Chapter 13
Medical Advance Directives

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SYNOPSIS

When clients come to an attorney's office, they are often surprised to learn that their estate plan is not limited to documents that deal with their affairs after death. In fact, for many clients, the most in-depth conversations are around the Medical Directives. It is critical that clients understand what these documents do and how to use them, and it is imperative that decisions be made carefully and with appropriate legal and medical guidance.

There are several documents that are considered part of a client's Medical Directives including, but not limited to, Living Wills, General Medical Powers of Attorney, Cardiopulmonary Resuscitation (CPR) Directives, Do No Resuscitate (DNR) orders, and Medical Orders for Scope of Treatment (MOST). Each of these documents is very different in its scope, use, and authority.

13-1. Medical Power of Attorney

At a minimum, a Medical Power of Attorney form allows you to appoint a person to speak on your behalf when you are unable to speak for yourself. The simplest forms contain only the appointment of an agent. More robust versions of the document allow your agent broader authority and give more specific directions to your agent. For example, you may want to include statements of religious belief or requests that music, pets, and family members be nearby when possible. These statements allow your agent to more easily "step into your shoes" and make the kinds of medical decisions you would have made if you were able to.

Your agent is your advocate. An agent's authority includes the right to advocate for you on matters of consent to or refusal of medical treatment and the enforcement of your properly executed Living Will, Do Not Resuscitate (DNR) orders, and Cardiopulmonary Resuscitation (CPR) directives.

Additional agent responsibilities could include speaking on your behalf for the purpose of securing long-term or hospice care, as well as your preferences for alternative therapies such as psilocybin, marijuana, psychedelics, and any other products or therapies that are legal in the state in which you are seeking care.

HIPAA, the Health Insurance Portability and Accountability Act of 1996, restricts access to your medical records. However, in order to successfully advocate for you, agents must have access to at least some of your personal medical information. For most people, the benefit of having an advocate outweighs their concerns about privacy. However, it is possible to limit an agent's access to certain records or specifically exclude portions of your medical record if you wish.

Depending on your level of incapacity, you might need a guardian rather than an agent to act on your behalf. This generally requires a court order appointing your guardian. Since this proceeding takes place after your incapacity, you would not choose your own guardian. However, if you would like your agent to become your guardian, this can be stated in the Medical Power of Attorney, thus removing the urgency, if not the necessity, for immediate guardianship proceedings.

While you have many opportunities to elect to be an organ donor, the Medical Power of Attorney allows you to make more specific requests about where your organs go and how they are to be used. Typically, you can choose general donation or limit your donation to a specific person, class of persons, or organization. Alternatively, you may also choose to donate your body to medical science. Some clients have already arranged for organ donation with an organization, and it is appropriate to state that in the Medical Power of Attorney.

While Colorado statutes do not require the Medical Power of Attorney to be witnessed and notarized, it is good practice to do so. Most attorneys require two witnesses and a notary signature in addition to the signature of the person for whom the document is being created. The reason for doing this is so that this document can be used in other states that do require those additional signatures. Without the witnesses and notary signature, your Medical Power of Attorney may not be deemed valid outside of Colorado.

You can revoke an agent's authority orally or in writing. Also, signing a new Power of Attorney form revokes an older one. Be particularly careful about signing any document that revokes your previous Power of Attorney form. This comes up often with clients who like the 5 Wishes Healthcare Directive. Signing 5 Wishes revokes the Medical Power of Attorney you completed with your attorney. If you like some of the language in the 5 Wishes document, discuss including those paragraphs or statements with the attorney who is preparing your Power of Attorney document.

13-2. Living Wills

Officially, the Living Will is entitled "Advance Directive for Medical/Surgical Treatment." This document allows you to elect whether you want life-sustaining procedures and artificial nutrition and hydration at the end of your life if you have been diagnosed to have a terminal condition or

be in a persistent vegetative state. The agent you appointed under your Medical Power of Attorney has the authority to advocate on your behalf for enforcement of the wishes you have expressed in this document.

To be clear, you will be making your own decisions as long as you can communicate with your medical team. The decisions you make in person do not have to be consistent with the decisions you made in your Living Will.

The Living Will really only becomes relevant when you can no longer communicate with your medical team *and* you have been diagnosed as (1) having a terminal condition or (2) are in a persistent vegetative state.

"Life-sustaining procedures," as that term used in the Living Will, are medical procedures whose only benefit to the patient is prolonging the dying process However, "life-sustaining procedures" does not include any kind of pain relief or comfort care. The use of life sustaining procedures and artificial nutrition and hydration can be withheld altogether, can be requested indefinitely, or can be limited to a specific span of time.

