

HEALTH ED

Louisiana Elder Law 2009

Advance
Directives

Presented by:

Peter J. Losavio, Jr., JD

Kent S. DeJean

Christopher W. Nielson

Losavio & DeJean, L.L.C.

I. Advanced Directives

- A. Patient Self-Determination Act of 1990: Congress passed the Patient Self-Determination Act of 1990 to require healthcare institutions to respect wishes of a patient. The Patient Self-Determination Act requires all healthcare providers to provide written information to each patient concerning the patient's rights under applicable state law "to make decisions concerning the patient's medical care including the right to accept or refuse medical treatment and with the right to formulate advanced medical directives", which term is statutorily defined to mean "a written instruction, such as a living will or durable power of attorney for healthcare, recognized on the State Law (whether statutory or as recognized by the courts of the state) and relating to the provisions of such care when the individual is incapacitated." 42 USC 1395cc(f)(3). Therefore, the authority for advanced directives must come from state law.

- B. Louisiana Law of Advanced Directives: Louisiana has enacted laws permitting durable powers of attorney for healthcare (LA. C.C. 2997A(7)) and living wills (LSA-R.S. 40:1299.58.1-14). Louisiana has also promoted awareness of advanced directives through passage of statutes.
 - 1. LSA-R.S. 34:14 C 32:410C requires the Louisiana Department of Public Safety to "give the widest possible dissemination of information about living wills."
 - 2. LSA-R.S. 40:2233 gives enrollees in state-funded medical programs the right to have medical advanced directives or living wills respected by providers.

II. Durable Powers of Attorney for Healthcare

- A. Louisiana Law authorizing powers of attorney for healthcare in C.C. 2997A(7) reads as follows:

To make health care decisions, other than declarations of life-sustained procedures pursuant to R.S. 40:1299.58.1 et. seq., but which may include surgery, medical expenses, nursing home residency, or medication.

- B. Louisiana Law authorizing healthcare powers of attorney require that the power must be expressed C.C. 2997A.

III. Living Wills

- A. General: LSA-R.S. 40:1299.58.1 sets out the legislative's intentions regarding living wills. The law makes it clear that no one is required to have a living will LSA-R.S. 40:1299.58.1 B(2).

- B. Who may make a living will?
 - 1. Adult individual's who have capacity may make their own living wills.

LSA-R.S.40:1299.58.3A. Incompetent or comatose persons who have not made living wills may have declarations made on their behalf by other persons, in the following order of priority: Any person authorized in writing to do so; the judicially appointed tutor or curator of the person; the person's spouse; an adult child of the person; the parents of the person; the person's siblings and the person's other ascendants or descendants.
LSA-R.S.40:1299.58.5A (2).

2. In fact, the absence of a living will is not to be construed as giving rise to any presumption as to the intent to consent to, or refuse life standing procedure. LSA-R.S.40:1299.58.5B.
3. A minor may have the declaration made for him or her by his or her spouse, (if the spouse is of the age of majority, and if there's no such spouse, the parents or guardian of the minor child.
LSA-R.S.40:1299.58.6.)

C. When can a living will be implemented?

1. In order for a living will to be implemented, for example, for extraordinary life sustaining means to be withheld or withdrawn, the person must be a "qualified patient," which is defined as one "diagnosed and certified in writing as having a terminal and irreversible condition by two physicians who have personally examined the patient, one of whom shall be the attending physician." LSA-R.S.40:1299.58.2 (8).
2. The "attending physician" is the physician who has primary responsibility for the treatment and care of the patient. LSA-R.S.40:1299.58.2 (1).
3. The term "terminally and irreversible condition" means a "continual profound comatose state with no reasonable chance of recovery or condition caused by injury, disease, or illnesses, within reasonable medical judgment, will produce death and for which the application of life sustaining procedure would serve only to postpone the moment of death." LSA-R.S.40:1299.58.2 (10).

D. What can a living will authorize?

1. A person can authorize withholding or withdrawal of life saving procedure in the event of a terminal irreversible condition. The person can authorize the withdrawal or withholding of nutrition and hydration.
2. The term "life sustaining procedure" is define to mean "any medical procedure or intervention, but including but not limited to the invasive administration of nutrition and hydration, which, within reasonable medical judgment, which serve only to prolong

the dying process for a person diagnosed of having a terminal and irreversible condition (which is not including any measures deemed necessary to provide comfort care).

LSA-R.S.40:1299.58.2 (5).

