

ADVANCE DIRECTIVES

WHAT ARE THEY?

May 3, 2002

**Presented by
Disability Law Center of Alaska
3330 Arctic Blvd. Suite 103
Anchorage, AK 99503-4580
907-565-1002
Toll Free 1-800-478-1234**

NOTICE:

This material does not constitute legal advice. Because answers to your legal questions depend upon the specific circumstances of a given situation, you are urged to contact your attorney for individual advice.

WHAT IS AN ADVANCE DIRECTIVE?

- A legal document...
- That is intended to clearly express a person's wishes concerning health treatment and care...
- during any time the person is mentally or physically unable to make decisions or communicate those wishes.
- The directive is signed before (in “advance of the time”) a person becomes mentally or physically incapacitated.
- Alaska law recognizes three types of advance directives:
 1. Durable Powers of Attorney (Page 3)
 2. Living Wills (Page 5)
 3. Declarations for Mental Health Treatment (Page 6)
Treatment

Following are explanations of all three documents. Brief descriptions of Living Wills and Durable Powers of Attorney are followed by information on Mental Health Declarations, provided in a question-and-answer format.

One question is frequently asked of all three documents: *What do I do with them?* The specific answers are provided in the following discussions, but generally the most important thing is to make sure your doctors, agents, and loved ones *know that you have signed* these documents!

DURABLE POWER OF ATTORNEY (AS 13.26.332)

A POWER OF ATTORNEY (POA) IS

- A legal document
- giving another person (who is called the “agent” or “attorney-in-fact” – this person should be a trusted friend or family member; even though the person is called an “attorney-in-fact,” he or she IS NOT a licensed attorney) the authority to do a variety of legal, business, and other transactions, including health care decisions,
- on behalf of the “Principal,” who is the person creating the POA.

A “DURABLE” POWER OF ATTORNEY IS

- a regular POA
- with a special provision
- that states that the authority given to the attorney-in-fact *continues in effect* even if the Principal becomes **disabled**.

HOW DOES IT WORK?

- “Disabled” means unable to make decisions or communicate one’s wishes. A disability is established by the affidavit of two physicians who have personally examined the principle.
- A Durable POA **DOES NOT** allow an agent to authorize the termination of life-sustaining procedures. Only a Living Will can accomplish that.
- A Durable POA **DOES NOT** allow an agent to authorize a voluntary commitment or placement in a mental health treatment facility, ECT, or

psychosurgery. Only a Declaration for Mental Health Treatment can provide that authority.

- Powers of Attorney can be “general” or “specific.” A general POA gives the attorney-in-fact broad authorization to conduct all types of business, and make many types of decisions, for the Principal. Examples of the authorization of a general POA include transactions with financial institutions, government agencies, doctors and other health care providers and health care institutions and clinics, child care centers, children’s doctors, etc. Anything any one of these people or agencies could do for the Principle, they must do for the attorney-in-fact.
- Photocopies of POA’s are as binding on 3rd parties as an original. Therefore, all the agencies and people mentioned above must honor a copy of a POA.
- **Revocation/termination:** Unless a termination date is on the form itself, termination or revocation is accomplished by completing another Special or General POA.

WHO HAS TO FOLLOW IT?

- A Power Of Attorney must be honored by any third party to whom it is presented.

SPECIAL CAUTION ABOUT USING POA’S

Because a POA can be used for so many different things, the Principle must be **EXTREMELY CAUTIOUS** in choosing an attorney-in-fact and in deciding what authority to give the agent. Unscrupulous individuals have been known to take advantage of persons with disabilities and steal government benefits, cash, and other assets. It would also be quite easy for an unscrupulous agent to make decisions concerning health care, child welfare, and other aspects of a Principle’s life.

LIVING WILL (AS 18.12.010)

A LIVING WILL IS

- A legal document (called a “Declaration” in the statute)
- directing medical providers
- to withdraw or withhold life-sustaining procedures
- from the Declarant.
- “Life Sustaining Procedures” include such things as respirators, giving CPR, etc. They DO NOT INCLUDE procedures that are necessary for comfort or to alleviate pain. The Declarant can choose whether food and water should be continued or withheld.

HOW DOES IT WORK?

- Declarant must give copy of Living Will to doctor.
- Effective ONLY when Declarant’s physician finds
 1. the patient is terminal and is
 2. not able to make treatment decisions for him/herself and
 3. doctor records these findings in the medical record.
- Doctor may issue a Do Not Resuscitate (DNR) Order orally or in the medical record.
- **Revocation:** A Living Will can be revoked any time and in any manner by which Declarant is able to communicate an intent to revoke to the attending physician or health care provider, without regard to mental or physical condition. The revocation may be communicated to the physician or health care provider by another person to whom the revocation was communicated.

