



Patti Goroski

## Living Wills (Declarations in Montana)

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*Describes how the Montana Rights of the Terminally Ill Act allows a person (or someone selected) to choose to end medical treatment with a living will, called declaration in Montana, if a person has an incurable and irreversible condition that would lead to death in a relatively short period of time.*

**THE MONTANA RIGHTS OF THE TERMINALLY ILL ACT** allows an individual (the declarant) who is of sound mind and who is 18 or more years of age to make a **declaration (living will)** to govern the withholding or withdrawing of life-sustaining treatment when they are in a terminal condition.

### Definition of words used in a Montana declaration (living will)

Definitions of the following words are important for an understanding of the declaration provided in the Montana Rights of the Terminally Ill Act.

**Attending physician** is the physician selected by or assigned to the patient, who has primary responsibility for the treatment and care of the individual.

An **attending advanced practice registered nurse (APRN)** is selected by or assigned to a patient and has primary responsibility for the treatment and care of the patient. APRNs hold at least a master's degree, in addition to nursing education and licensing needed for all Registered Nurses (RNs).

The **designee** is the individual named in a declaration to make decisions on the declarant's behalf about withholding or withdrawing treatment.

**Emergency medical services personnel** include paid volunteer firefighters, law enforcement officers, first responders, emergency care providers or other emergency services or health care providers acting within the ordinary course of their business.

A **health care provider** is a person who is licensed, certified, or otherwise authorized by the laws of Montana to

administer health care in the ordinary course of business or the practice of a profession.

**Life-sustaining treatment** is any medical procedure or intervention which, when administered to a qualified patient, will serve only to prolong the dying process.

A **qualified patient** is one who is 18 or more years of age, has written a declaration according to Montana law, and has been found by the attending physician or attending APRN to be in a terminal condition.

A **terminal condition** is an incurable or irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of the attending physician or attending APRN, result in death within a relatively short time.

### What is the format of a declaration (living will)?

A living will is referred to as a **declaration** under Montana law. An individual who has made a declaration is referred to as a **declarant**. A declarant may order the attending physician or attending APRN to withhold or withdraw treatment that would only prolong the process of dying. An example declaration is at the end of this MontGuide. The form is available for download from MSU Extension, at [montana.edu/estateplanning/Declaration-directphysician.pdf](http://montana.edu/estateplanning/Declaration-directphysician.pdf).

A declaration (living will) must be signed by the declarant and by two individuals who serve as witnesses. It can be handwritten. An attorney does not have to write a declaration, nor does it have to be notarized. Another individual can sign for a declarant who is unable to sign themselves.

**Example:** John is physically disabled but mentally competent. He asked his attorney to sign the declaration on his behalf in the presence of two disinterested witnesses. While Montana law allows family members to be witnesses, John chose not to have relatives as witnesses to the signing of the declaration to avoid potential questions about their impartiality about his chosen treatments at the end of life.

## **How will others know a declaration (living will) has been signed?**

A copy of a living will (declaration) should be provided to the attending physician. Upon deciding whether a terminal condition exists, the attending physician or APRN must record this information and the terms of the declaration in a patient's medical record.

A copy of a declaration should be shared with family members or, at a minimum, let them know its location. A declarant may want to carry a card in their wallet or purse notifying others of the existence of the declaration (living will) and where it can be found.

Another way to let others know about a declaration (living will) is on a Montana driver's license. At the time of application for a new driver's license or for renewal, an applicant is given the opportunity to show on their license if they wish to make an anatomical gift and if they have completed a living will. An applicant who wants the presence of these documents to be shown on their present license can apply online for a replacement driver's license for a fee from the Driver's License Bureau. [cars.dojmt.gov/app/\\_/](http://cars.dojmt.gov/app/_/)

Another way a declaration can be accessible to health care providers and family members is by storing it in the **Montana End-of-Life Registry**. The Office of the Montana Attorney General has set up a website so Montana citizens can securely store declarations online. Authorized healthcare providers can be given immediate access to the declarations. The registration form is available from the End-of-Life Registry at [www.endoflife.mt.gov](http://www.endoflife.mt.gov). More information about the registry is in the MSU Extension MontGuide, *Montana's End-of-Life Registry (MT200602HR)* or request a copy for your local MSU Extension office.

## **When is a declaration (living will) effective?**

People may make decisions about life-sustaining treatment for themselves if they are able to do so. A signed declaration should be communicated to an attending physician. It becomes operative provided the following two conditions exist:

1. The attending physician or attending APRN decides a patient is in a terminal condition; and
2. A person is no longer able to make decisions about the administration of life-sustaining treatment.

An attending physician or APRN who has been given a copy of a patient's declaration must make it a part of their medical record. When a declaration becomes operative, the attending physician or attending APRN must follow

its provisions. When a person is named as a designee, the attending physician or attending APRN must follow the designee's instructions.

## **What if hospital policies or health care providers do not accept a declaration (living will)?**

If the attending physician or attending APRN is unwilling to follow a declaration, they are required promptly to tell the patient, and any individual named to act for the patient, of their refusal. They must take all reasonable steps as promptly as practical to transfer the patient's care to another physician or attending APRN who is willing to follow the declaration. If the policies of a healthcare facility prohibit compliance with a declaration, the facility must take all reasonable steps to transfer a patient to a facility where the provisions can be honored.

## **Are there circumstances in which others may give consent to the healthcare provider to withhold or withdraw treatment?**

The declarant may choose another individual (designee) to make decisions about the withholding or withdrawing of life-sustaining treatment. A designee must be of sound mind and have reached 18 or more years of age. (An example declaration naming another individual, a designee, to make such decisions is at the end of this MontGuide.)

