# SUMMARY/COMPARISON OF ADVANCE DIRECTIVES AND SURROGATE HEALTH CARE DECISION MAKING PROCESSES FOR COLORADO (as of 7/2016)

**Prepared by Jennifer Ballentine, MA, co-chair, Colorado Advance Directives Consortium**

## GENERAL RULES OF ADVANCE DIRECTIVES AND SURROGATE DECISION MAKING

1) Adult (18+) Principal/Declarant (person executing the advance directive for him or herself) is considered competent (having decisional capacity) unless judged by physician or Court otherwise.
2) Capacity is a legal determination made by a Judge or a clinical determination made by a doctor. Both refer to the ability of a person to understand information, weigh risks and benefits, consider consequences, make *and communicate* decisions. The term competence is often used interchangeably with capacity.
3) Capacity is decision-specific; the same individual may have capacity (be competent) to make certain decisions and not others.
4) Principals and Wards (persons subject to Guardianship—see below) must always be consulted on healthcare decisions and appointment of surrogates; objections must be taken into careful consideration and honored if deemed competent.
5) Surrogate decision makers (authorized persons making decisions on behalf of a Principal or Ward) must always act first in accordance with known wishes of Principal/Ward and second according to Principal/Ward's best interests—not on wishes of surrogate decision maker.

| | What It Does | What Else It Does | What It Doesn't Do | Who Can/Must Sign | When It Takes Effect | When It Expires | Who Can Revoke/ Override |
|---|---|---|---|---|---|---|---|
| **Living Will**<br>a.k.a. "Colorado Declaration as to Medical Treatment"<br>CRS 15-18.101–113; "Colorado Medical Treatment Decision Act"<br>**INCLUDES UPDATES PER HB-10-1025 WHICH TOOK EFFECT 8/11/2010** | Directs that life-sustaining treatment be withdrawn or withheld when Declarant (person executing the form) (a) has an incurable or irreversible condition which 2 doctors consider to be terminal, ***or*** (b) in persistent vegetative state, ***and*** (c) lacking decisional capacity. | Allows Declarant to direct continuation or termination of artificial nutrition or hydration.<br>May include other preferences and instructions for care **following certification** of terminal illness or PVS.<br>May be combined with a document appointing health care power of attorney.<br>May grant to health care POA authority to override.<br>May designate persons with whom providers may discuss Declarant's condition. | Replace or obviate need for additional instructions to/in MDPOA—additional directives included in Living Will **only apply when patient has been certified terminal or in PVS**.<br>Directives or preferences for care prior to terminal phase must be documented elsewhere. | Declarant, at least 18 and having decisional capacity, and 2 witnesses who are NOT any of the following: any doctor or employee of Declarant's doctor, any employee of the facility or agency providing Declarant's care, any creditors or heirs.<br>Witness CAN be co-resident in health care facility where principal receiving care.<br>**Notary seal and signature optional.** | Only under the conditions stated in column 1 | At death of or revocation by Declarant, or, if authorized to revoke, by the Declarant's health care MDPOA. | The Declarant.<br>Agents under Medical Durable Power of Attorney (MDPOA) may ONLY override or revoke a Living Will if express authority to do so is granted in the Living Will or MDPOA.<br>Proxies by Statute and Guardians may NOT override a Living Will.<br>Any interested person may challenge the Living Will's validity in Court within 48 hours after doctors have signed certification of terminal illness or PVS. |
| **Penalties:** The Living Will is the only one of the various instruments that includes penalties: the statute includes misdemeanor-level penalties for any person who willfully conceals, defaces, damages, or destroys a declaration of another, without the knowledge and consent of the declarant, or any person who willfully withholds information concerning the revocation of the declaration of another; and felony-level penalties for any person who falsifies or forges a declaration of another or any person who falsifies or forges a declaration of another, and the terms of the declaration are carried out, resulting in the death of the purported declarant. As well, refusal of an attending physician to comply with a declaration and failure to transfer the care of the declarant to another physician constitutes unprofessional conduct. | | | | | | | |

