



WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

Advance Health Care Documents

Advance health care documents are documents that a person executes while he or she is competent to make decisions, in order to cover future situations when the person is no longer able to make health care decisions. Wisconsin statutes recognize three such documents: (1) the living will (referred to statutorily as a “declaration to physicians”); (2) the power of attorney for health care; and (3) the do-not-resuscitate order. This Information Memorandum describes laws that apply to those documents and updates a prior Information Memorandum on this topic.

NATURE OF DOCUMENTS

LIVING WILL

A living will is a document by which a person may direct physicians not to use life-sustaining procedures or feeding tubes when the person signing the living will is in a terminal condition or persistent vegetative state. The term “life-sustaining procedure” is defined by law as follows:

154.01 (5) “Life-sustaining procedure” means any medical procedure or intervention that, in the judgment of the attending physician, would serve only to prolong the dying process but not avert death when applied to a qualified patient. “Life-sustaining procedure” includes assistance in respiration, artificial maintenance of blood pressure and heart rate, blood transfusion, kidney dialysis and other similar procedures, but does not include:

- (a) The alleviation of pain by administering medication or by performing any medical procedure.
- (b) The provision of nutrition or hydration.

Living wills are governed under ch. 154, Stats., which was created in 1984 and has been modified several times since then.

POWER OF ATTORNEY FOR HEALTH CARE

A power of attorney for health care is a document that is executed by a person, referred to in the law as a “principal,” that authorizes a named person, known as a “health care agent,” to

make health care decisions for the principal when the principal is incapacitated. Under a power of attorney for health care, the person signing the document may also designate an alternate health care agent in case the designated health care agent is unable or unwilling to make health care decisions for the person signing the document. The designated health care agent may not be the health care provider [as defined in s. 155.01 (7), Stats.] for the person, an employee of the health care provider, or an employee of an inpatient health care facility in which the person is a patient or a spouse of those providers or employees, unless the health care provider, employee, or spouse is a relative of the person signing the document.

If necessary to implement the health care decisions that a health care agent is authorized to make, in accordance with the desires of the person signing the document, the health care agent may sign or otherwise execute any documents, waivers, or releases related to the person's care or treatment.

Powers of attorney for health care are governed by ch. 155, Stats., which was created in 1990 and has been modified since then.

DO-NOT-RESUSCITATE ORDER

A do-not-resuscitate order is a written order that directs emergency medical technicians, first responders and emergency health care facilities personnel not to attempt cardiopulmonary resuscitation on a person for whom the order is issued if that person suffers cardiac or respiratory arrest. Because of the definition of the term "do-not-resuscitate order" in the statutes, subch. III of ch. 154, Stats., applies only to orders that are directed to emergency medical technicians, first responders and emergency health care facilities personnel. Other types of do-not-resuscitate orders (e.g., do-not-resuscitate orders that apply in hospital inpatient settings) are not included within the definition and are not covered by the statute.

For the purposes of the statutes governing do-not-resuscitate orders, the term "resuscitation" is defined as follows:

154.17 (5) "Resuscitation" means cardiopulmonary resuscitation or any component of cardiopulmonary resuscitation, including cardiac compression, endotracheal intubation and other advanced airway management, artificial ventilation, defibrillation, administration of cardiac resuscitation medications and related procedures. "Resuscitation" does not include the Heimlich maneuver or similar procedure used to expel an obstruction from the throat.

Do-not-resuscitate orders are governed by subch. III of ch. 154, Stats., which was created by 1995 Wisconsin Act 200.

STATUTORY FORMS OF DOCUMENTS

The statutes governing living wills and powers of attorney for health care set forth statutory forms which the Department of Health Services (DHS) is required to print and prepare for distribution to specified groups and to individuals.* [There is no form in the statutes for do-not-resuscitate orders.] The statutory forms of both documents have boxes that may be checked to indicate the desires of the person signing the document with regard to use of

feeding tubes. In addition, the statutory form of a living will has boxes that may be checked to indicate the signer's desires regarding the effect of the document if the person is in a persistent vegetative state. The statutory form of the power of attorney for health care also has boxes that may be checked to indicate the signer's desires regarding admission to a nursing home or a community-based residential facility and the effect of the document during the signer's pregnancy.

