

Supreme Court's Verdict on Living Will



Wednesday Wisdom
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1. Euthanasia[1]

Euthanasia or Mercy Killing, is a controversial subject matter in the Indian jurisdiction. Euthanasia is an act of ending the life of an individual suffering from a terminal illness or in an incurable condition in a painless manner. This concept was explored in the Hindi movie “Guzaarish” which narrated the story of young magician who suffered spinal cord injury during his performance. He appealed for euthanasia, but court denies permission as the same was violative of the provisions of the Constitution of India.

2. Background

The original belief that life is sacrosanct and should be preserved at all times and by all means, has gone slight change in the recent past. Initially, in 1996, in Gian Kaur vs State of Punjab[2] the constitution bench was of the view, that “Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can extinction of life be read to be included in protection of life.”

3. Is Euthanasia legal in India?

The issue of euthanasia was discussed several times in various judgments. Despite the controversy and scepticism around the subject it is legalised in India in limited and rare circumstances. With the advent of landmark Supreme Court judgment in Common Cause (A Regd. Society) vs Union of India and Another (2018) 5 SCC 1 (“2018 Judgment”) the legal landscape around the topic is simplified; nevertheless, a comprehensive legislation still remains need of the hour.

In 2018 Judgment, the Supreme Court allowed passive euthanasia and admitted the right to die with dignity as a fundamental right under Article 21 of the Constitution. The Court held that individuals have the right to refuse medical treatment or life support in a situation where a person is faced with a medical condition with no hope of recovery and is continued on life support system/medicines and can make a Living Will specifying their wishes therein.

4. What is Living Will?

A Living Will/ Advance Directive is a legal document that outlines an individual’s preferences for medical treatment in case he/she is unable to communicate due to terminal illness (“Living Will/Advance Directive”). The Hon’ble Constitution Bench had given basic legal framework for Living Will. The 2018 Judgement demonstrates an astute consideration and classification of circumstances pertaining to the existence or absence of a Living Will. It categorically prescribes the procedures to be followed in both scenarios – i.e.

[1] The article reflects the general work of the author on the date of publication and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

[2] 1996 SCC (2) 648

- when a Living Will exists, providing clear guidance on the implementation process and
- also, in circumstances where the patient or individual has not formulated any Living Will, offering insights into the applicable procedures.

It should be noted that a Living Will is a different concept altogether from a general Will, wherein individuals make dispositions of their properties and assets to the beneficiaries named in a Will through an executor. More information on the general Will can be obtained here.[3]

5. How is Living Will effected?

In Living Will the individual, should:

- clearly identify and outline the circumstances and events, the occurrence of which will lead to withdrawal or refusal of medical treatment and any sort of life support;
- specify the name of guardian(s) or close relative(s) who in the event of the Executor[4] becoming incapable of taking decision, will be authorised to give consent to refuse or withdraw medical treatment in a manner consistent with the Living Will.

6. What are the eligibility criteria for making a Living Will?

A person making a Living Will should be:

- an adult who is of a sound and healthy state of mind;
- in a position to communicate;
- relate and comprehend the purpose and consequences of executing the document;
- making it voluntarily without any force or pressure.

7. What are the recent developments for making a Living Will?

The procedure under 2018 Judgement was found to be complex and thus, on July 19, 2019, the Indian Society of Critical Care Medicine filed a Miscellaneous Application[5] seeking clarification on the procedure outlined in 2018 Judgement for terminally ill patients to exercise their right to die with dignity. The petitioners also requested modifications of some of the guidelines prescribed in 2018 Judgment.

By allowing the Miscellaneous Application, a Constitutional Bench of Supreme Court headed by Justice K. M. Joseph, Justice Ajay Rastogi, Justice Aniruddha Bose, Justice Hrishikesh Roy and Justice C. T. Ravikumar passed order on January 24, 2023, and made suitable amendment to the procedures of Living Will.

