

# Advance Directives (Living Wills)

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**It is important to realize that changes may occur in this area of law. This information is not intended to be legal advice regarding your particular problem, and it is not intended to replace the work of an attorney.**

## What is an advance directive?

Many people recognize that death is as much a part of the life cycle as birth, growth, maturity and old age. Managing their final illness is something they can do through a living will, a legal document of health care instructions. In Oregon, this document is known as an advance directive. You can use this document to appoint someone called a health care representative to make health care decisions for you when you are unable to make your own health care decisions. (This representative cannot make decisions for you when you are capable of making them yourself – only if and when you become incapable.) The advance directive must be signed by you and witnessed by two qualified witnesses. If you wish, the advance directive may include a directive to physicians to withhold or withdraw life-sustaining procedures under certain circumstances.

## What are these “certain circumstances?”

Two physicians, one of whom must be your attending physician, must confirm that any of the following is true:

- you are close to death and life support would only postpone, not prevent death; or
- you are permanently unconscious; or
- you have an advanced progressive illness; or
- life support would not help your medical condition and would subject you to extraordinary suffering.

## Who can serve as a health care representative?

Generally speaking, you can choose any adult you want, so long as that person is willing to serve as your representative. You can choose a family member or a friend. There are two exceptions to this general rule: your attending physician or that doctor’s employee cannot serve. And an employee of a care facility may not serve unless that person agreed to act on your behalf before he or she became employed at the facility.

## What are the duties of the health care representative?

The health care representative must attempt in good faith to follow the wishes of the person as expressed in the advance directive. Once the representative agrees to serve, he or she cannot ignore the duty to do so. The only way the representative can avoid this duty is to resign altogether from serving as the representative.

The health care representative cannot overrule the person’s decision to a change of care even if it conflicts with the advance directive — regardless of whether the person is legally capable of making that decision. The representative does, however, have the power to allow the person to be admitted to a hospital for up to 18 days in order to get treatment for dangerous behavior that is caused by dementia, even if the person objects.

## Who can witness an advance directive?

One witness can be related to you by blood, marriage or adoption. One cannot, and that person should not expect to inherit anything under the terms of your will or have any claim against your estate. That witness cannot be an owner, operator or employee of a health care facility where you are a patient or resident. And neither the health care representative, nor an alternate health care representative can serve. You may not use your attending physician as a witness.

## How long is an advance directive valid?

An advance directive is effective from the date it is executed until you die or until the directive is revoked. If more than one advance directive has been executed, the last one to be executed will control.

### **How can it be revoked?**

You can revoke it at any time, regardless of your mental state or competency. If you revoke it, you can start it again or make a new one only by doing so in writing. You must be mentally competent to restart or make a directive.

### **Who can make an advance directive?**

Any capable person over the age of 18 may make an advance directive at any time. Someone under 18 can make an advance directive if the person is either legally emancipated or married.

### **May I draft my own advance directive?**

Oregon law states that an advance directive must be in a certain form. If you want your advance directive to be valid, you must use the correct form. All health care organizations, including home health agencies, hospice programs, hospital, long term care facilities and health maintenance organizations have the forms and will provide them to you. The form is in the Oregon Revised Statutes, and all hospitals have the form. A lawyer can prepare the form for you also.

Some people may make mistakes on their advance directive forms that prevent the directive from being legally binding. Even though these directives cannot necessarily be enforced, courts look at them as having expressed a person's wishes and desires and should allow them to be honored if they are sufficiently clear and there is no reason to doubt the person's capacity to express those wishes at the time the directive was made.

### **Isn't an advance directive the same as mercy killing?**

No. Nothing in the statute condones, authorizes or approves mercy killing or permits a deliberate act to end life. Instead, it permits the natural process of dying as provided by the laws dealing with advance directives. You express your choices; your health care representative must follow your wishes when you are incapable. Someone who actively ends your life may be guilty of a crime.

### **Won't physicians be afraid to get involved with advance directives?**

Designated health care representatives, health care providers, and health care facilities, who act in good faith and in accordance with the law are immune from criminal and civil liability.

### **Can insurance companies require policy holders to sign advance directives in order to get or retain medical insurance?**

No. The advance directive does not affect the terms of any life or health insurance policies.

### **If there is no advance directive, who will make end-of-life care decisions?**

If an incapable person with no advance directive — or no health care representative who has been medically confirmed as meeting the conditions described above — the attending physician can withdraw life support at the request of the following people, if they are willing to serve as the health care representative: the person's guardian authorized to make health care decisions; the person's spouse; a majority of the person's adult children; either parent of the person; a majority of the person's adult siblings; or any of the person's adult relatives or adult friends. If none of these people are available, life-support may be withdrawn by the attending physician. A duly authorized health care representative may make the decision to withdraw life-support only after consulting with family and close friends.

*Legal editor: Janay Haas, October 2014*