

Advance Directives: An Overview and Update

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In 1990, the United States Supreme Court decided *Cruzan v. Director of Missouri Health Department* and held that a person has a constitutional right to make a determination to accept or reject medical treatment. Also that year, a federal law was passed requiring licensed health care entities to inform patients about their rights under state law to execute documents containing written instructions for their health care and treatment when they were no longer competent to make such decisions regarding their medical treatment. Entities are also required to ask all patients whether or not they have advance directives; and if not, the entity must provide them with opportunities to execute the documents.

In all states a copy of any advance directive that a patient produces upon admission or executes while in the facility is filed in the patient's medical chart. The admitting physician also writes a progress note indicating that the documents are contained in the record and noting any specific requests the patient may have expressed in them. Currently, all 50 states and the District of Columbia have laws setting forth the processes whereby competent adults may make decisions regarding health care they will receive when they are about to die and/or are in a chronic vegetative state. The specifics regarding advance directive documents and procedures vary from state to state, but the basic right of patients to determine what types of life-prolonging health care they will receive in the future remains the same.

Kentucky

The Kentucky Living Will Directive Act permits patients to make advanced health care directives and to name surrogates to make medical decisions should the patients become incapacitated and unable to do so. Again, the basic concept in the Act is a patient's right to have life-prolonging medical treatment withheld or withdrawn. Individuals authorized to make healthcare decisions on behalf of the patients who lack decisional capacity are listed in the same priority order in both states. Kentucky statutes specifically permit advance directives to address withholding and withdrawing artificial nutrition and hydration. The Kentucky Supreme Court, in a 1993 decision, specifically recognized that even without written directives, surrogates could act on behalf of those about to die or in a chronic vegetative state. Surrogates could make healthcare choices; including withholding or withdrawing artificial nutrition and hydration, if there was clear and convincing evidence that the patient, when competent, had indicated his/her wishes not to be given life-prolonging treatment.

This brief overview of law as it relates to advance directives in Kentucky is by no means exhaustive. The laws regarding healthcare directives vary slightly from state to state, as do the laws relative to physicians rendering care and treatment to incompetent patients without written instructions prepared when the patient had decisional capacity. Efforts to standardize this area of the law have been unsuccessful. Statutes pertaining to advance directives comprise a relatively new area of law, and states seem to change them with some frequency. The failure of the patient to express his/her wishes in writing often makes it

difficult for a physician to know how to proceed. Making decisions to withdraw or withhold life-sustaining treatment from patients who are about to die or are in a coma from which they are not likely to awaken often turn on fact-specific circumstances. As treating physicians, you are encouraged to contact the administrators at the healthcare facility in which the patient is being treated and/or seek guidance from an SVMIC claims attorney when issues regarding advance directives arise.