your family and medical history. Talk to someone who can tell you about some of the alternatives to be decided. Persons to discuss these matters with you might include your lawyer, physician, clergyperson and family members. Your lawyer can give advice which will ensure that your documents are legally effective. If you do not have a lawyer, you can contact the Lawyer Referral Service of your local Bar Association, the Elder Law Section of the New York State Bar Association or various attorneys' groups such as the National Academy of Elder Law Attorneys. You can also get information about these matters, with appropriate forms, from The Partnership for Caring at www.partnershipforcaring.org. You can get the statutory form of Health Care Proxy from www.health.ny.gov/forms/doh-1430.pdf.

Will you get notification of the right to execute these documents?

Your medical care provider should notify you of your right to execute a Health Care Proxy and Living Will or documents equivalent to these in another state. Federal law requires hospitals, nursing homes, home health care services, hospice programs and health maintenance organizations participating in Medicaid or Medicare programs to give patients written information about Living Wills and/or other advance directives.

This pamphlet, which is based on New York law, is intended to inform, not to advise. No one should attempt to interpret or apply any law without the aid of an attorney. Produced by the New York State Bar Association in cooperation with the Committee on Law of the Elderly, Trusts and Estates Section.

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Living Wills and Health Care Proxies

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Introduction

Today's advanced medical technology may result in the possibility of being subjected to various invasive medical procedures, particularly life support systems, which may serve no purpose other than to prolong the process of dying. But each of us has the right to state his or her wishes in this regard, now, while our faculties are still in command and when our judgment will not be challenged. This statement of your wishes can be made most effectively through two documents, called: A 'Living Will' and a 'Health Care Proxy.'

This pamphlet describes the background and the purpose of these two documents, and how they can effect the implementation of your wishes.

What is a Health Care Proxy?

A Health Care Proxy is a document which allows you, as a competent adult, to appoint another person as "agent" to make decisions for you regarding your health care in the event you lose your decision-making capacity or the ability to understand and appreciate the nature and consequence of health care decisions. The Proxy can be general and apply to all medical decisions, or it can impose limitations and spell out specific instructions. Some states may limit its applicability in certain situations.

Is the Health Care Proxy recognized in New York?

Yes. Public Health Law (Section 2980 et seq.) specifically recognizes the Health Care Proxy and establishes a procedure to allow you (the "principal") to appoint someone you trust, often a family member or a close friend, to make decisions about your health care treatment on your behalf if you are no longer able to do so.

When does the appointment of the Health Care Proxy become effective?

Your agent's authority to make health care decisions under the proxy law is activated only upon a determination by your attending physician, to a reasonable degree of medical certainty, that you have sustained loss of your capacity to make such health care decisions. Your health care agent cannot act under the proxy until such determination has been made.

Can your health care agent make all medical decisions for you when authorized to act?

Yes. Your agent can make decisions in accordance with your wishes, including your religious and moral beliefs, if known to your agent, or, if your agent does not know your views, in accordance with your best interests. However, in regard to the administration of artificial feeding (nutrition or hydration), your agent must have specific knowledge of your wishes, otherwise the agent has no authority to make decisions regarding these procedures. You should express your views on these matters — just as to other questions — in your Living Will, or in the Proxy itself. While your views on this subject could also be expressed orally, because of the "clear and convincing evidence" rule, it is better to put them in writing. It is important to discuss your views and wishes with your agent.

When does the health care agent have the authority to decide to withhold or withdraw life-sustaining treatment?

Your agent's power to make such a decision comes into effect only after your attending physician and a second physician give written opinions that you lack decision-making capacity. If you are hospitalized and lack of capacity results from mental illness, then the second opinion must be that of a Board Certified psychiatrist or neurologist. In certain other cases the second opinion must be that of another relevant specialist.

Can you appoint more than one person to act as agent at the same time?

