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Freedom or Life: Does a Living Will Truly Serve Its Creator?

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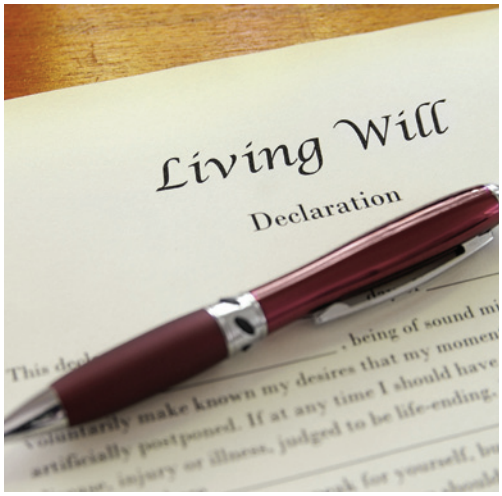
During the 20th century, medical science advanced to the point where it could enable doctors to extend life that under many circumstances had formerly been fatal. *Should You Consider A Living Will?*, FindLaw. Today, many of these treatments not only significantly extend life, but they even enable patients to remain attentive and active. However, many of these patients are in a "persistent vegetative state," awake, yet completely unaware. Dilling, *Diagnostic Criteria for Persistent Vegetative State*, AMA J. of Ethics (May 2007). Although such individuals may appear normal, they are unable to speak or respond to commands. Nat'l Inst. of Neurological Disorders and Stroke, *Coma and Persistent Vegetative State*, Brainline (March 11, 2009). In such situations, relatives may, for various reasons, urge hospitals to remove the life-prolonging technology. Meanwhile, doctors may be reluctant to remove such equipment for religious reasons. Kathrina Jeorgette Flores, *End-of-Life Care and the Physician-Assisted Suicide Debate*, Physicians Practice (July 1, 2016). Additionally, courts have a vested interest as well in whether the life-saving technology for patients in persistent vegetative states may be removed. In *Cruzan*, 497 U.S. 261, 278-80 (1990), the Supreme Court of the United States held that a state could constitutionally require that an incompetent person's wishes regarding the withdrawal of life-sustaining medical treatment be proven by clear and convincing evidence. The court further found that a living will constitutes such evidence.

A living will is a document in which one, in sound state of mind, writes what measures he does or does not want used to extend his life when he is dying. *Saunders v. State*, 492 N.Y.S.2d 510, 511 (Sup. Ct. 1985). The purpose of such a document is to make vital health care decisions



at a time when one is still competent to make them. *Should You Consider A Living Will?*, supra. That way, if one is struck with an unexpected disease or sustains a terrible injury that leaves him unable to communicate his wishes, he can feel reassured that his medical treatment preferences will be met. *Saunders*, 492 N.Y.S.2d at 511. As unanticipated accidents can occur to anyone at any age, experts feel it is imperative for one to make his wishes known. Id.

Today, all 50 states and the District of Colombia recognize living wills, in one way or another, and most states honor another state's advance directives. *Frequently Asked*

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Questions (FAQ) About The U.S. Living Will Registry. However, despite the advantages that a living will provides, less than 30% of adults in the United States have executed a living will. Kuldeep N. Yadav, et al, *Approximately One In Three US Adults Completes Any Type of Advance Directive For End-Of-Life Care*, HealthAffairs (July 2017). Moreover, of those living wills, many are simply ineffective. Considering that living wills are acknowledged in every jurisdiction in the United States and that medical care providers are generally held to a strict duty to comply with their provisions (*Health Care Directives: Is There a Duty to Follow Them?*, FindLaw), it seems contradictory that one's stated wishes may not always be followed. This article will provide an overview of the situations where one's living will may not serve its maker, while analyzing various relevant state laws.

Living Wills: Ignored In What Circumstances?

Potentially Deadly Misinterpretations. Every state in the United States provides its citizens unique advance directive documents. *State-by-State Advance Directive Forms*, Everplans. A living will is one type of an advance directive. National Institute on Aging, *The Difference Between An Advance Care Directive and a Living Will*, Agis. Similarly, each state has different requirements and laws that govern how an end-of-life medical care document need be executed. *Living Wills: State Laws*, FindLaw. However, in attempting to design a document that would ensure one could adequately convey his wishes to a potential life-saving doctor, state legislatures have complicated the matter by suggesting vague terms. Susan J. Nanovic, *The Living Will: Preservation of the Right-To-Die Demands Clarity and Consistency*, 95 Dick. L. Rev. 209, 215 (1990). For example, many states have decided that a living will should become effective when one's medical condition becomes terminal. (The Connecticut legislature defines "terminal condition" as the "final stage of an incurable … medical condition, which without the administration of a life support system, will result in death within a relatively short time period." Conn. Gen. Stat. Ann. §19a-570 (West 2018). The Maryland Code, however, writes that a "terminal condition" is a condition which makes "death imminent and from which, despite the application of life-sustaining procedures, there can be no recovery." Md. Code Ann., Health §5-601-614 (West 2017). Alabama Elder Law explains that one is terminally ill when one's death is imminent or whose condition is hopeless unless he is supported through the use of life-sustaining procedures. Ala. Code §7:28 (2017). Louisiana defines a "terminal and irreversible condition" as a continual profound comatose state. La. Stat. Ann. §40:1151.1 (2015).)