  

| | What It Does | What Else It Does | What It Doesn't Do | Who Can/Must Sign | When It Takes Effect | When It Expires | Who Can Revoke / Override |
|---|---|---|---|---|---|---|---|
| **Medical Durable Power of Attorney**<br><br>CRS 15-14-503–509<br><br>"Colorado Patient Autonomy Act" | Appoints person(s) (*Agent*) to make health care decisions for Principal either (a) right away or (b) when Principal lacks capacity to make decisions or speak for him/ herself.<br><br>Agent is a fully empowered surrogate for Principal—able to consult with physicians, view medical records, make all decisions related to health care of Principal.<br><br>**Agent is bound to make decisions according to wishes of the Principal, if known, or in Principal's best interests.** | Principal may include in MDPOA specific instructions to Agent concerning particular treatment choices or preferences.<br><br>**NOTE**: "Interstate" provisions encourage but do not mandate recognition of and reliance on Colorado MDPOA in other states; also state that MDPOAs executed in other states may "be presumed to comply" with the Colorado statute and "may, in good faith, be relied upon" by health care providers in Colorado. | Does not vacate the rights of the Principal to express preferences, make decisions when able, or "fire" the Agent.<br><br>Does not authorize Agent to make any decisions other than those directly related to health care.<br><br>Does not grant authority to Agent to override valid Living Will executed by Principal unless specifically granted in the Living Will.<br><br>Does not grant authority to Agent to override CPR directive executed by Principal. | **Principal only must sign.**<br><br>Principal must be 18 and have decisional capacity.<br><br>Agent must be 18,* have decisional capacity, and be willing to serve. If Agent is spouse and couple later divorces, legally separates, or annuls marriage, Agent is automatically removed unless otherwise expressly stated in document.<br><br>**Two witnesses and/or notary seal are optional.** May assist in interstate validity.<br><br>***There is some disagreement about whether Agent must be 18 or 21. Probably best to select agent 21 or older. | Can take effect immediately on signing or only when Principal is determined to be not able to make his/her own decisions (temporarily or long term). In either case, if Principal able to make decisions, Principal retains authority to do so. | At death of or revocation by Principal, or, if in effect only when Principal incapacitated, when Principal regains capacity. | The Principal, if competent.<br><br>**NO ONE BUT THE PRINCIPAL may override the decisions of a duly appointed Agent without a Court judgment.**<br><br>Others may challenge capacity of Principal or performance/ appropriateness of Agent in Court.<br><br>Agent under MDPOA "trumps" DB, regardless of date of appointment. |

| | What It Does | What Else It Does | What It Doesn't Do | Who Can/Must Sign | When It Takes Effect | When It Expires | Who Can Revoke / Override |
|---|---|---|---|---|---|---|---|
| **CPR Directive**<br><br>CRS 15-18.6-101–108<br><br>**UPDATE:** Revised regulations governing the CPR directive were passed by the Board of Health 3/17/10, and became effective 4/30/10. See NOTE below.<br><br>For new regulations and template form, see<br><br>https://www.colorado.gov/pacific/cdphe/cpr-directives | Instructs emergency medical service personnel, health care providers, and health care facilities as to the administration of cardiopulmonary resuscitation in the event the person's (Declarant's) heart or breathing malfunction or stop. Typically this instruction is a refusal of CPR; in the absence of a CPR directive, consent is presumed. | Holds health care professionals harmless from prosecution or civil suits in event of Declarant's death when CPR withheld. | Does not have any effect on the administration of any other health care interventions in any other circumstances. | See important NOTE below.<br><br>Declarant (at least 18 and having decisional capacity), Agent under MDPOA, Proxy by Statute, or Guardian, and, ***as a matter of best practice and if Colorado Board of Health form used,*** attending physician.*<br><br>Parents may sign a CPR directive for a minor child only AFTER attending physician has signed a "Do Not Resuscitate" (DNR) order.<br><br>*Whereas APNs and PAs may sign many other documents "requiring" a physician's signature, a legal opinion obtained by CDPHE indicates that this does not apply to the CPR directive form issued by the Board of Health or in full compliance with its provisions. | On signature by Declarant (or Agent, Proxy, or Guardian) and, ***as a matter of best practice and if Colorado Board of Health form used,*** attending physician. | At death or revocation by the Declarant.<br><br>Upon admission to a hospital, valid CPR directives are translated into a physician's DNR order for the duration of the person's stay in the hospital.<br><br>CPR directives remain in effect following the Declarant's discharge from the hospital. Physician's DNR orders do not.<br><br>Under some circumstances, CPR directives and DNR orders are suspended during surgery and are generally set aside if suicide or attempted suicide is suspected. | The Declarant<br><br>The Agent, Proxy by Statute, or Guardian may revoke/override a CPR directive **ONLY IF** the Agent, Proxy, or Guardian executed the CPR directive on behalf of the Declarant.<br><br>If the Declarant or person authorized to make an anatomical gift for the Declarant wishes to donate Declarant's organs or tissue, and if the Declarant has a CPR directive or any AD refusing life-sustaining treatment, the conflict must be resolved by the physician and Declarant or his/her authorized surrogate decision maker. If the conflict cannot be resolved ahead of time, CPR or other LSTs must be provided in order to preserve organs/ tissues until conflict is resolved. |

