



**OFFICE OF ATTORNEY GENERAL**

1302 East Highway 14, Suite 1  
Pierre, South Dakota 57501-8501

Phone (605) 773-3215

Fax (605) 773-4106

TTY (605) 773-6585

<http://atg.sd.gov/>

**MARTY J. JACKLEY**  
ATTORNEY GENERAL

**CHARLES D. McGUIGAN**  
CHIEF DEPUTY ATTORNEY GENERAL

HAND DELIVERED

December 20, 2016

Hon. Shantel Krebs  
Secretary of State  
500 E. Capitol  
Pierre, SD 57501

**RE: Attorney General's Statement for initiated measure (prescription of  
life-ending drugs for terminally ill patients)**

Dear Secretary Krebs,

This Office received a proposed initiated measure that the sponsor will seek to place on the November 2018 general election ballot. Enclosed is a copy of the initiated measure, in final form, that was submitted to this Office. In accordance with SDCL 12-13-25.1, I hereby submit the Attorney General's Statement with respect to this measure.

By copy of this letter, I am providing a copy of the Attorney General's Statement to the sponsor of the initiated measure pursuant to SDCL 12-13-25.1.

Very truly yours,

A handwritten signature in black ink, appearing to read "Marty J. Jackley".

Marty J. Jackley  
ATTORNEY GENERAL

MJJ/PA/lde  
Enc.

cc/enc.: Angela Albonico  
Jason Hancock, Director of LRC

## INITIATED MEASURE

### ATTORNEY GENERAL'S STATEMENT

Title: An initiated measure authorizing a South Dakota-licensed physician to prescribe drugs that a terminally ill patient may take for the purpose of ending life.

Explanation:

This measure authorizes a State-licensed physician, if requested by an adult patient diagnosed with a terminal disease, to prescribe life-ending drugs for the patient. The measure allows only the patient to self-administer the prescribed life-ending drugs. A "terminal disease" is incurable, irreversible, and expected to produce death within six months. The patient must be a South Dakota resident, as defined by the measure.

The patient must orally make the request to his or her attending physician, followed by another oral request after a fifteen-day period. The patient must also make a written request witnessed by two people. The patient may rescind the requests at any time.

Before prescribing the drugs, the attending physician must determine the patient is mentally competent and is making an informed and voluntary decision. The physician must also advise the patient of certain information, including medical diagnosis, prognosis, and alternatives such as comfort care, hospice care, and pain control. A second physician must confirm the diagnosis and consult with the patient to verify the patient's decision.

Individuals acting in good faith under this measure will not face civil or criminal liability or professional disciplinary action. The measure does not mandate participation by healthcare providers.

## BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA

### Section 1.

Terms used in this Act mean:

- (1) "Attending physician," the physician who has primary responsibility for the care of the patient and treatment of the patient's terminal disease;
- (2) "Competency," in the opinion of a court or in the opinion of the patient's attending physician or consulting physician, psychiatrist, or psychologist, a patient's ability to make and communicate an informed decision to healthcare providers, including communication through persons familiar with the patient's manner of communicating if those persons are available;
- (3) "Consulting physician," a physician who is qualified by specialty or experience to make a professional diagnosis and prognosis regarding the patient's disease;
- (4) "Counseling," one or more consultations as necessary between a state licensed psychiatrist or psychologist and a patient for the purpose of determining that the patient is competent and not suffering from a psychiatric or psychological disorder or depression causing impaired judgment;
- (5) "Health care provider," a person licensed, certified, or otherwise authorized or permitted by law to administer health care or dispense medication in the ordinary course of business or practice of a profession, and includes a health care facility;
- (6) "Informed decision," a decision by a qualified patient, to request and obtain a prescription for medication that the qualified patient may self-administer to end the patient's life in a humane and dignified manner, that is based on an appreciation of the relevant facts and after being fully informed by the attending physician of:
  - (a) The qualified patient's medical diagnosis;
  - (b) The qualified patient's prognosis;
  - (c) The potential risks associated with taking the medication to be prescribed;
  - (d) The probable result of taking the medication to be prescribed; and
  - (e) The feasible alternatives such as, comfort care, hospice care, and pain control;
- (7) "Medically confirmed," the medical opinion of the attending physician that has been confirmed by a consulting physician who has examined the patient and the patient's relevant medical records;
- (8) "Patient," a person who is under the care of a physician;
- (9) "Physician," a doctor of medicine or a doctor of osteopathy licensed to practice medicine under chapter 36-4;

