

# Making Your Wishes Known

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Understanding and preparing  
health care advance directives  
and other personal medical  
instructions in Wisconsin



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**Attorney Mark T. Johnson has prepared this guide for general informational purposes. Please consult an attorney for legal advice for your particular situation.**



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This guide is written with references to Wisconsin law, so please keep in mind that there may be numerous ways it will not apply in other states. For you or your attorney, Wisconsin statutory citations are provided throughout.

Disclaimer: The information in this guide is not legal advice. Do not act on this information without the advice of professional legal counsel, who must discuss with you your specific circumstances and wishes before giving you legal advice.

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# Introduction

You probably have particular wishes about your health care, treatment decisions, and end-of-life care. In addition, you may want certain individuals to speak for you if you are unable to express your wishes yourself. In Wisconsin, if you do not have someone designated to speak for you in a health care power of attorney, only a court-appointed guardian can make a decision for you if the need arises.

Discussing your wishes with your health care providers, family, and friends helps assure that your wishes will be followed. Furthermore, putting your wishes in writing and designating someone to carry out your wishes can avoid confusion and facilitate communication in difficult situations.

In Wisconsin, there are three types of health care advance directives:

1. Health care power of attorney
2. Declaration to Health Care Professionals (also known as a Living Will)
3. Do-Not-Resuscitate Order

In addition, you may want to state your wishes for a variety of other personal and medical circumstances. You may wish to have one or more of the following documents:

- A. An additional statement or addendum to your health care power of attorney
- B. Authorization for Release of Protected Health Information (HIPAA Release)
- C. Visitation Instructions
- D. Anatomical Gift or Organ Donation Designation
- E. POLST Order
- F. Authorization for Final Disposition

Each of these topics is explained in more detail in this guide.



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# Health Care Power of Attorney

## *Definitions and Background*

A health care power of attorney is the most essential and powerful of your advance directives. In a health care power of attorney, you can designation someone to make decisions for you if you cannot do so yourself, and you can give instructions for the type of care you want. If you do not have a health care power of attorney, no one can make a decision for you without being appointed as your guardian by the county court.

### *Definitions*

**Principal**—the individual who creates a power of attorney to name someone else to act for the individual

**Agent**—the person named to act in a power of attorney (sometimes called a health care proxy or surrogate)

**Durable**—allows the agent to act even if the principal is incapacitated

**Incapacity**—the inability to receive and evaluate information effectively or to communicate decisions to such an extent that the individual lacks the capacity to manage his or her health care decisions (there is a slightly different definition for incapacity to make financial decisions)

### *Background—Agency Law*

Traditionally, an agent could only act for the principal if the principal had the capacity to supervise the agent (so, non-durable).

The basis of agency law is rooted in property or business law, where the principal, agent, and any third parties would want a clear understanding about who is authorized to act in certain situations.

The idea of durability came later, primarily for personal arrangements such as managing personal finances or health care decisions.

Even when an agent is appointed, the principal continues to have full authority to act regarding the principal's affairs.



# Health Care Power of Attorney

## *Important Details*

1. A health care power of attorney (HCPOA) allows you to designate someone to make health care decisions for you when you cannot do so for yourself.

Consider these factors when selecting your agent:

- a. Choose someone 100% trustworthy, because they may be acting for you when you are unable to give additional input or supervision.
  - b. Choose someone who can be available by telephone or in person and can confer with medical staff when needed.
  - c. Choose someone who knows your wishes and can implement them, even if they involve difficult decisions.
2. Decisions may involve medical care, treatment, nursing home arrangements, and use of feeding tubes.
  3. In most cases, a HCPOA is “activated” by a statement signed by 2 physicians or a physician and a psychologist, nurse practitioner, or physician assistant.
  4. It is best to name one agent to act, with one or more alternates (but not concurrent agents).
  5. Consult your attorney or the instructions for the HCPOA to make sure you choose an agent allowed under the statutes—generally, it cannot be a health care provider of yours.
  6. Consult your attorney or the instructions for the HCPOA to make sure you have proper witnesses—generally, they cannot be your agent or your health care provider.

