

TOWN CLINIC OF CRESTED BUTTE, PLLC

P.O. Box 1546
CRESTED BUTTE, CO 81224

214 6TH STREET, SUITE 1
(970) 349-6749

ERIC THORSON, M.D. & ROGER SHERMAN, M.D.

THE LIVING WILL AND POWER OF ATTORNEY FOR HEALTH CARE: AN OVERVIEW

It's smart to make documents setting forth your wishes for health care in case you are ever unable to speak for yourself.

If you're like most people, you aren't eager to spend time thinking about what would happen if you became unable to direct your own medical care because of illness, an accident, or advanced age. However, if you don't do at least a little bit of planning writing down your wishes about the kinds of treatment you do or don't want to receive and naming someone you trust to oversee your care these important matters could wind up in the hands of estranged family members, doctors, or sometimes even judges, who may know very little about what you would prefer.

Types of Health Care Documents

There are two basic documents that allow you to set out your wishes for medical care: **a living will** and **a durable power of attorney** for health care. It's wise to prepare both. In some states, the living will and the power of attorney are combined into a single form -- often called an advance directive. In fact, both of these documents are types of health care directives that is, documents that let you specify your wishes for health care in the event that you become unable to speak for yourself.

Living Wills

First, you need a written statement that details the type of care you want (or don't want) if you become incapacitated. This document is most often called a living will, though it may go by a different name in your state. A living will bears no relation to the conventional will or living trust used to leave property at death; it's strictly a place to spell out your health care preferences.

You can use your living will to say as much or as little as you wish about the kind of health care you want to receive.

Powers of Attorney for Health Care

You'll also want what's usually called a durable power of attorney for health care. In this document, you appoint someone you trust to be your health care agent (sometimes called an attorney-in-fact for health care, health care proxy, or surrogate) to make any necessary health care decisions for you and to see that doctors and other health care providers give you the type of care you wish to receive.

Who Can Make Health Care Documents

You must legally be an adult (18 years old in most states) to make a valid document directing your health care. You must also be of sound mind that is, able to understand what the document means, what it contains, and how it works.

When Your Health Care Documents Take Effect

Your health care documents take effect if your doctor determines that you lack the ability -- often called the "capacity" -- to make your own health care decisions. Lacking capacity usually means that:

- You can't understand the nature and consequences of the health care choices that are available to you, and you are unable to communicate your own wishes for care, either orally, in writing, or through gestures.
- Practically speaking, this means that if you are so ill or injured that you cannot express your health care wishes in any way, your documents will spring immediately into effect. If, however, there is some question about your ability to understand your treatment choices and communicate clearly, your doctor (with the input of your health care agent or close relatives) will decide whether it is time for your health care documents to become operative.
- In some states, it is possible to give your health care agent the authority to manage your medical care immediately. If your state allows this option, you may prefer to make an immediately effective document so that your agent can step in to act for you at any time, without the need to involve a doctor in the question of whether or not your health care document should take effect.
- Making your document effective immediately will not give your agent the authority to override what you want in terms of treatment; you will always be able to dictate your own medical care if you have the ability to do so. And even when you are no longer capable of making your own decisions, your health care agent must always act in your best interests and diligently try to follow any health care wishes you've expressed in your health care declaration or otherwise.

When Your Health Care Documents End

Your written wishes for health care remain effective as long as you are alive, unless you specifically revoke your documents or a court steps in (but court involvement is very rare). Here are a few specifics about when your health care documents are no longer effective:

- You revoke your document. You can change or revoke a health care document at any time. Just be sure that your health care providers and your agent know of your intention to cancel the document.
- A court invalidates your document. Most judges recognize that a court is normally not the right place to make health care decisions. However, if your health care is the subject of a dispute and someone questions the validity of your health care directives, the matter may end up before a judge.
- If someone doubts that you had the mental capacity to prepare a legally valid health care document, that person can ask a court to invalidate your document.

Such lawsuits are rare, but they do sometimes occur. The burden of proving that you were not of sound mind when you made your document falls on the person who challenges its validity. (In other words, the law presumes that you had the mental capacity to make your health care documents.)

- It is also possible that a court could invalidate your document if it wasn't properly completed -- for example, if you did not meet your state's requirements for having the document notarized or witnessed. If this happens, however, it is still likely that any wishes for health care you set out in the document will be followed -- as long as they are clearly expressed and you were of sound mind when you wrote them down. In the famous case of *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), the U.S. Supreme Court said that any strong evidence of someone's wishes for care should be honored. Your directions won't be ignored simply because of a technical error.
- A court revokes your agent's authority. If, after your health care documents take effect, someone believes that your health care agent is not acting according to your wishes or in your best interests, the concerned person can go to court and ask for an investigation of your agent's behavior. If a court finds that your agent is acting improperly and revokes his or her authority, the job will go first to an alternate agent you named in your document. If there is no available alternate or, if the court invalidates your entire document for one of the reasons discussed just above, a conservator or guardian will be appointed to make health care decisions for you.
- You get a divorce. Getting divorced has no effect on your written directions for health care (your health care declaration). But if you named your spouse as your health care agent, his or her authority is automatically revoked in a number of states. In that case, if you named an alternate agent, that person will take over.
- If you get a divorce before your health care directives take effect, it's wise to eliminate confusion by starting over. Even if you named an alternate agent, make a new document and name someone else as your agent.
- After your death. Generally, your health care documents are no longer necessary when you die. In some states, however, your health care directives remain effective after your death for some very limited purposes. Your agent may be permitted to supervise the disposition of your body, including authorizing an autopsy or organ donation, unless you specifically withheld these powers when you made your health care documents.

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Thank you!!