

# Gay and Lesbians: Living Will/Advance Directives

## Planning Ahead For Your Health Care

compiled by Kenneth Vercammen, Esq.

In the absence of a Living Will or other legal arrangement, if you become disabled, your partner generally has no say regarding medical care or life support. Your partner cannot access your assets. Your partner cannot receive information on your medical status or medical care. Advance directives are very personal documents and you should feel free to develop one which best suits your own needs. All States have declared that competent adults have the fundamental right, in collaboration with their health care providers, to control decisions about their own health care. States recognize in their law and public policy the personal right of the individual patient to make voluntary, informed choices to accept, to reject or to choose among alternative courses of medical and surgical treatment. If you have a Living Will, you can designate your partner as a decision maker.

WHY LIVING Wills Modern advances in science and medicine have made possible the prolongation of the lives of many seriously ill individuals, without always offering realistic prospects for improvement or cure. For some individuals, the possibility of extended life is experienced as meaningful and of benefit. For others, artificial prolongation of life may seem to provide nothing medically necessary or beneficial, serving only to extend suffering and prolong the dying process. States recognize the inherent dignity and value of human life

and within this context recognize the fundamental right of individuals to make health care decisions to have life-prolonging medical or surgical means or procedures provided, withheld, or withdrawn. States recognize the right of competent adults to plan ahead for health care decisions through the execution of advance directives, such as Living Wills and durable powers of attorney, and to have their wishes respected, subject to certain limitations.

**PURPOSE OF LIVING WILLS** To assure respect for patients' previously expressed wishes when the capacity to participate actively in decision making has been lost or impaired; to facilitate and encourage a sound decision making process in which patients, health care representatives, families, physicians, and other health care professionals are active participants; to properly consider patients' interests both in self-determination and in well-being; and to provide necessary and appropriate safeguards concerning the termination of life-sustaining treatment for incompetent patients as the law and public policy of this State, the Legislatures have enacted Living Will/ Advance Directives for Health Care Acts.

**REQUIREMENTS OF STATUTE** The advance directive for health care (Living Will) requires a writing executed in accordance with the requirements of the state law. It must be either signed and dated in front of an attorney at law or other person authorized to administer oaths, or in the presence of two subscribing adult witnesses. If the two adult witnesses are used, they both must attest that the declarant is of sound mind and not under undue influence. A designated health care representative shall not act as a witness to the execution of the advance directive. Since this is a legal document, it must be executed properly to be valid under the statute. □ **HEALTH CARE**

**REPRESENTATIVE** The declarant must designate one or more alternative health care representatives. "Health care representative" means the person

designated by you under the Living Will for the purpose of making health care decisions on your behalf.  WHEN DOES THE ADVANCE DIRECTIVE BECOME Operative An advance directive becomes operative when (1) it is transmitted to the attending physician or to the health care institution, and (2) it is determined pursuant to the Act that the patient lacks capacity to make a particular health care decision. Treatment decisions pursuant to an advance directive shall not be made and implemented until there has been a reasonable opportunity to establish and where appropriate confirm, a reliable diagnosis for the patient which shall include the attending physician's opinion concerning the nature, cause, extent, and probable duration of the patient's incapacity, and shall be made a part of the patient's medical records. For additional information or to have a "Living Will" prepared, see your attorney. In addition, be certain your Last Will and testament is up to date. As Americans, we take it for granted that we are entitled to make decisions about our own health care. Most of the time we make these decisions after talking with our own physician about the advantages and disadvantages of various treatment options. The right of a competent individual to accept or refuse medical treatment is a fundamental right now fully protected by law. But what happens if serious illness, injury or permanent loss of mental capacity makes us incapable of talking to a doctor and deciding what medical treatments we do or do not want? These situations pose difficult questions to all of us as patients, family members, friends and health care professionals. Who makes these decisions if we can't make them for ourselves? If we can't make our preferences known how can we make sure that our wishes will be respected? If disagreements arise among those caring for us about different treatment alternatives how will they be resolved? Is there a way to alleviate the burdens shouldered by family members and loved ones when critical medical decisions must be made?  Living Will: By using

documents known as advance directives for health care, you can answer some of these questions and give yourself the security of knowing that you can continue to have a say in your own treatment. A properly prepared Living Will permits you to plan ahead so you can both make your wishes known, and select someone who will see to it that your wishes are followed. After all, if you are seriously ill or injured and can't make decisions for yourself someone will have to decide about your medical care. Doesn't it make sense to

- ☐ Have your partner or another person you trust make decisions for you
- ☐ Provide instructions about the treatment you do and do not want, or
- ☐ Both appoint a person to make decisions and provide them with instructions.