Persons may obtain copies of the statutory forms for either or both documents by sending a self-addressed, stamped business-size envelope to DHS, using the following address:

Division of Public Health
ATTN: POA
P.O. Box 2659
Madison, WI 53701-2659

For one self-addressed, stamped business-size envelope, a person may receive up to four living will forms or one power of attorney for health care form or one copy of each form. A note should be enclosed stating which form or forms the person is requesting.

EXECUTION OF DOCUMENTS

LIVING WILL AND POWER OF ATTORNEY FOR HEALTH CARE

In order to execute either a living will or a power of attorney for health care, a person must be 18 years of age or older and of sound mind. Execution of either document must be voluntary.

The signature of the person signing either document must be witnessed by two persons. None of the following persons may witness a living will or a power of attorney for health care:

- a. A person related to the person signing the document by blood, marriage or adoption, or the domestic partner of the individual.
- b. A person who has knowledge that he or she is entitled to or has a claim on any portion of the estate of the person signing the document.
- c. A person who is directly financially responsible for the health care of the person signing the document.
- d. A person who is a health care provider [as defined in s. 155.01 (7), Stats.], who is serving the person signing the document at the time of execution, an employee of the health care provider or an employee of an inpatient health care facility in which the person signing the document is a patient. However, notwithstanding these restrictions, a document may be witnessed by a chaplain or a social worker who is an employee of either the health care provider or the inpatient health care facility.

In addition to the above restrictions, a power of attorney for health care may not be witnessed by the person designated as the health care agent of the person signing the document.

Either document that is in its original form or is a legible photocopy or electronic facsimile copy is presumed to be valid. Either document may be filed for safekeeping with the register in probate for the county in which the person signing the document resides, but the law does not require that it be so filed.

A valid document that authorizes the withholding or withdrawal of life-sustaining procedures or of feeding tubes and that is executed in another state or jurisdiction in compliance with the law of that state or jurisdiction is valid and enforceable in Wisconsin to the extent that the document is consistent with Wisconsin laws.

DO-NOT-RESUSCITATE ORDER

The issuance of a do-not-resuscitate order differs from the execution of a living will or power of attorney for health care in the following ways:

a. A living will or power of attorney for health care is executed by the principal himself or herself, while a do-not-resuscitate order may be issued only by a physician. As described above, there are witness requirements for the first two documents, but not for the do-not-resuscitate order.

b. A living will or power of attorney for health care may be executed at any time by an adult of sound mind, whereas a do-not-resuscitate order may be issued for a person only when the person is a qualified patient. The do-not-resuscitate statutes define the term “qualified patient” as follows:

154.17 (4) “Qualified patient” means a person who has attained the age of 18 and to whom any of the following conditions applies:

(a) The person has a terminal condition.

(b) The person has a medical condition such that, were the person to suffer cardiac or pulmonary failure, resuscitation would be unsuccessful in restoring cardiac or respiratory function or the person would experience repeated cardiac or pulmonary failure within a short period before death occurs.

(c) The person has a medical condition such that, were the person to suffer cardiac or pulmonary failure, resuscitation of that person would cause significant physical pain or harm that would outweigh the possibility that resuscitation would successfully restore cardiac or respiratory function for an indefinite period of time.

With the exception of an incapacitated qualified patient, an attending physician may issue a do-not-resuscitate order only if the patient is a qualified patient, the patient requests the order, the order is in writing, the patient signs the order and the physician does not know the patient to be pregnant. The guardian or health care agent of an incapacitated qualified patient may request the order and sign the order on the patient’s behalf.

The attending physician or a person directed by the attending physician must provide the patient with written information about the resuscitation procedures that the patient has chosen to forego and the methods by which the patient may revoke the do-not-resuscitate order.

After providing this information, the attending physician or the person directed by the attending physician must document in the patient’s medical record the medical condition that qualifies the patient for the do-not-resuscitate order, make the order in writing, and either affix to the patient’s wrist a do-not-resuscitate bracelet or provide an order form from an approved

commercial vendor. DHS is required to establish, by rule, a uniform standard for the size, color and design of all do-not-resuscitate bracelets. The rules must require that the bracelets include the inscription “Do Not Resuscitate”; the name, address, date of birth, and gender of the patient; and the name, business telephone number, and signature of the attending physician issuing the order.

