

THE IMPORTANCE OF LIVING WILLS

Fendrick & Morgan, LLC
1307 White Horse Rd., Bldg B, Ste 200
Voorhees, NJ 08043
(856) 489-8388
www.fendricklaw.com

The right to refuse medical treatment was first recognized in a New Jersey case involving Karen Ann Quinlan. See In Re Quinlan, 70 N.J. 10, 335 A. 2d 657 (1976). In the Quinlan case, the New Jersey Supreme Court held that persons have a constitutional right to privacy which entitles them to refuse life-sustaining treatment when they are in a terminal condition. In 1989, the National Conference Commissioners on Uniform State Laws approved the Uniform Rights of the Terminally Ill Act. Now all 50 states have legislation on the subject of living wills and advanced directives. In addition, the Patient Self-Determination Act provides that all health care providers must furnish a patient, at the time of admission, with written information concerning their right to make decisions concerning medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advanced directives.

The health care provider must document on the patient's chart whether or not the patient has an advanced directive. In 1990, the United State Supreme Court held that both the common law doctrine of informed consent and the Fourteenth Amendment's protection of liberty interests under the due process clause, establish the legal basis for recognizing and enforcing the patient's right to decide what may be done to the patient's body. See Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990). Following the Cruzan case, the Health-Care Decisions Act was adopted by the Commissioners, and this supersedes the Uniform Rights of the Terminally Ill Act.

A living will or advanced directive should set forth the circumstances under which the person does not want life-sustaining treatment. Most state statutes provide that a person may discontinue treatment, if there is no reasonable hope of recovery where the person is brain dead or in a terminal condition. The document should also define what the client means by life-sustaining treatment. Usually, clients do not want cardiac resuscitation, mechanical respiration, blood or blood products, any form of surgery or invasive diagnostic tests, kidney dialysis, antibiotics and chemotherapy. Furthermore, if the individual wants to be treated aggressively, no matter how hopeless his or her condition, the Living Will can so provide.

A more sensitive issue is fluids and nutrition by feeding tube or intravenous infusion. Conservative and Orthodox Jews are not permitted to withhold or withdraw a feeding tube. The Catholic church teaches that a feeding tube may be withheld or withdrawn if the patient is brain dead, but not in a situation where the patient is terminal. Other religious groups have guidelines which need to be considered and incorporated into the client's living will or health care proxy.

A Living Will should also designate a representative to voice the individual's health care preferences to medical practitioners in the event the individual is unable to communicate such desires. The representative designated in the Living Will acts as an agent or Health Care Proxy for the individual. A Living Will and Health Care Proxy can be combined into one document.

A health care proxy is like a power of attorney and appoints a health care representative to make decisions with respect to the patient's health and to deal with the health care provider. A health care power of attorney, which is a form of a living will, is designed to:

- a. Provide instructions for the conditions when life-sustaining procedures should be utilized.
- b. Designate who will make health care decisions.
- c. Ensure that the individual chosen to make these decisions has access to the principal's medical records during incapacity.

In the absence of a health care power of attorney, the medical profession sometimes ignores even family members in decision making. Therefore, it is imperative that everyone have a health care power of attorney which designates to what extent life should be prolonged in the event that there is no reasonable hope of recovery or regaining a meaningful quality of life. A health care proxy does not need to set forth standards governing the conduct of the healthcare representative and can be combined into a living will.

The problem with living wills and health care proxies is in enforcement. Only about one-half of all of these documents are enforced. The problem is that many living wills do not contain clear directions as to what treatment the patient wants and what treatment the patient wants to refuse. Individuals should not utilize pre-printed, vague forms as their Living Wills. By having a specific and properly drafted Living Will, individuals no longer able to communicate can ensure that their health care instructions will be followed. Another problem is resistance by the medical community to accept the idea that people should be allowed to die. By training, physicians are

taught to keep patients alive. Over the past ten years, more physicians are becoming more empathetic of the wishes of their patients.