

# **The Right to Decide**

We have the right to make health care decisions, but how do we communicate them clearly to the health care professionals who provide the care? All persons have the fundamental right to control the decisions relating to their own medical care and treatment. The following guidelines explain the various ways a patient can communicate his or her decision(s) to receive or refuse treatment to his treating physicians or health care providers.

## **I. ADVANCE HEALTH CARE DIRECTIVES**

An advance directive is a document that allows the patient to document the type of medical care that is acceptable to the patient in case of a terminal illness, and is used when the patient is unable to speak for himself or herself. These documents are referred to as “advance” directives because they are prepared in advance so that the health care providers will know the patient’s wishes concerning treatment. The advance directive provides the physician or health care provider with an outline of the patient’s wishes relating to end of life care. This is effective because it spares the family, or someone else close to the patient, whomever is present, from having to make those end of life decisions on the patient’s behalf. An advance directive allows the patient to make his or her preferences regarding medical care known to the health care providers treating the patient. Three types of advance directives in Louisiana are a living will<sup>i</sup>, a durable power of attorney for health care<sup>ii</sup>, and the Louisiana Physician Order for Scope of Treatment (LaPOST).

## **II. LIVING WILLS AND DURABLE POWER OF ATTORNEY**

### **1) Living Will<sup>iii</sup>**

A living will is a written declaration that allows the patient to describe the types of life sustaining treatment or procedures that he/she wants or does not want in the event that the patient

has a terminal and irreversible<sup>iv</sup> condition and is unable to communicate (for example, being in a coma)<sup>v</sup>. A living will is restrictive. It will only go into effect if the patient has lost the ability to make decisions and is terminally ill. While an adult can make a written declaration if he or she so chooses, an adult can also make an oral or nonverbal declaration in the presence of two witnesses by any non-written means of communication subsequent to the diagnosis of a terminal and irreversible condition.<sup>vi</sup>

Since the living will is formulated by the patient, it can be very specific or very vague<sup>vii</sup>. A living will is completed by the patient and generally must be honored by the physician as if the patient is speaking directly to the physician. The physician will place the living will in the medical record and will use it as a guide to write orders related to the patient's care<sup>viii</sup>. The living will can be revoked if the patient changes his or her mind.<sup>ix</sup>

## **2) Durable Power of Attorney for Health Care**

A Durable Power of Attorney for Health Care is a legal document by which the patient authorizes another person (an agent or attorney in fact) to make health care decisions in the event that the patient becomes temporarily or permanently unable to make the decisions for himself or herself<sup>x</sup>. A person may appoint any competent adult to be their agent or attorney in fact. The patient may designate alternatives in the event that their first choice of Durable Power of Attorney is unable or unwilling to act. The power of attorney should be designated in favor of someone who understands the patient's wishes and is comfortable accepting the responsibility.

Unlike a living will, which contains the patient's wishes, a Durable Power of Attorney authorizes someone else to make decisions on the patient's behalf. The Durable Power of Attorney is only used if the patient is temporarily or permanently unable to make his own health care decisions<sup>xi</sup>. The difference between a written declaration (such as a living will) and a Durable

Power of Attorney is that a living will only goes into effect if the patient is in a continual comatose state or is terminally ill (a “terminal and irreversible condition”). In contrast, the Durable Power of Attorney allows the patient to appoint an agent to make medical decisions in the event he is incapacitated. The Durable Power of Attorney is broader, and gives the patient’s agent the authority to respond to unanticipated medical situations.

### **Do Not Resuscitate (DNR) Orders**

A Do Not Resuscitate (DNR) Order is a separate document, and not to be confused with a living will or a Durable Power of Attorney. A DNR order is a mechanism or vehicle through which the treatment decisions requested by the patient in an advance directive or conveyed to a physician by a competent patient are related to that patient’s health care providers. A DNR order provides instructions about how the health care providers of the patient should carry out the end of life decisions of a patient in the event the patient has a terminal and irreversible condition. A DNR is an order that a physician can include in a patient’s medical record based on the known wishes of the patient.

In the event that it is determined that a patient has a terminal and irreversible condition, a Do Not Resuscitate Order can be entered in the patient’s medical record (based on the patient’s advance directive or previous declaration to a physician), and provides that if the patient goes into cardiac arrest or respiratory arrest, his health care providers will not try to revive the patient<sup>xii</sup>. Do Not Resuscitate does not mean ‘Do Not Treat.’ However, comfort measures will always be provided and basic needs will always be met regardless of whether the patient has a DNR order.

