Chapter 14
Medical Advance Directives

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SYNOPSIS

Medical advance directives are legal documents that tell medical professionals and others about your desires concerning your medical treatment for use in the event you can no longer speak for yourself. The term "medical advance directive" most commonly refers to a living will, but the term may also include medical durable powers of attorney, cardiopulmonary resuscitation (CPR) directives, Do Not Resuscitate (DNR) orders, Medical Orders for Scope of Treatment (MOST), and other directives concerning your care and disposition in the event your medical condition is terminal, and at or after the time of your death.

14-1. Living Wills

A living will, correctly titled an "Advance Directive for Medical/Surgical Treatment" but commonly known in Colorado as a "living will," is a document in which you express your preferences as to how you wish to be treated in the event you are in a terminal condition or a persistent vegetative state and are also incapable of speaking for yourself concerning how you wish to be treated medically.

In 2010, the Colorado General Assembly passed a major update to Colorado's advance directive statutes. The purpose of the update was to modernize the 1989 statute, to recognize medical advances that have occurred since that time, and to allow for more flexibility in drafting living wills in Colorado. The law does not change the basic philosophy of advance directives in Colorado, which is based upon the premise that competent adults should be permitted to accept

or reject medical treatment in end-of-life situations, and to express those preferences in advance, in writing.

The basic living will covers two end-of-life situations. The first of these is a terminal condition. A terminal condition means an incurable or irreversible condition for which the administration of life-sustaining procedures will serve only to postpone the moment of death. In other words, the medical professionals have determined they can take no other actions that will cure or improve your medical condition, and life-sustaining procedures may prolong your life somewhat, but not overcome your impending death. Life-sustaining procedures are medications, surgeries, or other medical therapies that would lengthen your remaining lifetime somewhat, but not reverse your medical condition. The second medical condition is a persistent vegetative state. The law recognizes that the determination of whether a person is in a persistent vegetative state should be made by medical professionals, and not by attorneys and courts. As a result, the term is not defined in Colorado law, except to say that determination is based upon prevailing medical standards.

In either of these two end-of-life situations, a Colorado living will permits the individual to select one of three choices. The first is to forego life-sustaining treatment. The second is to accept life-sustaining treatment, but only for a limited period of time. At the end of this period of time, determined by the individual in the living will, the individual's doctors will re-evaluate the individual, and if it is determined the individual remains in a terminal condition or a persistent vegetative state (which should always happen if the individual was correctly diagnosed previously), the life-sustaining treatment will be terminated. The third choice is to continue life-sustaining treatment as long as medically feasible.

In addition to expressing one's preference regarding life-sustaining treatment, Colorado law permits the individual to express the desire to accept or withhold nutrition and hydration in a terminal condition or a persistent vegetative state. Under Colorado law, nutrition and hydration are treated separately from any other form of medical treatment. As with life-sustaining treatments, when determining one's preferences for provision of nutrition and hydration, the individual can express one of three preferences, as defined above.

The law also permits a person to express individual medical instructions concerning other medical issues that he or she might face. The law now permits a person to list individuals with whom the person's doctor may discuss the person's medical situation, and provides language permitting the doctor to openly discuss the medical situation in light of the privacy requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Finally, the law includes language permitting an organ and tissue donation preference to be expressed in the living will. Organ and tissue donation is discussed more fully later in this chapter.

Under previous Colorado law, a sample living will was included in the statutes. The new law removes this sample form. This was done to permit more flexibility in using the various living will forms that have been developed in the last two decades. A sample living will form is available on the Colorado Bar Association website (see Appendix A; Resources, Chapter 14 for details). A sample living will can also be obtained from the Colorado Medical Society.

Any competent adult may execute a living will. Under the statute, the individual may also indicate whether an agent under a medical power of attorney may override the preferences expressed by the individual in the living will, or whether the agent under the medical power of attorney should be required to follow the directions contained within the living will.

