

Advance Health Care Decision Making: The Living Will and the Health Care Power of Attorney

Under current statutes, Indiana law gives a competent individual the opportunity to make medical treatment directives in advance and to appoint a surrogate decision-maker to speak for him or her during a period of incapacity. The legal tools for advance health care directives are the Living Will and the Health Care Power of Attorney (sometimes called a Health Care Proxy), which are often combined into a single document. At Severns Associates, we routinely produce the documents together as one, so that all of an individual's legal health care decisions are easily transmitted to physicians and those serving as Health Care POAs.

What is a Living Will?

The **Living Will** continues an adult's right to control treatment decisions even if that person is incompetent at the time a decision is to be made to provide, withhold, or withdraw treatment. A Living Will is not a Will at all -- at least not in the sense that most of us understand the term. Whereas a Will has to do with the disposition of your property after death, the Living Will has more to do with the manner of your death. It is a document in which you state your desire to either have or not have extraordinary life-prolonging measures used when recovery is not possible. The use of artificial respirators, surgeries, radiation, and other treatments that may delay, but not prevent imminent death, can be avoided by a Living Will. Perhaps the most important benefit of a Living Will is that your loved ones can be relieved of the burden of making this decision for you in the event you can no longer express your desires. In a time of crisis, a Living Will speaks for you if you cannot speak for yourself.

Who can make a Living Will?

It is important to know that you must be over 18 and competent -- that is, in full possession of your senses -- in order to make a Living Will. You must sign it in front of two witnesses, both of whom must also be over 18 and competent. Family members or individuals mentioned in your Last Will and Testament are not eligible to be witnesses for your Living Will.

Does the Living Will cover all situations?

No. The Living Will can only speak for you if your illness can be diagnosed by your doctor as being terminal, meaning that the natural course of your illness will result in your death.. If your illness is such that you may be kept alive by artificial means indefinitely, even if that means for the rest of your natural life, the Living Will does not apply and will not help you. However, it is possible to make sure that your wishes will be carried out in all situations by appointing a member of your Response Team to be your Health Care Representative under a Health Care Power of Attorney.

What is a Health Care Power of Attorney?

Legally, everyone must be informed of the consequences of a proposed medical treatment and to

consent to it before it is administered. A **Health Care Power of Attorney** allows you to designate a person as your Health Care Representative. This person is then able to receive information and make a decision for you in the event you are incapacitated and unable to speak for yourself. If you have executed a Living Will, and are suffering from a terminal illness, that document will control the doctors' actions. In most other situations, your Health Care Representative will make decisions for you. It is becoming increasingly important for those individuals without a legal spouse to put a this document into place when they are healthy, so that there is someone close to them who knows how they would wish to be cared for, should the unthinkable happen.

What authority can be given to a Health Care Representative?

Virtually any health-related decision can be made by a properly delegated health care representative. This includes the selection of a physician, permission to release medical information, and authorization for any treatment or medical procedure. For instance, a Parkinson's or Alzheimer's disease patient in the very early stages could appoint his or her spouse or child as Health Care Representative and give instructions about whether to consent to certain treatments as the disease progresses.

Can my Health Care Representative overrule my decisions?

No. There are two important limitations to the document:

1. The Health Care Representative has no authority to act unless the patient is, at that time, incapable of consenting, and
2. The power may not be used to overrule the patient's own instruction.

How is a Health Care Representative appointed?

The appointment of a Health Care Representative must be in writing, signed by the appointer, and witnessed by an adult other than the person appointed. Revocation of the appointment of Health Care Representative can be made by notice to the Representative that the appointment is revoked and by notice to the health care provider.

Careful use of the Living Will and the Health Care Power of Attorney together can ensure that your personal views will be carried out during a time of crisis. Equally important is the family discussion that should take place before signing these documents. If you discuss the documents with your Response Team members and voice your wishes in advance, it can reduce family stress at a very difficult time.

