

Gary B. Wells
Attorney at Law

9350 Hilltop Rd. | Argyle, TX 76226 (By appt. only) | 940.220.3736 | www.gbwells.law



HEALTH CARE DIRECTIVES

Health Care Directives and Health
Care Durable Powers of Attorney

I. HEALTH CARE DIRECTIVES

A. WHY YOU NEED A HEALTH CARE DIRECTIVE

A health care directive is a legal planning document that states your wishes regarding end-of-life medical treatment. Other names for a health care directive include:

- Advance Directive. Advance Medical Directive. Advance Decision Form.
- Advance Health Care Directive.

1. WHAT A HEALTH CARE DIRECTIVE DOES

A health care directive outlines the type of medical treatment you wish to receive (or not to receive) if you become terminally ill and are no longer able to make your own decisions or are permanently in a vegetative (unconscious) state. The health care directive helps your family and health care professionals determine whether you want death-delaying procedures in these situations. A terminal condition usually means an incurable and irreversible condition where death is imminent and the use or application of any death-delaying procedures serves only to prolong the dying process.

A health care directive does not:

- Appoint a representative to carry out your wishes. Apply to conditions that are not terminal or vegetative.
- Appoint a representative to manage your property or finances.

2. WHO CAN MAKE A HEALTH CARE DIRECTIVE

Any competent adult can make a health care directive. Different states may have slightly different standards, but in general, an adult is anyone aged 18 or older. Competent means that the person executing a health care directive understands the document he or she is signing and is able to communicate his or her wishes.

3. WILL MY DOCTOR HONOR MY HEALTH CARE DIRECTIVE?

Your doctor does not have to honor your health care directive if he or she has religious, moral, or ethical objections or believes it would not be consistent with sound medical practice. However if your doctor does have such objections, he or she is ethically obligated to transfer your care to other providers who are able to follow your wishes.

if your doctor does have such objections, he or she is ethically obligated to transfer your care to other providers who are able to follow your wishes.

Here are three steps you can take to ensure that your doctor will follow your wishes as stated in your health care directive:

First, give your doctor a copy of your health care directive, discuss your decisions with the doctor, and get assurances that he or she will abide by them.

Second, execute a health care durable power of attorney (discussed in II. below) that names an agent to make health care decisions for you when you no longer have the capacity to make decisions for yourself. Give your agent a copy of both your health care directive and health care durable power of attorney and make sure he or she is prepared to see that they are followed.

Third, share these documents with close family members and make sure they are aware of your wishes.

4. BENEFITS OF A HEALTH CARE DIRECTIVE

A living offers these potential benefits:

- It helps to ensure your wishes are followed regarding medical care at the end of your life. It relieves your loved ones of the burden of making end-of-life decisions without knowing your wishes.
- It enables your doctor to follow your instructions. Without a health care directive, a doctor may be concerned that it may constitute medical malpractice or even a crime if he or she withholds or removes treatment.
- It keeps your private wishes on dying out of the probate court. Without a health care directive, your family and medical care providers may disagree as to what care should be provided or withheld. If they don't all agree, the matter may end up in court.

B. TREATMENT CHOICES IN YOUR HEALTH CARE DIRECTIVE

A health care directive allows you to request your health care providers to administer life-prolonging treatment, withhold such treatment, or stop such treatment after a specified period of time when you are near death or in a permanently unconscious state.

Most states have a form that you can use to prepare a health care directive. In some states, you are not required to use the state form but can use a custom-drafted one.

Health care directive forms vary from state to state but all cover similar topics related to end-of-life care and death. Some spell out particular treatments that you can choose or decline, while others simply allow you to choose between requesting life-prolonging treatment or refusing life-prolonging treatment.

Common items to consider when preparing a health care directive are whether:

- You want medical personnel to attempt to resuscitate you should you experience cardiac arrest.
- You want to be placed on a ventilator to help you breathe.
- You want to be hydrated and fed through IVs and a feeding tube if you can't eat or drink. You want dialysis if your kidneys fail.
- You want to be given medication to treat infections.
- You want to undergo surgery if necessary to prolong your life.
- You want only palliative care to keep you comfortable and pain-free.