**A Few Definitions** ☐ Throughout this booklet there are four phrases. Each of these phrases has a special meaning when it comes to allowing you to make decisions about your future health care.

- ☐ Advance directive - If you want your wishes to guide those responsible for your care you have to plan for what you want in advance. Generally such planning is more likely to be effective if it's done in writing. So, by an "advance directive" we mean any written directions you prepare in advance to say what kind of medical care you want in the event you become unable to make decisions for yourself.
- ☐ 1. Proxy directives - One way to have a say in your future medical care is to designate a person (a proxy) you trust and give that person the legal authority to decide for you if you are unable to make decisions for yourself. Your chosen proxy (known as a health care representative) serves as your substitute, "standing in" for you in discussions with your physician and others responsible for your care. So, by a proxy directive we mean written directions that name a "proxy" to act for you. Another term some people use for a proxy directive is a "durable power of attorney for health care."
- ☐ 2. Instruction directives - Another way to have a say in your future medical care is to provide those responsible for your care with a

statement of your medical treatment preferences. By "instruction directive" we mean written directions that spell out in advance what medical treatments you wish to accept or refuse and the circumstances in which you want your wishes implemented. These instructions then serve as a guide to those responsible for your care. Another term some people use for an instruction directive is a "living will." □3. Combined directives - A third way combines features of both the proxy and the instruction directive. You may prefer to give both written instructions, and to designate a health care representative or proxy to see that your instructions are carried out.

Questions and Answers □1. Why should I consider writing an advance directive/ living will? Serious injury, illness or mental incapacity may make it impossible for you to make health care decisions for yourself. In these situations, those responsible for your care will have to make decisions for you. Advance directives are legal documents which provide information about your treatment preferences to those caring for you, helping to insure that your wishes are respected even when you can't make decisions yourself. A clearly written and legally prepared directive helps prevent disagreements among those close to you and alleviates some of the burdens of decision making which are often experienced by your partner, family members, friends and health care providers. □2. When does my advance directive take effect? Your directive takes effect when you no longer have the ability to make decisions about your health care. This judgment is normally made by your attending physician, and any additional physicians who may be required by law to examine you. If there is any doubt about your ability to make such decisions, your doctor will consult with another doctor with training and experience in this area Together they will decide if you are unable to make your own health care decisions. □3. What happens if I regain the ability to make my own decisions?

If you regain your ability to make decisions, then you resume making your own decisions directly. Your directive is in effect only as long as you are unable to make your own decisions.

4. Are there particular treatments I should specifically mention in my directive? It is a good idea to indicate your specific preferences concerning two specific kinds of life sustaining measures: 1. Artificially provided fluids and nutrition; and 2. Cardiopulmonary resuscitation. Stating your preferences clearly concerning these two treatments will be of considerable help in avoiding uncertainty, disagreements or confusion about your wishes.

The enclosed forms provide a space for you to state specific directions concerning your wishes with respect to these two forms of treatment.

Fluids and Nutrition. I request that artificially provided fluids and nutrition, such as by feeding tube or intravenous infusion (initial one)  1. \_\_\_\_\_ shall be withheld or withdrawn as "Life Sustaining Treatment." 2. \_\_\_\_\_ shall be provided to the extent medically appropriate even if other "Life Sustaining Treatment" is withheld or withdrawn.

Directive as to Medical Treatment. I request that "Life Sustaining Treatment" be withheld or withdrawn from me in each of the following circumstances: (Initial all that apply)  1. \_\_\_\_\_ If the "life sustaining treatment" is experimental and not a proven therapy, or is likely to be ineffective or futile in prolonging my life, or is likely to merely prolong an imminent dying process;  2. \_\_\_\_\_ If I am permanently unconscious (total and irreversible loss of consciousness and capacity for interaction with the environment);  3. \_\_\_\_\_ If I am in a terminal condition (terminal stage of an irreversibly fatal illness, disease, or condition); or  4. \_\_\_\_\_ If I have a serious irreversible illness or condition, and the likely risks and burdens associated with the medical intervention to be withheld or withdrawn outweigh the likely benefits to me from such intervention.  5. \_\_\_\_\_ None of the above. I direct that all medically appropriate measures be

provided to sustain my life, regardless of my physical or mental condition.