(10) "Qualified patient," a competent adult who is a resident of South Dakota and has satisfied the requirements of this Act in order to obtain a prescription for medication that the qualified patient may self-administer to end the patient's life in a humane and dignified manner;

(11) "Self-administer," a qualified patient's act of ingesting medication to end the patient's life in a humane and dignified manner; and

(12) "Terminal disease," an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months.

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## **Section 2.**

An adult patient who is competent, is a resident of South Dakota, and is determined by the attending physician and consulting physician to be suffering from a terminal disease, and who is voluntarily expressing a wish to die, may make a written request for medication that the patient may self-administer to end the patient's life in a humane and dignified manner in accordance with this Act;

No person qualifies under this Act solely because of age or disability.

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## **Section 3.**

A valid request for medication under this Act shall be in substantially the form provided in this section, signed and dated by the patient and witnessed by at least two persons who, in the presence of the patient, attest that, to the best of their knowledge, and belief, the patient is competent, acting voluntarily, and is not being coerced to sign the request.

One of the witnesses shall be a person who is not:

(1) A relative of the patient by blood, marriage, or adoption;

(2) A person who at the time the request is signed would be entitled to any portion of the estate of the qualified patient upon death under any will or by operation of law; or

(3) An owner, operator, or employee of a healthcare facility where the qualified patient is receiving medical treatment or is a resident.

The patient's attending physician at the time the request is signed may not be a witness.

If the patient is a resident in a long-term care facility at the time the written request is made, one of the witnesses shall be a person designated by the facility who meets the

qualifications specified by the Department of Health in rules promulgated pursuant to chapter 1-26.

A request for a medication as authorized by this Act shall be in substantially the following form:

**REQUEST FOR MEDICATION TO END MY LIFE IN A HUMANE AND DIGNIFIED MANNER**

I, ....., am an adult of sound mind.

I am suffering from ....., which my attending physician has determined is a terminal disease and which has been medically confirmed by a consulting physician.

I have been fully informed of my diagnosis, prognosis, the nature of medication to be prescribed and potential associated risks, the expected result, and the feasible alternatives, including comfort care, hospice care, and pain control.

I request that my attending physician prescribe medication that I may self-administer to end my life in a humane and dignified manner and to contact any pharmacist to fill the prescription.

INITIAL ONE:

..... I have informed my family of my decision and taken their opinions into consideration.

..... I have decided not to inform my family of my decision.

..... I have no family to inform of my decision.

I understand that I have the right to rescind this request at any time.

I understand the full import of this request and I expect to die when I take the medication to be prescribed. I further understand that although most deaths occur within three hours, my death may take longer and my physician has counseled me about this possibility.

I make this request voluntarily and without reservation, and I accept full moral responsibility for my actions.

Signed: .....

Dated: .....

**DECLARATION OF WITNESSES**

By initialing and signing below on or after the date the person named above signs, we declare that the person making and signing the above request:

Witness	Witness
1	2
Initials	Initials

- |       |       |  |
|-------|-------|--|
| ..... | ..... | 1. Is personally known to us or has provided proof of identity;    |
| ..... | ..... | 2. Signed this request in our presence on the date of the person's |

signature;

.....

3. Appears to be of sound mind and not under duress, fraud, or undue influence;

.....

4. Is not a patient for whom either of us is the attending physician.

Printed Name of Witness 1: . . . .

