ValpoScholar Valparaiso University Law Review

Volume 22
Number 1 *Fall 1987*

*pp.*39-60

Fall 1987

Videotaping Living Wills: Dying Declarations Brought To Life

William R. Buckley

Follow this and additional works at: https://scholar.valpo.edu/vulr

 Part of the Law Commons

Recommended Citation

William R. Buckley, *Videotaping Living Wills: Dying Declarations Brought To Life*, 22 Val. U. L. Rev. 39 (1987).
Available at: https://scholar.valpo.edu/vulr/vol22/iss1/2

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

Valparaiso University

VIDEOTAPING LIVING WILLS: DYING DECLARATIONS BROUGHT TO LIFE

WILLIAM R. BUCKLEY*

Accompanying the technological advancements of the twentieth century has been the debate among legal, medical, and religious scholars as to one's right to choose death when faced with a terminal affliction or "vegetative" condition. Under such circumstances, life-sustaining medical care is available to perpetuate existence, but the prognosis for recovery is virtually hopeless.

In the early 1970s, legislatures and judiciaries began wrestling in earnest with "living wills" in which terminally ill patients authorized their doctors, in the popular vernacular, "to pull the plug" and allow a natural and imminent death without prolonged suffering. The expression "living will" was initially coined by Luis Kutner in 1969.[1] Legal commentators have subsequently generated substantial analyses that elaborate the concept.[2] In

---

* A.B., Indiana University, 1980; J.D., Indiana University, 1983. Partner, Buckley, Buckley, & Buckley, Lafayette, Indiana.

1. Kutner, *Due Process of Euthanasia: The Living Will, A Proposal*, 44 IND. L.J. 539 (1969).

2. *See* PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT: ETHICAL, MEDICAL, AND LEGAL ISSUES IN TREATMENT DECISIONS (1983); J. SMITH, HOSPITAL LIABILITY §§ 13.01-13.04, at 13-1 to 13-45 (1985 & Supp. 1987); Blodgett, *New "Living Wills": Changes in Statutes Sought*, 72 A.B.A. J., Sept. 1986, at 24; Hallagan, *Natural Death Act & Right to Die Legislation*, MED. TRIAL TECH. Q. 301 (1986); Kolb, *Indiana's Living Wills and Life-Prolonging Procedures Act*, 19 IND. L. REV. 285 (1986); Kornreich, *Who Will Decide Whether to Withhold or Withdraw Extraordinary Medical Treatment? The Constitutional Right to a "Living Will,"* 6 PROB. L.J. 33 (1984); Kutner, *The Living Will: Coping with the Historical Event of Death*, 27 BAYLOR L. REV. 39 (1975); Martyn & Jacobs, *Legislating Advance Directives for the Terminally Ill: The Living Will and Durable Power of Attorney*, 63 NEB. L. REV. 779 (1984); Mooney, *Indiana's Living Wills and Life-Prolonging Procedures Act: A Reform Proposal*, 20 IND. L. REV. 539 (1987); Reaves, *Living Wills: Uniform Law Proposal*, 70 A.B.A. J., Dec. 1984, at 29; Simpson, *The Living Will: A Matter of Life & Death*, 125 TR. & EST., April 1986, at 10; Note, *The "Living Will": The Right to Death with Dignity?*, 26 CASE W. RES. L. REV. 485 (1976); Comment, *A Right to Choose Death*, 13 CUMB. L. REV. 117 (1982) [hereinafter Comment, *A Right*]; Note, *In re Living Will*, 5 NOVA L.J. 445 (1981); Comment, *The Living Will: Already a Practical Alternative*, 55 TEX. L. REV. 665 (1977); Comment, *The Right to Die a Natural Death and the Living Will*, 13 TEX. TECH. L. REV. 99 (1982) [hereinafter Comment, *Natural Death*]; Note, *The Right to Die: A Proposal for Natural Death Legislation*, 49 U. CIN. L. REV. 228 (1980); Annotation, *Living Wills: Validity, Construction, and Effect*, 49 A.L.R.4th 812 (1986); AM.

Produced by The Berkeley Electronic Press, 1987

1976 California enacted the first Natural Death Act,[3] and thirty-seven other states and the District of Columbia have followed suit through September, 1987.[4]

Contemporaneous with these developments was a mechanical innovation that remains unapplied to the living will arena. Videotape became widely affordable and available with the appearance of videocassette recorders (VCRs) in the 1970s and the 1980s. Videotaping a person who elects "the right to die" if savaged by an incurable malady seems to be a logical extension in today's age of telecommunications. A video living will truly enables the terminal patient to describe his decisions more directly and intimately than any written statement. The patient's recorded image revitalizes the instruction process for both the family and the physician in the manner closest to actual speech. Despite these expedient characteristics, no statutes empower videotape recordings to function as living wills.

This article will illustrate the benefits of videotaping living wills. Evidentiary considerations, statutory archetypes, and practice pointers shall be suggested. Production criteria and videotape vulnerability will also be discussed.

JUR. 2D, NEW TOPIC SERVICE *Right to Die; Wrongful Life* §§ 1-62 (1979 & Supp. 1987) [hereinafter AM. JUR. 2D, NEW TOPIC SERVICE].

3. CAL. HEALTH & SAFETY CODE §§ 7185-95 (West Supp. 1987).

4. The state living will statutes include: ALA. CODE §§ 22-8A-1 to -10 (1984); ALASKA STAT. §§ 18.12.010 to -.100 (1986); ARIZ. REV. STAT. ANN. §§ 36-3201 to -3210 (1986); ARK. STAT. ANN. §§ 82-3801 to -3804 (Supp. 1985); CAL. HEALTH & SAFETY CODE §§ 7185-95 (West Supp. 1987); COLO. REV. STAT. §§ 15-18-101 to -113 (Supp. 1986); CONN. GEN. STAT. ANN. §§ 19a-570 to -575 (West Supp. 1987); DEL. CODE ANN. tit. 16, §§ 2501-2509 (1983); D.C. CODE ANN. §§ 6-2421 to -2430 (Supp. 1987); FLA. STAT. ANN. §§ 765.01 to -.15 (West Supp. 1986); GA. CODE ANN. §§ 88-4101 to -4112 (Harrison 1986); HAW. REV. STAT. §§ 327D-1 to -27 (Supp. 1986); IDAHO CODE §§ 39-4501 to -4508 (1985 & Supp. 1987); ILL. ANN. STAT. ch. 110-½, para. 701-10 (Smith-Hurd Supp. 1987); IND. CODE §§ 16-8-11-1 to -22 (Supp. 1987); IOWA CODE ANN. §§ 144A.1 to -.11 (West Supp. 1987); KAN. STAT. ANN. §§ 65-28,101 to -28,109 (1986); LA. REV. STAT. ANN. §§ 40:1299.58.1 to -.10 (West Supp. 1987); ME. REV. STAT. ANN. tit. 22, §§ 2921-31 (Supp. 1986); MD. HEALTH-GEN. CODE ANN. §§ 5-601 to -614 (Supp. 1986); MISS. CODE ANN. §§ 41-41-101 to -121 (Supp. 1986); MO. ANN. STAT. §§ 459.010 to -.055 (Vernon Supp. 1987); MONT. CODE ANN. §§ 50-9-101 to -206 (1985); NEV. REV. STAT. §§ 449.540 to -.690 (1986); N.H. REV. STAT. ANN. §§ 137-H:1 to H:16 (Supp. 1986); N.M. STAT. ANN. §§ 24-7-1 to -10 (1986); N.C. GEN. STAT. §§ 90-320 to -323 (1985); OKLA. STAT. ANN. tit. 63, §§ 3101-11 (West Supp. 1987); OR. REV. STAT. §§ 97.050 to -.090 (1984); S.C. CODE ANN. §§ 44-77-10 to -160 (Law. Co-op. Supp. 1986); TENN. CODE ANN. §§ 32-11-101 to -110 (Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1987); UTAH CODE ANN. §§ 75-2-1101 to -1118 (Supp. 1987); VT. STAT. ANN. tit. 18, §§ 5251-62 (Supp. 1986); VA. CODE ANN. §§ 54-325.8:1 to -:12 (Supp. 1987); WASH. REV. CODE ANN. §§ 70.122.010 to -.905 (Supp. 1987); W. VA. CODE §§ 16-30-1 to -10 (1985); WIS. STAT. ANN. §§ 154.01 to -.15 (West Supp. 1986); WYO. STAT. ANN. §§ 33-26-144 to -152 (Supp. 1987).

