

# Freedom or Life: Does a Living Will Truly Serve Its Creator?

By Hon. C. Raymond Radigan and Jacob Gassner

## I. Introduction

During the 20th century, medical science advanced to the point where it could enable doctors to extend life that under many circumstances had formerly been fatal.<sup>1</sup> Today, many of these treatments not only significantly extend life, but they even enable patients to remain attentive and active.<sup>2</sup> However, many of these patients are in a “persistent vegetative state,”<sup>3</sup> awake, yet completely unaware.<sup>4</sup> Although such individuals may appear normal, they are unable to speak or respond to commands.<sup>5</sup> In such situations, relatives may, for various reasons, urge hospitals to remove the life prolonging technology.<sup>6</sup> Meanwhile, doctors may be reluctant to remove such equipment for religious reasons.<sup>7</sup> Additionally, courts have a vested interest as well in whether the life-saving technology for patients in persistent vegetative states may be removed.<sup>8</sup> In *Cruzan*, the Supreme Court of the United States held that a state could constitutionally require that an incompetent person’s wishes regarding the withdrawal of life-sustaining medical treatment be proven by clear and convincing evidence.<sup>9</sup> The Court further found that a living will constitutes such evidence.<sup>10</sup>

A living will is a document in which one, in sound state of mind, writes what measures he does or does not want used to extend his life when he is dying.<sup>11</sup> The purpose of such a document is to make vital health care decisions at a time when one is still competent to make them.<sup>12</sup> That way, if one is struck with an unexpected disease or sustains a terrible injury that leaves him unable to communicate his wishes, he can feel reassured that his medical treatment preferences will be met.<sup>13</sup> As unanticipated accidents can occur to anyone at any age, experts feel it is imperative for one to make his wishes known.<sup>14</sup>

Today, all fifty states and the District of Columbia recognize living wills, in one way or another.<sup>15</sup> However, despite the advantages that a living will provides,<sup>16</sup> less than 30% of adults in the United States have executed a living will.<sup>17</sup> Moreover, of those living wills, many are simply ineffective. Considering that living wills are acknowledged in every jurisdiction in the United States<sup>18</sup> and that medical care providers are generally held to a strict duty to comply with their provisions,<sup>19</sup> it seems contradictory that one’s stated wishes may not always be followed. This article will provide an overview of the situations where one’s living will may not serve its maker, while analyzing various relevant state laws.

## II. Living Wills: Ignored in What Circumstances?

### A. Potentially Deadly Misinterpretations

Every state in the United States provides its citizens unique advance directive documents.<sup>20</sup> Similarly, each state has different requirements and laws that govern how an end-of-life medical care document need be executed.<sup>21</sup> However, in attempting to design a document that would ensure one could adequately convey his wishes to a potential life-saving doctor,<sup>22</sup> state legislatures have complicated the matter by suggesting vague terms.<sup>23</sup> For example, many states have decided that a living will should become effective when one’s medical condition becomes terminal.<sup>24</sup> However, states disagree on the definition of the term “terminal condition.”<sup>25</sup> Is a condition only terminal if it results in death without the use of life-sustaining procedures? Some states, like Connecticut and Alabama, specify that it is.<sup>26</sup> Or is it terminal if it will result in death whether life-sustaining procedures are used or not? Maryland’s living will statute provides that it is.<sup>27</sup> What about conditions that are terminal but do not cause death for a number of years?<sup>28</sup> Moreover, the term “life-sustaining procedure” itself does not have a precise definition.<sup>29</sup> What treatments does it include?<sup>30</sup> How long must equipment sustain a patient for it to be considered “life-sustaining” equipment?<sup>31</sup>

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While certain states, including Connecticut, Maryland, Iowa, and Montana, provide statutory definitions for such terms,<sup>32</sup> the living will document itself does not provide any guidance on what these terms mean.<sup>33</sup> Yet, several jurisdictions, including Wisconsin, South Carolina, and Louisiana, require a physician to certify that a patient's condition is terminal before the living will can become effective.<sup>34</sup> Consequently, one physician may feel that a patient's condition is not terminal and may accordingly provide treatment, while another physician may say that treatment should be withheld pursuant to the living will because he views the patient's condition as terminal.<sup>35</sup> Sometimes, a doctor will simply refuse to act until the ambiguous term is clarified.<sup>36</sup> One need only imagine the disastrous consequences that such vague provisions in a living will can cause.

