

Advance Directives in New Jersey

Many of us have experienced the unfortunate dilemma of having a loved one in a hospital or a nursing home who is unable to communicate his or her needs. We know how difficult that is for the patient and for those with whom he or she wants to communicate. Many remember the **Schiavo** case in Florida as an example of this problem in its starkest form.

Advanced Directives for Health Care, some times called Living Wills, were developed for these situations. Advanced Directives arose out of efforts in the late sixties to increase personal autonomy in response to the increased standardization of medical practice and the growth of invasive technology. The growth in the use of mid-wives and hospices are other examples of this movement.

The use of Advance Directives also stemmed from the effects of a number of high profile court cases. In 1976, in the **Matter of Karen Ann Quinlan**, the New Jersey Supreme Court granted the request of Karen Quinlan's parents to disconnect her respirator. The court based its decision on the right to privacy and balanced that right against the State's interest, reasoning that the State's interest declines as the degree of invasiveness increases and the prognosis dims. In **Cruzan v. Director, Missouri Department of Health**, the U.S. Supreme Court decided that the U.S. Constitution does not forbid Missouri's requirement that evidence of an incompetent's wishes as to the withdrawal of life sustaining treatment be proved by clear and convincing evidence. In that case, the Court held that Missouri's living will statute was the appropriate manner in which to determine Nancy Cruzan's end of life wishes. Since the evidence was not clear that she wished to refuse end of life treatment and she did not have a living will, no one else could make that decision for her.

As a result of those decisions and other developments, New Jersey in 1991 enacted the Advance Directives for Health Care Act, (N.J.S. 26:2H-53, **et seq.**). This Act confirms that competent adults have the right to control decisions about their health care and this includes the right to refuse or withdraw life-prolonging medical or surgical means or procedures. The Act permits this through the execution of Advance Directives and Durable Powers of Attorney.

Definitions

There are a number of terms that are used in the New Jersey Act (and in the Acts of other states):

Advance Directive: a written instruction pertaining to what type of medical care you may not want in case you can not make decisions for yourself. There are three types of advance directives: (1) **Proxy Directives:** a written instruction giving another person the authority to act for you (your agent or proxy); (2) **Instruction Directives** (or Living Will): written instructions that indicate in advance what medical treatment you wish to accept or refuse and the circumstances in which you want your wishes implemented; (3) **Combined Directive:** a single document that contains both the proxy and the instruction directives; (4) **Permanently unconscious:** a medical condition that has been diagnosed in accordance with accepted medical standards and with reasonable medical certainty as total and irreversible loss of consciousness and capacity for interaction with the environment. The term “permanently unconscious” includes, without limitation, a persistent vegetative state or irreversible coma; (5) **Terminal condition:** the terminal stage of an irreversible fatal illness, disease or condition. A determination of a specific life expectancy is not required as a precondition for diagnosis of terminal condition but a prognosis of a life expectancy of six months or less with or without the provision of life sustaining treatment, based upon a reasonable medical certainty, is deemed to constitute a terminal condition.

Preparing an Advance Directive

Any competent individual may execute an Advance Directive at any time. This directive may include a proxy directive and an instruction directive or both. They may be done at the same time or at different times.

The Advance Directive is signed and dated by or at the direction of the declarant in the presence of two subscribing adult witnesses who shall attest that the declarant is of sound mind and free of duress and undue influence. Alternatively, it may be witnessed by a notary public, an attorney licensed in New Jersey or person able to take oaths.

The Advance Directive may be revoked, reaffirmed or modified. It is revoked by the notification to a health care representative, physician, nurse or other reliable witnesses or by any act evidencing intent to revoke or by execution of a subsequent directive. A reaffirmation or modification of an advance directive requires the same formalities that were performed in the original execution.

An Advance Directive becomes operational when it is (1) transmitted to the attending physician or to the health care institution; and (2) it is determined that the patient lacks the capacity to make a particular health care decision. The attending physician determines whether the patient lacks the capacity to make a particular health care decision. The decision must be in writing and provide a diagnosis. That decision has to be confirmed by one or more physicians.

Once it has been determined that a person lacks decision-making capacity, the health care representative shall have the authority to make health care decisions on behalf of the patient. The health care representative shall act in good faith and within the bounds of the Act. The health care representative shall be informed of the patient's medical condition prognoses and treatment options to give informed consent to a refusal of health care. The health care representative shall seek to make the health care decisions that the patient would have made had he or she possessed decision-making capacity under the circumstances, or, when the patient's wishes cannot adequately be determined, shall make health care decisions in the best interest of the patient.

If there has been no designated health care representative, the instruction directive is still valid. If it is clear, it shall be honored in accordance with its specific terms by a guardian, physician or other health care professional.

Consistent with the Advance Directive, life sustaining treatment may be withheld or withdrawn when the patient is permanently unconscious as determined by a physician and confirmed by a second physician or if in a terminal condition.

If these do not exist then such treatment can be withheld when a patient has a serious irreversible illness or condition and the likely risks associated with the medical intervention may reasonably be judged to outweigh the likely benefits to the patient.

An Advance Directive executed under the laws of another state in compliance with the laws of the State of New Jersey is validly executed for purposes of the Act. An Advance Directive executed in a foreign country in compliance with the laws of that country or New Jersey, which is not contrary to the public policy of the State, is also validly executed for purposes of the Act.

Problems with Advance Directives

As may be expected, having an Advance Directive and having it followed are not always the same thing. A number of problems can rise with the implementation of an Advance Directive.

(1) There can sometimes be too many directives. If a patient has conflicting directives that were done at different times, it can create confusion. Although the later directive controls, other directives can raise issues as to the meaning of the current one. Be sure to obtain the copies of your previous directives when you amend or re-do a directive.

(2) Sometimes the patient has failed to fully complete the Advance Directive or failed to follow the required formalities regarding its execution. It is very important that you follow the requirements of the law in preparing your directive.

(3) There are sometime conflicts within the family. New Jersey only allows for one proxy. Often this is the oldest sibling. But what if the family disagrees on what to do? Does he or she act alone?

(4) One of the biggest problems is in deciding whether to continue hydration and nutrition when the patient is terminal or in a vegetative state. Failure to provide nutrition and hydration will, of course, kill the patient. It is very important to understand the patient's wishes in this regard.

New Jersey has an excellent Advance Directive Act and has, through its Commission on Legal and Ethical Problems in the Delivery of Health Care, provided a number of forms to use. Before executing an Advance Directive, it is advisable to review the form and discuss it with your family, doctor and lawyer. In this area there can never be enough knowledge.

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