I. LIVING WILLS DEFINED

A living will is a document in which a legally competent adult indicates her desire to forego or conclude life-sustaining medical treatment in the event she becomes incapacitated by a terminal ailment.[5] The instrument typically becomes operative only upon (1) the development of an incurable or irreversible condition demanding life-sustaining care without which death would, in the physician's expert opinion, promptly and ultimately result;[6] (2) the preparation of a written and duly executed living will; (3) the communication of such a declaration to the patient's attending physician;[7] and (4) the physician's "qualification" that the patient suffered a terminal

---

5. A. BUCKLEY, INDIANA LAW & E.M.S. 109 (1985); J. SMITH, *supra* note 2, § 13.04, at 13-37; Kutner, *supra* note 1, at 551; Annotation, *supra* note 2 at 813; AM. JUR. 2D, NEW TOPIC SERVICE, *supra* note 2, at § 32 (1979).

6. ALA. CODE §§ 22-8A-3(6), -4 (1984); ALASKA STAT. §§ 18.12.010, -.100(7) (1986); ARIZ. REV. STAT. ANN. §§ 36-3201 to -3202 (1986); CAL. HEALTH & SAFETY CODE §§ 7187(f), 7188 (West Supp. 1987); COLO. REV. STAT. §§ 15-18-103(10), -104 (Supp. 1986); CONN. GEN. STAT. §§ 19a-570(3), -571 (West Supp. 1987); DEL. CODE ANN. tit. 16, §§ 2501(e), 2502-03 (1983); D.C. CODE ANN. §§ 6-2421(6), 6-2422(a) (West Supp. 1987); FLA. STAT. ANN. §§ 765.03(6), 765.04(1) (West Supp. 1986); HAW. REV. STAT. §§ 327D-3 (Supp. 1986); IDAHO CODE §§ 39-4503(3), -4504 (Supp. 1987); ILL. ANN. STAT. ch. 110-½, para. 701-02(f) (Smith-Hurd Supp. 1987); IND. CODE §§ 16-8-11-8, -9, -14 (Supp. 1987); IOWA CODE ANN. §§ 144A.2(8), 144A.3 (West Supp. 1987); LA. REV. STAT. ANN. §§ 40:1299.58.2(8), 1299.58.3(A)(1) (West Supp. 1987); ME. REV. STAT. ANN. tit. 22, §§ 2921(8), 2922(3)(B) (Supp. 1986); MD. HEALTH-GEN. CODE ANN. §§ 5-601(f), -(g) (Supp. 1986); MO. ANN. STAT. §§ 459.010(6), 459.025 (Vernon Supp. 1987); MONT. CODE ANN. §§ 50-9-102(7), -103(1) (1985); NEV. REV. STAT. §§ 449.590, -.600 (1986); N.H. REV. STAT. ANN. §§ 137-H:2(VI), -H:3 (Supp. 1986); N.M. STAT. ANN. §§ 24-7-2(F), -3 (1986); OKLA. STAT. ANN. tit. 63, §§ 3102(8), 3103 (West Supp. 1987); S.C. CODE ANN. §§ 44-77-20(d), -30 (Law. Co-op. Supp. 1986); TENN. CODE ANN. §§ 32-11-103(8), -(9) (Supp. 1986); UNIF. RIGHTS OF TERMINALLY ILL ACT §§ 1(9), 3, 9A U.L.A. 506, 509 (Supp. 1987); VT. STAT. ANN. tit. 18, §§ 5252(5), 5253 (Supp. 1986); VA. CODE ANN. §§ 54-325.8:2, -:3 (Supp. 1987); WASH. REV. CODE ANN. §§ 70.122.020(7), -.030 (Supp. 1987); WIS. STAT. ANN. § 154.01(8), 154.03 (West Supp. 1986).

7. ALA. CODE. § 22-8A-4(b) (1984); ALASKA STAT. § 18.12.010(b) (1986); ARIZ. REV. STAT. ANN. § 36-3202(B) (1986); COLO. REV. STAT. § 15-18-104(1) (Supp. 1986); CONN. GEN. STAT. § 19a-571 (West Supp. 1987); D.C. CODE ANN. § 6-2422(b) (Supp. 1987); FLA. STAT. ANN. § 765.04(2) (West Supp. 1986); HAW. REV. STAT. § 327D-8 (Supp. 1986); ILL. ANN. STAT. ch. 110-½, para. 703(d) (Smith-Hurd Supp. 1987); IND. CODE § 16-8-11-11(e) (Supp. 1987); IOWA CODE ANN. § 144A.3(2) (West Supp. 1987); LA. REV. STAT. ANN. § 40:1299:58.3(B)(1) (West Supp. 1987); ME. REV. STAT. ANN. tit. 22, § 2922(3)(A) (Supp. 1986); MD. HEALTH-GEN. CODE ANN. § 5-602(b) (Supp. 1986); MISS. CODE ANN. § 41-41-115(1) (Supp. 1986); MO. ANN. STAT. § 459.015(2) (Vernon Supp. 1987); MONT. CODE ANN. § 50-9-103(2) (1987); N.H. REV. STAT. ANN. § 137-H:5 (Supp. 1986); TENN. CODE ANN. § 32-11-104(b) (Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1987); UNIF. RIGHTS OF TERMINALLY ILL ACT § 3, 9A U.L.A. 509 (Supp. 1987); UTAH CODE ANN. § 75-2-1110 (Supp. 1987); VT. STAT. ANN. tit. 18, § 5256 (Supp. 1986); VA. CODE ANN. § 54-325.8:3 (Supp. 1987); W. VA. CODE § 16-30-3(c) (1985); WIS. STAT. ANN. § 154.03(1) (West Supp. 1986).

illness and is presently unable to render treatment decisions.[8] Copies of the writing usually must be incorporated into the declarant's medical record.[9] Prior judicial approval is generally unnecessary to implement a living will.[10] The substantive ingredients of a living will differ between the states; consequently the legal ramifications vary among jurisdictions. One universal provision in all current legislation demands that all valid living wills must be in writing. Thus, under current state laws, a videotape of a declarant indicating her wishes to withdraw or withhold life-sustaining medical care would merely serve as ordinary evidence of the patient's intent. Such video recordings would not be accepted as independent living wills.

