

Living wills

Introduction

A living will, technically known as an 'advance decision', is designed to allow you to address specific concerns you may have about particular medical treatments, in case you should become mentally incapable of making decisions in relation to these in future. Although these concerns could be addressed by appointing one or more attorneys to make these decisions for you in a Lasting Power of Attorney (Health and Welfare), these powers need to be registered with the Court of Protection before the attorneys can act for you even though you lose mental capacity. However, a living will, although it does not specify a person to make decisions on your behalf, is operational as soon as it is signed and witnessed.

Living wills are increasingly popular in the UK, particularly among people with chronic conditions whose health is likely to deteriorate.

Advance decisions

Following the coming into force of the Mental Capacity Act 2005 on 1 October 2007, advance decisions have a statutory footing. There are now two types of advance decision: the advance statement and the advance refusal and both only come into effect when the maker loses capacity to decide for themselves.

An advance statement is a general expression of your wishes regarding the treatment and care you would like to receive in the event that you become unable to communicate these wishes for yourself. It can be as simple or as detailed as you like. It could, for example, cover your religious beliefs or the sort of food you would prefer. It could also indicate who, if anyone, should be consulted before you are given any treatment. The people administering the treatment must consider the contents of the advance statement but may not be legally obliged to follow it, if, for example, it conflicts with their professional medical judgement.

An advance refusal, however, is legally binding. It allows you to refuse any treatment for any reason, even if this could lead to your death. An advance refusal must state exactly what type of treatment is to be refused and should mention the circumstances in which it is to apply (it will not apply if the specific circumstances are absent or in relation to treatments which are not specified). As it is such an important document, it must be clear although this does not mean that technical medical language must be used.

If the advance refusal is, or includes, a decision to refuse life-sustaining treatment, it must state clearly that it is to apply even if your life is at risk, it must be made in writing and be witnessed. Although other forms of advance decision need not be in writing, it is advisable that they are in order to avoid any uncertainty over their content or validity.

Advance decisions can be withdrawn or altered by the maker at any time whilst the maker has capacity and may be revoked by a later Lasting Power of Attorney (Health and Welfare) which includes provisions relating to the same treatment.

Pre-October 2007 living wills

Living wills made before 1 October 2007 remain valid if they satisfy the requirements of the Mental Capacity Act 2005 unless they have been overridden, revoked or otherwise affected by the provisions of a later Lasting Power of Attorney (Health and Welfare). The position may therefore have to be reviewed. We are happy to review any living wills made before that date to ensure that they do comply with the current law.

Our role

We can help you by advising on all aspects of advance decisions, from reviewing living wills in order to ensure compliance with any legal formalities, to the drafting of your, or a family member's, living will. We have a great deal of expertise in doing so and pride ourselves on offering a sensitive and compassionate service.

For further information or advice please contact:

Julia Abrey by telephone on 020 7597 6053 e-mail: julia.abrey@withersworldwide.com

9.2.10