

Living Wills and Maltese Law

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I have been invited to speak very briefly about “**living wills**” probably because I am a notary and, like every other notary, am very much involved *inter alia* in the drawing up of public wills and the liquidation of estates of deceased persons.

Contrary to public wills that come into effect on the opening of succession of a person, that is upon his or her death, a “**living will**” becomes operative when a person, who was of sound mind at the time of its execution, is no longer in a position to give his informed consent to procedures that may sustain or prolong his life.

A “**living will**” is sometimes referred to as an “**advance directive**” and, at times, it is coupled with the granting of a durable or lasting power of attorney.

I propose to analyse the wording of a living will and an advance directive with a durable power of attorney so that I may be in a position to attempt to state our law on the validity, or otherwise, of these documents.

Most of us, who are familiar with living wills, are aware that generally speaking they are divided into three parts namely (A) a reference to the happening of a contingency and other circumstances, (B) the actual directive/s and (C) exemptions from civil liability.

Since a living will is usually very short, I will have a look at one of them and make some brief comments. The will usually runs as follows:

A. *I the undersigned NN being of sound mind and after careful consideration, declare that if at any time the following circumstances occur (1) that I suffer from one of the diseases mentioned in the schedule: **it could be severe lasting brain damage due to injury, disease, stroke or other cause, or to take another example, senile or pre-senile dementia like Alzheimer’s disease;** and (2) that I have become unable to participate effectively in decisions affecting my medical care; and (3) two independent doctors, including a consultant, are of the opinion that I am unlikely to recover from illness or impairment involving severe distress or incapacity for rational existence; **my comment: the patient has taken it on himself to decide that if he is not mentally fit, he has the right to die;***

B. *Then and in those circumstances, my directions are as follows: (1) That I am not to be subjected to any medical intervention or treatment aimed at prolonging or sustaining my life; **my comment: this could mean a lot like Do Not Attempt Resuscitation, or the refusal of nutrition and hydration;** (2) that any distressing symptoms (including any caused by lack of food and fluid) are to be controlled by appropriate analgesic or other treatment even though that treatment may shorten my life.*

C. Then follows the exemption from responsibility: *I consent to anything proposed to be done or omitted in compliance with the directives expressed above and I absolve any medical attendants from any civil liability arising out of such acts or omissions. This is the legal comfort given to doctors, nurses and care workers in general.*

The document is signed and dated before two witnesses who confirm that no pressure has been put to bear on the person signing the living will. This formality may differ according to the jurisdiction in question.

The living will may also include a durable or a lasting power of attorney, where the person making the will and granting the power of attorney appoints a person he trusts, at times referred to as a *health care representative*, who is charged to ensure that the directives embodied in the living will are followed. There could be variations on the same theme, for example the only directive given in the will may be that the health care representative has the right to give binding directives himself as he deems fit.

Since in Malta we do not have specific legislation on living wills and durable powers of attorney, the general principles in our Civil Code and other similar laws apply. It is very difficult to pigeon-hole living wills in any of the known institutes of Civil Law or, at least, to find some good analogies.

The living will is primarily an order to health care professionals and other workers to do or refrain from doing certain procedures including that of providing or withdrawing nutrition and fluid in the cases referred to in the will. I am of the opinion that according to our law, the directive far from being an “order” is only a statement of a desire on the part of the patient of what he would want his medical treatment to be in certain circumstances.

Where a proxy has been appointed to deal with the matter himself, he cannot under our law of mandate lawfully see to the execution of the directives since he does not have the right to act in the name of a person who is himself unable to act in view of his mental condition. In these cases, the mandator needs to be interdicted and a curator appointed to represent him, but limitedly to patrimonial matters like selling immovable property.

Where a particularly difficult case arises and a person is not in a position to give his informed consent, the Courts may be asked to take the decision themselves, something which may be considered, and indeed is, top-heavy.

The only “institute” I can think of that bears some resemblance to a living will with a durable proxy is the letter of wishes under our Trusts and Trustees Act. After the settlor has settled property on trust by trust instrument for the benefit of one or more beneficiaries, he may write a letter to the trustee outlining how the settlor would like the trustee to act in certain circumstances. The word “wishes” is perhaps an understatement in the administration of a trust. Though the trustee is only legally obliged to act in terms of the trust deed and may

ignore the letter of wishes, I am sure he will be very careful to ensure that the settlor's wishes as expressed in the letter are respected.

A discussion of which Civil Law legal institute a living will with or without a durable power of attorney resembles most, would take a lot of time and, I believe, is futile, even academically, since the analogies I have given centre on patrimonial matters without affecting the human person *per se*.

If I were asked in my capacity as a notary and a public official in private practice, to witness a living will with or without a durable power of attorney, I would first have to check whether its contents is expressly prohibited by the law or manifestly contrary to public morals or public policy. This is not an easy task at all even if, as I submitted earlier, for me a living will is just an expression of a wish.

On the 1st October of this year, the Mental Capacity Act 2005 came into force in England and Wales. It is a very long law addressing some end-of-life issues including the validity of living wills and lasting powers of attorney. There are various provisions regarding how a living will and a lasting power of attorney are drawn up and registered, their nature and legal effects and the legal comfort they give to health care professionals.

The time has certainly come for these issues to be addressed legislatively in Malta. I would be very happy to see a law with a clear definition of an advance directive, a durable power of attorney, their nature and effects, their registration and so on. But this is just the formal aspect which, though important in that it affords certainty to these documents, leaves the real issues unresolved. I must confess that I am not particularly enthusiastic about various aspects of the English Mental Capacity Act.

The English Act not only gives legal force to those living wills where patients have set down their directive refusing certain treatment like the amputation of a limb (in this case the law is only confirming judgements given by the English Courts), but also where they have directed that no food and fluid, whether by natural or artificial means, should be administered to them even though they are non-dying mentally incapable patients. Thus the Act not only allows but in some cases requires food and water to be denied. If this is not legalized euthanasia, I do not know what is.

My final comment: I am sure that extreme care will be taken in the drafting of a law on such issues. I am sure that Maltese legislators will not, as they are sometimes prone to do in view of our limited resources, just copy foreign laws on the matter without being absolutely sure that they conform to the objective criteria of the true dignity of patients and, also, the rights of medical personnel who care for them.

