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A PHYSICIAN'S GUIDE TO ADVANCE
DIRECTIVES:
LIVING WILLS

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*Information and guidance for physicians
Provided by the Illinois State Medical Society*

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A PHYSICIAN'S GUIDE TO ADVANCE DIRECTIVES: LIVING WILLS

ILLINOIS LIVING WILL ACT

Introduction

The Illinois Living Will Act, passed by the Illinois General Assembly in 1983 (755 ILCS 35), gives individuals the right to execute a "living will" or "declaration" instructing their physician to withhold or withdraw death-delaying procedures in the event of a "terminal condition." The Act, which clearly delineates the conditions under which a living will can be executed, also establishes responsibilities for Illinois physicians and health care institutions in their dealings with patients.

ISMS publishes a brochure for patients called *A Personal Decision*. In easy-to-understand language, it provides practical information about living wills, powers of attorney for health care and organ donation. An excellent resource to help physicians discuss advance directive alternatives with their patients, it also provides copies of statutory forms that allow patients to execute advance directives simply and easily.

Recognizing that many physicians need more detailed information about advance directives, ISMS has produced this series of booklets, *A Physician's Guide to Advance Directives*. The booklet you are reading will help prepare you to advise your patients about living wills. While its content is educational and informational in nature, it is not intended to serve as legal advice.

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Questions and Answers About the Illinois Living Will Act

Who can execute a living will?

According to the Illinois Living Will Act, any person of sound mind who has reached the age of 18 may execute a living will. The law also allows this same right to "emancipated minors," a legal term with a specific definition (see Glossary).

How should you counsel a patient about a living will?

Many patients will feel comfortable discussing a living will with you. Some, however, will consistently decline the opportunity to discuss this and other treatment issues that relate to the end of their lives. Special discretion and respect must be used. The natural history of the patient's disease as well as available family and personal support must be considered when you approach these issues.

You should invite any patient with a potentially life-threatening chronic illness, or one who has organ system failure (especially in the heart, lung, liver, kidney or the central nervous system) to discuss life-sustaining treatment. Moreover, when appropriate, patients, including younger patients who are at risk of accidents and injury, should be counseled regarding the availability of advance directives.

When does a living will become effective?

To be valid, a living will must meet these criteria:

1. It must be executed voluntarily.
2. It must be a written document, signed by the patient (or another person at the patient's direction) and witnessed by two others 18 years of age or older. The law does not recognize oral declarations.
3. The living will of a pregnant terminal patient is not effective as long as the attending physician determines that it is possible for the fetus to develop to the point of live birth by continuing death delaying procedures.
4. The patient must be "qualified," in other words, certified by the attending physician as having a "terminal condition" (see Glossary).

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5. Unless the physician has knowledge to the contrary, a living will is presumed to be valid.
6. A declaration executed in another state in compliance with its law, or with the Illinois law, is valid.
7. The Illinois Living Will Act provides a statutory form for executing a living will, but using that specific form is not mandatory. Any living will in substantially the same form is acceptable as long as it communicates the patient's intentions about life-sustaining treatment in a verifiable way. Other specific directions may be included as well.
8. A living will created prior to 1987 is valid as long as it is substantially the same as the statutory form.

How does a patient become "qualified" to execute a living will?

For a patient to be considered "qualified," the attending physician must certify in writing that the patient has a terminal condition, and that death is imminent.

An emergency room (ER) physician should not be expected to make this type of "certification" for several reasons. ER physicians generally do not have the time or information to determine that a terminal condition exists. Furthermore, they are trained and motivated to keep a patient in a stable, viable condition pending a more complete evaluation and further tests. For these reasons, your health care institution should clearly define the meaning of "attending physician."

What should you do when notified that a patient has executed a living will?