WHO HAS TO FOLLOW IT?

- The doctor who receives a copy of the Living Will must honor it.
- Other health care providers under the doctor's authority must also honor Living Wills.

DECLARATION FOR MENTAL HEALTH TREATMENT (AS 47.30.950)

A DECLARATION FOR MENTAL HEALTH TREATMENT IS:

- A legal document
- Stating the Principal's preferences regarding "Mental Health Treatment," defined in the law as
 - ☞ Electroconvulsive treatment (ECT)
 - ☞ Treatment with psychotropic medication
 - ☞ Short-term admission and retention in a facility

HOW DOES IT WORK?

- The Declaration must be given to doctor or mental health provider.
- The physician or provider must make the Declaration a part of the Principal's medical record.
- It becomes effective when the Principal becomes incapable.
- "Incapability" must be determined by two physicians that include a psychiatrist, or one physician and one professional mental health clinician, or the court in a guardianship proceeding. Incapability means
 - ☞ the Principal has an impaired ability to receive and evaluate information effectively or
 - ☞ To communicate decisions, and
 - ☞ Impairment must be to the extent that the person currently lacks

the capacity to make mental health treatment decisions.

- The Form includes an option to appoint an attorney-in-fact, who is a person authorized to make treatment decisions on behalf of the Principal. This agent must follow the choices set forth in the Declaration, but can also make decisions concerning treatment that is not specified in the Declaration.
- NOTE: An appointment of an agent under the Mental Health Declaration would be a “special POA,” limited to mental health treatment decisions. Nevertheless, the same cautions concerning choosing attorneys-in-fact that were highlighted in the POA section apply to appointments made under a Mental Health Declaration.
- A Declaration is witnessed by two competent adults who are not related to the Principal and are not providing mental health services to the Principal.
- Witnesses must
 - ☞ Know the Principal well enough to attest that he/she is of sound mind and
 - ☞ He/she signed the declaration in Witnesses presence and
 - ☞ Principal was not under a duress of undue influence to sign the Declaration
- Declaration must be renewed every three years. If Principal is incapable at renewal time, will remain in effect until Principal is capable again.
- **Revocation/termination:** Declaration can be changed or revoked at any time Principal is capable. Changes or revocations must be in writing and given to anyone who has copies of the original Declaration.

WHO HAS TO FOLLOW IT?

- All mental health treatment providers who have copies of a patient’s Mental Health Declaration must act in accordance with the Declaration when the principal has been found to be incapable. However, note the exceptions below under “Limitations.”

- An Attorney-in-fact appointed in the Declaration has a duty to act consistently with the desires of the Principal as expressed in the Declaration.
- NOTE: A Mental Health Declaration MIGHT NOT BE EFFECTIVE in another state. Each state has its own laws. Check with the State's Protection and Advocacy agency to determine what needs to be done in that State.

ADVANTAGES:

A Mental Health Declaration provides a legal way to make treatment preferences known to

- Psychiatrists,
- Other mental health care providers, and
- Family members and friends.

LIMITATIONS:

1. It is too easy for mental health providers to disregard it. The Declaration is NOT EFFECTIVE if
 - It is not consistent with "reasonable medical practice"
 - The requested treatment is not available
 - The Principal has been involuntarily committed
 - The Principal's condition is an emergency endangering life or health
2. The definition of "mental health treatment" is very narrow; it does not include different kinds of therapies (diet, exercise, talk therapy, etc.)

SUGGESTIONS:

1. **THE DECLARATION MAY BE MORE PERSUASIVE IF YOU CAN PROVE YOU WERE "CAPABLE" WHEN YOU PREPARED AND SIGNED IT.**
 - To prove you were capable, visit your own mental health provider on the same day you prepare the Declaration.

- Have your provider make a note in your record that you are capable of making and communicating mental health treatment decisions.
- Obtain a copy of that record and keep it with your Declaration.
- Whenever you give your Declaration to a doctor or other provider, make sure a copy of that medical record is given with it.

2. WHEN PREPARING THE FORM, ASK FOR HELP IN MAKING IT COMPLETE AND CLEAR.

- Your attorney-in-fact, your family, your friends, and other mental health advocates may help you prepare the form.
- Your case worker or other mental health treatment provider may also have valuable input about how to make your wishes clear to other providers.

