

Value of Living Wills Sometimes Limited
An Essay by Whitney Durand

If only Terri Schiavo had signed a living will! All the litigation could have been avoided, right? Not necessarily. Living wills are among the most misunderstood and misapplied of legal documents. All too often, they do not achieve their intended results. Here is why:

A living will based solely on a statute is inadequate. State laws often use ambiguous terms like "terminal condition." They usually do not reflect the full range of medical circumstances. Dementia is addressed, for example, in only a handful of statutes.

Too, treatments are seldom mentioned, with the exception of artificial food and water. Some patients want dialysis but not cardiopulmonary resuscitation. Living wills are frequently trumped by the wishes of families. A living will is a commandment to doctors. The problem comes when family members (sometimes only one) differ with what the living will says. The result: Almost invariably doctors and hospitals bow to the wishes of the threatening family member and disregard the instructions of the patient who can no longer speak for himself or herself.

Pain medication and other forms of comfort care must still be given if life support is not selected. Many documents say so, and most laws do too. All too often, though, physicians and hospitals balk at giving morphine in doses sufficient to relieve the severe pain that can beset a dying person. They fear that they will be accused of hastening death or feeding an addiction.

Living wills are often unavailable at the very time they are needed. They are commonly placed in safe deposit boxes. They then become unavailable during 128 hours out of 168 each week.

An oral statement by a patient can override a living will. This is as it should be. But physicians and hospitals must be careful in deciding whether the patient has truly changed his or her mind. This is the problem of hearsay evidence and self-serving statements by a family member or even a nurse. Unfortunately, the law has erected fewer safeguards for truth-telling in the hospital than it has for the courtroom.

What to do? Use a health care power of attorney. It is a superior document. The medical circumstances that give rise to decision-making at the end of life are complex. Drafting a meaningful living will presents great legal difficulty.

On the other hand, a health care power of attorney presents few problems. It says that one person authorizes another to make all the medical decisions that the first could have made if not incapacitated.

That is a very simple and powerful statement. It deals with situations like giving or withholding antibiotics when a patient has a routine infection while in the advanced stages of a progressive disease.

The health care power of attorney is fundamentally different from a living will. The difference lies in who has the final decision about whether to start or continue life-

prolonging medical treatments when the patient is not able to make decisions.

In the usual living will, the patient directs the attending physician to stop treatments at a certain point. By contrast, in the typical health care power of attorney, the patient gives a specific person – generally a family member, not the doctor – the decision-making role.

Caution: One must still tell the decision-maker what kind of care is desired. Studies show that spouses and children are often wrong when asked what they think their loved ones want at the end of life and their answers are then compared with those of the loved ones.

Finally, families and physicians sometimes think (mistakenly) that a document signed in one state is not effective in another. The doctrine of comity, state legislation and the Full Faith and Credit Clause of the U.S. Constitution say otherwise.

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