

The Legal Standing of Living Wills as Notarial Deeds in the Indonesian Health Law System: A Study on the Legal Certainty of Refusal of Medical Treatment

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ABSTRACT

A living will is a legal instrument that sets out a person's wishes regarding future medical treatment they wish to receive or refuse once they are no longer legally competent to give consent themselves. Law Number 17 of 2023 on Health regulates informed consent for medical procedures, but does not explicitly regulate the mechanism of an advance directive for future decisions, creating a normative vacuum that risks legal uncertainty for patients, families, and medical personnel. This study aims to examine the legal standing of living wills within the Indonesian health law system and to analyze the extent to which a notarial deed may serve as a valid and binding legal instrument for recording a living will. The research employs a normative juridical method using statutory, conceptual, and comparative approaches. The findings indicate that a notarial deed, given its perfect evidentiary force under Articles 1868 and 1870 of the Indonesian Civil Code, holds considerable potential to strengthen the legal certainty and binding force of a living will compared with the medical consent forms currently used in hospitals. The study recommends a proposed legal construction (*ius constituendum*) that explicitly recognizes the living will in the form of a notarial deed as part of the national health law system.

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1. INTRODUCTION

The development of modern health law places patient autonomy among its foundational principles governing the legal relationship between medical personnel and patients. This principle affirms that every individual has the right to determine which medical actions may or may not be performed on them, including in circumstances where they are no longer able to express their wishes

directly due to coma, dementia, or other terminal illness. The legal instrument commonly used in various jurisdictions to accommodate such situations is the advance directive, which consists of two main components: the living will and the durable power of attorney for healthcare [1].

In Indonesia, Law Number 17 of 2023 on Health has regulated the mechanism of informed consent for medical treatment in a

relatively comprehensive manner, including the strengthening of patient rights and consent mechanisms for legally incompetent patients [1]. However, this Law, as well as its implementing regulations, does not explicitly regulate the mechanism by which a patient may express their wishes for future medical decisions (an advance directive) in the event of a critical or terminal medical condition. This normative vacuum raises a practical problem: families and medical personnel are frequently compelled to make life-and-death medical decisions without any clear legal basis reflecting the wishes of the patient concerned.

On the other hand, a notarial deed, as an authentic instrument of evidence, carries perfect evidentiary force under Articles 1868 and 1870 of the Indonesian Civil Code, as well as Law Number 2 of 2014 on the Amendment of Law Number 30 of 2004 concerning the Position of Notary [2], [3]. This evidentiary force renders the notarial deed a potentially stronger legal instrument for recording a living will than the medical consent forms customarily used in hospitals, the evidentiary force of which is limited to that of a private (non-authentic) document.

Studies examining the intersection between notarial law and health law have so far largely focused on informed consent in the context of medical procedures to be performed immediately, as reflected in prior research [9]. Studies specifically positioning the notarial deed as a legal instrument for a patient's future wishes (a living will) remain very limited in the Indonesian legal literature. A similar normative vacuum has previously been identified in the context of inheritance law, where a notarial deed is used as an instrument affirming a person's wishes regarding their estate for the future [10], providing a conceptual precedent that may be drawn upon by analogy in regulating the living will.

Based on the foregoing, this study aims to examine the legal standing of the living will within the current Indonesian health law system, to analyze the extent to which a notarial deed may serve as a valid and binding legal instrument for the living

will, and to formulate an ideal legal construction capable of providing legal certainty for patients, families, and medical personnel in giving effect to the refusal of future medical treatment.

2. LITERATURE REVIEW

2.1 *The Concept of the Living Will and Patient Autonomy*

A living will is a written document setting out a person's specific instructions regarding the medical treatment they wish to receive or refuse should they become unconscious or medically unable to communicate, including instructions on the use of life support, resuscitation, or artificial nutrition [1]. This concept rests on the principle of autonomy in biomedical ethics, which places respect for the patient's wishes and dignity at the center of medical decision-making, alongside the principles of beneficence, non-maleficence, and justice [13]. This same principle of autonomy also underlies the obligation of informed consent in Indonesian medical practice as regulated under Article 45 of Law Number 29 of 2004 on Medical Practice [5].

2.2 *The Notarial Deed as an Authentic Instrument of Evidence*

A notary is a public official authorized to draw up authentic deeds concerning all acts, agreements, and stipulations required by law, insofar as the drawing up of such deeds is not reserved for other officials [3]. A notarial deed carries three forms of evidentiary force — external, formal, and material — which render it a perfect instrument of evidence before the law [2]. This

authentic character distinguishes a notarial deed from a private document, including the medical consent forms customarily used in health facilities, so that, in theory, the notarial deed carries a stronger binding force for recording a person's wishes, including in the domain of health law [18].

