ADVANCE DIRECTIVE INFORMATION

NOTE: This Advance Directive Information and the form Living Will and Durable Power of Attorney for Health Care on the Arkansas Bar Association’s website are being provided to you as a public service and are not the substitute for the advice of an attorney. By providing this information and these forms, neither the Arkansas Bar Association nor its Health Law Section is providing legal advice to you. Consult an attorney if you need legal advice of any nature.

1. What are Advance Directives?

You have the right to make decisions about the care you want at the end of your life. If you are conscious and able to make your own decisions when the time comes, you will be able to decide and whether the doctor should withdraw treatment and when that should happen. It is when you do not have the ability to make or explain your own decisions that you need what is called an Advance Directive. An Advance Directive is a legal document in which you tell your choices for medical treatment or name someone to make medical decisions for you when you cannot. A “Living Will” is a type of Advance Directive. A “Durable Power of Attorney for Health Care” is another type of Advance Directive.

2. What is a Living Will?

A Living Will is a document which tells medical professionals and members of your family to what extent special means should or should not be used to keep your body alive if you are incurably ill or permanently unconscious. It allows you to tell others your health care choices in the event that you are unable to express your wishes.

3. Why Should I Have a Living Will?

A Living Will gives you a voice in decisions about your medical care when you are unconscious or too ill to communicate. As long as you are able to express your own wishes, your advance directive will not be used, and you can accept or refuse any medical treatment. But if you are unable to participate in decisions about your own treatment, a Living Will becomes important to ensure that your personal wishes are respected. Also, by preparing a Living Will, you can relieve those closest to you of the burden and stress of trying to guess what your wishes might be at a very emotional time.

4. When Does A Living Will Become Effective?

Your Living Will will become effective only when you are unable to make or communicate decisions about your care and are terminally ill with no hope of recovery or permanently unconscious.

5. Does A Living Will Mean I am Giving Up or Stopping Care?

No. Making a Living Will does not mean that you will be abandoned by your health care providers. A Living Will affects only measures which are deemed useless. Doctors and nurses will continue attending to your needs, and comfort care will continue.

6. How Do I Make a Living Will?

A Living Will must be in writing, signed by you or another person at your direction, and witnessed by two other adults. A form Living Will prepared by the Health Law Section of the Arkansas Bar Association is available on the Arkansas Bar Association’s website at...
http://www.arkbar.com. You may also ask your attorney or health care provider for a form. It is a good idea to discuss your health care wishes with your loved ones and your physician before signing a Living Will.

7. **What is a Durable Power of Attorney for Health Care?**

By signing a Durable Power of Attorney for Health Care, you can choose another person as your representative to make health care decisions for you if you should become temporarily or permanently unable to make decisions. Your health care representative must make treatment decisions based on your known wishes. A Durable Power of Attorney for Health Care must be in writing, signed by you or another person at your direction, and witnessed by two other adults. A form Durable Power of Attorney for Health Care prepared by the Health Law Section of the Arkansas Bar Association is available on the Arkansas Bar Association’s website at http://www.arkbar.com. You may also ask your attorney or health care provider for a form.

8. **What Do I Do With My Living Will and Durable Power of Attorney for Health Care?**

Keep the original documents in a safe and easily accessible place, and make an extra copy for yourself in case the original is lost or accidentally destroyed. It is important that your doctor and family members know about your Living Will and have a copy of it. Take your Living Will and Durable Power of Attorney for Health Care with you if you are admitted to the hospital.

9. **What If I Change My Mind?**

Your Living Will and/or Durable Power of Attorney for Health Care can be revoked at any time by telling your doctor and family members that your wishes have changed. You should tear up and throw away all copies of the document you have revoked.

10. **What if I Choose Not To Have a Living Will and Have Not Signed A Durable Power Of Attorney For Health Care?**

If you do not have a Living Will or a Durable Power of Attorney for Health Care, then decisions about your care may be made by a “surrogate decision-maker,” such as certain relatives, a person appointed by a court, or a court itself. The surrogate decision-maker must make decisions based on what you would have wanted if you were able to express your decisions, but if you have not made your wishes known, then the surrogate decision-maker, together with your physician, will make treatment decisions for you based upon their opinions as to your best interest.

You are strongly encouraged to discuss your advanced directive options and decisions with your physician and family.
Living Will
And
Durable Power of Attorney for Health Care

Provided as a public service by
the Health Law Section of the Arkansas Bar Association

Please read the Advance Directive Information available on the Arkansas Bar Association’s website at http://www.arkbar.com/ carefully before completing these forms.

NOTE: The form Living Will and Durable Power of Attorney for Health Care are being provided to you as a public service. The attached forms are provided “as is” and are not the substitute for the advice of an attorney. By providing these forms and the Advance Directive Information, neither the Arkansas Bar Association nor its Health Law Section is providing legal advice to you. Consult an attorney if you need legal advice of any nature.
DECLARATION OF LIVING WILL
OF

[Name of Declarant]

If I should have an incurable or irreversible condition with no hope of recovery that will cause my death within a relatively short time, and I am no longer able to make decisions regarding my medical treatment, I direct my attending physician, pursuant to the Common Law and the Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary to my comfort or to alleviate pain.

