

LIVING WILLS AND OTHER ADVANCE DIRECTIVES

What is a Living Will?

A living will is a brief declaration or statement that a person may make indicating their desire that certain medical treatment be either withheld or withdrawn under certain circumstances. The Missouri statute authorizing the creation of living wills specifies that the statement or declaration be in substantially the following form:

“I have the primary right to make my own decisions concerning treatment that might unduly prolong the dying process. By this declaration I express to my physician, family and friends my intent. If I should have a terminal condition, it is my desire that my dying not be prolonged by administration of death-prolonging procedures. If my condition is terminal and I am unable to participate in decisions regarding my medical treatment, I direct my attending physician to withhold or withdraw medical procedures that merely prolong the dying process and are not necessary to my comfort or to alleviate pain. It is not my intent to authorize affirmative or deliberate acts or omissions to shorten my life, rather only to permit the natural process of dying.”

How is a Living Will Made?

Any competent person 18 years of age or older can make a living will by signing and dating a statement similar to that shown above before two witnesses. These witnesses must be at least 18 years old, and should not be related to the person signing the declaration, a beneficiary of his or her estate, or financially responsible for his or her medical care. The statement can be typed or handwritten. It is recommended that a living will or any other advance directives be considered and prepared in advance of any hospitalization or impending surgery — it is not something anyone should feel pressured to decide in a short period of time, if that can be avoided.

Limitations of Living Wills

While most people have heard of living wills, many are unaware of the significant limitations of the living will as defined by Missouri statutes. The terms “death-prolonging procedure” and “terminal condition” are used in the statute to specify the circumstances to which a living will applies. The statute defines both of those terms as relating to a condition where death will occur within a short period of time, regardless of whether or not certain treatment is provided. In other words, the patient will die shortly with or without artificial resuscitation, use of a ventilator, artificially supplied nutrition and hydration, or other invasive surgical procedures.

By definition, then, a living will only avoids treatment when death is imminent and the treatment is ineffective to avoid or significantly delay death. Furthermore, the statute prohibits a living will from withholding or withdrawing artificially supplied nutrition and hydration, which is sustenance supplied through a feeding tube or IV.

Alternatives to Living Wills

For patients who desire to give instructions for their health care that exceed the limitations of the living will statute, there is an alternative, commonly referred to as “advance directives.” An advance directive is an instruction by a patient as to the withholding or withdrawing of certain medical treatment in advance of the patient suffering a condition rendering the patient unable to refuse such treatment. A competent patient always has the right to refuse treatment for himself or herself or direct that such treatment be discontinued. Without an advance directive, once a patient becomes incapacitated, he or she may well lose that right. A living will is simply one type of advance directive. Recent court cases have made it clear that people have the right to make other types of advance directives that exceed the limitations of the living will statute. Those directives need to be “clear and convincing,” and may include instructions to withhold or withdraw artificially supplied nutrition and hydration or other treatment or machinery which may maintain a patient in a persistent vegetative state. These expanded advance directives can be tailored to meet the needs and desires of each individual patient, and need not be in any standard form. For example, they can specify that certain procedures are to be used for a reasonable period of time and then discontinued if they do not prove to be effective. Generally, additional advance directives should be signed, dated and witnessed in the same manner as living wills.

What Should I Do With My Living Will?

The most important part of having a living will or other advance directives after they are signed is to be certain that they are accessible. They should be kept close at hand – not in a safe deposit box – because they may be needed at a moment’s notice. Many people travel with them. Some even keep them in their purse or billfold. At a minimum, it is recommended that you deliver a copy to your attending physician and at least make your close relatives aware that you have one. Giving a copy of your living will or other advance directives to your physician gives you an opportunity to discuss your desires and ask any questions you may have about any procedure and also to ask your physician if he or she will follow your directions. If you have appointed an attorney-in-fact to make health care decisions in case of your incapacity, he or she should have a copy. If you are hospitalized, a copy should go into your medical records. For these reasons, it is often wise to sign more than one copy of your living will or other advance directives.

Revoking a Living Will

Once made, a living will or other advance directives are easily revoked or cancelled. They can be revoked either orally or in writing. If possible, it is advisable to gather and destroy all copies of the advance directives if you desire to revoke them. By statute, health care providers are required to note a revocation of a living will in the medical records of the patient.

Durable Power of Attorney

If you have a durable power of attorney that appoints someone to make health care decisions for you, do you still need a living will or other advance directives? The answer is “yes.” Whether or not you have a power of attorney does not affect the need or desire for a living will or other advance directives. If you do not have a power of attorney, your advance directives will be very helpful to instruct your physician and the hospital as to the care you desire. If you do have a power of attorney, your advance directives will give very important guidance to your attorney-in-fact as to how he or she should act. In fact, you may want to combine your power of attorney, your living will, and your other advance directives into one document.

Why Give Advance Directives?

You accomplish at least two things by completing advance directives, regardless of whether they direct all possible treatment, no treatment or only some treatment. First, you ensure that the treatment you receive is the treatment you desire – no more and no less. Second, you take the burden off of your family and friends to make those decisions for you at a time when they will most likely be emotionally upset by your critical condition. Finally, you may be avoiding litigation to determine what treatment you really desired or intended. In any event, it is time well spent.

Advance directives should address each person’s health care concerns. Accordingly, at a minimum, a properly drafted directive should clearly specify the following:

1. Who should be making treatment decisions based on a physician’s opinion;
2. Who may release medical information under HIPAA;
3. Who has the vested right to make funeral arrangements under the right of sepulcher;
4. Who may make anatomical gifts and organ donations, if any; and
5. Whether artificial nutrition and hydration are to be withheld.