

ADVANCE DECISIONS or “LIVING WILLS”

What is it and when does it operate?

An Advance Decision or “Living Will” allows you to make sure your wishes are carried out when you are no longer able to communicate them yourself. It is a means of letting other people know how you would like to be treated in the future. If you have reached the age of 18, and have the mental capacity to do so, you can record your decision to refuse consent to specific types of medical treatment in specific circumstances, in the event that you later lack the mental capacity to decide whether to consent to treatment at the material time. It operates only when you are physically or mentally incapable of giving or refusing consent to medical treatment.

To make an Advance Decision, you must have reached the age of 18 and must have capacity to make the decision. The Advance Decision may be in writing or given verbally, although if it relates to life sustaining treatment, it must be in writing and signed by you in front of a witness who subsequently signs the document, ie by deed. If it relates to life sustaining treatment the Advance Decision must also state clearly that the decision applies even if life is at risk.

There is no legal right to demand specific treatment and healthcare professionals do not have to provide treatment that conflicts with their professional judgement.

Is it legally enforceable?

Under the Mental Capacity Act 2005 which came in to full effect from 1 October 2007 a ‘living will’ can be legally binding if it is a decision to refuse medical treatment. This is known as an Advance Decision. Therefore, a valid and applicable Advance Decision will be effective as a contemporaneous refusal of consent by you with capacity to make the decision.

Any healthcare professional treating you must adhere to the Advance Decision if it is correctly made and valid and applicable to the proposed treatment.

Can I change my mind?

Yes. You can withdraw or change an Advance Decision as long as you still have the capacity to do so. There is no formal procedure for withdrawing an Advance Decision. It can be done verbally, in writing or by destruction of the original document.

However, if the Advance Decision deals with life sustaining treatment, the same rules which apply to the creation of the Advance Decision must be followed. Any withdrawal or change of an Advance Decision relating to life sustaining treatment must be in writing and signed as a deed.

As with the creation of an Advance Decision, you are advised to make your GP or other medical practitioners treating you, as well as your relatives, aware of your decision to make any changes or withdraw the Advance Decision.

Do Advance Decisions encourage euthanasia?

No. Euthanasia involves taking active steps to help people to die. A valid Advance Decision, which refuses treatment, only asks medical staff not to intervene (other than to ease the pain and for the comfort of the patient) and to allow the patient to die naturally.

The law relating to euthanasia following the Mental Capacity Act 2005, therefore, has not changed and the introduction of Health and Welfare Lasting Powers of Attorneys and statutory Advance Decisions does not legitimise euthanasia.

Advance Decisions and Lasting Powers of Attorney

A Health and Welfare Lasting Power of Attorney (LPA) allows a donor to give general authority to an attorney to consent or refuse treatment including life sustaining treatment. Unlike an Advance Decision, it is not necessary to specify a particular type of treatment or specific circumstances. Subject to the terms and any guidance in the LPA, the attorney will be able to make any decision for the patient relating to his or her health

and welfare in the event that the person no longer has mental capacity to make the decision himself.

Under a Health and Welfare LPA, an attorney must make decisions in the donor’s best interests. Whereas, in following an Advance Decision, the best interests principles do not apply and the Advance Decision must be carried out, even if the healthcare professionals concerned think it goes against your best interests.

If you already have a Health and Welfare LPA and subsequently make an Advance Decision, which is valid and applicable in the circumstances, then the Advance Decision will take priority.

Similarly, if you make an LPA after making an Advance Decision, then the Advance Decision will become invalid to the extent that the LPA gives the attorney the authority to make decisions about the same treatment. If the LPA does not allow the attorney to make decisions about the treatment specified in the Advance Decision, then the Advance Decision will still apply.

Who should keep the Advance Decision?

A copy of the Advance Decision should be placed with your medical records so that your Family Doctor is aware of your wishes. It is also advisable to discuss the contents of the Advance Decision with your family and friends; you can place a copy amongst your own personal papers, in a place made known to them. You might also decide to carry a card with you, rather like carrying a Donor Card, stating you have made an Advance Decision, and where it can be found. If you change your mind, you will need to arrange for copies of your Advance Decision to be returned to you and destroyed.

Advance Statements

An Advance Statement allows you to set out your wishes and feelings in relation to the care and treatment that you would like to receive should you lose capacity in the future. Unlike Advance Decisions, these are not legally binding but should be taken into account by decision makers, including attorneys when deciding what is in that person’s best interests.

What about advances in medicine?

With the advances of medical treatment you are advised to regularly review and update your Advance Decision as necessary. Treatments may have changed and become more advanced thereby making Advance Decisions made some time ago invalid or inappropriate.

If an Advance Decision is being prepared after you have been diagnosed with a particular illness or condition, it may be easier, with the assistance of your health care professionals treating you, to identify the likely types of treatment you may need in the future and in what circumstances. The Advance Decision in these circumstances could, therefore, be more specific in terms of the types of treatment to be refused.

Health Care Proxy

A Living Will can provide for the appointment of a "health care proxy". Doctors often discuss treatment with those people they consider to be the patient's next of kin, but there is no legal obligation on your doctor to consult your spouse, partner, or family members. A "Health Care Proxy" appointment tells your doctors that you would wish a particular person to be involved in discussions of your treatment when you are unable to do so, and they may be willing to comply with that request. You can nominate a person who might not normally be considered "next of kin" by medical practitioners or you may wish to specify that your spouse, partner, parent or other close relative should be consulted. The Proxy will be making decisions on your behalf. You must, therefore, ensure that he or she fully appreciates your views and advise them of any changes in your thinking. It could be the Proxy who makes vital decisions on your behalf.

If you would like to prepare an Advance Decision / 'Living Will' or you require further details please contact:

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What is a Living Will?



Heckford Norton