

## **END OF LIFE CARE DOCUMENTS (LIVING WILLS, POWER OF ATTORNEY and POLST (PHYSICIAN ORDERS FOR LIFE-SUSTAINING TREATMENT))**

### **May an adult person decide to have life-sustaining treatment withheld or withdrawn in case of a terminal or permanent unconscious condition?**

Yes. Adult persons have the fundamental right to control decisions related to the rendering of their own health care including the decision to have life-sustaining treatment withheld or withdrawn in cases of terminal or permanent unconscious conditions.<sup>1</sup>

### **What is a “terminal condition” or a “permanent unconscious condition”?**

Washington’s Natural Death Act defines a “terminal condition” is defined as “an incurable and irreversible condition caused by injury, disease, or illness that, within reasonable medical judgment, will cause death within a reasonable period of time in accordance with accepted medical standards, and where the application of life-sustaining treatment serves only to prolong the process of dying.”<sup>2</sup>

“Permanent unconscious condition” is defined as “an incurable and irreversible condition in which the patient is medically assessed within reasonable medical judgment as having no reasonable probability of recovery from an irreversible coma or a persistent vegetative state.”<sup>3</sup>

### **What is considered “life-sustaining treatment”?**

Washington law defines “life-sustaining treatment” as “any medical or surgical intervention that uses mechanical or other artificial means, including artificially provided nutrition and hydration, to sustain, restore, or replace a vital function, which, when applied to a qualified patient, would serve only to prolong the process of dying.”<sup>4</sup> It does not include, however, “the administration of medication or the performance of any medical or surgical intervention deemed necessary solely to alleviate pain.”<sup>5</sup>

### **What documents commonly apply at the end of life?**

In Washington State, there are three types of documents that pertain to the end of life care: the Health Care Directive (also known as a Living Will or Directive to Physician), the Durable Power of Attorney for Health Care, and the Physician Orders for Life-Sustaining

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<sup>1</sup> RCW 70.122.010; see also 42 U.S.C. 1395cc(f).

<sup>2</sup> RCW 70.122.020(9).

<sup>3</sup> RCW 70.122.020(6).

<sup>4</sup> RCW 70.122.020(5).

<sup>5</sup> *Id.*

Treatment (POLST) which applies in emergency situations<sup>6</sup> and translates your end-of-life wishes into medical orders.

## **LIVING WILLS**

### **What is a living will?**

A living will, sometimes referred to as a Health Care Directive, or an Advance Directive is a document in which an adult person directs, in advance, that life-sustaining treatment be withheld or withdrawn when the person is diagnosed with a terminal or a permanent unconscious condition and that person is otherwise unable to communicate to the physician his or her own decisions as to treatment.<sup>7</sup>

### **How does a person make a valid living will?**

A living will must be signed by a mentally competent patient in the presence of two witnesses.<sup>8</sup> The witnesses must not be:<sup>9</sup>

- Related to the patient by blood or marriage.
- Entitled to, or claiming, any portion of the patient's estate.
- The attending physician of the patient.
- An employee of either the attending physician or the health care facility providing treatment to the patient.

A living will or a copy thereof must be made a part of the patient's medical records maintained by the attending physician.<sup>10</sup> A copy must be sent to the health care facility when the withholding or withdrawal of life support is contemplated.<sup>11</sup>

### **What is the Health Care Declarations Registry?**

The Washington State Living Will Registry in the Department of Health was eliminated due to budget constraints in 2012.<sup>12</sup> If you registered and provided health declaration documents

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<sup>6</sup> See RCW 43.70.480.

<sup>7</sup> See *Black's Law Dictionary*, Deluxe Eighth Edition, (2004), at 57; See also RCW 70.122.030 (medical care) and Title 71.32 RCW (mental health).

<sup>8</sup> RCW 70.122.030(1).

<sup>9</sup> *Id.*

<sup>10</sup> RCW 70.122.030(2).