However, even if the terms of the living will are not vague, it may be misinterpreted. In 2016, Pennsylvania health care facilities reported that in 29 cases, patients were resuscitated against their wishes, and in two cases, patients were not resuscitated despite their wishes.<sup>37</sup> Additionally, a series of surveys by QuantiaMD, an online physician learning collaborative, found that nearly half of health professionals mis-

understood living will provisions.<sup>38</sup> Furthermore, a study conducted by Dr. Ferdinando Mirarchi, medical director of the department of emergency medicine at the University of Pittsburgh Medical Center Hamot, established that only 43% of doctors that partook in the survey understood that a living will only applied to patients with terminal conditions.<sup>39</sup> Consequently, in light of such research, it is unsurprising that one's recorded wishes as to life-sustaining medical treatment may be ignored regardless of the clarity and specificity of those stated wishes.

### B. The Pregnancy Problem

Although the Supreme Court approved of living will statutes,<sup>40</sup> the situation is more complicated when the patient is pregnant. Many states require physicians to ignore a patient's living will directives if the patient is pregnant.<sup>41</sup> These states have, in effect, determined that the state's interest in protecting the fetus outweighs the patient's right to determine whether to forego medical treatment.<sup>42</sup> Unsurprisingly, there has been opposition to such statutes.<sup>43</sup> Recently, four Idaho women sued the state on the basis that its law, the Medical Consent and Natural Death Act, that renders living wills invalid when a patient is pregnant,<sup>44</sup> is unconstitutional.<sup>45</sup> Moreover, the Con-



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necticut legislature recently amended its previous law that voided a patient's advance directive if she was pregnant.<sup>46</sup> Under its new law, women are permitted to indicate their preferences regarding life-sustaining medical treatment in their advance directives whether they are pregnant or not.<sup>47</sup> However, unless a patient's home state currently permits a physician to adhere to one's living will directives despite a known pregnancy, a patient's living will may be ineffective in such situations.<sup>48</sup>

### III. Conclusion

In sum, there is a general duty for physicians to follow one's living will provisions.<sup>49</sup> However, there are several circumstances when physicians disregard, whether by mistake, choice, or legal obligation, one's living will terms. These situations can include an ambiguous or misinterpreted living will, as well as when a living will's creator is pregnant. However, each state's advance directive laws and requirements differ.<sup>50</sup> Therefore, it is highly recommended that one consult a competent attorney when considering executing a living will to ensure that it is drafted correctly and in accordance with the applicable state laws.<sup>51</sup>

### Endnotes

1. *Should You Consider A Living Will?*, FINDLAW, <https://estate.findlaw.com/living-will/should-you-consider-a-living-will.html>.
2. *Id.*
3. "Persistent vegetative state", as defined by Dr. Fred Plum, the creator of the term, describes a body which is functioning entirely in terms of its internal controls. It maintains temperature, heart-beat, pulmonary ventilation, digestive activity, reflex activity of muscles and nerves for low level conditioned responses. Generally, it is a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 266 n. 1 (1990).
4. Dilling, *Diagnostic Criteria for Persistent Vegetative State*, AMA J. OF ETHICS, <https://journalofethics.ama-assn.org/article/diagnostic-criteria-persistent-vegetative-state/2007-05>.
5. Nat'l Inst. of Neurological Disorders and Stroke, *Coma and Persistent Vegetative State*, BRAINLINE, <https://www.brainline.org/article/coma-and-persistent-vegetative-state>.
6. In one case, daughters of one in a persistent vegetative state wished that their mother patient be allowed to die of thirst and starvation because living through a nasogastric tube was against their mother's wishes. *In re Westchester Cty. Med. Ctr.*, 72 N.Y.2d 517, 524 (1988). In another case, a loving mother wished to remove her daughter, who was in a persistent vegetative state, from life support because she had no hope of recovery and was subjected to numerous daily physical intrusions. *In re AB*, 768 N.Y.S.2d 256, 271 (2003). In another, a father wished for the respirator that was keeping his daughter in a persistent vegetative state alive to be disconnected. *In re Quinlan*, 70 N.J. 10, 18 (1976).
7. Kathrina Jeorgette Flores, *End-of-Life Care and the Physician-Assisted Suicide Debate*, PHYSICIANS PRACTICE (July 1, 2016),

