



Georgia Department of Human Services
Division of Aging Services



Alternatives to guardianship with advance directives

INTRODUCTION

When an individual is ill or is preparing in the event of future illness, there can sometimes be confusion about what the person's wishes are for his or her own treatment. There might be disagreement among family members about the person's decisions concerning his or her health care. Allowing an individual to make advance directions concerning his or her health care lets each person control the direction of his or her own health care and eliminates that burden from other family members who may disagree with or who simply may not know what to do.

In Georgia, advance directives refer to documents like the **Georgia Advance Directive for Health Care** and the **Do Not Resuscitate Order**, although **Living Wills** and **Durable Powers of Attorney for Health Care** validly executed in Georgia before July 1, 2007, will still be honored. Similar documents from other states are also recognized.

These documents provide the mechanism for conveying decisions that have been made about health care and treatment choices before one becomes incapacitated and can no longer make these decisions known. It is important to make these decisions while one is still able to make them.

The individual making them can revoke advance directive choices at any time, if the capacity to do so remains. If one expresses a choice for a directive in a document and wishes to change that directive, this is effectively done by destroying the document and retrieving all copies or executing a written revocation and sharing that new decision with all who had been informed of the previous choice. If the individual communicates the initial health care choice orally, then he/she may either orally revoke the decision or put the revocation in writing and make sure all physicians, health care facilities, and individuals to whom it was given receive it.

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GEORGIA ADVANCE DIRECTIVE FOR HEALTH CARE

The Georgia Advance Directive for Health Care is described below:

There are three parts of the Georgia Advance Directive for Health Care

PART ONE

Allows an agent to be appointed to carry out health care decisions (formerly the Durable Power of Attorney for Health Care)

PART TWO

Allows choices about withholding or withdrawing life support and accepting or refusing nutrition and/or hydration (formerly the Living Will)

The law provides terminology and criteria for making decisions about withholding or withdrawing life support and accepting or refusing artificial nutrition and/or hydration. There is a certification process that must take place.

Before any action can be taken to withdraw or withhold life-sustaining procedures or to withdraw or withhold nourishment or hydration for a declarant (the one completing the advance directive) who is in a state of permanent unconsciousness or is in a terminal condition, that condition must be certified in writing. The attending physician and one other physician must personally examine the declarant and certify in writing based upon the declarant's condition found during the course of their examination and in accordance with current accepted medical standards that the declarant does meet the criteria for terminal condition or state of permanent unconsciousness as defined in the law.

“State of permanent unconsciousness” means an incurable or irreversible condition in which the declarant is not aware of himself or herself or his or her environment and in which the declarant is showing no behavioral response to his or her environment.

“Terminal condition” means an incurable or irreversible condition which would result in the declarant's death in a relatively short period of time.

PART THREE

Allows one to nominate someone to be appointed as Guardian if a court determines that a guardian is necessary. For a person to make an advance directive for health care, he/she:

- **must be of sound mind**
- **must be 18 years of age or older or an emancipated minor**

To execute the advance directive:

- 1) The declarant must sign or expressly direct someone else do it for him/her.
- 2) Two witnesses are required.
 - Witnesses do not have to see the declarant sign.
 - Witnesses do not have to see each other sign the advance directive.
- 3) The declarant must see both witnesses sign.
- 4) Restriction on witnesses:
 - Cannot be the health care agent
 - Cannot knowingly be in line to inherit anything from or benefit from the death of the declarant
 - Cannot be directly involved in the health care of the declarant
 - Only one of the two witnesses can be an employee, agent or on the medical staff of the health care facility where the declarant is receiving his/her health care.
 - A physician or health care provider directly involved in the care of the declarant may not serve as health care agent.

Agents have certain duties they must follow:

- A health care agent does not have to act, even if named; however, if the health care agent does choose to act, s/he must not make decisions that are different or that contradict the decisions of the declarant.
- All the health care agent's actions must be consistent with the intentions and desires of the declarant.
- If those intentions and desires are not clear, the health care agent's actions must be in the best interests of the declarant considering all the benefits, burdens, risks and treatment options.