<sup>11</sup> RCW 70.122.030(1).

before July 1, 2011, information should be available using the following steps below as provided on the DOH Living Will Registry web page. That information may be found at: <http://www.doh.wa.gov/AboutUs/ProgramsandServices/DiseaseControlandHealthStatistics/CenterforHealthStatistics/LivingWillRegistry.aspx>. If you have problems accessing documents please call 1-800-548-9455.

- Go to <http://www.uslivingwillregistry.com>.
- At the very top of screen in the black bar click on “Access to Document using Wallet Card ID.”
- Next in the Source drop down select “Washington” which is at the very bottom of the list.
- In the registrant’s ID number use your wallet ID card and type in your registration ID #.
- Click on “Look Up”.

### **How and when may a living will be revoked?**

A living will may be revoked at any time by the patient, without regard to the patient’s mental state or competency.<sup>13</sup> If the patient becomes comatose or is rendered incapable of communicating with the attending physician, the living will remains in effect for the duration of such condition.<sup>14</sup>

Acceptable means of revocation include:<sup>15</sup>

- Cancellation, defacement, obliteration, burning, tearing, or other destruction of the document either by the patient or by some person in the patient’s presence and at the patient’s direction.
- Any written revocation expressing the patient’s intent to revoke, signed and dated by the patient.
- Any verbal expression by the patient of the patient’s intent to revoke the living will.
- An online method established by the Department of Health in the case of a directive that is stored in the Health Care Declarations Registry (see above for information on the Registry)

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<http://www.doh.wa.gov/AboutUs/ProgramsandServices/DiseaseControlandHealthStatistics/CenterforHealthStatistics/LivingWillRegistry.aspx>.

<sup>13</sup> RCW 70.122.040(1).

<sup>14</sup> RCW 70.122.040(3).

<sup>15</sup> RCW 70.122.040(1)(a)-(d).

A written or verbal revocation is not effective until communicated to the attending physician who must then record such revocation in the patient's medical records.<sup>16</sup>

### **What procedures must a physician follow to give effect to a living will?**

A physician must follow the following procedures to give effect to a living will:

- The attending physician must make a reasonable effort to determine that the living will complies with the requirements of the Natural Death Act and, if the patient is capable of making health care decisions, the living will and all steps proposed by the attending physician to be undertaken are currently in accord with the desires of the patient.<sup>17</sup>
- Prior to withholding or withdrawing treatment, a diagnosis of "terminal condition" by the attending physician, or a diagnosis of a "permanent unconscious condition" by two physicians must be entered in writing and recorded in the patient's permanent medical records.<sup>18</sup>
- If the patient is unable to communicate or make health care decisions, and another person has been appointed to make health care decisions for the patient through a durable power of attorney or otherwise, that other person must be notified to ensure continued validity of the living will and the health facility must be notified of the situation.<sup>19</sup>

### **May a physician refuse to comply with a patient's living will?**

Yes. No health care practitioner may be required to participate in the withholding or withdrawal of life-sustaining treatment.<sup>20</sup>

### **Must a physician or facility notify the patient or the patient's legal representative of any policy or practice which would preclude honoring a living will?**

Yes. At the time the physician or health facility becomes aware of the existence of a living will, the physician or facility must inform the patient or the patient's authorized representative of the existence of any policy or practice that would preclude the honoring of the living will.<sup>21</sup> If the patient, after being informed of such policy or practice, chooses to continue to retain the physician or facility, the physician or facility along with the patient or patient's representative must prepare a written plan to be filed with the patient's living will that sets forth the physician or facility's intended actions.<sup>22</sup> The physician or facility has no obligation to honor the patient's living will if they comply with these procedures and the written plan.<sup>23</sup>

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<sup>16</sup> RCW 70.122.040(1).

<sup>17</sup> RCW 70.122.060(1).

<sup>18</sup> RCW 70.122.030(2).

<sup>19</sup> RCW 70.122.

<sup>20</sup> RCW 70.122.060(4).

<sup>21</sup> RCW 70.122.060(2).

<sup>22</sup> *Id*

<sup>23</sup> *Id*.

