

# Advance Directives: Health Care Power of Attorney, Health Care Proxy, and Living Will

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Advance directives are used to provide directions about future health care decisions in case the person loses the *capacity* to make or the ability to express those decisions. Advance directives and end-of-life care raise complex issues of civil rights, ethics, health care policy, medical malpractice, and religion that are far beyond the scope of this guide. But advance directives and elder abuse sometimes intersect in ways that may involve crimes.

## Key Definitions and Facts

- Advance directive is a general term for two documents that individuals can use to guide decisions about future health care if they lose the *capacity* to make or the ability to express those decisions themselves. Those documents are:
  - A **health care power of attorney**, also known as a **health care proxy**, is used by a person (the **principal**) to give someone else (the **proxy** or **agent**) legal authority to make health care decisions for the principal.
    - The norm is to have a separate health care and financial *power of attorney*, but in some states one document may be used to give someone authority to make both types of decisions.
  - A **living will** does not authorize another person to make decisions. Instead, it instructs the proxy/agent, some other decision-maker (such as a *guardian/conservator*), or health care providers about the type of care (including emergency treatment) that a person wants or does not want.
- A person must have appropriate *decision-making capacity* to make an advance directive.
- While the use of advance directives to provide guidance is very helpful, courts generally have said that verbal and other written evidence of a person's wishes regarding health care is acceptable.
- In some states, the verbal appointment of a proxy/agent is not legally effective; appointment may only be made in writing.
- People have the right to change their minds about who can make decisions for them and what treatment they do or do not want. State laws govern what to do if a person indicates a change of mind and whether *capacity* is required.

- Generally, an advance directive will indicate when it should become effective. Otherwise, state law will provide guidance.
- A proxy/agent must make decisions that are consistent with the principal's instructions. If instructions are not clear, the proxy's/agent's decisions should be consistent with what the principal would likely do or, if that is not known, should be in the principal's best interest.

## Relevance to Elder Abuse

- Elder abuse may occur before the advance directive is signed.
  - A person who lacks appropriate *decision-making capacity* to make an advance directive may be coerced, persuaded, threatened, or tricked into signing.
  - A person with *decision-making capacity* may sign the advance directive because of *undue influence*, duress, fraud, or misrepresentation.
  - Someone may prepare an advance directive that does not reflect the person's wishes.
  - The signature on an advance directive may be forged.
- Providing health care treatment to a person whose advance directive indicates that such treatment is not wanted could be considered physical abuse. Failure to provide or arrange for treatment for a person whose advance directive indicates that such treatment is desired could be considered neglect.
  - A proxy/agent may make decisions that are contrary to the older person's wishes.
  - A proxy/agent may make decisions that the advance directive or state law does not authorize the proxy/agent to make.
- A proxy/agent may make treatment decisions that are inconsistent with the guidance provided in an advance directive (or otherwise known) and are not in the older person's best interest. Motives may include:
  - Hastening the older person's death to receive an inheritance or end the burden of acting as a caregiver.
  - Saving money.
  - Preventing changes to the status quo, such as having to move out of the older person's home or losing other financial support provided by the older person.
  - Preventing family members, *adult protective services (APS)*, or law enforcement from having access to the older person.
  - Covering up evidence of a crime.

- Family members may disagree about who the proxy/agent is, what health care instructions were provided, or what treatment should be given. These disputes may involve allegations of elder abuse by one family member against another.
- The state may have costs due to the abuse or neglect. For example, the failure to provide treatment desired by the older person may lead to the need for long-term care paid by Medicaid. Consider whether the perpetrator's actions in causing that result may be a crime.

## **Actions to Consider**

- The circumstances surrounding the signing of an advance directive or the proxy's/agent's activities or decisions may violate local, state, or federal laws relative to:
  - Elder abuse
  - False instrument
  - Financial exploitation
  - Forgery
  - Fraud (e.g., credit card, tax, or Medicaid)
  - Identity theft
  - Larceny
  - Manslaughter
  - Murder
  - Neglect
  - Theft
- State law governs the requirements for a valid advance directive, such as having it signed by witnesses or a notary public. A proxy/agent named in a legally defective advance directive may not have legal authority to make decisions. However, the defective document may still provide evidence of the person's wishes.
- Investigate further if a person claiming to be a proxy/agent cannot or will not produce the advance directive, if the document does not name that person as a proxy/agent, or if the document does not appear to authorize the decisions in question. If it is not clear whether an advance directive names that person as proxy/agent or authorizes the decisions in question, ask the prosecutor's office for an opinion.
- Consider whether it is necessary to protect the older person from physical or financial harm by taking temporary custody of the older person.
- If the older person has died, consider whether death may have been caused or hastened by actions or decisions that were contrary to the older person's wishes.

- Encourage the victim or concerned individual to seek legal assistance, per departmental policy.
  - Civil law remedies may stop unwanted care, lead to provision of desired care, or lead to financial compensation for physical and emotional harm.
- Make a report to *APS*.