The New York State Department of Health has stated that each person can appoint only one agent. While it is not clear that the statute was intended to have this result, most commentators have concluded that the statute precludes more than one agent acting at the same time, and recommend that only one person be authorized to act. The statute does allow for the appointment of an alternative agent, and you can and should provide in the Proxy for another person to act if the person you have appointed is unable, unwilling or unavailable to act as your health care agent.

When does the Health Care Proxy expire?

Unless you indicate otherwise, the Proxy will remain in effect until your death. If you wish, you can state a date, or the occurrence of any condition, on which to terminate the Proxy.

Are witnesses necessary?

Yes. You as principal should sign the Health Care Proxy in the presence of two witnesses, who must also sign and give their names and addresses. In fact, the New York statute requires that the witnesses state that the principal appeared to execute the Proxy willingly and free from duress. In New York, the person designated as agent or alternate agent may not act as a witness, and special witness requirements apply in health care facilities. Note that some states (not New York) require notarization as well as witnesses. Also, some states bar certain persons from acting as witnesses, and some states require a statement that the witnesses knew the principal.

It is also good practice to have two independent witnesses to the execution of your Living Will, if that is a document separate from your Health Care Proxy.

What is a Living Will?

A Living Will is a legal document in which you, as an adult who is now competent, can state your wishes regarding your future health care. It is used by those persons who want to express their feelings about the withholding or the withdrawing of life-sustaining treatment that prolongs the process of dying. Many persons want to make clear their objection to unwanted medical measures in advance; others wish to state that they favor measures to have all available kinds of life-sustaining treatment administered.

The Living Will is intended to anticipate the situation wherein you might be in an incurable or an irreversible mental or physical condition, with no reasonable expectation of recovery. Your instructions are usually intended to apply if you are in any of the following states:

(a) a terminal condition;
(b) permanent unconsciousness (persistent vegetative state) or
(c) conscious but with irreversible brain damage and will never regain the ability to make decisions and/or express your wishes.

The Living Will can also be used to provide for any expression whatsoever of your wishes as to health care and treatment. A Living Will is sometimes called an Advance Directive for Health Care, or a Health Care Declaration.

What is the basis in law for allowing a Living Will?

The common law has long recognized that a competent adult has the right to determine what will be done to the person or body, including the right to accept or decline medical treatment. This is known as the right of self-determination. Included in this right is the right to accept or decline medical treatment. Although there are certain limited exceptions when this right cannot be exercised (as, for example, for protection of minor children, or to prevent or assist suicide), the general rule is to allow each person the right of self-determination. Courts have held that these expressed wishes of a competent adult should be honored even when he or she is no longer competent. In the Cruzan case the Supreme Court of the United States stated in 1990 that a competent person has a liberty interest under the Due Process Clause of the Constitution in refusing medical treatment.

Is a Living Will recognized in New York?

Yes. The highest Court in New York has held that a patient's right to decline treatment is guaranteed by the common law. Although New York does not have a specific statute recognizing Living Wills as do most other states and the District of Columbia, the Courts in New York have upheld those expressions of intent that meet the test described below. Furthermore, the Supreme Court of the United States stated in the Cruzan case that the rights of individuals who declared in writing their objections to life sustaining treatment would be upheld.

What is the test that must be met?

In New York, it is necessary that your wishes be established by "clear and convincing proof"; that is, it must be shown that a person who has become incompetent had previously given clear and unequivocal instructions that he or she wanted life-sustaining measures to be terminated. In Matter of O'Connor, the New York Court of Appeals in 1988 held that the patient's statements about not being maintained on artificial life support systems were too unspecific and casual so as to constitute "clear and convincing proof that the patient had made a firm and settled commitment, while competent, to decline this type of medical assistance under circumstances such as these." The right of the state to impose such a strict test has been upheld by the Supreme Court in Cruzan.

To meet this "clear and convincing" proof test, your wishes must be expressed clearly and unequivocally. Although your wishes may be stated orally, and might be proven by testimony of conversations, those wishes which are expressed in writing are much more convincing and, therefore, preferable. The Living Will is the ideal document to express your wishes.

