

Advance Health-Care Directives in Maine: Planning Ahead for Health Care Decisions

First you forget names; then you forget faces; then you forget to zip up your fly; and then you forget to unzip your fly.

- Branch Rickey

I want to die in my sleep like my grandfather... not screaming and yelling like the passengers in his car.

- Wil Shriner

What is an estate plan? And where do advance health care directives fit in?

Basically, an estate plan establishes how to deal with **you** and **your stuff** when you are no longer able to make those decisions, either because you are **incapacitated** or **dead**. Without a plan, surrogates for health care and intestacy statutes make decisions for you.

Before death:

your stuff: durable power of attorney

you: **advance directive**

After death:

your stuff: will (aka last will and testament) (and/or other estate planning tools)

you: advance directive and/or will (funeral wishes, organ donation, etc.)

also business succession plan if own business, minor children

Good news: statutory forms available!

wills (Title 18-A of the Probate Code, Article 2, Part 5, §2-514); and

advance directives (Title 18-A of the Probate Code, Article 5, Part 8, §5-804).

Limited help for durable powers of attorney (for financial matters) is available in the form of statutory guidelines and a form for certification of an agent's powers (Title 18-A, Article 5, Part 9, §§5-901 – 5-964).

So what is an advance directive?

An advance directive is a legal document in which a person specifies what is to be done for their health in the event the person is no longer able to make such decisions due to illness or incapacity.

In Maine, which has adopted the Uniform Health Care Decisions Act, an advance directive is made up of two parts:

1. a living will; and
2. a power of attorney for health care.



Okay.... So what's a living will?

It is often said that a living will is a legal document expressing a person's desires to refuse extraordinary treatment that probably won't effect a cure but will likely prolong the process of dying.

But really a living will is not so limited. It may also document preferences regarding organ and tissue donation, funeral/burial arrangements, selection of a guardian if one is necessary, selection of health care providers and institutions, tests, procedures, medications, artificial nutrition, hydration, and all other health care decisions.



Okay.... Then what is a durable power of attorney for health care?

A durable power of attorney for health care is a legal document in which a person delegates to an agent the power to make health care decisions on his or her behalf. In Maine, it is part of your advance directive, along with the living will.

Unless otherwise specified, it becomes effective when the principal (you) becomes incapacitated and ceases to be effective when the principal regains capacity.



What happens if I don't have an advance directive?

A health care **surrogate** can make decisions on your behalf, but he or she

- may not know your preferences;
- may not follow your preferences if known;
- may not be who you want; and
- there may be more than one surrogate, and they may not agree; and
- an agent has more power than a surrogate or guardian, basically stepping into your shoes.

Who can make an advance directive?

- an adult or emancipated minor
- with **capacity** (the ability to make and communicate a health care decision and the ability to understand the consequences of designating an agent to make health care decisions)

Capacity to make an advance directive is *presumed*. That presumption may be rebutted by primary physician or by a court.

Individual instructions may be oral or written. If oral, only valid if made to health care provider or person who could serve as surrogate. Better to be in writing.

Power of attorney for health care must be **in writing** and **signed by two witnesses** (in person, by hand).

May use statutory form, or modify it, or create one from scratch. Can give agent limited or expansive powers.

Who can be the agent?

- someone you trust;
- must be a competent adult (or emancipated minor);
- need not live in Maine;
- cannot be owner, operator or employee of long term health care facility at which the principal is receiving care unless related to principal by blood, marriage or adoption; and
- alternate agents may be named in the advance directive.

STATUTORY FORM

§5-804. Optional form

The following form may, but need not, be used to create an advance health-care directive. The other sections of this Part govern the effect of this or any other writing used to create an advance health-care directive. An individual with capacity may complete or modify all or any part of the following form.

ADVANCE HEALTH-CARE DIRECTIVE

Explanation

You have the right to give instructions about your own health care. You also have the right to name someone else to make health-care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding donation of organs and the designation of your primary physician. If you use this form, you may complete or modify all or any part of it. You are free to use a different form.

Part 1 of this form is a power of attorney for health care. Part 1 lets you name another individual as agent to make health-care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you now even though you are still capable. You may also name an alternate agent to act for you if your first choice is not willing, able or reasonably available to make decisions for you. Unless related to you, your agent may not be an owner, operator or employee of a residential long-term health-care institution at which you are receiving care.

STATUTORY FORM (continued)

Unless the form you sign limits the authority of your agent, your agent may make all health-care decisions for you. This form has a place for you to limit the authority of your agent. You need not limit the authority of your agent if you wish to rely on your agent for all health-care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:

- (a).** Consent or refuse consent to any care, treatment, service or procedure to maintain, diagnose or otherwise affect a physical or mental condition;
- (b).** Select or discharge health-care providers and institutions;
- (c).** Approve or disapprove diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate; and
- (d).** Direct the provision, withholding or withdrawal of artificial nutrition and hydration and all other forms of health care, including life-sustaining treatment.

