

Living Wills and Powers of Attorney for Health Care: How They Work

It's smart to make documents setting out your wishes for health care in case you are ever unable to speak for yourself.

If you're like most people, you aren't eager to spend time thinking about what would happen if you became unable to direct your own medical care because of illness, an accident, or advanced age. But if you don't do at least a little bit of planning -- writing down your wishes about the kinds of treatment you do or don't want to receive and naming someone you trust to oversee your care -- these important matters could wind up in the hands of estranged family members, doctors, or sometimes even judges, who may know very little about what you would prefer.

Types of Health Care Documents

There are two basic documents that allow you to set out your wishes for medical care: a living will and a durable power of attorney for health care. It's wise to prepare both. In some states, the living will and the power of attorney are combined into a single form -- often often called an advance directive. (In fact, both of these documents are types of health care directives -- that is, documents that let you specify your wishes for health care in the event that you become unable to speak for yourself.)

Living Wills

First, you need a written statement that details the type of care you want (or don't want) if you become incapacitated. This document is most often called a living will, though it may go by a different name in your state. A living will bears no relation to the conventional will or living trust used to leave property at death; it's strictly a place to spell out your health care preferences.

You can use your living will to say as much or as little as you wish about the kind of health care you want to receive.

Powers of Attorney for Health Care

You'll also want what's usually called a durable power of attorney for health care. In this document, you appoint someone you trust to be your health care agent (sometimes called an attorney-in-fact for health care, health care proxy, or surrogate) to make any necessary health care decisions for you and to see that doctors and other health care providers give you the type of care you wish to receive.

Who Can Make Health Care Documents

You must legally be an adult (18 years old in most states) to make a valid document directing your health care. You must also be of sound mind -- that is, able to understand what the document means, what it contains, and how it works.

When Your Health Care Documents Take Effect

Your health care documents take effect if your doctor determines that you lack the ability -- often called the "capacity" -- to make your own health care decisions. Lacking capacity usually means that:

- ?? you can't understand the nature and consequences of the health care choices that are available to you, and
- ?? you are unable to communicate your own wishes for care, either orally, in writing, or through gestures.

Practically speaking, this means that if you are so ill or injured that you cannot express your health care wishes in any way, your documents will spring immediately into effect. If, however, there is some question about your ability to understand your treatment choices and communicate clearly, your doctor (with the input of your health care agent or close relatives) will decide whether it is time for your health care documents to become operative.

In some states, it is possible to give your health care agent the authority to manage your medical care immediately. If your state allows this option, you may prefer to make an immediately effective document so that your agent can step in to act for you at any time, without the need to involve a doctor in the question of whether or not your health care document should take effect.

Making your document effective immediately will not give your agent the authority to override what you want in terms of treatment; you will always be able to dictate your own medical care if you have the ability to do so. And even when you are no longer capable of making your own decisions, your health care agent must always act in your best interests and diligently try to follow any health care wishes you've expressed in your health care declaration or otherwise.

When Your Health Care Documents End

Your written wishes for health care remain effective as long as you are alive, unless you specifically revoke your documents or a court steps in (but court involvement is very rare). Here are a few specifics about when your health care documents are no longer effective:

?? **You revoke your document.** You can change or revoke a health care document at any time. Just be sure that your health care providers and your agent know of your intention to cancel the document.

?? **A court invalidates your document.** Most judges recognize that a court is normally not the right place to make health care decisions. However, if your health care is the subject of a dispute and someone questions the validity of your health care directives, the matter may end up before a judge.

If someone doubts that you had the mental capacity to prepare a legally valid health care document, that person can ask a court to invalidate your document. Such lawsuits are rare, but they do sometimes occur. The burden of proving that you were not of sound mind when you made your document falls on the person who challenges its validity. (In other words, the law presumes that you had the mental capacity to make your health care documents.)

It is also possible that a court could invalidate your document if it wasn't properly completed -- for example, if you did not meet your state's requirements for having the document notarized or witnessed. If this happens, however, it is still likely that any wishes for health care you set out in the document will be followed -- as long as they are clearly expressed and you were of sound mind when you wrote them down. In the famous case of *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), the U.S. Supreme Court said that any strong evidence of someone's wishes for care should be honored. Your directions won't be ignored simply because of a technical error.

?? **A court revokes your agent's authority.** If, after your health care documents take effect, someone believes that your health care agent is not acting according to your wishes or in your best interests, the concerned person can go to court and ask for an investigation of your agent's behavior. If a court finds that your agent is acting improperly and revokes his or her authority, the job will go first to an alternate agent you named in your document. If there is no available alternate -- or if the court invalidates your entire document for one of the reasons discussed just above -- a conservator or guardian will be appointed to make health care decisions for you.

?? **You get a divorce.** Getting divorced has no effect on your written directions for health care (your health care declaration). But if you named your spouse as your health care agent, his or her authority is automatically revoked in a number of states. In that case, if you named an alternate agent, that person will take over. If you get a divorce before your health care directives take effect, it's wise to eliminate confusion by starting over. Even if you named an alternate agent, make a new document and name someone else as your agent.

?? **After your death.** Generally, your health care documents are no longer necessary when you die. In some states, however, your health care directives remain effective after your death for some very limited purposes. Your agent may be permitted to supervise the disposition of your body, including authorizing an autopsy or organ donation, unless you specifically withheld these powers when you made your health care documents.

