

THIS IS THE LAW

LIVING WILLS AND HEALTH CARE POWERS OF ATTORNEY

To many people, the fear of a lingering death is worse than the fear of dying. Yet often, near the end of life, a person is unable to make decisions or express his or her desires concerning medical care to loved ones or medical personnel. A living will and a health care power of attorney are legal documents which permit you to state your preferences and make certain choices regarding your future health care. These documents also allow you to appoint other individuals to make health care decisions for you in the event that you are unable to make them for yourself.

NOTE: A living will, also known as an advance directive for a natural death, makes no provision for your personal belongings or property after your death. A living will should not be confused with a testamentary will. If you have additional questions about making a living will or health care power of attorney you should discuss them with a physician or attorney.

NORTH CAROLINA
BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

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Living Wills and Health Care Powers of Attorney

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What is a Living Will? • A living will is a legal document in which you direct whether your life will be prolonged by medical procedures in any of three circumstances: (1) you have an incurable or irreversible condition that will result in your death within a relatively short period of time; (2) you become unconscious and your health care providers determine that, to a high degree of medical certainty, you will never regain consciousness; and/or (3) you suffer from advanced dementia or any other condition which results in substantial loss of your cognitive ability, and your health care providers determine that, to a high degree of medical certainty, the loss is not reversible. In North Carolina, this is called an “Advance Directive for a Natural Death” or “Living Will.” A living will allows you to authorize or direct the withholding or withdrawal of life-prolonging measures (for example, respirator care and artificial nutrition or hydration) that would only serve to delay your death. In a living will you may also direct the provision of artificial nutrition and/or artificial hydration, together with or separate from life-prolonging measures.

What is a Health Care Power of Attorney? • A health care power of attorney is a legal document by which you give authority to another person or persons to consent to or refuse any or all medical care, including mental health treatment, on your behalf. This authority is only applicable if a physician or eligible psychologist determines that you are unable to make or communicate these decisions yourself. You may authorize the designated person or persons (the “health care agent”) to consent to the withholding or withdrawal of life-prolonging measures, and direct your health care agent regarding those medical and/or mental health treatments you would want, and those you would not want. In addition to making decisions in “life and death” situations, your health care agent also may be authorized to make more routine medical decisions for you (for example, to consent to X-rays or surgery). A health care power of attorney may contain or incorporate by reference any lawful guidelines or directions relating to your health care as you deem appropriate, including instructions to your health care agent to refuse any specific types of treatment that are unacceptable to you for religious or other reasons. In the event of death, you may authorize your health care agent to donate your organs and/or authorize an autopsy. A health care power of attorney will remain effective if a court appoints a guardian to act on your behalf, unless the court issues an order suspending the authority of the health care agent. You may indicate in the document your choice of a guardian in the event guardianship proceedings are commenced.

What are Life-Prolonging Measures? • Life-prolonging measures are those medical procedures or interventions which only serve to postpone artificially the moment of death by sustaining, restoring, or supplanting a vital function and may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and similar forms of treatment. Life-prolonging measures are distinct from medical care designed to provide comfort or alleviate pain.

How Should a Living Will or Health Care Power of Attorney Be Made? • The forms used to make a living will or health care power of attorney may be obtained from an attorney or may be obtained online at the North Carolina Secretary of State website (www.secretary.state.nc.us/ahcdr/). A health care power of attorney may be a separate document or may be included in a broader general power of attorney document (sometimes called a “durable power of attorney”) addressing matters other than consent for and refusal of medical care. In the event you have both a health care power of attorney and a general power of attorney, the provisions of your health care power of attorney will control with regard to medical decisions.

A living will and a health care power of attorney must be witnessed, signed and dated in accordance with North Carolina law and must be certified by a notary public. At least two witnesses are required for a living will and health care power of attorney. Witnesses cannot be related to the person signing the documents (the “declarant”) and cannot be potential heirs to the declarant’s estate or have any other claim against the declarant at the time they serve as a witness. No attending physician, attending mental health treatment provider, licensed health care provider who is a paid employee of the attending physician or mental health treatment provider, or paid employee of a health care institution may be a witness for these documents; however, such an employee may notarize the document. Volunteers are not employees of the physician or health care institution, so they may witness the execution of a living will or health care power of attorney.

You should carefully consider the implication of executing these documents, both as to the course of your future medical care and as to the effect of your decisions on your loved ones. Many people retain the services of an attorney to prepare their living will and health care power of attorney.

It is strongly suggested that you consult with family members prior to executing these documents.

Can I Have Both a Living Will and a Health Care Power of Attorney? • Yes. You may have a living will indicating your health care choices in the event you are unable to make those decisions in the future, and you also may have a health care power of attorney designating an individual to act on your behalf, consistent with your wishes as set out in your living will, unless you specify otherwise. In fact, you even may have a living will, a health care power of attorney, and an advance instruction for mental health treatment in the same document, or created separately. You may specify whether your health care provider is to follow the instructions expressed in your living will or the decisions made by your health care agent in the event there is a conflict between the two. Prior to 2007, the statutory forms did not attempt to resolve conflicts between the living will and a health care agent’s instructions. If you do not specify, or your documents were executed before 2007, your health care provider should follow the instructions expressed in your living will.

Can I Change My Mind Once I Sign a Living Will or Appoint a Health Care Agent? • Yes. You may revoke a living will at any time that you are able to communicate health care decisions. You may revoke a health care power of attorney if you are also capable of making health care decisions. You may do so by executing and acknowledging a document of revocation, executing a subsequent living will or health care power of attorney, or by any other manner by which you are able to communicate your intent to revoke. The revocation will become effective only upon communication to the attending physician, and, if a health care power of attorney is to be revoked, to each health care agent named. In addition, the authority of a health care agent will be revoked upon the entry of a divorce or separation between the principal and the agent.

These documents should be reviewed periodically, especially in the event of divorce, or death or disability of a named agent, to ensure that they continue to reflect your desires about health care decisions.

If I Do Not Have a Living Will or Health Care Power of Attorney, Who Will Make These Decisions for Me? If you do not have a living will or health care power of attorney, the attending physician will ask your spouse or next of kin to consent to treatment, unless a court has appointed a guardian or you have a durable power of attorney which gives your attorney-in-fact powers to make health care decisions for you. If the attending physician has determined, and another physician has confirmed, that (1) you have an incurable or irreversible condition that will result in your death in a relatively short period of time, or (2) you are unconscious and, to a high degree of medical certainty, will never regain consciousness, North Carolina law provides that the decision to withdraw or withhold life-prolonging measures may be made by the attending physician, after consulting with your guardian or attorney-in-fact, if applicable, and if not, after consulting with your spouse or next of kin.

Living wills and health care powers of attorney are recommended in order to prevent disputes or disagreements between family members or between your family and the attending physician as to the appropriate medical care because these documents clearly state your preferences and appoint a health care agent with full authority to decide.

Where Should I Keep My Living Will or Health Care Power of Attorney? • It is suggested that you give a copy of these documents to your family physician, your attorney, spouse or trusted adult family members. For a fee of \$10, you also may file a copy of these documents with the Advance Health Care Directive Registry maintained by the Secretary of State (www.secretary.state.nc.us/ahcdr/). Each registrant receives a password allowing remote online access to his or her documents.

A signed copy of a health care power of attorney document also can be given to your health care agent and any alternate named in your health care power of attorney. A safe deposit box or locked safe is not recommended for storage of these documents.