



## Living Will – Leave your voice for when you are unable to speak

27 March 2023

How can you guide your family and medical professionals to give effect to your wishes? The easiest way to ensure that your wishes are implemented, is by drafting and executing a living will.

A living will is a legal document that sets out your wishes for your family and medical professionals when you are unable to speak or make a decision for yourself. This is an advance directive that provides instructions regarding your medical care. A living will includes considerations as to whether the person would like life-sustaining medical treatment, feeding and for pain relief.

The process of drafting and executing a living will is reasonably simple and straightforward. Any person over the age of 18 years who is mentally competent at the time, is entitled to make a living will. At the time of signing the living will, the individual must be able to appreciate and understand the content and nature of what they are signing. The validity of the living will is not dependent on the persons mental competence after the signing thereof.

Living wills are not governed by legislation, in contrast to that of your last will and testament, which is governed by the Wills Act No. 7 of 1953. For that reason, it is of utmost importance to understand what the role of your living will is, and the enforceability thereof. It is also important to understand to what extent your wishes and directives can be expressed in your living will.

Despite the South African Medical Association (SAMA) guidelines, which provide that a medical professional should treat a patient in their best interest and provide the patient with medical care which is in accordance with good medical practice, the family and medical professionals must take into consideration the patient's wishes to refuse medical treatment. The most important principle of



a living will is that you clearly outline to the family and medical professionals that when the event occurs and there is no reasonable hope of recovery and death appears inevitable, the medical professionals should honour the directives on the instruction of the family, and only in exceptional circumstances may the doctor or specialist rely on their professional judgment.

Considering the above, it is evident that what must be included in the living will is extremely important. You will have to address the various types of care that you wish to refuse and receive. These include, but are not limited to, life-prolonging medical care, such as blood transfusions, CPR, diagnostic test, or the use of a respirator. Secondly, food and water in respect of patients who are permanently unconscious and need to receive intravenous sustenance. Lastly, palliative care, i.e. the care given in order to minimize or relieve the pain when the patient refuses to forego life-prolonging treatments.

Further to the refusal of the care, when you are executing the living will it must clearly stipulate who will be responsible for honouring your wishes should you have been diagnosed with any incurable or terminal disease for a certain period of time. Your living will should provide a clear guideline as to when and who must determine that your prospect is terminal and there is no reasonable possibility of recovery. The medical professional cannot make the decision on their own to terminate life support, but will have to be instructed by the family member, who acts as per the directive of the living will. The living will should make provision that at least two medical professionals should determine that there is no reasonable prospect of recovery and that the person nominated, i.e. spouse or family member must make the decision and give the instruction on your behalf. As mentioned, the medical professional is not allowed to make the decision to refuse medical treatment but must be instructed by the designated spouse or family member to give effect to the living will.

Whilst drafting your living will, it is important to consider what your medical or hospital scheme covers in terms of life-prolonging medical care. This will provide clarity in framing that your wishes and directives and will avoid financial hardship on your family.

The living will is often included in the last will and testament. Where the person has not included same in their last will and testament, it is advisable to add it as a codicil or in separate form. Therefore, the question of whether one should have last will and testament or a living will should never cross your mind, because the answer is both! Ensure that your family has guidance and is well taken care of, avoiding any unhappiness down the line.

---

By Larissa Kotzee (Candidate Legal Practitioner) | Corporate and Commercial Department

*Disclaimer:*

*This article is for the purpose of general information only and does not constitute nor must it be construed as legal advice. Specialist legal advice must be sought in respect of a specific legal matter. We accept no liability, damage, loss and/or responsibility, whether direct or consequential, for any actions taken or failure to take any actions, based on the content contained herein.*

© 2022 Klagsbrun Edelstein Bosman Du Plessis Inc. All rights reserved.