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The Supreme Court decision in *Cruzan vs. Director, Missouri Department of Health*,[[1]](#endnote-1) held that the U.S. Constitution does not prohibit states from requiring that evidence of an incompetent patient’s wishes to have life-sustaining treatment withdrawn must be established by clear and convincing evidence. In Justice Scalia’s concurring opinion, he stated that there is no federal constitutional basis whatsoever for preventing states from prohibiting patients, or their families, to refuse unwanted life-sustaining treatment.

Although the states and medical providers will vary on the degree of compliance with a patient’s, or a patient’s family’s, wishes when extraordinary life-sustaining measures are required, the *Cruzan* decision means that a person can improve his chances that his wishes will be carried out through advance planning. If a person becomes legally incapacitated, terminally ill, or in a permanent vegetative state, medical decisions made by hospitals and physicians to prolong the person’s life by artificial means could be imposed against the wishes of the patient’s immediate family. More importantly, the decisions may not be what the person would have desired if the person could have made the choice before losing capacity. Such prolonged medical treatment and related family disputes are often an unwarranted emotional and financial drain on the family.

Two mechanisms are available for a person to indicate his wishes regarding life-sustaining measures if a person should become so disabled, so incompetent, that there is no reasonable hope or expectation of recovery. The two methods to indicate intent are the Living Will, also called Advanced Directive for Medical Care, and the Durable Power for Health Care, also known as Health Care Proxy. The laws of the state where a person is located will determine the validity of such documents and competent local counsel will provide the best assurance that the wishes expressed in the documents will be carried out.

# Living Wills

A living will, or advanced directive for medical care, is a document indicating a person’s intentions in the event the person becomes disabled and lacks the legal capacity to make medical decisions. A living will deals with the health-care measures desired in the event of disability and incapacity. The living will should carefully spell out whether or not heroic measures should be taken in the event of a terminal accident or illness or a permanent coma.

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*Legal environment*. Living wills require a specific statute to be legally binding and are not valid in all states. However, many states recognize them and others currently have statutes pending. Most practitioners feel that the document provides clear and convincing evidence of a person’s wishes and, even absent a statute, may cause health care providers to respond in accordance with a person’s wishes, or will convince a court to force the doctors to comply.

*Elements*. A living will should contain the following:

* Provisions conforming to the domicile state’s living will statute, if any
* The specific wishes with respect to various life-sustaining measures. Some specimen documents contain an actual list of the type of measures that one can either choose or avoid.
* A proxy for someone to interpret its terms. A trusted family member or friend should be selected to make decisions if the interpretation is unclear.
* Language exonerating those medical-care providers and proxy-holders acting in reasonable compliance with the living will. This will help alleviate the liability concerns of those taking action.

# Durable Power of Attorney for Health Care

A durable power of attorney, or health care proxy, gives a selected agent the power to make health-care decisions for a person if the person becomes legally incompetent. The durable power for health care is more widely recognized and more flexible than a living will, since the designated agent may be able to act before a person’s permanent incapacity. Of course, while a person is still competent, the person is still free to continue to make the person’s own decisions and can revoke the power at any time the person still has the legal capacity to do so.

*Suggested elements*. The following are suggestions for durable powers for health care and should be discussed with counsel:

* The document should comply with state law and be broad enough to cover other jurisdictions where a person is likely to spend extended vacation or retirement time.
* The document should carefully enumerate the types of decisions the attorney-in-fact is granted the power to make.

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*Naming the attorney-in-fact*. The decisions concerning medical care are best left to the person himself or his immediate family. To ensure this result, a person must take proactive measures. Either a living will or a durable power for health care could accomplish the desired intentions. Quite often, a combination of the two is suggested to cover the broadest range of choices for medical decisions. In any event, the documents should be drafted in accordance with the laws of the domicile state and duplicate originals should be given to a person’s doctor(s) and any family members who will be granted the power to act in the person’s behalf.

1. 110 S.Ct. 111. [↑](#endnote-ref-1)