

1 **AN ACT** *to amend* 155.20 (2) (a), 155.20 (2) (b), 155.20 (2) (c) 2. a., 155.20 (5),
 2 155.30 (3) and 155.40 (1); and *to create* 155.25 of the statutes; **relating to:**
 3 authorization of an agent under a power of attorney for health care to make certain
 4 decisions related to care and treatment of dementia.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill draft was prepared for the Joint Legislative Council’s Special Committee on Legal Interventions for Persons with Alzheimer’s Disease and Related Dementias.

Currently, any person at least 18 years of age and of sound mind may voluntarily execute a power of attorney for health care. If the person who executes the power of attorney for health care (the “principal”) is later found, by 2 physicians, to be incapacitated, the power of attorney for health care instrument is activated and the person’s designated health care agent (the “agent”) may make health care decisions on behalf of the principal, as specified in the power of attorney for health care instrument. “Incapacity” means the inability to receive and evaluate information effectively or to communicate decisions to such an extent that the individual lacks the capacity to manage his or her health care decisions.

The draft changes Wisconsin law pertaining to powers of attorney for health care, as follows:

Care and Treatment of Dementia

Currently, an agent must act in good faith consistently with the desires of the principal as expressed in the power of attorney for health care instrument or as otherwise specifically directed by the principal to the health care agent *at any time*. Under this standard, a principal’s protest to certain care or treatment, even if the principal has incapacity, can be interpreted as a specific direction to the principal that conflicts with the authority granted to the agent in the power of attorney for health care. Thus, if an incapacitated principal protests a certain type of care or treatment, the agent may not consent to that care or treatment on behalf

of the principal, even if the power of attorney for health care instrument grants the agent that authority.

This draft creates a new option for decisions regarding care and treatment of dementia in this situation. The draft provides that—if the power of attorney for health care instrument includes a specific authorization to that effect—with regard to any decision related to care or treatment of dementia, or any conditions or behaviors substantially related to dementia, a health care agent must act in good faith consistently with the desires of the principal as expressed in the power of attorney for health care instrument or as otherwise specifically directed by the principal to the health care agent *at a time when the principal does not have incapacity*. The draft requires an agent acting under this provision to consult with appropriate care providers and consider the prognosis and acceptable alternatives for care and treatment of dementia, or any condition or behavior substantially related to dementia.

Currently, a power of attorney for health care may be revoked by the principal *at any time*.

This draft provides that if a power of attorney for health care instrument contains the authorization regarding care and treatment of dementia and related conditions and behaviors referred to above, the instrument may be revoked by the principal only *at a time when he or she does not have incapacity*.

Admission of a Principal With Dementia to Certain Inpatient Facilities

Currently, an agent under a power of attorney for health care may not consent to the admission of the principal on an inpatient basis to any of the following facilities:

- An institution for mental diseases.
- An intermediate care facility for persons with an intellectual disability.
- Any of the institutions operated by DHS for the purpose of providing diagnosis, care or treatment for mental or emotional disturbance, developmental disability, alcoholism or drug dependency including, but not limited to, mental health institutes.
- Any publicly or privately operated facility or unit thereof providing treatment of alcoholic, drug dependent, mentally ill or developmentally disabled persons, including but not limited to inpatient and outpatient treatment programs, community support programs, and rehabilitation programs.

Currently, a principal may be admitted on an inpatient basis to any of these facilities only under the applicable requirements of ch. 51 or 55, stats.

Under the draft, if the power of attorney for health care instrument specifically authorizes the agent to do so, a health care agent may, for purposes of care or treatment of dementia, or any condition or behavior substantially related to dementia, consent to admission of the principal on an inpatient basis to a facility described above. This consent may be provided only if a physician from the facility certifies in writing that reasonable efforts have been made to address or accommodate the behaviors or conditions for which an inpatient admission is sought, and that the proposed admission will allow the principal to receive care or treatment more appropriate to the principal's needs. The draft requires an agent acting under this provision to consult with appropriate care providers and consider the prognosis and acceptable alternatives for care and treatment of dementia, or any condition or behavior substantially related to dementia.

Admission to Nursing Home for Recuperative Care

Currently, a health care agent may consent to the admission of a principal to a nursing home, for recuperative care for a period not to exceed 3 months, if the principal is admitted directly from a hospital inpatient unit, unless the hospital admission was for psychiatric care.