For the majority of clients, an ordinary written living will will suffice. In certain cases, however, videotape could be a valuable evidentiary supplement. Occasionally, a client opting for "the right to die" will be vehemently

---

8. ALA. CODE § 22-8A-6 (1984); ALASKA STAT. §§ 18.12.030, -.100(6) (1986); ARIZ. REV. STAT. ANN. § 36-3204(A) (1986); COLO. REV. STAT. § 15-18-107 (Supp. 1986); CONN. GEN. STAT. § 19a-571 (West Supp. 1987); D.C. CODE ANN. § 6-2425 (Supp. 1987); FLA. STAT. ANN. §§ 765.03(5), 765.07(1) (West Supp. 1986); HAW. REV. STAT. § 327D-10 (Supp. 1986); ILL. ANN. STAT. ch. 110-½, para. 706(a) (Smith-Hurd Supp. 1987); IND. CODE § 16-8-11-14(a) (Supp. 1987); IOWA CODE ANN. § 144A.5 (West Supp. 1987); LA. REV. STAT. ANN. § 40:1299.58.7(A) (West Supp. 1987); ME. REV. STAT. ANN. tit. 22, § 2922(3)(B), (C) (Supp. 1986); MD. HEALTH-GEN. CODE ANN. § 5-604(a) (Supp. 1986); MISS. CODE ANN. § 41-41-113 (Supp. 1986); MO. ANN. STAT. § 459.025 (Vernon Supp. 1987); MONT. CODE ANN. § 50-9-102(6) (1987); N.H. REV. STAT. ANN. §§ 137-H:2(V), -H:6(I) (Supp. 1986); N.M. STAT. ANN. § 24-7-5 (1986); N.C. GEN. STAT. § 90-321(b)(1) (1985); OKLA STAT. ANN. tit. 63, § 3107 (Supp. 1987); OR. REV. STAT. § 97.083 (1984); S.C. CODE ANN. § 44-77-30 (Law. Co-op. Supp. 1986); UNIF. RIGHTS OF TERMINALLY ILL ACT § 3, 9A U.L.A. 509 (Supp. 1987); VA. CODE ANN. § 54-325.8:2 (Supp. 1987); WASH. REV. CODE ANN. § 70.122.030(2) (Supp. 1987); W. VA. CODE § 16-30-5(a) (1985).

9. ALA. CODE § 22-8A-4(b) (1984); ALASKA STAT. § 18.12.010(b) (1986); ARIZ. REV. STAT. ANN. § 36-3202(B) (1986); COLO REV. STAT. § 15-18-104(1) (Supp. 1986); CONN. GEN. STAT. § 19a-571 (West Supp. 1987); D.C. CODE ANN. § 6-2422(b) (Supp. 1987); FLA. STAT. ANN. § 765.04(2) (West Supp. 1986); HAW. REV. STAT. § 327D-8 (Supp. 1986); ILL. ANN. STAT. ch. 110-½, para. 703(d) (Smith-Hurd Supp. 1987); IND. CODE § 16-8-11-11(e) (Supp. 1987); IOWA CODE ANN. § 144A.3(2) (West Supp. 1987); LA. REV. STAT. ANN. § 40:1299.58.3(3) (West Supp. 1987); ME. REV. STAT. ANN. tit. 22, § 2922(2) (Supp. 1986); MD. HEALTH-GEN. CODE ANN. § 5-602(b) (Supp. 1986); MISS. CODE ANN. § 41-41-115(1) (Supp. 1986); MO. ANN. STAT. § 459.015(2) (Vernon Supp. 1987); MONT. CODE ANN. § 50-9-103(2) (1987); NEV. REV. STAT. § 449.610 (1986); N.H. REV. STAT. ANN. § 137-H:5 (Supp. 1986); OR. REV. STAT. § 97.070(2)(a) (1984); TENN. CODE ANN. § 32-11-104(b) (Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1987); UNIF. RIGHTS OF TERMINALLY ILL ACT § 2(c), 9B U.L.A. 614 (1987); UTAH CODE ANN. § 75-2-1110 (Supp. 1987); VT. STAT. ANN. tit. 18, § 5256 (Supp. 1986); VA. CODE ANN. §§ 54-325.8:3 (Supp. 1987); WASH. REV. CODE ANN. § 70.122.030(2) (Supp. 1987); W. VA. CODE § 16-30-3(c) (1985); WIS. STAT. ANN. § 154.03(1) (West Supp. 1987).

10. For the common law basis for this principle, see, e.g., John F. Kennedy Memorial Hosp., Inc. v. Bludworth, 452 So. 2d 921 (Fla. 1984). *Cf.*, A.B. v. C., 124 Misc. 2d 672, 477 N.Y.S.2d 281 (1984) (dictum) (guardian could seek judicial approval to enforce incompetent patient's living will). A.B. v. C. involved a written living will in which the declarant also had prepared a videotape recording. *Id.*

opposed by family members who wish to countermand the living will. In a flurry of motions, an attorney for these relatives will seek injunctive relief until a hearing can be held to determine the validity of the document. The declarant's state of mind, intent, and execution of the instrument will be challenged. For the incurably ill patient who truly desires life-sustaining treatment to be withdrawn, the living will must promptly quash such attacks. A videotape recording showing the declarant reciting the living will and executing the will provides compelling evidentiary ammunition.

II. A VIDEO LIVING WILL PROTOTYPE

Once a client determines that a videotape is desirable, counsel should prepare a *written* living will in the form endorsed by statute. A recording session should be scheduled "in the field" or at the production facilities. Healthy clients may elect to record in their homes or, alternatively, at the video firm or the attorney's offices. Hospitalized patients will necessarily require on-site filming, and this presents administrative complications such as securing advance permission to videotape inside the hospital. Appropriate video equipment must be obtained for the particular recording location. During the filming, the declarant, the required witnesses, the attorney, and, if practical, the physician should be present. For recordings in advance of illness, the family physician is the suitable medical professional. At the hospital, the attending physician should participate. Once the camera begins "rolling," the individual making the medical treatment declaration should introduce herself and the others present, explain in detail the purpose of the videotaping, specify any particular decisions regarding medical care, and recite the written living will. If the declarant is hindered by her affliction and cannot deliver such lengthy speeches, a "designated speaker" may conduct the recitation and prefatory remarks. The declarant then should request the witnesses' signatures, and declarant and witnesses should converse to demonstrate that the document is intended to operate as a living will and that each person is signing as a voluntary action. The lawyer may wish to orchestrate this discussion to guarantee performance of any legal precepts. The writing should then be executed with careful attention to the procedures required under state law. The execution of the instrument should be painstakingly filmed to document statutory compliance. After recording has been completed, copies of the videocassette should be made for the patient, the physician (to be included in the patient's medical record), the attorney, the video company, the family, or as otherwise advised.

Depending upon the evidentiary rules of each jurisdiction, camera operators or other video production personnel may need to execute affidavits attesting that (1) the video equipment was capable of recording at the time of the session and operated satisfactorily, (2) the operator was competent, (3) the videotaping was voluntary and/or at the request of the declarant,

Produced by The Berkeley Electronic Press, 1987

and (4) the activities recorded are a true and accurate representation of the events as they actually transpired.[11]

III. FUNCTIONS OF THE LIVING WILL AND THE SUPERIORITY OF VIDEOTAPE

As a mechanism to implement one's "right to die," living wills effectuate the declarant's constitutionally protected right of self-determination and autonomy over personal medical treatment decisions.[12] Courts have frequently held that these constitutional interests stem from privacy[13] or the free exercise of religion.[14] In addition, a living will allows the terminally ill

---

11. *See infra* note 28 and accompanying text. For a sample operator's certification document, as used for videotaped depositions, see Michael J. Tabas, How to Conduct a Videotape Deposition, Supplemental Materials, Lectures before the Seminar on Videotaping Legal Proceedings, National Network of Legal Video Companies, Inc., New York City, New York, July 11, 1987.

