

FREQUENTLY ASKED QUESTIONS REGARDING ADVANCE DIRECTIVES

What is an advance directive?

An advance directive is an order to your health care provider (usually a doctor) made in advance of a loss of competency, that directs the healthcare provider, your family, or a surrogate decision maker how to manage your health care in the event you are unable to communicate your wishes yourself.

Isn't that a living will?

A living will is only one kind of advance directive. Texas law calls a living will a "Directive to Physicians and Family or Surrogates."

What are the types of directives?

Texas law provides four directive forms: the Directive to Physicians and Family or Surrogates; a Medical Power of Attorney; an Out-of-Hospital Do-Not-Resuscitate (DNR) Order, and a Mental Health Treatment Declaration.

Where do you get directives?

Many lawyers, doctors, hospitals/health care providers including Texas Tech University Health Sciences Center have blank copies of directives. You may fill out an Out-of-Hospital DNR order, but it must be a form the Texas Department of Health has prescribed in its rules, and it has to be signed by a doctor to be valid. The other documents only need to be witnessed.

What is this about witnessing? Is this a will?

It is not a will that disposes of your property. It is a will, in a sense, because it describes your will concerning medical treatment. Your signature needs to be witnessed, and the law is very specific on this.

Witnesses to a Directive to Physicians, Medical Power of Attorney, and DNR Order must be competent adults, and at least **one** witness **may not be**:

- (A) a person designated by the patient to make a treatment decision;
- (B) a person related to the patient by blood or marriage;
- (C) a person entitled to any part of the patient's estate after the patient's death under a will or
codicil executed by the patient or by operation of law;
- (D) the attending physician;

(E) an employee of the attending physician;
(F) an employee of a health care facility in which the patient is admitted if the employee is providing direct patient care to the patient or is an officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility; or

(G) a person who, at the time the written advance directive is executed or, if the directive is a nonwritten directive issued under this chapter, at the time the nonwritten directive is issued, has a claim against any part of the patient's estate after the patient's death.

The laws concerning witnesses are a bit different for the declaration of mental health treatment. A witness to a declaration for mental health treatment may not, at the time the declaration is executed, be:

- (1) the patient's health or residential care provider or an employee of that provider;
- (2) the operator of a community health care facility providing care to the patient or an employee of an operator of the facility;
- (3) a person related to the patient by blood, marriage, or adoption;
- (4) a person entitled to any part of the estate of the patient on the death of the patient under a will, trust, or deed in existence or who would be entitled to any part of the estate by operation of law if the principal died without a will; or
- (5) a person who has a claim against the estate of the patient.

Do I have to use the form in the law for the other directives?

The "Directive to Physicians . . ." found in the law is a suggested form. The Medical Power of Attorney and the Mental Health Treatment Declaration must be in substantially the same form as written in the law.

For a directive to physicians, you may write out your wishes, sign the paper, have it witnessed by the required people and it is effective. Be sure to include all the necessary information. For instance, in a power of attorney, be sure to include the name, address and phone of your agent and any alternate agents.

Where is the law on Advance Directives found?

The Mental Health Treatment Declaration is Sec. 137.011, Civil Practice and Remedies Code. The other two are in the Health and Safety Code as follows: the Directive to Physicians and Family or Surrogates is Section 166.032; and the Medical Power of Attorney is Section 166.159. You must get the DNR order from the Health Department or your health care provider.

Does a directive have to be notarized?

The law specifically states that a "Directive to Physicians" does not have to be notarized. A physician, health care facility, or health care professional may not require it be notarized nor may any of them require you to use a specific form. The law does not mention notarization in the other three directives.

Why is this so important? If I get sick, I'll have plenty of time to discuss treatments with my doctor. I don't want to be bothered with this.

If you have some sort of unpredictable illness or accident and you are unconscious there is no way to communicate your health care wishes to your doctor. If you have not discussed possible medical treatments with your doctor, loved ones, trusted friends, or a clergy person, who would know what you would wish to have done for you, or not done for you? It may be important that someone know your wishes concerning medical care if you are unable to communicate those wishes. And, it is important that someone have the legal right to make those decisions for you if that person knows of your wishes. Additionally, it is not a wise decision to make choices concerning health care treatment when you are under stress.

If I try to talk about this to my loved ones they will be very upset and I do not want to upset the people I love. They will think something is wrong.

If you do not talk about your wishes BEFORE something happens how will anyone know what you would have chosen? It is uncomfortable to talk of these things, but the advances in medical treatment today make it very necessary that someone knows what your wishes are. If you take the time to decide what treatments you may or may not want at some time you will be giving your loved ones a great deal of peace of mind if those decisions ever have to be made.