Many people worry that if life-sustaining treatment, including nutrition and hydration, is withheld or withdrawn, they will suffer pain and discomfort as a result. The law in Colorado, and every other state, requires medical professionals to provide whatever medications or other treatments are necessary in order to make you as comfortable and pain free as is practical.

After you have executed your living will, you should provide a copy of the living will to any medical professional who keeps regular medical records on you. If you have multiple doctors, such as an internist, an orthopedic doctor, and so on, you should give a copy of your living will to each of these medical professionals. In all cases, provide them a copy of your living will to be placed in your medical files, but keep the original living will yourself, or provide it to your agent under your medical power of attorney.

Federal law requires that, upon admission to a hospital, the hospital must ask you if you have a living will. You should bring your living will with you to the admissions process and let them make a copy for your medical file at the hospital. If you enter an assisted living facility or a nursing home, you should also provide a copy of the living will to the facility at the time of your admission.

Remember, so long as you are capable of making your own medical decisions, you can determine what treatments you will or will not receive. The purpose of the living will is for you to express in advance what your wishes are, so that in the event you are unable to express your wishes, there is a written document telling the medical professionals and your family what your preferences are on the subject of terminal illness and persistent vegetative state situations.

Perhaps most important of all is for you to discuss with your loved ones your feelings, beliefs, and desires with regard to end-of-life treatment. The more your loved ones know about your desires, the more likely you are to receive the kind of medical treatment you wish to receive at the end of your life. Lawyers and doctors can provide support and expertise, but only you can provide your preferences. Take the time to speak with your loved ones and be open with them about how you feel about end-of-life treatment, life-sustaining procedures, and other issues concerning end-of-life matters.

You do not have to execute a new living will if you travel to or move to another state. However, as medical professionals are most comfortable with the living will form(s) commonly found in their state, if you stay for an extended period of time in another state (such as individuals who have a winter home in a warmer climate) or move to another state, it is a good idea to execute a new living will in a form that is commonly found in that state. For people who have two residences, it is a good idea to have two living wills, each in the format commonly found in that state. HOWEVER: Be careful to ensure that the information in those two living wills is not in any way contradictory, or a court may invalidate both documents.

14-2. CPR Directives and DNR Orders

Cardiopulmonary resuscitation (CPR) directives and Do Not Resuscitate (DNR) orders are directives, signed by a doctor, that direct that in the event your heart stops or you stop breathing, you do not wish to have CPR or other methods of restarting your heart and breathing. These directives must be issued by a doctor. As such, you need to speak with your physician to obtain such a directive. Unless you have a signed CPR or DNR directive or a living will stating you do not want CPR, the law in Colorado and the standards of medical practice will require medical professionals to make all reasonable efforts to restart your heart in the event it stops.

14-3. Medical Orders for Scope of Treatment

In 2010, the Colorado General Assembly passed a law creating authority for a Medical Orders for Scope of Treatment (MOST) form. This law recognizes a growing trend in the various states to permit medical professionals to capture your wishes concerning end-of-life treatment preferences, and to allow that information to follow the patient from one health care facility to another, rather than requiring the information to be recreated and recompiled once the patient is admitted to the new facility. As with living wills and other advance directives, the purpose is to better ensure, in a written advance directive, that the wishes of the individual concerning his or her end-of-life medical treatment are known and followed.

The MOST statute does not make substantive changes to Colorado law or provide new alternatives for medical treatment. Rather, it simply places your wishes on one document, clearly identified in your medical records (because of the bright green color of the form). The document is signed by you and your physician, thus making it a medical order in your medical records. It does not replace the living will; instead, the two documents work together to more fully capture your intentions concerning end-of-life treatment. Consistent with the living will statutes, the MOST statutes specifically say that nothing contained in the MOST form changes the accepted standards of medical practice and ethics.

The MOST form provides identifying information about the patient and expresses the patient's preferences concerning end-of-life treatment, cardiopulmonary resuscitation (CPR), transfer to hospital facilities, and other end-of-life issues.

To account for differences in moral or religious beliefs between the patient and the medical professionals treating the patient, the law provides that in the event the medical provider's moral convictions or religious beliefs conflict with the patient's instructions, the medical provider is required to effect the transfer of the patient to a medical provider or facility that is willing to comply with the MOST form.

