



Planning for Health Care Decisions

Do you have a living will or health care declaration? Have you designated an appropriate individual to make health care decisions on your behalf in the event you become incompetent?

In this age of modern medicine, advance planning for health care decisions should be an important consideration for people of all ages and backgrounds. Today, all fifty states provide some type of mechanism which enables individuals to give advance instructions for their medical treatment and health care in the event of their future incompetency. The most commonly used advance directives are (i) the living will (also referred to as a "health care declaration," "directive to physician," or "medical directive" but referred to herein as "living will") and (ii) the appointment of a health care agent or proxy, either in a durable power of attorney for health care or a separate similar document.

What is a living will?

- A living will is a written document which sets forth your instructions regarding the withholding or withdrawal of life-sustaining treatment or other medical procedures under certain circumstances (generally if you are terminally ill or in a persistent vegetative state). Executed at a time when you are competent to make health care decisions, your living will speaks for you when you are unable to make or communicate decisions regarding your medical care. It generally instructs your physician and family members not to prolong your life by artificial means.
- Most states have statutory-based living will forms which define when the living will goes into effect, as well as the extent and nature of the treatments to which the living will applies. These statutory forms are widely used by individuals and recognized by health care providers.
- In most states the statutory form is not exclusive, in that you can choose to sign a living will which differs from your state's statutory form if your wishes concerning your medical treatment are not addressed by your state's form; your health care provider, however, may only be willing (or may be required) to adhere to medical instructions which have been authorized by statute, especially if your family members have differing opinions about your care.
- Living will forms vary from state to state, and although many states explicitly recognize the validity of a living will executed in another jurisdiction, some states do not. Therefore, if you spend a significant amount of time in more than one state, you may wish to consider executing living wills for each state in which you spend time.
- Living wills are signed at a particular time and reflect the laws and medical practices existing at that time. Consequently, when executing a living will, you may wish to incorporate provisions which are sufficiently broad and flexible to deal with future changes in the law or medical practice.

Should I designate a health care agent or proxy?

- Most state statutes provide that the living will only applies when a physician deems a patient to be terminally ill or in a persistent vegetative state and only addresses decisions to withhold or withdraw life support systems. Living wills generally do not provide guidance with respect to most health care issues that may arise. Therefore, in addition to signing a living will, you may wish to designate one or more appropriate individuals to act on your behalf with respect to your future medical care.
- Most states recognize your right to designate a health care agent/proxy to make a broad range of decisions concerning your medical treatment if you are unable to do so. Designating an appropriate person to act in this capacity provides greater assurance that your wishes regarding your medical treatment will be carried out.
- Your designee speaks for you in accordance with your previously-expressed written or oral intentions. If you have not communicated your wishes to your agent, he/she can make decisions he/she thinks you would have made if you were able to speak for yourself. He/she generally is given broad authority to act on your behalf with respect to a variety of health care decisions, not just with respect to life sustaining treatment.
- Depending on your state of residence, you can designate your health care agent/proxy in (i) a durable power of attorney, (ii) a designation of health care agent/proxy document, or (iii) both.
- In Connecticut, for example, most individuals would be advised to execute an appointment of health care agent *and* a durable power of attorney in order to best protect their wishes regarding their future medical care. Connecticut's statutory-based appointment of a health care agent is limited in that it does not authorize your agent to make decisions concerning many issues relating to your health care. Connecticut's statutory-based durable power of attorney, however,

specifically authorizes your agent to act with respect to a wide array of health care decisions. In addition, you may include in your durable power of attorney additional powers which are not explicitly itemized in the statute.

- The manner in which health care agents are appointed and the scope of their authority varies from state to state. In order to best assure that your wishes concerning your medical treatment will be carried out, you should carefully consider the extent and nature of the authority you wish to grant your agent and then execute all documents which are necessary to confer appropriate authority to your agent in your state of residence.
- If you spend a significant amount of time in more than one state, you should be sure that you have properly designated a health care agent in each of those states.

Whom do I appoint as my health care agent/proxy?

- Close family members are generally best suited to act as your health care agent/proxy because they know you best. However, these are the people who are most emotionally affected by the situation requiring the actions of an agent/proxy.
- It is important that your agent clearly understands his/her obligations as agent, as well as your wishes and concerns. You need to select an agent who is ready, willing and able to act on your behalf and in accordance with your wishes, whether or not his/her personal views regarding health care are consistent with your own.
- If you designate more than one agent, you should consider whether possible conflicts may arise as a result of this designation.

Should I update my health care documents periodically?

- Your health care documents, if properly executed, are effective until they are revoked in accordance with your state's law. Consequently, you should review your health care documents periodically to confirm that they continue to reflect your intentions and are appropriate in light of the then current law and medical practice. Your wishes regarding your health care planning, as well as your selection of a health care agent/proxy, may change with time.

To whom should I give my health care documents?

- You should store the originals of your health care documents in a safe but accessible place (preferably not a safe deposit box).
- You should provide your physician, your health care agent/proxy, and appropriate family members or other potential care providers with copies of your health care documents and any revocations and updates. Some state statutes specifically require that you file your living will or designation of health care agent with your physician.
- More importantly, you should discuss the contents of your health care documents and your wishes regarding your medical treatment with those who may be involved with your care.

What happens if I fail to execute advance medical directives?

- If you fail to execute a valid living will/health care declaration or to properly appoint a health care agent/proxy, a substitute decision-maker may be appointed for you either by statute or by a court. Many states have "family consent statutes" or "health care surrogate" statutes, which provide a statutory procedure for selecting a health care surrogate for an incompetent person who has failed to execute a living will or appoint a health care agent/proxy.
- If your state does not have such a statute (Connecticut does not) or if your state's statute cannot resolve an issue relating to your health care, a guardian or conservator may be appointed for you by a court. The circumstances under which a guardian/conservator may be appointed and the procedures to be followed vary from state to state.
- Family consent statutes, health-care surrogate statutes and court-appointed guardianships and conservatorships provide a substitute health care decision-maker for you if you have not done so. However, the statutory- or court-appointed surrogate may not be the surrogate you would choose to make health care decisions on your behalf. Therefore, these mechanisms should not be used as a substitute for proactive advance planning for future health care decisions.

This bulletin, which has been prepared by the attorneys of the Individual Clients Group of Robinson & Cole, is intended to provide only general information on the topics presented. If you wish to examine how this information may impact your estate plan, please contact Robinson & Cole and ask for an attorney in the Individual Clients Group.



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