



ASA DIX LEGAL BRIEF

A PREVENTIVE LAW SERVICE OF THE JOINT READINESS CENTER LEGAL SECTION
UNITED STATES ARMY SUPPORT ACTIVITY DIX
KEEPING YOU INFORMED ON YOUR PERSONAL LEGAL NEEDS

ADVANCE MEDICAL DIRECTIVES

1) LIVING WILLS

2) HEALTH CARE POWER OF ATTORNEY

Generally, the term Advance Medical Directives refers to two types of special legal documents: Living Wills and Health Care Powers of Attorney. Both types of Advance Medical Directives allow you to provide instructions about your future medical care if you become mentally incapable of making decisions. It is important to note that some states use their own terminology for such directives. For example, the State of New Jersey refers to the overall category as “Advance Directives for Health Care”, a living will is also referred to as an “Instruction Directive”, and an HCPOA is referred to as a “Proxy Directive or Durable Power of Attorney for Health Care”. If both the Living Will and HCPOA are combined into one document, New Jersey refers to that document as a Combined Directive.

Q: WHAT HAPPENS IF I AM INCAPABLE OF MAKING MEDICAL DECISIONS ON MY OWN?

We all dread losing control at the end of our lives, but most of us avoid the relatively simple planning that can assure our wishes will be followed regarding health care. Nowadays, preparing for possible end-of-life issues is simpler than ever, and is routinely part of estate planning. At the same time you and your attorney prepare a Will or trust to take care of your property, you can execute documents that direct how you will be cared for if you are no longer able to make your own health-care decisions, i.e. if you become terminally ill and unable to communicate, will not recover from a persistent vegetative state, or need to be admitted to a nursing facility due to Alzheimer’s disease. For health-care decisions, some states have family consent laws permitting other family members to make some decisions on your behalf if you are incapable of making decisions and usually only address life-sustaining medical treatment. However, in most states, no one, not even your spouse, has the legal right to make any kind of health-care decisions on your behalf; they might have to file a court petition to obtain such right, and obtaining such guardianships or conservatorships can be expensive, time-consuming, and still may not accomplish your wishes. As a result, most states have adopted legal devices to help you carry out your wishes when you are incapable of making such important decisions. This planning is accomplished through Living Wills and HCPOAs. They must be in writing and are only valid if made while you are competent – not, for example, when you have entered an advanced state of Alzheimer’s disease.

Q: WHAT IS A LIVING WILL? A Living Will is a written declaration in which you state in advance your wishes about the use of life-prolonging medical care if you become terminally ill and unable to communicate or a physician has determined that you will not recover from a vegetative state due to brain damage. Usually, you will be in a state that if you do not receive life-sustaining treatment (e.g., intravenous feeding, respirator), you will die. If you do not want to burden your family with the medical expenses and prolonged grief involved in keeping you alive, when there is no reasonable hope of revival, a Living Will typically authorizes withholding or turning off of life-sustaining treatment. If your Living Will is properly prepared and clearly states your wishes, the hospital or doctor should abide by it, and will, in turn, be immune from criminal or civil liability for withholding treatment. Some people worry that by making a Living Will, they are authorizing abandonment by the medical system. However, a Living Will can state whatever your wishes are regarding treatment; so even if

you prefer to receive all possible treatment, whatever your condition, it is a good idea to state those wishes in a Living Will.

Q. WHAT TYPES OF MEDICAL TREATMENT CAN I SPECIFY IN A LIVING WILL? A Living Will can be general or very specific in specifying the types of medical treatment you desire if you become incapacitated. The language commonly utilized in Living Wills executed through the Joint Base Legal Assistance Office is as follows: "If at any time (a) I am close to death and life support would only postpone the moment of my death; or (b) I am unconscious and it is very unlikely that I will ever become conscious again; or (c) I have a progressive illness that will be fatal and the illness is in an advanced stage, and I am consistently and permanently unable to communicate, swallow food and water safely, care for myself and recognize my family and other people, and it is very unlikely that my condition will substantially improve; or (d) life support would not help my medical condition and would make me suffer permanent and severe pain; then, in any such event, I direct that life support be withheld and withdrawn and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to keep me comfortable and to relieve pain. The procedures and treatment to be withheld and withdrawn include, without limitation, surgery, antibiotics, cardiac and pulmonary resuscitation, and respiratory support. I expressly authorize the withholding and withdrawal of artificially provided food, water, and other nourishment and fluids." A Living Will can also address whether you want to donate tissue or organs upon your death, whether you desire to live the last days of your life in your home instead of a hospital, and other near death health issues.

