

# **DISABILITY PLANNING**

March 19, 2013

## **INTRODUCTION**

Why is disability planning important? Disability can happen suddenly and without warning. You should sign an appointment of health care representative, Hipaa release, and financial power of attorney while you are healthy and competent. You can decide who will have authority over your health care decisions, finances and property.

This article is written to provide you with general educational information. This article is not a substitute for legal advice concerning your particular situation and your estate and disability plan.

## **LIVING WILL**

Indiana law allows you to sign a living will that complies with the Indiana Statute. See Appendix 1.

A Federal law called the Patient Self-Determination Act requires that hospitals and nursing homes ask their patient if they have a living will at the time of admission, and if so, then they must make the patient's living will a part of the patient's medical record. This is one reason why many folks believe that living wills are an important document.

A living will becomes effective only if your attending physician certifies in writing that you have an incurable injury, disease, or illness, that your death will occur within a short period of time, and that the use of life prolonging procedures would serve only to artificially prolong the dying process. After your attending physician makes the required certifications, the living will requires that your life not be artificially prolonged, except for procedures or medication necessary to provide you with comfort care or to alleviate pain.

Living wills signed on or after July 1, 1994 allow you to choose (after your attending physician makes the required written certifications) whether or not you want to be given artificially supplied nutrition and hydration under certain circumstances or you can elect to leave those decisions up to your health care representative. Living wills signed before July 1, 1994, require artificially supplied nutrition and hydration.

Although Indiana law requires certain provisions in a living will, these provisions may include additional specific directions. Standard living will forms do not have provisions that require the consent of your health care representative, but leave the decision of whether you are to receive life prolonging treatment to your attending physician. Most of our clients who decide to sign living wills want the consent of their health care representative incorporated into their living wills, because they don't want the life and death decision left solely to the written certification of their attending physician.

We have come to the conclusion that living wills should not be relied upon. Most physicians do not certify the three (3) circumstances in writing that are required to make a living will effective. Also, some physicians and health care professionals do not understand living wills. Some health care professionals may consider living wills to be “no treatment documents” even without an attending physician’s required written certifications. As a consequence, we recommend that most of our clients not sign a living will.

In Indiana, one can empower their health care representative to withhold or withdraw health care even if it leads to death. For most people, it makes more sense to leave life and death decision-making to your health care representative instead of leaving it up to a written certification of your attending physician.

### **APPOINTMENT OF HEALTH CARE REPRESENTATIVE**

If you become incapable of consenting to health care and if you have not appointed a health care representative, then Indiana law allows the following persons to consent to your health care: your spouse, your parent, any of your adult children, and any of your adult siblings. The Indiana statute does not set out any priority among these persons, meaning that any of them can authorize your health

care even though the others object. This can cause huge problems for your health care providers!

Indiana law also allows you to decide who has the authority to make your health care decisions by appointing your health care representative. Even though you appoint someone as your health care representative you will still be in control of all of your own health care decisions as long as you are able to make your health care decisions. However, after your attending physician determines that you are no longer capable of consenting to your health care, then your health care decisions can be made by the person or persons who you have appointed as your health care representative.

Your health care representative could be your spouse, child, family member, or friend. You should choose someone who you think would make health care decisions consistent with how you would want them to be made. You can designate your first, second, and third choices.

Your health care representative can be given the power to do the following:

1. Have access to your medical records,
2. Disclose your medical information to others,
3. Hire and discharge your doctors and health care providers,
4. Consent or refuse to consent to medical care and to delegate this authority to anyone else,
5. Consent or refuse to consent to psychiatric care and to voluntarily commit you to a psychiatric care facility,
6. Provide you with appropriate relief from pain,
7. Arrange for your care in a hospital, nursing home, assisted living facility, or hospice,
8. Make anatomical gifts on your behalf,
9. Request an autopsy of your remains, and
10. Determine the disposition of your body after your death, including authorizing cremation.

Your health care representative can also be authorized to make decisions concerning withdrawal or withholding of health care even if your death may

result; however, certain language be included in your appointment that conforms with the requirements of Indiana law.

It is important to communicate your preferences about life and death decision-making to those persons who are appointed as your health care representative. One example of such communication is attached as Appendix 2.