Any competent person may execute a MOST form in conjunction with his or her doctor. Where a person is not competent to complete the form, an authorized agent under the person's medical power of attorney or a proxy under the medical surrogate statutes may complete the form on behalf of the incompetent person. The form may be revoked at any time and in any way that clearly indicates the executing person's intention to revoke the form.

Where the person has previously executed a living will, medical power of attorney, or other advance directives, those documents are to be kept with the MOST form in the patient's medical records. If there is an inconsistency between the documents, the most recently executed document will prevail.

14-4. Medical Power of Attorney

A medical power of attorney, sometimes known as a "Durable Medical Power of Attorney" or a "Power of Attorney for Health Care," is a legal document in which you appoint an "agent" to speak for you on the subject of medical treatment in the event you are unable to speak for yourself. Unlike the living will, the medical power of attorney's use is not limited to a terminal condition or persistent vegetative state situations. The agent under the medical power of attorney is authorized to make any medical decision that you could make for yourself, with certain limitations, if you were mentally competent to do so. However, nothing in the medical

power of attorney permits the agent to direct your medical treatment while you are still mentally capable of making your own medical decisions.

The medical power of attorney is called "durable" because it contains language within the document that directs that its authority should continue to be effective even in the event that you become legally or medically incompetent. Medical powers of attorney can be as simple or as sophisticated as you and your attorney wish to make them. However, at a minimum, the medical power of attorney needs to appoint an adult (defined in Colorado as a person 18 years of age or older) as your agent under the medical power of attorney. It is a good idea to include in the medical power of attorney an alternate or successor agent, in the event your primary named agent is deceased, unwilling, or otherwise unable to make medical decisions for you. It is not a good idea to appoint, and the medical community discourages appointing, co-agents, that is, two or more people who must act together to make medical decisions. The medical professionals much prefer to have one person with the authority to act. This does not mean you cannot appoint successor agents in the event your primary agent is unavailable to act. Appointing successor agents is encouraged, but like the primary agent, appoint only one successor to act at any given point in time.

Any properly written medical power of attorney today should include in it language sufficient to satisfy the requirements of the Health Insurance Portability and Accountability Act of 1996, commonly known as "HIPAA" (pronounced "HIP-ah"). HIPAA is intended to ensure the privacy of your medical information and to ensure that you have access to any medical information that medical professionals keep concerning you. Your medical power of attorney should include language that permits your agent to be considered a "personal representative" (the HIPAA term for an agent) for the purpose of discussing your medical records, conditions, and possible courses of medical treatment with the medical professionals. By including HIPAA language in the appointment of an agent under medical power of attorney, your agent can discuss your medical issues with the medical professionals, can make medical decisions when you are unable to do so, and can do such things as pick up medications for you at a pharmacy.

In addition to the basic elements of a medical power of attorney, you should consider adding language to your medical power of attorney to permit your agent to complete admission applications to medical facilities, assisted living facilities, and nursing homes; make applications for Medicare, Medicaid, and other medical insurance forms; and nominate and appoint a guardian.

Like the living will, you should provide a copy of your medical power of attorney to any medical professionals who keep medical records on you and provide a copy to any hospital, assisted living facility, nursing home, or other medical facility upon admission. You should keep the original of the medical power of attorney, or provide it to your agent. Additionally, as with the living will, it is an excellent idea to discuss your medical issues, your feelings and beliefs concerning medical treatment, and other related issues with your agent under the medical power of attorney and with your loved ones. It is the purpose of appointing an agent under the medical power of attorney that your agent should follow your wishes and intent as to medical treatment. The agent can only do so if he or she knows what you want.

You do not need to execute a new medical power of attorney in the event you travel or move to another state, unless you wish to make changes to your medical power of attorney. To be safe, and to ensure your medical power of attorney meets the execution requirements of each state, you should have your medical power of attorney witnessed by two individuals unrelated to you who are not in any way responsible for your medical care and medical bills, and have the medical power of attorney notarized.

