

Western Mass Estate Planning

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COMPARING HEALTH-RELATED DOCUMENTS

HEALTH CARE PROXIES:

Health Care Proxies allow a Principal to appoint someone, called a Health Care Agent, to make health care decisions on the Principal's behalf, in the event the Principal is unable to make the decisions him- or herself. This document does not specify what the Principal's wishes are, but rather names the people, in order of preference who know the Principal well enough to exercise those wishes. The Proxy becomes extremely important should decisions be necessary concerning termination of life support.

A Health Care Proxy is not in effect upon signing. It must be invoked by a physician, who states in writing, that the Principal is unable to make or communicate decisions. Only then does the first-nominated agent have authority to make decisions. It is imperative that the Health Care Proxy includes telephone numbers, so that a hospital can easily reach the agents, in the order listed. Ideally, the Proxy would have three agents, to increase the chances that someone the Principal has chosen is able and willing to serve. Absent a Health Care Proxy or willing Agent, a hospital may initiate guardianship proceedings for a court-appointed individual with authority to make medical decisions.

If the Principal regains the ability to participate in medical decisions, a Health Care Proxy can be un-invoked, returning power to the Principal.

The Massachusetts Executive Office of Elder Affairs, all Massachusetts hospitals, and some physician's offices and Senior Centers have Health Care Proxy forms available free of charge. These are often one page and provide for an Agent and one Alternate Agent. More comprehensive versions, with three or more agents listed, are sometimes available with estate planning attorneys.

LIVING WILLS:

This is a companion to the Health Care Proxy. Whereas the Proxy names the individual the Principal wishes to make medical decisions, the Living Will expresses in writing the Principal's wishes with respect to end-of-life decisions. Although not legally enforceable in Massachusetts, this is a helpful document because it provides evidence of wishes for family and any other interested third party (e.g., a hospital, a court). A Living Will typically provides that the individual does not want heroic measures taken if it is believed that the individual has an irreversible medical condition that will prevent the individual from communicating on a permanent basis.

Ideally, any Living Will would be in a document separate from the Health Care Proxy, so that its provisions can be considered under circumstances selected by the patient's family, without influencing the health care providers.

Massachusetts does not have any specific form of Living Will, but many estate planning attorneys have crafted their own versions.

HIPAA RELEASE FORMS:

It has a silly-sounding acronym, but the federal "HIPAA" regulations are very serious and may require many individuals to review their estate plans to ensure that documents will be effective in the event of incapacity.

The Health Insurance Portability and Accountability Act ("HIPAA") is intended to protect personal information from identify theft or public disclosure. The law's impact, however, is often frustrating. A wife calls her husband's physician to inquire about test results and is told that "HIPAA" prevents disclosure. A dentist refuses to discuss options for a woman's treatment with her son. A friend calls the local hospital and is unable to determine the status of a patient. In every case, the health provider is aware of the law's potential for fines in the event that any health care information is wrongfully disclosed.

In response, some medical offices are asking patients to complete authorization forms, designating family or friends with whom the office may communicate. While this serves as a great first step, it does not allow the authorized people to obtain information from any other physician's office or a hospital. More commonly, however, the HIPAA Release forms signed at physician's offices are intended for the sole purpose of allowing the office to bill the patient's health insurance company (it would be a HIPAA violation to bill without the patient's consent).

Further, individuals who have signed such limited forms or who have not signed *any* "HIPAA" form, may discover that their estate planning documents are ineffective. For example, if a Durable Power of Attorney requires a finding that the principal is incapacitated before the named agent can serve, it may be impossible to obtain the medical documentation needed to prove incapacity. The document, then, cannot be used. Since the agent is usually needing to act under urgent circumstances, the inability to do so may have disastrous results.

Similarly, trusts typically provide for a Successor Trustee, in the event the original Trustee is incapacitated. Again, if the successor cannot obtain written confirmation of incapacity, he or she cannot step in and take over trust matters. If it is imperative that the successor have access to trust assets, the only alternative would be guardianship or conservatorship proceedings, which are expensive, lengthy, and personally intrusive.

A property-drafted, comprehensive "HIPAA" authorization form which applies to all medical providers is a critical piece of anyone's estate plan. In addition, Durable Powers of Attorney, Health Care Proxies, and trusts should be carefully reviewed by a knowledgeable attorney, since it may be necessary to change or expand these documents to incorporate "HIPAA" language. Doing so should ensure the effectiveness of these important documents.