[Wisconsin statutes: Chapter 155]



# Health Care Power of Attorney

## *Options for HCPOAs and More Information*

1. Wisconsin Statutory Form—available from the Wisconsin Department of Health Services—website: [dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm](https://dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm)
2. Honoring Choices—website: [wismed.org/wisconsin](https://wismed.org/wisconsin) (follow the About Us menu to Honoring Choices Wisconsin)
3. Five Wishes—website: [fivewishes.org](https://fivewishes.org)
4. Attorney-Drafted Document (which may be based on one of the above versions)

Each year on April 16, The Conversation Project promotes National Healthcare Decisions Day to encourage all adults to prepare health care powers of attorney and other advance directives. Learn more at the website: [theconversationproject.org](https://theconversationproject.org).

In addition, the State Bar of Wisconsin offers *A Gift to Your Family: Planning Ahead for Future Health Needs*, as a consumer guide for advance directives. The guide is for sale at a nominal cost, and the State Bar has frequently offered it for free during National Health-Care Decisions week. The State Bar of Wisconsin website: [wisbar.org](https://wisbar.org).

The Greater Wisconsin Agency on Aging Resources (GWAAR) offers information and consumer guides for power of attorney and guardianship through its Guardianship Support Center. Its website: [gwaar.org/guardianship-resources](https://gwaar.org/guardianship-resources).



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# Health Care Power of Attorney

## *Recommendations for Handling Your Health Care POA*

1. Discuss your wishes and philosophy with your loved ones—the conversation is key.
2. Give a copy of your completed HCPOA and other advance directives to your agent and alternate agents.
3. Give a copy of your completed HCPOA and other advance directives to your doctor or clinic to be included in your medical records.
4. Carry your HCPOA (either a paper copy or electronic file) with you when you travel. Another alternative is to have a wallet card that has your agent's name and phone number to establish initial contact in an emergency.

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# Health Care Power of Attorney



## *Expressing Your Wishes*

You have several opportunities and methods for elaborating on your wishes for your medical treatment and end-of-life care. When writing your wishes, give careful thought to avoid contradictory or confusing statements.

Methods for expressing your wishes include the following:

1. Statement of Desires, Special Provisions, or Limitations in the HCPOA form.
2. An Addendum to the HCPOA—this includes various questions or topics regarding certain treatments in certain medical conditions.
3. Other written instructions, such as a personal statement or Five Wishes.
4. Conversations with loved ones and medical providers. Resources, such as in-person facilitators, printed worksheets, or video guides, can help you have a meaningful conversation.





# Declaration to Health Care Professionals (Living Will)

## *Expressing Your Wishes for End-of-Life Care*

A Declaration to Health Care Professionals (previously called Declaration to Physicians) is a way to state your wishes about a feeding tube and life sustaining procedures if you ever have a terminal condition or are in a persistent vegetative state.

1. Your medical provider can follow your wishes if your Declaration to Health Care Professionals is in your medical record.
2. A Declaration to Health Care Professionals supplements, but does not replace, your health care power of attorney.
3. If there is a contradiction between your HCPOA and your Declaration to Health Care Professionals, your HCPOA (your health care agent's decision) will override your Declaration.

### **Definitions**

***Terminal Condition*** means an incurable condition caused by injury or illness that reasonable medical judgment finds would cause death imminently, so that the application of life-sustaining procedures serves only to postpone the moment of death.

***Persistent Vegetative State*** means a condition that reasonable medical judgment finds constitutes complete and irreversible loss of all of the functions of the cerebral cortex and results in a complete, chronic and irreversible cessation of all cognitive functioning and consciousness and a complete lack of behavioral responses that indicate cognitive functioning, although autonomic functions continue.

[Wisconsin statutes: Chapter 154]



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# Do-Not-Resuscitate Order

*Prepared by Your Health Care Professional and Signed by You*

Wisconsin statutes authorize do-not-resuscitate (DNR) orders in certain circumstances. Although a DNR order follows certain laws, it is a document prepared by your health care professional, not your lawyer. However, you can express your wishes about resuscitation, CPR, and future DNR orders in your HCPOA.

The main requirements of a DNR order are:

1. Your attending health care professional issues the order. A “health care professional” is a physician, physician assistant, or advance practice registered nurse.
2. You are a “qualified patient”—meaning you have a terminal condition or a medical condition that would indicate that CPR would be unsuccessful or cause physical pain or harm.
3. You request the DNR order.
4. You consent to the order after receiving written information about resuscitation and the right to revoke the DNR order.
5. The order is in writing.
6. You sign the order.
7. You are not pregnant (to your health care professional’s knowledge).

Your DNR order will become part of your medical record, and you will receive a DNR bracelet to alert emergency responders of your DNR order.