What You Can Cover in Your Health Care Documents

An overview of some important medical issues you'll face when preparing a living will and a power of attorney for health care.

When creating your living will and your durable power of attorney for health care, you have many options and a great deal of flexibility. Following are some issues you may want to consider.

Your Living Will

Your living will (health care declaration) is the place to write out what you do and do not want in terms of medical care if you are unable to speak for yourself. You don't need to become a medical expert to complete your document, but it will help you to become familiar with the kinds of medical procedures that are commonly administered to patients who are seriously ill.

Life-Prolonging Medical Care

In most states, living wills ask you whether or not you want to receive life-prolonging treatments at the end of life. Such procedures typically include:

- ?? transfusions of blood and blood products
- ?? cardiopulmonary resuscitation (CPR)
- ?? diagnostic tests
- ?? dialysis
- ?? administration of drugs
- ?? use of a respirator, and
- ?? surgery.

If you want more information, you can discuss these treatments with your doctor or a patient representative at a hospital or health insurance plan office, or you can turn to self-help resources for more detailed information.

Food and Water

If you are close to death from a serious illness or permanently comatose, you may not be able to survive without the administration of food and water. Unless you indicate that treatment should be withheld, doctors will use intravenous (IV) feeding or tubes to provide you with a mix of nutrients and fluids. IV feeding, where fluids are introduced through a vein in an arm or a leg, is a short-term procedure. Tube feeding, however, can be carried on indefinitely. Permanently unconscious patients can sometimes live for years with artificial feeding and hydration without regaining consciousness. If food and water are removed, death will occur in a relatively short time due to dehydration, rather than starvation. Such a course of action generally includes a plan of medication to keep the

patient comfortable. When you make your health care documents, you can choose whether you want artificially administered food and water withheld or provided. This decision is difficult for many people. Keep in mind that as long as you are able to communicate your wishes, by whatever means, you will not be denied food and water if you want it.

Palliative Care (Pain Relief)

If you want death to occur naturally -- without life-prolonging intervention -- it does not mean you must forgo treatment to alleviate pain or keep you comfortable. This type of care, sometimes known as "comfort care" is now more commonly called "palliative care." Rather than focusing on a cure or prolonging life, palliative care emphasizes quality of life and dignity by helping a patient remain comfortable and free from pain until life ends naturally. Palliative care may be administered at home, in a hospice facility, or at a hospital.

You may wish to spend some time educating yourself about palliative care. You can include your feelings and preferences about such care in your living will.

DNR Orders

Some people who do not wish to receive life-prolonging treatment when close to death -- most likely those who are already critically ill -- may also want to prepare a "do not resuscitate" order, or DNR order. If a medical emergency occurs, this form alerts emergency personnel that you do not wish to receive cardiopulmonary resuscitation (CPR).

If you are in the hospital, your doctor can add a DNR order to your medical record. If you are not hospitalized, you can make what's called a "prehospital DNR order," to alert paramedics who come to your home or care facility. In addition to preparing a prehospital DNR order, you should also obtain an easily identifiable Medic Alert bracelet, anklet, or necklace. If you think you might want to make a DNR order, talk to your doctor or a hospital representative.

Your Durable Power of Attorney for Health Care

You can use a durable power of attorney for health care to name someone (your health care agent) to oversee your health care wishes and make any necessary medical decisions for you. You can give your health care agent as much or as little power as feels comfortable to you. Most people give their health care agent comprehensive power to supervise their care. Recognizing this, the power of attorney forms for most states give your agent the authority to make all health care decisions for you unless you specifically place limits on that authority in the document. This means that your agent will normally be permitted to:

- ?? consent or refuse consent to any medical treatment that affects your physical or mental health (there are usually exceptions to this rule for situations such as extreme psychiatric treatments and termination of pregnancy, and your agent is not permitted to authorize any act that violates the wishes you've stated in your living will)
- ?? hire or fire medical personnel
- ?? make decisions about the best medical facilities for you
- ?? visit you in the hospital or other facility even when other visiting is restricted
- ?? gain access to medical records and other personal information, and
- ?? get court authorization, if required to obtain or withhold medical treatment, if for any reason a hospital or doctor does not honor your living will or the authority of your health care agent.

Organ Donation and Body Disposition

Most of your agent's authority under a durable power of attorney for health care will end upon your death. In an increasing number of states, however, you can give your agent permission to oversee the disposition of your body, including authorizing an autopsy or carrying out your wishes for organ donation. If you want your agent to have these powers, you should say so in your power of attorney document.

If you have specific wishes about these matters, your living will is a good place to write them down. Your agent is legally required to follow your instructions whenever possible.

Limiting Your Health Care Agent's Authority

Keep in mind that as long as you are able to understand and communicate your own wishes, your agent cannot override what you want. Your agent steps in only if you can no longer manage on your own.

In addition, as mentioned, you are permitted to restrict your agent's authority in any way that you like. For example, some people give their health care agent only the authority to carry out the health care wishes specified in their living will, and not to make other medical decisions for them.

Think carefully, however, before you add limiting language to your power of attorney. One of the most important reasons for appointing a health care agent is so that someone will be there to respond to the needs of your situation as it develops. Your medical needs may change in ways that you cannot now foresee, and an agent who has full power can act for you no matter what the circumstances.