

What are advance directives?

An advance directive is a document you prepare that states what your wishes are in the event you are no longer able to make health care decisions. These directives come into effect only when you are no longer competent (for example, if you are in a coma). Advance directives can take one of two forms: instructional or proxy.

Instructional directive

This type of directive states what (or how) health care decisions are to be made when you are unable to make these decisions for yourself. This type of directive may set out specific instructions or it may set out general principles to be followed for making your health care decisions. Instructional advance directives are also known as “living wills”.

Proxy directive

This type of directive specifies who you want to make decisions for you when you are no longer able to make the decisions yourself. Your proxy, also known as a “substitute decision-maker”, should be someone who knows you well and should be someone you trust to follow your instructions and make decisions that are likely to comply with your wishes. A proxy should always be asked in advance whether he or she is willing to take on the responsibility of making decisions for you. Proxy advance directives are also known as “durable powers of attorney for health care”.

Not all provinces and territories accept instructional (ID) and proxy directives (PD), and some do not have any legislation regarding advance directives.

	ID	PD	None
BC, AB, SK, MB, ON, PE, NL	x	x	
YK, QC, NS		x	
NWT, NU, NB			x

How is a living will or durable power of attorney for health care different from a traditional will or traditional power of attorney?

A “living will” or “durable power of attorney for health care” contains instructions about your health care and comes into effect when you are still alive but no longer competent to make health care decisions.

By contrast, a traditional power of attorney operates only while you are competent and is relevant only to decisions relating to property. A traditional will contains instructions about how your property is to be divided and comes into effect only when you are dead.

A doctor is not free to disregard a patient's advance instructions any more than he would be free to disregard instructions given at the time of the emergency.

Malette v. Shulman (1990), 72 O.R. (2d) 417 at 424 (Court of Appeal).

Why would I want to make an advance directive?

Commonly expressed reasons for wanting to have an advance directive include:

- to maintain control over your own health
- to remove the burden of decision-making from family and healthcare providers
- to get you to think about, reflect on, and talk about your future health care choices with your family, friends and healthcare providers. Conversations about death and serious illness can be difficult to start, and the process of completing an advance directive can help start these conversations.

Do I need a lawyer to write an advance directive?

No. You can write the directive without a lawyer. However, it is a good idea to have a lawyer with experience in this area read your directive to make sure that what you have written is legally valid.

Do I need to go to a physician to write an advance directive?

No. You can write the directive without a physician, but again it is a good idea to discuss conditions, treatments, and other relevant issues with a physician to be sure that the decisions you are making about your future care are well-informed.

Now that I have an advance directive, what do I do with it?

When you have taken the time to write your directive, it is important to share the information in it with your proxy if you have named one, your family, and your primary healthcare provider. Talk to them about what you have written and why you have chosen to be cared for in this way. Give them each a copy of your advance directive. You may also wish to give a copy to your lawyer if you have one.

What will happen if I don't have an advance directive?

If you do not have an advance directive, provincial/territorial consent legislation or common law sets out who will make decisions on your behalf when you are no longer capable of making treatment decisions and have not appointed a proxy.

Where does the law stand on advance directives?

The provincial and territorial governments

These provincial/territorial governments have advance directives legislation:

British Columbia	Ontario
Alberta	Quebec
Manitoba	Nova Scotia
Saskatchewan	Prince Edward Island
Yukon Territory	Newfoundland & Labrador

New Brunswick, the Northwest Territories and Nunavut do not have advance directives legislation.

The federal government

There is currently no federal law or policy governing advance directives. In 1995, a Special Senate Committee recommended that those provinces and territories that did not have advance directive legislation should pass such legislation. The Committee also recommended that the provinces and territories establish reciprocity protocols to accept advance directives written in other provinces and territories.

The courts

There have been two significant cases in which the courts have spoken on advance directives.

In *Malette v. Shulman*, an emergency doctor gave a blood transfusion to a severely injured unconscious Jehovah's Witness woman after finding a card on the woman declaring her unwillingness to undergo a blood transfusion. The card was neither dated nor witnessed. Mrs. Malette survived, but she suffered mentally and emotionally when she found out that she had received a blood transfusion. She sued the doctor, among others, for damages in battery. (A physician who treats a patient against his or her wishes or without an informed consent to the treatment may be found by a court under

the common law to have committed what is called a "battery".) The Ontario High Court found the doctor liable in battery and awarded Mrs. Malette \$20,000 in damages. The doctor appealed the decision to the Ontario Court of Appeal, which dismissed his appeal. The Court of Appeal ruled that a written advance directive (the Jehovah's Witness card) constituted a refusal of consent to treatment and so must be respected.

In a subsequent case, *Fleming v. Reid*, the Ontario Court of Appeal upheld the requirement to respect advance directives. In this case, two psychiatric patients, while competent, refused treatment. They intended for their refusal to be binding even if they became incompetent.

Where can I find more information about advance directives?

Dalhousie University's Health Law Institute produced the End of Life Project. This project provides information on the end of life issues of advance directives, potentially life-shortening palliative interventions, and withholding and withdrawal of potentially life-sustaining treatments. The End of Life Project's online library gives the public access to policies, case summaries, and legislation applicable to these important end of life issues. Please visit the End of Life Project's website at www.dal.ca/law/hli.

To get in touch with the Institute about the End of Life Project please write or e-mail:

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The Dalhousie End of Life Project is an educational research project funded by the Max Bell and Nova Scotia Health Research Foundations.

What you need to know about:

Advance Directives

Not Legal Advice

The information contained in this brochure is intended as general legal information only and is not intended to constitute legal advice. If you have any questions about your particular situation, you should consult a lawyer.