

McDonald & Kanyuk, PLLC

Attorneys at Law
Concord, New Hampshire

New Hampshire Legislation Authorizes Health Care Powers of Attorney and Allows “Living Wills” to Direct Withdrawal of Artificial Hydration and Nutrition

By: Joseph F. McDonald III, Esq.

A. Overview. In 1990, the United States Supreme Court decided a case involving Nancy Cruzan, a terminally ill and unconscious resident of Missouri. In that case, the Court for the first time recognized that states may require an unconscious and terminally ill person's family to prove by “clear and convincing evidence” that the patient would wish to die in the absence of any advance written instructions given in the form of a “living will” or some other terminal care document.

Since *Cruzan* was decided, commentators in the national media have emphasized the importance of such advance directives as a means of avoiding the hardships endured by the Cruzan family in attempting to assert her right to die. The family was forced to pursue the issue through the court system over the objection of Missouri's Attorney General while Nancy lay unconscious in a hospital bed with no reasonable prospects of recovery.

Closer to home, local commentators have criticized the uncertainties and ambiguities in the New Hampshire right to die law, most notably the troublesome questions whether our statutory living will form allows a direction to withdraw or withhold artificial feeding and hydration, and whether New Hampshire law allows the delegation of terminal care decision making powers to a family member or other third party through a “health care power of attorney.”

Legislation signed by the Governor in May and June, 1991 has resolved these and other important issues. The legislation specifically authorizes New Hampshire residents to sign enforceable health care powers of attorney. It also changes the living will form to resolve many ambiguities created by the wording of the old form, and specifically allows a direction concerning artificial hydration and nutrition. The new form expands the circumstances under which a living will directive will be enforced by supplementing the restrictive definition of “terminal condition” with a new and broader standard under which the living will will operate if the patient is “permanently unconscious”. Those interested in responding to these developments by updating existing living wills or signing health care powers of attorney should do so immediately.

B. Discussion.

1. The Cruzan Case. Part of the importance of the *Cruzan* case lies in the Court's recognition for the first time of a federal constitutional "right to die". This confirms the right of a competent, conscious United States citizen to direct medical providers to withhold or withdraw life sustaining procedures such as artificial respiration, nutrition and hydration. Perhaps more important, however, is the portion of the Court's opinion dealing with the "substituted judgment doctrine".

This doctrine concerns the ability of family members or others to assert the right to die of an unconscious loved one who has not given his or her own advance terminal care directive. The Court recognized the right of the States in these situations to require the family to prove in court that its wishes to withhold or withdraw terminal care would also have been the wishes of the patient. This creates the unsettling prospect that these sensitive decisions which many feel should be left to family members and physicians will now be politicized and resolved in a public forum.

Historically, New Hampshire medical providers have respected the judgment of the family, and New Hampshire state officials have given no indication of a desire to intervene. There is no guarantee, however, that these attitudes will persist after *Cruzan*; even the remote prospect of state intervention is disconcerting to many. Accordingly, those persons concerned about *Cruzan* and its implications should ensure that advance terminal care directives are in place for themselves and their loved ones.

2. New Hampshire Terminal Care Legislation. New Hampshire now specifically authorizes two forms of such directives: the living will and the health care power of attorney. As indicated above, the new legislation represents a vast improvement on and clarification of the New Hampshire right to die law. The following will highlight the notable features and application of the new rules in the context of answers to many commonly asked questions.

1 I already have a living will. Should I sign a new one? You may not need a new one. However, you should make an informed decision on this issue. Living wills prepared and signed in accordance with the old statutory form will continue to be effective. They may operate if the conditions described in the document exist: you are suffering from a "terminal condition", and you are unconscious or otherwise unable to express your own wishes concerning terminal care.

If, however, you are interested in taking advantage of the broader revised statutory form, you should sign a new living will and destroy the old one (including any copies which you have distributed to medical providers or family members).

