

Health Care Advance Directives

Health care advance directives are witnessed documents in which an individual, called the principal, gives instructions or expresses desires regarding any aspect of the principal's health care. These directives are important because they allow medical providers, as well as family members, to know your wishes regarding medical treatment should you become unable to make health care decisions for yourself. In Florida, a health care advance directive may also be a witnessed oral statement. Florida's legislation on health care advance directives is in Chapter 765 of the Florida Statutes.

There are three common types of health care advance directives: anatomical gift directives (*e.g.*, organ donor cards), the designation of a health care surrogate, and living wills. This pamphlet deals with living wills and health care surrogates.

Living Wills

A living will is a witnessed document in which an individual gives instructions concerning what life prolonging procedures should be withheld or withdrawn if he or she becomes incompetent and terminally ill, in an end-stage condition, or in a persistent vegetative state. Under Florida law, the living will must be signed by the principal in the presence of two witnesses, one of whom is neither a spouse nor a blood relative of the principal. If the principal is physically unable to sign the living will, one of the witnesses must subscribe the principal's signature in the principal's presence and at the principal's direction. (Florida Statutes §765.302)

Florida law defines these terms as follows:

- Terminally ill: Being in a condition "caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death"
- End-stage condition: "A condition caused by injury, disease, or illness which has resulted in severe and permanent deterioration, indicated by incapacity and complete physical dependency, and for which, to a reasonable degree of medical certainty, treatment of the irreversible condition would be medically ineffective"
- Persistent vegetative state: A permanent and irreversible condition of unconsciousness in which there is the absence of any kind of voluntary action or cognitive behavior, and an inability to communicate or interact purposefully with the environment.

Note that a living will will *not* go into effect if an individual becomes terminally ill, but is not incompetent to make medical decisions for him or herself. A living will cannot authorize euthanasia or assisted suicide. You may designate a surrogate in the living will to ensure that its terms are carried out, but this is not a requirement for a valid living will. Florida law recognizes living wills that have been properly executed in another state or in Florida. It is your responsibility to ensure that your physician has a copy of your living will.

Health Care Surrogate Designation

A health care surrogate designation is a written, witnessed document in which the principal designates another person, called a surrogate, to make health care decisions for the principal should he or she become incapacitated. The surrogate may make treatment decisions, authorize the release of medical records, and apply for public benefits such as Medicare or Medicaid on behalf of the principal. If no living will exists, the surrogate may also make the decision about whether to withhold or discontinue life-sustaining treatments in

cases of terminal illness, end-stage conditions, or persistent vegetative states. The principal may also designate an alternate surrogate, if the original surrogate is unwilling or unable to perform his or her duties.

The surrogate's power only becomes effective when a physician makes a determination that the principal is not competent to make medical treatment decisions on his or her own behalf. The surrogate's authority commences when that determination is made. His or her authority ends when a doctor determines that the principal has regained the capacity to make decisions on his or her own behalf.

In Florida, a health care surrogate is authorized to make almost all treatment decisions on your behalf. However, Florida law will only allow a surrogate to consent to the following treatments if they are expressly granted in the health care surrogacy document itself: abortion, sterilization, electroshock, psychosurgery, experimental treatments not yet approved by a federally approved institutional review board, voluntary admission to a mental hospital, and the withholding or discontinuance of any life support measure on a pregnant woman before the fetus is viable. So if you want to authorize your surrogate to consent to any of those treatments, you must make sure language expressly granting him or her that power is included in your designation of a health care surrogate.

While most states recognize living wills and designations of health care surrogates, you should consult with an attorney in the state you move to if you do move outside of Florida in order to find out if these documents are valid in that state. Health care advance directives that were executed outside of Florida in accordance with the laws of another state will be honored in Florida.

As an alternative to a health care surrogate, or in addition to, you may consider designating a durable power of attorney to name another person to act on your behalf. For more information, speak with a judge advocate during our legal assistance hours.

How do you revoke an advance directive?

Advance directives may be revoked in any of the following ways:

- By means of a signed writing executed by you
- By means of the physical cancellation or destruction of the advance directive by you or by another in your presence and by your direction (this is the best way to revoke a written advance directive)
- By means of an oral expression of your intent to revoke the directive (this is *not* a recommended way to effectuate revocation)
- By means of a subsequently executed advance directive that is materially different than a previously executed advance directive.
- Unless you provide otherwise, when your marriage is ended through divorce or annulment if you named your former spouse as a surrogate.

If you revoke your advance directive, be sure to inform your physician, as well as your surrogate.

Where should you keep the directive?

Since you are responsible for letting your health care provider know about the existence and contents of your living will and designation of health care surrogate, you should give a copy to your primary care physician. It will then be placed in your medical records. You should give the original to your surrogate, who should keep it with other important legal papers so that it is safe and readily available if needed. You may also want

to give a copy to a family member, any health care facility that you know will be treating you in the future, and your lawyer. It is also a good idea to keep a wallet card noting that an advance directive exists, with information about how to contact your surrogate, in case you have to notify health care providers in an emergency.

When should you review your advance directive?

You should review your advance directive at least every five years and certainly after major life events, like retirement, marriage, divorce, and major illnesses. An advance directive is effective until and unless you revoke or amend it.

What happens if you don't have an advance directive?

If you become incapacitated and do not have a valid living will or designation of a health care surrogate, Florida law will look to the following people, listed in the order of precedence, to make health care decisions, *including the withholding or discontinuance of life support*, on your behalf:

1. A court appointed guardian if one has been appointed for you
2. Your spouse
3. Your adult child or a majority of your adult children
4. Your parents
5. Your adult siblings
6. Any other adult relative that had close personal ties with you
7. A close personal friend who provides an affidavit containing the statutorily required information

However, none of these people will be able to consent to withhold or remove life support from you *unless* they can show by clear and convincing evidence that you would have made that choice if you were competent to make the decision yourself.

Although most states give effect to living wills and health care surrogates, the surrogate's decision is subject to review. Florida, like most other states, allows members of the patient's family, the health care facility, the attending physician, or any other interested party who could be directly affected by the surrogate's decision, to seek judicial review of that decision. This includes the decision to remove or withhold life support as directed in your living will. Furthermore, your living will will not be given effect unless the attending physician or health care facility determines that you are incompetent and terminally ill, in an end-stage condition, or in a persistent vegetative state. The medical professionals' opinions on this matter will be followed even if your surrogate or your family disagrees. Also, a hospital will not be forced to do anything it considers by policy to be unethical. In the case where your directions conflict with hospital policy, the law requires that you be transferred to another hospital that will follow your wishes if it is medically possible to transfer you to such a hospital.

The material in this handout represents general legal advice. Since the law is continually changing, some provisions in this pamphlet may be out of date. It is always best to consult an attorney about your legal rights and responsibilities regarding your particular case.