## **What are the legal effects of carrying out a patient's living will?**

Any physician or health care provider acting under the direction of a physician who participates in good faith in the withholding or withdrawal of life-sustaining treatment from a patient in accordance with the requirements of the Natural Death Act is immune from legal liability, including civil, criminal, or professional conduct sanctions, unless otherwise negligent.<sup>24</sup>

Carrying out a living will in compliance with the Natural Death Act will not be treated as an intervening force or affect the chain of causation between the conduct of anyone that placed the patient in a terminal or a permanent unconscious condition and the death.<sup>25</sup>

Carrying out a living will in compliance with the Natural Death Act does not, for any purpose, constitute a suicide or a homicide.<sup>26</sup>

## **Is it unlawful to discriminate against a physician based upon the physician's willingness or refusal to participate in the withholding or withdrawal of life support?**

Yes. It is unlawful to discriminate in employment or professional privileges because of a person's participation or refusal to participate in the withholding or withdrawal of life-sustaining treatment.<sup>27</sup>

## **What is treated as criminal conduct under the Natural Death Act?**

Under the Natural Death Act:<sup>28</sup>

- Any person who willfully conceals, cancels, defaces, obliterates, or damages a living will of a patient without the patient's consent, is guilty of a gross misdemeanor.
- Any person who falsifies or forges the living will of another, or willfully conceals or withholds personal knowledge of a revocation with the intent to cause a withholding or withdrawal of life-sustaining treatment contrary to the wishes of the patient, and thereby causes such life-sustaining treatment to be withheld or withdrawn and death to be hastened, is subject to prosecution for murder in the first degree.

## **May a physician, health facility, or other health care provider require a person to execute a living will as a condition for receiving health care services?**

No.<sup>29</sup>

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<sup>24</sup> RCW 70.122.051(2).

<sup>25</sup> RCW 70.122.080.

<sup>26</sup> RCW 70.122.070(1).

<sup>27</sup> RCW 70.122.060(3).

<sup>28</sup> RCW 70.122.090.

<sup>29</sup> RCW 70.122.070(3).

**May the carrying out of a living will invalidate or impair any life insurance policy of the patient?**

No.<sup>30</sup>

**May a patient, upon request, be released to die at home?**

Yes. The Natural Death Act specifically allows a qualified patient capable of making health care decisions to indicate that they wish to die at home. The health care provider or facility has an obligation to explain the medical risks of an immediate discharge to the qualified patient and to discharge the patient as soon as reasonably possible following the patient's decision.<sup>31</sup>

**Is a physician liable for adverse consequences if the patient, upon request, is released to die at home?**

If the physician complies with the obligation to explain the medical risks of an immediate discharge to a qualified patient, there shall be no civil or criminal liability for claims arising from such discharge.<sup>32</sup>

**Absent a directive, under what circumstances may a physician withhold or withdraw life-sustaining treatment?**

Judicial intervention, including the appointment of a guardian, is not routinely required even if the treatment decision is to discontinue life-sustaining treatment for a terminally ill or permanently unconscious individual, but may be necessary in some circumstances.<sup>33</sup>

Additional safeguards should be present before a decision is made to withdraw treatment in circumstances where the incompetent individual did not execute, while competent, an advance directive and/or durable power of attorney for health care.<sup>34</sup>

Life-sustaining treatment may be withheld or withdrawn when all of the following circumstances are met:<sup>35</sup>

- An incompetent patient's<sup>36</sup> attending physician, together with at least two other disinterested physicians qualified to assess the patient's condition and/or a unanimous prognosis committee, determine with reasonable medical judgment that the patient is either in a persistent vegetative state with no reasonable chance of recovery or in an

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<sup>30</sup> RCW 70.122.070(2).

<sup>31</sup> RCW 70.122.110.

<sup>32</sup> RCW 70.122.110

<sup>33</sup> *In re Welfare of Colyer*, 99 Wn.2d 114, 127-28 (1983); *In re Guardianship of Grant*, 109 Wn.2d 545, 565-68 (1987).

<sup>34</sup> *In re Colyer*, 99 Wn.2d at 134-35, 136-37.