The agent has authority to carry out certain responsibilities and duties related to the necessary care of the declarant. These include the authority to:

- 1) Consent to, authorize, withdraw consent from, refuse, withhold, any and all types of medical/surgical care, treatment, programs and/or procedures
- 2) Sign and deliver all instruments (documents).
- 3) Negotiate and enter into all agreements and contracts binding the declarant.
- 4) Accompany him/her in an ambulance or air ambulance.
- 5) Admit to or discharge the declarant from any health care facility.
- 6) Visit and consult with the declarant as necessary.
- 7) Examine, copy and consent to disclosure of all the declarant's medical records deemed relevant.
- 8) Do all other acts reasonably necessary and carry out duties and responsibilities in person or through those employed by the health care agent; **this does not include delegating the authority to make health care decisions.**
- 9) Consent to an anatomical gift of the declarant's body, in whole or part.
- 10) Consent to an autopsy, and direct the final disposition of declarant's remains, including funeral arrangements, burial, or cremation (**Note: The law states that the agent can bind the declarant to pay but does not expressly mention binding the estate of the declarant. It may be a good idea to make all arrangements prior to the death of the declarant.**).

The health care agent may not consent to psychosurgery, sterilization, or involuntary hospitalization or treatment under the Mental Health Code, Title 37.

HONORING THE ADVANCE DIRECTIVE FOR HEALTH CARE

Sometimes an advance directive is not honored. When the attending physician, health care provider and/or health care facility refuses to honor the advance directive for health care, the law states that after this decision is communicated to the agent, the agent is responsible for arranging for the declarant's transfer to another health care provider. [O.C.G.A. §31-32-8(2)] This section of the law does not expressly include life-sustaining procedures, nourishment or hydration in "health care decisions."

For a declarant's decision to withhold or withdraw life-sustaining procedures or withhold or withdraw the provision of nourishment or hydration, attending physicians who fail or refuse to comply are responsible for making a good faith attempt to effect the transfer of the declarant to another physician who will comply or must permit the agent, next of kin or legal guardian to obtain another physician who will comply. [O.C.G.A. §31-32-9 (d) (1-2)].

If it is the health care facility that refuses to comply with the declarant's decision to withhold or withdraw life-sustaining procedures or nutrition or hydration, the law does not expressly state whose responsibility it is to ensure the declarant is transferred to another health care facility.

REVOKING THE ADVANCE DIRECTIVE FOR HEALTH CARE

The Georgia Advance Directive for Health Care may be revoked at any time, regardless of the declarant's mental state or competency. **It remains effective even if a guardian is appointed for the declarant unless a court specifically orders otherwise.**

Revocation may occur in any of the following ways:

- by completing a new advance directive for health care
- by burning, tearing up, or otherwise destroying the existing advance directive for health care
- by writing a clear statement expressing the intent to revoke the advance directive for health care
- by orally expressing the intent to revoke the advance directive for health care in the presence of a witness 18 years of age or older who confirms this in writing within 30 days. The revocation is effective when the treating physician documents it in the medical record.
- marrying after executing an advance directive for health care revokes any agent other than the declarant's spouse
- divorcing or otherwise dissolving a marriage after the execution of an advance directive for health care revokes the designation of the spouse as the health care agent

DO NOT RESUSCITATE ORDERS

Orders surrounding the administration of cardiopulmonary resuscitation (CPR) are recognized by several names:

- Do Not Resuscitate (DNR)
- Do Not Attempt Resuscitation (DNAR)
- Order Not to Resuscitate
- No Code
- Allow Natural Death
- Order to Allow Natural Death

DEFINITIONS

1. Candidate for non-resuscitation: a patient who, based on a determination to a reasonable degree of medical certainty by an attending physician with the concurrence of another physician —
 - a) has a medical condition which can reasonably be expected to result in the imminent death of the patient;
 - b) is in a non-cognitive state with no reasonable possibility of regaining cognitive functions;
 - c) is a person for whom CPR would be medically futile in that such resuscitation will likely be unsuccessful in restoring cardiac and respiratory function or will only restore cardiac and respiratory function for a brief period of time so that the patient will likely experience repeated need for CPR over a short period of time so that such resuscitation would be otherwise medically futile;
2. Cardiopulmonary resuscitation (CPR): refers to measures used to restore or support cardiac or respiratory function in the event of cardiac or respiratory arrest.
3. Caregiver: an unlicensed assistant who provides direct health-related care to patients or residents, a proxy caregiver performing health maintenance activities providing care under the direction and orders of a licensed health care provider; or a person providing auxiliary services in the care of patients.
4. Nurse: a person who is a licensed practical nurse or a registered professional nurse.
5. Physician assistant: a person licensed as a physician assistant.

