

---

# Wisconsin Legislative Council

## ACT MEMO

---



**Prepared by:** Andrea Brauer, Staff Attorney

March 9, 2020

### 2019 Wisconsin Act 90 [2019 Assembly Bill 287]

### Certain Decisions Regarding a Person's Health Status

2019 Wisconsin Act 90 expands the health care provider types that can make decisions regarding a person's health status for the purpose of admitting an incapacitated person to a hospice, implementing a living will, issuing a do-not-resuscitate order, and implementing a power of attorney for health care.

## ADMISSION OF INCAPACITATED PERSONS TO A HOSPICE

A person who does not have a valid living will or a valid power of attorney for health care and has not been adjudicated incompetent in Wisconsin may be admitted to a hospice if:

- The person is determined to be incapacitated;
- A qualifying relative or close friend provides informed consent and certifies that, in his or her belief, the incapacitated person would have selected hospice care; and
- A physician certifies that the incapacitated person has a terminal condition and that the physician believes the person giving informed consent is acting in accordance with the views or beliefs of the incapacitated person.

The act changes the provider types that can make a determination that a person is incapacitated, under the first bullet point above. **Under prior law**, the determination had to be made by two physicians, or by one physician and one psychologist, both of whom personally examined the person and signed a statement specifying that the person was incapacitated.

**Under the act**, the determination can be made by two physicians, or by one physician and one "advanced practice clinician," defined to mean: (1) a psychologist; (2) a registered nurse who is certified as a nurse practitioner by a national certifying body approved by the Board of Nursing; or (3) a physician assistant (PA), if a physician responsible for overseeing the PA's practice affirms that the PA is competent to conduct evaluations of the capacity of patients to manage health care decisions. The act retains the requirement that both providers personally examine the patient and sign a statement specifying that the patient is incapacitated.

## LIVING WILLS (DECLARATIONS TO HEALTH CARE PROFESSIONALS)

A living will authorizes the withholding of life-sustaining procedures or feeding tubes when the person who executed the living will is diagnosed and certified in writing to be afflicted with a terminal condition or to be in a vegetative state.

**Under prior law**, the diagnosis and certification had to be made by two physicians, one of whom was the attending physician, who both personally examined the patient. The "attending" provider is the provider who has primary responsibility for the treatment and care of the patient.

**Under the act**, the diagnosis and certification may be made by: (1) two physicians; (2) one physician and one PA; or (3) one physician and one advanced practice registered nurse. The act requires that both providers who make the diagnosis and certification must personally examine the patient, but does not require that the physician be the attending provider.

Correspondingly, prior law referred to the living will as a “declaration to physicians,” whereas the act refers to it as a “declaration to health care professionals.”

## **DO-NOT-RESUSCITATE ORDERS**

A do-not-resuscitate order directs emergency medical technicians, first responders, and emergency health care facility personnel not to attempt cardiopulmonary resuscitation on a person for whom the order is issued if that person suffers cardiac or respiratory arrest. Only certain patients can request a do-not-resuscitate order. The patient must be 18 years of age or older and must have a terminal condition or a medical condition such that resuscitation would be unsuccessful (or the person would experience repeated cardiac or pulmonary failure within a short time before death occurs) or resuscitation would cause significant physical pain or harm that would outweigh the possibility of successful treatment. The person also cannot be known to be pregnant.

**Under prior law**, only an attending physician could issue a do-not-resuscitate order. **The act** authorizes any of the following health care professionals to issue a do-not-resuscitate order: (1) an attending physician; (2) an attending PA; or (3) an attending advanced practice registered nurse. Under the act, a health care professional who issues a do-not-resuscitate order is subject to all of the other requirements that previously applied to a physician who issued a do-not-resuscitate order.

## **POWER OF ATTORNEY FOR HEALTH CARE**

A power of attorney for health care designates another person as a “health care agent” for the purpose of making health care decisions when the person who executed the document cannot due to incapacity. In this context, incapacity means the inability to receive and evaluate information effectively or to communicate decisions to such extent that the person lacks the capacity to manage his or her health care decisions.

**Prior law** provided that, unless specified otherwise in the power of attorney for health care, an individual’s power of attorney for health care took effect upon a finding of incapacity by two physicians, or one physician and one psychologist, who personally examined the patient and signed a statement specifying that the patient had incapacity.

**The act** provides that, unless specified otherwise in the power of attorney for health care, a person’s power of attorney for health care takes effect upon a finding of incapacity by two physicians or by one physician and one “advanced practice clinician,” defined to mean: (1) a psychologist; (2) a registered nurse who is certified as a nurse practitioner by a national certifying body approved by the Board of Nursing; or (3) a PA, if a physician responsible for overseeing the PA’s practice affirms that the PA is competent to conduct evaluations of the capacity of patients to manage health care decisions. Both providers must personally examine the patient and sign a statement specifying that the patient has incapacity.

**Effective date:** February 7, 2020

AB:mca;ksm