The patient, if able, must notify the physician or the health care institution that a living will exists, including any amendments or a revocation of the document. If no such advice is given, the physician is permitted to act as though a living will does not exist. When an attending physician learns that a patient has executed a living will, he or she must:

1. Request a copy of the declaration and make it a part of the patient's medical record.
2. Determine if the patient is "qualified" (see Glossary) and record such information in the medical record:

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- a. If the patient is "qualified" record the date, the condition, and the terms of the patient's living will, if known.
 - b. If the patient is not "qualified," record the date and status of the patient at the time of notification, noting that the patient was not "qualified" on that date.
3. If a patient revokes a living will and the physician learns of it from the patient or someone else who witnessed the revocation, the revocation should be noted in the medical record including the time, date, and place the physician received notice and, if witnessed, a written statement of the witness.
 4. Retain in the medical record a copy of any new declaration created after the original one.

In addition, physicians are advised to include in the medical record notes about the wishes of the patient or family (made to the physician or other person) that relate to the use of death delaying procedures. It is also advisable to retain a written description and any notes about actions, opinions or directions that a physician takes in coming to terms with the directions of the living will or that may have modified it, such as removing what was considered an invalid section.

The Illinois Vehicle Code contains a provision mandating that the reverse side of the Illinois driver's license contain a place to indicate the existence of a living will; physicians are advised to inform their patients of such. Moreover, patients may indicate the existence of an advance directive on a wallet card such as that provided in the patient brochure entitled *A Personal Decision*.

What is the relationship between a living will and a durable power of attorney for health care (DPA)?

Individuals may choose to execute one or both declarations. A living will generally indicates what the patient's decisions are or would be in the event of a terminal illness. The DPA authorizes an agent, designated by the patient, to act as the patient would in managing his or her own medical affairs. When an individual has executed both declarations, the DPA takes precedence if the agent is available.

What happens if no living will or DPA exists?

The Illinois legislature has established guidelines that determine when it is appropriate to refuse life-

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sustaining care, including nutrition and hydration, in the absence of a living will or DPA. These guidelines can be found in the Illinois Health Care Surrogate Act. See ISMS booklet "Health Care Surrogate: Illinois Health Care Surrogate Act."

What would make a living will invalid?

A living will could be considered invalid if:

1. It lacks the patient's signature.
2. It lacks witnesses or their signatures.
3. No certification of a terminal condition exists.
4. The physician has not been notified that a living will exists.
5. A power of attorney for health care exists.

Unless a physician has information to the contrary, a declaration is presumed valid. If the living will does not conform to provisions of the law, a court may find it invalid in whole or in part. Even if a part of a living will is determined to be invalid, other provisions in the declaration remain valid.

What is the duration of a living will?

A declaration lasts from the time it is created until after the person's death, unless it contains other specific limitations.

Can a living will be revoked?

Yes. A patient can revoke a living will at any time regardless of mental or physical condition by any of these methods:

1. Destroying the document; or attempting to destroy it in a manner that shows the person's intention to cancel it, for example, by tearing, burning or obliterating the document.
2. Preparing a written revocation, signed and dated by the patient or another person

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acting at the direction of the patient.

3. Expressing orally or by other means an intention to revoke the living will in the presence of a witness 18 years of age or older who signs and dates a written confirmation of the patient's intent.

Under certain circumstances, a court may also revoke a living will. For example, if a court declares a patient incompetent, a guardian may be able to revoke the declaration. In such a case, legal advice should be obtained.

A revocation becomes effective upon communication to the attending physician or any other health care facility staff member or employee by the patient or by another person who witnessed the revocation. The physician should make such an expression or confirmation a written part of the medical record along with the time, date and place it was made.

What if the physician is unable to follow the directions of a living will?

The law recognizes that an attending physician may hold personal beliefs that make executing a qualified patient's living will difficult or impossible. In such a case, the physician must promptly advise the patient of this unwillingness. If the patient cannot initiate the transfer to another physician, the attending physician must notify the highest priority person available (as listed below), who is able and willing to arrange for transfer of the patient and the appropriate medical records to another physician who can and will comply with the patient's declaration. The order of priority is:

1. Any person authorized by the patient to make such arrangements.
2. A guardian of "the person" of the patient.*
3. Any member of the patient's family.