Signature of Witness 1/Date: . . . .

Printed Name of Witness 2: . . . .

Signature of Witness 2/Date: . . . .

NOTE: One witness may not be a relative by blood, marriage, or adoption of the person signing this request, may not be entitled to any portion of the person's estate upon death, and may not own, operate, or be employed at a health care facility where the person is a patient or resident. If the patient is an inpatient at a health care facility, one of the witnesses shall be a person designated by the facility.

#### **Section 4.**

The attending physician shall:

- (1) Make the initial determination of whether a patient has a terminal disease, is competent, and has made the request voluntarily;
- (2) Require the patient to demonstrate South Dakota residency pursuant to section 13 of this Act;
- (3) Ensure that the patient is making an informed decision by informing the patient of:
  - (a) The patient's medical diagnosis;
  - (b) The patient's prognosis;
  - (c) The potential risks associated with taking the medication to be prescribed;
  - (d) The probable result of taking the medication to be prescribed; and
  - (e) The feasible alternatives such as comfort care, hospice care, and pain control;
- (4) Refer the patient to a consulting physician for medical confirmation of the diagnosis, and for a determination that the patient is competent and acting voluntarily;
- (5) Refer the patient for counseling, if appropriate;
- (6) Recommend that the patient notify next of kin;
- (7) Counsel the patient about the importance of having another person present when the patient takes the medication prescribed under this Act and of not taking the medication in a public place;

- (8) Inform the patient that the patient may rescind the request at any time and in any manner, and offer the patient an opportunity to rescind at the end of the fifteen-day waiting period;
- (9) Verify, immediately before writing the prescription for medication under this Act, that the patient is making an informed decision;
- (10) Fulfill the medical record documentation requirements;
- (11) Ensure that all appropriate steps are carried out in accordance with this Act before writing a prescription for medication to enable a qualified patient to end the patient's life in a humane and dignified manner; and
- (12) Dispense medications directly, including ancillary medications intended to facilitate the desired effect to minimize the patient's discomfort, if the attending physician is authorized under statute and rule to dispense or with the patient's written consent, the attending physician shall:
- (a) Contact a pharmacist and inform the pharmacist of the prescription; and
  - (b) Deliver the written prescription personally, by mail or facsimile to the pharmacist, who will dispense the medications directly to either the patient, the attending physician, or an expressly identified agent of the patient. Medications dispensed pursuant to this subsection may not be dispensed by mail or other form of courier.

The attending physician may sign the patient's death certificate which shall list the underlying terminal disease as the cause of death.

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### **Section 5.**

Before a patient is qualified under this Act, a consulting physician shall examine the patient and the patient's relevant medical records and confirm, in writing, the attending physician's diagnosis that the patient is suffering from a terminal disease, and verify that the patient is competent, is acting voluntarily, and has made an informed decision.

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### **Section 6.**

If, in the opinion of the attending physician or the consulting physician, a patient may be suffering from a psychiatric or psychological disorder or depression causing impaired judgment, either physician shall refer the patient for counseling. Medication to end a patient's life in a humane and dignified manner may not be prescribed until the person performing the counseling determines that the patient is not suffering from a psychiatric or psychological disorder or depression causing impaired judgment.

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### **Section 7.**

No person may receive a prescription for medication to end the person's life in a humane and dignified manner unless the person has made an informed decision. Immediately before writing a prescription for medication under this Act, the attending physician shall verify that the qualified patient is making an informed decision.

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### **Section 8.**

The attending physician shall recommend that the patient notify the next of kin of the patient's request for medication under this Act. A patient who declines or is unable to notify next of kin may not have the patient's request denied for that reason.

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### **Section 9.**

To receive a prescription for medication that the qualified patient may self-administer to end the patient's life in a humane and dignified manner, a qualified patient shall make an oral request and a written request, and reiterate the oral request to the qualified patient's attending physician at least fifteen days after making the initial oral request. At the time the qualified patient makes a second oral request, the attending physician shall offer the qualified patient an opportunity to rescind the request.