Discussing these decisions with your doctor before making your health care directive is a good idea. Your doctor can explain the risks, benefits, and consequences of these treatments so you can make a more informed decision. Your doctor can also tell you if he or she has reservations about following your instructions which will allow you the opportunity to find another doctor.

A health care directive may also indicate your:


- Desire to become an organ or tissue donor.
- Religious preferences.
- Burial and final disposition wishes (e.g. cremation).

C. EXECUTING AND DISTRIBUTING YOUR HEALTH CARE DIRECTIVE

1. EXECUTION REQUIREMENTS FOR A HEALTH CARE DIRECTIVE

You must be mentally competent (i.e. able to understand the document) when you sign your health care directive. If you are competent but have impaired function (e.g. cannot write), someone may be able to complete the document for you, but no one can make a health care directive for another person. The choices must be your own.

Once you have completed the health care directive, you will have to follow your state's requirements for execution. Most states require that you sign the document before one or two witnesses or a



Once you have properly executed your health care directive according to your state's requirements, you should keep the original document in a safe, but accessible place.

notary. Certain persons may be disqualified as witnesses, such as your doctors, nurses, beneficiaries of your estate, and relatives.

2. WHAT TO DO WITH YOUR HEALTH CARE DIRECTIVE

Once you have properly executed your health care directive according to your state's requirements, you should keep the original document in a safe, but accessible place. Tell someone you trust where it is. You also should provide copies to your regular health care providers and to the hospital or care facility when you are admitted. Your health care providers can follow your wishes only if they know them.

If you have a health care durable power of attorney (discussed in II. below), you should give a copy of your health care directive to your agent. Consider also giving copies to family members so they understand your wishes and do not inadvertently interfere with them.

3. IF YOU MOVE TO ANOTHER STATE

Each state has its own laws, forms, and procedures, so it is best to consult an attorney or prepare a new health care directive if you move from one state to another. Not all states will recognize a health care directive from another state. The U.S. Supreme Court has ruled that each state has the authority to decide what evidence is "good enough" to determine someone's wishes about end-of-life decisions.

D. WHEN A HEALTH CARE DIRECTIVE TAKES EFFECT

Although state laws may vary, generally, a health care directive takes effect only if at least one doctor finds you incompetent and certifies that you are terminally ill or in a persistent vegetative state. Incompetent means you cannot understand the consequences of treatment decisions including risks, benefits, and alternatives.

If you are temporarily incapacitated, your health care directive does not take effect. For example, if your medical condition does not allow you to speak but you are likely to recover, your doctors cannot invoke your health care directive.

In situations of temporary incapacity, an agent under a health care durable power of attorney (covered in II. below) may be able to make decisions for you.

E. CHANGING OR REVOKING YOUR HEALTH CARE DIRECTIVE

You have every right to change or revoke your health care directive if you change your mind about the contents. As long as you remain mentally competent, you can change or revoke your health care directive at any time.

It's a good idea to review your health care directive from time to time to make sure it still expresses your wishes. Good times to do so are before you enter the hospital for treatment, when you are diagnosed with a serious illness, and when your marital status changes.

State laws typically provide that you can revoke a health care directive by destroying the original, executing a written document revoking the health care directive, or executing a new health care directive that is inconsistent with the old one.

The best way to revoke your old health care directive is by destroying it (e.g. tearing it, striking it with lines, or shredding). Then you can execute a new health care directive and redistribute it. Be sure to give a copy to everyone to whom you gave a copy of your former health care directive—your doctors, hospital or care facility, health care agent, and family. Just to make sure there is no confusion about which version of a health care directive is in effect, your new health care directive should be dated and state that it revokes all prior health care directives.

II. HEALTH CARE DURABLE POWER OF ATTORNEY

A. WHY YOU NEED A HEALTH CARE DURABLE POWER OF ATTORNEY (DPOA)

A health care directive is an important document to have, but it has limitations. A health care durable power of attorney (DPOA) is a more versatile document that allows you to appoint a health care agent to act on your behalf.

