

Advance Directives and Living Wills - The way forward



On 09 March 2018, the Supreme Court of India passed a landmark judgment [\[1\]](#) permitting adults of sound mind to leave advance directives regarding the end of life treatment they wish to receive – and the kinds of treatment that they do not wish to receive.

What is an advance directive?

An advance directive or advance medical directive is a legal document executed by a person explaining that person's wishes about medical treatment if that person becomes incompetent or unable to communicate.

Advance directives can be of broadly two types: a living will (in which a person indicates their wishes regarding medical treatment) and a durable power of attorney or healthcare proxy (in which a person nominates another individual to take medical decisions on their behalf in the event they become unable to make such decisions themselves).

Why execute an advance directive?

The Supreme Court judgment has clearly stated that every person of sound mind has the right to refuse medical treatment and that the decision of a person not to receive medical treatment which would merely delay a natural death cannot be considered to be (or prohibited as) suicide. In this context, the court has permitted all adults in "a sound and healthy state of mind and in a position to communicate, relate and

comprehend the purpose and consequences” of their actions to make an advance directive stating the specific medical treatment they would like and when medical treatment should be withdrawn, when the medical treatment would only have the effect of delaying the process of death or may cause the person pain, anguish and suffering and further put them in a state of indignity.



An advance directive of the nature permitted by the Supreme Court allows a person to express their preferences about what kind of treatment they would like to receive for a terminal illness in the event they are later unable to communicate their preferences... Advance directives can ensure that a patient’s preferences with respect to their own body are respected.

An advance directive of the nature permitted by the Supreme Court allows a person to express their preferences about what kind of treatment they would like to receive for a terminal illness in the event they are later unable to communicate their preferences. It allows a person to specifically state whether, in the event of their incapacitation, they would or would not like their life to be sustained on life support systems or to be subjected to different types of treatments for a terminal illness. Advance directives can ensure that a patient’s preferences with respect to their own body are respected.

Advance directives can also provide relief to concerned family members or doctors who are better able to take difficult decisions about the treatments that should be provided to their loved ones or patients.

In the absence of an advance directive, the Supreme Court has stated that the doctor will (in consultation with family

members and other medical practitioners) be able to initiate the process for refusal or withdrawal of end of life treatment in what they determine to be the best interests of the patient.

What are the Supreme Court's requirements for a valid advance directive?

Among other things, a valid advance directive must be executed in writing and, in much the same manner as a will, must be witnessed by two witnesses. The document must have been signed by the executor of their own free will and without any coercion and must be registered with the appropriate authorities specified in the Supreme Court judgment. The advance directive must also specify the name of a guardian or close relative who will act as the surrogate of the executor in the event the executor becomes incapable of taking a decision.

In order to be enforceable, the directive must also be drafted in the correct manner and be clear and unambiguous, and plainly indicate the decision relating to the circumstances in which withholding or withdrawal of medical treatment can be resorted to.



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Will such an advance directive always be implemented?

The Supreme Court has mandated that an advance directive regarding withholding or withdrawing end of life treatment will only be

implemented after following a strict procedure that the court has laid down. Several medical professional boards as well as the surrogate appointed under the advance directive will be consulted as part of this

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process and will have to certify their agreement with the implementation of the advance directive. The guidelines presently laid down by the court describe a cumbersome process. However, the court has suggested that the legislature should frame its own law on advance directives at the earliest; hopefully this will lay down an easier procedure for implementation of advance directives.

Further, an advance directive will not be implemented for a particular treatment if circumstances exist that the person making the directive did not anticipate at the time of executing the directive and that would have affected their decision had they anticipated them.

Finally, for an advance directive to be implementable, it is

imperative that it is properly formulated, clear and unambiguous.

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Do any other laws provide for other types of advance directives?

The Supreme Court decision is clear that an advance directive must be

given effect to as a part of a person's right to self-determination and autonomy. However, it only lays down guidelines with respect to advance directives concerned with withholding and withdrawing treatments for incurable terminal illnesses. The judgment is not clear about the procedure to be followed for or the validity of advance directives with respect to other kinds of medical treatments not involving a terminal illness.

On the other hand, specific other kinds of advance directives have already been provided for in legislation. The Mental Healthcare Act, 2017 permits and lays down the procedure for execution of advance directives with respect to treatment for mental illness. Similarly, the Transplantation of Human Organs and Tissues Act, 1994 permits persons to execute a document similar to an advance directive, authorising donation of their organs upon their death.

The way forward

At the moment, the Supreme Court has only made guidelines with respect to a specific type of advance directive. As the law stands, in order to express their preferences with respect to different types of treatment and organ donation, an individual will need to execute and register several different advance directives with respect to each matter. As the Supreme Court has urged the legislature to pass a law with respect to advance directives, this position is hopefully only temporary and the legislature will enact a law enabling individuals to execute one advance directive for all kinds of medical treatment.

Although further legislation on advance directives is awaited, the fact that the Supreme Court has upheld the validity of advance directives is itself a milestone. Anyone who has an opinion about the kind of end of life medical care they would like to receive can (and should) now set down their preferences in an advance directive. Just like it's important to leave your Will relating to movable/immoveable property, it is equally important to seek legal assistance to make an advance directive setting down your preferences relating to end of life treatment that you wish to receive.

- By Krishna Hariani

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[\[1\]](#) Common Cause (A Regd. Society) v. Union of India and Another (Writ Petition (Civil) No. 215 of 2005).

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