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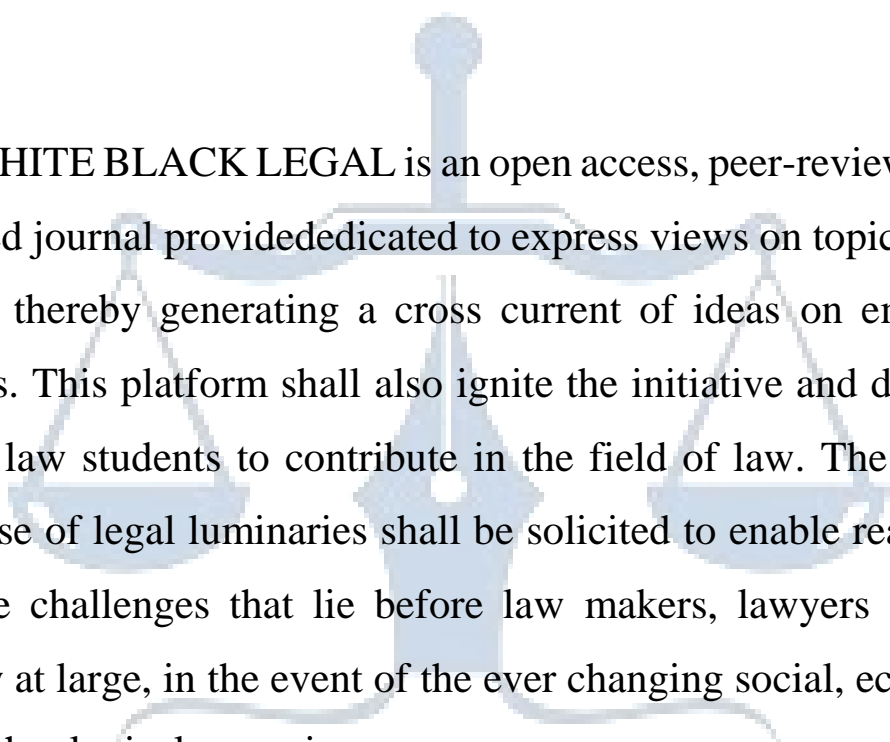


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ABOUT US



WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you



LIVING WILLS AN ANALYSIS

AUTHORED BY - AKHIL JOHNY

ABSTRACT

A living will, also known as an advance directive, advance healthcare directive is a legal document that allows individuals to express their wishes regarding medical treatment in the event they become incapacitated and unable to communicate their preferences. It typically outlines the types of medical interventions a person does or does not want in specific situations, such as life-sustaining treatments like resuscitation, mechanical ventilation, or feeding tubes. Living wills vary depending on jurisdiction, but they generally require witnesses and sometimes notarization to be legally binding. It's an important document to have, as it ensures that your healthcare preferences are respected even if you're unable to communicate them yourself. It's often recommended to discuss your wishes with your loved ones and healthcare providers so they understand and can advocate for your preferences if necessary.

INTRODUCTION

A Will is a document whereby a testator devises the bequest plan of his estate which comes in effect upon the demise of the testator. In contrast, an advance medical directive commonly known as 'Living Will', which has gained ground throughout the world, comes into effect during the lifetime of the person executing it. that the Court is the ultimate decider of what is best for the patient and extended this power to the High Courts under Article 226. the Supreme Court under Article 32, seeking the declaration that the right to die with dignity is a fundamental right under Article 21. It was also prayed before the Court to direct the Union Government to allow terminally ill patients to execute 'living wills' for any consented future action in case that there arises a medical emergency. Common Cause contended that terminally ill patients must not be subjected to ruthless treatments and that denying them the 'right to die' in a dignified manner further extends their suffering. It was thus prayed before the Court to secure their right to die with dignity, by permitting such persons to make an informed choice pertaining to their future medical complications in advance, through a living will. On 9th March 2018, a 5 Judge Bench held that the right to die with dignity is a fundamental right. Consequently, it was also held that an individual's right to execute advance medical directives for future reference is nothing but an assertion of his/her 'right to bodily integrity and self-

determination.. Some of these could include,Breathing tubes or ventilators,Feeding tubes,Blood transfusions,Dialysis (a treatment that takes over kidney function),Types of pain medications,Organ donation.