1. WHAT A HEALTH CARE DPOA DOES

A health care DPOA allows you to appoint a health care agent or representative to make decisions on your behalf if your condition doesn't allow you to make your own decisions. The health care DPOA applies to all health care decisions for all types of medical conditions, not just when death is imminent or you are in a vegetative state. It gives you an opportunity to outline your philosophy as to the types of treatment you want to receive or decline including end-of-life care. Thus, it is much broader than a health care directive, which only expresses your desires if you are terminally ill or permanently unconscious and are unable to express your wishes regarding the use of life-prolonging procedures.

2. WHO CAN MAKE A HEALTH CARE DPOA

Generally, you must be at least 18 years old to execute a health care DPOA. Additionally, you must be mentally competent to understand what the health care DPOA is and what powers it gives your health care agent.

3. BENEFITS OF A HEALTH CARE DPOA

A health care DPOA may be one of the most important legal documents you will ever sign. Unfortunately, you never know when you might suddenly need someone to make medical decisions for you. Every year in the United States over 700,000 people have a heart attack and 800,000 suffer a stroke. A health care DPOA allows you to prepare in advance for this kind of emergency health crisis. The health care DPOA ensures that the right person will be making decisions for you and those decisions are consistent with your personal values and wishes.

4. WHO MAKES MEDICAL DECISIONS FOR YOU WHEN YOU DON'T HAVE A HEALTH CARE DPOA

When you are unable to make medical decisions and do not have a health care DPOA, state laws give family members decision making authority with a spouse having top priority, followed by adult children, parents, adult siblings, and more distant relatives.

This makes sense because generally family members are considered to be in the best position to know what treatment decisions you would make for yourself if you were able. However, there is no guarantee that a decision made by a family member won't cause problems. When stress is high and a loved one's health hangs in the balance, conflicts among family members are possible. Further, some family members may make decisions based on ignorance, a desire to end family distress, or downright bad faith and personal motives. Depending on the situation, the most knowledgeable decision maker may not even be a member of the family.

For these reasons, it is much better for everyone-- you, your healthcare providers, family, and friends if you have a health care DPOA.

Whether you have a health care DPOA or not, you should have conversations with key people in your life about your wishes for medical treatment. Do this for your family and not just yourself. Let them know what you want them to do if the time comes that they must speak for you.