NOTE: Every adult is presumed to have the capacity to decide regarding CPR, unless determined otherwise in writing in the patient's record or pursuant to a court order. Every patient shall be presumed to consent to the administration of CPR unless there is consent or authorization for the issuance of an order not to resuscitate.

PERSONS AUTHORIZED TO ISSUE OR CONSENT TO AN ORDER NOT TO RESUSCITATE

- attending physician may issue an order which authorizes a physician, health care professional, nurse, physician assistant, caregiver or emergency medical technician to withhold or withdraw CPR;
- an adult person with decision making capacity (even if capacity is lost in the future) may consent orally or in writing to an order;
- an agent under a durable power of attorney for health care or an advance directive for health care consents on behalf of the adult person, or where a Physician Orders for Life-Sustaining Treatment (POLST) form with a code status of “do not resuscitate” or its equivalent. (in such instances, an attending physician does not need a concurring physician to issue an order not to resuscitate.);
- other appropriate authorized persons who may consent as long as the adult person meets all the criteria of a “candidate for nonresuscitation”: spouse; guardian; son or daughter 18 years of age or older; parent; brother or sister 18 years of age or older; parent for a minor child, unless the child is deemed mature enough by the physician to understand the order; in such case, the consent of the minor is required;
- as a last resort, if none of the above is available, an attending physician may issue an order not to resuscitate if: he or she has the concurrence of a second physician in writing that the patient is a candidate for nonresuscitation; and an ethics committee or similar group concurs in the opinion of the attending and the concurring physician; and the patient is receiving inpatient or outpatient treatment from or is a resident of a health care facility other than a hospice or a home health agency.

EFFECTIVENESS OF AN ORDER

An order is effective, whether the patient is receiving treatment from or is a resident of a health care facility, until the order is canceled, or the consent is revoked.

REVOCACTION

An order not to resuscitate can be revoked by an adult for him/herself, or by a parent or any authorized person; or by a physician or his/her designee who may cancel an order not to resuscitate when deemed appropriate. A revocation can be accomplished in writing, by oral declaration or by any other act that indicates a specific intent on the part of the adult to revoke consent. The revocation must be communicated to or in the presence of an attending physician, nurse, physician assistant, caregiver, health care professional or emergency medical technician.

CANCELLATION

An order not to resuscitate may be canceled by –

- the attending physician for whose patient an order not to resuscitate has been issued; the physician shall examine the patient at intervals to determine if the patient still qualifies as a candidate for non-resuscitation; if not, the order must be canceled;
 - o if the attending is not available, another physician must cancel the order if the patient no longer qualifies;
 - o if the order is entered and the patient regains decision making capacity, the attending physician or another physician shall determine if the patient consents and if he/she does not, cancel the order.

CARRYING OUT AN ORDER FOR ONE NOT IN A HEALTH CARE FACILITY

A DNR order can be carried out for a patient who is not in a hospital, nursing home or licensed hospice when the order is evidenced in writing containing the patient's name, date of the form, printed name of the attending physician, and signature of the attending physician on a form substantially similar to the one provided in the law. Orders may be carried out by any physician, health care professional, nurse, physician assistant, caregiver or emergency medical technician.

BRACELET/NECKLACE OPTION

A person who is not in a hospital, nursing home or licensed hospice and has an order not to resuscitate may wear an identifying bracelet on either the wrist or the ankle or an identifying necklace and shall post or place a prominent notice in the person's home or residence to provide notice of the order not to resuscitate.

LIABILITY

No authorized person is subject to any criminal or civil liability for carrying out a DNR order in good faith if it was carried out in compliance with the standards and procedures set forth in the law.

REQUIREMENT TO CARRY OUT ADVANCE DIRECTIVES

The law does not force doctors or hospitals to carry out the decision in advance directives. If a doctor informs you that he or she has decided not to carry out the request in an advance directive, the next of kin or legal guardian has the right to elect that the patient be transferred to a different doctor or if necessary, a different hospital.