- <http://www.physicianspractice.com/career/end-life-care-and-physician-assisted-suicide-debate>.
8. The Supreme Court of the United States raised several relevant considerations that need be addressed in such cases. Namely, one's liberty interest in refusing medical treatment under the due process clause and the state's interest in the protection and preservation of human life. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278-280 (1990). Additionally, courts are reluctant to remove life-sustaining technology because of the state's interest in preserving life. *In re Browning*, 543 So.2d 258, 266 (Fla. Dist. Ct. App. 1989); *Cruzan v. Harmon*, 760 S.W.2d 408, 420 (Mo. 1988).
9. *Cruzan*, 497 U.S. at 278-280.
10. *Id.* at 339.
11. *Saunders v. State*, 492 N.Y.S.2d 510, 511 (Sup. Ct. 1985).
12. Should You Consider A Living Will?, *supra* note 1.
13. *Saunders*, 492 N.Y.S.2d at 511. Another major benefit of a living will is that one's family will be spared the guilt and stress of trying to determine what the patient would want. Amir Khan, *Why You Need a Living Will—Even at Age 18*, U.S. NEWS (Dec. 19, 2014), <https://health.usnews.com/health-news/health-wellness/articles/2014/12/19/why-you-need-a-living-will-even-at-age-18>.
14. *Id.*
15. *Frequently Asked Questions (FAQ) About The U.S. Living Will Registry*, <https://www.uslivingwillregistry.com/faq.shtm> (last visited Nov. 8, 2018). Additionally, most states honor another state's advance directives. *Id.*
16. See *supra* notes 12-14.
17. Kuldeep N. Yadav, et al., *Approximately One In Three US Adults Completes Any Type of Advance Directive For End-Of-Life Care*, HEALTH AFFAIRS (July 2017), <https://www.healthaffairs.org/doi/abs/10.1377/hlthaff.2017.0175>.
18. *Frequently Asked Questions (FAQ) About The U.S. Living Will Registry*, *supra* note 15.
19. *Health Care Directives: Is There a Duty to Follow Them?*, FINDLAW <https://estate.findlaw.com/living-will/health-care-directives-is-there-a-duty-to-follow-them.html>.
20. *State-by-State Advance Directive Forms*, EVERPLANS, <https://www.everplans.com/articles/state-by-state-advance-directive-forms>. A living will is one type of an advance directive. National Institute on Aging, *The Difference Between An Advance Care Directive and a Living Will*, AGIS, <http://www.agis.com/document/455/the-difference-between-an-advance-care-directive-and-a-living-will.aspx>.
21. *Living Wills: State Laws*, FINDLAW, <https://estate.findlaw.com/living-will/living-wills-state-laws.html>. For example, Arkansas requires that two witnesses must be present at the time one executes his living will. ARK. CODE ANN. § 20-17-202 (West 2017). Arizona, on the other hand, only requires one witness or a notary. ARIZ. REV. STAT. ANN. § 36-3262 (2018).
22. *Living Will: Advantages and Disadvantages of a Living Will*, GLOBAL-WILLS.COM, [http://www.global-wills.com/articles/Living\\_Will/Living\\_wills\\_pros\\_cons.htm](http://www.global-wills.com/articles/Living_Will/Living_wills_pros_cons.htm).
23. Susan J. Nanovic, *The Living Will: Preservation of the Right-To-Die Demands Clarity and Consistency*, 95 DICK. L. REV. 209, 215 (1990).
24. The Connecticut legislature defines "terminal condition" as the "final stage of an incurable ... medical condition, which without the administration of a life support system, will result in death within a relatively short time period." CONN. GEN. STAT. ANN. § 19a-570 (West 2018). The Maryland Code, however, writes that a "terminal condition" is a condition

