

## ADVANCE DIRECTIVES

As our society becomes more complex it is important for individuals to have written instructions for their medical treatment and financial affairs should they become incapacitated. On admission to most hospitals and long-term care facilities, patients are asked if they have a Medical Durable Power of Attorney, a Living Will, a Proxy Decision Maker, a Do Not Resuscitate order (DNR), and/or a Cardiopulmonary Resuscitation Directive (CPR).

In most cases a hospital or nursing home cannot refuse admission because one does not have these directives, but it is better if such planning has been done. Persons with Alzheimer's and other types of dementias, who need the specialized services provided in a secured unit of a long-term care facility, must have a Medical Durable Power of Attorney or Health Care Proxy for admission. **It is important to have these documents in place before you need them.** Without them, a court-ordered guardianship and/or conservatorship may be required, taking time and at a cost.

Advance directives offer individuals self-determination in their medical and financial affairs. While forms can be obtained from different organizations and at office supply stores, it is advisable to have an elder law attorney draft these documents to assure they comply with Colorado statutes and are inclusive in their directives. There are two types of advance directives – health care and financial.

### HEALTH CARE DIRECTIVES

Health care directives protect an individual's right to make medical decisions and choices about personal care, help family members make decisions if the individual cannot, and help physicians, hospitals, and long-term care facilities by providing guidelines for care.

#### Living Will

A Living Will is a written declaration that allows a person to state in advance his or her wishes regarding the use of life-sustaining medical treatment, and artificial nutrition and hydration, in **terminally ill situations** when he or she is unable to convey his or her wishes. A Living Will does not go into effect until the individual has been unconscious or comatose for a specific time period and until two doctors agree in writing that the condition is **terminal** as defined by Colorado law. It differs from a Medical Durable Power of Attorney in that a Living Will does not appoint an agent and is only used in **terminal** situations.

Two witnesses must sign a Living Will. They cannot be persons who may inherit from the individual, employees of any health care facility that provides care for the patient, other patients in the health care facility, or creditors. The Living Will should be notarized, but this is not required.

#### Medical Durable Power of Attorney

A Medical Durable Power of Attorney (also called Durable Power of Attorney for Health Care) allows an individual to appoint an agent over 18 years of age to make any or all health care decisions in the event the individual lacks medical decisional capacity as determined by a physician to make decisions. A Medical Durable Power of Attorney is not limited to terminal illness situations and can enumerate more health care issues than a

Living Will. It becomes effective when the individual is unable to make decisions. These decisions can include orders for life-sustaining treatment, nutrition, hydration, and resuscitation. In the event of a serious illness or disability, it is important to have designated a person you trust to make medical decisions on your behalf in the case that you are not able to do so yourself. This is especially important because of the HIPAA (Health Insurance Portability and Accountability Act) rules which severely restricts the information doctors and other medical personnel are allowed to give out even to family members, including a spouse. **Powers of Attorney cannot be set up after the individual is considered incompetent or incapacitated, therefore it is important to have this document in place before a medical crisis.**

It is advisable to have the Medical Durable Power of Attorney drawn up by an elder law attorney to assure personal wishes are expressed and include the specifics which comply with HIPAA rules. A Medical Durable Power of Attorney does not have to be witnessed or notarized, but it is advisable to do so.

### **Cardiopulmonary Resuscitation (CPR) Directive and Do Not Resuscitate order (DNR)**

Cardiopulmonary Resuscitation Directive (CPR) 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.

Paramedics or any other emergency response medical personnel are required by law to try all means to resuscitate someone in answering a 911 call even if the individual has a Medical Durable Power of Attorney. The only instance in which they will not try to revive a person whose heart or lungs have stopped is if they have a CPR directive. Such a directive is used by persons in extreme or terminal illness situations who live in the community. In emergency situations in a hospital or nursing home setting the same requirement is mandated.

CPR and DNR forms are issued by the Colorado Medical Society and are available through family physicians, hospitals, nursing homes, hospice, and certified home health agencies - **not** attorneys. This form is signed by the patient and the doctor, after the doctor or a member of his staff has thoroughly explained the implications of this directive. Patients who do not want to be resuscitated should have both a CPR directive, and or a DNR directive, and a Medical Durable Power of Attorney. Emergency medical technicians, as well as hospital and nursing home personnel are trained to recognize these forms. The forms should be kept in a location where they are readily available in an emergency situation. An identifying necklace or bracelet is recommended stating the individual does not want CPR in an emergency situation.

