

# Norton Peskett

## Solicitors

148 LONDON ROAD NORTH LOWESTOFT SUFFOLK NR32 1HF

Telephone: 01502 533000 Fax: 01502 533001

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*Please note that this is a general guide and not to be relied upon when taking any personal or business decisions and that it is not a substitute for legal advice tailored to the reader's circumstances.*

## Living Wills

The Mental Capacity Act 2005 provides the legal framework and puts the law on Living Wills (now known as advance decisions and advance statements) on a clear statutory basis for the first time. This will help empower people to make their own decisions and to make clear what actions carers and families can take. The rules deal, in particular, with Advance Decisions to refuse treatment, including the refusal of life sustaining treatment. The Act does not extend to provisions to take active steps to end a life or to force doctors to act against their professional judgement.

There are two types of "Living Will": Advance Decisions and Advance Statements. An Advance Statement is a general statement of your wishes and views. It can be used to reflect your religious or other beliefs (e.g. the refusal of blood transfusions) and can also include anything non-medical, such as food preferences, as well as any aspects of life that you particularly value. It should be used to help those involved in your care to know more about what is important to you. They should have regard to your Advance Statement but they are not legally bound by it. This is something that you can write yourself without legal assistance as it is merely a guide to those treating you and has no legal effect.

An Advance Decision is the only type of "Living Will" that is legally binding. All adults with mental capacity can refuse treatment for any reason, even if such refusal may lead to their death. An Advance Decision is used when you no longer have the ability to make your own decisions regarding your treatment, or in legal terminology, you "lack mental capacity". If you lack mental capacity, for example, then doctors have a legal and ethical obligation to act in your best interests. However, if you have made an Advance Decision and such decision is valid and applicable to the circumstances, then doctors are bound to follow this even if they think it may not be in your best interests. An Advance Decision to refuse treatment must indicate what treatment you wish to refuse and the circumstances under which this refusal would apply in as much detail as possible.

An Advance Decision can only be legally binding if, when the document was made:-

- The person making the Advance Decision had mental capacity to make the decision to refuse treatment and was over the age of 18
- The statement of intentions concerning future treatment is clear
- There was no undue influence or harassment from another person

It is also important that:-

- Your refusal was intended to apply in the kind of situation that later arises
- You understood fully the consequences of such decision in that kind of situation

The general principle is that an Advance Decision is to be given to protect people who act in good faith, providing guidance to both the medical professionals and family as to their wishes as to what should happen in a certain set of circumstances.

An Advance Decision cannot be used to:-

- Ask for anything that is illegal, such as euthanasia or help to commit suicide
- Demand care that the health care team considers to be inappropriate in your case
- Refuse the offer of food and drink by mouth
- Refuse the use of measures solely designed to maintain your comfort such as providing appropriate pain relief, warmth or shelter
- Refuse basic nursing care that is essential to keep you comfortable such as washing, bathing and mouth care

You may wish to make an Advance Decision if you have strong feelings about a particular situation that could arise in the future. You may wish to prepare an Advance Decision indicating the type of treatment you would not want to receive in the future.

Making an Advance Decision can also give you peace of mind knowing that your wishes should not be ignored if you are unable to take part in the decision making process at the relevant time. However, as you will appreciate this is an extremely delicate area and in some instances can cause upset and extreme distress to family members and friends. We would therefore recommend that if you wish to make an Advance Decision you discuss this with your family and friends so that they are aware of your decision. It is also advisable to discuss this with your G.P. and we will, on request, provide you with copies of your Advance Decision to give to your family, friends and GP to ensure that in the event of any of the circumstances arising there will be no confusion as to your wishes.

If you wish to make an Advance Decisions or you wish to discuss this further please contact a member of our Probate and Wills Department.