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ADVANCE DIRECTIVES OR LIVING WILLS

Prepared By
James A. Rapp
and
The Schmiedeskamp Estate Planning Group
525 Jersey Street
Quincy, Illinois 62301
Telephone: 217.223.3030

Introduction

With advances in medical science, it is possible to prolong life even for those suffering terminal illnesses. Death-delaying procedures may be used to prolong death through various artificial means including drugs, intravenous feedings and other life support measures. Most states recognize that an individual may decline health care including these measures. A recognized method for declaring one's wishes about death-delaying measures is an advance directive or living will. This information is designed to provide some basic information and background on these directions.

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What is a Living Will?

A living will is a written declaration providing that if the person is suffering from a terminal condition, that death-delaying procedures not be utilized for the prolongation of life.

The term advance directive is sometimes used for living wills. It is likely a better and more descriptive term. It has not gained popular usage. Living will is the more common term.

Must I Have a Living Wills?

No one must have a living will. This is entirely a personal choice. Many individuals prefer allowing a health care power of attorney to make decisions regarding care. The power of attorney can then take into account the facts and circumstances at the time rather than presume.

There is a misimpression that one must have a living will because health care providers ask about this. Federal law requires that hospitals and others ask. While it is a great idea for health care providers to know if you have a living will, the implication is that everyone should have one. Again, that's not the case. More recent changes in health care law also encourage end-of-life counseling by paying health care providers to advise patients on options for end-of-life planning, including living wills. Each person needs to make their own decision whether a living will is something they want and should not feel pressured in having one.

Are Living Wills Effective?

Living wills are recognized in most states. Illinois, for example, has adopted the Illinois Living Will Act (755 Ill. Comp. Stat. 35/1-35/10). The State of Missouri has a similar statute (Mo. Rev. Stat. §§ 459.010-459.055).

What Requirements Exist for Living Wills?

There are several requirements for a living will. In order to execute a living will, a person must be competent or of sound mind and of legal age (which is 18). The living will must be in writing and signed by the person or another at the person's direction, and witnessed by two individuals who are also of legal age. Illinois requires that all living wills be witnessed. In Missouri, this is a usual requirement as well, but Missouri also allows a valid living will to be entirely in a person's own handwriting without a witness.

What is the Form of Living Will?

Both the States of Illinois and Missouri have adopted statutory forms of living wills. These forms are not mandatory. Therefore, other specific instructions may be provided. This is not especially common, but specific needs or concerns may be addressed.

What Procedures does a Living Will Withdraw?

A living will directs that death-delaying procedures not be used. Death-delaying procedures are not to be used where a valid living will is in effect. Under Illinois law, a death-delaying procedure is defined as follows:

> "Death-delaying procedure" means any medical procedure or intervention which, when applied to a qualified patient, is in the judgment of the attending physician would serve

> only to postpone the moment of death. In appropriate circumstances, such procedures include, but are not limited to, assisted ventilation, artificial kidney treatments, intravenous feeding or medication, blood transfusions, tube feeding and other procedures of greater or lesser magnitude that serve only to delay death. However [the Illinois Living Will Act] does not affect the responsibility of the attending physician or other health care provider to provide treatment for a patient's comfort care or alleviation of pain. Nutrition and hydration shall not be withdrawn from a qualified patient if the withdrawal or withholding would result in death solely from dehydration or starvation rather than from the existing terminal condition.

In Missouri, the term death-prolonging (rather than death-delaying) is used. It similarly provides for the withdrawal of any medical procedure or intervention that would serve only to prolong artificially the dying process.

It warrants emphasis that a living will, standing alone, does not provide for allowing a person to die through dehydration or starvation. In some cases life is maintained by artificially providing nutrition and hydration but life support is not otherwise required. Provisions to withhold hydration (or water) and nutrition (or food) may be added to a living will. Usually this provision is not included. A decision to withhold hydration or nutrition will usually be made by one's power of attorney.

Are Living Wills Followed?

Living wills are to be followed. There are some exceptions. For example, the Illinois Living Will Act provides that a living will is ineffective where a patient is pregnant. In practice, as well, most physicians will consult with family members before withholding medical procedures. A living will is helpful, however, to provide the physician and family with a clear indication of the person's wishes. Also, a living will may provide considerable comfort to family when asked to make decisions regarding health care.

Who Should Know About the Living Will?

Family should be made aware that a living will has been signed and where it is kept. The same goes for one's physician and any hospital where treatment may be obtained in the foreseeable future. Physicians and hospitals frequently ask about living wills automatically.

The Illinois Living Will Act contemplates that an individual will provide a copy of the declaration to the physician and determine whether the physician is willing to comply with the living will. In practice, it is usually advisable to let a person's regular physician know that there is a living will and inquire whether the physician would want a copy. A copy should be provided if desired. More often than not, a physician regularly taking care of an individual is not always the physician who would take care of that person when near death. What is important is that when the issue arises, the living will would be available to provide to the physician and hospital to include in the individual's medical record at that time.

How is the Living Will Implemented?

Where a person is determined to have a terminal condition, the attending physician who is aware of the living will declaration will make a determination that there is a terminal condition and a living will in place. This information is recorded in the person's medical record. Death-delaying procedures are thereafter not to be used.

A terminal condition, in Illinois, is an incurable and irreversible condition which is such that death is imminent and the application of death-delaying procedures would serve only to prolong the dying process. Missouri describes a terminal condition as an incurable or irreversible condition which in the opinion of the attending physician is such that death will occur within a short time regardless of the application of medical procedures.