You should sign your appointment of health care representative while you are in good health. When you are in need of having a health care representative you may not have sufficient mental capacity to legally appoint one. Your failure to appoint a health care representative could also result in the necessity of a guardianship or protective proceeding through a court.

You should make sure your health care representative has your signed and notarized appointment.

### **HIPAA RELEASE AUTHORITY**

The Health Insurance Portability and Accountability Act (Hippa) became effective in 2003. This law makes it unlawful for your doctor or health care provider to make certain disclosures or releases of your health care information or records. You should sign a Hippa release that will authorize your doctors and health care providers to disclose and release your health care information to those persons who you appoint to act as your health care representative.

### **OUT OF HOSPITAL DO NOT RESUSCITATE DECLARATION AND ORDER**

There is a lot of confusion about out of hospital do not resuscitate declarations and orders ("DNR order"). In order for a DNR to be valid, the language must conform to the requirements of Indiana law, and it must be signed by the attending physician. The proper form for a DNR order is attached as Appendix 3.

## **FINANCIAL POWER OF ATTORNEY**

A power of attorney is a document giving someone the power to act on your behalf. This person is called an attorney-in-fact. A general power of attorney can give your attorney-in-fact the power to do almost anything with your property, and a limited power of attorney gives authority for only certain transactions such as selling a house.

Your power of attorney can be durable which means that it can remain in effect even though you later become incompetent.

You should never give a power of attorney to someone who is not absolutely and completely trustworthy.

A power of attorney can be immediately effective, or it can become effective after your doctor gives an opinion that you are unable to manage your financial affairs. If your attorney-in-fact is completely trustworthy, then you may want to sign a power of attorney that is immediately effective. Immediately effective powers of attorney are easier to use, because the attorney-in-fact does not have to obtain a written opinion from your doctor before the attorney-in-fact can act on your behalf.

If you become incompetent and unable to manage your financial affairs and if you have not signed a power of attorney, then it may be necessary for someone to hire an attorney and file a petition with a court to have a guardian appointed for you. The guardian would have the legal authority to manage your personal finances and property under the supervision of a court. The guardian may be required to purchase a bond that can be costly. An inventory and appraisal of all your property must be filed with the court. Guardians must obtain court approval for a number of matters, including the sale of property and periodic accountings. Guardianships can be cumbersome, costly, and time-consuming. A guardianship can usually be avoided by signing a power of attorney while you are in good health.

The provisions in the power of attorney could include authority to perform certain transactions with your property that could help you qualify for Medicaid or other governmental benefits. It is best to have an attorney prepare your power of attorney so that your power of attorney is prepared according to your wishes.

**Appendix 1**

**LIVING WILL DECLARATION**

Declaration made this 19th day of March, 2013, I, James K. Voelz , being at least eighteen (18) years old and of sound mind, willfully and voluntarily make known my desires that my dying shall not be artificially prolonged under the circumstances set forth below, and I declare:

If at any time my attending physician certifies in writing that: (1) I have an incurable injury, disease, or illness; (2) my death will occur within a short time; (3) the use of life-prolonging procedures would serve only to artificially prolong the dying process; then I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the performance or provision of any medical procedure or medication necessary to provide me with comfort care or to alleviate pain, and, if I have so indicated below, the provision of artificially supplied nutrition and hydration.

(Indicate your choice by initialing or making your mark before signing this declaration):

\_\_\_\_\_ I wish to receive artificially supplied nutrition and hydration, even if the effort to sustain life is futile or excessively burdensome to me.

\_\_\_\_\_ I do not wish to receive artificially supplied nutrition and hydration, if the effort to sustain life is futile or excessively burdensome to me.

\_\_\_\_\_ I intentionally make no decision concerning artificially supplied nutrition and hydration, leaving the decision to my representative appointed under IC 16-36-1-7 or my attorney in fact with powers under IC 30-5-5.

In the absence of my ability to give directions regarding the use of life-prolonging procedures, it is my intention that this declaration be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences of the refusal.

I understand the full import of this declaration.

Signed: \_\_\_\_\_  
James K. Voelz

\_\_\_\_\_  
Columbus, Bartholomew County, Indiana

The declarant has been personally known to me, and I believe him to be of sound mind. I did not sign the declarant's signature above for or at the direction of the declarant. I am not a parent, spouse, or child of the declarant. I am not entitled to any part of the declarant's estate or directly financially responsible for the declarant's medical care. I am competent and at least eighteen (18) years of age.

