LIVING WILL AND HEALTHCARE PROXY

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A living will is a written document that allows a patient to give explicit instructions about medical treatment to be administered when the patient is terminally ill or permanently unconscious (also called an advance directive). There is no statute in New York that governs Living Wills. The highest court in New York has held that a Living Will is valid as long as it constitutes "clear and convincing evidence" of your wishes. There is no standard form for a Living Will in New York, which is interpreted in a uniform way. This means that even a well-drafted Living Will is ultimately subject to interpretation by those who need to determine your wishes. It is hard to draft a Living Will that provides specific instructions with regard to all possible future events. This means that inevitably, a Living Will requires those responsible for your care to interpret general instructions in your Living Will in the context of specific circumstances.

HEALTHCARE PROXY

A healthcare proxy is a document in which you appoint a representative to make medical decisions on your behalf. A healthcare proxy is important to have incase you are unable to make medical decision due to medical illness or injury. Everyone over 18 should have a healthcare proxy. There are two situations in which a health care agent will be needed:

1. Temporary inability to make health care decisions – no matter what your age is. For example, you are having an outpatient surgical procedure and are under general anesthesia. Something unexpected happens and a health care decision needs to be made. If you have a health care agent, since you are temporarily unable to make your own decisions, the health care agent may make the decision. Once you become conscious again, the health care agent would no longer have any authority to act;
2. Permanent inability to make health care decisions – this would arise if you were comatose from a terminal illness, in a persistent vegetative state, suffered from an illness that left you unable to communicate or, if elderly, suffered from senile dementia or Alzheimer's disease. Under these circumstances you would obviously be unable to make your own health care decisions. If you have appointed a health care agent, your health care agent can be your voice and make your health care decisions according to your own wishes, or your best interests.

A disabled (incompetent child) would have to go through a guardian proceeding in order to have a healthcare agent appointed. If a child is disabled, parents will typically go early on to be a guardian for their child. This is also necessary for adults who cant take care of themselves.

NY Law states that two people CANNOT serve as healthcare rep at the same time. Some attorneys will add a clause in the healthcare proxy as to why the person was chosen. An attorney can also add a clause for the agent to consult with other individuals if the client wishes to do so.

It is very important to have an alternate named incase the person you appointed is not around or cannot be reached. NY Law requires that there be two witnesses for a healthcare proxy to be valid.

RELEVANT STATUTES

- N.Y. Pub. Health Law § 2981 (McKinney). Appointment of health care agent; health care proxy
- N.Y. Pub. Health Law § 2990 (McKinney). Proxies executed in other states
- N.Y. Pub. Health Law § 2982 (McKinney). Rights and duties of agent
- N.Y. Pub. Health Law § 2983 (McKinney). Determination of lack of capacity to make health care decisions for the purpose of empowering agent
- N.Y. Pub. Health Law § 2985 (McKinney). Revocation.

RELEVANT CASE LAW

Matter of Westchester County Medical Center on Behalf of O'Connor, 72 N.Y.2d 517 (1988)

Hospital sought order to permit it to administer nasogastric feeding to incompetent patient. The Supreme Court, Westchester County, Colabella, J., denied hospital's application, and hospital appealed. The Supreme Court, Appellate Division, Mangano, J.P., 139 App.Div.2d 344, 532 N.Y.S.2d 133, affirmed, and hospital appealed by permission. The Court of Appeals, Wachtler, C.J., held that hospital was authorized to insert nasogastric feeding tube into elderly, mentally incompetent patient who was unable to obtain food and drink without medical assistance, in that there was no clear and convincing proof that patient had made firm and settled commitment, while competent, to decline assistance under instant circumstances

Mary O'Connor is an elderly hospital patient who, as a result of several strokes, is mentally incompetent and unable to obtain food or drink without medical assistance. In this dispute between her daughters and the hospital the question is whether the hospital should be permitted to insert a nasogastric tube to provide her with sustenance or whether, instead, such medical intervention should be precluded and she should be allowed to die because, prior to becoming incompetent, she made several statements to the effect that she did not want to be a burden to anyone and would not want to live or be kept alive by artificial means if she were unable to care for herself.