STATUTORY FORM (continued)

Part 2 of this form lets you give specific instructions about any aspect of your health care. Choices are provided for you to express your wishes regarding the provision, withholding or withdrawal of treatment to keep you alive, including the provision of artificial nutrition and hydration, as well as the provision of pain relief. Space is also provided for you to add to the choices you have made or for you to write out any additional wishes.

Part 3 of this form lets you express an intention to donate your bodily organs and tissues following your death.

Part 4 of this form lets you designate a physician to have primary responsibility for your health care.

After completing this form, sign and date the form at the end. You must have 2 other individuals sign as witnesses. Give a copy of the signed and completed form to your physician, to any other health-care providers you may have, to any health-care institution at which you are receiving care and to any health-care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take the responsibility.

You have the right to revoke this advance health-care directive or replace this form at any time.

STATUTORY FORM (continued)

* * * * *

PART 1

POWER OF ATTORNEY FOR HEALTH CARE

(1) DESIGNATION OF AGENT: I designate the following individual as my agent to make health-care decisions for me:

.....

(name of individual you choose as agent)

.....

(address) (city) (state) (zip code)

.....

(home phone) (work phone)

OPTIONAL: If I revoke my agent's authority or if my agent is not willing, able or reasonably available to make a health-care decision for me, I designate as my first alternate agent:

.....

(name of individual you choose as first alternate agent)

.....

(address) (city) (state) (zip code)

.....

(home phone) (work phone)

STATUTORY FORM (continued)

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able or reasonably available to make a health-care decision for me, I designate as my second alternate agent:

.....

(name of individual you choose as second alternate agent)

.....

(address) (city) (state) (zip code)

.....

(home phone) (work phone)

(2) AGENT'S AUTHORITY: My agent is authorized to make all health-care decisions for me, including decisions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care to keep me alive, except as I state here:

.....

.....

.....

(Add additional sheets if needed.)

(3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE: My agent's authority becomes effective when my primary physician determines that I am unable to make my own health-care decisions unless I mark the following box. If I mark this box [], my agent's authority to make health-care decisions for me takes effect immediately.

STATUTORY FORM (continued)

(4) AGENT'S OBLIGATION: My agent shall make health-care decisions for me in accordance with this power of attorney for health care, any instructions I give in Part 2 of this form and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health-care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

(5) NOMINATION OF GUARDIAN: If a guardian of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able or reasonably available to act as guardian, I nominate the alternate agents whom I have named, in the order designated.

PART 2

INSTRUCTIONS FOR HEALTH CARE

If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, you need not fill out this part of the form. If you do fill out this part of the form, you may strike any wording you do not want.

(6) END-OF-LIFE DECISIONS: I direct that my health-care providers and others involved in my care provide, withhold or withdraw treatment in accordance with the choice I have marked below:

(a) Choice Not To Prolong Life

I do not want my life to be prolonged if (i) I have an incurable and irreversible condition that will result in my death within a relatively short time, (ii) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, or (iii) the likely risks and burdens of treatment would outweigh the expected benefits, OR

(b) Choice To Prolong Life

I want my life to be prolonged as long as possible within the limits of generally accepted health-care standards.

STATUTORY FORM (continued)

(7) ARTIFICIAL NUTRITION AND HYDRATION: Artificial nutrition and hydration must be provided, withheld or withdrawn in accordance with the choice I have made in paragraph (6) unless I mark the following box. If I mark this box [], artificial nutrition and hydration must be provided regardless of my condition and regardless of the choice I have made in paragraph (6).

(8) RELIEF FROM PAIN: Except as I state in the following space, I direct that treatment for alleviation of pain or discomfort be provided at all times, even if it hastens my death:

.....
.....

(9) OTHER WISHES: (If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.) I direct that:

.....
.....

(Add additional sheets if needed)

PART 3
DONATION OF ORGANS AT DEATH
(OPTIONAL)

- (10) Upon my death (mark applicable box)
- [] (a) I give any needed organs, tissues or parts, OR
- [] (b) I give the following organs, tissues or parts only

.....

STATUTORY FORM (continued)

(c) My gift is for the following purposes (strike any of the following you do not want)

- (i) Transplant
- (ii) Therapy
- (iii) Research
- (iv) Education

PART 4
 PRIMARY PHYSICIAN
 (OPTIONAL)

(11) I designate the following physician as my primary physician:

.....

(name of physician)

.....

(address) (city) (state) (zip code)

.....