[Wisconsin statutes: Chapter 154]

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# Authorization for Release of Protected Health Information



## *HIPAA Release*

In general, your medical information is considered private, and your health care providers and health insurers will not share your medical information without your permission. In some cases, your medical provider will provide information to others if you are present and do not object or if sharing information about your current condition is in your best interest.

A HIPAA release is one way for you to allow others to obtain information from your doctor, clinic, or hospital. A HIPAA release allows someone to access information, but it does not give them any decision-making power, so a health care power of attorney is essential to name someone to make decisions for you if you become incapacitated.

Most health care providers have a release form you may complete. Alternatively, attorneys may draft HIPAA releases as part of preparing advance directives. You may revoke a HIPAA release at any time, and you may include a date or event which terminates the release.

(HIPAA stands for the federal Health Insurance Portability and Accountability Act, which was enacted in 1996.)

[Wisconsin law also addresses aspects of patient health care records in Chapter 156 of the Wisconsin Statutes.]



# Visitation Instructions

## *Inpatient and Family Visitation*

In some cases, it can be helpful to express your wishes about visitors in a written document. This can be especially important if family members do not get along and may try to prevent others from visiting you. There is not standard form or format to express your wishes, although Wisconsin statutes provide visitation laws for various settings, including home, hospitals, and long-term care facilities.

1. If you are a patient at an inpatient health care facility, you may identify to your health care provider those individuals with whom you wish to visit while you are a patient. Your wishes may be made orally or in writing. The health care provider may deny visits in certain circumstances, such as if the presence of an individual would endanger your health or safety.
2. Court-ordered visitation may be an option in extreme cases.
  - a. A family member may petition the court to compel visitation if it is being denied.
  - b. The court will not order visitation if you express your wishes to not have visits from certain family members, or if the court determines that such visitation is not in your best interests.

Legal point—If you prepare a written statement, you may want to include a reference to the relevant statutes. For example, *“I make this statement for all purposes, including, but not limited to, patient visitation under Wisconsin Statutes section 146.95 and visitation by family members under Wisconsin Statutes section 50.085, and any other statutes or rules of law or equity.”*

[Wisconsin statutes: Wisconsin Statutes section 146.95 (patient visitation); Wisconsin Statutes section 50.085 (family visitation)]

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# POLST/MOLST/POST/MOST



## *Portable Medical Orders*

Some health care providers and some states promote POLST medical orders for certain patients. To qualify for this type of portable medical order, you and your doctor decide the following:

1. Whether your medical condition—usually a serious illness or frail condition—qualifies for such an order.
2. What treatment and care you want to receive.

A POLST order is signed by your health care provider after discussing your options and wishes with you.

Like all advance directives, a POLST order is voluntary. At any time, when you are able, you may express your wishes directly to your medical providers, whether to confirm, supplement, or contradict your written directives.

A portable medical order may be known by a variety of names:

POLST—Physician/Provider/Portable Orders for Life-Sustaining Treatment

MOLST—Medical Orders for Life-Sustaining Treatment

POST—Physician Orders for Scope of Treatment

MOST—Medical Orders for Scope of Treatment

POLST is now considered a term rather than an acronym, at least by the National POLST organization.

Wisconsin has not adopted a POLST protocol, although some health care providers or networks have introduced them for their patients. Wisconsin does not recognize POLST orders as an advance directive, although a POLST order can be considered an expression of the patient's wishes for treatment and care, similar to any other type of oral or written expression.

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# Anatomical Gifts



## *Organ and Tissue Donation*

In most cases, the agent you name in your health care power of attorney may make an anatomical gift for you, effective at the time of your death. You may give specific instructions regarding anatomical gifts, including refusal of any such gifts.

There are several ways to make your wishes known about making an anatomical gift or organ donation:

1. Sign the organ donation statement on your driver's license or state ID card.
2. Complete the anatomical gift and organ donation section of your health care power of attorney.
3. Register with the state registry, either online or by mail.

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# Authorization for Final Disposition



## *Decisions for Funeral, Burial, and Other Final Arrangements*

An individual may give directions for the disposition of their remains after death, including the following subjects:

1. Arrangements for a viewing
2. Funeral or memorial services
3. Burial, cremation, donation of the decedent's body, or other disposition
4. Naming an individual ("representative") to carry out the directions

If a representative is not named, then Wisconsin statutes give an order of priority for next of kin or others to make final arrangements.