“TRIGGERING CONDITION”

LIVING WILL

A living will may be used upon a finding by two physicians who have personally examined the person signing the document that the person has a terminal condition. One of the physicians must be the person’s attending physician. The law defines “terminal condition” as follows:

154.01 (8) “Terminal condition” means an incurable condition caused by injury or illness that reasonable medical judgment finds would cause death imminently, so that the application of life–sustaining procedures serves only to postpone the moment of death.

In addition, a living will may be used when the person is in a persistent vegetative state. The term “persistent vegetative state” is defined by law as follows:

154.01 (5m) “Persistent vegetative state” means a condition that reasonable medical judgment finds constitutes complete and irreversible loss of all of the functions of the cerebral cortex and results in a complete, chronic and irreversible cessation of all cognitive functioning and consciousness and a complete lack of behavioral responses that indicate cognitive functioning, although autonomic functions continue.

The statutory form of the living will includes boxes that may be checked to indicate the signer’s desires regarding use of life-sustaining procedures or feeding tubes if the person is in a persistent vegetative state and use of feeding tubes if the person has a terminal condition. If neither box is checked for life-sustaining procedures, those procedures will be used during a persistent vegetative state; if neither box is checked for feeding tubes, those tubes will be used during a persistent vegetative state or when the person has a terminal condition.

POWER OF ATTORNEY FOR HEALTH CARE

A health care agent may make health care decisions under a power of attorney for health care when the person who signed the document has been found to have an incapacity, as determined by either two physicians, or by a physician and a psychologist, who have personally examined the person. The physicians, or the physician and psychologist, may not be relatives of the person signing the document or have knowledge that they are entitled to, or have a claim on, any portion of the person’s estate. The law provides that mere old age, eccentricity or physical disability, either singly or together, are insufficient to make a finding of incapacity. The law defines “incapacity” as follows:

155.01 (8) “Incapacity” means the inability to receive and evaluate information effectively or to communicate decisions to such an extent that the individual lacks the capacity to manage his or her health care decisions.

DO-NOT-RESUSCITATE ORDER

Under the definition of “do-not-resuscitate order” in the statutes, such an order comes into play when a person for whom the order is issued suffers cardiac arrest or respiratory arrest. Emergency medical technicians, first responders, and emergency health care facilities personnel are required to follow these orders. The procedures used in following a do-not-resuscitate order must be in accordance with any procedures established by DHS by rule. The requirement to follow a do-not-resuscitate order does not apply if the order has been revoked; if the bracelet appears to have been tampered with or removed; or if the emergency medical technician, first responder, or emergency health care facilities personnel knows that the patient is pregnant.

NUTRITION AND HYDRATION

A living will may authorize the withholding or withdrawal of life-sustaining procedures or feeding tubes when the person signing the document is in a terminal condition or a persistent vegetative state. However, a living will may not authorize the withholding or withdrawal of nutrition or hydration that is administered or otherwise received by the person through means other than a feeding tube (e.g., food or water), unless the person’s attending physician advises that, in his or her professional judgment, the administration is medically contraindicated. In addition, a living will may not authorize the withholding or withdrawal of any medication, life-sustaining procedure or feeding tube if the person’s attending physician advises that, in his or her professional judgment, the withholding or withdrawal will cause the person pain or reduce the person’s comfort and the pain or discomfort cannot be alleviated through pain relief measures.

A health care agent may consent to the withholding or withdrawal of feeding tubes if the power of attorney for health care authorizes this. However, the health care agent may not consent to this if it will cause the person pain or reduce the person’s comfort. Also, a health care agent may not consent to the withholding or withdrawal of orally ingested nutrition or hydration (e.g., food or water), unless its provision is medically contraindicated.

The statutory form of the living will and the power of attorney for health care includes boxes that may be checked to indicate the signer’s desires regarding use of feeding tubes; if neither box is checked, feeding tubes will be used.

Since do-not-resuscitate orders deal only with use of resuscitation, the statutes regarding those orders do not refer to nutrition and hydration.

