receive. Your agent's authority will begin when your doctor certifies that you lack the capacity to make health care decisions. If for moral or religious reasons you do not wish to be treated by a doctor or examined by a doctor for the certification that you lack capacity, you must say so in the document and name a person to be able to certify your lack of capacity. That person may not be your agent or alternate agent or any person ineligible to be your agent. You may attach additional pages if you need more space to complete your statement.

If you want to give your agent authority to withhold or withdraw the artificial providing of nutrition and fluids, your document must say so. Otherwise, your agent will

not be able to direct that. Under no conditions will your agent be able to direct the withholding of food and drink for you to eat and drink normally.

Your agent will be obligated to follow your instructions when making decisions on your behalf. Unless you state otherwise, your agent will have the same authority to make decisions about your health care as you would have had if made consistent with state law.

It is important that you discuss this document with your physician or other health care providers before you sign it to make sure that you understand the nature and range of decisions which may be made on your behalf. If you do not have a physician, you should talk with someone else who is knowledgeable about these issues and can answer your questions. You do not need a lawyer's assistance to complete this document, but if there is anything in this document that you do not understand, you should ask a lawyer to explain it to you.

The person you appoint as agent should be someone you know and trust and must be at least 18 years old. If you appoint your health or residential care provider (e.g. your physician, or an employee of a home health agency, hospital, nursing home, or residential care home, other than a relative), that person will have to choose between acting as your agent or as your health or residential care provider; the law does not permit a person to do both at the same time.

You should inform the person you appoint that you want him or her to be your health care agent. You should discuss this document with your agent and your physician and give each a signed copy. You should indicate on the document itself the people and institutions who will have signed copies. Your agent will not be liable for health care decisions made in good faith on your behalf.

Even after you have signed this document, you have the right to make health care decisions for yourself as long as you are able to do so, and treatment cannot be given to you or stopped over your objection. You have the right to revoke the authority granted to your agent by informing him or her or your health care provider orally or in writing.

This document may not be changed or modified. If you want to make changes in the document you must make an entirely new one.

You should consider designating an alternate agent in the event that your agent is unwilling, unable, unavailable, or ineligible to act as your agent. Any alternate agent you designate will have the same authority to make health care decisions for you.

THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS IT IS SIGNED IN THE PRESENCE OF TWO (2) OR MORE QUALIFIED WITNESSES WHO MUST BOTH BE PRESENT WHEN YOU SIGN AND ACKNOWLEDGE YOUR SIGNATURE. THE FOLLOWING PERSONS MAY NOT ACT AS WITNESSES:

- the person you have designated as your agent;
- your spouse;
- your lawful heirs or beneficiaries named in your will or a deed;

ONLY ONE OF THE TWO WITNESSES MAY BE YOUR HEALTH OR RESIDENTIAL CARE PROVIDER OR ONE OF THEIR EMPLOYEES.

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:15

137-J:15 Durable Power of Attorney; Form. – The durable power of attorney shall be in substantially the following form:

DURABLE POWER OF ATTORNEY FOR HEALTH CARE

I, _____, hereby appoint _____ of _____ as my agent to make any and all health care decisions for me, except to the extent I state otherwise in this document or as prohibited by law. This durable power of attorney for health care shall take effect in the event I become unable to make my own health care decisions.

STATEMENT OF DESIRES, SPECIAL PROVISIONS, AND LIMITATIONS REGARDING HEALTH CARE DECISIONS.

For your convenience in expressing your wishes, some general statements concerning the withholding or removal of life-sustaining treatment are set forth below. (Life-sustaining treatment is defined as procedures without which a person would die, such as but not limited to the following: cardiopulmonary resuscitation, mechanical respiration, kidney dialysis or the use of other external mechanical and technological devices, drugs to maintain blood pressure, blood transfusions, and antibiotics.) There is also a section which allows you to set forth specific directions for these or other matters. If you wish you may indicate your agreement or disagreement with any of the following statements and give your agent power to act in those specific circumstances.

1. If I become permanently incompetent to make health care decisions, and if I am also suffering from a terminal illness, I authorize my agent to direct that life-sustaining treatment be discontinued. (YES) (NO) (Circle your choice and initial beneath it.)

2. Whether terminally ill or not, if I become permanently unconscious I authorize my agent to direct that life-sustaining treatment be discontinued. (YES) (NO) (Circle your choice and initial beneath it.)

3. I realize that situations could arise in which the only way to allow me to die would be to discontinue artificial feeding (artificial nutrition and hydration). In carrying out any instructions I have given above in #1 or #2 or any instructions I may write in #4 below, I authorize my agent to direct that (circle your choice of (a) or (b) and initial beside it):

(a) artificial nutrition and hydration not to be started or, if started, be discontinued,
-or-

(b) although all other forms of life-sustaining treatment be withdrawn, artificial nutrition and hydration continue to be given to me. (If you fail to complete item 3, your agent will not have the power to direct the withdrawal of artificial nutrition and hydration.)

4. Here you may include any specific desires or limitations you deem appropriate, such as when or what life-sustaining treatment you would want used or withheld, or instructions about refusing any specific types of treatment that are inconsistent with your

religious beliefs or unacceptable to you for any other reason. You may leave this question blank if you desire.

(attach additional pages as necessary)

In the event the person I appoint above is unable, unwilling or unavailable, or ineligible to act as my health care agent, I hereby appoint _____ of _____ as alternate agent.

I hereby acknowledge that I have been provided with a disclosure statement explaining the effect of this document. I have read and understand the information contained in the disclosure statement.

The original of this document will be kept at _____ and the following persons and institutions will have signed copies:

In witness whereof, I have hereunto signed my name this _____ day of ____, 20

Signature

I declare that the principal appears to be of sound mind and free from duress at the time the durable power of attorney for health care is signed and that the principal has affirmed that he or she is aware of the nature of the document and is signing it freely and voluntarily.

Witness: _____ Address: _____

Witness: _____ Address: _____

STATE OF NEW HAMPSHIRE

COUNTY OF _____

The foregoing instrument was acknowledged before me this _____ day of _____, 20 ____, by _____

Notary Public/Justice of the Peace

My Commission Expires:

Source. 1991, 146:2, eff. July 19, 1991.

Section 137-J:16

137-J:16 Civil Action. – Any person who is a near relative of the principal or a responsible adult who is directly interested in the principal by personal knowledge and acquaintance, including but not limited to a guardian, social worker, physician, or clergyman, may file an action in probate court requesting that the durable power of attorney for health care be revoked on the grounds that the principal was not of sound mind or was under duress, fraud, or undue influence when the durable power of attorney for health care was executed and shall have all the rights and remedies provided by RSA 506:7 which shall apply to documents executed under this chapter and persons acting pursuant to this chapter.

Source. 1991, 146:2. 1992, 284:2, eff. Jan. 1, 1993.