How specific should you be in your Living Will?

Your Living Will should express your general wishes but it should also be as specific as reasonably possible. If you have definite desires or preferences as to medical treatment under certain circumstances, it is important to spell them out both in the document itself and in discussions with your health care agent and physician. This corroboration of written and oral evidence helps ensure that your wishes and values will be respected when you can no longer make such judgments on your own behalf. Some examples of specific matters that you should cover are your wishes concerning:

(a) artificial nutrition and hydration,
(b) cardiac resuscitation,
(c) mechanical respiration,
(d) antibiotics,
(e) pain medicine, etc.

It is especially important to be specific about artificial nutrition and hydration (tube feeding) since many statutes differ significantly with respect to this issue. You may also want to authorize the issuance of a DNR (Do Not Resuscitate) Order by your physician. Avoid using terms such as "heroic measures" or "extraordinary treatments."

Should you execute both a Living Will and a Health Care Proxy?

Yes. The Living Will is an expression of your attitudes and wishes about your health care. This instrument is especially important if you do not have a person to appoint as your Health Care Proxy, or if the person you have appointed is not available. The Health Care Proxy is important because it names the agent you select to make decisions on your behalf if you cannot do so. You will want to have your health care agent communicate the views expressed in the Living Will to your physician to be sure the physician understands your wishes.

In New York State, the Health Care Proxy is statutorily recognized. By specifically providing in the Health Care Proxy statute that a person can specify his or her wishes in a separate document, it appears that the New York legislation invites persons to also write a Living Will.

How many copies should you sign?

You may execute more than one original copy of the Health Care Proxy, although the New York State Department of Health has advised that photocopies are acceptable. Originals or photocopies may be given to your physician, your health care agent, your alternate agent, your attorney or other advisor, close family members, and, of course, one for yourself.

As to the Living Will, you may also execute more than one copy, and should provide originals or photocopies to the same individuals. It is recommended that you carry a wallet card giving information about the existence and location of your Health Care Proxy and Living Will. If you have executed a Health Care Proxy, it may not be necessary to give your physician a copy of the Living Will. But you will want to have your health care agent communicate the views expressed in the Living Will to your physician to be sure the physician understands your wishes. If your physician or the hospital questions that the agent is acting contrary to your wishes, the agent could then show that your wishes were expressed to the agent in your Living Will.

What if you change your mind and want to revoke or change your Living Will or Health Care Proxy?

Periodic reviews are important to ensure that the documents you have signed are still in accord with your wishes. You can modify or revoke your Living Will or Health Care Proxy or appoint a different agent at any time, by destroying the document or by executing a new one. You should also notify your agent, your attorney, your physician or any other health care provider, and anyone who has a copy of your change or revocation. You should notify each of these parties of your change or revocation both verbally and in writing. Keep a record of who has copies of existing documents to make revocation or amendment easier.

What if you move?

Generally, the "clear and convincing proof" standard in New York is among the strictest of all the states, and documents signed here should be effective as proof of your wishes in other jurisdictions. To be sure, check locally in your new residence, because different states have different rules and standards and requirements for execution. In any event, take with you all documents which you have executed, since they show your wishes and intentions. In New York, if a Health Care Proxy or similar document from another state complies with the laws of that state, it will be honored in New York. Correspondingly, most states generally consider valid and will accept documents properly executed in another state. Even if you do not move, if you spend any significant amount of time in another state you should have documents which comply with the laws of that state.

Will other documents be helpful to ensure your wishes are carried out?

Yes. You should consider having a Durable Power of Attorney for property management so that your agent has power to provide funding for medical care and treatment. The agent appointed may, but need not be, the person who is the health care agent in your Proxy. Your Health Care Proxy should not be combined with your Power of Attorney. The New York Proxy Law requires a separate Health Care Proxy.

Who can help you create a Living Will and a Health Care Proxy?

Start by talking to someone who knows you and can help you express your values and wishes in the context of