<sup>35</sup> *In re Grant*, 109 Wn. 2d, at 566-67.

<sup>36</sup> *Grannum v. Berard*, 70 Wn.2d 304, 306-7 (1967). (Discussing competence, the general presumption of competence, and determination of incompetence.)

advanced stage of a terminal and incurable illness and is suffering severe and permanent mental and physical deterioration.

- The incompetent patient's attorney in fact or guardian, if one has been appointed, determines that either (a) the patient, if competent, would choose to refuse life sustaining treatment; or, (b) if such a determination cannot be made, the attorney in fact or guardian determines that the withholding of life sustaining treatment would be in the best interests of the patient. If no attorney-in-fact or guardian has been appointed, the incompetent patient's immediate family must make these determinations.
- All members of the incompetent patient's immediate family concur in the decision.<sup>37</sup>
- Neither the patient's physicians nor the health care facility responsible for the care of the patient objects to the decision.

### **Where can a physician obtain more information about living wills?**

The WSMA has provides information for physicians and patients, and sample health care directive and durable power of attorney for health care forms. This information can be found online at: <http://www.wsma.org/advance-directives>.

## **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**

### **What is a durable power of attorney for health care?**

A durable power of attorney for health care is a legal document allowing you to name a person as your health care agent - someone who is authorized to consent to, stop or refuse most medical treatment for you if a physician determines you cannot make these decisions yourself. Once appointed, your health care agent can speak on your behalf anytime you are unable to make your own medical decisions, not only at the end of life.<sup>38</sup>

This type of advance directive is also referred to as a health care proxy, appointment of health care agent or a medical power of attorney.

A durable power of attorney for health care form can be downloaded on the WSMA website, located here: <http://www.wsma.org/Media/Patients-pdfs/advance-directive-forms.pdf>.

### **What rules apply to surrogate decision-making for persons who are incompetent?**

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<sup>37</sup> See also *In re Guardianship of Hamlin*, 102 Wn.2d 810, 819 (1984). (Reaffirming *Colyer*, stating that when a decision is made by a family, without dissent, a guardian is not necessary, and that there are sufficient other safeguards to protect against abuse.)

<sup>38</sup> See RCW 11.94.010.

When an incompetent person has not previously executed an advance directive under the Natural Death Act, a surrogate is responsible for making medical decisions on behalf of the incompetent person. Washington law sets forth a list of the individuals, based on priority, who may make medical decisions on behalf of an incompetent person:<sup>39</sup>

- The appointed guardian of the patient, if any.
- The individual, if any, to whom the patient has given a durable power of attorney that encompasses the authority to make health care decisions;
- The patient's spouse or state registered domestic partner.
- Children of the patient who are at least eighteen years of age.
- Parents of the patient.
- Adult brothers and sisters of the patient.

A physician who needs to obtain informed consent on behalf of an incompetent person must make an attempt to obtain consent from the individual who is highest in priority in the list above. If the physician is unable to obtain consent from an individual higher on the list, the physician may successively seek the consent of an individual in the next lower position in the list.<sup>40</sup> The law creates two special exceptions to this general process: (i) a person who has lower priority on the list is not authorized to provide consent if an individual higher on the list has refused consent; and (ii) when there is more than one individual in a relevant category on the list above, a decision regarding consent must be unanimous.<sup>41</sup>

Any competent person may execute durable power of attorney for health care. A durable power of attorney for health care gives a person the authority to act on behalf of an incompetent person, including the authority to grant informed consent for health care procedures or other decisions.<sup>42</sup> As shown in the list above, only a guardian appointed by a court has higher priority

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<sup>39</sup> RCW 7.70.065(1)(a).

<sup>40</sup> RCW 7.70.065(1)(b).

<sup>41</sup> RCW 7.70.065(1)(b)(i-ii).