Q: WHAT IS A HEALTH CARE POWER OF ATTORNEY? This is a special kind of durable power of attorney dealing with health-care planning. It allows you to appoint someone else, referred to as your agent, to make health-care decisions for you if you become incapable of making such decisions, including, if you wish, the decision to refuse intravenous feeding or turn off the respirator if a physician determines that you are brain dead. The HCPOA can also be used to make medical decisions beyond the life-ending decisions dictated in a Living Will, such as admitting you to a nursing home or consenting to surgeries. Having both a Living Will and a HCPOA enables you to handle all areas of disability, or gray-area cases, where it is not certain that you are terminally ill, or your doctor or state law fail to give your wishes due weight. Obviously, decisions so important should be discussed in advance with your agent, who should be a spouse, child or close trusted friend. You should try to talk about the various contingencies that might arise and what he or she should do in each case. Make sure you put a copy in your medical record. Since it is much more flexible than a Living Will, the HCPOA is a very useful document that could save you and your family much anxiety, grief, and money.

Q: IF I HAVE A LIVING WILL, DO I STILL NEED A HEALTH CARE POWER OF ATTORNEY? It is a good idea. A Living Will details the type of medical care you desire if you become incapacitated and are near the end of your life; it does not appoint an agent to carry out health care decisions. A HCPOA appoints an agent to oversee the wishes you have set out in your Living Will, as well as the power to make additional necessary decisions about health care matters. A HCPOA can generally give your agent full power to make all medical decisions on your behalf when you become mentally incompetent or just specific instructions about the issues you care most about, or what you want done in particular circumstances. Some states combine the Living Will and durable power of attorney (HCPOA) into a single form, most often called an "Advance Medical Directive".

Q: WHEN DO MY ADVANCE MEDICAL DIRECTIVES TAKE EFFECT? They become effective when you become mentally incompetent, i.e. you can no longer make decisions about your own health care. The decision as to whether you are mentally incompetent is generally made by your treating physician and any other physicians required by law to examine you. Your Advance Medical Directives are in effect for as long as you are mentally incompetent. If you become mentally competent, then you will make you own health care decisions.

Q: IS A PHYSICIAN OR HOSPITAL OBLIGATED TO HONOR THE ADVANCE MEDICAL DIRECTIVES? Most medical providers will respect advance directives, but some may have restrictive policies. Once the doctor receives a properly signed and witnessed directive, he or she is under a duty either to honor its instructions, if it does not violate accepted medical practice, or make a reasonable effort to transfer the patient to another provider who will respect the advance directive. However, old habits die hard, and many doctors and nurses are still reluctant to turn off life support; even if that is what the patient wants. That is why you need an agent appointed by your HCPOA to advocate your intentions. If your medical provider(s) will not honor your directive, state law dictates their obligations.

Q: CAN I HAVE THE LIVING WILL AND HCPOA PREPARED AT THE SAME TIME? It is a good idea to prepare the HCPOA and Living Will at the same time to make sure they are compatible with each other and the rest of your estate plan. Planning for the day when you might not be able to decide for yourself should be regarded as an essential component of any estate plan.

Q. ARE THERE ANY SPECIAL REQUIREMENTS FOR EXECUTING A LIVING WILL AND HCPOA? The specific requirements depend on state law. In most states, any person 18 years of age or older can execute (sign) a Living Will if he or she is mentally competent and is doing so as his or her voluntary act. Generally, the Living Will must be in writing, signed by the person making the Living Will, and some states require two witnesses who are mentally competent or that the form is signed in the presence of a Notary Public, or both. If an agent is appointed to carry out your health care wishes, the agent should not also be a witness. It is a good idea to seek the advice of an attorney to ensure that the documents meet your state's requirements and comply with your overall estate plan. As a military member or family member eligible for military legal assistance, your legal assistance attorney can prepare a Living Will and HCPOA for you.

Q. CAN I REVISE OR REVOKE MY LIVING WILL OR HCPOA? Yes. You can revise or revoke the Living Will and HCPOA at any time, including during a terminal illness, as long as you are competent and follow the procedures set out in your state's law. When you change or revoke either document, inform your treating health care provider, your agent and the people and/or facilities that you gave copies to, preferably in writing. A Living Will and HCPOA can be changed by executing a new one and they can be revoked either through a revocation letter or executing a new one.

Q: WHO SHOULD BE GIVEN THE ADVANCE MEDICAL DIRECTIVES? The original should be given to your agent named in the HCPOA and copies should be given to your family, doctors, and other individuals who may have a say in your health care. If you are admitted to a hospital, nursing facility, or other health care institution, you should provide such facility with a copy so that it may be made a part of your medical records.