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### **Section 10.**

A patient may rescind a request at any time and in any manner without regard to the patient's mental state. No prescription for medication under this Act may be written without the attending physician offering the qualified patient an opportunity to rescind the request.

### **Section 11.**

At least fifteen days shall elapse between the patient's initial oral request and the writing of a prescription under this Act.

At least forty-eight hours shall elapse between the date the patient signs the written request and the writing of a prescription under this Act.



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## **Section 12.**

The following shall be documented or filed in the patient's medical record:

- (1) Any oral request by a patient for medication to end the patient's life in a humane and dignified manner;
- (2) Any written request by a patient for medication to end the patient's life in a humane and dignified manner;
- (3) The attending physician's diagnosis and prognosis, and determination that the patient is competent, is acting voluntarily, and has made an informed decision;
- (4) The consulting physician's diagnosis and prognosis, and verification that the patient is competent, is acting voluntarily, and has made an informed decision;
- (5) A report of the outcome and determinations made during counseling, if performed;
- (6) The attending physician's offer to the patient to rescind the request at the time of the patient's second oral request; and
- (7) A note by the attending physician indicating that all requirements under this Act have been met and indicating the steps taken to carry out the request, including a notation of the medication prescribed.

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## **Section 13.**

Only requests made by South Dakota residents under this Act may be granted. A patient may demonstrate residency by any of the following:

- (1) Possession of a South Dakota driver's license;
- (2) Registration to vote in South Dakota; or
- (3) Evidence that the person owns or leases property in South Dakota.

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## **Section 14.**

Any medication dispensed under this Act that is not self-administered shall be disposed of by lawful means.

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## **Section 15.**

The Department of Health shall annually review all records maintained under this Act.

The department shall require any health care provider upon writing a prescription or dispensing medication under this Act to file a copy of the dispensing record and any other

required documentation with the department. All required documentation shall be mailed or otherwise transmitted as allowed by the department no later than thirty calendar days after the writing of a prescription and dispensing of medication under this Act, except that all documents required to be filed with the department by the prescribing physician after the death of the patient shall be mailed no later than thirty calendar days after the date of death of the patient.

The Department of Health shall promulgate rules pursuant to Chapter 1-26 outlining the documentation required pursuant to this section and how the documentation may be transmitted to the department. Notwithstanding any other provision of law, the information collected is not a public record and may not be made available for inspection by the public.

The Department of Health shall generate and make available to the public an annual statistical report of information collected under this section.

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#### **Section 16.**

No provision in any contract, will, or other agreement, whether written or oral, to the extent the provision would affect whether a person may make or rescind a request for medication to end the person's life in a humane and dignified manner, is valid.

No obligation under any currently existing contract may be conditioned or affected by the making or rescinding of a request, by a person, for medication to end the person's life in a humane and dignified manner.

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#### **Section 17.**

No sale, procurement, or issuance of any life, health, or accident insurance or annuity policy or the rate charged for any policy may be conditioned upon or affected by the making or rescinding of a request, by a patient, for medication that the patient may self-administer to end the person's in a humane and dignified manner. A qualified patient's act of ingesting medication to end the patient's life in a humane and dignified manner does not have an effect upon any life, health, or accident insurance or annuity policy.

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**Section 18**

Nothing in this Act authorizes a physician or any other person to end a patient's life by lethal injection, mercy killing, or active euthanasia. Any action taken in accordance with this Act does not, for any purpose, constitute suicide, assisted suicide, mercy killing, or homicide, under the law. No state report may refer to any practice under this Act as suicide or assisted suicide. Any state report shall refer to practice under this Act as obtaining and self-administering life-ending medication.

Nothing in this Act may be interpreted to lower the applicable standard of care for the attending physician, consulting physician, psychiatrist or psychologist, or other health care provider participating under this Act.

