ADVANCE DIRECTIVES

Both chapter 154 and chapter 155, Wis. Stats., allow a person 18 years of age or older the right to formulate advance directives for health care while s/he is of sound mind. An individual cannot autonomously formulate advance directives, under state statutes, if s/he is not of sound mind or did not formulate the advance directives while of sound mind.

Living wills executed under the statute allow a competent adult to authorize the withholding or withdrawal of life-sustaining procedures and non-oral nutrition and hydration (feeding tubes) when he or she has a terminal condition or is in a persistent vegetative state, unless the attending physician advises that this will cause pain or reduce the individual's comfort. The statute also allows oral nutrition and hydration to be withheld if the attending physician advises that administration of food or fluid is medically contraindicated.

Two physicians who have examined the individual (one of whom must be the attending physician) must certify in writing that an individual has a terminal illness and is near imminent death or in a persistent vegetative state.

Living wills executed under the statute do not allow an individual to authorize the withholding or withdrawal of non-oral nutrition or hydration (tube feedings), if such actions, in the judgement of the attending physician, will cause pain or reduce the individual's comfort level. Nor do they allow an individual to authorize the withholding or oral food and fluid unless the attending physician advises that administration is medically contraindicated.

Each person who voluntarily makes a living will must sign and date the living will in the presence of two witnesses who:

- are not related to the individual by blood or marriage;
- are not entitled to any portion of the estate of the individual under any will which s/he has drafted;
- have no claim against any part of the individual's estate at the time the living will is executed;
- are not, at the time the living will is executed, the attending physician, employees of the attending physician, the attending nurse, members of the attending medical staff, or employees of a hospital, nursing home, or community-based residential facility who are health care providers involved in the medical care of the individual. (Health care providers are defined as a licensed nurse, chiropractor, dentist, physician, podiatrist, physical therapist, occupational therapist, occupational therapy assistance, respiratory care practitioner, optometrist, acupuncturist, or psychologist, or a partnership or corporation of the above.) For living wills executed under the statute, no employe of an inpatient health care facility can be a witness to the signing of a living will.

If an individual is physically unable to sign his or her living will, the living will can be signed in the individual's name, at the express direction of the individual and in his or her presence, by a witness or another person appointed by the individual making the living will.

No physician, inpatient health care facility or health care professional acting under the direction of a physician can be held criminally or civilly liable, or charged with unprofessional conduct, for:

- carrying out an individual's directive to withhold or withdraw life-sustaining procedures *or tube feedings*;
- failing to act upon a revocation unless the person or facility had actual knowledge of the revocation; or
- failing to comply with a living will.

Effective with living wills executed under the revised 1991 statute, a qualified witness acting in good faith cannot be held criminally or civilly liable for participating in the withholding or withdrawal of life-sustaining procedures or tube feedings.

A physician who fails to comply with a living will of a patient may be charged with unprofessional conduct if s/he is aware of the living will, refuses to honor it, and fails to make a good faith attempt to transfer the patient to another physician who will comply with the living will.

Persons who willfully conceal, cancel, deface, obliterate or damage the living will of another without the individual's consent may be fined not more than $500 or imprisoned not more than 30 days or both. Persons who willfully conceal knowledge or evidence that a living will has been revoked or who illegally falsify or forge a living will, with the intent of causing life-sustaining procedures *or tube feedings* to be withheld or withdrawn contrary to the individual's wishes, may be fined not more than $10,000 or imprisoned not more than ten years, or both. (s. 154.15, Stats.)

The provisions in chapter 155, Stats. [Power of Attorney for Health Care], allow any person 18 years of age or older and of sound mind (referred to, in the statute, as a "principal") the right to designate an individual and/or a second individual (the "health care agent(s)") with power of attorney for health care. This gives the health care agent authority to accept, maintain, discontinue or refuse certain health care options if the individual is found to have an incapacity. Incapacity is evidenced by an unwillingness or inability to make health care decisions because the individual is unable to receive and evaluate information effectively or is unable to communicate decisions. The finding of incapacity must be made by two physicians, or one physician and one psychologist, who:

- personally examine the individual,
- sign, in writing, a statement specifying that the individual has an incapacity; and
- append this statement to the power of attorney health care form.

The certifying physicians cannot be related to the individual nor be an heir of the individual's estate.

The decisions of the health care agent have priority over those of all other individuals, except those of an individual (principal) who has not been certified as having an incapacity and those of a guardian appointed by the Court, unless the Court declares that the power of attorney for health care remains in effect.

Are there limits to the decisions a health care agent can make?

The health care agent is required to act in good faith consistent with the desires of the individual as expressed in the health care instrument or as otherwise specifically directed by the individual to the health care agent at any time. However, according to s. 155.20, Stats., the health care agent may not:

- Make any health care decisions for an individual who is pregnant if she has not extended authorization to cover periods of pregnancy in the power of attorney health care instrument.