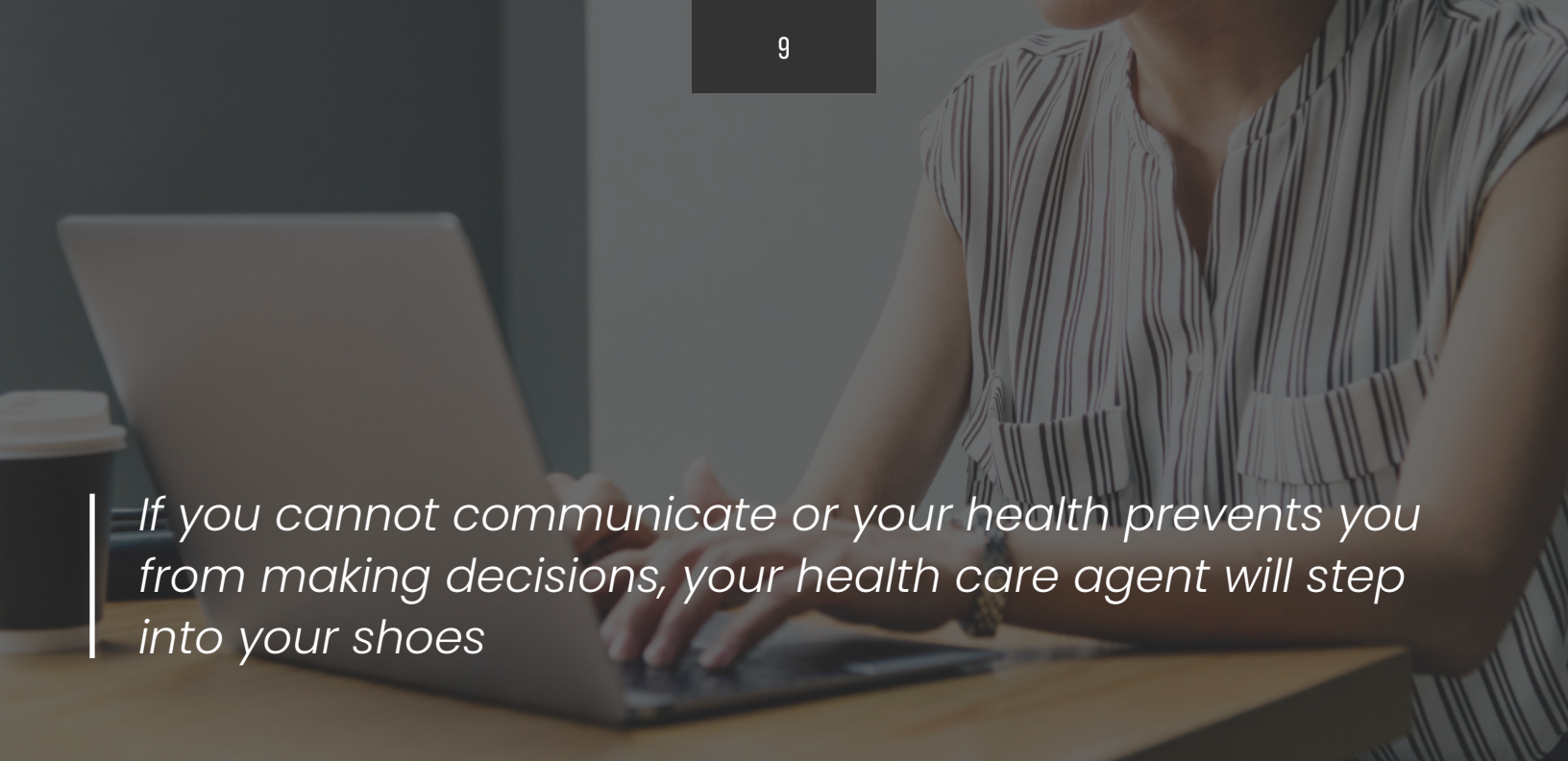
5. WHY YOU NEED A HEALTH CARE DPOA EVEN IF YOU ARE MARRIED

By signing a health care DPOA, you help ensure that the right person will be making decisions for you and that you will receive the best and most appropriate health care possible. You should have a health care DPOA even if you are married. If you have a spouse and children from previous relationships or adult children, they may disagree about your treatment or which of them should be the decision maker. The appointment of the health care agent will reduce conflict in this high stress situation. If you want to name someone other than your spouse to be the decision maker, you will need a health care DPOA. Additionally, if you and your spouse are in a simultaneous accident, your health care DPOA can name a successor or alternate health care agent to act on your behalf.

6. WHY YOU NEED BOTH A HEALTH CARE DIRECTIVE AND A HEALTH CARE DPOA

Preparing for the unexpected means having the right documents in place. As discussed here, a health care directive and health care DPOA serve different legal functions. A health care directive is limited to end-of-life situations. It is used to express your wishes regarding life-prolonging measures if there's no reasonable hope of recovery, for example, in the event of brain death, permanent unconsciousness, or terminal illness.

A health care DPOA, on the other hand, covers all health care decisions and lasts only as long as you are incapable of making decisions for yourself. It is also the legal document that allows you to appoint a health care agent to act on your behalf. Therefore, it is important to have both documents. Often state forms combine the two in one document.



If you cannot communicate or your health prevents you from making decisions, your health care agent will step into your shoes

B. CHOOSING YOUR HEALTH CARE AGENT

1. WHOM TO CHOOSE

The person you name in your health care DPOA and trust with your healthcare decisions is called your health care agent. (Other terms you may encounter are health care surrogate, proxy, or representative.) If you cannot communicate or your health prevents you from making decisions, your health care agent will step into your shoes. Your agent will make health care decisions based on what you outline in your health care DPOA, health care directive, and what he or she understands your wishes to be. Obviously, your choice of health care agent is of critical importance.