Witness: \_\_\_\_\_  
Mary T. Doe

Date: \_\_\_\_\_

Witness: \_\_\_\_\_  
John E. Smith

Date: \_\_\_\_\_



## Appendix 2

### GUIDE FOR MAKING MY HEALTH CARE DECISIONS

Please consider the following as a guide, if you, as my health care representative, are to make my health care decisions:

I wish to continue enjoying life with a quality of life if possible. If, in the sole opinion of my health care representative, certain medical treatment gives me a chance to return to a quality of life or to improve my quality of life, then I desire to have that treatment. There are numerous examples where people have had their life artificially prolonged through the use of a ventilator, artificially supplied nutrition and hydration, and other means, and some of those people have recovered and gotten better to enjoy a quality of life.

On the other hand, if, in the sole opinion of my health care representative, I am suffering from an incurable or irreversible condition, including but not limited to brain death, irreversible coma, or advanced Alzheimer's disease, and if I have no chance to return to a quality of life, in the sole opinion of my health care representative, then I would not want my health care representative to make decisions that would prolong my life, but I would want my health care representative to make decisions that would provide me with comfort care.

If I become unable to consent to my own health care, then my health care representative has the legal right to require that my representative's health care decisions for me be followed even if those decisions involve no further treatment or removing me from life sustaining procedures so that my life is not artificially prolonged.

If I am unable to consent to my own health care, then I request that my health care representative take a very active role in making my health care decisions and have frequent meetings and communications with my attending physician and any health care professionals who are caring for me.

Date: \_\_\_\_\_

Signature: \_\_\_\_\_

**Appendix 3**

**OUT OF HOSPITAL DO NOT RESUSCITATE  
DECLARATION AND ORDER**

This declaration and order is effective on the date of execution and remains in effect until the death of the declarant or revocation.

**OUT OF HOSPITAL DO NOT RESUSCITATE DECLARATION**

Declaration made this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ . I, \_\_\_\_\_, being of sound mind and at least eighteen (18) years of age, willfully and voluntarily make known my desires that my dying shall not be artificially prolonged under the circumstances set forth below. I declare:

My attending physician has certified that I am a qualified person, meaning that I have a terminal condition or a medical condition such that, if I suffer cardiac or pulmonary failure, resuscitation would be unsuccessful or within a short period I would experience repeated cardiac or pulmonary failure resulting in death.

I direct that, if I experience cardiac or pulmonary failure in a location other than an acute care hospital, cardiopulmonary resuscitation procedures be withheld or withdrawn and that I be permitted to die naturally. My medical care may include any medical procedure necessary to provide me with comfort care to alleviate pain.

I understand that I may revoke that out of hospital DNR declaration at any time by a signed and dated writing, by destroying or canceling this document, or by communicating to health care providers at the scene the desire to revoke this declaration.

I understand the full import of this declaration.

Signed \_\_\_\_\_  
Printed name \_\_\_\_\_

City and State of Residence \_\_\_\_\_

The declarant is personally know to me, and I believe the declarant to be of sound mind. I did not sign the declarant's signature above, for, or at the direction of, the declarant. I am not a parent, spouse, or child of the declarant. I am not entitled to any part of the declarant's estate or directly financially responsible for the declarant's medical care. I am competent and at least eighteen (18) years of age.

Witness \_\_\_\_\_

Printed name \_\_\_\_\_

Date \_\_\_\_\_

Witness \_\_\_\_\_

Printed name \_\_\_\_\_

Date \_\_\_\_\_

**OUT OF HOSPITAL DO NOT RESUSCITATE ORDER**

I, \_\_\_\_\_, the attending physician of \_\_\_\_\_, have certified the declarant as a qualified person to make an out of hospital DNR declaration, and I order health care providers having actual notice of this out of hospital DNR declaration and order not to initiate or continue cardiopulmonary resuscitation procedures on behalf of the declarant, unless the out of hospital DNR declaration is revoked.

Signed \_\_\_\_\_ Date \_\_\_\_\_

Printed name \_\_\_\_\_

Medical license number \_\_\_\_\_