

LIVING WILLS
also known as
ADVANCED DECISIONS TO REFUSE TREATMENT

What is a “Living Will”?

A Living Will can be a written or an oral statement that specifies the treatment or medical procedures that a person would not want to receive in the future, if that person did not have the mental capacity to make their own decision at that time.

From October 2007 the Mental Capacity Act sets out new rules relating to “Living Wills” and calls them “Advanced Decisions to Refuse Treatment”.

An Advanced Decision to Refuse Treatment can only be relied upon if a person is not mentally capable of making their own decision. Put another way, a person should be asked to make their own decision if they are mentally capable of doing so at that time.

An Advanced Decision to Refuse Treatment can only be used to refuse treatment; it cannot be used to demand that a person is given particular treatment.

Who can make an Advanced Decision to Refuse Treatment?

To make an Advanced Decision to Refuse Treatment a person must be:-

- Aged 18 years or over
- Mentally capable of understanding the decision at the time it is made

It is important that a person has thought carefully about their decision and specified exactly what it is they want. When the Advanced Decision to Refuse Treatment is considered by healthcare professionals at some time in the future it is unlikely that the person will be able to confirm exactly what they meant or had in mind. Therefore, it is important that the person’s wishes are carefully and fully set out to ensure the proper course of action is taken by the treating healthcare professionals.

Can I Make An Advanced Decision To Refuse Treatment If I Am Already Ill?

A person making an Advanced Decision to Refuse Treatment may already have some form of physical frailty or mental illness; often an Advanced Decision to Refuse Treatment will be made by someone who is aware that they have a condition that may lead to further treatment being necessary at some time in the future.

Therefore, it may be necessary to ask that person’s General Practitioner or treating Consultant to be involved for the following purposes:-

- To confirm what medical treatment may be necessary in the future.
- To confirm whether the person does have the necessary mental capacity to make an Advanced Decision to Refuse Treatment. It may be appropriate to ask them to witness the document when it is signed.

An Advanced Decision to Refuse Treatment cannot be used to refuse compulsory treatment under the Mental Health Act 1983 to a person who is presently detained, or is likely to be detained, under that Act.

What form should the Advanced Decision to Refuse Treatment take?

The Advanced Decision to Refuse Treatment does not have to take any particular form. It could be any of the following:-

- A written statement, which may be witnessed by another person
- A card that you carry with you
- An oral statement to a friend or family member
- An oral statement to a healthcare professional, which may be recorded on your medical records

From the point of view of proving a person's wishes, it is much clearer if a written statement is made as evidence of their wishes

However, if your Advanced Decision to Refuse Treatment refuses life sustaining treatment it must be in the following format:-

- In writing
- Signed by the person and witnessed. If you are unable to sign yourself, you can direct someone else to sign for you in front of yourself and a witness.
- It must state clearly on the document that the refusal of treatment applies "even if life is at risk".

Should I consider making an Advanced Decision to Refuse Treatment?

The decision whether to make an Advanced Decision to Refuse Treatment, and what is contained within it, is entirely up to the person making it.

It is not for any other person to tell them what to do or to unduly influence their decision.

You may wish to make an Advanced Decision to Refuse Treatment if you:-

- Are aware that you may have to go into hospital or receive some form of treatment
- Are already in hospital or undergoing treatment

- Are aware that you may have an illness, or a family history of a particular condition.
- Have strong religious, cultural or personal beliefs that you do not want a particular form of treatment
- Are planning for your future, in case something untoward should happen to you.

What does an “Advanced Decision to Refuse Treatment” mean to your treating Healthcare Professionals?

Healthcare professions are trained to give the care and treatment that they believe to be in a person’s best interests. They can be found to have failed in their professional duties if they do not act in a person’s best interest.

However, sometimes people can have different views about what is in a person’s best interests. You may not want to have a certain treatment, even though your treating healthcare professional may take the professional view that the treatment is in your best interests.

Therefore, a healthcare professional will be protected from liability if they withhold a treatment, reasonably believing that a person:-

- Has made an Advanced Decision to Refuse Treatment, and
- That it is valid, and
- That it is applicable to that person in their present circumstances

In addition, a healthcare professional will be protected from liability if they give a treatment, reasonably believing that a person:-

- Has not made an Advanced Decision to Refuse Treatment, or
- If they have made an Advanced Decision to Refuse Treatment, it is not valid, or
- If they have made an Advanced Decision to Refuse Treatment, it is not applicable to that person in their present circumstances

When considering if an Advanced Decision to Refuse Treatment is valid and applicable a healthcare professional may consider the following:-

- If a person has since done anything that clearly goes against that
- If that person has withdrawn their Advanced Decision to Refuse Treatment
- If that person has subsequently granted someone else power to make that

decision under a Lasting Power of Attorney (explained below)

- If that person would have changed their decision if they had know more about their present circumstances.