**NOTE:** The Colorado Board of Health has for many years printed and distributed special carbonless CPR directive forms on blue "security" paper. Some Emergency personnel and other advisors will claim that *only* this "blue form" is valid for refusal of CPR and that it must be the original (not a photocopy, etc.) and must have original signatures—***NONE of which is required by statute*.** For instance, refusal of CPR may be included in instructions to a health care agent or in another advance directive, and many health care facilities have their own proprietary forms indicating refusal of CPR. Forms other than the BOH "blue form" may be signed by advanced practice nurses as well as physicians, or not signed by a health care provider at all. These matters have been clarified in revisions to the CPR directive regulations, passed by the Board of Health 3/17/10, effective 4/30/2010. However, as misinformation persists, using the BOH authorized form, with physician's signature, is recommended because Emergency personnel are trained to recognize it without delay or undue scrutiny. Whatever form is used, it should clearly identify the individual to whom the directive applies and should, for practical but not legal reasons, be signed by both the Declarant and attending physician.

| | What It Does | What Else It Does | What It Doesn't Do | Who Can/Must Sign | When It Takes Effect | When It Expires | Who Can Revoke / Override |
|---|---|---|---|---|---|---|---|
| **Five Wishes** | Privately produced by the Aging With Dignity nonprofit organization, the Five Wishes is an omnibus advance directive document which conforms to Colorado laws governing advance directives. It is thus "legal" in Colorado.<br><br>It includes sections for appointment of a health care agent, refusal of various types of "life support treatment" including artificial nutrition/hydration under conditions such as terminal illness, permanent and severe brain damage, coma, etc. | Offers lots of choices and opportunities for direction around health and personal care such as desire for visitors & entertainments, preferred place of death, comfort measures, etc.<br><br>Offers many options by which the Principal might limit or expand the authority of his or her MDPOA agent.<br><br>Offers opportunity for documenting values, memories, spiritual and personal legacy.<br><br>Funeral plans may also be documented. | Does not provide authoritative instructions on administration of CPR. If one wishes to refuse CPR, such instructions may be written in, or—for quicker compliance by EMTs and first responders—a CPR directive or MOST (see below) must be completed. | Principal, at least 18 and having decisional capacity, and 2 witnesses who are NOT any of the following:<br>• Health care Agent<br>• DB (see p. 6)*<br>• Principal's health care provider including the owner of health care facility in which Principal is living or being served<br>• Any employee of Principal's health care provider<br>• Relative by blood, marriage, or adoption<br>• Creditor or heir<br><br>Notary seal and signature optional.<br><br>*This is an assumption based on close reading of the Designated Beneficiary Agreement Act, but not specified in the Five Wishes document itself. | When Principal is determined, by attending physician and one other physician, to lack capacity to make or communicate decisions.<br><br>**NOTE:** executing a Five Wishes revokes all previously executed health care advance directive. | At death or revocation by the Principal. | Agents, Proxies by Statute, Guardians are intended to follow the wishes as expressed in the form. Principal may write in permission to Agent to override or revoke instructions. Final provision of directive states that "if any part of this form cannot be legally followed, . . . all other parts of the form [should] be followed." |