Even if you lose your mental capacity after making an advance directive, the directive will continue to be legally effective. Your decision will not be changed unless someone can prove that you had really changed your mind about the directive. Directives will typically not be affected by the appointment of a guardian unless the court determines in the court order that there is a specific reason to overturn the directive or remove the health care agent.

PENALTIES

There are penalties for

- falsifying or forging advance directives
- forcing someone to make or preventing someone from making an advance directive
- concealing or withholding an executed advance directive
- witnessing an advance directive for health care when you are knowingly not qualified to do so.

The penalties range from misdemeanors to criminal homicide, depending upon the effect on the patient.

OTHER ALTERNATIVES TO GUARDIANSHIP

Frequently, family members feel it is necessary to pursue guardianship over a loved one in order to gain authority to assist them with financial matters or disposal of property. While it is true that guardianship is sometimes necessary to protect one who has lost the capacity to make sound judgments to ensure his/her health, safety and welfare, this should be a last resort as opposed to a first response mechanism. Some other tools are discussed in the remainder of this publication that can provide alternatives to guardianship.

LAST WILL AND TESTAMENT

A will is a person's last legal opportunity to personally direct how his or her property will be disposed and distributed at their time of death. To make a will, you must be at least 14 years old. A person making a will must be of sound mind to understand that he or she is making a will and what that process means.

In Georgia, no prescribed format is necessary to constitute a valid will. The law instructs that the whole document is to be considered to determine the intent of the maker of the will.

Names used to refer to different types of wills include:

- 1) **nuncupative or oral:**
a will made orally by one in the last stages of illness;
- 2) **holographic:**
a will that is completely handwritten by the one making the will; and
- 3) **self-proved:**
this will has an affidavit by two witnesses attesting under oath and in the presence of a notary that the person making the will declares to them that the document is actually his or her will, and that he/she is the one actually signing the will. A self-proved will eliminates the need for the witnesses to testify during the probate process. A self-proving affidavit can be added to an existing will any time before the person who made the will dies.

A will normally requires at least two witnesses in order to be valid and does not currently have to be notarized. Unless the will is self-proved as described above, the witnesses' presence will be required during the will's probate.

It is a common myth that if a person dies without a will “the person’s property goes to the state.” If a person dies without a will, if they leave relatives that can be found, the property that they leave does not go to the state, but instead, the state’s law determines which surviving relatives are entitled to the property.

Therefore, the only danger in dying without a will is that it is possible that relatives that you did not want to share in your estate may be able to receive your property when you die.

Here are some points to keep in mind concerning wills that usually come up as questions:

- There are certain kinds of gifts that cannot be made in a will and there are certain directions or wishes that cannot be carried out by a will. If you are unsure about a gift, direction, or wish, contact the Elderly Legal Assistance Program provider in your area, a private attorney or the State Bar of Georgia.
- Some forms for wills that you buy in stores, get online and from other places may not allow you to accurately convey the wishes that you want to express, and some of them are not in valid form according to Georgia law.
- Wills executed in other states may be valid in Georgia, but it is best to have an attorney review the will first before deciding to make or not to make another will.
- A person can only have one valid will at a time. A later executed will revokes the previous will, if that second will is in valid form.
- You cannot add something to a will by just writing the changes on the will or by crossing out some terms that you no longer want. This may in fact destroy your will. If there is something that you want to change, you can amend the will by adding a "codicil."
- A codicil is a formal document that allows you to add to or remove things out of your will. A codicil must be executed with the same formality as the will and it too can be self-proved.
- You should review your will periodically to make sure that it still says what you want it to say.
- It is not a good idea to leave instructions for your burial in your will. Typically, the will is not looked at until after you are laid to rest and any special requests that you have may be overlooked. There are other documents such as **Details of My Final Arrangements** (available from the Division of Aging Services) that can be used for this purpose.
- A will does not have to be probated unless a court, at someone's request, orders it probated. The law **requires only that a will be filed**. Any person who is in possession of another person's will **must by law file that will with the probate court** in that person's county of residence upon his or her death.
- Without proper planning, certain events may automatically revoke your will, such as:
 - 1) Birth or adoption of a child;
 - 2) Divorce;
 - 3) Marriage.
- Your will has no effect on you, your property or those mentioned in your will if you are still living. You are not restricted from using any property mentioned in your will and there is no legal obligation to make sure that property mentioned in your will still exists upon your death. You do not have to "save" something because you mentioned it in your will if you want to use it now; you have every right to use it because it belongs to you.