When considering whom to choose, look for someone who:

- Knows you well and is willing to talk to you about sensitive issues, including end-of-life care.
- Understands your values and wishes, respects them, and will forcefully pursue them despite opposition.
- Is immediately available, reliable, and willing to serve.
- Is articulate and has strong advocacy skills.
- Understands medical issues.
- Is able to deal with potential family conflicts.

Most people choose their spouse, an adult child, or other close adult relative. But your health care agent does not need to be a relative. A trusted friend is a fine choice. If you have named an agent

for financial decisions under a financial durable power of attorney, you may want to choose the same person as your health care agent.

As a general rule, you may not name any of your doctors or other health care providers or employees of your health care providers or of the hospital or other facility at which you receive care.

2. CHOOSING MORE THAN ONE AGENT OR AN ALTERNATE AGENT

Many states allow you to appoint two or more persons to serve as co-health care agents. For most people, appointing co-agents is not a good idea. The agents may disagree, which can confuse health care providers and delay a crucial decision. The stalemate could even need to be broken by a judge. In most circumstances, the better choice is to name one primary health care agent and one or two successor agents. A successor agent serves only if the first health care agent is unable or refuses to serve.

This is ultimately your decision and should be based on your individual circumstances.

C. WHAT DECISIONS YOUR HEALTH CARE AGENT CAN MAKE

You can decide what decisions you want your health care agent to make. You can give your health care agent broad authority to make virtually all health care decisions for you if you are unable to make them for yourself. Or you can limit the agent's power. Some people limit their agent's power to the instructions in their health care directives.

With broad powers, your health care agent will be able to:

- Access your medical records.
- Decide in which medical facilities you will receive care. Choose your health care providers.
- Visit you when you are in a hospital or medical facility
- Consent to or refuse most types of medical and mental health treatment. State law may provide that certain treatments cannot be authorized by your health care agent. These typically include abortion and some extreme mental health treatments. Your agent also cannot authorize treatment or withdrawal of treatment in conflict with your health care directive. Furthermore, your agent must make your health care decisions according to the agent's knowledge of your wishes, which is why it's so important for you to have a candid discussion with him or her. If the agent does not know your wishes, the agent must base the health care decisions on your best interests.

So long as you have full confidence in your agent, consider giving him or her broad powers to make decisions for you as it can be difficult to foresee what anyone's medical needs may be in the future. Giving your agent full authority may reduce the chances of having the issue end up in court.

D. EXECUTING AND DISTRIBUTING YOUR HEALTH CARE DPOA

1. EXECUTION REQUIREMENTS FOR A HEALTH CARE DPOA

Each state has its own execution requirements for a completed health care DPOA to become effective. Some states provide a form, the use of which may or may not be mandatory. You will need to verify your specific state's requirements and may want to consider seeking counsel to advise you. After the document is completed, it will need to be executed. Most states require you to sign and date the document in front of either two witnesses or a notary. Certain persons may be disqualified as witnesses such as relatives, beneficiaries of your estate, the person named as your agent, and your health care providers.

2. WHAT TO DO WITH YOUR HEALTH CARE DPOA

Once you have properly executed your health care DPOA according to your state's requirements, you should keep the original document in a safe, but accessible place. Tell someone you trust where it is and make sure that person can access it.

Provide copies to your regular health care providers, to your agent, and to any alternates. Your agent may need a copy to prove his or her authority to medical personnel. If you are admitted to a hospital or care facility, provide it with a copy as well.

E. WHEN A HEALTH CARE DPOA GOES INTO EFFECT

Your health care DPOA goes into effect when you become unable to make your own health care decisions. Until then, you have the right to make your own health care decisions.

Before your health care DPOA goes into effect, state law typically requires at least one doctor to certify that you lack the capacity to make your own health care decisions. Lacking capacity usually means (1) you cannot understand the health care choices that are available to you including the risks, benefits, and alternatives to these choices, or (2) you are unable to articulate your wishes in any way, including orally, in writing, or through other gestures.


