The Legal Intelligencer

Making Decisions About Health Care Under Living Wills

The role of the living will (also known as a health care declaration or an advance directive for health care), a key document in the estate planning process, has been evolving over the last 20 years or so.

By **Rebecca Rosenberger Smolen and Amy Neifeld Shkedy** | May 06, 2019

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The role of the living will (also known as a health care declaration or an advance directive for health care), a key document in the estate planning process, has been evolving over the last 20 years or so. Initially, its core function was to allow a client to guide his loved ones about how to handle "heroic measures" in the medical arena when faced with permanent unconsciousness or the terminal stage of a medical condition. A typical living will form allows a client to specify whether or not, under those circumstances, the following types of life-sustaining treatment should be administered:

- Cardiac resuscitation;
- Mechanical respiration;
- Tube feeding or other “forced” administration of nutrition and hydration;
- Blood or blood products;
- Surgery or invasive diagnostic tests; or
- Kidney dialysis.

Over time, another key component of the living will form has been to appoint one or more agents to implement the decisions for the client rather than just rely on medical providers to do so on their own. Generally, a client will name close family members, such as a spouse, children, or siblings for this role. Soon after the HIPAA privacy rules for personal health care information were implemented in 2000, another key role for the living will form was to authorize the designated agents to receive private health care information. This aspect of a living will form is regularly referred to as a “health care power of attorney.”

In a health care power of attorney provision, the agent is not only charged with receiving private health care information and implementing decisions about life-sustaining treatment, but, also with making and implementing other health care decisions on behalf of a client such as:

- Authorizing admission or discharge from a medical facility;
- Authorizing the administration, withholding, or withdrawing of medical care, including drugs and surgical procedures;
- Employing and discharging medical service providers; and
- Authorizing anatomical gifts.

As attorneys, it has always felt a bit awkward to advise clients on the intricacies of the choices to be made on these forms since our medical knowledge is no greater than that of our clients, as a general matter. However, we recognize that it is important for our clients to have these forms in place for when they are needed since, at that time, they may not be conscious and able to complete them with proper guidance from knowledgeable medical advisers. So, we do our best to muddle through the options

with our clients and urge them to review them with their medical advisers if they have questions, although it's doubtful that many of them take that step before signing the document.

In recent years, there have been other notable developments in this arena that impact the living will document. Pennsylvania law allows residents to elect on a driver's license (as well as in a living will) whether, at death, to donate organs such as the heart, lung, liver and kidneys. However, the law now requires explicit and specific consent to donate hands, facial tissue and limbs, and other "vascularized composite allografts." Apparently, this is because those types of donations are more disfiguring to the body and may preclude an open casket funeral. Attorneys should consider updating their living wills forms to take into account the distinction between donations of these different types of body parts to allow clients, for whom this may be of interest, to effectuate their wishes in this regard.

A new frontier on the horizon for Pennsylvania lawyers may be the Death with Dignity Act type of law which has gradually been sweeping the country. Under this act, our clients may be able to not only authorize the withdrawal or withholding of medical treatment, but, also the administration of a medical treatment that, contrary to the Hippocratic Oath, may hasten death. Oregon was the first state to enact such legislation. New Jersey recently became the eighth jurisdiction to enact this type of law, and its version, the Aid in Dying for the Terminally Ill Act, is scheduled to take effect Aug. 1. Other states that have implemented the law are California, Colorado, Hawaii and Vermont, as well as the District of Columbia. Pennsylvania has had this legislation introduced by Sen. Daylen Leach (starting in 2007), but it has not yet been adopted into law in our commonwealth.

For the time being, it does not appear that a living will can play a role with respect to the version of the Death with Dignity Act that has been adopted in New Jersey. Under the New Jersey version of the law, the medicine to hasten death must be self-administered and the request for it must be initiated by the terminally ill patient.

Specifically, the terminally ill patient must make two oral requests to an attending physician spaced at least 15 days apart. There also must be a written request by the terminally ill patient. A limited role for a health care agent under the statute would be for the agent to communicate the patient's health care decisions in this regard to a health care provider, but, only if the patient is able to currently so request (as opposed to a preauthorization as is the standard role for a living will).

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