5. What is the advantage of having a health care representative, isn't it enough to have an instruction directive? Your doctor and other health care professionals are legally obligated to consider your expressed wishes as stated in your instruction directive or "living will." However, instances may occur in which medical circumstances arise or treatments are proposed that you may not have thought about when you wrote your directive. If this happens your health care representative has the authority to participate in discussions with your health care providers and to make treatment decisions for you in accordance with what he or she knows of your wishes. Your health care representative will also be able to make decisions as your medical condition changes, in accordance with your wishes and best interests. □6. If I decide to appoint a health care representative, who should I trust with this task? □The person you choose to be your health care representative has the legal right to accept or refuse medical treatment (including life-sustaining measures) on your behalf and to assure that your wishes concerning your medical treatment are carried out. You should choose your partner or another person who knows you well, and who is familiar with your feelings about different types of medical treatment and the conditions under which you would choose to accept or refuse either a specific treatment or all treatment. A health care representative must understand that his or her responsibility is to implement your wishes even if your representative or others might disagree with them. So it is important to select someone in whose judgment you have confidence. People that you might consider asking to be your health care representative include your partner, a member of your family or a very close friend. □7. Should I discuss my wishes with my health care representative and others? □Absolutely! Your health care representative is the person who



speaks for you when you can't speak for yourself. It is very important that he or she has a clear sense of your feelings, attitudes and health care preferences. You should also discuss your wishes with your physician, family members and others who will be involved in caring for you. 8. Does my health care representative have the authority to make all health care decisions for me? It is up to you to say what your health care representative can and cannot decide. You may wish to give him or her broad authority to make all treatment decisions including decisions to forego life-sustaining measures. On the other hand, you may wish to restrict the authority to specific treatments or circumstances. Your representative has to respect these limitations. 9. Is my doctor obligated to talk to my health care representative? Yes. Your health care representative has the legal authority to make medical decisions on your behalf, in consultation with your doctor. Your doctor is legally obligated to consult with your chosen representative and to respect his or her decision as if it were your decision. In the absence of a Living Will or other written authorization The Federal Health Information Privacy and Protection Act (HIPAA) prevents a physician from discussing confidential medical information with your partner. 10. Is my health care representative the only person who can speak for me, or can other friends or family members participate in making treatment decisions? It is generally a good idea for your health care representative to consult with family members or others in making decisions, and if you wish you can direct that he or she do so. It should be understood by everyone, however, that your health care representative is the only person with the legal authority to make decisions about your health care even if others disagree. 11. Can I request all measures be taken to sustain my life? Yes. You should make this choice clear in your advance directive. Remember, a directive can be used to request



medical treatments as well as to refuse unwanted ones.  12. Does my doctor have to carry out my wishes as stated in my instruction directive?  If your treatment preferences are clear your doctor is legally obligated to implement your wishes, unless doing this would violate his or her conscience or accepted medical practice. If your doctor is unwilling to honor your wishes he or she must assist in transferring you to the care of another doctor.  13. Can I make changes in my directive?  Yes. An advance directive can be updated or modified in whole or in part, at any time, by a legally competent individual. You should update your directive whenever you feel it no longer accurately reflects your wishes. It is a good idea to review your directive on a regular basis, perhaps every 5 years. Each time you review the directive, indicate the date on the form itself and have someone witness the changes you make. If you make a lot of changes, you may want to write a new directive. Remember to notify all those important to you of any changes you make.  14. Can I revoke my directive at any time? Yes. You can revoke your directive at any time, regardless of your physical or mental condition. This can be done in writing, orally, or by any action which indicates that you no longer want the directive to be in effect.  15. Who should have copies of my advance directive? A copy should be given to the person that you have named as your health care representative, as well as to your family, your doctor, and others who are important to you. If you enter a hospital, nursing home, or hospice, a copy of your advance directive should be provided so that it can be made part of your medical records. The back cover of this brochure contains a wallet size card you can complete and carry with you to tell others that you have an advance directive.  16. Can I use my advance directive to make an organ donation upon my death? Yes. You may state your wishes regarding organ donation. Also you may want to place an organ donor card in your wallet to

alert medical personnel. Any card will do. If you decide to make a gift of your organs upon your death please complete the card and carry it with you at all times. For further information regarding organ donation you should contact either an organ procurement agency or your local hospital.