This draft removes the prohibition on nursing home admissions following psychiatric care in a hospital. Under the draft, a health care agent may consent to the admission of a principal to a nursing home, for recuperative care for a period not to exceed 3 months if the principal is admitted directly from *any* hospital inpatient unit.

Amendments to Power of Attorney for Health Care Form

The draft includes amendments to the power of attorney for health care form provided in ch. 155, stats., to reflect the changes made in the draft.

Initial Applicability

The draft provides that the provision described above regarding admission to a nursing home for recuperative care, which does not require a specific authorization in the power of attorney for health care instrument, will apply only to a health care power of attorney created on or after the date that the draft becomes law. All of the other provisions of the draft that affect a health care agent's authority require a specific authorization in the health care power of attorney instrument in order to apply to that individual. As a result, in most cases, these provisions will

also only apply to powers of attorney for health care created on or after the date that the draft becomes law.

However, the draft provides that a specific reference to the statutory section is not required for an authorization to be included in the instrument. As a result, it is possible that some pre-existing power of attorney for health care instruments may contain language adequate for the required authorization. In those cases, the provision of the draft will apply (with the exception of the provision regarding admission to a nursing home for recuperative care) on the date that the draft becomes law, regardless of the fact that the power of attorney for health care instrument was executed prior to that date.

1 **SECTION 1.** 155.20 (2) (a) of the statutes is amended to read:

2 155.20 (2) (a) A health care agent may not consent to admission of the principal on an
3 inpatient basis to any of the following, except as provided in s. 155.25 (4):

4 **SECTION 2.** 155.20 (2) (b) of the statutes is amended to read:

5 155.20 (2) (b) A principal may be admitted or committed on an inpatient basis to a
6 facility specified in par. (a) 1. to 4. only as provided in s. 155.25 (4) or under the applicable
7 requirements of ch. 51 or 55.

8 **SECTION 3.** 155.20 (2) (c) 2. a. of the statutes is amended to read:

9 155.20 (2) (c) 2. a. To a nursing home, for recuperative care for a period not to exceed
10 3 months, if the principal is admitted directly from a hospital inpatient unit, ~~unless the hospital~~
11 ~~admission was for psychiatric care.~~

12 **SECTION 4.** 155.20 (5) of the statutes is amended to read:

13 155.20 (5) The health care agent shall act in good faith consistently with the desires of
14 the principal as expressed in the power of attorney for health care instrument or as otherwise
15 specifically directed by the principal to the health care agent at any time, except as provided
16 in s. 155.25 (3). The health care agent shall act in good faith consistently with any valid
17 declaration executed by the principal under subch. II of ch. 154, except that the provisions of

1 a principal's valid power of attorney for health care instrument supersede any directly
2 conflicting provisions of a valid declaration executed by the principal under subch. II of ch.
3 154. In the absence of a specific directive by the principal or if the principal's desires are
4 unknown, the health care agent shall, in good faith, act in the best interests of the principal in
5 exercising his or her authority.

6 **SECTION 5.** 155.25 of the statutes is created to read:

7 **155.25 Care and treatment of dementia.** (1) In this section, "dementia" means
8 deterioration or loss of intellectual faculties, reasoning power, memory, and will due to
9 organic brain disease characterized by confusion, disorientation, apathy, or stupor of varying
10 degrees that is not capable of being reversed and from which recovery is impossible.
11 Dementia includes, but is not limited to, Alzheimer's disease.

NOTE: This definition of "dementia" is the same as the definition for
"irreversible dementia" used in s. Ins 3.46 (3) (i), Wis. adm. code,
pertaining to standards for certain insurance coverage.

12 (2) This section shall apply only to a decision made by a health care agent after
13 consultation with appropriate care providers regarding the principal's prognosis and
14 acceptable alternatives for care or treatment of dementia, or any condition or behavior
15 substantially related to dementia. Subsections (3) and (4) shall apply to a power of attorney
16 for health care only to the extent specifically authorized in the power of attorney for health
17 care instrument. Specific reference to this section is not required in the power of attorney for
18 health care instrument in order for the instrument to contain an authorization under this
19 subsection.

20 (3) If the principal has been diagnosed with dementia, with regard to any decision
21 related to care or treatment of dementia, or any condition or behavior substantially related to
22 dementia, made by a health care agent acting under a power of attorney for health care

1 instrument containing the required authorization under sub. (2), the health care agent shall act
2 in good faith consistently with the desires of the principal as expressed in the power of attorney
3 for health care instrument or as otherwise specifically directed by the principal to the health
4 care agent at a time when the principal does not have incapacity.