12. Roe v. Wade, 410 U.S. 113 (1973); Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891); Bartling v. Superior Court, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984); Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980); *In re* Spring, 380 Mass. 629, 405 N.E.2d 115 (1980); *In re* Brown, 478 So. 2d 1033 (Miss. 1985); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.*, Garger v. N.J., 429 U.S. 922 (1976); Suenram v. Society of Valley Hosp., 155 N.J. Super. 593, 383 A.2d 143 (1977); Scholendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914); *In re* Melideo, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (1976); A. BUCKLEY, *supra* note 5, at 109; J. SMITH, *supra* note 2, § 13.01, at 13-3 to -4; Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 236 (1973); Comment, *A Right*, *supra* note 2, at 118-19.

Bartling involved a patient wishing to be disconnected from a ventilator. The declarant had executed a durable power of attorney as well as a videotaped deposition which was admitted into the record during enforcement proceedings. *See* Bartling v. Superior Court, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984).

13. Roe v. Wade, 410 U.S. 113 (1973); *In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1016-17 (D.C. Cir. 1964) (Burger, J., dissenting), *cert. denied*, 377 U.S. 978 (1964); Severns v. Wilmington Medical Center, Inc., 421 A.2d 1334 (Del. 1980); *In re* Spring, 380 Mass. 629, 405 N.E.2d 115 (1980); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); Lane v. Candura, 6 Mass. App. 377, 376 N.E.2d 1232 (1978); *In re* Brown, 478 So. 2d 1033 (Miss. 1985); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (1978); Suenram v. Society of Valley Hosp, 155 N.J. Super. 593, 383 A.2d 143 (1977); *In re* Yetter, 62 Pa. D. & C.2d 619 (C.P. Northampton County Ct. 1973); J. SMITH, *supra* note 2, § 13.01, at 13-5 to -8; Borst, *The Right to Die: An Extension of the Right to Privacy*, 18 J. MARSHALL L. REV. 895 (1985); Comment, *A Right*, *supra* note 2, at 120-24; Comment, *Natural Death*, *supra* note 2, at 101-09; AM. JUR. 2D, NEW TOPIC SERVICE, *supra* note 2, at §§ 10-11 (1979 & Supp. 1987), *Cf.*, Foster v. Tourtellotte, 704 F.2d 1109 (9th Cir. 1983) (dictum) (questioning right of privacy to refuse life-saving treatment).

14. Holmes v. Silver Cross Hosp., 340 F. Supp. 125 (N.D. Ill. 1972); Montgomery v. Bd. of Retirement of Kern County Employees Retirement Ass'n, 33 Cal. App. 3d 447, 109 Cal. Rptr. 181 (1973); *In re* Osborne, 294 A.2d 372 (D.C. App. 1972); St. Mary's Hosp. v. Ramsey, 465 So. 2d 666 (Fla. App. 1985); *In re* Brooks' Estate, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); Mercy Hosp., Inc. v. Jackson, 62 Md. App. 409, 489 A.2d 1130 (1984); *In re*

patient to indicate lucidly her wishes against the continuation of life-sustaining treatment should the patient become incapable of communicating overtly. The instrument establishes a permanent record from which the health care provider and family may clearly ascertain the patient's desires. Having a properly executed writing minimizes the risk that thoughtful relatives, with the best of intentions, will prevent disconnection of life-support systems and preclude consummation of the declarant's desires. A duly executed document also protects against fraudulent attempts by dispassionate relations to euthanize an afflicted relative prematurely in order to reap estate benefits or avoid crippling medical expenses.

By providing a uniform statutory procedure for documenting and implementing a living will, the potential liability of the health care provider or another involved party is limited. Physicians are less hesitant to terminate life-sustaining care if the legislature has shielded them from culpability when acting in good faith to comply with a dying patient's orders. As a consequence, medical liability insurance premiums should be lower, and, to some degree, the cost of medical care should be relieved.

A *videotaped* version of the living will also accomplishes these objectives. The terminally ill individual is afforded the opportunity to decide her own destiny. Her wishes are explicitly expressed on an accessible record available to the hospital, to relatives, and to judges for confirmation. As long as one complies with the pertinent law, and the jurisdiction has a provision limiting liability for good faith performance, any living will, whether on paper or magnetic tape, will insulate the medical profession or other participants from culpability. Videotape actually furnishes a superlative defense for the doctor involved. Significantly, the visual document provides more definitive evidence that the physician acted upon express instructions when deciding to cease life-sustaining measures.

The videotaped living will offers special advantages. The video recording supplies a *visual nexus* between the declarant and the document so that intentions are crystallized and mental competency is undeniably demonstrated. With videotape, the terminal individual literally addresses the physician, her family, and—if necessary—the court, even after personal communication becomes impossible. A written declaration simply states a disembodied desire to end treatment. The videotape "revives" the patient and her recommendations. Furthermore, there can be little question as to proper execution of the written living will if the events are video recorded. Also, videotaped living wills render fraud virtually unachievable at least in the instance of counterfeit substitutes. Bogus living wills with wishes con-

---

Brown, 478 So. 2d 1033 (Miss. 1985); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962) (common law rule); *In re* Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955); *In re* Melideo, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (1976).

Produced by The Berkeley Electronic Press, 1987

trary to the patient's cannot survive the compelling testimony of the actual declarant "on camera."

IV. WRINKLES IN THE VIDEO APPROACH

The introduction of videotape into the living will formula could result in Hollywood-style productions saturated with pathos and emotional inflections. Frequently, plaintiffs in personal injury cases who employ video recordings of "days-in-the-life," depositions of medical experts, or accident reconstructions cast the presentations in heavy emotionalism to manipulate juries or inflate settlement prospects. In the living wills context, a videotape could display an exaggerated scenario of the pathetic, agonizing patient, helpless against the inevitable consequences of her deteriorating condition, who attempts to avoid a hellish continuation of misery through a last, gallant quest for dignity. Out come the handkerchiefs!

It is certainly natural for any intelligent person to suspect the values of anything which appears on a television, but it is improbable that videotapes of dying declarants would be doctored to reflect melodrama. The introduction of videotape into living wills does not alter the fundamental objective sought by such statements: the clarification, in a legally enforceable form, of a person's hope to preclude an existence which merely prolongs an incurable disease and the appurtenant discomforts. There are no multi-million dollar recoveries hanging in the balance as is true with many personal injury cases. The living will can normally be activated without prior judicial approval,[15] so there often is no trier-of-fact to influence. Since the living will contemplates extremely unpleasant circumstances, it would seem ridiculous to heighten the grief and sadness of the declarant, her family and friends by engaging in a videotaped gesture of tasteless theatrics.

A related issue focuses upon the question of dignity. Why would a terminally ill individual wish to appear on videotape in a degenerating physical condition? For some, the opportunity to record their living, breathing image beyond death will be a temptation to their egos. Admittedly, the video recording could be something of a keepsake through which surviving relatives could remember the declarant, but it is difficult to leave such a message while on one's deathbed. For those sensitive to such considerations, it would be wise to videotape a living will while still healthy. However, many people do not execute such documents until the situation has become critical. Ultimately, videotape is not appropriate for everyone, but that should not altogether disqualify its use.

