A Living Will is Not a Will — But No Less Important

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Viewpoint

Lawyers are occasionally guilty of speaking legal jargon that a non-lawyer has no idea what the lawyer is talking about. For example, an estate-planning lawyer (or perhaps an estate-planning website you found) may suggest that you execute a living will in addition to a will, health-care proxy, and power of attorney.

Like the article title implies, a living will really has no relation to a will. A will primarily deals with directing who will inherit your assets when you die. It is only effective after you pass away and an order accepting probate of the will is issued by the appropriate court.

By contrast, a living will is a document that is effective only while you are alive, does not require a court order to be effective (unless someone challenges its validity), and has nothing to do with your assets. Its purpose is to set forth a person's instructions about treatment to be followed in the event the person becomes incapable of making treatment decisions and primarily involves life-sustaining medical treatment.

For example, a living will may state that, "If I become terminally ill, I do/do not want to receive the following treatments…" or "If I am in a coma or persistent vegetative state, with no hope of recovery, then I do/do not want…" These statements are then typically followed by special instructions about certain medical treatments you want withheld (or continued) such as artificial respiration or artificial nutrition and hydration (i.e. nourishment and water provided by feeding tubes).

There is no statute or "official" form for a living will in New York state, as they are primarily a creation of case law. New York case law has permitted the use of living wills as clear and convincing evidence of a person's intentions regarding health-care decisions.

Similarly, there are no legal guidelines for execution of living wills but the general practice is to execute a living will in the same manner as a traditional will (i.e. two disinterested witnesses).

It is also wise to discuss your health-care wishes and end-of-life preferences with your health-care agent and give him or her a signed copy of your living will.

After signing a living will, you still have the right to make health-care decisions for yourself as long as you are able to do so.

So what is the big deal if you do not have a living will? If you tragically end up in a persistent vegetative state and there is no clear and convincing evidence of your wishes about artificial respiration or feeding tubes, it can turn potentially even more tragic if your loved ones get into a dispute about what should be done. This is what happened in the Terri Schiavo case, a story that made national news involving a Florida woman who fell into a persistent vegetative state that led to a protracted legal battle between her husband and her parents about whether to remove her feeding tube or not. If Schiavo had a living will in place explaining her wishes, this nasty dispute may have been avoided.

So while a living will is not really a will at all, one can see that it is no less important.

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