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Interplay of Health Care Proxy and Living Will

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More than a century ago, the U.S. Supreme Court held that an individual's right to privacy includes the right to make medical decisions affecting their bodies. This right exists even if the decisions result in death.[1] As stated by Judge Benjamin Cardozo, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."[2]

Yet, an individual's right to make medical decisions becomes more complicated when the patient is comatose. What if the agent under a health care proxy refuses to comply with the principal's stated wishes in a living will? What if the language of the living will is too general or too specific? What if there is no health care proxy or living will? This article looks at the history of this issue and how it is addressed today.

Early Cases

One of the earliest cases to widely publicize this issue was a 1976 New Jersey case.[3] Karen Ann Quinlan, then 21 years old, was in a "chronic persistent vegetative state" with no cognitive function.[4] The court held if "there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state, the present life-support system may be withdrawn."[5] More importantly, the court held that removing Quinlan from life-support would not lead to civil or criminal liability for her guardian, her physicians or the hospital where she was receiving care.[6] Since *Quinlan*, several New York cases have addressed the removal of feeding and hydration tubes from comatose patients, as well as removal from a respirator.

Significantly, in 1988, the New York Court of Appeals addressed the issue in *Matter of Westchester County Med. Ctr. (O'Connor)*.[7] Mary O'Connor, then 77 years old, was receiving intravenous nutrition over the objection of her two daughters. The medical facility where O'Connor was receiving treatment sought authorization from the court to insert a nasogastric feeding tube to continue providing life-sustaining treatment. The request was denied by the Westchester County Supreme Court and the Second Department. The Court of Appeals reversed and found a lack of

clear and convincing evidence that O'Connor would have refused artificial nutrition under her present circumstances. The heightened standard requires proof "the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented."

The Court of Appeals further detailed several factors to consider, including: (i) the persistence of the individual's statements; (ii) the seriousness with which those statements were made; and (iii) any inferences that could be drawn from the surrounding circumstances. The Court of Appeals otherwise concluded that a "living will" could be sufficient to meet the clear and convincing standard. An executed living will suggests the author was serious about the stated beliefs. A living will also "ensures that the court is not being asked to make a life-or-death decision based upon casual remarks" by the patient throughout their life.

However, even with a properly executed living will, a compelling state interest could override the patient's wishes and right to determine what happens to his or her body. The common-law right to refuse medical treatment is not absolute and could, in some cases, yield to a compelling state interest. These state interests could include: "(1) the preservation of life; (2) the prevention of suicide; (3) the protection of innocent third parties; and (4) maintaining the ethical integrity of the medical profession."[8]

Each of these potential state interests was reviewed in the case of Daniel Delio. Delio had suffered severe and irreversible brain damage. He relied upon two artificial devices for nutrition and hydration. Delio did not have a living will, but family, friends and colleagues offered substantial testimony of statements by Delio over the years on this issue. The Second Department determined that the "inescapable conclusion" was that Delio, under the present circumstances, would have refused artificial nutrition and hydration.

The Second Department further addressed what, if any, interest the state had in the decision to end life-sustaining treatments to Delio. Ultimately, the court found that any potential interest of the state did not overcome Delio's right to refuse medical treatment (under the facts of that case). The Second Department stated that a person in a permanent vegetative coma essentially "has no health and, in the true sense, no life, for the State to protect."[9]

Accordingly, at least in the case of comatose patients in a chronic vegetative state, courts will authorize termination of respirators,[10] the removal of feeding and hydration tubes,[11] and the enforcement of "Do Not Resuscitate" orders[12] provided the requisite proof is found.

Proxy v. Living Will

New York Public Health Law 2981 authorizes any competent adult (the "principal") to appoint a health care agent. The form empowers the agent to make health care decisions for the principal if the principal becomes incompetent.

The agent's decisions must be consistent with the known wishes of the principal.[13] If the principal's wishes are not reasonably known or cannot reasonably be determined, the agent may act in accordance with the principal's best interests.[14] However, if the principal's wishes regarding the administration of artificial nutrition and hydration are not reasonably known and cannot with reasonable diligence be ascertained, the agent shall not have any authority to make decisions

regarding these measures.[15]

Conversely, a living will is a written directive to family, physicians and hospitals that states whether life-prolonging treatment should be administered in the event the person becomes incompetent.

The drawback of a living will is that it is written in advance of the time when treatment decisions must be made. The directive was made in a vacuum and cannot represent an informed decision under the present circumstances. If a living will is drafted in specific language, it cannot provide guidance in unanticipated circumstances. If, the living will is written in general language, then its terms may be too ambiguous and vague to apply to any particular treatment. The value of a living will is solely to provide evidence of a patient's wishes in the abstract.