Revocation poses another query. If a person prepares and executes a valid living will, but later chooses to rescind the document, many statutes

15. *See supra* note 10 and accompanying text.

establish a cancellation procedure. In most states, abrogation is accomplished in three ways: (a) physical destruction of the living will; (b) communication of the patient's repudiation to the attending physician; or (c) insertion of the countermand in the patient's medical record.[16] Under some laws, revocation may be achieved through any manner that clearly delineates the intention.[17]

Assume that videotaped living wills are valid under any state law. At first glance, the video instrument may seem difficult to revoke, but a videotaped living will may be annihilated just as easily as its paper counterpart. Similarly, the declarant need only execute a new writing or videotape that cancels the original video living will. Repudiation by extermination or a superseding document are not barriers to video use.

One major obstacle to videotaped living wills is the requirement to include these documents in the patient's medical records. Hospitals usually file a written living will along with the declarant's charts, physician's reports, and medication lists in a binder headed for an obscure file cabinet. A videocassette cannot be filed so easily. Hospitals would have to create a special storage facility for video recordings, and many hospitals do not have special locations to house magnetic media. Some hospitals might not even possess VCRs with which to view the tapes, although recorders are easy and inexpensive to rent. Perhaps the solution to the filing problem would be a statutory precept that a *transcription* of the videotape be incorporated in the medical records. This written duplicate would be an additional safeguard in the event that the videocassette was damaged.

Another obvious barrier to videotaped living wills is the execution mandate. For centuries, signatures on paper have infused an elevated air of authenticity to contracts, wills, and negotiable instruments. Undoubtedly,

---

16. ALA. CODE § 22-8A-5 (1984); ARIZ. REV. STAT. ANN. § 36-3203 (1986); CAL. HEALTH & SAFETY CODE § 7189 (West Supp. 1987); COLO. REV. STAT. § 15-18-109 (Supp. 1986); DEL. CODE ANN. tit. 16, § 2504 (1983); D.C. CODE ANN. § 6-2424 (Supp. 1987); FLA. STAT. ANN. § 765.06 (West Supp. 1986); HAW. REV. STAT. § 327D-12 (Supp. 1986); IDAHO CODE § 39-4505 (1985); ILL. ANN. STAT. ch. 110-½, para. 705 (Smith-Hurd Supp. 1987); IND. CODE § 16-8-11-13 (Supp. 1987); LA. REV. STAT. ANN. § 40:1299.58.4 (West Supp. 1987); MD. HEALTH-GEN. CODE ANN. § 5-603 (Supp. 1986); NEV. REV. STAT. § 449.620 (1986); N.H. REV. STAT. ANN. § 137-H:7 (Supp. 1986); N.M. STAT. ANN. § 24-7-6(A) (1986); OKLA. STAT. ANN. tit. 63, § 3104 (West Supp. 1987); OR. REV. STAT. § 97.055(5) (1984); S.C. CODE ANN. § 44-77-80 (Law. Co-op. Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 4590h, § 4 (Vernon Supp. 1987); UTAH CODE ANN. § 75-2-1111(1) (Supp. 1987); VT. STAT. ANN. tit. 18, § 5257 (Supp. 1986); VA. CODE ANN. § 54-325.8:5 (Supp. 1987); WASH. REV. CODE ANN. § 70.122.040 (Supp. 1987); W. VA. CODE § 16-30-4 (1985); WIS. STAT. ANN. § 154.05 (West Supp. 1986).

17. ALASKA STAT. § 18.12.020 (1986); IOWA CODE ANN. § 144A.4(1) (West Supp. 1987); ME. REV. STAT. ANN. tit. 22, § 2923(1) (Supp. 1986); MO. ANN. STAT. § 459.020 (Vernon Supp. 1987); MONT. CODE ANN. § 50-9-104 (1987); UNIF. RIGHTS OF TERMINALLY ILL ACT § 4, 9B U.L.A. 616 (1987).

Produced by The Berkeley Electronic Press, 1987

state legislatures enacting videotape living will resolutions would still demand a written execution provision requiring signatures by the declarant and the witnesses. The question answers itself: merely require that a sworn execution affidavit accompanies the videotape instrument.

Generally, videotape recordings are considered to be photographs under evidentiary rules.[18] Under some state provisions, however, videotape could conceivably be construed as a writing.[19] Indeed, courts have occasionally classified audio recordings and motion pictures as writings.[20] In the majority of instances, however, audio and videotape recordings will fail to satisfy the traditional writing requirement in the minds of virtually every judge or legal scholar.[21]

V. EVIDENTIARY ELEMENTS

Courts have admitted videotape in criminal proceedings as evidence of defendants' confessions,[22] police "sting" operations,[23] line-ups,[24] and crime

---

18. *See, e.g.*, FED. R. EVID. 1001(2); ALASKA R. EVID. 1001(2); ARIZ. R. EVID. 1001(2); ARK. R. EVID. 1001(2); COLO R. EVID. 1001(2); DEL. R. EVID. 1001(2); FLA. STAT. ANN. § 90.951(2) (West 1979); HAW. R. EVID. 1001(2); IDAHO R. EVID. 1001(2); IOWA R. EVID. 1001(2); ME. R. EVID. 1001(2); MICH. R. EVID. 1001(2); MINN. R. EVID. 1001(2); MISS. R. EVID. 1001(2); MONT. R. EVID. 1001(2); N.H. R. EVID. 1001(2); N.M. R. EVID. 1001(2); N.C. R. EVID. 1001(2); N.D. R. EVID. 1001(2); OHIO R. EVID. 1001(2); TEX. R. EVID. 1001(2); TEX. R. CRIM. EVID. 1001(2); UTAH R. EVID. 1001(2); VT. R. EVID. 1001(2); WASH. R. EVID. 1001(2); W. VA. R. EVID. 1001(2); WYO. R. EVID. 1001(2). The Federal Rules also contain the following definition: " 'Writings' and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by . . . photographing, magnetic impulse, mechanical or electronic recording, . . . " FED. R. EVID. 1001(1). The Uniform Rules of Evidence, Rule 1(13), employs essentially identical language. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 70 n.22 (E. Cleary 2d ed. Supp. 1978) [hereinafter MCCORMICK'S LAW OF EVIDENCE].

19. *See, e.g.*, CAL. EVID. CODE § 250 (West 1966) (writings include "every . . . means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.").

20. *See, e.g.*, Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) (motion pictures); People v. Purify, 43 Ill. 2d 351, 253 N.E.2d 437 (1969) (audio recording); State v. Beach, 304 Minn. 302, 231 N.W.2d 75 (1975) (audio recording). *Contra*, *In re* Estate of Reed, 672 P.2d 829 (Wyo. 1983).

21. *See, e.g.*, Howard v. State, 264 Ind. 275, 342 N.E.2d 604 (1976); Commonwealth v. Balukonis, 357 Mass. 721, 260 N.E.2d 167 (1970).

22. *See, e.g.*, Hendricks v. Swenson, 456 F.2d 503 (8th Cir. 1972); Smith v. State, 272 Ind. 328, 397 N.E.2d 959 (1979); People v. Higgins, 89 Misc. 2d 913, 392 N.Y.S.2d 800 (1977); G. JOSEPH, MODERN VISUAL EVIDENCE § 5.05, at 5-23 to -26 (1984 & Supp. 1987). Joseph is the Wigmore or Williston of video law, and his is the definitive treatise on legal applications of videotape.

