

Helpful Legal Information for MAHCP Members

LIVING WILLS

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Since 1993 it has been possible to make a Living Will in Manitoba. The correct legal term for a Living Will is Health Care Directive (HCD). Anyone who is 16 years of age or more and has the necessary mental capacity to make health care decisions can make a HCD.

The purpose of a HCD is to express the maker's wishes regarding health care decisions or to appoint someone to make those decisions, called a proxy, or both. In expressing your wishes you may give general directions or you can be very specific and exclude certain types of treatment.

The HCD becomes effective in one of two circumstances: when you cease to have the mental capacity to make a health care decision; or when you are unable to communicate your wishes regarding a proposed treatment. It continues in effect until you regain capacity or the ability to communicate (or until death).

A HCD must be in writing and dated. In addition, it must be signed by the person who makes it. If the individual is not capable of signing then someone else can sign at the maker's direction but then there are very specific additional requirements that must be met. If the maker is signing the HCD then no witness is required. However, out of an abundance of caution, it is common legal practice to have at least one witness.

Once made, a HCD can be revoked at any time provided the maker has the requisite capacity. There are three ways to revoke a HCD: by way of a later directive; by a later writing that declares an intention to revoke the directive; or by destroying all original copies of the directive with the intention to revoke same.

There is no set form of HCD, one must merely meet the requirements set out in The Health Care Directives Act. As long as they meet those requirements, directives made in other jurisdictions are valid in Manitoba.

Although the maker of a HCD need only be 16 or older, a proxy must be at least 18 years old. A proxy must also be "apparently" mentally competent and must act according to the following principles: if a directive appointing the proxy expresses the maker's health care decisions, those decisions must be complied with; if the maker's decisions are not expressed in a directive, the proxy shall act in accordance with any wishes that he or she knows the maker expressed when the maker had capacity, and believes the maker would still act on if capable; if the proxy knows of wishes applicable to the circumstances that the maker expressed when the maker had capacity, and believes the maker would still act on them if capable, and if the wishes are more recent than the decisions expressed in a directive, the wishes must be followed; or if the proxy has no knowledge of the maker's wishes, the proxy shall act in what the proxy believes to be the maker's best interests.

There are certain restrictions on a proxy's consent. A proxy cannot agree to medical treatment for the main purpose of research, sterilization (unless necessary to protect the maker's health), or the removal of tissue from the maker's body while he or she is still alive for either transplant or medical education or research.

A Living Will can designate more than one proxy but it should indicate whether they are to act jointly or successively. If it does not so indicate then the Act deems them to act successively in the order they are named in the directive. If the proxies are to act jointly and cannot agree regarding a treatment then the decision of the majority applies, unless the HCD indicates otherwise. If one or more of the proxies have died or are unavailable then the remaining proxy or proxies may make any necessary health care decisions. However,



reasonable efforts have to be made to contact all proxies.

One should carefully consider the order of the proxies named. Firstly because if the proxies are not named to act jointly then the first named proxy will take precedence as set out above. Secondly, if there are joint proxies and no majority decision is reached the Act deems the first proxy shall make the ultimate decision.

The proxy's appointment may be revoked by divorce. Unless the HCD provides otherwise, if a maker designates his or her spouse as proxy and they subsequently divorce or the marriage is declared void or a nullity then the spouse's appointment as proxy is revoked and any named alternate would become proxy.

A proxy may also have his or her appointment suspended or terminated by the court if the proxy is not acting in good faith. In addition, the court may rescind any health care decision made by the proxy and has the power to substitute its own decision if there is no alternate proxy named in the HCD. However, the proxy is protected from liability as long as he or she is acting in good faith.

There is no requirement of health care providers, or anyone else for that matter, to inquire as to whether an individual has made a HCD or, having made one, subsequently revoked it. Therefore, the onus is on the maker to ensure his or her proxies, physician and family know of the existence of a HCD.

The Manitoba government, through local community resource councils for

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seniors, provides Emergency Response Information Kits (E.R.I.K). The goal of this kit is to improve the accessibility to important information in an emergency. The package includes an information brochure, a Health Information form, a HCD Information sheet and form, an organ donation card, a donation slip and a sticker for the front door of the home. This alerts emergency responders to look for the necessary information. There is also a magnetic holder for your HCD to be attached to your fridge.

Partly due to the fact that Living Wills are relatively new to Manitoba and still not that common there is some confusion regarding Powers of Attorney and health care decisions. The usual form of general Power of Attorney does not include anything which gives the attorney the power to make health care decisions. The best way to avoid potential problems or confusion is to have a properly drafted HCD.

This paper is intended as an introduction to the topic and not as legal advice. If you require specific advice with respect to your situation, you should contact a lawyer.

This is one of a series of articles that will be appearing in future editions of the MAHCP News.