You keep talking about my wishes! The doctor makes all of the decisions, I have no way of knowing what is available and what is best for me.

That is only partially true. Health care professionals do know what is available, what is necessary, and what is possible in different situations. But YOU always have the right to direct your treatment. You have the right to discontinue treatment, decline it, and to request it. You have the right to be fully informed of all of the consequences of that treatment decision. A doctor cannot treat you without your informed consent.

Treatment decisions and options are always yours to make. If something unforeseen happens to you, there are many decisions that will be made for you that you could have made yourself had you been able to do so. That is why these directives are so important.

Additionally, you have the right, under the law, to request treatment. However, there is no obligation to provide you with treatment the doctors thinks is unnecessary, frivolous, futile, or that would deprive another person with a better chance of recovery of the opportunity to receive that particular treatment.

What kind of decisions are we talking about?

As the end of life approaches there may be treatment that could be provided that you would not want. However, in all cases, comfort care would be provided.

What if I have a heart attack? If I have a "Directive to Physicians and Family or Surrogates" will the doctors refuse to treat me? That's certainly NOT what I want!

This directive does not become operative, or "kick-in," unless you are a qualified patient. "Qualified patient" means a patient with a terminal or irreversible condition that has been diagnosed and certified in writing by a doctor and who is incompetent, unable to make a treatment decision for him or herself. A Medical Power of Attorney becomes operative only if you become incompetent.

A Directive does not mean that emergency or other medical care will not be provided to you. Many people have advance directives and are treated for things like stroke and heart attacks everyday. The difference is that if, for instance, a massive stroke left you very near death and paralyzed with no hope of recovery and you had decided you did not want to be hooked up to machines and kept alive in that condition, then the advance directive would allow the doctors to follow your wishes.

Conversely, if you do want to be kept alive in that manner because you would never want anyone to give up hope that you would recover, you have the right to make those wishes known also.

What does terminal or irreversible condition mean?

A "terminal condition" is defined as "an incurable condition caused by injury, disease, or illness that according to reasonable medical judgment will produce death within six months, even with available life-sustaining treatment provided in accordance with the prevailing standard of medical care." A person who has been admitted to a hospice is presumed to be in a terminal condition.

"Irreversible condition" is defined as "a condition, injury, or illness that may be treated but is never cured or eliminated, that leaves a person unable to care for or make decisions for the person's own self; and that, without life-sustaining treatment provided in accordance with the prevailing standard of medical care, is fatal."

What happens if the doctor and the patient or the patient's decision maker disagree on a patient's treatment decision or directive?

There is a new procedure that must be followed if a doctor refuses to honor a patient's directive or treatment decision. First the decision must be reviewed by a medical or ethics committee, and the doctor may not be a member of that committee. If the doctor normally is a member of that committee, then good sense tells us that the doctor simply would not participate in the committee's decision making process. The patient or the patient's

representative must be informed of the committee meeting, may attend, and is entitled to a written explanation of the proceeding.

If the doctor, the patient, or the person responsible for the health care decisions of the individual does not agree with the committee decision, the doctor must make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive. The facility will help during the transfer process. The patient must be transferred to another doctor, or another facility, or another setting in the facility. The physician and the health care facility are not obligated to provide lifesustaining treatment after the 10th day after the written committee decision is provided to the patient or the person responsible for the health care decisions of the patient unless ordered to do so by a court.

What happens if this goes to court? What can the judge do?

The court may extend the 10 day time period only if the court finds, by a preponderance of the evidence, that there is a reasonable expectation that a physician or health care facility that will honor the patient's directive will be found if the time extension is granted. The court may not second guess the committee's decision making process.

If there is a transfer, who pays for it?

The patient is responsible for any costs incurred in transferring the patient to another facility.

What happens if they "pull the plug" while this review is going on or the doctor tells the insurance company that the treatment isn't necessary?

The law is specific: The patient must be given life-sustaining treatment while the review is under way and during the transfer process and the doctor cannot describe the life-sustaining treatment required by the law as medically unnecessary treatment.

Life-sustaining treatment - what is that?

Life-sustaining treatment is treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. It includes both medications and artificial life support (mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration).

It does NOT include the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain.

Do I need a directive in order to receive treatment or to get insurance?

No! The law states "A physician, health facility, health care provider, insurer, or health care service plan may not require a person to execute or issue an advance directive as a condition for obtaining insurance for health care services or receiving health care services."