- Authorize experimental mental health research, psychosurgery, electroconvulsive treatment or other drastic mental health treatment procedures;

- Consent to the withholding or withdrawing of orally ingested nutrition or hydration unless provision of such is medically contraindicated;

- Consent to the withholding or withdrawing of non-orally ingested hydration or nutrition unless authority for this is specifically granted in the health care instrument and the attending physician, in his or her professional judgement, advises that the withholding or withdrawal will not cause the individual pain or reduced comfort. Note: Even if a person authorizes the withholding or withdrawal of hydration or nutrition and the physician has advised that this will not cause pain or discomfort, hydration or nutrition cannot be withheld if the individual executed a power of attorney for health care *prior to December 11, 1991* and has a valid living will executed under *earlier versions* of chapter 154. A living will executed under *earlier versions* of chapter 154 does not allow any form of hydration or nutrition to be withheld and takes precedence of the instructions authorized in a power of attorney for health care instrument *that was executed prior to December 11, 1991.* (s. 155.70(3), 1989 Stats.) See page 6.

- Consent to inpatient admission of the individual to any of the following:

  - an institution for mental diseases, as defined by statute;

  - an intermediate care facility for the mentally retarded, as defined by statute;

  - a treatment facility, as defined by statute;

  - a nursing home, as defined by statute, unless one of the following applies: (1) the admission occurs directly from a non-psychiatric hospital and is for

recuperative care for a period not to exceed three months; (2) the individual lives with the health care agent and admission is temporary (not exceeding 30 days) in order to provide the health care agent a vacation or a release for a family emergency; (3) authority for admission is specifically granted in the health care instrument and the principal is not diagnosed as being developmentally disabled or as having a mental illness at the time of the proposed admission.

- a community-based residential facility, unless the exceptions noted for nursing home admission apply.

Persons 18 years of age or older and of sound mind who voluntarily wish to designate a power of attorney for health care must sign and date the power of attorney for health care document in the present of two witnesses who:

- are 18 years of age or older;
- are unrelated to the individual by blood, marriage, or adoption;
- are not, to the best of their knowledge, entitled to or have claim to any portion of the individual's estate;
- are not health care providers (licensed nurse, chiropractor, dentist, physician, podiatrist, physical therapist, occupational therapist, occupational therapy assistant, optometrist, psychologist, a person practicing Christian Science treatment, a partnership or corporation of the above that provides health care services, a home health agency, or a cooperative sickness care plan that provides services through salaried employees in its own facility) serving the individual at the time power of attorney authority is granted;
- are not directly financially responsible for the individual's health care; and
- are not the designated health care agent.

If an individual who is appointing a power of attorney for health care is unable to sign the form, the power of attorney for health care form may be signed and dated, at the express direction and in the presence of the individual, by a person who is at least 18 years old.

What takes precedence, a living will or a power of attorney for health care?

This applies to persons with both a living will and a power of attorney for health care.

In some cases, a living will takes precedence over conflicting provisions in a power of attorney for health care instrument and, in other cases, a power of attorney for health care instrument takes precedence over conflicting provisions in a living will, depending upon when the documents were executed.

- *A power of attorney for health care instrument executed after December 11, 1991, supersedes conflicting provisions of a living will no matter when the living will was executed.*

- *A living will executed under earlier versions of chapter 154 supersedes conflicting provisions of a power of attorney for health care instrument executed prior to December 11, 1991.*

- *If a person has a living will executed under the revised 1991 statute and a power of attorney for health care instrument executed prior to December 11, 1991, it is not clear from the statutes which would take precedence if conflicts arose between the two. We have brought this to the attention of the Legislative Reference Bureau which helped draft the revisions to the statutes. To minimize possible confusion of one's intentions, persons falling into this category may wish to execute a new power of attorney for health care instrument or revoke one of the documents.*

Uniform Durable Power of Attorney

The Uniform Durable Power of Attorney (UDPOA), as originally enacted, had an effective date of May 1, 1982. It may be a valid means to have designated a health care agent if it was executed prior to April 28, 1990 (the effective date of ch. 155, Stats.) and meets the provisions noted below. A UDPOA executed after April 28, 1990 is not a valid way to designate a health care agent *unless that portion of the instrument conforms to the requirements in s. 155.30(2), Stats. One way a UDPOA may conform to s. 155.30(2), Stats., is to contain the statement; "I am a lawyer authorized to practice law in Wisconsin. I have advised my client concerning his or her rights in connection with this power of attorney for health care and applicable law.".*

A UDPOA executed prior to April 28, 1990 still is valid if it specifically designates an agent to perform in the event of an individual's incapacity and if it contains words similar to "this power of attorney shall not be affected by subsequent disability or incapacity of the principal". No other formulation requirements existed to delegate health care decisions.

The Uniform Durable Power of Attorney was used primarily to designate an individual (called an "attorney-in-fact" in the statute) to carry out personal or business financial transactions in the event of an individual's incapacity. It was used less frequently to designate a health care agent.

A properly completed uniform durable power of attorney form authorizes the attorney-in-fact/health care agent to accept, maintain, discontinue or refuse health care options if the individual (the principal) becomes unable to do so. However, the attorney-in-fact cannot place a declarant in a nursing home.