

# Kennedy Krieger Institute Advance Directive Toolkit

Adults are empowered to make their own decisions about medical treatment. Accident or illness may impact an adult's ability to make their own healthcare decisions. When an adult is not able to make their own healthcare decisions, someone else may make those decisions for them. Adults may use an advance directive to designate who has the power to make decisions on their behalf, what decisions others may make for them, and the scope of those decisions. Having an advance directive in place is particularly important in light of the COVID-19 pandemic.



Maryland Center for Developmental Disabilities  
at Kennedy Krieger Institute



## What is an advance directive?

A Maryland law called the Health Care Decisions Act allows individuals to plan for healthcare decisions through advance directives. An advance

directive allows an adult to decide who may make healthcare decisions for them if they are not able to do so themselves. An advance directive may be used to name a healthcare agent—someone entrusted by the adult to make healthcare decisions on their behalf if they are unable to make decisions for themselves. Adults may also use the advance directive to designate what kinds of treatments they do or do not want, especially treatments that are typically used in a medical emergency. An advance directive may also be used to specify the adult's preferences about certain life-sustaining treatments.



## What is the difference between an advance directive and a living will?

A living will is a legal document that specifies the medical treatments an adult would and would not want to be used to keep them alive. The state of Maryland offers a form to assist adults with executing advance directives. The section of that form that outlines an adult's preferences with respect to life-sustaining treatment is called the living will.



## What is a healthcare agent?

An advance directive may name another person to act as a healthcare agent to carry out the wishes of the adult executing the advance directive.

The healthcare agent is usually a family member or a close friend whom the adult trusts to make decisions on their behalf. Generally, the agent must follow the specific terms or healthcare wishes that the adult specified in the advance directive. The agent must follow the wishes of the adult, while also considering things such as the current diagnosis and prognosis with and without treatment, the adult's religious and moral beliefs, and the adult's personal values, among other things.



## Who may serve as the healthcare agent?

An adult executing an advance directive may name anyone they trust to carry out their wishes.

The healthcare agent is typically a person whom the adult executing the advance directive knows well and trusts, like a family member or a close friend. The designated healthcare agent must be 18 years old or older. There are some exceptions regarding who may be named as a healthcare agent, including, generally, that the adult may not designate someone who works for a healthcare facility where the adult is receiving care. It is important to remember that the designated healthcare agent will have the power to make important

treatment decisions on behalf of the adult, even if other family members and friends might encourage a different decision. When selecting a healthcare agent, adults should choose the person whom they feel is best qualified to make decisions on their behalf. Also, adults should consider selecting a back-up agent, in the event the designated healthcare agent is unavailable when needed.



## What is the scope of the healthcare agent's decision-making ability?

The healthcare agent will speak for the adult and will make decisions based on what the adult would have wanted if they were able to make their own choices. If the preferences of the adult are unknown, the healthcare agent will make decisions that are in the adult's best interest. When executing an advance directive, the adult may decide how much power the agent will have to make healthcare decisions. An adult may also specify in the advance directive when this decision-making power will begin (e.g., immediately upon execution of the advance directive, or only after a doctor confirms that the adult is not able to decide on their own). Once a healthcare agent is selected, the adult executing the advance directive should ensure that the designated person understands their obligations. The adult should also ensure that the healthcare agent understands their wishes and medical preferences. When the time comes for medical decision-making, the healthcare agent should follow the wishes and directions of the adult on behalf of whom they are acting.

## Types of advance directives:

According to Maryland law, advance directives may be made either in writing or orally. Under the law, there are different requirements for each type of advance directive.



### Written

For a written advance directive, an adult must be competent to make the advance directive and must do so voluntarily. The adult executing the advance directive must date and sign the advance directive. If the adult is unable to sign their own name, someone else must sign at the adult's direction and in the adult's presence. The written document must also be signed by two witnesses. The witnesses may be any two competent adults. However, if a healthcare agent is appointed in the document, that person may not serve as a witness. And, at least one witness must be someone who is not knowingly entitled to any financial benefit from the death of the person executing the advance directive. Electronic advance directives are enforceable and acceptable in Maryland.