NOTE: “Incapacity,” for purposes of ch. 155, is defined in s. 155.01 (8),
stats., as the inability to receive and evaluate information effectively or
to communicate decisions to such an extent that the individual lacks the
capacity to manage his or her health care decisions.

5 (4) If the principal has been diagnosed with dementia, a health care agent acting under
6 a power of attorney for health care instrument containing the required authorization under sub.
7 (2) may, for purposes of care or treatment of dementia, or any condition or behavior
8 substantially related to dementia, consent to admission of the principal on an inpatient basis
9 to a facility described in s. 155.20 (2) (a), provided that a physician from the facility certifies
10 in writing that reasonable efforts have been made to address or accommodate the behaviors
11 or conditions for which care or treatment in the facility is sought and the proposed admission
12 will allow the principal to receive care or treatment more appropriate to the principal’s needs.

COMMENT: The above provision would allow an agent, with the required
authorization, to consent to admission of a principal on an inpatient basis
to a facility described in s. 155.20 (2) (a), stats., which are as follows:

1. An institution for mental diseases, as defined in s. 49.43 (6m).
2. An intermediate care facility for persons with an intellectual disability,
as defined in s. 46.278 (1m) (am).
3. A state treatment facility, as defined in s. 51.01 (15).
4. A treatment facility, as defined in s. 51.01 (19).

The committee may want to consider limiting the types of facilities for
which consent to admission may be given by an agent with the required
authorization. For example, instead of allowing admission to any of the
facilities currently described in s. 155.20 (2) (a), admission might be
limited to only those facilities defined as an “inpatient facility” in WLC:
0017/4.

1 **(5)** A power of attorney for health care instrument containing an authorization under
2 sub. (2) may be invalidated, and the power of attorney for health care may be revoked, only
3 at a time when the principal does not have incapacity.

4 **SECTION 6.** 155.30 (3) of the statutes is amended to read:

5 **155.30 (3)** The department shall prepare and provide copies of a power of attorney for
6 health care instrument and accompanying information for distribution in quantities to health
7 care professionals, hospitals, nursing homes, multipurpose senior centers, county clerks, and
8 local bar associations and individually to private persons. The department shall include, in
9 information accompanying the copy of the instrument, at least the statutory definitions of
10 terms used in the instrument, statutory restrictions on who may be witnesses to a valid
11 instrument, a statement explaining that valid witnesses acting in good faith are statutorily
12 immune from civil or criminal liability and a statement explaining that an instrument may, but
13 need not, be filed with the register in probate of the principal's county of residence. The
14 department may charge a reasonable fee for the cost of preparation and distribution. The
15 power of attorney for health care instrument distributed by the department shall include the
16 notice specified in sub. (1) and shall be in the following form:

17 POWER OF ATTORNEY FOR HEALTH CARE

18 Document made this.... day of.... (month),.... (year).

19 CREATION OF POWER OF ATTORNEY

20 FOR HEALTH CARE

21 I,.... (print name, address and date of birth), being of sound mind, intend by this
22 document to create a power of attorney for health care. My executing this power of attorney
23 for health care is voluntary. Despite the creation of this power of attorney for health care, I
24 expect to be fully informed about and allowed to participate in any health care decision for

1 me, to the extent that I am able. For the purposes of this document, “health care decision”
2 means an informed decision to accept, maintain, discontinue or refuse any care, treatment,
3 service or procedure to maintain, diagnose or treat my physical or mental condition.

4 In addition, I may, by this document, specify my wishes with respect to making an
5 anatomical gift upon my death.

6 DESIGNATION OF HEALTH CARE AGENT

7 If I am no longer able to make health care decisions for myself, due to my incapacity,
8 I hereby designate.... (print name, address and telephone number) to be my health care agent
9 for the purpose of making health care decisions on my behalf. If he or she is ever unable or
10 unwilling to do so, I hereby designate.... (print name, address and telephone number) to be
11 my alternate health care agent for the purpose of making health care decisions on my behalf.
12 Neither my health care agent nor my alternate health care agent whom I have designated is
13 my health care provider, an employee of my health care provider, an employee of a health care
14 facility in which I am a patient or a spouse of any of those persons, unless he or she is also my
15 relative. For purposes of this document, “incapacity” exists if 2 physicians or a physician and
16 a psychologist who have personally examined me sign a statement that specifically expresses
17 their opinion that I have a condition that means that I am unable to receive and evaluate
18 information effectively or to communicate decisions to such an extent that I lack the capacity
19 to manage my health care decisions. A copy of that statement must be attached to this
20 document.