New York has not enacted legislation recognizing the validity of living wills. Thus, a living will is only enforceable in New York on a case-by-case basis where it can be offered as clear and convincing evidence of the incompetent patient's intent.

The health care proxy and living will complement each other and should be executed simultaneously. If the individual becomes incompetent, the agent will be able to confer with physicians regarding the type of treatment involved and the accompanying risks and benefits. Thus, the agent will be able to make the same type of informed decision that the patient would have made if competent.

But a health care proxy alone may not address all scenarios. If the agent does not know the patient's wishes concerning life-sustaining treatments, they are not authorized to make any decisions regarding those measures. N.Y. Public Health Law §2982. The living will is a statement of the patient's wishes to assist the agent, and may give the agent authority to act (depending upon the language of the document, and the circumstances of the patient's medical condition). Practitioners may want to also state in their health care proxy forms that the principal has discussed their wishes with the agent (and ensure that this is actually done).

Non-Compliance

What happens if the health care agent does not comply with the living will? As discussed above, the health care agent is the only person with legal authority to end life-sustaining treatment on an incompetent person's behalf. However, the agent has the power to make health care decisions on behalf of the principal only to the extent the decisions are consistent with the known wishes of the principal.[16]

New York Public Health Law 2992 authorizes special proceedings to determine the validity of a health care proxy, or removal of an agent. One ground for removal may be noncompliance with N.Y. Public Health Law 2982, including the statutory requirement that the agent's decisions are consistent with the known wishes of the principal. Thus, the failure of the agent to comply with the decedent's wishes, particularly those stated in a living will, could lead to their removal as agent.

No Living Will or Proxy

What happens if there is no living will or health care proxy? New York Public Health Law 2989

specifically states that the failure to appoint a health care agent does not create any presumptions about the patient's health care wishes. But if there is no agent appointed, no one has legal authority to end life-sustaining treatment on the incompetent patient's behalf. Clear and convincing evidence of the specific, express wishes of the incompetent person will be the sole legal basis for discontinuing treatment. A living will may be sufficient proof of the patient's wishes, provided the language utilized in the document fits the circumstances of the patient's condition.

Family members could seek the authority to end life-sustaining measures based upon this document or other evidence of the patient's wishes.

If Principal Cannot Sign

What if the principal is competent but cannot physically sign either document? A competent, but physically disabled client poses additional issues for any estate practitioner. Pursuant to N.Y. Public Health Law 2981, the health care proxy may be signed and dated by a third party on behalf of the principal, provided it is done at the principal's direction and in the principal's presence, and in the presence of two adult witnesses who shall sign the proxy.

These same procedures may not be effective for a living will, however, because the living will is not statutory. Despite this lack of statutory authority, there could be a corollary between the procedures for execution of a will and the procedures for execution of a living will. For example, EPTL 3-2.1(a)(1) states that a will can be executed by a third party's signature, provided the third party is acting at the direction of the testator. If a testator who is physically unable to sign his or her name requires assistance, they may even have a third party hold their hand and guide—provided it is at their direction. *Matter of Kearney*, 69 A.D. 481, 74 N.Y.S. 1045 (2d Dept. 1902); see also *Matter of Morris*, 208 A.D.2d 733, 617 N.Y.S.2d 513 (2d Dept. 1994). In *Matter of Albert*, N.Y.L.J., April 23, 2013, at 25 (Sur. Ct. Kings Co.), it was even found that the testator placing a fingerprint on the signature was sufficient for due execution.

Of course, each of these scenarios are ripe for a probate contest based upon undue influence and should be well-documented. However, they may provide guidance for the court and practitioners when a competent client is unable to physically sign the document.

Conclusion

A health care proxy and living will are complementary documents. Their execution is intended to ensure a patient's wishes are complied with should they become incompetent. The interplay between the two documents necessitates that both are executed.

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Endnotes:

1. *Union Pacific Railway Co. v. Botsford,* 141 U.S. 250 (1891).

2. *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129 (1914).

3. *Matter of Quinlan*, 70 N.J. 10, cert. den., 429 U.S. 922 (1976).

4. Id. at 24.

5. Id. at 54.

6. Id. at 671.

7. 72 N.Y.2d 517 (1988).

8. *Matter of Delio v. Westchester Co. Medical Center*, 129 A.D.2d 1, 23 (2d Dept. 1987).

9. Id. at 23 (quoting *Matter of Eichner*, 73 A.D.2d 431, 465 (1980).

10. See, e.g., *Matter of Eichner*, supra.

11. *Matter of Delio*, supra.

12. New York Public Health Law §2960.

13. NY Public Health Law §2982.

14. NY Public Health Law §2982.

15. NY Public Health Law §2982(2).

16. NY Public Health Law §2982(2).