The patient's family must prove by clear and convincing evidence: that the patient held a firm and settled commitment to the termination of life-support systems under the circumstances presented (majority opn., at 531, at 892 of 534 N.Y.S.2d, at 613 of 531 N.E.2d), and that she would consider the alternative of death without the life-support system in question, in this case lack of nourishment, preferable to being sustained by artificial means (majority opn., at 531, 533, 534, at 892, 893, 894, of 534 N.Y.S.2d, at 613, 614, 615 of 531 N.E.2d). As the majority concedes, it is a "demanding standard".

The Court of Appeals concluded that the order of the Appellate Division should be reversed and the hospital's petition granted. On this record there is not clear and convincing proof that the patient had made a firm and settled commitment, while competent, to decline this type of medical assistance under circumstances such as these.

In re University Hosp. of State University of New York, 194 Misc.2d 372 (2002)

State university hospital petitioned for order determining validity of health care proxy and living will executed by patient, who was rendered incompetent to make her own medical

decisions by serious medical condition. The Supreme Court, Anthony J. Paris, J., held that: (1) patient revoked living will, which directed patient's agents to authorize termination of life sustaining measures, and (2) health care proxy was revoked by implication.

The decision in this case is interesting because it is undisputed that the Health Care Proxy and Living Will/Power of Attorney are validly executed instruments and that the physical condition of the patient satisfies the specified criteria to invoke the patient's expressed wishes that the life sustaining treatment currently in place be terminated.

Respondents have argued that their aunt (through marriage and not by blood relation), whom they have known for 40 years, is a devout Catholic who resided with them for five (5) years and did not intend to be removed from life sustaining treatment in the event that same became necessary to sustain her life. They argue that Mrs. Casimiro did not fully understand the nature of the directions set forth in the Health Care Proxy and Living Will/Power of Attorney documents that she executed in 1995 and 1997, respectively and that they were later revoked.

The issue before this Court is the validity of the Living Will/Power of Attorney and the Health Care Proxy. Both instruments direct the patient's agents, Rosalie Karschner in the Health Care Proxy and both Karschners in the Living Will/Power of Attorney, to essentially authorize the termination of any life sustaining measures. Petitioner has presented evidence that both instruments were validly executed and urges that each remain in force. Respondents, on the other hand, urge the Court to strike the Living Will/Power of Attorney as it was their great aunt's intent to revoke same. They do not contest the validity of the Health Care Proxy, but maintain that by refusing to execute a DNR, they are, pursuant to this instrument, complying with Yvette Casimiro's wishes and desires to stay alive according to her devout Catholic beliefs that only God can take a life.

The Court held "there is little doubt that Yveette Casimiro, by her actions, revoked the Living Will/Power of Attorney executed on April 3, 1997. At the very least, the record reveals that Mrs. Casimiro intended to do so based on her statements to Respondents as well as the tenets of her religious faith, particularly once Mrs. Casimiro understood the dire implications of the instrument she executed. Therefore, by reason of the foregoing, the Living Will/Power of Attorney executed by Yvette Casimiro on April 3, 1997 is hereby stricken in its entirety the Health Care Proxy executed by Yvette Casimiro on October 31, 1995 is hereby stricken in its entirety."

In re M.B., 6 N.Y.3d 437, 846 N.E.2d 794 (2006)

Under the Health Care Decisions Act for Persons with Mental Retardation, a guardian can make health care decisions for a mentally retarded person, including the decision to terminate life-sustaining medical treatment, under carefully prescribed circumstances. The issue in this case—solely one of statutory interpretation—is whether the Act applies only to guardians appointed after its March 2003 effective date or whether it also affects the authority of persons already serving as guardians before March 2003. Based on the language and history of the Act, the Court of Appeals concluded that the Legislature also granted existing guardians full health care decision-making authority, subject to the detailed procedures set forth in the statute.

LINKS TO ACCESS FORMS:

Healthcare Proxy:
http://www.health.ny.gov/forms/doh-1430.pdf
Living Will: http://www.cumc.columbia.edu/student/health/pdf/New_York_Living_Will.pdf