21 GENERAL STATEMENT OF AUTHORITY GRANTED

22 Unless I have specified otherwise in this document, if I ever have incapacity I instruct
23 my health care provider to obtain the health care decision of my health care agent, if I need
24 treatment, for all of my health care and treatment. I have discussed my desires thoroughly with

1 my health care agent and believe that he or she understands my philosophy regarding the
2 health care decisions I would make if I were able. I desire that my wishes be carried out
3 through the authority given to my health care agent under this document.

4 If I am unable, due to my incapacity, to make a health care decision, my health care agent
5 is instructed to make the health care decision for me, but my health care agent should try to
6 discuss with me any specific proposed health care if I am able to communicate in any manner,
7 including by blinking my eyes. If this communication cannot be made, my health care agent
8 shall base his or her decision on any health care choices that I have expressed prior to the time
9 of the decision. If I have not expressed a health care choice about the health care in question
10 and communication cannot be made, my health care agent shall base his or her health care
11 decision on what he or she believes to be in my best interest.

12 LIMITATIONS ON MENTAL HEALTH TREATMENT

13 My health care agent may not admit or commit me on an inpatient basis to an institution
14 for mental diseases, an intermediate care facility for persons with an intellectual disability, a
15 state treatment facility or a treatment facility, except as provided in this paragraph. If I have
16 checked "Yes" to any of the following types of facilities, then, if I am diagnosed with
17 dementia, my health care agent may consent to my admission on an inpatient basis to that type
18 of facility for purposes of care or treatment of dementia, or any condition or behavior
19 substantially related to dementia. My health care agent may not consent to my admission to
20 the facility until after he or she has consulted with appropriate care providers regarding my
21 prognosis and acceptable alternatives for my care or treatment. My health care agent may not
22 consent to my admission to the facility unless a physician from the facility has certified in
23 writing that reasonable efforts have been made to address or accommodate the behaviors or

1 conditions for which care or treatment in the facility is sought, and that the proposed admission
2 will allow me to receive care or treatment more appropriate to my needs.

3 1. An institution for mental diseases? Yes? No?

4 2. An intermediate care facility for persons with an intellectual disability? Yes? No?

5 3. A state treatment facility? Yes? No?

6 4. A treatment facility? Yes? No?

7 If I have checked "No" immediately above, or if I have not checked either "Yes" or "No"
8 immediately above, my health care agent may not consent to my admission on an inpatient
9 basis to the type of facility so indicated.

10 My health care agent may not consent to experimental mental health research or
11 psychosurgery, electroconvulsive treatment or drastic mental health treatment procedures for
12 me.

13 PROVISIONS FOR CARE AND TREATMENT OF DEMENTIA

14 If I have checked "Yes" to the following, then, I may revoke this power of attorney for
15 health care and invalidate this power of attorney instrument only at a time when I do not have
16 incapacity, and if I am diagnosed with dementia, my health care agent, with regard to any
17 decision related to care or treatment of dementia or any related condition or behavior, must
18 act in good faith consistently with my desires as expressed in this instrument or as otherwise
19 specifically directed by me to my health care agent at a time when I do not have incapacity.
20 This paragraph shall not apply to a decision of my health care agent until after he or she has
21 consulted with appropriate care providers regarding my prognosis and acceptable alternatives
22 for my care or treatment.

23 Provisions for care and treatment of dementia? Yes? No?

1 If I have checked “No” immediately above, or if I have not checked either “Yes” or “No”
2 immediately above, the provisions described above for care and treatment of dementia will
3 not apply.

4 ADMISSION TO NURSING HOMES OR
5 COMMUNITY–BASED RESIDENTIAL FACILITIES

6 My health care agent may admit me to a nursing home or community–based residential
7 facility for short–term stays for recuperative care or respite care.

8 If I have checked “Yes” to the following, my health care agent may admit me for a
9 purpose other than recuperative care or respite care, but if I have checked “No” to the
10 following, my health care agent may not so admit me:

- 11 1. A nursing home — Yes.... No....
- 12 2. A community–based residential facility — Yes.... No....