Massachusetts does not have any specific form of HIPAA Release form, but many estate planning attorneys have crafted their own versions. Ideally, any HIPAA Release would be in a document separate from a Health Care Proxy, as HIPAA Release forms are effective immediately upon signing and do not require any finding that the Principal is unable to make medical decisions. (as is necessary to invoke a Health Care Proxy). The individuals listed in a HIPAA Release form include anyone the individual wishes to have access to the individual's medical information. There is no hierarchy – anyone on the list may communicate with any medical provider.

DNR FORMS

A Massachusetts do not resuscitate (DNR or DNAR) order form is a document that patients may obtain from their physician if, for personal or health-related reasons, they do not wish to be resuscitated. This document, which may be signed on behalf of the patient by an authorized representative, parent, or legal guardian, indicates that cardiopulmonary resuscitation (CPR) will *not* be used in the treatment of the patient, unless the DNR order is revoked by the patient or their representative. Once issued, the order will be put into the patient's medical records and will often be printed on bright-colored paper in order to alert medical staff of its existence. People often keep DNR forms on their refrigerator, in the even that a first responder is called to their home for a medical emergency. The form may be found here, but note that it must be signed and verified by a physician, nurse practitioner, or physician's assistant..

<https://eforms.com/images/2018/02/Massachusetts-Comfort-Care-DNR-Order-Verification.pdf>

MOLST FORMS

A Medical Orders for Life-Sustaining Treatments (MOLST) form is not the same as a Health Care Proxy because it is a medical document that contains actionable medical orders that are effective immediately based on a patient's current medical condition. Health care proxies and living wills are legal documents that are effective only after the patient has lost capacity. In other words, a health care agent can make decisions for a person only after he or she has been determined to lack capacity; a living will is relevant only after the patient can no longer be consulted. A MOLST form, on the other hand, is a medical document signed by both the clinician and the patient, and is effective as soon as it is signed, regardless of a patient's capacity to make decisions.

A MOLST is intended for individuals with a serious advanced illness or injury and should be filled out by a health professional, *after* discussions between a clinician and patient about the patient's prognosis, treatments and goals of care. The MOLST form should not be used to introduce or solicit patient decisions about life-sustaining treatments. It is designed only for documenting decisions patients make in the context of appropriate discussions about life-sustaining treatment choices with a clinician.

Use of a Health Care Proxy form to appoint one's Health Care Agent is recommended for all adults, ages 18 and above, healthy or sick. The purpose, timing of use, intended users and content of the MOLST form are all very different from using a Health Care

Proxy form to appoint one's Health Care Agent.: It is recommended for anyone with a MOLST form to also fill out a HCP form to appoint their Health Care Agent.

In addition, the CC/DNR form can still be used to document that a valid DNR order exists for a patient, and it will be honored by EMTs in outpatient settings. Because the MOLST (an actual medical order form) can be filled out to indicate "DNR" if that is the patient's decision, the MOLST form can be used instead of the CC/DNR form. In some situations, patients may have both the MOLST and the CC/DNR forms. If both forms are present, in the event of cardiac or respiratory arrest, the *most recent* orders should be followed. In events other than cardiac or respiratory arrest, the MOLST orders should be followed.

MOLST vs. Health Care Proxy form

| | MOLST | HEALTH CARE PROXY |
|------------------|---|---|
| Form type | Medical document | Legal document |
| Form users | Patients of any age with advanced illness | All adults, healthy or sick |
| Form contains | Current medical orders about life-sustaining treatments | Name of person's appointed health care agent(s) for future shared decision-making |
| Form signer(s) | The patient* <u>and</u> clinician | The person and two witnesses of the person's choice |
| Goes into effect | Immediately upon signing | Only if person is declared to lack capacity to make own health care decisions |

**Or patient's health care agent (only if the patient lacks capacity)*

A MOST form may be found here, but note that it must be signed and verified by a physician, nurse practitioner, or physician's assistant.

<https://molst-ma.org/sites/molst-ma.org/files/MOLST%20Form%20and%20Instructions%208.10.13%20FINAL.pdf>