[3] [Microsoft Word - 1-Will- A Testament Charusheela- 6th July 2022.docx \(ynzgroup.co.in\)](#)

[4] Executor means a person making a Living Will.

[5] Miscellaneous Application No. 1699 Of 2019 in Writ Petition (Civil) No. 215 Of 2005

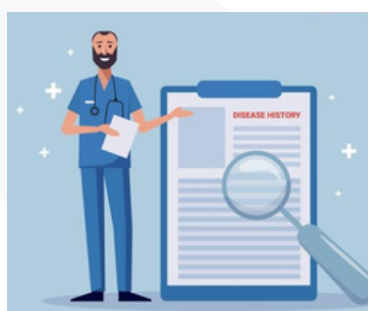
8. What is the Procedure for execution of Living Will?

The following is a procedure for execution of Living Will as per the amendment passed by the Constitutional Bench of Supreme Court:

- By making a Living Will, the Executor has to sign it in presence of two attesting witnesses (preferably independent) and attest the same before a Notary or a Gazetted Officer.
- The witnesses and the Notary or Gazetted Officer shall (after their satisfaction) record their confirmation that the document was executed voluntarily and without any coercion or inducement or compulsion by Executor and with complete understanding and knowledge of all relevant information and consequences.
- The Executor shall inform and hand over a copy of the Living Will to the person(s) whose name mentioned in the Living Will and the family physician (if any).
- A copy of the Living Will needs to be handed over to the officer of the Local Government or Municipal Corporation or Municipality or Panchayat (as the case may be). The authority to whom the copy is handed over shall nominate an official as the custodian of such copy.
- If the Executor becomes terminally ill and has been undergoing prolonged medical treatment with no hope of recovery and does not have decision making capacity, then the treating physician, after being made aware of the Living Will, shall ascertain the genuineness and authenticity of the Living Will with reference to the existing digital health records of the patient (if any) or from the custodian of the document

- The instructions in the Living Will must be given due weight by the doctors. However, it should be given effect to only after being fully satisfied that the Executor is terminally ill and is undergoing prolonged treatment or is surviving on life support and that the illness of the Executor is incurable or there is no hope of him/her being cured.
- If the treating physician is satisfied that the Executor is terminally ill and that the instructions in the Living Will need to be acted upon, then he shall inform the person(s) named in the Living Will about the nature of the illness, the availability of medical care, consequences of alternative forms of treatment and the consequences of not taking treatment.
- If the person(s) named come to a conclusion that it is the best choice, then the hospital where the Executor has been admitted shall constitute a Primary Medical Board which consists of the treating physician and at least two subject experts of the concerned speciality who shall have at least five years of experience and they shall visit the patient (Executor) and determine whether or not to certify the instructions given in the Living Will within 48 hours of the case being referred to it.
- If the Primary Medical Board certifies that the instructions given should be carried out, then the hospital shall constitute a Secondary Medical Board comprising one registered medical practitioner nominated by the Chief Medical Officer of the District and at least two subject experts with at least five years of experience of the concerned speciality who were not part of the Primary Medical Board. The Secondary Medical Board shall provide its opinion within 48 hours of the case being referred to it.
- The Secondary Medical Board shall ascertain the wishes of the Executor (if he/she is in a position to communicate) or the consent of the person(s) nominated by the Executor regarding the withdrawal or refusal of the treatment as per the instructions giving in the Living Will.

- The hospital shall then convey the decision of the Primary and Secondary Medical Boards and consent of the person(s) named in the Living Will to the Jurisdictional JMFC before giving effect to the decision of withdrawal of medical treatment.
- If the permission to withdraw the medical treatment is denied by the Secondary Medical Board, then the nominated person(s) or treating doctor or hospital staff can approach the High Court by the way of filing a writ petition under Article 226 of the Constitution. After filing of such petition, the Chief Justice of the High Court shall constitute a Division Bench to decide upon grant of approval or refuse the same. The High Court will be free to constitute an independent committee consisting of three doctors from the fields of general medicine, cardiology, neurology, nephrology, psychiatry or oncology with experience in critical care and with overall standing in the medical profession of at least twenty years.
- The High Court may constitute Medical Board in terms of its order to examine the patient (Executor) and submit report about the possibility of acting upon the instructions contained in the Living Will and it shall ascribe reasons specifically keeping in mind the principles of “best interests of the patient”.
- If the Primary Medical Board takes a decision not to follow instruction stated in the Living Will while treating a patient, then the person(s) named may request the hospital to refer the case to the Secondary Medical Board for consideration and appropriate direction on the Living Will.



