

Chapter 24

Medical Advance Directives

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Medical advance directives are legal documents that tell medical professionals and others about your desires concerning your medical treatment for use in the event you can no longer speak for yourself. The term “medical advance directive” most commonly refers to a living will, but the term may also include medical durable powers of attorney, cardiopulmonary resuscitation (CPR) directives, Do Not Resuscitate (DNR) orders, and other directives concerning your care and disposition in the event your medical condition is terminal, and at or after the time of your death.

24-1. Living Wills

A living will, known in Colorado as an “Advance Directive for Medical/Surgical Treatment,” is a document in which you express your preference as to how you wish to be treated in the event you are in a terminal condition. A terminal condition means an incurable or irreversible condition for which the administration of life-sustaining procedures will serve only to postpone the moment of death (C.R.S. § 15-18-103(10)). In other words, the medical professionals have determined that they can take no other actions which will cure

or improve your medical condition and life-sustaining procedures may prolong your life somewhat, but not overcome your impending death. Life-sustaining procedures are medications, surgeries, or other medical therapies which would lengthen your remaining lifetime, but not reverse your medical condition. In Colorado, the term “life-sustaining procedures” does not include the administration of nutrition or hydration. “Nutrition and hydration” typically means food and water, but, in fact, in a medical setting may mean fluids given through a tube to attempt to sustain the patient. While there is no legal definition of the amount of time you are expected to live and still qualify as being terminally ill, the medical community generally accepts that this means your death will occur within six months or less.

Any competent adult may execute a living will, indicating whether they wish to have such life-sustaining procedures or whether, upon the determination that they are terminally ill, they would request that such life-sustaining procedures be withheld or withdrawn. In addition, you may indicate in the living will that you wish to have such procedures, but only for a limited period of time, after which you wish for the life-sustaining procedures to be withdrawn. You can fill in any amount of time you wish, if you choose this option.

Many people worry that if life-sustaining treatment, including nutrition and hydration, is withheld or withdrawn, they will suffer pain and discomfort as a result. The law in Colorado, and every other state, requires medical professionals to provide whatever medications or other treatments are necessary in order to make you comfortable and as pain free as is practical.

Colorado has a statutory living will form. That is, the Colorado Revised Statutes (the “law” in Colorado) set out the minimums that need to be in a living will. However, it is not a mandatory form, and you may use other living will forms, either drawn up by your attorney or provided by the hospital or other medical professionals, or you may use a form that you have found from another source.

Colorado’s current living will form does not address the issue of persistent vegetative states. A “persistent vegetative state” is the condition in which Terri Schiavo from Florida found herself which created national controversy in recent years. However, medical professionals and others who participated in the creation of the Colorado living will statute take the position that the definition of terminal illness used in Colorado was intended to cover a persistent vegetative state as well. Nonetheless, it is a good idea to include in your living will a separate statement as to your wishes concerning life-sustaining procedures and nutrition and hydration as they apply to a persistent vegetative state.

Under Colorado law, as a part of your living will, you may include a statement as to whether or not you wish to be considered an organ and tissue donor at the time of your death. Organ and tissue donation is discussed more fully later in this chapter.

After you have executed your living will, you should provide a copy of the living will to any medical professional who keeps regular medical records on you. If you have multiple doctors, such as an internist, an orthopedic doctor, and so on, you should give a copy of your living will to each of these medical professionals. In all cases, provide them a copy of your living will to be placed in your medical files, but you should keep the original living will yourself.

Federal law requires that, upon admission to a hospital, the hospital must ask you if you have a living will. You should bring your living will with you to the admissions process and let them make a copy for your medical file at the hospital. If you enter an assisted living facility or a nursing home, you should also provide a copy of the living will to the facility at the time of your admission.

Remember, so long as you are capable of making your own medical decisions, what you say at that time will determine what treatments you will or will not receive. The purpose of the living will is for you to express in advance what your wishes are, so that in the event you are unable to express your wishes, there is a written document telling the medical professionals and your family what your preferences are on the subject of terminal illness and persistent vegetative state situations.

Perhaps most important of all is for you to discuss with your loved ones what your feelings, beliefs, and desires are with regard to end-of-life treatment. The more your loved ones know about your desires, the more likely you are to receive the kinds of medical treatment you wish at the end of your life. Lawyers and doctors can provide support and expertise, but only you can provide your preferences. Take the time to speak with your loved ones and be open with them about how you feel on the subject of end-of-life treatment, life-sustaining procedures, and other issues concerning end-of-life matters.

You do not have to execute a new living will if you travel to or move to another state. However, as medical professionals are most comfortable with the living will form(s) most commonly found in their state, if you stay for an extended period of time in another state (such as individuals who have a winter home in a warmer climate) or move to another state, it is a good idea to execute a new living will in a form that is commonly found in that state. For people who have two residences, it is a good idea to have two living wills, each in the format commonly found in that state. **HOWEVER:** Be careful to ensure that the information in those two living wills is not in any way contradictory, or a court may invalidate both documents.