### **III. LOUISIANA PHYSICIAN ORDER FOR SCOPE OF TREATMENT (LaPOST)**

#### **LaPOST Complements a Living Will or Durable Power of Attorney to Optimize Patient Care**

Louisiana enacted the Natural Death Act in 1984 in response to expanding concerns regarding the “End of Life Debate”. The Act was passed in the wake of prominent cases (*Quinlan* and *Cruzan*) that dealt with sudden, unexpected, and catastrophic events, and disagreements over life sustaining treatment when the patient’s wishes were unclear. In anticipation of the End of Life decisions that follow from catastrophic events, the Natural Death Act was enacted in Louisiana. The purpose of the Act is to enable qualified persons or their representatives to make a declaration regarding the withholding or withdrawal of life sustaining procedures under certain limited conditions. The Natural Death Act only concerns the withholding or withdrawal of certain life sustaining procedures from persons who have a terminal and irreversible condition (a continual profound comatose state with no reasonable chance of recovery or a condition caused by injury, disease, or illness which, within reasonable medical judgment, would produce death and for which the application of life-sustaining procedures would serve only to postpone the moment of death). There are three types of declarations: 1) written, 2) oral and 3) non-verbal. Both the living will and Durable Power of Attorney discussed earlier are written declarations that apply under the Natural Death Act.

In contrast to the Natural Death Act, LaPOST was passed in 2010, and was designed for terminal patients who have not experienced a catastrophic event, but instead whose condition will take some time before death occurs. While the Natural Death Act concerns patients who have a terminal and irreversible condition, LaPOST was designed for patients who have a “life-limiting and irreversible condition”, and have approximately six months to one year left to live. The Natural Death Act was passed in the wake of the *Quinlan* and *Cruzan* cases, and was done in anticipation of an unexpected event, or a worst case scenario. LaPOST was enacted for a different reason, and was enacted for terminal patients to meet with a physician, and communicate

and discuss their condition with the physician, which will allow them to make knowledgeable and informed decisions regarding their care.

The Louisiana Physician Order for Scope of Treatment (LaPOST) is an independent document that translates a patient's goals of care and treatment preferences into a physician order. LaPOST is voluntary, and is more detailed and easier for a physician than either a Durable Power of Attorney or a living will. This is because LaPOST is a physician order that outlines a patient's wishes for medical treatment and goals of care. LaPOST is recommended for people with a "life-limiting and irreversible condition" who have less than a year to live<sup>xiii</sup>.

LaPOST is a gold document (golden harvest in color) that translates a patient's goals of care and treatment preferences into a physician order and transfers across all health care settings. LaPOST travels with a patient as he or she moves from one health care setting to another. In order to complete LaPOST, the patient (or his personal health care representative<sup>xiv</sup>) sits down with his physician and has a thorough discussion regarding his understanding of his illness, treatment preferences, values and goals of care. This encourages communication and discussion between doctors and patients and allows patients to make informed decisions and document those decisions in the medical record. In order for LaPOST to be valid, it must be signed by the patient (or his personal health care representative) and his physician<sup>xv</sup>. LaPOST must be signed by a physician since it establishes medical orders and is classified as a physician order.

LaPOST is divided into six sections: Cardiopulmonary Resuscitation (CPR)<sup>xvi</sup>, Medical Interventions, Antibiotics, Artificially Administered Nutrition, Other Instructions, and Summary of Goals<sup>xvii</sup>. LaPOST's purpose is to provide direction regarding a patient's preferences regarding these areas of medical treatment and to make the wishes of the patient clear to a physician in order to render treatment in keeping with the desires of the patient. LaPOST

encourages communication between doctors and patients, and enables patients to make informed decisions regarding their treatment. And because the patient's wishes are discussed with a physician, LaPOST provides clear direction about a patient's health care treatment for physicians, nurses, emergency responders and other health care providers.

Since LaPOST is made a part of the patient's medical record, the document travels with the patient across health care settings (for example from a long term care facility to a hospital). LaPOST can be modified or revoked any time, based on new information or changes in patient's treatment preferences. A patient with capacity can void the LaPOST document at any time or change his/her mind about treatment<sup>xviii</sup>. The LaPOST document should also be reviewed periodically, such as when the patient is transferred from one care setting to another, there is a substantial change in the patient's health status, or the patient's treatment preferences change<sup>xix</sup>.