The state form for Authorization for Final Disposition is available at the Wisconsin Department of Health Services website:  
[dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm](https://dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm)

[Wisconsin statutes: Section 154.30]

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# Court-Appointed Decision Makers



## *Guardianship*

If you do not have powers of attorney, and if you become incapacitated, a guardianship may be necessary for a court to appoint someone to make decisions for you. In some cases, even with a power of attorney, a guardianship is necessary if there is no agent available to act or if the principal is incapacitated but refuses necessary care.

A **guardian of the person** is someone appointed to manage health and personal decisions, and a **guardian of the estate** is a person appointed to manage financial matters. The person under guardianship is the **ward**. If the court determines that an individual is incompetent (based largely on the report or testimony of the examining doctor or psychologist), the court appoints the guardian to make decisions on the ward's behalf.

In most guardianships, the court restricts or removes the ward's rights to act independently. The court gives the guardian most of those rights to exercise in the ward's best interest. The guardian may exercise only those powers authorized in the guardianship. The guardian is under ongoing court supervision and must give annual reports to the court regarding the ward's well-being and financial accounts. If anyone wishes to modify or terminate the guardianship, court approval is required.

Guardianship has pros and cons for those seeking this type of court-appointed authority. Pros include protecting the ward's well-being and providing certainty that decisions are made by a suitable substitute decision-maker. Cons include the expense of fees for obtaining a guardianship, plus the additional cost in time and energy to appear in court and file annual reports.

[Wisconsin statutes: Chapter 54]





# Capacity to Make Decisions

## *How Is Capacity Determined and by Whom?*

- You may ask, “Will my doctor or a judge declare me incompetent?”
- Capacity is a fluid concept. It can diminish as certain health conditions worsen and can have ups and downs.
- Time is a powerful component of making decisions and signing legal documents. For example, a person with mild dementia usually has the capacity to make decisions and to understand and sign legal documents to prepare for future incapacity.
- In some cases, the additional input from medical professionals will help an attorney or other advisor determine whether an individual has the necessary capacity to make legal or financial decisions.

### ***Legal definitions***

- A. In general, **incapacity** is defined as the inability to receive and evaluate information effectively or to communicate decisions. Incapacity for health care decisions and for financial decisions may be separate determinations.
- B. A health care power of attorney takes effect upon a finding of incapacity by two physicians or by a physician and a psychologist, physician assistant, or nurse practitioner who personally examine the individual and sign a statement specifying that the individual has incapacity. Alternatively, a power of attorney document may state a different event or determination to establish incapacity.
- C. For purposes of guardianship, a person must be incapacitated, plus the incapacity must cause the individual’s personal or financial wellbeing to be at risk. This is the basis for a judge to determine a person is **incompetent**.
- D. Further details regarding legal incapacity and incompetency are specifically spelled out in the Wisconsin Statutes related to these subjects.

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# Resources

1. The Wisconsin Department of Health Services provides state forms for health care power of attorney, financial power of attorney, declaration to health care providers (living will), and authorization for final disposition:  
<https://www.dhs.wisconsin.gov/forms/advdirectives/adformspoa.htm>
2. The website for Five Wishes (for health care advance directives) is [www.fivewishes.org](http://www.fivewishes.org)
3. The website for Honoring Choices Wisconsin (for health care advance directives) is [www.wismed.org/wisconsin](http://www.wismed.org/wisconsin) (follow About Us to Honoring Choices Wisconsin)
4. The State Bar of Wisconsin offers general information to the public, with many brochures and articles free of charge. The State Bar's booklet *A Gift to Your Family: Planning Ahead for Future Health Needs* is for sale at a nominal cost, and the State Bar has frequently offered it for free during National Health-Care Decisions week. The website for the State Bar of Wisconsin is [www.wisbar.org](http://www.wisbar.org).
5. The Greater Wisconsin Agency on Aging Resources (GWAAR) offers information and consumer guides for power of attorney and guardianship through its Guardianship Support Center. Its website is [www.gwaar.org/guardianship-resources](http://www.gwaar.org/guardianship-resources).
6. To learn more about The Conversation Project and National Healthcare Decisions Day, visit <https://theconversationproject.org>.
7. To learn more about portal medical orders (such as POLST), visit the National POLST website: [www.polst.org](http://www.polst.org).
8. The National Academy of Elder Law Attorneys (NAELA) provides information about attorneys who practice in the areas of elder law and special needs planning: [www.naela.org](http://www.naela.org).