### **Guardianship**

Guardianship is a court proceeding where someone is appointed by the Court to handle another person's medical and personal care matters. A guardian is appointed by the court to assist with the personal affairs and day-to-day living experiences of a person who has been declared incapacitated according to Colorado statute. In this case the individual is deemed unable to make or communicate responsible decisions about his or her person. Age alone is not a reason for someone to be declared incapacitated.

A guardian is responsible for housing and medical treatment, but has limited powers in financial matters, which may require a conservatorship in combination with the guardianship. An attorney is usually needed for guardianship proceedings, in addition to a hearing before a judge or magistrate. Guardianship proceedings can take a month or more to complete and may cost at least \$2,500 or double this estimate, if contested by disgruntled family members. Besides being expensive, guardianships are difficult to deal with, requiring several court appearances and court supervision. Most times a guardianship is set up in conjunction with a conservatorship.

### **Five Wishes**

Five Wishes is an advance directive that acts as a Living Will and Medical Durable Power of Attorney. An agent is declared who will make health care decisions for an individual who is unable to make them. The five wishes include: choosing an agent; declaring what kind of treatment you want or do not want; specifically stating what kinds of things you want for comfort; stating your wishes regarding treatment by others; and statements letting family members and loved ones your feelings. The Five Wishes is accepted as a legal document in Colorado. It does need two witnesses to sign it, but does not have to be notarized. For more information and the Five Wishes forms you can go to [www.agingwithdignity.org](http://www.agingwithdignity.org) or call 1-888-594-7437.

Whether you decide to use a Medical Durable Power of Attorney or the Five Wishes it is very important to talk with family members about your wishes and decisions. Even with these documents in place, if family members are conflicted about what end of life care you may need or not need, physicians and hospital personnel may do everything to prolong a person's life, because of threat of a lawsuit by an unhappy family member. It is very difficult in time of crisis for family members to make hard decisions. It helps if they have been informed ahead of time as to what your wishes are.

### **FINANCIAL DIRECTIVES**

Financial Directives have two main advantages. They allow individuals to prepare financial instructions in advance of a debilitating illness when they would not be capable of handling their own affairs, and they empower family members or a designated agent to handle the financial affairs for an individual who can no longer do so. Again this is important in light of all the privacy rules regarding giving out information to a second party.

#### **Durable Power of Attorney**

A Durable Power of Attorney (DPOA) is a legal document that names an agent to act on behalf of another person regarding financial decisions according to the wishes stated in the power of attorney. A "durable" power extends the agent's power to an agent should a period of incapacitation occur. In other words, it "endures" during the incapacity of the individual who assigned the DPOA. **To be "durable" the document must state that it is "durable" or "is not affected by the incapacity" of the individual.** If the power of attorney does not state this, it is considered a General Power of Attorney, which automatically becomes invalid when the individual becomes incapacitated.

A DPOA allows the agent to pay bills, manage assets, sell property, etc. It is preferable to have an attorney draw up a DPOA because it is important to be specific about the duties the agent can perform. Bank, insurance companies, and title companies do not have to recognize a DPOA if they feel that it does not offer complete instructions. Many financial institutions require that a financial power of attorney be dated within a certain time of when the agent tries to use it.

A DPOA is a powerful legal tool. For this reason the agent should be carefully selected as someone who can be trusted to act on the person's behalf without supervision. The Power of Attorney must be notarized. Any power of attorney terminates upon the death of the principal (the person who signed the document). The power of attorney may be revoked by the individual at any time. If it is revoked, all persons and institutions must be notified of the change, in order to have the correct agent on record.

### **Conservatorship**

A Conservator is appointed by the court to manage the financial affairs of one declared unable to manage his or her financial affairs effectively according to Colorado statutory definition. A Conservator is required to file an inventory of personal and real property and to make a yearly report to the court showing financial activity. Additionally, a detailed financial plan is required which may set up restrictions on how money is to be spent and what can and cannot be sold. The conservator has to make periodic reports to the court and petition the court for additional authority to sell real property and/or assets.

An attorney is usually needed for conservatorship proceedings, in addition to a hearing before a judge or magistrate. Conservator proceedings can take a month or more to complete and may cost at least \$2,500 or double, if contested. Besides being expensive, conservatorships are difficult to deal with, requiring several court appearances and court supervision. Most times a guardianship is set up in conjunction with a conservatorship.

### **SUMMARY**

In order to have some peace of mind for yourself, as well as your family members, it is imperative that you set up these directives while you can make the choices about your care and finances. Once something happens and you are unable to make your own decisions, these documents cannot be put into place and you are forced into a Guardianship and Conservatorship. If nothing else, set up a Medical Durable Power of Attorney (or Five Wishes) and a Financial Durable Power of Attorney. And as important, let your family know what you have done, what you want, and who you have designated to make the decisions.