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**Section 19.**

No person may be subject to civil or criminal liability or professional disciplinary action for participating in good faith compliance with this Act. This includes being present when a qualified patient takes the prescribed medication to end the patient's life in a humane and dignified manner.

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**Section 20**

No professional organization or association, or health care provider, may subject a person to censure, discipline, suspension, loss of license, loss of privileges, loss of membership, or other penalty for participating or refusing to participate in good faith compliance with this Act.

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**Section 21**

A patient's request for or provision by an attending physician of medication in good faith compliance with this chapter does not constitute neglect for any purpose of law or provide the sole basis for the appointment of a guardian or conservator.

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## **Section 22**

Only willing health care providers may participate in the provision to a qualified patient of medication to end the patient's life in a humane and dignified manner. If a health care provider is unable or unwilling to carry out a patient's request under this Act, and the patient transfers the patient's care to a new health care provider, the prior health care provider shall transfer, upon request, a copy of the patient's relevant medical records to the new health care provider.

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## **Section 23**

A health care provider may prohibit another health care provider from participating under this Act on the premises of the prohibiting provider if the prohibiting provider has given notice to all health care providers with privileges to practice on the premises and to the general public of the prohibiting provider's policy regarding participating. If a health care provider has provided the notice required pursuant to this section, the health care provider may subject another health care provider to the following sanctions:

- (1) Loss of privileges, loss of membership, or other sanctions provided under the medical staff bylaws, policies, and procedures of the sanctioning health care provider if the sanctioned provider is a member of the sanctioning provider's medical staff and participates under this Act while on the health care facility premises of the sanctioning health care provider, excluding the private medical office of a physician or other provider;
- (2) Termination of a lease or other property contract or other nonmonetary remedies provided by a lease contract, not including loss or restriction of medical staff privileges or exclusion from a provider panel, if the sanctioned provider participates under this Act while on the premises of the sanctioning health care provider or on property that is owned by or under the direct control of the sanctioning health care provider; or
- (3) Termination of a contract or other nonmonetary remedies provided by contract if the sanctioned provider participates under this Act while acting in the course and scope of the sanctioned provider's capacity as an employee or independent contractor of the sanctioning health care provider.

Nothing in this section prevents a health care provider from participating under this Act while acting outside the course and scope of the provider's capacity as an employee or independent contractor or a patient from contracting with the patient's attending physician and consulting physician to act outside the course and scope of the provider's capacity as an employee or independent contractor of the sanctioning health care provider.

A health care provider that imposes sanctions under this section shall follow all due process and other procedures the sanctioning health care provider may have that are related to the imposition of sanctions on another health care provider. No sanction imposed under this section may be the sole basis for a report of unprofessional conduct.

For the purposes of this section the notice required shall be in writing to the health care provider specifically informing the health care provider before the provider's participation under this Act of the sanctioning health care provider's policy about participation in activities covered under this Act. Participating under this Act does not include making an initial determination that a patient has a terminal disease and informing the patient of the medical prognosis, providing information about this Act to a patient upon the request of the patient, or providing a patient, upon the request of the patient, with a referral to another physician.

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#### **Section 24.**

A person who without authorization of the patient willfully alters or forges a request for medication or conceals or destroys a rescission of that request with the intent or effect of causing the patient's death is guilty of a Class A felony.

A person who coerces or exerts undue influence on a patient to request medication to end the patient's life, or to destroy a rescission of a request, is guilty of a class A felony.

This Act does not limit further liability for civil damages resulting from other negligent conduct or intentional misconduct by any person.

The penalties in this section do not preclude criminal penalties applicable under other law for conduct that is inconsistent with this Act.

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#### **Section 25.**

Any governmental entity that incurs costs resulting from a person terminating the person's life under this Act in a public place has a claim against the estate of the person to recover such costs and reasonable attorneys' fees related to enforcing the claim.

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#### **Section 26.**

The effective date of this Act is April 1, 2019.