Some states permit you to give your health care agent the authority to manage your medical care immediately without waiting for a doctor's determination of incapacity. Even if you choose this

option, your health care agent must always act in your best interests and diligently try to follow any health care wishes you've expressed in your health care DPOA and health care directive.

F. CIRCUMSTANCES UNDER WHICH YOUR HEALTH CARE DPOA MIGHT END

Your executed health care DPOA will remain in effect as long as you are alive unless you or a court takes action to terminate it. Below are some circumstances in which your health care documents can become ineffective:

- You revoke your health care DPOA: You have the right to amend or revoke your health care DPOA at any time as long as you remain mentally competent (see G below). If you revoke your health care DPOA make sure your agent(s) and health care providers know the document has been revoked and is no longer effective.
- A court determines your health care DPOA is invalid: Although very rare, under certain circumstances, the validity of your health care DPOA may be questioned. In these situations, a court may need to determine the validity of the document. Challenges tend to be more common when family members disagree with choices your health care DPOA expresses, or people have issues with your health care agent. Some reasons a court can rule on your health care DPOA include:
 - You lacked mental capacity: If someone doubts that you had the requisite mental capacity at the time you prepared your health care DPOA, that individual can file a motion in court to invalidate your health care DPOA. The person bringing the motion in court bears the burden of proof. This means the law presumes you had the mental capacity and the person filing the case has to prove otherwise.
 - Execution was improper: Every state has specific execution requirements for a health care DPOA. If your document was not properly executed, a court can invalidate it. An example might be if you did not have the document notarized and state law requires notarization for the document to be valid. However, in these situations, your intentions outlined in the health care DPOA may still be relevant and used as evidence of what your wishes are. In a United States Supreme Court case, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), the Court determined that an improperly executed health care DPOA can be used as strong evidence of someone's wishes for care and still be honored. In other words, your wishes should not be ignored simply because of a technical error.
 - Your agent's authority is revoked: A health care agent is obligated to make decisions based on your wishes in your health care DPOA. If your health care agent does not act according to your best interests or wishes, any concerned person can ask the court to review the health care agent's behavior. If a court finds that your agent is acting improperly, it will revoke the agent's authority. Then, the authority will pass to the alternate agent you named in your



Your executed health care DPOA will remain in effect as long as you are alive unless you or a court takes action to terminate it.

document. If your health care DPOA does not name an alternate, a conservator or guardian may be appointed to make health care decisions for you.

- **Death:** A health care DPOA is no longer valid once you die. However, some of the directions or instructions in the document may remain effective after your death for some very limited purposes. For example, your health care agent may be allowed supervise the disposition of your body, including authorizing an autopsy or organ donation if your health care DPOA gives these powers.
- **Divorce:** A divorce will have no effect on the validity of your health care DPOA, but if you named your spouse as your health care agent, his or her authority is automatically revoked in some states. In this circumstance, if you named an alternate, he or she will become the agent. However, to avoid confusion, it is best to execute a new health care DPOA after a divorce.

G. CHANGING OR REVOKING YOUR HEALTH CARE DPOA

Over time circumstances can change and you may want to change or revoke your health care DPOA. You will need to take an affirmative step to revoke the document, usually by physically destroying the actual document and all copies or executing a written revocation. Make sure to check your state's revocation requirements. Once you revoke your health care DPOA, you should notify your health care agents and your health care providers of the revocation.

Additionally executing a new health care DPOA revokes any previous document as long as it so states. Make sure your health care agent and your health care providers are notified and have copies of the new document.

III. 8 COMMON MISCONCEPTIONS ABOUT HEALTH CARE DIRECTIVES AND HEALTH CARE DPOAS

MISCONCEPTION #1: I CAN FIND A HEALTH CARE DIRECTIVE OR HEALTHCARE DPOA FORM ON THE INTERNET

This is partially true. Each state usually has its own health care directive and health care DPOA forms. Often both documents are combined in one form. Use of the form may or may not be mandatory depending on the state. These statutory forms might be found on one of your state's official pages. If you can verify that you have the most current state form, it can be okay to use. However, if you conduct a search for "health care directive form" you might find multiple forms that look like they might be correct but are not specific to your state. Make sure to do your due diligence and confirm you are using the correct and most current form.