2.3 *The Normative Vacuum in the Regulation of Future Refusal of Medical Treatment*

A normative vacuum (leemten in het recht) occurs when a legal event has not been explicitly regulated by applicable legislation, giving rise to uncertainty in its application [11]. In the context of Indonesian health law, the regulation of informed consent for medical treatment is relatively adequate, yet the regulation of the refusal of future medical treatment (an advance directive) has not been explicitly accommodated in Law Number 17 of 2023 on Health or its implementing regulations [1], [6], [7]. This condition aligns with Gustav Radbruch's conception of legal certainty, which holds that positive law must be able to provide certainty for legal subjects through norms that are clear and predictable in their application [11].

3. METHODS

This study employs a normative juridical method, namely doctrinal legal research examining primary, secondary, and tertiary legal materials [14]. The approaches used include the statutory approach, to examine Law Number 17 of 2023 on Health, the Indonesian Civil Code, and the Law on the Position of Notary; the conceptual approach, to examine the concepts of patient autonomy, legal certainty, and authentic deeds; and the comparative approach, to review the

regulation of advance directives in other jurisdictions as a point of comparison in formulating the proposed ideal legal construction [15]. The legal materials are analyzed qualitatively using a descriptive-prescriptive technique, describing the law as it currently stands (das sein) and comparing it with the law as it ought to stand (das sollen).

4. RESULTS AND DISCUSSION

4.1 *The Standing of the Living Will within the Current Indonesian Health Law System*

The current Indonesian health law system regulates informed consent for medical treatment under Article 56 of Law Number 17 of 2023 on Health, which provides that any medical procedure may only be performed after the patient has given consent based on complete information [1]. This is further reflected in Minister of Health Regulation Number 290/Menkes/Per/III/2008 on Consent to Medical Procedures [6]. However, all of these provisions are oriented toward contemporaneous consent for a procedure about to be performed, rather than toward a patient's expressed wishes regarding future medical treatment once the patient is no longer legally competent. Consequently, when a patient is unconscious without a legally binding statement of their wishes, medical decisions are frequently left entirely to the family or medical personnel, which may not reflect the patient's actual wishes.

4.2 *The Notarial Deed as a Legal Instrument for the Living Will*

Examined against the objective and subjective requirements for an authentic deed under the Law on the Position of Notary, there is no prohibition against a notary drawing up a deed setting out a person's wishes regarding the refusal or acceptance of specific medical treatment in the future, provided the party appearing before the notary is legally competent and expresses their wishes freely and without coercion [3]. The authority of a notary to draw up deeds concerning acts, agreements, and stipulations

desired by an interested party, insofar as not reserved for other officials, opens the possibility of constructing a living-will deed as one of the products of notarial practice [18]. A notarial deed may thus function as a legal instrument that strengthens the certainty and binding force of a patient's wishes, given its perfect evidentiary force, compared with the private medical consent forms currently in use.

4.3 Evidentiary Force and the Binding Effect of the Living Will on Medical Personnel and Families

The perfect evidentiary force of a notarial deed makes a living will recorded in notarial form more difficult to dispute than a private document, thereby offering, in theory, stronger legal protection for both the patient and the medical personnel who carry out that wish [2]. As demonstrated in notarial practice within inheritance law, where a notarial deed is used to affirm a person's wishes regarding their estate for the future and to provide legal certainty for interested parties [10], a similar pattern may be applied within health law to affirm a patient's wishes regarding future medical treatment.

4.4 A Brief Comparison with Regulation in Other Jurisdictions

In the United States, the Patient Self-Determination Act of 1990 requires healthcare facilities receiving federal funding to inform every admitted patient of their right to an advance directive, including a living will [21]. This provision offers a clear legal basis for the binding effect of a living will on medical personnel, while also providing legal certainty for patients and families. This comparison indicates that explicit regulation of the advance directive — whether through health legislation or through a notarial instrument as known in civil law systems

such as Indonesia's — is a step that may be taken to fill the current normative vacuum.

4.5 A Proposed Ideal Legal Construction (Ius Constituendum)

Based on the foregoing analysis, a legal construction is needed that explicitly recognizes the living will in the form of a notarial deed as part of the national health law system. Such a construction may be pursued along two lines: first, adding a provision to the implementing regulations of Law Number 17 of 2023 on Health that explicitly recognizes a notarial deed as a valid form of advance directive; and second, strengthening ethical guidelines and standard operating procedures for notaries in drawing up living-will deeds, given that this type of deed differs from ordinary notarial deeds in that it concerns a deeply personal right over one's own body and life. This construction is consistent with the notion of legal certainty, which requires clear, consistent norms capable of being applied effectively by all legal subjects involved — patients, families, notaries, and medical personnel [11], [12].

5. CONCLUSION

The current Indonesian health law system does not explicitly regulate the living will as an instrument for the refusal of future medical treatment, giving rise to a normative vacuum that risks legal uncertainty for patients, families, and medical personnel. A notarial deed, given its perfect evidentiary force, holds considerable potential to function as a valid and binding legal instrument for the living will, as similarly demonstrated in the field of inheritance law. It is therefore recommended that legislators consider strengthening the legal norms that explicitly recognize the living will in the form of a notarial deed as part of the national health law system, and that the notarial profession's organization develop technical guidelines for drawing up living-will deeds to ensure consistency in their application in practice.

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