The features which might make the revised form more attractive are (i) the opportunity to direct that artificial hydration and nutrition be withheld or withdrawn, and (ii) language which allows the document to operate if two physicians certify that you are suffering from a “terminal condition” or you are “permanently unconscious.” This significantly expands the range of circumstances in which the living will may be given effect.

For example, the medical condition of Nancy Cruzan would likely satisfy the “permanently unconscious” standard but not the narrower definition of a “terminal condition”. Conceivably, if you do not sign a new revised form of living will and later lapse into a coma which in your physicians’ opinion is irreversible but does not rise to the level of a “terminal condition” which renders your death imminent, your physicians may well interpret your old form of living will as inoperative and refuse to withhold artificial feeding and hydration (despite any wishes of your family to the contrary). Worse, your physician (or the courts, if the issue were litigated) might interpret the language of your living will as providing clear and convincing evidence of your desire that artificial hydration and nutrition **not** be withheld or withdrawn. You can avoid this risk by adopting the new form.

2 *Will my New Hampshire living will and health care power of attorney be enforced if I am hospitalized in another state?*

In theory, yes. But the out-of-state hospital or physician should first determine that your terminal care documents are valid under New Hampshire law before giving it full faith and credit under the laws of the state in which you are hospitalized or are residing. This could result in unnecessary delays.

Therefore, if you are considering moving to another state, you may wish to sign new documents conforming to the laws of that state. Or, if you split your time between two residences in different states (New Hampshire and Florida, for example), consider signing a set of documents for each state.

3 *Is it prudent to sign a form living will or health care power of attorney provided by a non-lawyer advocate?*

In most cases, no. Too many people use forms which can be found in hospitals, doctors’ offices, senior citizens’ magazines, how-to-do-it articles, and the like. There is no uniformity among state laws in the wording of statutory form terminal care documents, or the conditions to their effectiveness.

In view of this disparity among state laws, the odds are not acceptable that a form terminal care document will be appropriate, especially if you have changed residence. There are reputable national advocacy groups (such as the Right to Die Society of New York) who monitor the situation in each state and will provide an appropriate form document together with specific instructions concerning its execution. In any event, it is always a good idea to have an attorney review any form document and supervise its execution.

4 *Can I sign both a living will and a health care power of attorney?* Yes. Nothing in the law or the nature of these documents makes them mutually exclusive. In fact, it is probably a good idea to have both in many cases.

The health care power of attorney allows your agent (a spouse, parent or other family member or even a close friend) to make the terminal care decision based on circumstances as the agent perceives them at the time the decision is to be made. The clinical opinion of two physicians may well differ from the family's opinion whether the conditions exist which trigger the operation of a living will. Having the new power of attorney takes that decision out of the doctors' hands and places it in the hands of the someone close to you who is presumably familiar with your philosophies and desires concerning terminal care. If the agent (or any successor agent or agents you designate) is not living, is unavailable, or is otherwise unable to make the decision, the living will can serve as a "backup" document. In this two part system, the health care power of attorney is the primary terminal care directive. The living will is the secondary document.

5 *Can I modify the new statutory forms to incorporate more specific terminal care directives and a general statement of my philosophy?* Yes. The law only requires that the living will or power of attorney be prepared and signed in substantially the same form as the statutory form. In fact, the form for the health care power of attorney invites the principal to state additional directions concerning terminal care.

Many persons have incorporated in their terminal care directives a "personal statement" or specific directives in the form of a grid or checklist specifically identifying medical conditions and medical procedures to be withheld or withdrawn under certain circumstances. Others have directed that certain procedures (such as artificial nutrition or hydration) be applied (and not withdrawn or withheld). Some have even directed that every effort should be made to sustain and prolong their lives regardless of the terminal nature of their medical condition.

Be aware, however, that while modest revisions to and departures from the statutory form are permitted, living wills and health care powers of attorney must satisfy certain requirements (particularly in their execution) to be given effect. Simply marking up or otherwise supplementing your existing document, or writing your own new document may create enforceability problems. Seek the assistance of an attorney or other qualified professional.