Terms You Should Understand

- 1. Artificially provided fluids and nutrition: The provision of food and water to seriously ill patients who are unable or unwilling to eat. Depending on the method used, such as insertion of a feeding tube or an intravenous line, and the condition of the patient, techniques may involve minor surgery, continuous supervision by medical (and sometimes surgical) personnel, risk of injury or infection, and side effects.
- 2. Cardiopulmonary Resuscitation (CPR): A treatment administered by health care professionals when a person's heartbeat and breathing stops. CPR may restore functioning if administered properly and in a timely fashion and may include the use of mechanical devices and/or drugs.
- 3. Life-sustaining measures: Any medical procedure, device, artificially provided fluids and nutrition, drugs, surgery, or therapy that uses mechanical or other artificial means to sustain, restore or supplant a vital bodily function. thereby prolonging the life of a patient.
- 4. Decision making capacity: A patient's ability to understand the benefits and risks of a proposed medical treatment and its alternatives and to reach an informed decision.
- 5. Health care representative or health care proxy: In the event an individual loses decision making capacity, a health care representative or proxy is a person who has been legally designated to make decisions on his or her behalf. A health care representative is appointed through the execution of a proxy directive (a durable power of attorney for health care).
- 6. Terminal condition: The terminal stage of an irreversibly fatal illness, disease, or condition. While determination of a specific "life

expectancy" is not required for a diagnosis of a "terminal condition a prognosis of a life expectancy of one year or less, with or without the provision of life-sustaining treatment, is generally considered terminal. □7. Permanent unconsciousness: A medical condition defined as total and irreversible loss of consciousness. The term "permanently unconscious" includes the conditions persistent vegetative state and irreversible coma Patients in this condition cannot interact with their surroundings or others in any way and do not experience pleasure or pain. □8. Persistent vegetative state: A condition of permanent unconsciousness in which the patient loses all capacity for interaction with their environment or other people. It is usually caused by an injury to the brain. It is normally not regarded as a terminal condition and with the aid of medical care and artificial fluids and nutrition patients can survive for many years. 9. Incurable and irreversible chronic diseases: Disabling diseases such as Alzheimer's disease, organic brain syndrome or other diseases which get progressively worse over time, eventually resulting in death. Depending on the disease, the patient may also experience partial or complete loss of physical and mental abilities. Because the rate at which these diseases advance may be slow, such diseases are not considered terminal in their early stages. □10. Whole brain death: Death due to total and irreversible loss of all functions of the entire brain, including the brain stem. The criteria of whole brain death must be used to accurately determine death in individuals who have suffered massive or total brain damage but whose heart and lungs are kept functioning by machines. Brain dead individuals are not vegetative or in a coma. but are, in fact, dead. □11. Attending physician: The doctor directly responsible for your medical treatment. He or she may or may not be your regular family physician. Depending on your health care needs the attending

physician may consult with others in order to diagnose and treat your medical condition, but he or she remains directly responsible for your care.

<http://www.njlaws.com/LivingWillGayLesbian.html>

## ESTATE PLANNING FOR GAY AND LESBIAN COUPLES WHO HAVE NOT ENTERED INTO A CIVIL UNION OR REGISTERED AS DOMESTIC PARTNERS

"SAVE MONEY AND PROVIDE FOR YOUR LOVED ONES "

By Kenneth A. Vercammen

As average Americans, we work 80,000 hours in a lifetime, or 45 to 55 years. In spite of all the resources and assets we earn, the vast majority of Americans with assets do not take the time to create a Will.

National statistics indicate that 80% of Americans die without leaving a Will. There are several reasons for this: fear of death; procrastination; and misinformation (people presume that only the rich or married with children need to have Wills). Whatever the excuse, it is clear that people would benefit from having a Will.

In the absence of a Will or other legal arrangement to distribute property at death, your partner cannot receive any assets and cannot administer your estate. The result can be lengthy delays and other problems. Individuals in gay or lesbian relationships need properly drafted Wills and estate planning documents more than straight persons. The probate laws generally provide if a person dies without a Will, their property goes to family, rather than a partner they had a relationship with for years or decades.

### IF YOU HAVE NO WILL:

If you leave no Will or your Will is declared invalid because it was improperly prepared or is not admissible to probate:

- \* State law determines who gets assets, not you
- \* Additional expenses will be incurred and extra work will be required to qualify an administrator
- \* Possible additional State inheritance taxes and Federal estate taxes
- \* If you have no s Civil Union , spouse, or close relatives the State may take

your property

\* The procedure to distribute assets becomes more complicated-and the law makes no exceptions for persons in unusual need or for your own wishes.

\* It may also cause fights and lawsuits between your partner and your family

When your loved ones are grieving and dealing with death, they shouldn't be overwhelmed with disputes over property and Financial concerns. Careful estate planning helps take care of that.