There is no established, concrete definition of persistent vegetative state. Colorado statutes only provide that "persistent vegetative state" is to be defined by current standards in the practice of medicine.

Some attorneys have updated their Living Will forms to include a section addressing progressive neurocognitive illness. A progressive neurocognitive illness contemplates progressive deterioration of cognitive functions. For this provision to apply, a physician *must* determine that there is no hope of any improvement of the condition. There is a fine line between feeding and force feeding. This provision gives the physician some guidance as to where you believe that line can be drawn. Generally, we are looking for the following signs: consistently and permanently unable to communicate, swallow food and water safely, and recognize family and friends. However, you may add to this list if you wish.

13-3. CPR Directives and DNR Orders

CPR Directives and DNR Orders are medical documents that indicate whether you would like to be resuscitated in the event that you stop breathing and/or your heart stops beating. Medical professionals will attempt resuscitation unless you have CPR Directives, DNR Orders, or a Living Will stating that you do not want resuscitation. Since these are medical documents, they must be obtained from and signed by your physician.

13-4. Medical Orders for Scope of Treatment

The Medical Orders for Scope of Treatment (MOST) form is a two-page quick reference used by medical professionals to quickly obtain information about your end-of-life wishes, including CPR, artificial nutrition and hydration, medical interventions, and choice of treatment facility. MOST forms are printed on green paper, making them easy to identify in a patient's file. Once a MOST form has been properly signed, it becomes part of your patient medical record and travels with your records wherever you are receiving medical treatment. An agent appointed under a Medical Power of

Attorney can complete this document for you if you are not able to fill it out yourself. Medical Powers of Attorney and Living Wills should be kept along with the MOST form in your medical file.

13-5. Organ and Tissue Donation

There are a variety of ways to make your wishes with regard to organ and tissue donation known. The most common ways are to designate your donor status on your driver's license, make a donation election on your Medical Power of Attorney Form or Living Will, or simply by putting your wishes in writing. It is also possible to state your wishes in your Will; however, this is generally not your best option. The Will is usually not located and read until days after your death. It is likely that the opportunity to act on your donation request will have passed by that time.

13-6. Disposition of Last Remains

In Colorado, you have the right to choose how you would like your body handled after death. You may determine whether you wish to be buried, cremated, or have your remains donated to medical science. You may also state what types of ceremonies you wish held in your honor. You may select readings, specific pieces of music you would like played, and locations for the event. All directions must be in writing and legal within the state.

13-7. Aid in Dying

In 2016, Colorado recognized a person's right to die under certain conditions and with certain limitations. Only Colorado residents may seek Aid in Dying in Colorado. Before invoking this right, it must be determined by two independent physicians (one of which must be your attending physician) that you are both terminally ill *and* competent to make this decision. Further, the physicians must determine that you are expected to die within six months without assistance from life-ending medication. You must make two oral requests for the prescriptions for life-ending drugs at least seven days apart. These oral requests must be followed by a written request.

Physicians are required to provide education to the patient about alternatives to death, the consequences of taking the life-ending medication, and the patient must be informed that procuring the prescription does not require the patient to take it. Finally, the patient must be capable of administering the medication without assistance from anyone else.

Although Aid in Dying is legal in Colorado, it does not mean that it is accessible. Physicians and medical facilities are not required to participate in the Aid in Dying process. Given the oath to "do no harm" that physicians are sworn to, it can be difficult to find physicians to assist with the process.

13-8. Resources

Aging with Dignity, "Five Wishes"
P.O. Box 1661
Tallahassee, FL 32302-1661
(850) 681-2010
www.agingwithdignity.org

Colorado Department of Public Health & Environment, "Medical Aid in Dying"
https://cdphe.colorado.gov/center-for-health-and-environmental-data/registries-and-vital-statistics/medical-aid-in-dying

Colorado Statutes
C.R.S. § 15-14-506 (Medical Power of Attorney)
C.R.S. §§ 15-18-101, *et seq.* (Colorado Medical Treatment Decision Act)
C.R.S. §§ 15-18.6-101, *et seq.* (Directive Relating to Cardiopulmonary Resuscitation)
C.R.S. §§ 15-18.7-101, *et seq.* (Directives Concerning Medical Orders for Scope of Treatment)
C.R.S. §§ 15-19-101, *et seq.* (Disposition of Last Remains)
C.R.S. §§ 15-19-201, *et seq.* (Revised Uniform Anatomical Gift Act)
C.R.S. §§ 25-48-101, *et seq.* (Colorado End-of-life Options Act)

The Donor Alliance, Organ & Tissue Donation
www.donoralliance.org/who-we-are/

University of Colorado Anschutz, "Make Medical Choices"
https://medschool.cuanschutz.edu/coloradocareplanning/roadmap/make-medical-choices