### Oral

Oral advance directives may also be valid and enforceable. To create a valid oral advance directive, the adult must be competent to execute an oral advance directive and must do so voluntarily. The adult must intend for this oral statement to be understood to be an advance directive. The oral advance directive must be made in the presence of an attending physician, physician assistant or nurse practitioner, and one witness. The oral advance directive must be documented in the adult's medical record, and the documentation must be dated and signed by an attending physician, physician assistant or nurse practitioner, and by the witness.



### When does the advance directive go into effect?

Unless otherwise specified, the advance directive takes effect when an attending physician and another physician certify in writing that the adult in question is not competent to make an informed decision about their medical care. This certification by the two physicians must be based on a personal physical examination of the adult. In addition, at least one of the physicians must have physically examined the adult within two hours of making the certification. In the event that the adult is unconscious or completely unable to communicate by any means, a second physician's certification is not necessary.



### Is there one particular form that must be used for an advance directive?

No. The Maryland Office of the Attorney General has a form (linked below in the "Sources and Resources" section) that may be used, but other forms may be valid as well. The form may be filled out without going to a lawyer. However, adults who have questions or concerns regarding the execution of an advance directive are encouraged to consult a lawyer regarding their rights.



### Does the advance directive need to be notarized?

No. However, if you travel frequently to another state, check with a knowledgeable lawyer to see if that state requires notarization.



### For how long does an advance directive endure?

Once an adult executes an advance directive, it remains in effect until revoked by the adult. It does not expire, and no one but the adult who created it may alter or change the advance directive. Adults are free to amend or revoke an advance directive at any time, as long as they still have decision-making capacity. If an adult decides to revoke or amend an existing advance directive, the adult should inform their doctors and anyone else who has a copy of the advance directive. All adults with advance directives are encouraged to periodically review the document so that it is up to date and reflects the adult's current attitudes, preferences and wishes.



### To whom should I give copies of my advance directive?

Copies should be provided to all relevant physicians and hospital or nursing home staff members (if applicable), to the designated healthcare agent

(and backup agent[s], if applicable), and to family members or friends who should be aware of the adult's wishes. Some adults carry a card in their wallet stating that they have an advance directive and whom to contact in case of emergency.



### May the healthcare agent or adult's family decide treatment issues differently from what is written in the advance directive?

It depends on how much flexibility is given in the advance directive. Some adults intentionally give their healthcare agent flexibility in applying the advance directive, while other adults want it followed very strictly. When executing an advance directive, it is important to very clearly state personal wishes and preferences.



### Is a minor legally permitted to execute an advance directive?

Under the Maryland Health Care Decisions Act, a minor may not legally execute an advance directive unless the minor is married or the minor is a parent.



### May adults under guardianship have an advance directive?

No. Legal guardians are only appointed when it is determined that the adult lacks capacity to make their own decisions regarding their person (such as decisions about medical treatment), their property (such as decisions about bank accounts) or both. If it is determined that an adult lacks capacity to make these decisions and requires a guardian to make these decisions on the adult's behalf, then the adult would lack the required capacity to execute an advance directive. In the case of guardianship, the appointed guardian of the person would be responsible for making medical decisions in a manner consistent with the wishes and preferences of the adult under guardianship.

Kennedy Krieger patients, students, families, faculty members, staff members and trainees are encouraged to contact Project HEAL (Health, Education, Advocacy, and Law) at Kennedy Krieger Institute with any questions about this material.

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#### **Sources and Resources**

[The People's Law Library of Maryland](#)

[Maryland Code, Health General § 5-602](#)

[Maryland Office of the Attorney General](#)

[Advance Directive Wallet Card](#)