Under Colorado law, if you have a living will and have appointed an agent under a medical power of attorney (discussed later), and the agent under the medical power of attorney disagrees with your directions under the living will, the directions in the living will prevail over the wishes of the agent. If you prefer to have the wishes of the agent prevail, you should specifically state this in both the living will and in the medical power of attorney.

24-2. CPR Directives and DNR Orders

Cardiopulmonary resuscitation (CPR) directives and Do Not Resuscitate (DNR) orders are directives, signed by a doctor, which direct that in the event your heart stops or you stop breathing, you do not wish to have CPR or other methods of restarting your heart and breathing. These directives must be issued by a doctor. As such, you need to speak with your physician to obtain such a directive. Unless you have a signed CPR or DNR directive, the law in Colorado and the standards of medical practice will require medical professionals to make all reasonable efforts to restart your heart in the event it stops.

24-3. Medical Power of Attorney

A medical power of attorney, sometimes known as a “Durable Medical Power of Attorney” or a “Power of Attorney for Health Care,” is a legal document in which you appoint an “agent” to speak for you on the subject of medical treatment, in the event you are unable to speak for yourself. Unlike the living will, the medical power of attorney’s use is not limited to terminal illness or persistent vegetative state situations. The agent under the medical power of attorney is authorized to make any medical decision that you could make for yourself, with certain limitations, if you were mentally competent to do so. However, nothing in the medical power of attorney permits the agent to direct your medical treatment while you are still mentally capable of making your own medical decisions.

The medical power of attorney is called “durable” because it contains language within the document which directs that its authority should continue to be effective even in the event that you become legally or medically incompetent. Medical powers of attorney can be as simple or as sophisticated as you and your attorney wish to make them. However, at a minimum, the medical power of attorney needs to appoint an adult (defined in Colorado as a person 18 years of age or older), as your agent under the medical power of attorney. It is a good idea to include in the medical power of attorney an alternate or successor agent, in the event your primary named agent is deceased, unwilling, or otherwise unable to make medical decisions for you. It is not a good idea to appoint, and the medical community discourages appointing, co-agents, that is, two or more people who must act together to make medical decisions. The medical professionals much prefer to have one person with the authority to act.

Any properly written medical power of attorney today should include in it language sufficient to satisfy the requirements of the Health Insurance Portability and Accountability Act of 1996, commonly known as “HIPAA” (pronounced “HIP-ah”). HIPAA is intended to ensure the privacy of your medical information and to ensure that you have access to any medical information that medical professionals keep concerning you. Your medical power of attorney should include language which permits your agent to be considered a “personal representative” (the HIPAA term for an agent) for the purpose of discussing your medical records, conditions, and possible courses of medical treatment with the medical professionals. By including HIPAA language in the appointment of an agent under medical power of attorney, your agent can discuss your medical issues with the medical professionals, can make medical decisions when you are unable to do so, and can do such things as pick up medications for you at a pharmacy.

In addition to the basic elements of a medical power of attorney, you should consider adding language to your medical power of attorney to permit your agent to complete admission applications to medical facilities, assisted living facilities, and nursing homes; make applications for Medicare, Medicaid, and other medical insurance forms; and nominate and appoint a guardian.

Like the living will, you should provide a copy of your medical power of attorney to any medical professionals who keep medical records on you and provide a copy to any hospital, assisted living facility, nursing home, or other medical facility upon admission. You should keep the original of the medical power of attorney, or provide it to your agent. Additionally, as with the living will, it is an excellent idea to discuss your medical issues,

your feelings and beliefs concerning medical treatment, and other related issues with your agent under the medical power of attorney and with your loved ones. It is the purpose of appointing an agent under the medical power of attorney that your agent should follow your wishes and intent as to medical treatment. The agent can only do so if he or she knows what you want.

You do not need to execute a new medical power of attorney in the event you travel to or move to another state, unless you wish to make changes to your medical power of attorney. To be safe, and to ensure your medical power of attorney meets the execution requirements of each state, you should have your medical power of attorney witnessed by two individuals unrelated to you, who are not in any way responsible for your medical care and medical bills, and have the medical power of attorney notarized.

Finally, authority to act under a medical power of attorney ceases upon the death of the principal, that is, the person who executed the medical power of attorney appointing the agent to act.

24-4. Organ and Tissue Donation

Under Colorado law, if you choose to, you may decide to donate your organs and/or tissue at the time of your death. This declaration to donate your organs or tissue may be done in a variety of methods, including making such a statement in your will, by making a direction on your driver's license, by declaration in a living will, or by declaration in another written document such as an organ/tissue donation card or other similar written instrument. Be careful, however. While legally you can donate your organs and tissues through a statement in your last will and testament, there is a distinct possibility that no one will look at the terms and directions of your last will and testament until well after your death, including not until after your burial or cremation. So, while you can legally use a will to do this, it may not be the best choice available.