Be Cautious of Generic Living Wills and Health Care Proxy Forms

Currently, anyone who is admitted to a hospital or nursing facility will be informed of their right to make a Living Will, and may be presented with a bare-bones form to sign. Hospitals often give patients a health care proxy form, which allows you to appoint someone else to act as your agent for medical decisions, to sign when being admitted. While signing a generic health care

form is better than not signing one at all, these documents vary in the amount of care that has gone into their drafting, and having one that is specifically tailored to your needs can be important. Also bear in mind that if you already have a living will and/or health care proxy as a part of your estate plan, the generic form will revoke your more personal health care proxy or power of attorney.

Are there other documents that can be used for advance health care planning?

Additional documents sometimes used for advance health care planning in Indiana include DNR Declarations and Orders and POST forms.

A **DNR**, or do-not-resuscitate order, is an indication that you do not want CPR. In a hospital or health facility setting, if you have a terminal condition and you do not want CPR, your physician will write a “do not resuscitate” order in your medical chart. If you are home when an emergency occurs, there is no medical chart or physician’s order. For situations outside of a hospital or health facility, the “Out of Hospital Do Not Resuscitate Declaration and Order” is used to state your wishes. The law allows a qualified person to say they do not want CPR given if the heart or lungs stop working in a location that is not a hospital or a health facility. This declaration may override other advance directives. The declaration may be canceled by you at any time by a signed and dated writing, by destroying or canceling the document, or by communicating to health care providers at the scene the desire to cancel the order.

In 2013, the **Physician Orders for Scope of Treatment (POST)** were added to the options for advance care planning in the state of Indiana. This program is designed to ensure that a patient’s treatment wishes are honored in the hospital or nursing facility. It is designed only for patients with a serious advanced medical condition. Preferences for life sustaining treatments including resuscitation, medical interventions (e.g., comfort care, hospitalization, intubation and ventilation), antibiotics, and artificial nutrition are documented as medical orders on the POST form. It must be reviewed and signed by a physician to be activated. This form transfers throughout the health care system and the orders are valid in all settings. You can change it or cancel it at any time.

POST does not replace your own Health Care Power of Attorney and Health Care Declaration (Living Will); rather, the POST procedure will enable your doctor to enter appropriate orders to carry out your wishes. The POST form helps medical providers understand your wishes at a glance, but it is *not* a substitute for a properly prepared living will and durable power of attorney for health care. Taken together, a living will and durable power of attorney for health care provide more information than a POST form, including details about your chosen attorney-in-fact and health care representative, more complete health care wishes, and your preferences for organ donation. Therefore, if you have a POST form, you do not need a DNR order, but you should still complete these two additional health care directives to provide a full set of wishes about your care.

What about advance health care planning for other circumstances than those given above?

In Indiana, there are two other options that can be planned for in advance regarding health care decisions. One is a **Psychiatric Advance Directive**, used in cases where a person has a pre-existing condition and uses a written document to express preferences and consent to treatment

measures for a specific diagnosis. The directive sets forth the care and treatment of a mental illness during periods of incapacity, and may be completed only when the person making the directive has legal capacity. A more common advanced planning device is **Organ and Tissue Donation**. Increasing the quality of life for another person is the ultimate gift, and donating your organs is a way to help others. Making your wishes concerning organ donation clear to your physician and family is an important first step. This lets them know that you wish to be an organ donor. A person that wants to donate organs may include their choice in their will, living will, on a card, or other document. Our attorneys commonly include this provision, if desired, in a Health Care Power of Attorney. If you do not have a written document for organ donation, someone else will make the choice for you. A common method used to show that you are an organ donor is making the choice on your driver's license. When you get a new or renewed license, you can ask the license branch to mark your license showing you are an organ donor.

While this article offers information about legal health care documents, our attorneys are the best source for answering your questions and developing documents specific to your needs and wishes. Please contact our office to set up an appointment to put these documents into place, or to update documents already in place.