- Concept

The concept of a living will emerged from the recognition of individuals' rights to make decisions about their own medical care, even if they're unable to communicate those decisions due to illness or incapacity. Here's a breakdown of its key aspects:

Autonomy: At the core of the living will concept is the principle of autonomy, which emphasizes an individual's right to self-determination and the ability to make decisions about their own healthcare.

Advance Directive: A living will is a form of advance directive, allowing individuals to document their preferences for medical treatment in advance of any incapacity. This ensures that their wishes are known and respected, even if they're unable to communicate them later.

Medical Treatment Preferences: Living wills typically address specific medical interventions, such as resuscitation, mechanical ventilation, artificial nutrition and hydration, and other life-sustaining treatments. Individuals can specify which treatments they do or do not want under various circumstances.

Legal Document: Living wills are legally binding documents, provided they comply with the relevant laws and requirements in the jurisdiction where they're created. This means that healthcare providers and family members are obligated to follow the directives outlined in the document.

Healthcare Proxy: In addition to a living will, individuals may also appoint a healthcare proxy or healthcare power of attorney. This is someone who is authorized to make medical decisions on their behalf if they're unable to do so. The proxy is expected to make decisions that align with the individual's wishes, as expressed in the living will or through prior discussions.legal document that lets you choose someone to make medical decisions for you if you can't make them yourself. In some states, this person might be called your healthcare proxy, agent, or representative.

Communication and Discussion: While a living will provides important guidance, it's also essential for individuals to communicate their wishes with their loved ones and healthcare providers. This can help ensure that everyone understands their preferences and can advocate for them if necessary.

Overall, the concept of a living will empowers individuals to maintain control over their healthcare decisions, even in situations where they're unable to actively participate in decision-making. It promotes dignity, autonomy, and the right to die with dignity according to one's own values and preferences.

The Mental Healthcare Act, 2017 ('Mental Healthcare Act') allows the person suffering from mental illness to specify the form of treatment to be provided in advance and also empowers that person to nominate a representative to ensure that directives are being adhered to. These directives are binding in nature. The Mental Healthcare Act also lays down provisions to revoke, amend or cancel the advance directive at any time. The directions laid down in the 'Common Cause Judgment' act as the guiding force in the absence of any statute governing and regulating the Advance Medical Directive.

The mental healthcare Act, 2017 chapter 3 "ADVANCE DIRECTIVE"

- Origin and evolution

A living will is used while you're alive, to explain what kinds of healthcare procedures and medications you want. The concept of Living Will is of recent origin. The advance medical directive has been recognized first by Statute in the United States of America when in the year 1976, State of California passed "Natural Death Act". The term 'Living Will', also known as an advance directive or advance decision, means and includes an instruction given by an individual while conscious, specifying what action should be taken in the event he/she is unable to decide due to illness or incapacity and appoints a person to take such decision on his/her behalf. It may include a directive to withdraw life support or certain eventualities.¹

¹ Aruna Ramchandra Shanbaug v. Union of India and Ors, (2011) 4 SCC 454 ('Aruna Shanbaug Case'). Bench: Gyan Sudha Misra, Markandey Katju

- Execution and Implication
‘Common Cause Judgment²’ act as the guiding force in the absence of any statute governing and regulating the Advance Medical Directive. Key findings of the Judgment are as follows:
Who can execute a Living Will -An adult with a sound mind capable of communicating his/her decision clearly.
- Prescribed Mode of Registration of a Living Will –The Living Will shall be in writing. It shall be signed in presence of 2 independent attesting witnesses by the Executor of the Living Will (‘Executor’). It shall be countersigned by the jurisdictional Judicial Magistrate of First Class (‘JMFC’). The JMFC is under an obligation to supply the requisite copies of the Living Will to the concerned authorities and to inform the immediate family members of the Executor.
- Contents of a living will –The Living Will should clearly stipulate Executor’s wishes and his apparent intent for resorting to such measures. It should mention that the Executor may revoke the instructions at any time for any rationale whatsoever by informing the same to the agent and the treating physician. It is primary to disclose that the executor has understood the consequences of executing such a directive. Further, it should also specify the name of a guardian or close relative who, in the event of the Executor becoming incapable of deciding at the relevant time, will be authorized to give consent to refuse or withdraw medical treatment in a manner consistent with the Advance Directive.

