Health Care Advance Directives

Florida law gives every competent adult the right to make decisions concerning his or her own health, including the right to choose or refuse medical treatment. When a person is unable to make or communicate health care decisions for themselves because of a physical or mental change, the person is considered incapacitated. During their incapacitation, a person cannot make or communicate their desires, so Florida law enforces health care advance directives, which are declarations made by a competent adult regarding their desires for future medical care. The three most common types of health care advance directives are designations of a health care surrogate, living wills, and anatomical gift directives (e.g., organ donation).

NOTE: Although this guide focuses on advance directives, Florida also recognizes Physicians Orders for Life-Sustaining Treatment (POLST). As the name suggests, a POLST is a Physician's Order for your future medical care. They are completed by your physician in consultation with you and can get into much finer details than an advance directive. If you have been diagnosed with a terminal or degenerative condition, you should talk to your physician about a POLST.

Advance Directives Generally

An advance directive is a written or oral statement by a competent adult regarding how they want medical decisions to be made in the event that they cannot make them themselves. Advance directives are most often written and these documents are drafted as part of clients' estate planning (i.e., getting a will), though they can be done on their own.

An advance directive must be witnessed by at least two people, at least one of whom cannot be a spouse or blood relative. The Eglin Legal Office recommends that you executive a written statement, to ensure that there is no confusion about your wishes and to reduce the burden upon witnesses/loved ones in trying to remember (or fighting over differing memories) regarding your wishes.

Most states (including Florida) recognize health care advance directives made outside of Florida if they were made in accordance with either Florida law or the law of the state where they were made.

Health Care Surrogate Designation

A health care surrogate designation is an advance directive 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.

Florida law permits you to choose whether the powers given in your health care surrogate designation begin immediately and remain in effect regardless of your medical capacity or whether they spring into effect only when a physician determines you lack the ability to make or communicate your own decisions. If you want the powers to begin immediately, you must explicitly state that in the document. Otherwise, the surrogate's power only becomes effective when a physician makes a determination that that the principal is not

competent to make medical treatment decisions on his or her own behalf. Under these circumstances, 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.

Living Wills

A living will is an advance directive 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. A living will cannot authorize euthanasia or assisted suicide.

Florida law defines these terms as follows:

- Terminal condition: means 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: (a) the absence of voluntary action or cognitive behavior of any kind; and (b) an inability to communicate or interact purposefully with the environment.

Note that a living will will *not* go into effect until both of the following conditions are met:

1. Two physicians have independently determined that the individual has a terminal condition, an end-state condition or is in a persistent vegetative state, as those terms are defined above.
2. One physician determines that the individual cannot make or communicate their wishes.

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. You must ensure that your physician has a copy of your living will.

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.

How do you revoke an advance directive?

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

- By means of a signed and dated 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.

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.

For more information go to: http://www.floridahealthfinder.gov/reports-guides/advance-directives.aspx

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.