

Living Wills in New Jersey Law

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Anyone who cares about the feelings of their family members, or their own final health care treatment, should consider executing a Living Will. It has become an essential element in the practice of Estate Planning Attorneys.

Why? A Living Will permits the patient to communicate, in advance, the medical care decisions he or she would make if rendered incapacitated, so that their family won't be put in the difficult position of having to do so for them.

The recent nationwide controversy caused by the unfortunate situation of a woman in Florida, who did not possess a Living Will, has demonstrated the family pain created by this issue and sparked renewed public interest in the Living Will. Clients from California to New Jersey have contacted Estate Planning Attorneys to learn more about them.

The Basics:

The legal name for a Living Will is an Advanced Directive, a document codified nearly 15 years ago by The New Jersey Advanced Directives for Health Care Act.

In New Jersey, according to the law, an Advanced Directive, or Living Will, in and of itself, is a simple document needing only to be in writing, signed and dated in the presence of two subscribing adult witnesses who must attest to the fact that the person is of sound mind and free from duress and undue influence. Alternatively, it simply may be signed, dated and acknowledged before a notary public, an attorney or other person authorized in New Jersey to administer oaths.

The Advanced Directive becomes operative when it is transmitted to the attending physician who has determined that the patient lacks the capacity to make a particular health care decision.

Once made, the patient may revoke the Advanced Directive either by oral or written notification of the revocation to the "Health Care Representative", physician, nurse or other health care professional, or by any other act evidencing an intent to revoke the document. In other words, the patient can change his or her mind, at any time, simply by saying so.

What It Does:

Consistent with the terms of an Advance Directive, life-sustaining treatment may be withheld or withdrawn from a patient if the life-sustaining treatment is:

- Experimental and not proven therapy, or is likely to be ineffective or futile in prolonging life, or is likely to merely prolong an imminent dying process;
- The patient is permanently unconscious, as determined by the attending physician and confirmed by a second qualified physician;
- The patient is in a terminal condition as determined by the attending physician and confirmed by a second qualified physician, or
- The patient has a serious irreversible illness or condition, and the likely risks and burdens associated with the medial intervention to be withheld or withdrawn may be reasonably judged to outweigh the likely benefits to the patients from such intervention or imposition on an unwilling patient would be inhumane.

The law allows the attending physician, consistent with the terms of the Advance Directive, to issue a "Do Not Resuscitate" Order.

Two Types -- Instruction and Proxy:

There are two types of New Jersey Advanced Directive, or Living Will: An Instruction Directive and a Proxy Directive. You may choose to create either one or both.

The first type, an Instructive Directive is what clients usually mean when referring to a Living Will. It provides instructions and directions regarding health care in the event that the patient subsequently lacks such decision-making capacity. The Instruction Directive may state the person's general treatment philosophy and objections together with the person's specific wishes regarding the provision, withholding or withdrawal of any form of health care, including life-sustaining treatment.

The second type, the Proxy Directive is more similar to a Power of Attorney because it appoints a "Health Care Representative" to make health care decisions in the event the patient subsequently loses the capacity to make such decisions.

A person may appoint as his "Health Care Representative" any competent adult, including a family member, a friend or a religious adviser. Once the person's attending physician determines that a person lacks decision-making capacity (along with confirmation of another physician, unless that person's lack of decision-making capacity is clearly apparent), the "Health Care Representative" has the authority to make health care decisions on behalf of the patient. The "Health Care Representative" is to make all health care decisions the patient would have made had he or she possessed decision-making capacity, or where the patient's wishes cannot be determined adequately, to make a decision in the best interest of the patient.

In carrying out the person's wishes, the "Health Care Representative" is to give priority to that patient's Instruction Directive, if one exists. Also, a Proxy Directive can be written in New Jersey so as to place specific limitations upon the authority of the "Health Care Representative".

Also important to note, the Living Will statute in New Jersey covering Proxy Directives specifically protects the patient's "Health Care Representative" from liability. The law states that the "Health Care Representative" is not imposed with any liability for any portion of the person's health care costs, not subject to criminal or civil liability for any action performed in good faith and in accordance with the provisions of the act to carry out the terms of the Advance Directive.

Physician and Hospital Responsibilities:

Interestingly, the law requires the attending physician to make affirmative inquiry of the patient, his family or others as appropriate under the circumstances, concerning the existence of an Advance Directive. In other words, the attending physician must initiate the question of a Living Will. The attending physician is required to note in the patient's medical records whether an Advance Directive exists and the name of the patient's "Health Care Representative", if any. If an Advance Directive exists, a copy must be attached to the patient's medical records.

Health care institutions including hospitals, nursing homes, home health care agencies and hospice programs are required to adopt policies and practices that are necessary to provide for routine inquiry at the time of admission and other appropriate times concerning the existence and location of an Advance Directive. Moreover, health care institutions must adopt policies and practices necessary to provide appropriate informational materials concerning Advance Directive to all interested patients, their families and their "Health Care Representatives", and to assist those patients in discussing the executing an Advance Directive.

These health care institutions will also be required to adopt policies and practices necessary to educate patients, their families and "Health Care Representatives" about the availability, benefits and burdens of rehabilitative treatment, therapy and services, included but not limited to family and social services, self-help and advocacy services, employment and community living, and the use of assisting devices. Health care institutions must establish procedures and practices for resolution of the disputes among the patient, and "Health Care Representative" and attending physician in the event there is disagreement concerning the patient's decision making capacity or in the interpretation of the Advance Directive concerning the patient's course of treatment.

The New Jersey law on Living Wills expressly states that it should not be interpreted to impair the obligations of health care professionals to provide for the care and comfort of the patient and to alleviate pain, in accordance with accepted medical and nursing standards.

The patient's family, "Health Care Representative", and appropriate others should be informed that if a person has appointed a "Health Care Representative" and subsequently lacks decisions-making capacity concerning a particular health care decision, the attending physician must obtain the informed consent for, or refusal of, health care from the "Health Care Representative" after discussing the nature and the consequences of the person's medical condition, and the risks, benefits and burdens of the proposed health care and its alternatives. However, if the patient is subsequently found to possess adequate decision-making capacity, the patient shall retain legal authority to make the health care decision.

Moreover, even if the patient lacks decision-making capacity, but nonetheless clearly expresses the wish that medically appropriate measures be utilized to sustain life, that wish shall take precedence over any contrary decision of the "Health Care Representative" and over any contrary statement in the patient's Instructive Directive.

Conclusion:

The services of an Estate Planning Attorney are not necessarily required in New Jersey to execute a Living Will – just as they are not required to execute a Real Estate Contract or a Last Will & Testament – provided the document is in the proper form, correctly drafted, signed and witnessed. However to be sure that a Living Will conforms to New Jersey legal guidelines and that the patient's wishes in the event of incapacity are clearly expressed – so as to be understood and followed – it may be prudent to consult a lawyer experienced in Estate Planning before the occasion arises in which the Living Will is needed.

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