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However, states disagree on the definition of the term "terminal condition." §19a-570; §5-601-614; §7:28. Is a condition only terminal if it results in death without the use of life-sustaining procedures? Some states, like Connecticut and Alabama, specify that it is. §19a-570; §7:28. Or is it terminal if it will result in death whether life-sustaining procedures are used or not? Maryland's living will statute provides that it is. §5-601-614. What about conditions that are terminal but do not cause death for a number of years? Moreover, the term "life-sustaining procedure" itself does not have a precise definition. What treatments does it include? How long must equipment sustain a patient for it to be considered "life-sustaining" equipment?

While certain states, including Connecticut, Maryland, Iowa, and Montana, provide statutory definitions for such terms (§19a-570; §5-601-614; §144A.2; §50-10-101), the living will document itself does not provide any guidance on what these terms mean. Yet, several jurisdictions, including Wisconsin, South Carolina, and Louisiana, require a physician to certify that a patient's condition is terminal before the living will can become effective. Wis. Stat. Ann. §154.03 (West 2008); S.C. Code Ann. §44-77-50 (2018); La. Stat. Ann. §40:1151.2 (2015). Consequently, one physician may feel that a patient's condition is not terminal and may accordingly provide treatment, while another physician may say that treatment should be withheld pursuant to the living will because he views the patient's condition as terminal. Ferdinando Mirarchi, Understanding Your Living Will (2006). Sometimes, a doctor will simply refuse to act until the ambiguous term is clarified. One need only imag-

ine the disastrous consequences that such vague provisions in a living will can cause.

However, even if the terms of the living will are not vague, it may be misinterpreted. In 2016, Pennsylvania health care facilities reported that in twenty-nine cases, patients were resuscitated against their wishes, and in two cases, patients were not resuscitated despite their wishes. Additionally, a series of surveys by QuantiaMD, an online physician learning collaborative, found that nearly half of health professionals misunderstood living will provisions. Alicia Gallegos, *Clearing up confusion on advance directives*, American Medical News (Oct. 29, 2012). Furthermore, a study conducted by Dr. Ferdinando Mirarchi, medical director of the department of emergency medicine at the University of Pittsburgh Medical Center Hamot, established that only forty-three percent of doctors that partook in the survey understood that a living will only applied to patients with terminal conditions. Ferdinando Mirarchi, et al., *TRIAD III: nationwide assessment of living wills and do not resuscitate orders*, PubMed.gov (May 2012). Consequently, in light of such research, it is unsurprising that one's recorded wishes as to life-sustaining medical treatment may be ignored regardless of the clarity and specificity of those stated wishes.

The Pregnancy Problem. Although the Supreme Court approved of living will statutes (*Cruzan*, 497 U.S. at 339**)**, the situation is more complicated when the patient is pregnant. Many states require physicians to ignore a patient's living will directives if the patient is pregnant. These states have, in effect, determined that the state's interest in protecting the fetus outweighs the patient's right to determine whether to forgo medical treatment. Molly C. Dyke, *A Matter of Life and Death: Pregnancy Clauses in Living Will Statutes*, 70 B.U. L. Rev. 867, 870 (1990). Unsurprisingly, there has been opposition to such statutes. Recently, four Idaho women sued the state on the basis that its law, the Medical Consent and Natural Death Act, that renders living wills invalid when a patient is pregnant (Idaho Code Ann. §39-4510 (West 2012)), is unconstitutional (Rebecca Boone, *Idaho sued over pregnancy exclusion in advance directive law*, AP News (May 31, 2018)). Moreover, the Connecticut legislature recently amended its previous law that voided a patient's advance directive if she was pregnant. Thaddeus Mason Pope, *Connecticut Now Honors Advance Directives Even When the Patient Is Pregnant*, Medical Futility Blog (May 27, 2018). Under its new law, women are permitted to indicate their preferences regarding life-sustaining medical treatment in their advance directives whether they are pregnant or not. Conn. Gen. Stat. Ann. §19a-575 (West 2018). However, unless a patient's home state currently permits a physician to adhere to one's living will directives despite a known pregnancy, a patient's living will may be ineffective in such situations. *Health Care Directives: Is There a Duty to Follow Them?*, supra.

It is highly recommended that one consult a competent attorney when considering executing a living will to ensure that it is drafted correctly and in accordance with the applicable state laws.

Conclusion

In sum, there is a general duty for physicians to follow one's living will provisions. However, there are several circumstances when physicians disregard, whether by mistake, choice, or legal obligation, one's living will terms. These situations can include an ambiguous or misinterpreted living will, as well as when a living will's creator is pregnant. However, each state's advance directive laws and requirements differ. Therefore, it is highly recommended that one consult a competent attorney when considering executing a living will to ensure that it is drafted correctly and in accordance with the applicable state laws.