

17 LIVING WILLS

By KENNETH A. VERCAMMEN and RANDALL KEITH BENJAMIN,II

All States have declared that competent adults have the fundamental right in collaboration with their health care providers, to control decisions about their own health care. States recognize in their laws and public policy, the personal right of the individual patient to make voluntary, informed, choices to accept, reject or to choose among various alternative courses of medical and surgical treatment.

WHY LIVING WILLS

Modern advances in science and medicine have made possible the prolongation of the lives of many seriously ill individuals, without always offering realistic prospects for improvement or cure. For some individuals the possibility of extended life is experienced as meaningful and of benefit. For others, artificial continuation of life may seem to provide nothing medically necessary or valuable, serving only to extend suffering and draw out the dying process. States recognize the inherent dignity and value of human life and within this context recognize the fundamental right of individuals to make the necessary health care decisions to have life-prolonging medical, surgical, or procedure means provided, withheld, or withdrawn.

States acknowledge the right of competent adults to plan ahead for health care decisions through the execution of advance directives, such as living wills and durable powers of attorney, and to have their wishes respected, subject to certain limitations.

PURPOSE OF LIVING WILLS

In order to assure respect for patients' previously expressed wishes when the capacity to participate actively in decision making has been lost or impaired; to facilitate and encourage a sound decision making process in which

patients, health care representatives, families, physicians, and other health care professionals are active participants; to properly consider patients' interests both in their self-determination and well-being; and to provide necessary and appropriate safeguards concerning the termination of life-sustaining treatment for incompetent patients as the law and policy of this State and the Legislatures have enacted Living Will/ Advance Directives for Health Care Acts.

REQUIREMENTS OF STATUTE

The advance directive for health care (Living Will) requires a writing executed in accordance with the requirements of the state law. It must be signed and dated in front of an attorney at law, other person authorized to administer oaths, or in the presence of two subscribing adult witnesses. If the two adult witnesses are used, they both must attest that the declarant is of sound mind and not under undue influence. A designated health care representative shall not act as a witness to the execution of the advance directive. Since this is a legal document, it must be executed properly to be valid under the statute.

HEALTH CARE REPRESENTATIVE

The declarant must designate one or more alternative health care representatives. "Health care representative" means the person designated by you under the Living Will for the purpose of making health care decisions on your behalf.

WHEN DOES THE ADVANCE DIRECTIVE BECOME OPERATIVE

An advance directive becomes operative when (1) it is transmitted to the attending physician or to the health care institution, and (2) it is determined pursuant to the Act that the patient lacks capacity to make a particular health care decision.

Treatment decisions in pursuit of an advance directive shall not be made and implemented until there has been a reasonable opportunity to establish and where appropriate confirm, a reliable diagnosis for the patient which shall include the attending physician's opinion concerning the nature, cause, extent, and probable duration of the patient's incapacity. This soon after shall be made a part of the patient's medical records. For additional information or to have a "Living Will" prepared, see your attorney. In addition, be certain your Last Will and testament is up to date.

1. Introduction:

As Americans, we take it for granted that we are entitled to make decisions about our own health care. Most of the time we make these decisions after talking with our own physician about the advantages and disadvantages of various treatment options. The right of a competent individual to accept or refuse medical treatment is a fundamental right now fully protected by law.

But what happens if serious illness, injury or permanent loss of mental capacity makes us incapable of talking to a doctor and deciding what medical treatments are best for us? These situations pose difficult questions to all of us as patients, family members, friends and health care professionals. Who makes these decisions if we can't make them for ourselves? If we can't make our preferences known how can we make sure that our wishes will be respected? If disagreements arise among those caring for us about different treatment alternatives how will they be resolved? Is there a way to alleviate the burdens shouldered by family members and loved ones when critical medical decisions must be made?

Living Will:

By using documents known as advance directives for health care, you can answer some of these questions and give yourself the security of knowing that you can continue to have a say in your own treatment. A properly prepared Living Will permits you to plan ahead so you can both make your wishes known, and select someone who will see to it that your wishes are followed.