3. The living will statutes do not authorize assistant suicide euthanasia. LSA-R.S.40:1299.

E. Form and Execution Requirements: Revocations. Living will, referred to as a "declaration" in LSA-R.S.40:1299.58.2 (2), "may be made in writing, orally or by other means of nonverbal communication."

1. Any living will whether by written, oral or nonverbal means must be made by an adult in the presence of two witnesses, LSA-R.S.40:1299.58.3A (2) (3). There is no notarization requirement.
2. Any participant serving as a witness must not be related to either the declarant or to the patient by blood or marriage and must not be entitled to any portion of the estate of the person from whom life sustaining procedures are to be withdrawn or withheld. LSA-R.S.40:1299.58.2 (11).
3. Suggested form is contained in LSA-R.S.40:1299.58.3C (1), unlike living will statutes of other states, the suggested form expressly is illustrative only, and "may include other specific directions."
4. Living wills may, but do not have to be recorded but the Louisiana Secretary of State has to keep a registry of living wills that people desire to file therewith. LSA-R.S.40:1299.58 3D.
5. A living will can be revoked "at any time by the declarant without regard to his or her mental state or competency." LSA-R.S.40:1299.58.4A

F. Healthcare providers on living wills: Attending physicians are not required to inquire as to whether a person has a living will; it is "the responsibility of the declarant to notify his attending physician that a declaration has been made." LSA-R.S.40:1299.58.3B (1) 1. Attending physicians and other healthcare providers who have discovered or who have been advised that a person who is in a terminal or irreversible condition or is in any other way a "qualified patient has made a living will, then, essentially, the attending physician and healthcare institution must either comply or take steps to get out of the way." LSA-R.S.40:1299.58.7

As would be expected, physicians and other healthcare providers have pretty broad immunity from liability arising out of the withdrawal or withholding of life sustaining procedures. LSA-R.S.40:1299.58.8.

G. Advance Medical Directives.

1. Living Wills are not adequate because they do not address situations before end of life. Therefore, a person should have advance medical directives that direct his agent concerning the medical treatment that he wishes to receive during his life time. In addition, it should allow the agent to receive medical records. It should allow the agent to consent and authorize withholding or withdrawing any treatment.
2. Advance medical directives are necessary such that a person may continue to control his medical treatment even though he is not able to communicate his wishes.
3. Secondly, by specifying his medical treatment in advance, he removes the emotional burden from making the decisions from his agent.
4. The agent has to carryout his wishes but does not have to make the decision.
5. Third and most importantly, by executing advance medical directives, the person prevents disagreement among family members.

H. Validity of Living Will

1. Should any of the specific directions be held to be invalid, such invalidity shall not affect other directions of the declaration which can be given effect without the invalid direction and to this and the directions and the declarations are severable.
2. Any declaration prior to January 1, 1992, was so as not yet contained directions regarding life sustaining procedure in the event that the declarant is in a continual profile, to a state shall not be invalid for that reason. Such declaration shall be applicable to any terminal and irreversible condition, unless it clearly provides to the contract.
3. Any declaration prior to August 15, 2005 which does not contain an option to specifically initial of charge regarding nutrition and hydration shall not be invalid for that reason nor presume to mean that the declarant desires the invasive administration of nutrition or hydration.

I. Registry of Living Will

1. The Secretary of State shall establish a declaration registry in which a person or his attorney if authorized by the person to do so may register the original, multiple original or certified copy of the declaration.

2. The Secretary of State shall issue a do-not-resuscitate identification bracelet to qualified patients listed in the registry. The do-not-resuscitate identification bracelet must include the patient's name, date of birth, and the phrase, "Do not resuscitate."
3. Any attending physician or healthcare facility may orally or in writing request the Secretary of State to confirm immediately the existence of the declaration and to disclose the contents thereof for any patient believed to be a resident of Louisiana.
4. A copy of the declaration or a facsimile thereof transmitted from the Office of the Secretary of State shall be deemed authentic. However, nothing herein requires a physician or healthcare facility to confirm the existence of such declaration or obtain a copy thereof prior to the withholding or withdrawal of medical treatment or life-sustaining procedures.
5. The Secretary of State may charge a fee of \$20.00 for registering a declaration and issuing a do-not-resuscitate identification bracelet and a fee of \$5.00 for filing a notice of revocation.
6. No charge shall be made for the furnishing of information concerning the existence of the declaration, disclosure of its contents, or providing of a copy or facsimile thereof.