Additionally, if I should become permanently unconscious, I direct my attending physician, pursuant to the Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, to withhold or withdraw life-sustaining treatments that are no longer necessary to my comfort or to alleviate pain.

Section 1: Life-Sustaining Treatments

The life-sustaining treatments which may be withheld or withdrawn are (check all that apply):

- [ ] Cardiopulmonary Resuscitation.
- [ ] Mechanical Breathing.
- [ ] Major Surgery.
- [ ] Kidney Dialysis.
- [ ] Chemotherapy.
- [ ] Minor Surgery (unless necessary for my comfort or to alleviate pain).
- [ ] Invasive Diagnostic Tests.
- [ ] Antibiotics.
- [ ] Blood Products.
- [ ] Other Medications not Necessary for Alleviation of Pain.

Add other medical directives, if any
___________________________________________________________________________________
___________________________________________________________________________________
___________________________________________________________________________________
___________________________________________________________________________________
___________________________________________________________________________________
___________________________________________________________________________________
___________________________________________________________________________________

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Section 2: Artificial Nutrition and Hydration

I understand that Arkansas law requires me to make my wishes regarding artificial nutrition and hydration known separately from the above directions. Therefore, by initializing the appropriate line(s) below, I specifically:

_______ DIRECT that artificial nutrition may be withheld or withdrawn after consultation with my attending physician.

_______ DIRECT that artificial hydration may be withheld or withdrawn after consultation with my attending physician.

SIGNED this __________ day of ______________________________, 20____.

________________________________________
Signature

We, the undersigned, do hereby certify that the Declarant, _____________________________________________ subscribed this Declaration of Living Will in our presence, and we, at his or her request, in his or her presence, and in the presence of each other, signed as attesting witnesses, and we do further certify that the Declarant appeared to be eighteen years of age or older, of sound mind, and acting without undue influence, fraud or restraint and that his or her signature was voluntary.

________________________   ________________
Witness       Witness

________________________   ________________
Address       Address

________________________   ________________
City, State and Zip Code  City, State and Zip Code
Pursuant to the Arkansas Durable Power of Attorney for Health Care Act (Ark. Code Ann. § 20-13-104) (the “Act”), I hereby designate and appoint ____________________ as my agent, or attorney in fact, to make decisions regarding my health care during periods when my health care provider has determined that I lack capacity to decide for myself. Specifically, and not to limit any other rights prescribed under the Act, my attorney-in-fact shall have the power to have access to my medical records for treatment or payment decisions; to disclose medical records to others for purposes of treatment, payment, or health care operations; to employ and discharge physicians; to consent to or refuse to consent to medical procedures, including the withholding or withdrawal of life-sustaining treatment, and nutrition and hydration, according to my wishes expressed in my Living Will, or, if my wishes are unclear under the then existing circumstances of my medical condition, then upon consideration of my best interests as determined by my physician in consultation with my agent; to admit me to hospitals, including psychiatric hospitals, nursing homes, or hospice care; and to sign all appropriate forms, consents and releases in connection with any of said matters.

If ______________________ resigns, or is not able or available to make health care decisions for me, or if an agent named by me is divorced from me or is my spouse and legally separated from me, I appoint ____________________ as successor, with all of the rights and powers and authority herein stated. The term “health care” shall have the meaning set forth in Ark. Code Ann. § 20-13-104(c). This Durable Power of Attorney for Health Care shall not be affected by my subsequent disability or incapacity.

SIGNED this _____________ day of ______________________________, 20____.

________________________________________
Signature

We, the undersigned, do hereby certify that the Declarant, ________________________ subscribed this Durable Power of Attorney for Health Care in our presence, and we, at his or her request, in his or her presence, and in the presence of each other, signed as attesting witnesses, and we do further certify that the Declarant appeared to be eighteen years of age or older, of sound mind, and acting without undue influence, fraud or restraint and that his or her signature was voluntary.

Witness
Address
City, State and Zip Code

Witness
Address
City, State and Zip Code
Other Legal Oversight - Use this category for any other program in your state whereby someone other than the resident participates in or makes decisions about the resident’s health care and treatment.

Durable Power of Attorney/Health Care - Documentation that someone other than the resident is legally responsible for health care decisions if the resident becomes unable to make decisions. This document may also provide guidelines for the agent or proxy decision-maker, and may include instructions concerning the resident’s wishes for care. Unlike a guardianship, durable power of attorney/health care proxy terms can be revoked by the resident at any time.

Durable Power of Attorney/Financial - Documentation that someone other than the resident is legally responsible for financial decisions if the resident becomes unable to make decisions.

Family Member Responsible - Includes immediate family or significant other(s) as designated by the resident. Responsibility for decision-making may be shared by both resident and family.

Resident Responsible for Self - Resident retains responsibility for decisions. In the absence of guardianship or legal documents indicating that decision-making has been delegated to others, always assume that the resident is the responsible party.

g. **NONE OF ABOVE**

**Process:** Legal oversight such as guardianship, durable power of attorney, and living wills are generally governed by State law. The descriptions provided here are for general information only. Refer to the law in your state and to the facility’s legal counsel, as appropriate, for additional clarification.