After all, if you are seriously ill or injured and can't make decisions for yourself someone will have to decide about your medical care. Doesn't it make sense to

- Have a person you trust make decisions for you,
- Provide instructions about the treatment you do and do not want, or
- Appoint a person to make decisions and provide them with instructions.

A Few Definitions

Throughout this booklet there are four phrases. Each of these phrases has a special meaning when it comes to allowing you to make decisions about your future health care.

- Advance directive-If you want your wishes to guide those responsible for your care you have to plan for what you want in advance. Generally such planning is more likely to be effective if it's done in writing. So, by an "advance directive" we mean any written directions you prepare to say what kind of medical care you want in the event you become unable to make decisions for yourself.

1. Proxy directives - One way to have a say in your future medical care is to designate a person (a proxy) you trust and give that person the legal authority to decide for you if you are unable to make decisions for yourself. Your chosen proxy (known as a health care representative) serves as your substitute, "standing in" for you in discussions with your physician and others responsible for your care. So, by a proxy directive we mean written directions that name a "proxy" to act for you. Another term some people use for a proxy directive is a "durable power of attorney for health care."

2. Instruction directives - Another way to have a say in your future medical care is to provide those responsible for your care with a statement of your medical treatment preferences. By "instruction directive" we mean written directions that spell out in advance what medical treatments you wish to accept or refuse and the circumstances in which you want your wishes implemented. These instructions then serve as a guide to those responsible for your care. Another term some people use for an instruction directive is a "living will."

3. Combined directives - A third way combines features of both the proxy and the instruction directive. You may prefer to give both written instructions, and to designate a health care representative or proxy to see that your instructions are carried out.

2. Questions and Answers

1. Why should I consider writing an advance directive/ living will?

Serious injury, illness or mental incapacity may make it impossible for you to make health care decisions for yourself. In these situations, those responsible for your care will have to make decisions for you. Advance directives are legal documents which provide information about your treatment preferences to those caring for you, helping to insure that your wishes are respected even when you can't make decisions yourself. A clearly written and legally prepared directive helps prevent disagreements among those close to you and alleviates some of the burdens of decision making which are often experienced by family members, friends and health care providers.

2. When does my advance directive take effect?

Your directive takes effect when you no longer have the ability to make decisions about your health care. This judgment is normally made by your

attending physician, and any additional physicians who may be required by law to examine you. If there is any doubt about your ability to make such decisions, your doctor will consult with another doctor with training and experience in this area. Together they will decide if you are unable to make your own health care decisions.

3. What happens if I regain the ability to make my own decisions?

If you regain your ability to make decisions, then you resume making your own decisions directly. Your directive is in effect only as long as you are unable to make your own decisions.

4. Are there particular treatments I should specifically mention in my directive?

It is a good idea to indicate your specific preferences concerning two specific kinds of life sustaining measures:

1. Artificially provided fluids and nutrition; and
2. Cardiopulmonary resuscitation.

Stating your preferences clearly concerning these two treatments will be of considerable help in avoiding uncertainty, disagreements or confusion about your wishes. The enclosed forms provide a space for you to state specific directions concerning your wishes with respect to these two forms of treatment.

Fluids and Nutrition. I request that artificially provided fluids and nutrition, such as by feeding tube or intravenous infusion (initial one)

1. _____ shall be withheld or withdrawn as "Life Sustaining Treatment."
2. _____ shall be provided to the extent medically appropriate even if other "Life Sustaining Treatment" is withheld or withdrawn.