THE FOLLOWING IS A SAMPLE OF A VARIETY OF CLAUSES AND ITEMS WHICH SHOULD BE INCLUDED IN A WILL FOR UNMARRIED PERSON:

1ST: DEBTS AND TAXES

2ND: SPECIFIC BEQUESTS TO PARTNER, CHARITY, ETC

3RD: DISPOSITION TO PARTNER

4TH: DISPOSITION OF REMAINDER OF ESTATE IF PARTNER IS PREDECEASED

5TH: CREATION OF TRUSTS FOR PARTNER

6TH: DISTRIBUTION TO CHILDREN OR TRUST FOR CHILDREN

7TH: OTHER BENEFICIARIES UNDER 21

8TH: EXECUTORS

9TH: TRUSTEES

10TH: GUARDIANS OF CHILDREN

11TH: NO SURETY OR BOND REQUIRED

12TH: POWERS

13TH: SELF PROVING WILL

14TH: PRINCIPAL AND INCOME

15TH: NO ASSIGNMENT OF BEQUESTS

16TH: GENDER

17TH: CONSTRUCTION OF WILL

18TH: NO CONTEST CLAUSE

A Will must not only be prepared within the legal requirements of the New Jersey Statutes but should also be prepared so it leaves no questions regarding your intentions.

WHY PERIODIC REVIEW IS ESSENTIAL

Even if you have an existing Will, there are many events that occur which may necessitate changes in your Will. Some of these are:

- \* Domestic Partnership, Marriage, death, birth, divorce or separation affecting people named in your Will
  - \* Significant changes in the value of your total assets or in any particular assets which you own
  - \* Changes in your relationships
  - \* A change in your State domicile
- 
- \* Death or incapacity of a beneficiary, or death, incapacity or change in residence of a named executor, or of one of the witnesses to the execution of the Will if the Will is not self- proving
- 
- \* Annual changes in tax law

## MAY I CHANGE MY WILL?

Yes. A Will may be modified, added to, or entirely changed at any time before your death provided you are mentally and physically competent and desire to change your Will. You should consider revising your Will whenever there are changes in the size of your estate.

Beware, if you draw lines through items, erase or write over, or add notations to the original Will, it can be destroyed as a legal document. Either a new Will should be legally prepared by an attorney or a Codicil prepared by an attorney signed to legally change portions of the Will.

## SAVE MONEY

Probate in New Jersey is not difficult. Your estate will be subject to probate whether or not you have a Will and in most cases, a Will reduces the cost by eliminating the requirements of a bond. When you meet with your attorney to draft a Will, you may also learn ideas to reduce death taxes and other expenses. Don't pinch pennies now to the detriment of your Partner and beneficiaries. We have attempted to briefly explain in this article some of the issues, techniques, and decisions involved in Wills, Estate Planning, and Administration of an Estate. Because the matters covered are complicated and the Federal and New Jersey laws frequently change, this article can only outline some of the many legal issues you should consider.

The cost of a Will depends on the size and the complexity of the estate and the plans of the person who makes the Will.

A properly drawn Simple Will without Trust costs approximately \$300.00 to \$600.00. It is one of the most important documents you will ever sign, and may be one of the best bargains you will ever have.

Also, ascertain if your Will is “self-proving”, which would dispense with having to find the Will’s witnesses after death.

## WHAT IS A WILL?

“A Will is a Legal written document which, after your death, directs how your individually owned property will be distributed, who will be in charge of your property until it is distributed. You should remember that the term “property” under the law includes “real estate as well as other possessions and rights to receive money or items of value.” Everyone who has at least \$3,000 in assets should have a Will. You do not have to be wealthy, married, or near death to do some serious thinking about your Will.

## ADMINISTRATION OF AN ESTATE

If you are named the executor or executrix, you must visit the County Surrogate to probate the Will. You will need the following items:

1. The Death Certificate
2. The Original Will
3. Names and Addresses of decedent's next of kin and will beneficiaries
4. Minimum of \$100.00 for Surrogate fees

A state inheritance tax return must be filed and the tax paid on the transfer of real or personal property within eight months after death.

## OTHER ITEMS OF CONCERN TO BE PREPARED BY YOUR ATTORNEY

-Power of Attorney- to allow your partner or another person to administer your assets during your lifetime, either upon disability or now

-Living Wills/ Advance Directive- to state your wishes concerning medical care in the event of your serious illness and to allow your partner or another person to make medical decisions.

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