The safest choice is to have your health care directive and health care DPOA prepared by your estate planning attorney as part of your comprehensive estate plan. Then you can be assured that you have the correct form correctly filled out and executed.

MISCONCEPTION #2. IF I HAVE A HEALTH CARE DIRECTIVE, I DON'T NEED A HEALTH CARE DPOA

For optimal protection you really need both a health care directive and health care DPOA. The documents apply in different circumstances. A health care directive outlines your preferences to the doctors who are treating you at the time you are terminally ill or in a vegetative state. A health care DPOA appoints a health care agent to make your health decisions at any time you are unable to do so yourself.

Additionally, a health care DPOA can cover a wide range of treatment issues that might arise when you are not competent to make your own decisions but are not terminally ill or permanently unconscious.

MISCONCEPTION #3. A HEALTH CARE DIRECTIVE GOES INTO EFFECT WHEN YOU ARE TEMPORARILY INCAPACITATED

A health care directive can only be activated when you are incapacitated and your condition is terminal or you are in a persistent vegetative state. Usually, at least one doctor must certify these requirements are met. For temporary incapacitation, such as a car accident, from which you are expected to recover, the health care directive has no legal effect. For these situations, you will need a health care DPOA.

MISCONCEPTION #4: MY HEALTH CARE DIRECTIVE AND HEALTH CARE DPOA ARE ACTIVE ONCE I SIGN THEM

Each state has its own execution requirements for these documents to be valid. Generally, your signature alone is not enough to make the documents be valid. State law typically requires that your signature be notarized or witnessed by two witnesses. Typically a health care directive goes into effect when a doctor certifies that you are terminally ill and incompetent to make medical decisions or in a permanently unconscious state. Typically a health care durable power of attorney goes into effect when a doctor certifies that you are incompetent to make medical decisions. In other words, you are incapable of communicating your wishes or incapable of understanding the consequences of treatment decisions.

MISCONCEPTION #5. MY HEALTHCARE PROVIDERS WILL NOT HONOR MY WISHES AND DOCUMENTS

A doctor who is unable or unwilling to follow your directives is required by rules of professional conduct to transfer your care to another doctor who is willing and able. The best policy is to discuss your wishes with your doctor and share your documents with him or her as soon as they are prepared. If your doctor expresses reservations, you can then decide whether you want to choose another provider.

MISCONCEPTION #6. MY HEALTH CARE DIRECTIVE AND HEALTH CARE DPOA ARE LIMITED TO THE CHOICES PROVIDED IN MY STATE'S FORM

Your state likely has a specific form you can or may be required to use for your health care directives. It may provide specific choices regarding life support, life-saving measures, use of antibiotics, pain control, and other similar categories. You are often not limited to the scripted blanks and options that are outlined in the form. If there is something specific you want to communicate about your

care, you can often insert it into the form or add an attachment to the form. If the form is not mandatory in your state, you can have a custom-drafted form prepared by your attorney.

MISCONCEPTION #7: I CAN HAVE SOMEONE SIGN A HEALTH CARE DIRECTIVE OR HEALTH CARE DPOA FOR ME IF I AM LEGALLY INCOMPETENT

This is one of the most common misconceptions about legal documents. You must be legally competent to execute legal documents. Once you lack legal capacity you can no longer sign any legal documents including a health care directive or health care DPOA. The only recourse then is a conservatorship or guardianship proceeding through the court, which is a very costly and time-consuming process.

MISCONCEPTION #8. ONLY ELDERLY OR TERMINALLY ILL PERSONS NEED HEALTH CARE DIRECTIVES AND HEALTH CARE DPOAS

Health care directives and health care DPOAs are not just for the sick or elderly. Every adult should consider putting these documents in place. A catastrophic accident or medical crisis rendering a person permanently unconscious could occur at any time. Many people execute health care directives and health care DPOAs as part of a comprehensive estate plan prepared by their estate planning attorney.