- Generally, estates (the name given to everything you own at your death) that are less than a certain amount are excluded from tax. The tax exemption periodically changes in amount. As of 2019, estates valued at less than \$11.4 million were exempt from estate taxes.
- An executor (male) or an executrix (female) is the one who presents your will for probate and makes sure that the wishes expressed in your will are carried out.

LIVING TRUSTS

An agreement that controls how your assets will be distributed after your death without going through the court's probate proceeding is a living trust. The living trust, unlike a will, starts to take effect while you are still alive, and, should you desire, can continue to be effective after you die. All your assets must be transferred to the living trust. Once you transfer assets to the trust, you no longer own them; they are the property of the trust. The trustee is the person who manages the trust and controls the assets. You can be trustee of your own living trust.

There are different kinds of living trusts, such as:

- 1) Standby Trusts - no assets are transferred to the trust until you become disabled; but someone must have the authority to transfer the assets or the trust is empty and worthless;
- 2) Irrevocable Life Insurance Trusts - which plan for your life insurance policy proceeds;
- 3) Supplemental Benefits Trusts or Luxury Trusts - which provide transfer of assets to a person who may receive public benefits so that items not covered by the public benefits may be purchased without affecting the recipient's eligibility for the public benefit;
- 4) Irrevocable Trusts - which once made cannot be changed or canceled;
- 5) Revocable Trusts - which can be amended or canceled after it is made.

Because these documents are so specialized, it is better to have an attorney prepare a living trust for you rather than use a form that you purchase at an office supply store. If you decide to use an office-supply-store form, it is a good idea to allow an attorney who has experience in this area to review the papers to make sure they have been prepared properly.

DURABLE FINANCIAL POWER OF ATTORNEY

Unless a power of attorney states otherwise, it is common for it to be assumed that the person giving the power intends for it to end should they develop a condition, such as mental incapacity, which would permanently keep them from being able to revoke the power of attorney. It is possible to state within a power of attorney document that you do not want the power of attorney to begin until you become incapacitated and/or to require the power of attorney to end once you become incapacitated. The characteristic of a durable power of attorney is that it continues to function even if a person becomes mentally incapacitated. The durable power of attorney should state within its text that it is meant to be durable. In Georgia the Statutory Financial Power of Attorney is durable unless the principal instructs in the document that it should be limited and states the limitation.

A financial power of attorney allows you to voluntarily appoint another person or persons as agent(s) to conduct business transactions for you that you could do yourself if you were not ill, disabled or otherwise unavailable. The power of attorney permits someone else to handle these matters for you. Powers of attorney can be limited to a certain act or acts, or they can extend to every aspect of business that you could do for yourself. A power of attorney ends when the principal dies.

A power of attorney is a formal and important document requiring two competent witnesses,

- one of whom must be a judge of a municipal court, or by a magistrate,
- a notary public, or a clerk or deputy clerk of a superior court or of a city court created by special Act of the General Assembly,
- and who is not also named as an agent in the power of attorney being attested. Powers of attorney may be filed with the superior court to provide notice that the power of attorney exists. Powers of attorney can be revoked at any time prior to mental incapacitation.

Once signed, powers of attorney are effective, and the agent is authorized to act unless something is written into the power of attorney that prevents the agent's authority from taking effect until a certain event happens. The Georgia legislature has authorized a statutory form within the law that can be used as a guide. This form is available upon request from the Division of Aging Services. One may also obtain forms from office supply stores, bookstores, online, some banks and some courts. Otherwise, an attorney can prepare such a document to meet specific needs.

IMPORTANT NOTICE

This information is not intended to be legal advice but education to assist you in becoming aware of important issues that may affect various aspects of your life. For specific legal advice, please consult your own attorney.

If there are questions about this publication, they may be directed to the **State Legal Services Developer** at **404-657-5328** or **1-866-552-4464** or by sending an email to: **natalie.thomas@dhs.ga.gov**

For additional copies of this document, contact the **Georgia Department of Human Services** Division of Aging Services at **404-657-5258** or **1-866-552-4464**, or send a request to:

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