LaPOST can be used as a "stand alone" document, but can also be used to complement another advance directive. LaPOST does not replace another advance directive, but is instead used to clarify the directives of a living will or a durable power of attorney<sup>xx</sup>. LaPOST can be used to translate a living will into a physician order when the patient has a terminal and irreversible condition. LaPOST's purpose is to make the wishes of a patient clear to a physician in order to render treatment in keeping with the desires of the patient. A physician may not be able to quickly translate the language of a living will into treatment orders, but LaPOST provides a quick reference for the physician to follow<sup>xxi</sup>. In addition, the physician has had a lengthy discussion with the patient, so that the patient's wishes are clearly understood by the physician who signed the LaPOST document.

## IV.SUMMARY

### The Differences Between LaPOST and a Living Will

	<b>Written Declaration (Living Will)</b>	<b>LaPOST</b>
Who can prepare the document?	Every adult	Someone who has a “life-limiting and irreversible condition” regardless of age in which the patient is not expected to survive the year.
What is the document?	A living will is a broad outline that requires interpretation and translation to a physician order. It is only used when the patient is unable to speak for himself and two physicians certify the patient has a “terminal and irreversible condition”	LaPOST identifies specific wishes of the patient regarding medical treatment and contains specific physician orders. Once the document contains the proper signatures, it is immediately actionable.
How is the document accessed?	A living will needs to be retrieved, as there is no universal system. A physician must be made aware of its existence by a patient or someone else who knows of its existence. A living will can also be archived with the Louisiana Secretary of State office for a fee	LaPOST is a physician order and travels with the patient across health care settings. The original document accompanies the patient (such as from a long-term care facility to a hospital), while a copy is always kept in the patient’s medical record.

## V. CONCLUSION

Since any adult can make a living will or durable power of attorney, it is recommended that he do so in order to avoid any confusion concerning his end of life wishes. Since the patient will not be able to foresee every situation that may arise, it is important for the patient to be prepared, especially if he is seriously ill. If the patient has a “life-limiting and irreversible condition”

regardless of age, then that person may speak with a physician in order to work with the physician to complete the LaPOST document. This document clearly sets forth a patient's end of life decisions concerning treatment and care. The living will, durable power of attorney, and LaPOST enable health care providers to honor the health care wishes of patients in Louisiana.

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<sup>i</sup>In order for a written declaration (commonly referred to as a living will) to be valid, it must have two witnesses, but does not need to be notarized. The two witnesses must be competent adults who are not related to the patient by blood or marriage, and would not be entitled to inherit from the patient.

<sup>ii</sup>In order for the durable power of attorney to be valid, it must be notarized, and contain the signatures of two witnesses.

<sup>iii</sup>In Louisiana, any adult person may, at any time, make a written declaration directing the withholding or withdrawal of life sustaining procedures in the event such person should have a terminal and irreversible condition. *LSA - R.S. 40:1299.58.3*. These written declarations are more commonly referred to as a "living will".

<sup>iv</sup>A terminal and irreversible condition is defined as a continual profound comatose state with no reasonable chance of recovery or a condition caused by injury, disease, or illness which, within reasonable medical judgment, would produce death and for which the application of life-sustaining procedures would serve only to postpone the moment of death.

<sup>v</sup>A written declaration, or living will, becomes effective when three conditions are met: 1) The patient's health care provider has a copy of their living will, 2) The patient's physician and one other physician have determined that the patient is no longer able to make his or her own decisions concerning medical treatment and health care, and 3) The patient's physician and one other physician have determined that the patient is in a continual profound comatose state or has a terminal and irreversible condition. (*LSA - R.S. 40:1299.58.2*, "Qualified patient", and *LSA - R.S. 40:1299.58.7*)

<sup>vi</sup>Similar to a written declaration, the two witnesses must be competent adults who are not related to the patient by blood or marriage, and would not be entitled to inherit from the patient. After an oral or nonverbal declaration, the physician shall promptly make a recitation of the reasons the declarant could not make a written declaration and make the recitation part of the patient's medical record. The oral or nonverbal statement should also be reduced to writing, signed by the witnesses, and made a part of the medical record.

