

**LIVING WILLS & HEALTH CARE PROXIES:
“Advance Medical Directives” for
Making Medical Decisions in New York State
Barbara H. Cane, Attorney at Law**

1) What is a living will?

A living will is a written document stating your wishes about end of life care. It describes the types of measures you do or do not want taken if you are so ill that you cannot make health care decisions for yourself. It can give guidance about how you define “aggressive” treatment, and “recovery”. A living will may state your preferences about dying in a hospital or at home, your desire to make anatomical donations, your wishes regarding palliative care for relief of pain, direction about DNR (“do not resuscitate”) orders, and artificial feeding and hydration. You can also refer to your religious beliefs or suggest that clergy or a spiritual advisor be consulted. Since the specifics are impossible to anticipate, guiding principals, not specifics, are most useful. In essence, a living will provides a clear statement to family, loved ones and your physician about your wishes.

2) What is a health care proxy?

A health care proxy appoints someone an Agent to make health care decisions for you if you lack the physical or mental capacity to make those decisions yourself. Through this document, you give your Agent the power to make decisions for you based on their knowledge or belief of what you would have wanted - or rejected - under the circumstances. For instance, you can give your Agent the power to withhold or withdraw life sustaining treatment, including artificial nutrition and hydration, or not. Your Agent will make sure your health care providers follow your wishes, by going to court if necessary.

In New York State, you may name only one Agent to act at a time. But you can, and should, name alternate Agents to act if the person you have named as your first choice is unable or unwilling to act. Since decisions may have to be made quickly and under pressure, it is wise that one person, and only one person, has the ultimate responsibility to communicate with the health care provider and make the decisions. Of course, in a family that functions well, people will discuss the issues with each other.

The Health Care Proxy document can also state your desire to make anatomical donations. (There are over 8,000 people in New York State waiting for organ donations, and about ten times that number nationwide. For more information visit the New York Organ Donor Network-Donate Life at www.nyodn.org or call 800-GIFT-4NY. Most religions allow and often encourage organ donation. For information on your religion's view of organ donation visit <http://www.transweb.org>. For an Orthodox Jewish view visit <http://www.hods.org>.

3) Do I need both a Living Will and a Health Care Proxy?

In our office we do both documents for our clients. Still, the Health Care Proxy is the key document in New York State and the one on which you should focus. It is short and health care providers will recognize it immediately. Taken together, the documents are often referred to as "Advance Health Care Directives".

The two documents should be consistent. The Living Will is meant to guide and inform the decision makers. We often refer to it as a "spine-stiffener" because it sets out the principles of decision making at a less emotionally turbulent time. If none of the "Agents" named in the Health Care Proxy were able and willing to act, the Living Will will guide the professional health care providers.

4) How do I create these documents?

In New York State there is no "form" for a living will. There are various documents available on the internet, and you can devise something for yourself based on samples, your own thoughts, religious perspective and your experience with end of life issues. It should be in writing, dated and witnessed by two people who will have no role in making decisions for you.

You can find a standard Health Care Proxy form for New York at www.health.state.ny.us/nysdoh/hospital/healthcareproxy/about.htm or ask your attorney to prepare one for you. You may add to the form, but we believe it is best to preserve the general format of the New York State form. The Health Care Proxy MUST be signed in the presence of two witnesses who are over the age of eighteen and who are not named as your Agents under the document.

We prepare a Health Care Proxy, Living Will, Designation of HIPAA Representative, and registration with the U.S. Living Will Registry for our clients as part of their comprehensive efforts to “put their affairs in order,” which may include wills, revocable living trusts, powers of attorney, beneficiary designations and other documents.

5) Will my wishes be honored in other states?

A document that is valid in the state where it is signed should be honored in other states. All states have their own particular rules regarding Health Care Proxies and Living Wills: they may be called by different names, and have different formal requirements.

6) How will people know my wishes?

Signing your documents is only part of the process. For them to be effective, you must discuss them with the people you empower to make decisions for you. Are they comfortable with the responsibility? Can they carry out your wishes? Give copies of the documents to family members, your doctor, your attorney, hospital personnel if you go in for a procedure, or your social worker or geriatric care counselor. Keep a copy with your other important papers and tell others where that place is. Post a copy inside the medicine cabinet, on the side of your refrigerator, or in the glove compartment of your car.