If a person does not have a declaration (living will), Montana law gives the authority to consent or to withhold consent about the administration of life-sustaining treatment to be exercised by the following individuals, in order of priority:

1. The spouse of the individual.
2. An adult child of the individual or, if there is more than one adult child, a majority of the adult children are reasonably available for consultation.
3. The parents of the individual.
4. An adult sibling of the individual or, if there is more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation.
5. Or the nearest other adult relative of the individual by blood or adoption who is reasonably available for consultation.

## **Is a health care power of attorney the same as a declaration?**

It depends. Under Montana law, using the health care power of attorney to appoint an agent and giving the agent written authorization to make decisions about the withholding or withdrawing of life-sustaining treatment constitutes a declaration. However, at least two individuals must properly witness the signing of the health care power of attorney for it to be effective as a declaration (living will). The MSU Extension Bulletin *Health Care Power of Attorney* includes a declaration. [store.msuextension.org/Products/Health-Care-Power-of-Attorney-and-Related-Documents-for-Montanans-EB0231\\_\\_EB0231.aspx](https://store.msuextension.org/Products/Health-Care-Power-of-Attorney-and-Related-Documents-for-Montanans-EB0231__EB0231.aspx)

## **What if a person has a change of mind and does not want their declaration (living will) to be implemented?**

A declaration (living will) may be revoked at any time, either in writing or verbally, regardless of the person's mental or physical condition. A revocation is effective when communicated to the attending physician or attending APRN by the declarant or by a witness to the revocation. The revocation must be included in the declarant's medical record.

Emergency medical services personnel who witness a revocation by an individual must act upon it and communicate the revocation to the attending physician or APRN at the earliest opportunity. A revocation communicated to a person other than the attending physician, emergency medical services personnel, or a health care provider is not effective unless the attending physician or attending APRN is informed of it before the qualified patient is in need of life-sustaining treatment.

## **What if a person wrote a living will when living in another state?**

A living will written by a person who was a resident in another state is effective if the wording is similar to Montana's declaration. Compare the other state's living will with the declaration at the end of this MontGuide. Persons should consult an attorney if they have any questions about the wording of an out-of-state living will to decide whether it conforms to Montana law.

## **What impact does a declaration (living will) have on a life insurance policy?**

Death resulting from the withholding or withdrawing of life-sustaining treatment under the Montana Rights of the Terminally Ill Act does not constitute a suicide or homicide.

The making of a declaration does not affect the sale, the purchase, or the issuing of any life insurance policy or annuity. A declaration also does not affect, impair, or change the terms of an existing policy of life insurance. A life insurance policy is not invalidated by the withholding or withdrawing of life-sustaining treatment from the insured.

## **Summary**

The Montana Rights of the Terminally Ill Act allows an individual who is of sound mind and who is 18 or more years of age to make a declaration (living will). The document governs the withholding or withdrawing of life-sustaining treatment when a person is in a terminal condition.

The declaration (living will) must be signed by the declarant and by two individuals who serve as witnesses. The signatures do not have to be notarized. A person may have another individual sign the declaration (living will) if they are unable to sign it themselves.

## **Acknowledgments**

This MontGuide has been reviewed by representatives from the following who recommend its reading by all Montanans who want to learn about the Montana Rights of Terminally Ill Act:

- Business, Estates, Tax, Trusts and Real Property Law Section, State Bar of Montana

## **References**

*Basic Questions and Answers on the Patient Self-Determination Act*, Choice in Dying, 250 West 57th Street, New York, NY 10107.

Montana Code Annotated 2023, Sections §50-9-101 through §50-9-111.

**DECLARATION**

***(Direct physician or attending advanced practice registered nurse to withhold life-sustaining treatment)***

**MCA 50-9-103**

If I should have an incurable or irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician, cause my death within a relatively short time and I am no longer able to make decisions regarding my medical treatment, I direct my attending physician or attending advanced practice registered nurse, pursuant to the Montana Rights of the Terminally Ill Act, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary to my comfort or to alleviate pain.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Signature: \_\_\_\_\_

City, county, and state of residence: \_\_\_\_\_

The declarant voluntarily signed this document in my presence

Witness 1 signature: \_\_\_\_\_

Witness 1 address: \_\_\_\_\_

Witness 2 signature: \_\_\_\_\_

Witness 2 address: \_\_\_\_\_

A declaration choosing another individual to make decisions governing the withholding or withdrawal of life-sustaining treatment may, but need not, be in the following form:

## **DECLARATION**

*(Designating another individual to make a decision)*

**MCA 50-9-103**

If I should have an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician or attending advanced practice registered nurse, cause my death within a relatively short time and I am no longer able to make decisions regarding my medical treatment, I appoint \_\_\_\_\_ or, if that person is not reasonably available or is unwilling to serve, \_\_\_\_\_ to make decisions on my behalf regarding withholding or withdrawing of treatment that would only prolong the process of dying and is not necessary for my comfort or to alleviate pain, pursuant to the Montana Rights of the Terminally Ill Act. If the individual I have appointed is not reasonably available or is unwilling to serve, I direct my attending physician or attending advanced practice registered nurse, pursuant to the Montana Rights of the Terminally Ill Act, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Signature: \_\_\_\_\_

City, county, and state of residence: \_\_\_\_\_

The declarant voluntarily signed this document in my presence

Witness 1 signature: \_\_\_\_\_

Witness 1 address: \_\_\_\_\_

Witness 2 signature: \_\_\_\_\_

Witness 2 address: \_\_\_\_\_

Designee name: \_\_\_\_\_

Designee address: \_\_\_\_\_