<sup>vii</sup>In the event a comatose or incompetent person physically unable to communicate has not made a written declaration, a declaration may be made on a qualified patient's behalf by a person or persons designated by *LSA - R.S. 40:1299.58.5*. According to *LSA - R.S. 40:1299.58.5*, the

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absence of a declaration by an adult patient shall not give rise to any presumption as to the intent to consent to or refuse life sustaining procedures. When a comatose or incompetent person or a person who is physically or mentally incapable of communication has been certified as a qualified patient and has not previously made a declaration, any of the following individuals in the following order of priority, if there is no individual in a prior class who is reasonably available, willing, and competent to act, may make a declaration on the qualified patient's behalf:

- (a) The judicially appointed tutor or curator of the patient if one has been appointed.
- (b) Any person or persons previously designated by an adult patient by written instrument signed by the patient in the presence of at least two witnesses, to have the authority to make a declaration for the patient in the event of the patient's inability to do so. If the instrument so authorizes more than one person, it may include the order in which the persons designated shall have authority to make the declaration. [Even though it is not specifically mentioned in subparagraph (b), a Durable Power of Attorney gives an individual authority to make a declaration on behalf of the patient pursuant to this section]
- (c) The patient's spouse not judicially separated.
- (d) An adult child of the patient.
- (e) The parents of the patient.
- (f) The patient's sibling.
- (g) The patient's other ascendants or descendants.

If there is more than one person within the above named class in subparagraphs (d) through (g), then the declaration shall be made by a **majority** of that class available for consultation upon good faith efforts to secure participation of all of that class. Where the declaration is made by a person specified in subparagraphs (b) through (f), there shall be at least two witnesses present at the time the declaration is made.

<sup>viii</sup>A living will does not need to be recorded, although the patient should be sure that all of his or her health care providers have a copy of their living will (as well as alert friends and family members of its existence). A living will can be registered with the Louisiana Secretary of State for a fee.

<sup>ix</sup>The patient may revoke a declaration (such as a living will) at any time, regardless of his or her mental state or competency. The declaration may be revoked by destroying the original or preparing a written revocation. If the living will is filed with the Secretary of State, a written notice of revocation must be sent to that office. A patient may also revoke their living will by an oral or nonverbal expression, which becomes effective upon communication to a physician (who must record the revocation in the medical record). LSA - R.S. 40:1299.58.4

<sup>x</sup>A Durable Power of Attorney is different from a Power of Attorney in that with a Durable Power of Attorney, the agent is given authority to make decisions for the principal regardless of the competency of the principal. A regular Power of Attorney only lasts as long as the principal is competent. Since medical and end of life decisions arise in the context of the patient (or

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principal) not being competent, a Durable Power of Attorney is necessary. The Durable Power of Attorney must also specifically and expressly state that the patient is giving consent for this person to make both medical and end of life decisions on their behalf.

<sup>xii</sup>The Durable Power of Attorney only becomes effective if the patient is temporarily or permanently unable to make their own health care decisions. If, after the Durable Power of Attorney becomes effective, the treating physician determines that the patient has regained capacity to make their own health care decisions, then the agent's authority ends and the patient makes their own health care decisions again.

<sup>xiii</sup>A living will may convey a patient's decisions concerning all types of life sustaining treatments and procedures after a patient develops a terminal and irreversible condition (including cardiac and respiratory arrest). However, a Do Not Resuscitate Order only covers when a patient's heart stops beating (cardiac arrest) or a patient stops breathing (respiratory arrest).

<sup>xiv</sup>The statute (La. R.S. 40:1299.64.1 et seq) defines "life-limiting and irreversible condition" as "a continual profound comatose state with no reasonable chance of recovery or a condition caused by injury, disease, or illness which within reasonable medical judgment would usually **produce death within six months**, for which the application of life-sustaining procedures would serve only to postpone the moment of death and for which the life-sustaining procedures would be a burden and not a benefit to the qualified patient". However, literature on LaPOST, including the LaPOST website itself, generally defines "life-limiting" to mean the patient has less than a year to live, rather than less than six months.

<sup>xv</sup>A personal health care representative is a person who has the authority (under Louisiana law) to act on behalf of an individual related to that individual's health care because of the individual's incapacity.

<sup>xvi</sup>Once signed by both physician and patient, LaPOST becomes part of the patient's medical record, and is immediately actionable.

<sup>xvii</sup>Since LaPOST is classified as a physician order, a DNR order is included as an option under the Cardiopulmonary Resuscitation (CPR) section of LaPOST.

<sup>xviii</sup>Any section of LaPOST not completed implies full treatment for that section.

<sup>xix</sup>In order to void the LaPOST document, the patient must have capacity, and should draw a line through the sections he or she wishes to void and write "VOID", then sign and date the document.

<sup>xx</sup>If a new LaPOST form is completed, the old form must be properly voided and retained in the medical chart.

<sup>xxi</sup>In the event that a patient's other advance directive and LaPOST conflict with each other, the most recent expression of the patient's wishes is honored.

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<sup>xxi</sup>LaPOST must be followed even if the physician who signed the LaPOST document is not on the medical staff of the facility where the patient is being treated.