(phone)

STATUTORY FORM (continued)

OPTIONAL: If the physician I have designated above is not willing, able or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

.....

(name of physician)

.....

(address) (city) (state) (zip code)

.....

(phone)

* * * * *

STATUTORY FORM (continued)

(12) EFFECT OF COPY: A copy of this form has the same effect as the original.

(13) SIGNATURES: Sign and date the form here:

.....
(date) (sign your name)

.....
(address) (print your name)

.....
(city) (state)

SIGNATURES OF WITNESSES:

First witness Second witness

.....
(print name) (print name)

.....
(address) (address)

.....
(city) (state) (city) (state)

.....
(signature of witness) (signature of witness)

.....
(date) (date)

LINKS

Statutory form: <http://www.legislature.maine.gov/statutes/18-A/title18-Asec5-804.html>

Statutory form, in fillable pdf format: <https://www.pdfFiller.com/5528241-title18-Asec5-804-18--A-5--804--OPTIONAL-FORM-18--A-5--804--OPTIONAL-FORM-Other-forms-mainelegislature>

Maine Hospital Association form: <http://www.themha.org/policy-advocacy/Issues/End-of-Life-Care/advdirectivesform.aspx>

PDF fillable form: <http://www.mainelse.org/sites/default/files/advddir.pdf>

Caring Connections (a program of the National Hospice and Palliative Care Organization):

http://www.aarp.org/content/dam/aarp/relationships/caregiving/2011_01/ad/Maine.pdf

Maine Health: http://www.mainehealthlearningcenter.org/wp-content/uploads/2017/01/2963_Advance-Directive-Handbook-Color_1-17-SinglePages.pdf

Consider possible additions:

- granting power to consent to admission to mental health care institution (even if principal objects);
- indemnifying agent (allowing for reimbursement of agent's costs, including legal costs) (*e.g.*, "On behalf of myself, my executors and heirs, I further hold my health care agent and my health care providers harmless and indemnify them against any claim for their good faith actions in recognizing my health care agent's authority or in following my treatment instructions.");
- including primary physician statement that principal has capacity to make directive;
- require second opinion as to incapacity if agent's power linked to your incapacity, for all or some decisions;
- people to notify regarding your condition and treatment;
- specific treatments you do not wish to receive (and why); and
- instructions regarding specific medications.

For more information, see <http://www.drme.org>.

The statute also provides rules for health care decisions by surrogates and guardians; sets forth the responsibilities of health care providers with respect to advance directives; provides for sharing of health care information (HIPAA) with agents, surrogates, etc.; provides providers and decision makers with legal immunities; provides an enforcement mechanism (fines, actual damages, attorney's fees); and provides for judicial (equitable) relief.

The statute does not specifically govern Do-Not-Resuscitate Orders (DNR's). In Maine, a DNR is a separate form obtained from (and signed by) your physician. Forms may be downloaded from <http://www.maine.gov/ems/documents/EMSDNRDirective.pdf> and <http://www.maine.gov/ems/documents/CCDNROrder.pdf>.

So my advance directive is done. Now what?

- Talk to agent and agents if you haven't done so already, and keep the dialogue open;
- Share the advance directive!
 - agent/agents
 - other family members
 - close friends
 - clergy
 - primary physician
 - other health care providers/institutions

What if I change my mind?

- A principal with capacity (which is presumed) may revoke any or all of an advance health care directive, *other than designation of an agent*, at any time, and in any manner that communicates an intent to do so (including making a new one);
- the designation of an agent may only be revoked by a signed writing, or by personally informing the supervising health care provider.

If you have questions or comments, or would like a copy of this presentation, please reach out to me at steve@westernmainelaw.com.

Steve Arner was first admitted to practice law in Virginia in 1995 after graduating from the College of William and Mary and the Marshall-Wythe Law School at the College of William and Mary, and recently moved his practice to Maine last fall. His practice has ranged from construction law at a small firm, to environmental law at a mid-sized boutique firm, to general civil litigation at one of the country's largest law firms. Now, Steve runs a general practice in Carrabassett Valley. He has experience representing clients in a wide range of matters, in state and federal courts and other venues, including commercial disputes, immigration, consumer law, estate planning and administration and probate, family law, landlord/tenant disputes, antitrust, copyright, real estate, trade secrets, fraud, the Computer Fraud and Abuse Act, the First Amendment, criminal matters, and under numerous environmental statutes. He has been committed to *pro bono* practice for the entirety of his career.

Since moving to Carrabassett Valley with his family four years ago, Steve has been active in the community, coaching boys' soccer at the Stratton School, being elected to the Carrabassett Valley School Committee, co-chairing the Parent Student Organization (PSO) at CVA, and working various jobs at Sugarloaf including driving a shuttle bus and skiing as a mascot.