- which makes “death imminent and from which, despite the application of life-sustaining procedures, there can be no recovery.” MD. CODE ANN., Health § 5-601-614 (West 2017). Alabama Elder Law explains that one is terminally ill when one’s death is imminent or whose condition is hopeless unless he is supported through the use of life-sustaining procedures. ALA. CODE § 7:28 (2017). Louisiana defines a “terminal and irreversible condition” as a continual profound comatose state. LA. STAT. ANN. § 40:1151.1 (2015).
25. § 19a-570; § 5-601-614; § 7:28.
  26. § 19a-570; § 7:28.
  27. § 5-601-614.
  28. Oklahoma’s statutory advance directive form provides that a condition is terminal when it results in death within six months. OKLA. STAT. ANN. tit. 63, § 3101.4 (West 2018). However, not many state forms provide specific time constraints.
  29. Life-sustaining treatment has been defined as any “medical procedures that would only prolong the process of dying or sustain a condition of permanent unconsciousness.” *Life-Sustaining Treatment*, NOLO, <https://www.nolo.com/dictionary/life-sustaining-treatment-term.html>. Iowa defines a life-sustaining procedure as any medical procedure that utilizes a mechanical or artificial means to sustain a vital function, which when applied to the patient in a terminal condition, serves only to prolong the dying process. IOWA CODE ANN. § 144a.2 (West 2014). Montana, however, defines a life-sustaining procedure as meaning “cardiopulmonary resuscitation or a component of cardiopulmonary resuscitation.” MONT. CODE ANN. § 50-10-101 (West 2017).
  30. *Infra* note 31.
  31. One dictionary provides that life-sustaining treatment need merely delay death for a short while. *Life-Sustaining Treatment*, *supra* note 29. Montana, however, is silent on how long life-sustaining treatment need postpone death. HEALTH § 50-10-101.
  32. § 19a-570; § 5-601-614; §144A.2; § 50-10-101.
  33. South Dakota’s living will form includes such terms, but it does not provide what a “terminal condition” may include, nor what “life-sustaining procedures” may comprise. S.D. CODIFIED LAWS § 34-12D-3 (2018). Nor do the forms in Kentucky, Florida, Tennessee, and many others. KY. REV. STAT. ANN. § 311.625 (West 2013); FLA. STAT. ANN. § 765.303 (West 2018); TENN. CODE ANN. § 32-11-105 (West 2007).
  34. WIS. STAT. ANN. § 154.03 (West 2008); S.C. CODE ANN. § 44-77-50 (2018); LA. STAT. ANN. § 40:1151.2 (2015).
  35. FERDINANDO MIRARCHI, UNDERSTANDING YOUR LIVING WILL (2006).
  36. Span, *supra* note 18.
  37. *Id.*
  38. Alicia Gallegos, *Clearing up confusion on advance directives*, American Medical News (Oct. 29, 2012), <https://amednews.com/article/20121029/profession/310299941/4/>.
  39. Ferdinando Mirarchi, et al, *TRIAD III: nationwide assessment of living wills and do not resuscitate orders*, PUBMED.GOV (May 2012), <https://www.ncbi.nlm.nih.gov/pubmed/22100496>.
  40. *Cruzan*, 497 U.S. at 339.
  41. Pennsylvania, Iowa, Washington, Arkansas and Wisconsin are among such states. §5429; IOWA CODE ANN. § 144a.6 (West 2014); WASH. REV. CODE ANN. § 70.122.030 (West 2018); §20-17-206; WIS. STAT. ANN. § 154.03 (West 2008). New Hampshire and South Dakota require a physician to ignore a living will unless the life-sustaining treatment will not permit the continuing development and live birth of the fetus or will be physically harmful or prolong severe pain to the patient which cannot be alleviated by medication. N.H. REV. STAT. ANN. § 137-J:10 (2015). S.D. CODIFIED LAWS 59-7-2.8 (2018).
  42. Molly C. Dyke, *A Matter of Life and Death: Pregnancy Clauses in Living Will Statutes*, 70 B.U. L. Rev. 867, 870 (1990).
  43. Rebecca Boone, *Idaho sued over pregnancy exclusion in advance directive law*, AP NEWS (May 31, 2018), <https://www.apnews.com/824dae6a669147cd88d53c0e690adf09>.
  44. IDAHO CODE ANN. §39-4510 (West 2012). Living will and durable power of attorney for health care.
  45. <https://www.apnews.com/824dae6a669147cd88d53c0e690adf09>
  46. Thaddeus Mason Pope, *Connecticut Now Honors Advance Directives Even When the Patient Is Pregnant*, MEDICAL FUTILITY BLOG (May 27, 2018), [http://medicalfutility.blogspot.com/2018/05/connecticut-now-honors-advance.html?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+MedicalFutilityBlog+%28Medical+Futility+Blog%29](http://medicalfutility.blogspot.com/2018/05/connecticut-now-honors-advance.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+MedicalFutilityBlog+%28Medical+Futility+Blog%29). In opposition to the previous law, Dr. Matthew Drago, a neonatologist and bioethicist at Yale University claimed that a pregnancy exception is medically unethical “because it forces doctors to ignore patients’ stated wishes.” The Associated Press, *Bill allowing living wills for pregnant women clears House*, AP NEWS (Apr. 24, 2018) <https://apnews.com/1e65deea137d44729a34ee29c7a88f32>.
  47. CONN. GEN. STAT. ANN. § 19a-575 (West 2018).
  48. Health Care Directives: Is There a Duty to Follow Them?, *supra* note 21.
  49. *Id.*
  50. Living Wills: State Laws, *supra* note 23.
  51. *Id*; see also Living Will: Advantages and Disadvantages of a Living Will, *supra* note 24.

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