3. MAKE YOUR PREFERENCES AS SPECIFIC AS POSSIBLE, AND ALSO INCLUDE TYPES OF TREATMENT NOT ON THE FORM.

- When listing drugs, list dosages and manufacturers
- When listing preferred providers, include addresses and phone numbers
- When listing preferred institutions, include addresses and phone numbers
- List types of therapy you feel are most effective for you, including diet, exercise, cognitive behavior therapy, psychotherapy, group therapy, etc. State how often and by what provider, or what kind of provider (e.g., doctor, nurse, social worker, etc.)
- Distinguish between different treatments for different circumstances if that is important

4. APPOINT AN ATTORNEY-IN-FACT TO ADVOCATE FOR YOU IF YOU BECOME INCAPABLE. Choose someone who...

- Knows you well and respects your values and preferences, and
- Can be contacted easily when needed, and
- Can communicate effectively with providers, and
- Can explain your preferences and why they are important to you.

5. GIVE COPIES OF YOUR DECLARATION TO

- Your mental health providers, including doctors, therapists, case workers,
- Your attorney(s)-in-fact, and
- Your family members and friends.

6. KEEP A CARD IN YOUR WALLET STATING THAT YOU HAVE A MENTAL HEALTH DECLARATION

- The card may also state that you have a Living Will and a Durable Power of Attorney.
- List the name and phone numbers of the doctors and family members who have copies of these documents.

7. KEEP A LIST OF THE NAMES OF ALL THE PEOPLE WHO HAVE A COPY OF YOUR MENTAL HEALTH DECLARATION

- A similar list of the people who have your Living Will is also a good idea. If you decide to revoke or change these documents, you will know who should get copies of the revocation or the new document.

ATTENTION EMERGENCY PERSONNEL
 I have executed the following Advance Directives:
 Alaska Living Will
 Alaska Declaration for Mental Health Treatment
 Durable Power of Attorney

Please contact the following persons for more information:
 Doctor: _____ Phone: _____
 Other: _____ Phone: _____

_____ Date _____ Signature _____

ATTENTION EMERGENCY PERSONNEL
 I have executed the following Advance Directives:
 Alaska Living Will
 Alaska Declaration for Mental Health Treatment
 Durable Power of Attorney

Please contact the following persons for more information:
 Doctor: _____ Phone: _____
 Other: _____ Phone: _____

_____ Date _____ Signature _____

ATTENTION EMERGENCY PERSONNEL
 I have executed the following Advance Directives:
 Alaska Living Will
 Alaska Declaration for Mental Health Treatment
 Durable Power of Attorney

Please contact the following persons for more information:
 Doctor: _____ Phone: _____
 Other: _____ Phone: _____

_____ Date _____ Signature _____

ATTENTION EMERGENCY PERSONNEL
 I have executed the following Advance Directives:
 Alaska Living Will
 Alaska Declaration for Mental Health Treatment
 Durable Power of Attorney

Please contact the following persons for more information:
 Doctor: _____ Phone: _____
 Other: _____ Phone: _____

_____ Date _____ Signature _____

ATTENTION EMERGENCY PERSONNEL
 I have executed the following Advance Directives:
 Alaska Living Will
 Alaska Declaration for Mental Health Treatment
 Durable Power of Attorney

Please contact the following persons for more information:
 Doctor: _____ Phone: _____
 Other: _____ Phone: _____

_____ Date _____ Signature _____

ATTENTION EMERGENCY PERSONNEL
 I have executed the following Advance Directives:
 Alaska Living Will
 Alaska Declaration for Mental Health Treatment
 Durable Power of Attorney

Please contact the following persons for more information:
 Doctor: _____ Phone: _____
 Other: _____ Phone: _____

_____ Date _____ Signature _____

ATTENTION EMERGENCY PERSONNEL
 I have executed the following Advance Directives:
 Alaska Living Will
 Alaska Declaration for Mental Health Treatment
 Durable Power of Attorney

Please contact the following persons for more information:
 Doctor: _____ Phone: _____
 Other: _____ Phone: _____

_____ Date _____ Signature _____

ATTENTION EMERGENCY PERSONNEL
 I have executed the following Advance Directives:
 Alaska Living Will
 Alaska Declaration for Mental Health Treatment
 Durable Power of Attorney

Please contact the following persons for more information:
 Doctor: _____ Phone: _____
 Other: _____ Phone: _____

_____ Date _____ Signature _____