*without having to obtain a court order

A physician who is unwilling to comply with a patient's decision must continue to provide reasonably necessary consultation and care in connection with the transfer. The physician should document his or her unwillingness or hesitation to comply with the patient's declaration, including the circumstances involved, when a transfer is required.

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What immunities exist for physicians?

A physician, following appropriate medical standards in accordance with the law, who certifies that a patient has a terminal condition, is presumed to be acting in good faith and is immune from any civil or criminal liability that might otherwise occur. Unless a physician has actual knowledge that a living will has been revoked, failing to act on such a revocation does not imply liability or unprofessional conduct.

Immunity, however, is not absolute. A physician's actions must be in good faith and conform with the standards of reasonable professional medical care and judgment. If a physician violates such standards in verifying a terminal condition, he or she may be subject to criminal or civil liability. Such a standard of care will probably be determined on a local basis in conformance with the law relating generally to medical and professional responsibilities. Any physician who fails to comply with the law and acts in bad faith can also be civilly liable.

Further, a physician may be considered guilty of unprofessional conduct and subject to licensure discipline under the Medical Practice Act if he or she:

1. Fails to notify the health facility of a known living will declaration.
2. Fails to record a patient's terminal condition.
3. Fails to explain his or her unwillingness to comply with the declaration to the patient.

A person who willfully conceals the revocation of a living will or causes life-sustaining procedures to be withheld or withdrawn contrary to a patient's intent will be subject to criminal prosecution.

What other provisions does the Illinois Living Will Act contain?

The Act contains a number of other general provisions. First, withholding or withdrawing death delaying procedures from a qualified patient is not to be considered suicide, nor will it be considered to affect insurance policies. Second, a person cannot be required by a hospital, nursing home, physician, insurance plan, or other provider of health benefits to execute a living will as a condition of being insured or receiving benefits.

Final comment.

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Physicians are advised to discuss advance directives options with their patients and include written documentation of the patient's wishes in the medical record. To that end, the Illinois State Medical Society has developed a helpful brochure, *A Personal Decision*, for patients to use in executing their own advance directives. Limited free copies are available to ISMS members and to the general public upon request.

No booklet can answer all the possible questions about living wills or identify all possible problems. The information herein is provided to educate physicians about their basic responsibilities while acknowledging the challenges that lie ahead. Faced with these serious legal, ethical and moral issues, physicians must do their best to help their patients while abiding by the law and adhering to community standards of medical practice.

Glossary

Attending Physician.

The physician who is selected by or assigned to the patient and who has the primary responsibility for the patient's care and treatment.

Death.

- A. *Illinois Case Law* - In 1983, an Illinois Appellate Court defined what constitutes death in the state of Illinois as follows: "Death is deemed to occur when a person has sustained either: 1) irreversible cessation of total brain function, according to usual and customary standards of medical practice; or 2) irreversible cessation of circulatory and respiratory functions, according to usual and customary standards of medical practice." *In re Haymer, 115 Ill. App. 3d 349, 450 N.E. 2d 940 (1983)*.
- B. *ISMS Policy* - The following excerpt from ISMS's policy entitled *Death, Legal Definition* defined death as the: 1) irreversible cessation of circulatory and respiratory functions, or 2) irreversible cessation of all functions of the entire brain, including the brain stem.
- C. *Illinois Health Care Surrogate Act* - In 1991, the Illinois General Assembly defined death as it applies to situations falling under the Health Care Surrogate Act: "Death" means when, according to accepted medical standards, there is: 1) an irreversible cessation of circulatory and respiratory functions, or 2) an irreversible cessation of all functions of the entire brain,

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including the brain stem.

Death-Delaying Procedure.