<sup>42</sup> RCW 11.94.010(3).



in acting on behalf of an incompetent person than the individual who acts as the person's attorney-in-fact pursuant to the execution of a valid durable power of attorney for health care.<sup>43</sup>

## **POLST**

### **What is the Physician Orders for Life-Sustaining Treatment (POLST) Form?**

The POLST form represents a way of summarizing wishes of an individual regarding life-sustaining treatment. These wishes may have already been expressed in another document, such as a Healthcare Directive or Durable Power of Attorney for Health Care. The form accomplishes two major purposes:<sup>44</sup>

- It is portable from one care setting to another.
- It translates wishes of an individual into actual physician orders.

The POLST form takes the previously expressed wishes of an individual and translates them into a set of physician orders for medical treatment that should be followed by health care providers in a variety of care settings. These include the site of an emergency, an emergency room, an acute care hospital, or a long-term facility. Moreover, the form represents a means of transferring the known wishes of an individual from one care setting to another, using a uniform document in each setting. The form reduces the need for repetitive end-of-life discussions, facilitates the process, and provides security for the individual and the physician that the expressed wishes will be carried out. There is no other form that streamlines the process in this way.<sup>45</sup>

### **Who should complete the POLST form?**

The POLST form should be completed by the attending physician after discussion with the patient or surrogate decision-maker regarding the preferences of the patient. The document may be completed by other health care professionals under the direction of the attending physician. The attending physician must sign the form and assume full responsibility for its accuracy. The form may also be signed by an ARNP or a certified physician assistant.<sup>46</sup>

### **How is the POLST form used?**

In a health care facility, the form should be the first document in the clinical record.<sup>47</sup> It should be recognized as a set of physician orders to be implemented as any physician orders

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<sup>43</sup> RCW 7.70.065(1)(a).

<sup>44</sup> See Department of Health POLST web page, available at: <http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/PhysiciansOrdersforLifeSustainingTreatment.aspx>.

<sup>45</sup> See generally WSMA POLST resources, available at: <http://www.wsma.org/POLST>.

<sup>46</sup> See Washington State POLST Form, available at: <http://www.wsma.org/Media/Patients-pdfs/POLST-PrintDownload.pdf>.

<sup>47</sup> See WSMA POLST resources, *supra*.

would.<sup>48</sup> In a non-institutionalized setting (such as a home), the form should be located in a prominent location. It will be recognized by emergency personnel as orders to be followed, in the same way the current EMS/No CPR form is used.

### **How is the POLST form transferred from one setting to another?**

The completed POLST form is a physician order form that should remain with the patient when the patient is transported between care settings, regardless of whether the patient is in a hospital, at home, or in a long-term care facility. The institution may wish to keep a duplicated copy in the permanent medical record upon discharge. Photocopies and electronic facsimiles of signed POLST forms are legal and valid.<sup>49</sup> The institution may wish to keep a duplicate copy in the permanent medical record upon discharge.<sup>50</sup>

### **If a patient has a POLST form, do they need an advance directive, too?**

Patients should be encouraged to have an advance directive, such as a durable power of attorney for health care and/or living will.<sup>51</sup> While advance directives are often very helpful in determining end-of-life decisions, they are not required or necessary for having a POLST form.<sup>52</sup>

### **How may a POLST form be obtained?**

Individuals are encouraged to contact their physician to request a POLST form. Patients may, however, obtain the POLST form (and/or the WSMA POLST brochure) by sending a self-addressed, stamped envelope to WSMA, Attn: POLST, 2033 Sixth Avenue, Suite 1100, Seattle, WA 98121.<sup>53</sup> Physicians may order free copies of the POLST form and patient information brochures from the Washington State Medical Association at: <http://www.wsma.org/POLST>, or by calling WSMA at 1 (800) 237-3329, or (206) 956-3649.

Information regarding POLST is also available at the Department of Health, <http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/PhysiciansOrdersforLifeSustainingTreatment.aspx>.

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<sup>48</sup> See Washington State POLST Form, *supra*.

<sup>49</sup> See Washington State POLST Form, *supra*.

<sup>50</sup> *Id*

<sup>51</sup> See WSMA POLST resources, *supra*.

<sup>52</sup> *Id*.

<sup>53</sup> *Id*.