How Does a Living Will Become Operational –

- i. The physician of the Executor after ascertaining the genuineness of the Living Will shall inform the Executor or his guardian /close relative inter alia, about the details of the illness and the consequences of remaining untreated. He must also ensure that he believes on reasonable grounds that the person in question understands the information provided, and has come to a firm view that the option of withdrawal or refusal of medical treatment is the best choice.
- ii. The hospital where the Executor has been admitted shall constitute a Medical Board to form an opinion whether to certify the instructions regarding withdrawal or refusal of

² Common Cause (A Registered Society) v. Union of India and Anr, (2018) 5 SCC 1 (‘Common Cause Judgment’).
Bench: Chief Justice, A.K. Sikri, A.M. Khanwilkar, D.Y. Chandrachud, Ashok Bhushan

further medical treatment. In the event the Hospital Medical Board certifies the instructions, the hospital shall forthwith inform the jurisdictional Collector about the proposal who shall then constitute its own Medical Board. This Board jointly visits the hospital and if they concur with the decision of the previous Medical Board, they may endorse the certificate to carry out the instructions given in the Living Will. The Chairman of the Medical Board shall convey the decision of the Board to the jurisdictional JMFC. Thereafter, the JMFC shall visit the patient and, after examining all aspects, authorise the implementation of the decision of the Board. In case the life support is withdrawn, the same shall be intimated by the Magistrate to the High Court and the High Court shall maintain the requisite records in digital format.

However, if there is a difference of opinion between the Board and the Executor or his family members, the parties can prefer a writ petition in the concerned High Court. The decision of the High Court in this regard shall be final and binding.

CONCLUSION

In its 196th Report, the Law Commission of India recommended the making of a law to safeguard terminally ill patients, who refuse medical treatment for some reason or the other, from the consequences flowing out from Section 309 of the Indian Penal Code. The report also recommended that the doctors doing so on the patient's behalf, or making the decision for such patients in their best interests, must be given protection from punishment under Section 306 of the IPC (abetment of suicide) or Section 299 (culpable homicide).

It was very well clarified in the report that the patient must be suffering from a 'terminal illness' by virtue of which extreme pain and suffering is caused and it must be ascertained if such a suffering will inevitably cause the death of the patient.³

Right to die with dignity as a fundamental right with in the fold of Right to live with dignity guaranteed under article 21 of the indian constitution. the state government where necessary to ensure that a persons of deteriorated health or terminally ill patients should be able to execute a document tittle My Living Will and Attorney Authorisation which can be presented to the

³ LAW COMMISSION OF INDIA 196TH REPORT ON MEDICAL TREATMENT TO TERMINALLY ILL PATIENTS (PROTECTION OF PATIENTS AND MEDICAL PRACTITIONERS) MARCH, 2006[1] Report No. 241, Chapter VII, captioned "Whether Advance Directives (Living Will) Should be Allowed Legal Sanctity in our Country, Law Commission of India, Passive Euthanasia: A Relook, 11th August 2012.

hospital for appropriate action in the event of the executant being admitted to the hospital with serious illness which may threaten termination of the life of the executant

Reference

1. Aruna Ramchandra Shanbaug v. Union of India and Ors, (2011) 4 SCC 454 ('Aruna Shanbaug Case'). Bench: Gyan Sudha Misra, Markandey Katju
2. Common Cause (A Registered Society) v. Union of India and Anr, (2018) 5 SCC 1 ('Common Cause Judgment'). Bench: Chief Justice, A.K. Sikri, A.M. Khanwilkar, D.Y. Chandrachud, Ashok Bhushan
3. LAW COMMISSION OF INDIA 196TH REPORT ON MEDICAL TREATMENT TO TERMINALLY ILL PATIENTS (PROTECTION OF PATIENTS AND MEDICAL PRACTITIONERS) MARCH, 2006[1] Report No. 241, Chapter VII, captioned "Whether Advance Directives (Living Will) Should be Allowed Legal Sanctity in our Country, Law Commission of India, Passive Euthanasia: A Relook, 11th August 2012.



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