

# Advance directives

**A patient with HIV signs an advance directive refusing resuscitation or admission into intensive care. Early in the course of the disease, the patient suffers an anaphylactic reaction to a drug. What do you do?**

This scenario was posed in a paper published in the *MJA* (2000; 172: 545-548). What should be done when an advance directive rules out treatment that is in the patient's best interests? If the directive is valid, treatment may constitute battery. If the directive is legally invalid, withholding treatment may amount to a breach of the duty of care.

## When is an advance directive legally valid?

Victoria, South Australia, Queensland and the two Territories have legislation providing for advance directives. In the remaining States, the validity of directives is determined by common law. Factors that may be considered include:

- the competence of the decision maker at the time the directive was made
- whether the directive was informed and intended to cover the circumstances that have arisen
- whether the decision was free from the undue influence of others.

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## Duties of doctors

In the Territories, Victoria, SA and Queensland, doctors are not required to investigate whether the patient's decision was voluntary or reasonably informed, or that the patient was over 18 years of age when the directive was signed. It is the witness to the directive who attests to these matters. In Victoria, SA and Queensland, the witness also attests to the patient's capacity to refuse treatment at the time of making the directive. In NSW, WA and Tasmania, the obligations on physicians may be greater, and legal advice may be required.

## What about the case scenario?

The authors believed the advance directive in the above scenario would be invalid ethically and under common law, because it was not intended to apply in this circumstance.

In most jurisdictions in Australia, legislation would also rule the directive invalid, the exception being in the ACT. But as the directive is likely to be invalid in other States and under common law, the situation in the ACT is unclear.

The authors recommended treating the patient in his or her best interests while legal advice is sought.

## Series Editor's comment

If you have reasonable grounds to doubt the validity of an advance directive, use your judgement to administer or withhold treatment until the legal position is clarified. The test is one of 'reasonableness'. Would or should a reasonable doctor with the knowledge appropriate to your field of medicine have the same doubt? In unusual circumstances, especially urgent and life-threatening ones, you can prevaricate (reasonably) while seeking legal advice.

**Mental competence.** 'Wrongful life' claims against doctors have arisen when a legally valid refusal of treatment has been ignored. Recently in Victoria, a patient suffering a severe haemorrhage

refused blood transfusion for religious reasons. When she lost consciousness, her husband made an urgent application to the court, and an order was granted, making her his ward. He consented to a transfusion for her. She sought to sue her husband and the relevant court.

If you argue that a person was not competent to make decisions about treatment, you need to prove that you are sufficiently skilled to assess mental competence and testamentary capacity.

**Being fully medically informed** is as important for refusal of treatment as it is for consent. A decision made in the absence of all the relevant information is a poorly informed decision.

**Undue influence.** I have seen children influencing elderly parents to undergo distressing chemotherapy for disseminated malignancy, when the anticipated benefits were at best marginal and when the parents had been content with good palliative care.

**Legal thresholds.** An advance directive comes into operation when patients are no longer able to give or withhold consent themselves. The attending doctor is unable to assess the patient's competence at the time the directive was signed, or if the decision was informed and free from undue influence. The test is legal – is the directive in proper legal form, and appropriately signed and witnessed? If in doubt, seek legal advice.

**Acting as a witness.** A doctor who witnessed a signature on a will was taken to task in court when he argued that he signed only as an ordinary eye witness, not as an expert certifying the patient's testamentary capacity. It was argued that there is a reasonable presumption if a doctor witnesses a signature that the doctor believed the patient was competent to sign the document. Similarly, acting as a witness for an advance directive may reasonably be taken as certification that the doctor believed the patient was fully informed and mentally competent to sign. **MT**