A health care agent may also make an anatomical gift of all or part of the principal’s body, in accordance with s. 157.06 (4) (b) and (9) (a) 1., Stats.

RESTRICTIONS ON THE AUTHORITY OF A HEALTH CARE AGENT

Unlike a living will, which directs only the withholding or withdrawal of life-sustaining procedures or feeding tubes when the person signing it is in the required condition, a power of attorney for health care authorizes the health care agent to make most types of health care decisions for a person who has an incapacity. However, the law does place certain restrictions on the authority of the health care agent.

Under a power of attorney for health care, a health care agent may not consent to admission of the person signing the document to an institution for mental diseases, an intermediate care facility for persons with mental retardation, a state treatment facility, or a facility providing treatment for mental illness, substance abuse, or developmental disability.

A health care agent is also limited in the ability to admit the person signing the document to other facilities. A health care agent may consent to the admission of the person to a nursing home for recuperative care, for a period not to exceed three months, if the person is admitted directly from a hospital inpatient unit, unless the hospital admission was for psychiatric care. In addition, if the person lives with his or her health care agent, the health care agent may consent to admission of the person to a nursing home or a community-based residential facility as a temporary placement not to exceed 30 days, in order to provide the health care agent with a vacation or to release the health care agent for a family emergency temporarily.

A health care agent may consent to the admission of the person signing the document to a nursing home or a community-based residential facility for purposes other than those described in the previous paragraph if the power of attorney for health care specifically authorizes this and if the principal is not diagnosed as being developmentally disabled or as having a mental illness at the time of the proposed admission. The statutory form of the power of attorney for health care includes boxes that may be checked to indicate the signer's desires regarding these admissions; if neither box is checked, the health care agent may not consent to these admissions.

A health care agent may not consent to experimental mental health research or to psychosurgery, electroconvulsive treatment, or drastic mental health treatment procedures for the person signing the power of attorney for health care.

EFFECT OF DOCUMENTS DURING PREGNANCY

Life-sustaining procedures or feeding tubes may not be withheld or withdrawn under a living will when the person signing the living will is pregnant.

Under a power of attorney for health care, if the person signing the document is known to be pregnant, the health care agent may make a decision on behalf of the person if the power of attorney for health care specifically authorizes this. The statutory form of the power of attorney for health care includes boxes that may be checked to indicate the signer's desires regarding the document's effect during pregnancy; if neither box is checked, the health care agent may not make health care decisions for the person during the person's pregnancy.

An attending physician may issue a do-not-resuscitate order only if the physician does not know the patient to be pregnant. In addition, emergency medical technicians, first responders,

and emergency health care facilities personnel are not required to follow a do-not-resuscitate order if they know that the patient is pregnant.

REVOCATION OF DOCUMENTS

A living will or power of attorney for health care may be revoked by the person signing the document in any of the following ways: (1) canceling, defacing, obliterating, burning, tearing, or otherwise destroying the document; (2) executing a written revocation; (3) expressing verbally the intent to revoke the document; or (4) executing a subsequent living will or power of attorney for health care. In order for a verbal revocation of a living will to be effective, the person signing the document or a person who is acting on his or her behalf must notify the attending physician of the revocation. In order for a verbal revocation of a power of attorney for health care to be effective, the verbal expression must occur in the presence of two witnesses.

In addition to the above methods of revoking either document, if the health care agent is the spouse or domestic partner of the person signing the document, the power of attorney for health care is automatically revoked upon divorce or annulment of the marriage, or if the domestic partnership is terminated.

The power of attorney for health care remains in effect if a principal is adjudicated incompetent, but a court may, for good cause, revoke it or limit the authority of the agent.

If a person who has been named a health care agent under a power of attorney for health care knows that a revocation has taken place, the health care agent is required to communicate this fact to any health care provider for the person that the agent knows has a copy of the document.

A do-not-resuscitate order may be revoked by a patient at any time by any of the following methods: (1) the patient expressing to an emergency medical technician, first responder, or emergency health care facilities personnel the desire to be resuscitated (in which case the person to whom the expression is made must remove the bracelet); (2) the patient defaces, burns, cuts, or otherwise destroys the bracelet; or (3) the patient, or another person acting at the patient's request, removes the bracelet. The guardian or health care agent of an incapacitated qualified patient may revoke the order in the same manner.