Even if an Advanced Decision to Refuse Treatment is not valid or applicable to that person in their present circumstances, a healthcare professional may consider it to be an expression of their wishes that should be taken into consideration.

When considering what to do for a person who cannot make their own decision, a healthcare professional must consider the following “Best Interests” criteria from October 2007:-

- That person’s past and present wishes and feelings (including any written statement made when they had capacity)
- The beliefs and values that they would be likely to have if they had capacity
- Factors they would consider “if able to do so”
- The views of others should also be consulted, if appropriate, namely:-
 - Anyone named by the person as someone to be consulted
 - Anyone caring for the person or interested in their welfare
 - Anyone appointed under a Power of Attorney
 - Any deputy appointed by the Court of Protection

Can I Appoint Someone Else To Make A Decision For Me In The Future?

From October 2007 a person over 18 years of age may grant a Lasting Power of Attorney to someone else to allow them to make future decisions with regard to their personal welfare and consent to care treatment.

A person may choose one or more persons to be their Attorney(s) and can stipulate if they must make decisions separately, or if they must make them together.

A person can also stipulate the nature and extent of the decisions that their Attorney(s) may make on their behalf. They can give them very limited power to make decisions, or very broad powers.

If a person is still mentally able to make their decisions then they must be allowed to do so with regard to medical consent issues.

A person’s Attorney(s) are under a legal duty to try to take all practical steps to enable that person to fully understand the decision that is to be made and to assist that person in making their own decision if at all possible.

If a person wishes to give their Attorney(s) the power to refuse life sustaining treatment, that must be set out clearly in the Lasting Power of Attorney that the refusal of treatment applies “even if life is at risk”.

When making decisions, Attorneys are obliged to act in the “Best Interests” of a person, along the same rules healthcare professionals (as set out above).

If a person is mentally incapable of making a Lasting Power of Attorney it may be appropriate to make an application to the Court of Protection for the Court to make a particular decision, or to appoint a Deputy to make decisions for that person.

What If I Change My Mind About My An Advanced Decision To Refuse Treatment?

A person who has made an Advanced Decision to Refuse Treatment can modify or revoke it at any time while they have the mental capacity to do so.

However, it is important that this decision is properly reported to friends, family or healthcare professionals to ensure the new wishes are known and understood.

If anyone else holds a copy of previous written Advanced Decision to Refuse Treatment it would be wise to ask them to note the change, write on the old copy that there has been a change, and to keep a copy of any new document with the old document.

What if there is any doubt about my Advanced Decision to Refuse Treatment?

In case of doubt or dispute about an Advanced Decision to Refuse Treatment, the Court of Protection can determine the issue and make a declaration concerning the following:-

- Whether it is valid
- Whether it is applicable to that person in their present circumstances.
- Whether the decision of a healthcare professional is in a person’s “Best Interests”

While a decision is being sought a healthcare professional may take action to prevent the death or serious deterioration of the person concerned whilst the matter is referred to the Court.

There are certain circumstances where the Court of Protection will always be required to make a decision:-

- Withholding artificial nutrition and hydration to a person in a permanent vegetative state
- Organ or bone marrow donation by a person who is unable to consent

- The non-therapeutic sterilisation of a person who is unable to consent
- Where there is doubt or dispute as to what is in a person's best interests

What Should I Do If I Want To Make An Advanced Decision To Refuse Treatment?

If you want to make an Advanced Decision To Refuse Treatment is important that you act straight away, as you cannot make one if for any reason you are unable to make the decision in the future.

You should consider speaking to the following people:-

- A legal advisor. They will be able to advise you on what to do.
- Your G.P., treating consultant, or other healthcare professional. They will be to advise on the treatment that you may require in the future.
- Your family and friends. It is important that they know your wishes and understand your plans for the future.

You should consider the following potential advantages of putting your Advanced Decision To Refuse Treatment in the form of a written document:-

- It makes your wishes clear and specific.
- It allows you to provide copies of the document to any people who may be involved if you became unable to make decisions for yourself in the future.
- It clarifies your wishes in case of doubt or dispute.
- Preparing a written document may prompt you to think through your wishes and consider all of the different options that are available.
- If you wish to refuse life sustaining treatment your Advanced Decision To Refuse Treatment must be in writing, signed and witnessed, clearly stating on the document that the refusal of treatment applies "even if life is at risk".

What should I do with the Advanced Decision to Refuse Treatment when it is made?

It is important that any treating healthcare professionals are made aware of your Advanced Decision to Refuse Treatment as soon as possible.

Therefore you may wish to consider the following:-

- Providing a copy of any written document to your G.P. or treating consultant

- Explaining your wishes to your healthcare professionals as soon as you are able
- Informing your family or close friends of your wishes and the location of any documents
- Keeping any written documents in a safe place where they can easily be found by your family or friends.
- Carrying a card or statement on your person, explaining that you have made an Advanced Decision to Refuse Treatment and where it can be found.

For further advice please contact the following:-

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