| | What It Does | What Else It Does | What It Doesn't Do | Who Can/Must Sign | When It Takes Effect | When It Expires | Who Can Revoke / Override |
|---|---|---|---|---|---|---|---|
| **Proxy Health Care Decision Maker Process ("Proxy by Statute")**<br>CRS 15-18.5-101–105<br>"Proxy Decision-makers for Medical Treatment Act"<br>****REVISIONS ENACTED BY HB 16-1101, WHICH TAKE EFFECT 8/1/2016** | When patient is, as determined by attending physician or APN, incapacitated and has no legally designated surrogate decision maker (i.e., Agent under MDPOA, or Guardian), physician, APN, or physician's designee, must make efforts to find "interested persons" who select by consensus one of the group to be the Proxy decision maker (or "Proxy by Statute").<br>Interested persons include spouse, parent, adult child, other relative or close friend of the patient, who-ever knows the patient and his/her wishes best.<br>Proxy by Statute has full powers and responsibilities of medical decision making on behalf of the patient while he/she lacks decisional capacity except as noted in column 3. | Provides process by which, if the interested persons cannot reach a consensus re the selection of the Proxy or any of the parties disagrees with a decision of the Proxy, any party(ies) may petition the Court for Guardianship of the patient.<br>Suggests that Proxy utilize the facility's ethics committee to assist with any end-of-life decisions.<br>**If no "interested persons" can be found, the attending physician may ask another physician to act as proxy. The designation of the physician proxy, and all his/her decisions on behalf of the patient, must be affirmed by the facility's ethics committee. If this process is used, the attending physician may make all routine medical decisions for the patient, but the proxy physician makes decisions for treatments that would require informed consent or involve end-of-life care. | Does not grant authority to Proxy to withhold or withdraw artificial nutrition or hydration from patient unless 2 physicians (1 trained in neurology) certify that such provision will only prolong dying and will not contribute to patient's recovery of neurological functioning. | Patient must be advised of both state of incapacity and identity of Proxy and has right to object.<br>No special form or signatures required, but documentation in patient's medical record of the patient's decisional incapacity and, if applicable, recovery of such capacity is required.<br>If provision of artificial nutrition/ hydration will only prolong dying, documentation of this fact in the medical record is also required. | When Court or physician or APN determines patient lacks capacity to make his/her own decisions | When Court or physician or APN determines patient has regained capacity, if Proxy refuses to serve, or at death of patient<br>**NOTE:** Proxy selection and authority is intended as a "stop gap" measure to make health care decisions without recourse to the courts. As such, it is intended to be limited to a single episode of care, not a long-term appointment for surrogate decision making. If the person does not regain capacity and long-term surrogate decision making is needed, court proceedings to identify a Guardian are recommended. | Patient may object to Proxy designation or decisions and, if considered competent for that decision, patient's wishes will be followed.<br>Any interested party may challenge Proxy designation or decisions and initiate Guardianship process. Only when Proxy removed by completed Guardianship process can his/her decisions be revoked or reversed. |

| | What It Does | What Else It Does | What It Doesn't Do | Who Can/Must Sign | When It Takes Effect | When It Expires | Who Can Revoke / Override |
|---|---|---|---|---|---|---|---|
| **Designated Beneficiary with Power to Act as Proxy Decision Maker**<br><br>C.R.S. 15-22-101–111<br><br>Colorado Designated Beneficiary Agreement Act<br><br>Effective July 1, 2009; Updated in 2010 session by SB 10-199, effective July 1, 2010 | Allows for two unrelated adult persons to designate each other as beneficiaries of a number of items and instruments related to health care, medical emergencies, incapacity, death, and administration of estates.<br><br>All rights and duties enumerated in agreement are assumed to be granted unless specifically excluded. The model agreement requires that each right be specifically granted or excluded by each party—it is possible that Party A might grant/withhold different rights than Party B and vice versa. | DB at top of list in priority as Guardian<br><br>Possible rights to be assigned to designated beneficiary (DB) include rights to:<br>• Petition for and have priority (over Agent) for appt as conservator, guardian, or personal rep for other DB;<br>• Visit other DB in hospital, nursing home, hospice or similar healthcare facility;<br>• Initiate formal complaint re care in nursing home;<br>• Act as proxy decision maker for other DB pursuant to Proxy statute<br>• Receive notice of withdrawal/ withholding of LST for other DB;<br>• Challenge validity of Living Will of other DB;<br>• Act as agent for granting of anatomical gifts;<br>• Have standing to sue for wrongful death of DB;<br>• Direct the disposition of DB's last remains | Does not "do the job" or substitute for estate planning, advance medical directives, and other legal agreements. Only operative "in the absence of other estate planning documents" and is overridden by other instruments such as MDPOA, POA, Will, beneficiary designation on insurance policies or pension plans, regardless of when with respect to DB agreement those documents are executed. | Two competent adults (18 years+) who are not married to each other or anyone else nor party to any other DB agreement.<br><br>Must be notarized. | When signed by both parties, notarized, AND received for recording by County Clerk and Recorder of the county in which one of the DBs resides | When superseded in whole by superseding legal document. Other legal documents may supersede parts of the DB agreement.<br><br>On death of one or both parties to the agreement; however, certain rights granted to DB may survive the death of the other DB (e.g., right to dispose of remains, etc.) | May be revoked by either party unilaterally but a formal revocation must be recorded with County Clerk and Recorder; also revoked on marriage of either party.<br><br>If either party to DB has previously designated or in future designates an Agent for health care by MDPOA, Agent has authority. |