A living will does not prevent physicians from stabilizing a patient or treating a patient where death is not imminent or inevitable. For that reason, they tend to be less significant in truly emergency situations but only after a more thoughtful reflection as to a person's condition. Because a physician must be involved in evaluating a person, emergency personnel do not accept or recognize a living will.

Protection exists for physicians and others who follow living wills. Statutes regarding living wills usually include specific immunities or freedoms from liability for physicians and others honoring living wills. Therefore, no liability may be imposed on a physician or others for withholding or withdrawing death-delaying or death-prolonging procedures from a qualified patient.

May a Living Will be Revoked?

A living will may be revoked. Significantly, it may be revoked without regard to the person's mental or physical condition. It may be revoked by being obliterated, burned, torn or otherwise destroyed or defaced in a manner indicating intention to cancel. There also may be a written revocation of the living will signed and dated by the person or someone acting at the person's direction. Revocation even may be made orally or any other expression of intent to revoke the declaration in the presence of a witness 18 years of age or older who signs and dates a writing confirming that such expression of intent was made. Missouri more broadly states that a declaration may be revoked at any time and in any manner when a declarant is able to communicate an intent to revoke.

A revocation is effective upon communication to the person's attending physician by another who witnessed the revocation. The attending physician is to record the revocation in the person's medical record.

Does a Living Will Authorize Assisted Suicide?

Living wills do not authorize assisted suicide. Compliance with a living will does not constitute suicide. In other words, withholding or withdrawing medical procedures is not considered to involve assisting suicide. On the contrary, affirmative steps to cause death may constitute suicide. Most states, including Illinois and Missouri, prohibit assisted suicide. The United States Supreme Court has held that there is no constitutional right to assisted suicide. This is an issue that continues to be debated.

With a Living Will, Should I Have a Power of Attorney?

A living will expresses a person's wishes. It is not an extremely flexible tool. For most, a power of attorney including health care powers is a preferred tool. This is because almost any medical treatment can be appropriate care in some circumstances and extraordinary care in other circumstances. The advantage of a health care power of attorney is that it authorizes someone to make decisions for the person. Nonetheless, a living will can be helpful in stating one's wishes that will provide guidance for the person authorized to make decisions under a power of attorney. A living will usually should be used only in addition to a power of attorney where desired.

Where there is a power of attorney, it may be a good idea to provide additional information detailing your wishes on specific procedures. In most cases, of course, a person is competent and can make these decisions. Where it is not possible to make decisions, it may be helpful for your power of attorney to have guidance from you. Discuss your views with your power of attorney and even provide written notes to which your power of attorney can refer.

Should I Have a Do Not Resuscitate (DNR) Order?

A living will may or may apply to cardiopulmonary resuscitation. This is because a person may well not suffer from a terminal condition. Depending on a person’s condition and views, a Do Not Resuscitate (DNR) Order may be signed. The Illinois Department of Public Health provides a model form. If this is signed, CPR will not be performed if breathing or heart beat stops. A DNR Order is usually not signed unless or until a person actually suffers from a terminal illness. If a person is unable to sign the Order, a health care power of attorney may do so. In some rare cases, however, a person might well want to sign their own DNR Order.

Do Other States Recognize Living Wills?

Most states now recognize living wills. Statutes vary somewhat. However, these statutes generally recognize a living will in the written and witnessed forms provided for by Illinois and Missouri. Where a person receives treatment in multiple states, it may be advisable to execute forms for both states unless it is confirmed that the laws of each state are compatible.

What Happens If I Do Not Have a Living Will?

Where there is no living will or power of attorney, the authority to make health care decisions for a person who has become incompetent is determined by state law or custom. Some states, such as Illinois, address this situation by adopting the Health Care Surrogate Act (755 Ill. Comp. Stat. 40/1-40/55). This law provides that health care decisions are to be made by a person's guardian, spouse, child, parent or others. This is often the custom in practice. However, other states, including Missouri, require that there be "clear and convincing evidence" of a person's wish to forgo a specific life sustaining treatment.

Are Religious Considerations Important?

Religious considerations may be relevant in deciding whether to execute a living will. Most faiths recognize that ordinary means should be used to preserve life, such as water, food, and medical care. Most also recognize that discontinuing medical procedures that are burdensome, dangerous, extraordinary, or disproportionate to the expected outcome can be legitimate. Where a person has an underlying terminal disease or some organ is not able to work without mechanical assistance, allowing nature to take its natural course rather than receive some therapy or using a machine may well be morally acceptable.

The administration of water and food can be a particularly difficult moral issue. Pope John Paul II, for example, emphasized that "the administration of water and food, even when provided by artificial means, always represents a natural means of preserving life, not a medical act." Its use, he continued, "should be considered, in principle, ordinary and proportionate, and as such morally obligatory." While there are views to the contrary, statutory living wills are consistent with this view – hydration and nutrition are to be provided.

Should I Have a Living Will?

Whether to have a living will is a personal decision. In some circumstances, it is important, even critical, to determine the wishes of an individual regarding death-delaying procedures. The health care power of attorney usually is preferable to a living will. Nonetheless, for those who feel very strongly about death-delaying procedures, a living will provides a helpful tool that should be considered. It can make very clear one's wishes.

Please note that this discussion provides general information.
It is not intended to provide specific or personal legal advice.

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