23. *See, e.g.*, Allen v. State, 146 Ga. App. 815, 247 S.E.2d 540 (1978); Gross v. State, 444 N.E.2d 296 (Ind. 1983); State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980), *cert. denied and appeal dismissed*, 301 N.C. 724, 276 S.E.2d 285 (1981); G. JOSEPH, *supra* note 22, § 5.04, at 5-15 to -22.

scenes.[25] Entire criminal and civil trials have been video recorded.[26] Videotape depositions,[27] wills,[28] "day-in-the-life" documentaries,[29] and accident

---

24. *See, e.g.*, Bruce v. State, 268 Ind. 180, 375 N.E.2d 1042, *cert. denied*, 439 U.S. 988 (1978); People v. Heading, 39 Mich. App. 126, 197 N.W.2d 325 (1972).

25. *See, e.g.*, People v. Mines, 132 Ill. App. 2d 628, 270 N.E.2d 265 (1971); State v. Thurman, 84 N.M. 5, 498 P.2d 697 (Ct. App. 1972); G. JOSEPH, *supra* note 22, § 5.03, at 5-11 to -14.

26. G. JOSEPH, *supra* note 22, § 3.04, at 3-27 to -33; McCrystal & Maschari, *Will Electronic Technology Take the Witness Stand?*, 11 U. TOL. L. REV. 239 (1980); McCrystal, *The Videotaped Trial Comes of Age*, 57 JUDICATURE 446, 446 (1974); McCrystal & Young, *Pre-Recorded Videotape Trials — An Ohio Innovation*, 39 BROOKLYN L. REV. 560 (1973).

27. *See, e.g.*, Lucien v. McLennand, 95 F.R.D. 525 (N.D. Ill. 1982); Mills v. Dortch, 142 N.J. Super. 410, 361 A.2d 606 (1976); FED. R. CIV. P. 30(b)(4); FED. R. CRIM. P. 15(a); IND. R. TR. P. 30(B)(4); UNIF. AUDIO-VISUAL DEPOSITION ACT §§ 1-10, 12 U.L.A. 9-15 (Supp. 1987); G. JOSEPH, *supra* note 22, §§ 1.03[3], 2.01-3.07, 5.09[2], at 1-11 to -12, 2-1 to 3-39, 5-41 to -44; Murray, *Videotaped Depositions: Putting Absent Witnesses in Court*, 68 A.B.A. J. 1402 (1982); Annotation, *Use of Videotape to Take Deposition for Presentation at Civil Trial in State Court*, 66 A.L.R.3d 637 (1975); Annotation, *Admissibility of Videotape Film in Evidence in Criminal Trial*, 60 A.L.R.3d 333 (1974); Annotation, *Recording of Testimony at Deposition by Other Than Stenographic Means Under Rule 30(b)(4) of Federal Rules of Civil Procedure*, 16 A.L.R. FED. 969 (1973).

28. *See, e.g.*, IND. CODE § 29-1-5-3(d) (Supp. 1987); N.J. Ass. Res. 3030 (Sept. 11, 1986); Beyer, *Videotaping the Will Execution Ceremony — Preventing Frustration of the Testator's Final Wishes*, 15 ST. MARY'S L.J. 1 (1983); Buckley, *Devising Videotaped Will Statutes: A Primer*, 13 BARRISTER 37 (Spring 1986); Buckley & Buckley, *Videotaped Wills*, 89 CASE & COM. 3 (Nov.-Dec. 1984); Buckley, *Videotaped Will Statutes: The Indiana Experiment, and Other Model Provisions*, 2 IN FOCUS, Fall 1986, at 19; Buckley & Buckley, *Videotaping Wills: A New Frontier in Estate Planning*, 11 OHIO N.U.L. REV. 271 (1984) [hereinafter Buckley & Buckley, *Videotaping Wills*]; Buckley, *Indiana's New Videotaped Wills Statute: Launching Probate into the 21st Century*, 20 VAL. U.L. REV. 83 (1985); Nash, *A Videowill: Safe and Sure*, 70 A.B.A. J., Oct. 1984, at 87; Nash, *The Videotape as a Will: Valid and Valuable*, 1 IN FOCUS, Summer 1985, at 3.

New York, like most states, has a statute which provides an out-of-court procedure to "self-prove" a written will without direct testimony of the witnesses. To corroborate the will by affidavit, witnesses may identify "a court-certified *photographic reproduction* of the will." N.Y. S.P.C.A. LAW § 1406(2) (McKinney 1967) (emphasis added). The photographic reproduction is deemed an original for purposes of witness verification. *Id.* This law is designed to accommodate the use of photostatic copies of wills so that witnesses need not travel to the courthouse to authenticate the original registered will. However, one could contend that, under this statute, a court-certified *videotape* copy could be shown to witnesses to "self-prove" the written will.

29. *See, e.g.*, Grimes v. Employers Mut. Liab. Ins. Co. of Wis., 73 F.R.D. 607, 609 (D. Alaska 1977); Pisel v. Stamford Hosp., 180 Conn. 314, 430 A.2d 1 (1980); Heller, Buchanan & Bos, *Using Videotape to Effectively Prepare and Present Your Case*, in LITIGATION AND ADMINISTRATIVE PRACTICE SERIES, VIDEO TECHNIQUES IN TRIAL AND PRETRIAL 7, 13-15 (F. Heller ed. 1983); Heller, Buchanan & Bos, *Admissability Requirements of Videotape*, in LITIGATION AND ADMINISTRATIVE PRACTICE SERIES, VIDEO TECHNIQUES IN TRIAL AND PRETRIAL, *supra*, at 17, 21; G. JOSEPH, *supra* note 22, § 4.06, at 4-40 to -42; Dombroff, *Videotape Evidence: Day in the Life Presentations*, 14 THE BRIEF No. 4 (1985), *reprinted in* 2 IN FOCUS, Fall 1986, at 5.

Produced by The Berkeley Electronic Press, 1987

scenes[30] have been awarded statutory and judicial endorsement. Videotape is certainly no stranger to the courtroom.

Videotape is admissible into evidence under common law principles comparable to audio recordings, motion pictures, or photographs.[31] Like these predecessors, videotape will be admitted into evidence if relevant, and some courts require a showing that (1) the videotape recorder was capable of recording testimony; (2) the video machine operator was competent; (3) the recording had not been altered; (4) the videotape was appropriately preserved; (5) the recording was both visually and audibly clear so as not to be unintelligible or misleading; (6) the testimony was voluntary; and (7) the speakers on the videotape can be identified.[32]

If introduced as demonstrative evidence, the video recording must be authenticated by a "live" witness on the stand,[33] and it must be a true and

---

30. Heller, Buchanan & Bos, *Admissability Requirements of Videotape*, in LITIGATION AND ADMINISTRATIVE PRACTICE SERIES, VIDEO TECHNIQUES IN TRIAL AND PRETRIAL, *supra* note 29, at 25-28; G. JOSEPH, *supra* note 22, § 4.04[1], at 4-28 to -29.