The attending physician for a person signing a living will or for a person for whom a do-not-resuscitate order has been issued, and the health care provider for a person signing a power of attorney for health care, are required to note in the person's medical record revocations of which they are aware.

IMMUNITIES

LIVING WILL

Under a living will, no physician, inpatient health care facility or health care professional acting under the direction of a physician may be held criminally or civilly liable, or charged with unprofessional conduct, for any of the following:

a. Participating in the withholding or withdrawal of life-sustaining procedures or feeding tubes under the living will statutes.

b. Failing to act upon a revocation unless the person or facility has actual knowledge of the revocation.

c. Failing to comply with a living will. However, failure of a physician to comply constitutes unprofessional conduct if the physician refuses or fails to make a good faith attempt to transfer the person signing the document to another physician who will comply.

In addition, no person who acts in good faith as a witness to a living will may be held civilly or criminally liable for participating in the withholding or withdrawal of life-sustaining procedure or feeding tubes under the living will statutes. This immunity does not apply to a person who is prohibited by law from witnessing the living will.

POWER OF ATTORNEY FOR HEALTH CARE

A power of attorney for health care provides that, no health care facility or health care provider may be charged with a crime, held civilly liable, or charged with unprofessional conduct for any of the following:

a. Certifying incapacity, if the certification is made in good faith based on a thorough examination of the person signing the document.

b. Failing to comply with a power of attorney for health care or a health care agent's decision. However, failure of a physician to comply constitutes unprofessional conduct if the physician refuses or fails to make a good faith attempt to transfer the person signing the document to another physician who will comply.

c. Complying, in the absence of actual knowledge of a revocation, with the terms of a power of attorney for health care or a health care agent's decision, if the power of attorney for health care is in compliance with the statutes.

d. Acting contrary to, or failing to act on, a revocation of a power of attorney for health care. This immunity does not apply if the health care facility or health care provider has actual knowledge of the revocation.

e. Failing to obtain the agent's decision, if the health care facility or health care provider has made a reasonable attempt to contact the health care agent and obtain the decision, but has been unable to do so.

In addition, no health care agent may be charged with a crime or held civilly liable for making a decision in good faith under a power of attorney for health care that is in compliance with the statutes. Also, no health care agent may be held personally liable for any goods or services purchased or contracted for pursuant to a power of attorney for health care unless the agent is the spouse of the person signing the document.

DO-NOT-RESUSCITATE ORDER

A do-not-resuscitate order provides that, no physician, emergency medical technician, first responder, health care professional, or emergency health care facility may be held criminally or civilly liable, or charged with unprofessional conduct for any of the following:

- a. Under the directive of a do-not-resuscitate order, withholding or withdrawing, or causing to be withheld or withdrawn, resuscitation from a patient.
- b. Failing to act upon the revocation of a do-not-resuscitate order unless the person or facility had actual knowledge of the revocation.
- c. Failing to comply with a do-not-resuscitate order if the person or facility did not have actual knowledge of the order or if the person or facility in good faith believed that the order had been revoked.

SAFEGUARDS REGARDING THE POWER OF ATTORNEY FOR HEALTH CARE

Any interested party may petition a court to review whether a health care agent is performing his or her duties in accordance with the terms of a power of attorney for health care. If the court finds that an agent has not done so, the court may: (1) direct the agent to do so; (2) require the agent to report periodically to the court; or (3) rescind the agent's powers.

Also, if a court appoints a guardian for a person who has signed a power of attorney for health care, the power of attorney for health care remains in effect. If the court has good cause, the power of attorney for health care may be revoked or subject to limitations. The guardian for the person may not make health care decisions that may be made by the person's health care agent unless the guardian is also the health care agent. Also, in determining who to appoint as guardian, a court must give consideration to appointing the health care agent designated in the power of attorney for health care. [s. 54.15 (3), Stats.]

