

# "LIVING WILLS" OR ADVANCE HEALTH CARE DIRECTIVES

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While death is frightening, it is often the *process* of dying that causes the most fear. There may be strong objections to artificially prolonging life, despite medical science's best intentions.

For those who want to make their wishes known now, so called "living wills", or more properly, "advance health care directives," are a way of dealing with this issue.

Saskatchewan has joined other jurisdictions in adopting legally binding health care directives ("HCD's). *The Health Care Directives and Substitute Health Care Decision Makers Act*, which came into force September 1, 1997, permits people to decide how they will be treated, even if they lose the capacity to decide later.

This article deals with HCD's under Saskatchewan law only. While the rules in other jurisdictions may be similar, there can also be significant differences that would affect the validity of an HCD.

## **HCD's Are Not...**

First, we should clarify what is not included in an HCD. It is not a will. A will deals only with property and matters **after** death, and does not cover medical treatment. Likewise, a Power of Attorney usually means authority to deal with property, not to make health decisions.

Most importantly, an HCD in Saskatchewan is not a permission to break other laws. Situations involving active euthanasia or assisted suicide are explicitly excluded from the Act. An HCD only grants the power that the maker of the document would have had in the first place. Thus, for example, an HCD could not oblige a doctor to take active steps to end one's life.

## **Different Types**

There are actually two different kinds of HCD's under the Act. The first is a plain directive, sometimes called a "living will". A directive is intended to give advance health care decisions in the event that you were not able to decide on your own at the time. For instance, you might state that in the later stages of your illness, you do not wish any CPR or resuscitation efforts to be undertaken.

The Saskatchewan Act requires a directive to "clearly anticipate and give directions relating to treatment for the specific circumstances that exist" so it is crucial that detailed instructions be included. If it is not specific enough, the directive can be used for guidance, but is not binding.

A directive is sometimes combined with the second type of HCD, a proxy. Under a proxy, you appoint a person (the "proxy") to make decisions on your behalf. These documents are sometimes known as "durable powers of attorney", but again, do not confuse them with an ordinary power of attorney. It is obvious that the proxy chosen should be someone you would "trust with your life."

## **Formalities**

In Saskatchewan, there are three main requirements for a valid HCD. First, the maker must be at least 16 years of age. Secondly, the maker must have the necessary capacity. This means:

- an ability to understand the information;

- an ability to appreciate the reasonably foreseeable consequences of the decision; and
- an ability to communicate a health care decision in some fashion.

Thirdly, the HCD must be in writing. It must be dated and signed by the maker. There is, however, provision for allowing another to sign on a person's behalf in certain cases. An HCD can be revoked, and the Act provides a number of ways in which this can be done:

- Orally;
- In writing;
- By destroying the HCD;
- Making a new HCD;
- Divorce. This is a limited form of revocation. The Act provides that if you appoint your spouse as your proxy, and subsequently are divorced, the appointment of the proxy is nullified unless specifically stated otherwise.

### **Practical Aspects**

An HCD takes effect only when the maker loses capacity to make a health care decision, and then only for as long as the capacity is lost. Therefore, provided you meet the requirements mentioned above, you can change your HCD as many times as you want. When changing it, however, you should destroy any previous HCD's so that confusion does not arise.

An HCD can be made at any time, although most people tend to make them when they are faced with a terminal or life threatening situation. It is not a good idea to wait until you notice changes in memory or ability to concentrate, since these could affect your capacity.

Communication is vital when making a directive. In order to be binding with respect to your wishes, it must specifically describe the circumstances and treatments desired. If you have appointed a proxy, be sure to discuss this with him or her. More importantly, talk to your doctor. He or she can discuss the treatments that might be considered, and you can also ensure that the doctor is morally comfortable with your wishes (some hospitals and doctors, for example, may not wish to comply with a Do Not Resuscitate Order).

Once you have made your HCD, leave a copy with the doctor, and perhaps any hospitals that might be appropriate. Also give a copy to family members, your proxy, and either carry it in your wallet, or have some indication in your wallet that there is an HCD in existence. Remember that time may be at a premium, and your wishes should be easily available.

HCD's are not for everyone, and there is certainly no obligation to have one in place. If, however, there are concerns about treatment or quality of life, an HCD can be an important tool.

*This article is for general information only and relates only to Saskatchewan law. Specific situations may require different or additional information. Do not act on any information contained in this article without consulting your advisors regarding your specific circumstances. As well, some of the articles are of historical interest only because legislation or case law may have changed.*