

PLANNING FOR YOUR FUTURE

Advance Directives In New York State

Will End-Of-Life Treatment Decisions Be Honored?

By Bernard A. Krooks, Certified Elder Law Attorney

Imagine a person stricken with advanced emphysema who, while she was still healthy enough to do so, had the foresight to sign certain advance directives, whereby she appointed her daughters as her health care agents (i.e., Health Care Proxy) and memorialized her wishes to decline life-sustaining treatment (i.e., Living Will). Now imagine that same person several months later, no longer able to express her wishes and being kept alive only by a ventilator and feeding tubes, but unable to have her previously expressed wishes honored by the hospital and facing the prospect of prolonged litigation in Court. It's not supposed to happen that way, particularly where the patient has taken the time to memorialize her wishes in advance directives. Or is it?

In New York State, under the common law, an individual has the right to decline medical treatment, even life-sustaining treatment, absent an overriding state interest. Where an individual does not have capacity to do so or able to communicate his or her wishes, the Court may intervene and direct the termination of artificial life support in accordance with the patient's wishes as established by clear and convincing evidence. According to New York State's highest Court, the ideal case for establishing a patient's wishes by clear and convincing evidence is where the patient has expressed his or her wishes in writing such as a Living Will.

However, in a recent case, when the hospital refused to honor the patient's Living Will, her family had no choice but to turn to the Court for relief. Unfortunately, no matter how sympathetic the attorneys and the Court may have been to the plight of the patient and her family, who had to suffer through the pain and indignity of each passing day along with their mother in watching her stare vacantly into space unresponsive to the visits of her loved ones, the prospect of going to Court meant unavoidable delays and several weeks of waiting and watching. This was the very indignity (i.e., the lingering on machines) that the patient sought to avoid when she signed her Living Will. Nonetheless, it was left to the Court to decide the patient's fate.

It would be easy to blame the hospital for failing to honor the patient's Living Will by refusing to remove her from the ventilator which artificially prolonged her life. However, in this case, it appears that the treating physician (i.e., the hospital) honestly believed that by keeping the patient on a ventilator and thus preserving her life, he was doing what was best for his patient. In addition, after reviewing the patient's Living Will, the hospital's legal counsel concluded that the language of the patient's Living Will was ambiguous in terms of memorializing her wishes under these circumstances. In other words, it was for the Court to decide. In particular, the Court would have to decide whether the patient's Living Will, along with the testimony of friends and family, established clearly and convincingly that the patient's wishes under these circumstances would be to have the hospital to withdraw the life sustaining treatment.

It would appear, at first glance, that the patient's Living Will, along with the testimony of her friends and family, would be more than sufficient to establish clearly and convincingly that her wishes under these circumstances

would be to have the hospital to withdraw the life sustaining treatment. However, the hospital's legal counsel suggested that the Living Will was ambiguous in that it required, as a condition for the removal of life-sustaining treatment, that the patient have "no medical or reasonable probability of recovery," as determined by the

patient's treating physician and a consulting physician. Unfortunately, in her Living Will, the patient did not define what she meant by "no medical or reasonable probability of recovery." While her treating physician stated to the family that it was unlikely that their mother would ever be able to breathe on her own (i.e., without the assistance of a ventilator), he refused to state that she had "no medical or reasonable probability of recovery." Furthermore, the hospital's legal counsel suggested that the patient may have meant recovery to include life on a ventilator (even though the generally accepted purpose of a Living Will is to avoid being kept alive only by machines).

One lesson to take from this case may be that while the ideal case for establishing a patient's wishes by clear and convincing evidence is where the patient has expressed his or her wishes in a writing such as a Living Will, the writing should be as specific as possible in order to give it the greatest likelihood of being either honored by the hospital or enforced by the Court. You and your legal counsel must take the time to discuss these issues when drafting your advance directives to ensure that your wishes are adequately reflected in the documents.

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