13 If I have not checked either “Yes” or “No” immediately above, my health care agent may
14 admit me only for short–term stays for recuperative care or respite care.

15 PROVISION OF A FEEDING TUBE

16 If I have checked “Yes” to the following, my health care agent may have a feeding tube
17 withheld or withdrawn from me, unless my physician has advised that, in his or her
18 professional judgment, this will cause me pain or will reduce my comfort. If I have checked
19 “No” to the following, my health care agent may not have a feeding tube withheld or
20 withdrawn from me.

21 My health care agent may not have orally ingested nutrition or hydration withheld or
22 withdrawn from me unless provision of the nutrition or hydration is medically
23 contraindicated.

24 Withhold or withdraw a feeding tube — Yes.... No....

1 If I have not checked either “Yes” or “No” immediately above, my health care agent may
2 not have a feeding tube withdrawn from me.

3 HEALTH CARE DECISIONS FOR
4 PREGNANT WOMEN

5 If I have checked “Yes” to the following, my health care agent may make health care
6 decisions for me even if my agent knows I am pregnant. If I have checked “No” to the
7 following, my health care agent may not make health care decisions for me if my health care
8 agent knows I am pregnant.

9 Health care decision if I am pregnant — Yes.... No....

10 If I have not checked either “Yes” or “No” immediately above, my health care agent may
11 not make health care decisions for me if my health care agent knows I am pregnant.

12 STATEMENT OF DESIRES,
13 SPECIAL PROVISIONS OR LIMITATIONS

14 In exercising authority under this document, my health care agent shall act consistently
15 with my following stated desires, if any, and is subject to any special provisions or limitations
16 that I specify. The following are specific desires, provisions or limitations that I wish to state
17 (add more items if needed):

18 1) –

19 2) –

20 3) –

21 INSPECTION AND DISCLOSURE OF
22 INFORMATION RELATING TO MY PHYSICAL
23 OR MENTAL HEALTH

1 Subject to any limitations in this document, my health care agent has the authority to
2 do all of the following:

3 (a) Request, review and receive any information, oral or written, regarding my physical
4 or mental health, including medical and hospital records.

5 (b) Execute on my behalf any documents that may be required in order to obtain this
6 information.

7 (c) Consent to the disclosure of this information.

8 (The principal and the witnesses all must sign the document at the same time.)

9 SIGNATURE OF PRINCIPAL

10 (person creating the power of attorney for health care)

11 Signature.... Date....

12 (The signing of this document by the principal revokes all previous powers of attorney
13 for health care documents.)

14 STATEMENT OF WITNESSES

15 I know the principal personally and I believe him or her to be of sound mind and at least
16 18 years of age. I believe that his or her execution of this power of attorney for health care
17 is voluntary. I am at least 18 years of age, am not related to the principal by blood, marriage,
18 or adoption, am not the domestic partner under ch. 770 of the principal, and am not directly
19 financially responsible for the principal's health care. I am not a health care provider who is
20 serving the principal at this time, an employee of the health care provider, other than a chaplain
21 or a social worker, or an employee, other than a chaplain or a social worker, of an inpatient
22 health care facility in which the declarant is a patient. I am not the principal's health care agent.
23 To the best of my knowledge, I am not entitled to and do not have a claim on the principal's
24 estate.

1 Witness No. 1:
 2 (print) Name.... Date....
 3 Address....
 4 Signature....

5 Witness No. 2:
 6 (print) Name.... Date....
 7 Address....
 8 Signature....

9 STATEMENT OF HEALTH CARE AGENT AND
 10 ALTERNATE HEALTH CARE AGENT

11 I understand that.... (name of principal) has designated me to be his or her health care
 12 agent or alternate health care agent if he or she is ever found to have incapacity and unable
 13 to make health care decisions himself or herself. (name of principal) has discussed his or
 14 her desires regarding health care decisions with me.

15 Agent's signature....

16 Address....

17 Alternate's signature....

18 Address....

19 Failure to execute a power of attorney for health care document under chapter 155 of
 20 the Wisconsin Statutes creates no presumption about the intent of any individual with regard
 21 to his or her health care decisions.

22 This power of attorney for health care is executed as provided in chapter 155 of the
 23 Wisconsin Statutes.

24 ANATOMICAL GIFTS (optional)