Consult the resident and the resident’s family. Review records. Where the legal oversight or guardianship is court ordered, a copy of the legal document must be included in the resident’s record in order for the item to be checked on the MDS form.

**Coding:** Check all that apply.

**A10. Advanced Directives**

**Intent:** To record the legal existence of directives regarding treatment options for the resident, whether made by the resident or a legal proxy. Documentation must be available in the record for a directive to be considered current and binding. The absence of pre-existing directives for the resident should prompt discussion by clinical staff with the resident and family regarding the resident’s wishes. Any
discrepancies between the resident’s current stated wishes and what is said in legal documents in the resident’s file should be resolved immediately.

**Definition:** a. **Living Will** - A document specifying the resident’s preferences regarding measures used to prolong life when there is a terminal prognosis.

**Do Not Resuscitate** - In the event of respiratory or cardiac failure, the resident, family or legal guardian has directed that no cardiopulmonary resuscitation (CPR) or other life-saving methods will be used to attempt to restore the resident’s respiratory or circulatory function.

**Do Not Hospitalize** - A document specifying that the resident is not to be hospitalized even after developing a medical condition that usually requires hospitalization.

**Organ Donation** - Instructions indicating that the resident wishes to make organs available for transplantation, research, or medical education upon death.

**Autopsy Request** - Document indicating that the resident, family or legal guardian has requested that an autopsy be performed upon death. The family or responsible party must still be contacted upon the resident’s death and re-asked if they want an autopsy to be performed.

**Feeding Restrictions** - The resident or responsible party (family or legal guardian) does not wish the resident to be fed by artificial means (e.g., tube, intravenous nutrition) if unable to be nourished by oral means.

**Medication Restrictions** - The resident or responsible party (family or legal guardian) does not wish the resident to receive life-sustaining medications (e.g., antibiotics, chemotherapy). These restrictions may not be appropriate, however, when such medications could be used to ensure the resident’s comfort. In these cases, the directive should be reviewed with the responsible party.

**Other Treatment Restrictions** - The resident or responsible party (family or legal guardian) does not wish the resident to receive certain medical treatments. Examples include, but are not limited to, blood transfusion, tracheotomy, respiratory intubation, and restraints. Such restrictions may not be appropriate to treatments given for palliative reasons (e.g., reducing pain or distressing physical symptoms such as nausea or vomiting). In these cases, the directive should be reviewed with the responsible party.

**NONE OF ABOVE**
Process: You will need to familiarize yourself with the legal status of each type of directive in your state. In some states only a health care proxy is formally recognized; other jurisdictions allow for the formulation of living wills and the appointment of individuals with durable power of attorney for health care decisions. Facilities should develop a policy regarding documents drawn in other states, respecting them as important expressions of the resident’s wishes until their legal status is determined.

Review the resident’s record for documentation of the resident’s advance directives. Documentation must be available in the record for a directive to be considered current and binding.

Some residents at the time of admission may be unable to participate in decision-making. Staff should make a reasonable attempt to determine whether or not the new resident has ever created an advance directive (e.g., ask family members, check with the primary physician). Lacking any directive, treatment decisions will likely be made in concert with the resident’s closest family members or, in their absence or in case of conflict, through legal guardianship proceedings.

Coding: The following comments provide further guidance on how to code these directives. You will also need to consider State law, legal interpretations, and facility policy.

- The resident (or proxy) should always be involved in the discussion to ensure informed decision-making. If the resident’s preference is known and the attending physician is aware of the preference, but the preference is not recorded in the record, check the MDS item only after the preference has been documented.
- If the resident’s preference is in areas that require supporting orders by the attending physician (e.g., do not resuscitate, do not hospitalize, feeding restrictions, other treatment restrictions), check the MDS item only if the document has been recorded or after the physician provides the necessary order. Where a physician’s current order is recorded, but resident’s or proxy’s preference is not indicated, discuss with the resident’s physician and check the MDS item only after documentation confirming that the resident’s or proxy’s wishes have been entered into the record.
- If your facility has a standard protocol for withholding particular treatments from all residents (e.g., no facility staff member may resuscitate or perform CPR on any resident; facility does not use feeding tubes), check the MDS item only if the advanced directive is the individual preference of the resident (or legal proxy), regardless of the facility’s policy or protocol.

Check all that apply. If none of the directives are verified by documentation in the medical records, check NONE OF ABOVE.
42 CFR 483.10 requires facilities to protect and promote the rights of each resident, including the right to “formulate an advanced directive.” There is no regulatory text specifying a location for advanced directive information. Unless there are State codes or regulations regarding this matter, the method of communicating the information is up to the facility. If documentation is not available in the resident’s clinical record, facility staff should be the source of this information, and surveyors will assess whether or not the staff knowledge and actions are in agreement with resident/family wishes. Some facilities elect to maintain the information in the resident’s clinical record and may even verify the advanced directive was properly prepared, i.e., not witnessed by someone who will benefit from the resident’s death. Make sure you are well aware of your facility’s policies.