31. Pisel v. Stamford Hosp., 180 Conn. 314, 430 A.2d 1 (1980); Paramore v. State, 229 So. 2d 855 (Fla. 1969), *vacated on other grounds and remanded*, 408 U.S. 935 (1972); State v. Needs, 99 Idaho 883, 591 P.2d 130 (1979); Pratt v. State, 39 Md. App. 442, 387 A.2d 779 (1978); People v. Heading, 30 Mich. App. 126, 197 N.W.2d 325, 329 (1972); State v. Lusk, 452 S.W.2d 219, 224 (Mo. 1970); State v. Thurman, 84 N.M. 5, 498 P.2d 697 (Ct. App. 1972); Williams v. State, 542 P.2d 554 (Okla. 1975); Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979); State v. Newman, 4 Wash. App. 588, 484 P.2d 473 (1971); G. JOSEPH, *supra* note 22, § 4.02[1], at 4-3; Merlo & Sorenson, *Video Tape: The Coming Courtroom Tool*, 7 TRIAL, Nov./Dec. 1971, at 56; Annotation, *Admissibility of Videotape Film in Evidence in Criminal Trial*, 60 A.L.R.3d 333, 338 (1974).

Many of the precedents cited in this section involved photographs, motion pictures, and audio recordings. Since identical evidentiary standards most often apply to videotape, these cases provide guidelines for videotape admissibility.

32. United States v. Neal, 527 F.2d 63 (8th Cir. 1975), *cert. denied*, Robinson v. United States, 429 U.S. 845 (1976); Popplewell v. State, 269 Ind. 323, 381 N.E.2d 79 (1978); Lewis v. State, 264 Ind. 288, 342 N.E.2d 859 (1976); State v. Radcliff, 188 Neb. 236, 196 N.W.2d 119 (1972); State v. Yarborough, 55 N.C. App. 52, 284 S.E.2d 550 (1981); G. JOSEPH, *supra* note 22, § 4.02, at 4-4 to -8; Buckley & Buckley, *Videotaping Wills*, *supra* note 28, at 277; Elman, *The Use of Videotape Evidence in Civil Cases*, 19 ALBERTA L. REV. 215 (1981); Merlo & Sorenson, *supra* note 31, at 56; Salvan, *Videotape for the Legal Community*, 59 JUDICATURE 222, 224 (1975); Annotation, *Admissibility of Videotape Film in Evidence in Criminal Trial*, 60 A.L.R.3d 333, 338 (1974); Annotation, *Authentication or Verification of Photograph as Basis for Introduction in Evidence*, 9 A.L.R.2d 899 (1950 & Supps. 1971, 1983); 29 AM. JUR. 2D *Evidence* § 788 (1967 & Supp. 1987).

These standards were originally established for audio tape recordings. *See, e.g.*, State v. Williams, 49 Wash. 2d 354, 301 P.2d 769 (1956). However, at least one court has ruled that the *Williams* sound recording elements do not control videotape or photographs. State v. Newman, 4 Wash. App. 588, 484 P.2d 473 (1971).

A formula comparable to the seven precepts listed above has been employed when videotaped evidence is utilized for substantive rather than demonstrative purposes. *See, e.g.*, Torres v. State, 442 N.E.2d 1021 (Ind. 1982); Bergner v. State, 397 N.E.2d 1012 (Ind. App. 1979).

33. *See, e.g.*, Grimes v. Employers' Mut. Liab. Ins. Co. of Wis., 73 F.R.D. 607 (D.

accurate representation of the events portrayed.[34] Generally, videotaped evidence is relevant if it demonstrates that a fact at issue is more or less probable to have occurred as alleged.[35] In some cases, judges have considered photographs relevant if it would have been suitable to admit the depicted object itself or other evidence of the portrayed circumstances.[36]

Despite the relevancy of videotaped material, courts may exclude the evidence if it tends to be unduly prejudicial or inflammatory,[37] confusing or misleading to the jury,[38] cumulative,[39] or unnecessarily time-consuming.[40] Naturally, all of these "fairness factors" must significantly outweigh the probative value of the videotape.[41] Certain portions of a videotape, if objectionable, may be edited and excluded, while the remaining images are admitted.[42]

Alaska 1977); State v. Thurman, 84 N.M. 5, 498 P.2d 697 (Ct. App. 1972); Richardson v. Missouri-Kan.-Tex. R.R., 205 S.W.2d 819 (Tex. Civ. App. 1947) (motion picture); State v. Newman, 4 Wash. App. 588, 484 P.2d 473 (1971); G. JOSEPH, *supra* note 22, § 4.02[4], at 4-11.

34. Hendricks v. Swenson, 456 F.2d 503 (8th Cir. 1972); Millers' Nat'l Ins. Co. v. Wichita Flour Mills Co., 257 F.2d 93 (10th Cir. 1958); Grimes v. Employers' Mut. Liab. Ins. Co. of Wis., 73 F.R.D. 607 (D. Alaska 1977); State v. Needs, 99 Idaho 883, 591 P.2d 130 (1979); People v. Mines, 132 Ill. App. 2d 628, 270 N.E.2d 265 (1971); Johnson v. State, 272 Ind. 427, 399 N.E.2d 360 (1980); Williams v. State, 271 Ind. 476, 393 N.E.2d 183 (1979); State v. Woolridge, 2 Kan. App. 2d 449, 581 P.2d 403 (1978); State v. Giles, 253 La. 533, 218 So. 2d 585 (1969); State v. Thurman, 84 N.M. 5, 498 P.2d 697 (Ct. App. 1972); Pease Co. v. Local Union 1787, 59 Ohio App. 2d 238, 393 N.E.2d 504 (1978); Richardson v. Missouri-Kan.-Tex. R.R., 205 S.W.2d 819 (Tex. Civ. App. 1947) (motion picture); State v. Newman, 4 Wash. App. 588, 484 P.2d 473 (1971).

35. *See, e.g.*, FED. R. EVID. 401; Grimes v. Employers' Mut. Liab. Ins. Co. of Wis., 73 F.R.D. 607 (D. Alaska 1977); G. JOSEPH, *supra* note 22, § 4.02[3][a], at 4-5; MCCORMICK'S LAW OF EVIDENCE, *supra* note 18, § 185, at 437 (E. Cleary 2d ed. 1972).

36. *See, e.g.*, Quigley v. Snoddy, 102 Ill. App. 2d 232, 242 N.E.2d 775 (1968); State v. Giles, 253 La. 533, 218 So. 2d 585 (1969); G. JOSEPH, *supra* note 22, § 4.02[3][a], at 4-5.

37. *See, e.g.*, FED. R. EVID 403; Randall v. Warnaco, Inc., 677 F.2d 1226 (8th Cir. 1982) (dictum); Thomas v. C.G. Tate Constr. Co., 465 F. Supp. 566 (D.S.C. 1979); Pisel v. Stamford Hosp., 180 Conn. 314, 430 A.2d 1 (1980); Williams v. State, 271 Ind. 476, 393 N.E.2d 183 (1979); Bergner v. State, 397 N.E.2d 1012 (Ind. App. 1979); Butler v. Chrestman, 264 So. 2d 812 (Miss. 1972); O'Neill v. State, 681 S.W.2d 663 (Tex. Ct. App. 1984); G. JOSEPH, *supra* note 22, § 4.02[3][b], at 4-5.

38. *See, e.g.*, FED. R. EVID. 403; Thomas v. C.G. Tate Constr. Co., 465 F. Supp. 566 (D.S.C. 1979); Culpepper v. Volkswagon of Am., Inc., 33 Cal. App. 3d 510, 109 Cal. Rptr. 110 (1973); G. JOSEPH, *supra* note 22, § 4.02[3][b], at 4-5 to -6.

39. *See, e.g.*, FED. R. EVID. 403; Ashley v. Nissan Motor Corp., 321 So. 2d 868 (La. Ct. App.), *cert. denied*, 323 So. 2d 478 (La. 1975); G. JOSEPH, *supra* note 22, § 4.02[3][b], at 4-6.

