



THE POWER
OF INDEPENDENT ADVICE

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IN SA 2020 INTELLIDEX
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WEALTH MANAGER AWARD.

THE VALUE OF A LIVING WILL

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Having a last will and testament is considered an important part of an overall financial plan and individuals typically invest a lot of thought and time into estate planning. Yet a LIVING WILL is another matter entirely, and something that not many have in place. As with other risk planning related matters, it makes provision for a ‘what if’ situation that hopefully never transpires.

➤ WHY IS IT IMPORTANT?

A living will is a directive or an advance directive that represents an individual’s wishes to refuse any medical treatment or attention in the form of being kept alive by artificial means. It guides an individual’s family members and doctors in the event that the medical condition of that individual is at a stage that makes recovery unlikely and when the individual can no longer make medical decisions. For instance, being in a vegetative state, irreversibly unconscious or terminally ill and suffering. A living will can also provide for the execution of personal wishes like organ donation.

➤ HOW IS IT DIFFERENT FROM A LAST WILL AND TESTAMENT?

A last will and testament deals with the distribution of a person’s property and assets after death, while a living will sets out the medical care preferred while the individual is still alive, but unable to competently express their wishes.

➤ WHAT IS REQUIRED FOR A VALID LIVING WILL?

The validity and use of a living will in South Africa is contentious, and while it is not a compulsory document, it can play a very valuable role in speaking for you when you are no longer able to.

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The National Health Act affirms a person's right to refuse treatment even if it may result in the shortening of one's life. In addition, the National Health Amendment Bill anticipates putting an end to doctors' responses and a family's consent to withdraw any treatment when an existing living will is in place.

Individuals have the right to refuse treatment and many people believe that such directive will be honoured under all circumstances. However, this is impossible in the reality of medical practice, which means that a living will can be ignored by the family and the attending doctors if there is a slight chance for recovery. It is therefore up to the doctors to also rely on their professional judgement whether the directive should be honoured or not.

A doctor may have a conscientious objection to withholding treatment in any circumstance, and by no means are they obliged to comply with an advance directive. It is important that they advise the patient accordingly of their views and offer to step aside or transfer treatment and management of the patient's care to another practitioner who does not share the same objections.

The South African Medical Association (SAMA) has stipulated that in order for a person to make such a directive, they must be over the age of medical consent and of sound mind ('*compos mentis*'). This directive will remain valid even if the declarant later becomes '*non compos mentis*' (of unsound mind), unlike that of a power of attorney, which loses its authority once the principal becomes mentally incompetent.

WHY SHOULD PUTTING A LIVING WILL IN PLACE BE CONSIDERED

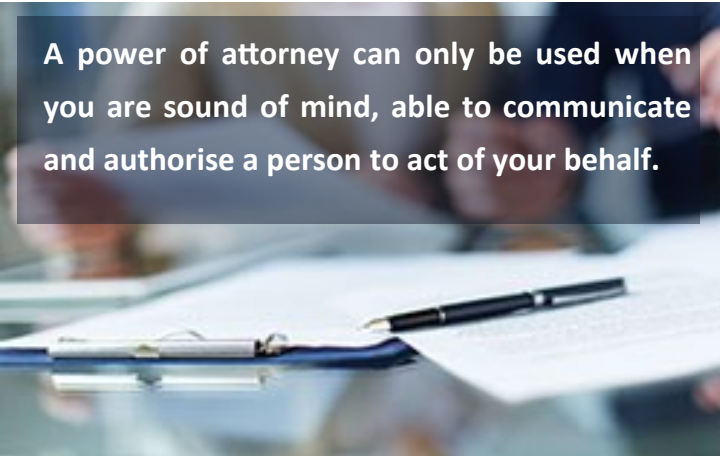
1. A living will speaks for you when you cannot speak for yourself.
2. It spares loved ones from the anguish in making life-or-death decisions. It also eliminates any emotionally straining arguments between family members over the present situation.
3. It allows you to have your say in specific medical procedures and with regards to organ donation.
4. It assists in containing the financial costs of dying. In the instance of no reasonable prospect of recovery, being put on life support can be extremely expensive, which could place a significant financial burden on family members or reduce the value of the estate that you had bequeathed.
5. It gives you peace of mind.

IMPORTANT NOTE:

➔ POWER OF ATTORNEY IS NOT VALID ON BECOMING MENTALLY INCAPABLE

Many believe that a power of attorney will suffice in an instance where an individual becomes mentally incapable or, for example, falls into a coma following an accident.

This is unfortunately not the case, as the power of attorney becomes invalid the moment the principal of the power of attorney can no longer exercise their judgement.



A power of attorney can only be used when you are sound of mind, able to communicate and authorise a person to act of your behalf.

This is confirmed in the case of *Pheasant v Warne 1922 AD 481* with reference to *Molyneux v Natal Land Company 1905 AC 555*, where the court held that a power of attorney cannot be granted by someone who, because their mental faculties had been impaired by old age, had not been in a position to understand what the particular legal proceedings instituted against them were about.

If a power of attorney has been drawn up and mental incapacity arises later, there would be the requirement that an application be brought before the court to appoint a *curator bonis*, which is time consuming, costly and cumbersome.

➔ A LIVING WILL IS NOT THE SAME AS AN ASSISTED SUICIDE/VOLUNTARY EUTHANASIA

A living will should not be confused with the concept of 'assisted suicide' or be seen to condone euthanasia, both of which are illegal in South Africa. A living will therefore cannot include any instructions or directives in respect of either instance. While you can request that specific medical treatments be withheld or withdrawn, you may not ask your doctor to end your life.

LIVING WILLS HAVE BECOME AN INCREASINGLY IMPORTANT PART OF ESTATE PLANNING IN SA, ALTHOUGH CREATING ONE IS COMPLETELY AT THE DISCRETION OF THE INDIVIDUAL.

It is imperative that a living will be reviewed regularly, and that both medical practitioners and family members have access to it. For ease, it is recommended that once drawn up a living will should be signed and kept in the safe custody of a doctor or attorney/fiduciary specialist.

More details about estate planning are available here: [Estate Planning](#)

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