Directive as to Medical Treatment. I request that "Life Sustaining Treatment" be withheld or withdrawn from me in each of the following circumstances: (Initial all that apply)

1. _____ If the "life sustaining treatment" is experimental and not a proven therapy, or is likely to be ineffective or futile in prolonging my life, or is likely to merely prolong an imminent dying process;
2. _____ If I am permanently unconscious (total and irreversible loss of consciousness and capacity for interaction with the environment);
3. _____ If I am in a terminal condition (terminal stage of an irreversibly fatal illness, disease, or condition); or
4. _____ If I have a serious irreversible illness or condition, and the likely risks and burdens associated with the medical intervention to be withheld or withdrawn outweigh the likely benefits to me from such intervention.
5. _____ None of the above. I direct that all medically appropriate measures be provided to sustain my life, regardless of my physical or mental condition.

5. What is the advantage of having a health care representative, isn't it enough to have an instruction directive?

Your doctor and other health care professionals are legally obligated to consider your expressed wishes as stated in your instruction directive or "living will." However, instances may occur in which medical circumstances arise or treatments are proposed that you may not have thought about when you wrote your directive. If this happens your health care representative has the authority to participate in discussions with your health care providers and to make treatment decisions for you in accordance with what he or she knows of your wishes. Your health care representative will also be able to make decisions as your medical condition changes, in accordance with your wishes and best interests.

6. If I decide to appoint a health care representative, who should I trust with this task?

The person you choose to be your health care representative has the legal right to accept or refuse medical treatment (including life-sustaining measures) on your behalf and to assure that your wishes concerning your medical treatment are carried out. You should choose a person who knows you well, and who is familiar with your feelings about different types of medical treatment and the conditions under which you would choose to accept or refuse either a specific treatment or all treatment.

A health care representative must understand that his or her responsibility is to implement your wishes even if your representative or others might disagree with them. So it is important to select someone in whose judgment you have confidence. People that you might consider asking to be your health care representative include:

- a member of your family or a very close friend, your priest, rabbi, or minister, or
- a trusted health care provider, but your attending physician cannot serve as both your physician and your health care representative.

7. Should I discuss my wishes with my health care representative and others?

Absolutely! Your health care representative is the person who speaks for you when you can't speak for yourself. It is very important that he or she has a clear sense of your feelings, attitudes and health care preferences. You should also discuss your wishes with your physician, family members and others who will be involved in caring for you.

8. Does my health care representative have the authority to make all health care decisions for me?

It is up to you to say what your health care representative can and cannot decide. You may wish to give him or her broad authority to make all treatment decisions including decisions to forego life-sustaining measures. On the other hand, you may wish to restrict the authority to specific treatments or circumstances. Your representative has to respect these limitations.

9. Is my doctor obligated to talk to my health care representative?

Yes. Your health care representative has the legal authority to make medical decisions on your behalf, in consultation with your doctor. Your doctor is legally obligated to consult with your chosen representative and to respect his or her decision as if it were your decision.

Kenneth A. Vercammen is an Edison, Middlesex County, NJ trial attorney who has published 125 articles in national and New Jersey publications on Probate and litigation topics. He often lectures to trial lawyers of the American Bar Association, New Jersey State Bar Association and Middlesex County Bar Association. He is Chair of the American Bar Association Estate Planning & Probate Committee. He is also Editor of the ABA Elder Law Committee Newsletter

He is a highly regarded lecturer on litigation issues for the American Bar Association, ICLE, New Jersey State Bar Association and Middlesex County Bar Association. His articles have been published by New Jersey Law Journal, ABA Law Practice Management Magazine, and New Jersey Lawyer. He is the Editor in Chief of the New Jersey Municipal Court Law Review. Mr. Vercammen is a recipient of the NJSBA- YLD Service to the Bar Award.

In his private practice, he has devoted a substantial portion of his professional time to the preparation and trial of litigated matters. He has appeared in Courts throughout New Jersey several times each week on many personal injury matters, Municipal Court trials, and contested Probate hearings.

KENNETH VERCAMMEN & ASSOCIATES, PC
Attorney at Law
2053 Woodbridge Ave.
Edison, NJ 08817
732-572-0500

www.centraljerseyelderlaw.com

To schedule an in office consultation, contact our web scheduler at VercammenLaw@njlaws.com