

Tyndall AFB Preventive Law Program Series
Legal Assistance Series

**HEALTH CARE
ADVANCE DIRECTIVES**

This handout contains basic information. If you have specific questions, come in to see a Judge Advocate for legal assistance.



OFFICE OF
THE STAFF JUDGE ADVOCATE 325 FW/JA
TYNDALL AFB, FL 32403

HEALTH CARE ADVANCE DIRECTIVES

Health care advance directives are witnessed documents in which an individual, called the principal, gives instructions, or expresses desires, regarding any aspect of the principal's health care. These directives are important because they allow medical providers, as well as family members, to know your wishes regarding medical treatment should you become unable to make health care decisions for yourself. In Florida, a health care advance directive may also be a witnessed oral statement.

There are three common types of health care advance directives. These are anatomical gift directives (e.g. organ donor cards), the designation of a health care surrogate, and living wills. This pamphlet deals with living wills and health care surrogates.

A **living will** is a witnessed document (or, in Florida, a witnessed oral statement) in which an individual gives instructions concerning what life prolonging procedures should be withheld or withdrawn if he or she becomes incompetent and terminally ill, in an end-stage condition, or in a persistent vegetative state. In Florida, terminally ill is defined as being in a condition "caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death." An end-stage condition is "a condition caused by injury, disease, or illness which has resulted in severe and permanent deterioration, indicated by incapacity and complete physical dependency, and for which, to a reasonable degree of medical certainty, treatment of the irreversible condition would be medically ineffective." A persistent vegetative state is a permanent and irreversible condition of unconsciousness in which there is the absence of any kind of voluntary action or cognitive behavior, and an inability to communicate or interact purposefully with the environment. Note that a living will will *not* go into effect if an individual becomes terminally ill but is not incompetent to make medical decisions for himself or herself. A living will cannot authorize euthanasia or assisted suicide. You may designate a surrogate in the living will to ensure that its terms are carried out; however, this is not a requirement for a valid living will. Florida law recognizes a living will properly executed in another state or in Florida. It is your responsibility to ensure that your physician has a copy.

A **health care surrogate** is a written, witnessed document in which an individual, called the principal, designates another person, called a surrogate, to make health care decisions for the principal should he or she become incapacitated. The surrogate may make treatment decisions, authorize the release of medical records, and apply for public benefits such as Medicare or Medicaid on behalf of the principal. If no living will exists, the surrogate may also make the decision about whether to withhold or discontinue life-sustaining treatments in cases of terminal illness, end-stage conditions, or persistent vegetative states.

The surrogate's power only becomes effective when a physician makes a determination that that the principal is not competent to make medical treatment decisions on his or her own behalf. The surrogate's authority commences when that determination is made. His or her authority ends when a doctor determines that the principal has regained the capacity to make decisions on his or her own behalf.

In Florida, a health care surrogate is authorized to make almost all treatment decisions on your behalf. However, Florida law will only allow a surrogate to consent to the following treatments if they are expressly granted in the health care surrogacy document itself: abortion, sterilization, electroshock, psychosurgery, experimental treatments not yet approved by a federally approved institutional review board, voluntary admission to a mental hospital, and the withholding or discontinuance of any life support measure on a pregnant woman before the fetus is viable. So if you want to authorize your surrogate to consent to any of those treatments, you must make sure language expressly granting him or her that power is included in your designation of a health care surrogate.

While most states recognize living wills and designations of health care surrogates, you should consult with an attorney in the state you move to if you do move outside of Florida in order to find out if these documents are valid in that state. Health care advance directives that were executed outside of Florida in accordance with the laws of another state will be honored in Florida.

Advance directives may be revoked in any of the following ways:

- a. By means of a signed writing executed by you
- b. By means of the physical cancellation or destruction of the advance directive by you or by another in your presence and by your direction (this is the best way to revoke a written advance directive)
- c. By means of an oral expression of your intent to revoke the directive (this is *not* an recommended way to effectuate revocation)
- d. By means of a subsequently executed advance directive that is materially different than a previously executed advance directive.
- e. Unless you provide otherwise, when your marriage is ended through divorce or annulment if you named your former spouse as a surrogate.

If you do not have a valid living will or designation of a health care surrogate and you become incapacitated, the law in Florida will look to the following persons, listed in the order of precedence, to make health care decisions, *including the withholding or discontinuance of life support*, on your behalf:

- a. First, a court appointed guardian if one has been appointed for you,
- b. Second, your spouse,
- c. Third, your adult child or a majority of your adult children,
- d. Fourth, your parents,

- e. Fifth, your adult siblings,
- f. Sixth, any other adult relative that had close personal ties with you, and
- g. Seventh, a close personal friend who provides an affidavit containing the statutorily required information.

However, none of these people will be able to consent to withhold or remove life support from you *unless* they can show by clear and convincing evidence that you would have made that choice if you were competent to make the decision yourself.

Although most states give effect to living wills and health care surrogates, the surrogate's decision is subject to review. Florida, like most other states, allows members of the patient's family, the health care facility, the attending physician, or any other interested party who could be directly affected by the surrogate's decision, to seek judicial review of that decision. This includes the decision to remove or withhold life support as directed in your living will. Furthermore, your living will will not be given effect unless the attending physician or health care facility determines that you are incompetent and terminally ill, in an end-stage condition, or in a persistent vegetative state. The medical professionals' opinions on this matter will be followed even if your surrogate and/or your family disagrees. Also, a hospital will not be forced to do anything it considers by policy to be unethical. In the case where your directions conflict with hospital policy, the law requires that you be transferred to another hospital that will follow your wishes if it is medically possible to transfer you to such a hospital.

Since you are responsible for letting your health care provider know about the existence and contents of your living will and designation of health care surrogate, you should give a copy to your primary care physician. It will then be placed in your medical records. You should give the original to your surrogate, who should keep it with other important legal papers so that it is safe and readily available if needed. It is also a good idea to keep a wallet card in your possession in case you have to notify health care providers in an emergency.

If you have any questions about health care advance directives, come speak to a judge advocate during our legal assistance hours.