We make a wallet card for our clients to carry at all times. The card states that a Health Care Proxy and Living Will have been created, identifies the Agents, and gives the contact information for the US Living Will Registry.

7) What is the US Living Will Registry?

The US Living Will Registry is an organization that archives Living Wills and Health Care Proxies. Upon request from a hospital, they will provide copies of your documents in a timely fashion. For example, if you are out of town, the hospital can call the US Living Will Registry and have the information faxed to them. Many hospitals use this service to keep track of the documents their patients have filed upon admission.

As a courtesy to our clients, we file copies of their health care documents with the US Registry of Living Wills. Ask your attorney if he or she does the same. If your attorney does not have a relationship with the US Living Will Registry, you can

register your documents with the Registry directly for a nominal fee. www.uslivingwillregistry.com or 800-LIV-WILL

8) Who should be my Agent (substitute decision maker)?

Your Agent should be someone who knows you well, who will respect your wishes, who can ask difficult questions about medical issues, and who can evaluate the answers. Your Agent must be a person who can make difficult decisions, especially when it is hard to do so.

This is not a “popularity contest”, but a delegation of a serious responsibility! Frequent choices are a spouse or partner, an adult child, a good friend, a parent, a clergy person or an attorney. Remember that the person you choose should be someone who can put your wishes first, above his or her own opinions. You should ask each person you intend to name if they would feel comfortable making these decisions for you. Sometimes people have religious or other reasons that would prevent them from honoring your wishes.

9) What is HIPAA?

HIPAA is the Health Insurance Portability and Accountability Act. It is designed to protect the confidentiality of your personal health care information. It prevents health care providers from sharing your confidential health care information with anyone except those you specifically authorize to receive it. This protection is good, but sometimes health care providers may be overzealous in applying it beyond the boundaries set by law. In New York State, if you are unable to make health care decisions for yourself so that the Agent under your Health Care Proxy is empowered to act, that Agent is entitled to review your confidential health care information. Nevertheless, to prevent misunderstandings and possible delays, we add specific reference to HIPAA in the Health Care Proxies we create for our clients. Why not give hospital personnel the language which will put them at ease?

We also offer our clients the opportunity to designate representatives who may receive confidential medical information otherwise protected by HIPAA, even if the circumstances are not so dire as to invoke the Health Care Proxy. For example, a person suffering from clinical depression may be unable to call the doctor to get test results, or even to set an appointment. We believe the “blanket” authorization we

create as a separate document may be useful in these “gray” areas. However, some people may not feel comfortable giving that power to anyone. You must discuss this with your attorney.

10) Who needs a Health Care Proxy and Living Will?

Everybody over the age of eighteen years old!

11) When should I prepare my Health Care Proxy, Living Will and HIPAA Designation of Representative?

Now! We do not know what the future brings, but it is much easier to discuss tough questions before there is a crisis.

12) How can I contact your office to start my planning process?

Our office is devoted to estate related law. We do estate planning, administration and estate settlement. We are based in historic Nyack, New York, and we regularly service clients living in New York, Connecticut and New Jersey. All New York residents may contact both Barbara H. Cane and Courtney E. Boniface. By phone: 845-353-7314 or 212-864-6401 By email: info@canelaw.net. For directions, articles and information on getting started, visit our website at <http://www.canelaw.net>.

13) Where can I learn more?

Making decisions about end of life care involves complex religious, philosophical, moral, and psychological issues, as well as medical considerations. These are some sources you might want to consult as you explore these issues:

“Fidelity, Wisdom & Love: Patients and Proxies in Partnership, An Interactive Workbook for End-of-Life Decision Making” by J.J. Fins & B.S. Maltby, available from New York-Presbyterian Hospital. 212-746-110 and www.abanet.org/aging/toolkit both give useful examples to discuss with your substitute decision maker.

“Talking about Death Won’t Kill You”, by Virginia Morris and “How We Die” by Sherwin H. Neuland, MD both give thorough and thoughtful discussion of end of life issues.

Useful websites are:

www.agingwithdignity.org or 888-594-7437 (“Five Wishes”)

www.nhpc.org or 703-837-1500 (National Hospice and Palliative Care Organization)

www.medicaldirectives.org forms available.

www.familydoctor.org discusses medical issues.

www.mayoclinic.com provides in-depth description of advance directives

www.abanet.org/aging/toolkit provides worksheets, resources and suggestions. Does not create directives.

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