| | What It Does | What Else It Does | What It Doesn't Do | Who Can/Must Sign | When It Takes Effect | When It Expires | Who Can Revoke / Override |
|---|---|---|---|---|---|---|---|
| **MOST: Medical Orders for Scope of Treatment**<br><br>C.R.S. 15-18.7-101-110<br><br>For questions on form or program, contact the Colorado Advance Directives Consortium: see last page.<br><br>Master form and detailed instruction booklet, along with additional resources available from www.ColoradoAdvanceDirectives.com | A summary of advance directives / current instructions with respect to key areas of medical treatment:<br>• CPR<br>• General scope of treatment (comfort-focused treatment, selective treatment, full treatment)<br>• Provision of artificial nutrition (AN)<br>• Provision of antibiotics (*only on forms executed prior to April 2015*)<br><br>On signature of MD, DO, APN, or PA, the MOST becomes medical orders, rather than just patient preferences.<br><br>It is intended to stay with person/ patient as he/she moves into and out of various health care facilities and settings (e.g., nursing home, hospital, hospice).<br><br>It is intended for the chronically or seriously ill person who is in frequent contact with health care providers or already residing in a nursing facility. | Provides prompts for frequent review of orders and documentation of any changes as person's condition or circumstances change.<br><br>Allows receiving physician latitude to discuss orders with patient or authorized surrogate if the physician thinks that the orders are medically inappropriate. If changes are made based on such a discussion, they are to be documented on the form and the form re-signed or revoked and replaced.<br><br>Provides an "out" if an individual provider or facility cannot comply with the orders on the form due to religious or moral convictions: in such a case, the patient must be informed of such refusal to comply and be transferred to the care of another provider who will comply. | Does not replace or remove the need to complete other advance directives.<br><br>Does not appoint an Agent (simply names Agent in place, if any).<br><br>Does not provide context or opportunity for detail or directives on treatment options not specifically named on or added to the form. | Declarant, at least 18 and having decisional capacity; or Agent under MDPOA, Proxy by Statute, or Guardian; *and* MD, DO, APN, or physician assistant (PA) must sign.<br><br>**NOTE:** if Declarant is incapacitated and only surrogate in place is Proxy by Statute (see below), Proxy may not decline use of AN unless 2 physicians (1 trained in neurology) certify that AN would only prolong dying and not contribute to functional recovery. | On signature by Declarant or Agent under MDPOA, Proxy by Statute, or Guardian *and* MD, DO, APN, PA | At death of Declarant, revocation, or replacement | Declarant or Agent under MDPOA, Proxy by Statute, or Guardian. However, provisions of a Living Will executed by the Declarant may not be overridden by any surrogate unless specifically authorized in the Living Will.<br><br>If Declarant executed a CPR directive, any surrogate decision maker must enter "NO" as CPR choice.<br><br>See column 3 for latitude granted to receiving physician to question/revise orders.<br><br>When MOST orders and instructions in previously executed advance directives conflict, in general the most recently completed document prevails. A previously completed – and not revoked – CPR directive or Living Will "trumps" a MOST completed and signed by an MDPOA or proxy on behalf of an incapacitated person, regardless of date of signature. |

  

| | What It Does | What Else It Does | What It Doesn't Do | Who Can/Must Sign | When It Takes Effect | When It Expires | Who Can Revoke / Override |
|---|---|---|---|---|---|---|---|
| **Guardianship**<br><br>CRS Title 15 (Probate, Trusts, Fiduciaries), Article 14 (Persons Under Disability – Protection), Part 3 (Guardianship of Incapacitated Person) | Legal (Court) process whereby a person is determined to lack capacity to make decisions in every area of personal/ life management or in certain areas (financial, medical, residential).<br><br>Person subject to Guardianship is called a "Ward."<br><br>Guardian(s) must be at least 21.<br><br>Guardians may be financially compensated out of Ward's assets. | Gives priority for appointment as Guardian to any person nominated by the person in question in a DPOA or DB agreement.<br><br>May include specific limitations or conditions on Guardian's scope of authority. | Does not revoke all rights of Ward to be consulted on decisions.<br><br>Depending on scope of Guardianship, decision making authority may be limited to particular arena or by time. | Guardianship is a process that must be undertaken in Court; may take up to several months to accomplish. | On decision of Court. | At death of Ward, removal of Guardian by Court. | Interested parties may challenge Guardianship appointment or decisions in Court. Only Court can appoint or remove Guardian. |

For questions or additional information, please contact Jennifer Ballentine, Jennifer@irisproject.net or 303-521-4111. For questions specifically on the Medical Orders for Scope of Treatment Program, please contact the Colorado Advance Directives Consortium, www.coloradoadvancedirectives.com.