

# Living wills/ Advance directives

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An advance directive is a statement or instruction given by a competent adult in anticipation of when a patient may lack capacity to make healthcare decisions. Such statements usually take the form of advance refusal of specified treatments, but may also contain information about the patient's values and beliefs, and are generally referred to as living wills. This factsheet outlines the main points to be aware of when a patient has advance directives in place.

## Assessing capacity

From an ethical perspective, for an advance directive to be valid, four conditions must be met:

- The patient must have issued the directives when they were aged 18 or over.
- You must be sure that the patient had the mental capacity to make their own medical decisions at the time of issuing the directives.
- A patient may only refuse consent to treatment if they have been fully informed about their condition and proposed treatment.
- You must be satisfied that the patient did not change his or her mind after issuing the directive.

If all of these four conditions are met, it is accepted – at least from an ethical point of view – that the advance directives must be followed. It is further accepted that the advance directives will also remain valid even when the patient later loses decisional capacity. Ensure that you see a copy of the original living will before proceeding with or withdrawing treatment.

## Lasting powers of attorney

An advance directive may also take the form of a lasting power of attorney (also referred to as a “proxy directive”) which allows the patient to appoint someone else as a healthcare proxy. For example, a trusted friend or relative could act as power of attorney to make healthcare decisions on the patient's behalf when they no longer have the capacity to do so.

## Legal aspects

A patient's contemporaneous decision to refuse medical treatment is valid in South African law. An advance directive, by definition, does not amount to a contemporaneous refusal of medical treatment – but rather, a prospective decision to refuse medical treatment.

Currently, there is no law in South Africa to validate the concept of a living will. A draft bill has been drawn up to change this after research carried out by the South African Law Commission found that there was a gap between the law and what is considered to be ethically acceptable among South African doctors. The draft bill, entitled “The End of Life Decisions Act”, was drawn up in 1999 but has not yet been debated in Parliament.

Therefore, advance directives – although ethically acceptable – are currently not recognised as legally enforceable instructions in terms of South African law and it is currently not possible to go to court to enforce an advance directive. It is, however, generally accepted as permissible to comply with an advance directive where the patient is in a permanent vegetative state. In all other instances, a doctor who is uncertain whether or not to comply with an advance directive may approach the court for guidance.

## Ethical guidance

The South African Medical Association (SAMA) and the Health Professions Council of South Africa (HPCSA) have both issued guidance stating that all patients have a right to refuse treatment. These guidelines also state that patients who have advance directives in place have constitutional rights to expect their living wills to be honoured. All doctors should make sure they are familiar with this guidance; see the Further Reading section for more information.

## Drafting an advance directive

If a patient has a terminal illness and wishes to draw up an advance directive, you should be aware of the following points:

- Whilst it is the patient's responsibility to draft their own living will and inform their family members, you must be sure you have offered medical advice, counselling and support to the patient beforehand and on an on-going basis throughout treatment.
- Ensure old versions of the advance directive are destroyed if changes are made.
- Advance directives that are written in relation to a very general set of circumstances may not be valid if they fail to provide definitive instructions. Patients must be made aware of these restrictions before drafting their living wills.
- In cases where advance directives are either too specific or too vague, doctors must rely on their professional judgment to reach a decision.
- Written advance directives will be classed as representing the patient's wishes, if no other evidence is available to suggest they had later changed their mind.

## Summary

In cases where emergency treatment is necessary and you have not received evidence of a living will, you should provide the necessary treatment until you are notified of the directive. Doctors who are not prepared to honour an advance directive must inform the patient of their views, and arrange for another doctor to resume care of the patient.

Above all, remember that your overriding obligation is to act in the patient's best interests and to provide treatment and relieve suffering wherever possible. Doctors are advised to contact MPS for advice if they are unsure how to treat a patient who has advance directives in place.

## Further reading

- MPS Booklet, *Guide to Taking Consent for Medical Treatment 2011* – [www.medicalprotection.org/southafrica/booklets](http://www.medicalprotection.org/southafrica/booklets)
- MPS Factsheet, *Consent: The basics* – [www.medicalprotection.org/southafrica/factsheets](http://www.medicalprotection.org/southafrica/factsheets)
- Skeen A, *Living wills and advance directives in South African Law 2004* University of the Witwatersrand
- SAMA, *Guidelines for medical practitioners on living wills* – [www.sama.co.za](http://www.sama.co.za)
- SAMA, *Euthanasia and the artificial preservation of life* – [www.sama.co.za](http://www.sama.co.za)
- HPCSA, *Guidelines for the Withholding and Withdrawing of Treatment* – [www.hpcsa.co.za](http://www.hpcsa.co.za)
- HPCSA, *Seeking Patients' Informed Consent: The Ethical Considerations* – [www.hpcsa.co.za](http://www.hpcsa.co.za)
- Visser, A. Advance directives: A guide for doctors. *What's New Doc* (Issue 18: 2012) – [www.whatsnewdoc.co.za](http://www.whatsnewdoc.co.za)

**For medicolegal advice please call us on:**

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This factsheet provides only a general overview of the topic and should not be relied upon as definitive guidance. If you are an MPS member, and you are facing an ethical or legal dilemma, call and ask to speak to a medicolegal adviser, who will give you specific advice.

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