Finally, authority to act under a medical power of attorney ceases upon the death of the principal, that is, the person who executed the medical power of attorney appointing the agent to act.

14-5. Organ and Tissue Donation

Under Colorado law, if you choose to, you may decide to donate your organs and/or tissue at the time of your death. This declaration to donate your organs or tissue may be done in a variety of methods, including making such a statement in your will, by making a direction on your driver's license, by declaration in a living will or a medical power of attorney, or by declaration in another written instrument. Be careful, however. While legally you can donate your organs and tissues through a statement in your last will and testament, there is a distinct possibility that no one will look at the terms and directions of your last will and testament until well after your death, including not until after your burial or cremation. So, while you can legally use a will to do this, it may not be the best choice available.

If you do not have a written declaration to donate your organs and tissue, or a written direction not to make such donation, then certain persons who survive you may make such donation of your organs and tissues. The authority to make such donation is in the following order of persons:

1) An agent of the decedent;
2) The spouse or partner in a civil union of the decedent;
3) Adult children of the decedent;
4) Parents of the decedent;
5) Adult siblings of the decedent;
6) Adult grandchildren of the decedent;
7) Grandparents of the decedent;
8) An adult who exhibited special care and concern for the decedent;
9) The persons who were acting as the guardians of the person of the decedent at the time of death; or
10) Any other person having the authority to dispose of the decedent's body.

As with all of these advance directive documents, it is a good idea to discuss your desires and beliefs with your loved ones so that they will know what you want done at the time of your death.

14-6. Disposition of Last Remains

We would all like to think that our relatives and loved ones will be in agreement as to what is to happen to our last remains at the time of our death. Unfortunately, it is quite possible that this will not be the case. As a result, Colorado has what is known as the Disposition of Last Remains Act.

Under this Act, you have the right to direct in writing who should control what happens to your last remains after your death. This direction must be in writing. If there is no such writing, your verbal directions do not have legal standing.

This written declaration may direct your wishes regarding your last remains, that is, whether you wish to be buried, cremated, or have your remains donated to medical science. The declaration may also direct what funeral, religious, or other ceremonies you wish to have after your death.

If you do not have a declaration as to disposition of last remains, the individual who has authority to determine how to dispose of your last remains will be decided in the following order:

- The appointed personal representative or special administrator of your estate;
- The nominated personal representative under your last will and testament;
- Your surviving spouse or partner in a civil union;
- The majority decision of your adult children;
- The decision of your surviving parents or legal guardians;
- Any person assuming legal and financial responsibility for the final disposition of your last remains; or
- The Office of the Public Administrator in your judicial district.

14-7. Aid in Dying

The subject of aid in dying is a controversial one. This issue is more commonly known as "assisted suicide"; however, this is not a correct use of the term. No one, not even a doctor or close relative, is permitted to assist you in ending your life. However, under a 2016 law, Colorado now recognizes that a competent individual has the right, if he or she meets certain medical criteria, to end his or her own life and to obtain medications from a physician that will cause his or her life to end.

Under the law, if a person is terminally ill and mentally competent, that person may make a request of the doctor for a prescription for life-ending drugs. To do this, the person must make two oral requests of the doctor, which must be made at least 14 days apart, and a written request for the prescription. To be considered terminally ill, a person must be determined by two medical professionals, including the person's attending physician, to be expected to die, without aid in dying, within the next six months. A person would not be terminally ill if other medical procedures would result in the person being expected to live more than six months.

To qualify for aid in dying, the person must be a Colorado resident and be terminally ill. The doctor consulted must inform the person of alternatives to aid in dying, the consequences of taking the medication, and that even if he or she obtains the medications, he or she does not have to take the medications. In addition, the person must be capable, both physically and mentally, of self-administering the medication.

Under the law, physicians and medical institutions may opt out of participating in the aid in dying law. Many Colorado hospitals have done so, and many individual physicians have decided not to participate as well. It appears the most difficult part of the new law may be in finding a physician who is willing to prescribe the medication.