

# ADVANCE HEALTH CARE DIRECTIVES IN NEW YORK

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Medical and Legal Considerations'

# IMPORTANCE OF ADVANCE PLANNING

New York law gives you the right to accept or reject medical treatment, including life-prolonging procedures, such as mechanical ventilation and tube or intravenous feeding

If you cannot make your own health care decisions due to incapacity (for example you are in a coma), who will make them for you?

Planning ahead assists you in preparing for a sudden unexpected illness, from which you expect to recover, as well as the dying process and ultimately death. Preparing a few legal forms helps to ensure that your health care wishes are followed and that decisions are made by people you trust.

Examples of advance health care documents:

- Health Care Proxy
- Living Will (often incorporated into a HCP form)
- ‘Do Not Resuscitate’ Order (DNR)
- Medical Orders for Life Sustaining Treatment (MOLST).

# OVERALL ESTATE PLANNING

Estate planning is the process of arranging, during your lifetime, for the management of your assets and affairs when you become incapacitated or die. A complete plan includes the following documents:

Last Will and Testament- this is a document that directs the distribution of your ‘probate assets’ (those owned by you that do not have a named beneficiary) after your death.

Power of Attorney- this document gives your agent- someone you trust- the authority to manage your finances if you become incapacitated. For example, your agent can withdraw funds from your bank account for your benefit to pay for medical care or treatment. However, your agent cannot make health care decisions for you.

Health Care Directives- while a POA agent can handle your financial affairs if necessary, you must appoint a health care proxy to make decisions regarding treatment or withdrawal of treatment if you cannot make such decisions for yourself.

# HEALTH CARE PROXY

- You can appoint a health care ‘proxy’- someone you trust to make health care decisions for you if you are unable to make decisions for yourself.
- Your agent can start making decisions for you when your doctor determines that you are not able to do so. Your proxy also has the right to obtain medical information and records in order to make informed health care decisions for you.
- You can only name one proxy at a time, although you can name a successor proxy who can step in if the original proxy cannot or will not serve in that role.
- Your proxy’s health care decisions are final unless an objecting family member or facility obtains a court order overriding the decision or disqualifying the agent.

# HEALTH CARE PROXY

- It is important to select a proxy who understands your wishes and will advocate on your behalf.
- Make sure to have an honest discussion with family members or anyone else you are considering naming as your health care proxy.
- The Dept of Health suggests that everyone older than 18 have a HCP, and that it should be updated every few years and during major life events, such as:
  - going to college; once a child turns 18, parents have no say...
  - getting married;
  - getting divorced;
  - having or adopting children;
  - receiving a medical diagnosis; and the like.

# LIVING WILL

- In a Living Will you can leave specific written instructions about medical treatments you may or may not want, when you are no longer able to decide for yourself. A Living Will serves as evidence of your wishes.
- Living Wills are valid as long as they provide ‘clear and convincing evidence’ of your wishes. Notably, casual statements made to family members such as ‘don’t keep me alive on machines,’ or ‘no heroics’ may not be specific enough for procedures to be withdrawn- make your wishes clear!
- In general your proxy can make decisions in accordance with your wishes if known to your proxy, or otherwise in accordance with your best interests. However, with regard to the administration or withholding of artificial nutrition (a feeding tube) and hydration, your agent must have specific knowledge of your wishes.

# LIVING WILL

- While you can orally convey your wishes to your proxy, because of the ‘clear and convincing evidence’ rule, it is better to put them in writing in your Living Will. This leaves no doubt if and when this situation arises.
- While health care proxy forms and Living Wills can be separate documents, they can also be combined into one document called a ‘Health Care Proxy/Living Will.’ That way the proxy is being given specific written instructions.

## **DO NOT RESUSCITATE ORDERS (DNRs)**

- A nonhospital DNR order is commonly used for someone with a serious health condition, advanced age, or a terminal illness and must be signed by a health care provider.
- If someone has a nonhospital DNR order, and they stop breathing or their heart stops beating, cardiopulmonary resuscitation (CPR) and other potentially-invasive, life-sustaining treatments will not be started.
- Examples of serious health conditions include:
  - advanced stage cancer diagnosis;
  - congestive heart failure;
  - chronic obstructive pulmonary disease (COPD);
  - a dementia diagnosis;
  - or frailty when a person nears the end of their natural life.



# DNRs

- Notably, a DNR order is only a decision about CPR – chest compression, intubation and mechanical ventilation – and does not relate to any other treatment. Do not resuscitate does **not** mean do not treat.
- Other appropriate treatments, as well as measures to relieve pain and to reduce suffering will still be administered unless you have directed otherwise. ‘Comfort care,’ also known as palliative care, should be available to all patients who need it.
- In order to alert medical personnel such as EMS staff about your DNR, you can carry it with you, post it on your refrigerator, and/or wear a DNR bracelet or necklace to indicate that you have a DNR order.

# MEDICAL ORDERS FOR LIFE SUSTAINING TREATMENT

A MOLST form allows you to record your preferences regarding CPR, mechanical intervention, and other life sustaining treatments on one form as a medical order. Completion of a MOLST begins with a conversation between the patient, the proxy, and a qualified trained health care professional that defines the patient's goals for care.

A MOLST is intended for patients with serious health conditions who:

- -want to avoid or receive any or all life-sustaining treatment;
  - -reside in a long-term care facility or require long-term care services; and/or
  - -might die within the next year.
- A MOLST must be completed by a health care professional and signed by a physician, nurse practitioner or physician assistant to be valid. A valid MOLST form serves as a “Medical Order Form” and can be transferred with you from one health care setting to another.

## **WHAT IF YOU DON'T HAVE A HEALTH CARE PROXY**

- If you can no longer make your own health care decisions and have not appointed a health care agent, a person close to you may make decisions on your behalf.
- In 2010 New York enacted the Family Health Care Decisions Act, which allows family members and others who are close to you to make decisions regarding medical treatment in accordance with your wishes or, if unknown, your best interests.
- The “surrogate” decision maker is also permitted to direct the withdrawal of life-sustaining treatment (including consenting to a DNR order), upon certain findings as spelled out in the Act.
- Of course, the best way to ensure that your specific wishes are met is to execute a Health Care Proxy and Living Will.

# DISPOSITION OF REMAINS

New York has a law- the Disposition of Remains Act- giving you the right to designate someone to handle your remains.

A DORA is a document that takes effect upon your death, when the Health Care Proxy terminates.

Keep in mind that a Will is often not read until a probate proceeding has begun and the burial or other disposition has already occurred. Thus, the terms of a DORA become applicable prior to the Will.

Notably, litigation over one's remains- which happens too often- can be avoided with this document, giving those left behind guidance and peace of mind.

## ADDITIONAL RESOURCES

- NYS Department of Health
- ‘Advance Care Planning and Advance Directives FAQ’-
- [Advance Care Planning and Advance Directives FAQ \(ny.gov\)](#)
- ‘Deciding about Health Care- a Guide for Patients and Families’  
<https://www.health.ny.gov/publications/1503.pdf>
- NY Attorney General’s Office
- ‘Advanced Directives- Making Your Wishes Known and Honored’
- <https://ag.ny.gov/sites/default/files/advancedirectives.pdf>