If you do not have a written declaration to donate your organs and tissue, or a written direction not to make such donation, then certain persons who survive you may make such donation of your organs and tissues. The authority to make such donation is in the following order of persons:

- 1) An agent of the decedent;
- 2) The spouse of the decedent;
- 3) Adult children of the decedent;
- 4) Parents of the decedent;
- 5) Adult siblings of the decedent;
- 6) Adult grandchildren of the decedent;
- 7) Grandparents of the decedent;
- 8) An adult who exhibited special care and concern for the decedent;

- 9) The persons who were acting as the guardians of the person of the decedent at the time of death; or
- 10) Any other person having the authority to dispose of the decedent's body.

As with all of these advance directive documents, it is a good idea to discuss your desires and beliefs with your loved ones so that they will know what you want done at the time of your death.

24-5. Disposition of Last Remains

We would all like to think that our relatives and loved ones will be in agreement as to what is to happen to our last remains at the time of our death. Unfortunately, it is quite possible that this will not be the case. As a result, Colorado has what is known as the Disposition of Last Remains Act.

Under this Act, you have the right to direct in writing who should control what happens to your last remains after your death. This direction must be in writing. If there is no such writing, your verbal directions do not have legal standing.

This written declaration may direct what you wish done with your last remains, that is, whether you wish to be buried, cremated, or have your remains donated to medical science. The declaration may also direct what funeral, religious, or other ceremonies you wish to have after your death.

If you do not have a declaration as to disposition of last remains, the individual who has authority to determine how to dispose of your last remains will be decided in the following order:

- ▶ The appointed personal representative or special administrator of your estate;
- ▶ The nominated personal representative under your last will and testament;
- ▶ Your surviving spouse;
- ▶ The majority decision of your adult children;
- ▶ The decision of your surviving parents or legal guardians;
- ▶ The majority decision of your adult siblings;
- ▶ Any person assuming legal and financial responsibility for the final disposition of your last remains; or
- ▶ The Office of the Public Administrator in your county.

24-6. Glossary

Adult. A person over the age of 18 years.

Advance Directives. Written instructions that state, in advance, how you want to be medically treated if you cannot speak or decide for yourself.

Agent/Attorney in Fact. The person whom you designate to act and make decisions for you under a medical power of attorney.

CPR Directives/DNR Orders. Orders signed by a doctor directing that in the event that your breathing or heart stops, you should not be resuscitated by medical professionals.

Declaration as to Medical or Surgical Treatment. The legal name in Colorado for an advance directive, concerning your preferences regarding allowing, withdrawing, or withholding life-sustaining treatment and nutrition and hydration in the event you are declared to be terminally ill or in a persistent vegetative state. Also commonly known as a living will.

Disposition of Last Remains Directive. A written statement, signed by you, indicating what you wish done with your last remains at the time of your death.

Guardian. A person appointed by a court to have responsibility for your well-being, including your physical health, your housing, and other personal issues, not to include financial matters.

Life-Sustaining Procedures. Medications, surgeries, or other medical therapies which would lengthen your remaining lifetime, but not reverse your medical condition. Under Colorado law, this does not include provision of nutrition and hydration.

Medical Power of Attorney. A legal document appointing an agent to make medical decisions for you in the event you are unable to make your own medical decisions. Also known as a Medical Durable Power of Attorney or a Power of Attorney for Health Care.

Organ/Tissue Donor Card. A document, signed by you, which declares your intentions as to whether or not to donate your organs and tissue.

Office of the Public Administrator. A person appointed by the Chief Judge in each judicial district in Colorado who is authorized to deal with the last remains and estate of a deceased individual in the event there is no appropriate family member or other interested individual to serve in this capacity.

Terminal Condition. An incurable or irreversible condition for which the administration of life-sustaining procedures will serve only to postpone the moment of death.

24-7. Resources

Aging With Dignity

Distributor of "Five Wishes"

P.O. Box 1661

Tallahassee, FL 32302-1661

(888) 5 WISHES ((888) 594-7437)

fivewishes@agingwithdignity.org

www.agingwithdignity.org

American Bar Association

Provides a Health Care Advance Directives booklet and form online:

www.abanet.org/aging/publications/docs/shape_your.pdf

Caring Connections

National Hospice and Palliative Care Organization

Advocates for the rights of dying patients, provides legal information about end-of-life decisions, and offers counseling. State-specific free forms and instructions are available online.

(800) 658-8898

www.caringinfo.org

Colorado Hospital Association

(720) 489-1630

www.cha.com; click on "Publications" for a free copy of the brochure, "Your Right to Make Healthcare Decisions."

U.S. Living Will Registry

Explanations of living wills, health-care proxies, and how the Living Will Registry works.

Free registration.

523 Westfield Ave.

P.O. Box 2789

Westfield, NJ 07091

(800) LIV WILL ((800) 548-9455)

admin@uslivingwillregistry.com

www.uslivingwillregistry.com