OTHER PROVISIONS

The laws governing living wills, powers of attorney for health care and do-not-resuscitate orders contain several general provisions. Included in the laws is a provision that the execution of a document or requesting a do-not-resuscitate order does not constitute, for any purpose, attempted suicide. In addition, the withholding or withdrawal of life-sustaining procedures or feeding tubes from a person who has executed a living will, the making of a health care decision on behalf of a person who has signed a power of attorney for health care and the withholding or withdrawing of resuscitation from a patient wearing a valid do-not-resuscitate bracelet do not, for any purpose, constitute suicide.

Portions of all three laws provide that nothing in the laws condones any affirmative or deliberate act to end life other than to permit the natural process of dying. The laws provide that failure of a person to execute a document or request a do-not-resuscitate order creates no presumption regarding that person's intent. The law on do-not-resuscitate orders states that it does not impair or supersede a person's right to withhold or withdraw resuscitation or the right of any person who does not have an order in effect to receive resuscitation. All three laws contain provisions regarding the effects of execution of a document or do-not-resuscitate order on insurance policies and receipt of health care.

For a person who has executed both a living will and a power of attorney for health care, the provisions of the power of attorney for health care supersede any directly conflicting provisions of a living will.

All three laws have provisions specifying that the patient's desires supersede the document or order at all times. The law on do-not-resuscitate orders states that a bracelet that has not been removed, altered, or tampered with in any way shall be presumed valid, unless the patient, the patient's guardian, or the patient's health care agent expresses to the emergency medical technician, first responder, or emergency health care facilities personnel the patient's desire to be resuscitated.

PENALTIES

LIVING WILL

The living will law provides penalties for the following:

- a. Intentionally concealing, canceling, defacing, obliterating, or damaging a living will without the consent of the person signing the document.
- b. Illegally falsifying or forging a living will or concealing a revoked living will, or intentionally withholding actual knowledge of a revocation, with the intent to cause a withholding or withdrawal of life-sustaining procedures or feeding tubes contrary to the person's wishes.

Violators of the first provision above are subject to a fine of not more than \$500, imprisonment for not more than 30 days, or both. Violators of the second provision above are guilty of a Class F felony.

POWER OF ATTORNEY FOR HEALTH CARE

The power of attorney for health care law provides penalties for the following:

- a. Directly or indirectly coercing, threatening, or intimidating a person so as to cause the person to execute a power of attorney for health care.
- b. Intentionally concealing, canceling, defacing, obliterating, damaging, or destroying a power of attorney for health care without the consent of the person signing the document.
- c. Knowingly concealing, falsifying, or forging a power of attorney for health care with intent to create the false impression that a person other than the health care agent has been so designated.
- d. Intentionally withholding actual knowledge of the revocation of a power of attorney for health care or the falsification or forgery of a power of attorney for health care.
- e. Acting or attempting to act as a health care agent based on a power of attorney for health care that the person knows has been: (1) executed without the voluntary consent of the principal; (2) forged or substantially altered without the authorization of the principal; or (3) revoked.

Violators of the first two provisions above are subject to a fine of not more than \$500, imprisonment for not more than 30 days, or both. Violators of the last three provisions above are subject to a fine of not more than \$1,000, imprisonment for not more than nine months, or both.

DO-NOT-RESUSCITATE ORDER

The do-not-resuscitate order law provides penalties for the following:

- a. Willfully concealing, defacing or damaging the do-not-resuscitate bracelet of another person without that person's consent.
- b. Falsifying, forging or transferring a do-not-resuscitate bracelet to a patient or concealing a revocation of an order or, if the person is a "responsible person," withholding personal knowledge of a revocation, with the intent to cause the withholding or withdrawal of resuscitation contrary to the wishes of the patient. The term "responsible person" is defined as the attending physician, a health care professional working with the person signing the living will, an inpatient health care facility in which the person is located, or the person's spouse, child, parent, brother, sister, grandparent, or grandchild.
- c. Directly or indirectly coercing, threatening or intimidating a person so as to cause the person to sign or issue a do-not-resuscitate order.

Violators of the first and third provisions above are subject to a fine of not more than \$500, imprisonment for not more than 30 days or both. Violators of the second provision above are guilty of a Class F felony, which carries a penalty of a fine not to exceed \$25,000, or imprisonment not to exceed 12 years and 6 months, or both.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Laura Rose, Deputy Director, on February 6, 2015.

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