9. What is the procedure to be followed in case when the patient is terminally ill and has not made a Living Will?

The Hon'ble Court further made it clear in the judgment that in cases where the patient is terminally ill and undergoing prolonged treatment in respect of illness which is incurable or where there is no hope of being cured, the physician may inform the hospital which, in turn, shall constitute a Primary Medical Board in the manner indicated earlier.

The Primary Medical Board shall discuss with the family physician (if any) and the family members and record the minutes of the discussion in writing.

During the discussion, the family members should be informed about the pros and cons of withdrawal or refusal of further medical treatment to the patient.

If family members give consent in writing, then the Primary Medical Board may certify the course of action to be taken, preferably within 48 hours of the case being referred to it.

In the event the Primary Medical Board certifies the option of withdrawal or refusal of further medical treatment, the hospital shall constitute a Secondary Medical Board comprising in the manner indicated above.

The Secondary Medical Board shall conduct the physical examination of the patient and study the medical papers, then concur with the opinion of the Primary Medical Board.

In that event, intimation shall be given by the hospital to the JMFC and the family members of the patient.

Further, if permission to withdraw medical treatment is refused by the Medical Boards, the nominee of the patient or the family member or the treating doctor or the hospital staff can seek permission from the High Court to withdraw life support by way of writ petition under Article 226 of the Constitution.

10. Can the Living Will be withdrawn?

An individual may withdraw or alter the Living Will at any time when he/she has the capacity to do so and by following the same procedure as provided for executing the Living Will. Withdrawal or revocation of a Living Will must be in writing. Similarly, if the Living Will is not clear and ambiguous, the Medical Boards concerned shall not give effect to the same and, in that event, the guidelines meant for patients without Living Will shall be made applicable.

Conclusion :

While the verdict of Hon'ble Supreme Court has outlined detailed guidelines and procedure for passive euthanasia and Living Will, there are many grappling issues which need to be handled. Lack of awareness and readiness of our systems are some of the aspects which need to be worked on.

The lack of our systems is clearly visible from this incident. It was widely reported in newspapers that Dr. Nikhil Datar, a distinguished gynaecologist and judicial activist, formally notarized his own will on February 24, 2023. Despite adhering to the prescribed procedures laid down in the abovementioned landmark judgment the municipal corporation has failed to designate an appropriate custodian for the Living Will, thereby causing a delay in the process. In light of the government authorities' lack of response, Dr. Nikhil Datar has taken the initiative to file a Public Interest Litigation (PIL) in the Bombay High Court, which is currently awaiting a hearing [6].

Difficulties of this nature further aggravate the pain of the victims and their families. A clear law from the legislatures with well-established systems, while incorporating the guidelines is the need of the hour for smooth implementation of this progressive concept.

[6] [HC to address concerns over lack of custodian for Living Wills | Mumbai news - Hindustan Times](#)

For any feedback or response on this article, the author can be reached on charusheela.vispute@ynzgroup.co.in and kedar.gurjar@ynzgroup.co.in



Author: Charusheela Vispute

Charusheela is heading Estate planning and trademark, having specialisation in property and testamentary matters. By qualification she is Bachelor of Arts and Bachelor of Law from Mumbai University.

Co-author: Kedar Gurjar,

Kedar is an Associate at YNZ Legal.

By qualification he is Bachelor of Commerce and Bachelor of Law from G.J. Advani Law college, Bandra, Mumbai University.