I just know that if I have a directive it will be impossible to get life insurance!

The law is specific on this point also. It states: "The fact that a person has executed or issued an advance directive does not:

- (1) restrict, inhibit, or impair in any manner the sale, procurement, or issuance of a life insurance policy to that person; or
- (2) modify the terms of an existing life insurance policy.

Additionally, no matter what any policy says, the fact that life-sustaining treatment is withheld or withdrawn from an insured qualified patient does not legally impair or invalidate that person's life insurance policy and may not be a factor for the purpose of determining, under the life insurance policy, whether benefits are payable or the cause of death. And, the fact that a person has executed or issued or failed to execute or issue an advance directive may not be considered in any way in establishing insurance premiums.

I already have a power of attorney - what is the difference between this one and the one I already have?

A general power of attorney controls your real and personal property. A person holding that type of power of attorney does not have the power to make health care decisions for you in the event you are not able to make them for yourself. A person holding a medical power of attorney can only make decisions regarding your health care and has no power over your property.

It scares me to think someone else may make all kinds of decisions about my health care! Are there any limitations on the types of things that a person who holds a Medical Power of Attorney can order done to me?

Yes! Under Texas law, a person who has your Medical Power of Attorney(your agent) can not consent to the following: voluntary inpatient mental health services; convulsive treatment; psychosurgery; or abortion. Additionally, your agent may not agree to neglect you through the omission of care primarily intended to provide for your comfort.

Who can I appoint as my agent?

The easier question is who may NOT act as your agent! You may appoint anyone as your agent except your health care provider or your residential care provider, or an employee of your health care provider or residential care provider unless that person is your relative.

I don't believe in suicide or mercy killing and I don't want anyone to get in trouble if they follow my directive to withdraw or withhold treatment.

The law specifically states that a person does not commit a criminal offense by withholding or withdrawing life-sustaining treatment from a qualified patient in accordance with the laws concerning advance directives. Additionally, the law does not condone, authorize, or approve mercy killing or permit an affirmative or deliberate act or omission to end life except to permit the natural process of dying.

What if a woman is pregnant? Can a directive to withdraw or withhold treatment be used then?

Again, the law is specific: "A person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient."

What if I execute a directive and then the doctor or the hospital refuses to do as I have directed? What can I do? I have heard they can ignore a directive and get away with it.

The law is very specific about this too! A doctor who has been notified of the existence of a directive shall provide for the patient's certification as a qualified patient on diagnosis of a terminal or irreversible condition. Before withholding or withdrawing life-sustaining treatment from a qualified patient, the doctor must determine that the steps proposed to be taken are according to the law and the patient's existing desires.

Additionally, if a health care professional refuses to honor a directive for a qualified patient, there are specific steps they must take which allow your family to seek treatment from another physician or transfer you to another facility that will honor your wishes.

What if I execute a directive and then I change my mind?

You may revoke a directive at any time without regard to your mental capacity. You may cancel it, tear it up, mark through it, burn it, or otherwise destroy it. Or you may direct someone to do that for you. You may sign a written revocation. You may simply tell people you revoke it. It takes effect as soon as someone tells the doctor.

I am worried that if I have a directive and my doctor withdraws or withholds treatment because that is what I wanted, that someone will sue the doctor and I would not want that to happen.

If they have followed the law, the doctor and any other health care professional or facility that causes life-sustaining treatment to be withheld or withdrawn from a qualified patient is not civilly liable for that action unless the physician or health care facility failed to exercise reasonable care when applying the patient's advance directive.

What if everyone has agreed on treatment for someone who is unable to do so for himself, and a family member decides that they don't like what all of the others have decided and tells the doctor they'll sue if the doctor proceeds according to everybody else's wishes? What happens then?

If the person is the patient's spouse, an adult child, the patient's parent, or nearest living relative, to challenge a treatment decision made in accordance with the law, the person must apply for temporary guardianship under Section 875, of the Probate Code.

My mother lives in Florida and has a Florida directive. If she comes to visit and something happens her directive valid in Texas?

Yes! The law says an advance directive (or similar instrument) validly executed in another state shall be given the same effect as an advance directive validly executed under Texas law.

And, what if I am visiting her? Will Florida honor a Texas directive?

We don't know what other states will do. Generally, unless it is against the public policy of a state, states will honor documents that are valid in another state. The exception would be a document valid in Oregon, or any other state, that would allow assisted suicide. Such a document would NOT be valid in Texas.

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