Any medical procedure or intervention which, when applied to a "qualified patient," in the judgment of the attending physician, would serve only to postpone the moment of death. The Living Will Act suggests that "death-delaying" procedures include, but are not limited to, the following: assisted ventilation, artificial kidney treatments, intravenous feeding or medication, blood transfusions, tube feeding and other procedures of greater or lesser magnitude that serve only to delay death. The Living Will Act does not affect the responsibility of the physician to provide treatment for a patient's comfort or alleviation of pain. Nutrition and hydration shall not be withdrawn or withheld from a qualified patient if such would result in death solely from dehydration or starvation rather than from the existing terminal condition.

Emancipated Minor.

Under the Emancipation of Mature Minors Act, an emancipated minor is a mature minor over 16 and under 18, who has been ordered by a court to be "emancipated" and has the right to enter into contracts, and other rights that a court may order. After the person reaches age 18, he or she is no longer considered a minor and has all rights and responsibilities of an adult. A minor is ordered "emancipated" if it can be shown that the person is of sound mind and has the capacity and maturity to manage his or her own affairs, including the ability to live wholly or partially independent of his or her parents/guardian, and that it is in the best interest of the person and the parents/guardian to declare the minor emancipated.

Physician.

A physician is a person licensed to practice medicine in all its branches.

Qualified Patient.

A "qualified" patient is one who has been diagnosed and verified, in writing, to have a terminal condition by his or her attending physician, who has personally examined the patient. A qualified patient has the right to make decisions regarding death-delaying procedures as long as he or she is able to do so. A terminal patient who is pregnant cannot be considered "qualified" if, in the attending

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physician's opinion, it is possible that the fetus could develop to the point of live birth by continuing death-delaying procedures.

Terminal Condition.

An incurable and irreversible condition, where death is "imminent" and the application of death-delaying procedures serves only to prolong the dying process.

The Illinois Living Will Act includes the suggested form (above) that individuals may use in executing a living will. The Act also states that another form, which may include specific prohibitions or types of procedures, can be acceptable. It is advisable that any variation from the form above should be reviewed by an attorney to assure that it is valid. The Illinois State Medical Society includes a blank copy of this form for your patients to use in its brochure, A Personal Decision. Copies of this brochure, which also includes a power of attorney for health care statutory form and an organ donation card, are available to ISMS members free of charge. Contact:

Illinois State Medical Society
Twenty North Michigan Avenue
Suite Seven Hundred
Chicago, Illinois 60602
Telephone: 312-782-1654; Fax: 312-782-2023

LIVING WILL

The Living Will Act (755 ILCS 35/3) includes the following suggested form:

DECLARATION

This declaration is made this _____ day of _____ (month, year).

I, _____ being of sound mind, willfully and voluntarily make known my desires that my moment of death shall not be artificially postponed.

If at any time I should have an incurable and irreversible injury, disease or illness judged to be a terminal condition by my attending physician who has personally examined me and has determined that my death is imminent except for death delaying procedures, I direct that such procedures which would only prolong the dying process be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication, sustenance, or the performance of any medical procedure deemed necessary by my attending physician to provide me with comfort care.

In the absence of my ability to give directions regarding the use of such death delaying procedures, it is my intention that this declaration shall be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences from such refusal.

Signed _____

City, County and State of Residence _____

The declarant is personally known to me and I believe him or her to be of sound mind. I saw the declarant sign the declaration in my presence (or the declarant acknowledged in my presence that he or she had signed the declaration) and I signed the declaration as a witness in the presence of the declarant. I did not sign the declarant’s signature above for or at the direction of the declarant. At the date of this instrument, I am not entitled to any portion of the estate of the declarant according to the laws of intestate succession or, to the best of my knowledge and belief, under any will of the declarant or other instrument taking effect at the declarant’s death or directly financially responsible for the declarant’s medical care.

Witness _____

Witness _____