40. *See, e.g.*, FED. R. EVID. 403; G. JOSEPH, *supra* note 22, § 4.02[3][b], at 4-6.

41. *See, e.g.*, FED. R. EVID. 403. *See also* cases and treatises cited *supra* notes 37-39, and *infra* note 42.

42. *See, e.g.*, Hunt v. State, 459 N.E.2d 730 (Ind. 1984); Reggio v. Louisiana Gas Service Co., 333 So. 2d 395 (La. Ct. App.), *cert. denied*, 337 So. 2d 526 (La. 1976); Lawton v. Jewish Hosp., 679 S.W.2d 370 (Mo. Ct. App. 1984); State v. Thurman, 84 N.M. 5, 498 P.2d 697 (Ct. App. 1972); G. JOSEPH, *supra* note 22, § 4.02[3], at 4-7. *Cf.* Abernathy v. Superior

The editing menace often arises in attempts to exclude visual evidence. Since video recordings are particularly jeopardized by erasure, editing can be achieved with extraordinary ease. Merely copying an original tape onto a duplicate, and excluding certain segments in the process, can be difficult to detect.[43] Since editing is actually not an issue of admissibility, but rather addresses the weight and sufficiency of the evidence,[44] the trial court would not automatically exclude the videotape simply because it had been edited.

Hearsay assaults are more common with visual evidence. The video recording itself could be argued to constitute hearsay because it is a mechanical reproduction of an out-of-court statement offered for the truth of the matters asserted without an opportunity to cross-examine the declarant.[45] More often, the contents of the tape are assailed on hearsay grounds. For instance, "voice-overs" narrating on videotape and question/answer exchanges have been held to be hearsay when speech is offered to document the truth of the words.[46] Of course, a witness may corroborate the veracity of the "disembodied voice" through direct testimony.[47] Hearsay objections to videotape may be overcome through the traditional exceptions. The video living will could be accepted as "res gestae,"[48] present sense impression,[49]

Hardwoods, Inc., 704 F.2d 963 (7th Cir. 1983) (inadmissibility of sound track); Brewer v. Jeep Corp., 546 F. Supp. 1147 (W.D. Ark. 1982), *aff'd*, 724 F.2d 653 (8th Cir. 1983) (inclusion of written instructions with video).

43. G. JOSEPH, *supra* note 22, § 4.02[3][c], at 4-8; P. UTZ, DO-IT-YOURSELF VIDEO: A BEGINNER'S GUIDE TO HOME VIDEO 182-91 (1984) [hereinafter P. UTZ]; Telephone conversation between author and Dr. Peter Utz, Director of Department of Instructional Media, County College of Morris, Randolph, N.J., Aug. 21, 1987.

44. *See, e.g.*, Pritchard v. Downie, 326 F.2d 323 (8th Cir. 1964); Millers' Nat'l Ins. Co. v. Wichita Flour Mills Co., 257 F.2d 93 (10th Cir. 1958); State v. Woolridge, 2 Kan. App. 2d 449, 581 P.2d 403 (1978); G. JOSEPH, *supra* note 22, § 4.02[3], at 4-8.

45. State v. Simon, 174 A. 867 (N.J. Sup. Ct. 1934), *aff'd*, 178 A. 728 (N.J. 1935) (audio recording); Beyer, *supra* note 28, at 44.

46. *See, e.g.*, Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985) (hypnosis question/answer session videotaped); Aetna Casualty & Sur. Co. v. Cooper, 485 So. 2d 1364 (Fla. Ct. App. 1986) (voice-over on videotape); State v. Thurman, 84 N.M. 5, 498 P.2d 697 (Ct. App. 1972) (voice-over on videotape); G. JOSEPH, *supra* note 22, § 4.02[4][a], at 4-9 to -10.

47. *See, e.g.*, United States v. Daniels, 377 F.2d 255 (6th Cir. 1967) (witness must identify circumstances surrounding photographed events); State v. Thurman, 84 N.M. 5, 498 P.2d 697 (Ct. App. 1972); G. JOSEPH, *supra* note 22, § 4.02[4][a], at 4-10.

48. *See, e.g.*, Torres v. State, 442 N.E.2d 1021 (Ind. 1982). "Res gestae" primarily includes spontaneous statements which modern decisions classify under other exceptions, such as present sense impression, then existing mental, emotional, or physical condition, excited utterances, and the like. MCCORMICK'S LAW OF EVIDENCE, *supra* note 18, § 288, at 686 (E. Cleary 2d ed. 1972). Res gestae is a vague and imprecise exception which has stirred the ire of many commentators. *Id.* § 288, at 687. "The ancient phrase can well be jettisoned, with due acknowledgement that it has served well its era in the evolution of evidence law." *Id.*

49. *See, e.g.*, FED. R. EVID. 803(1). For caselaw discussing this exception, see, e.g., Pfeil v. Rogers, 757 F.2d 850 (7th Cir. 1985); Brown v. Tard, 552 F. Supp. 1341 (D.N.J. 1982); United States v. Earley, 657 F.2d 195 (8th Cir. 1981); United States v. Blakey, 607 F.2d 779

then existing mental, emotional, or physical condition,[50] statements made for purposes of medical diagnosis or treatment,[51] recorded recollection[52] "to refresh" a living will witness' memory, and business records[53] (since the living will is part of the declarant's medical record). Since the patient-declarant, due to her terminal ailment, is incapable of testifying, the videotape, introduced either as a living will or as evidence supporting the written instrument, would satisfy the unavailability and the "all purpose" exceptions to hearsay. The "all purpose" exception allows hearsay evidence to be admitted if the hearsay is more probative than other available evidence, is sufficiently trustworthy, and entry of the evidence into the record would best serve the interests of justice.[54]

Perhaps an easier approach to circumvent the hearsay dilemma would be an alternate application of the video recording as proof other than the truth of the assertions contained therein. If litigation ensued which challenged the validity or objectives of a written living will, a video recording of a living will declaration could be submitted as evidence *not* of the truth of the written living will itself, but of the declarant's mental capacity and intent, proper execution of the instrument, or other pertinent issues under contention. Hearsay is mostly a picket fence through which the attorney

---

(7th Cir. 1979) (involving audio recording).

50. *See, e.g.*, FED. R. EVID. 803(3); MCCORMICK'S LAW OF EVIDENCE, *supra* note 18, §§ 291, 294, at 689-90, 694-96 (E. Cleary 2d ed. 1972). For caselaw analyzing this exception, see, e.g., Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892); United States v. Ponticelli, 622 F.2d 985 (9th Cir. 1980), *cert. denied*, 449 U.S. 1016 (1980); United States v. Cosby, 601 F.2d 754 (5th Cir. 1979); United States v. Layton, 549 F. Supp. 903 (N.D. Cal. 1982) (involving audio recording).

51. *See, e.g.*, FED. R. EVID. 803(4); MCCORMICK'S LAW OF EVIDENCE, *supra* note 18, § 292, at 690-92 (E. Cleary 2d ed. 1972). For caselaw exploring this exception, see, e.g., Roberts v. Hollocher, 664 F.2d 200 (8th Cir. 1981); Britt v. Corporacion Peruana de Vapores, 506 F.2d 927 (5th Cir. 1975); United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977).

52. *See, e.g.*, FED. R. EVID. 803(5); MCCORMICK'S LAW OF EVIDENCE, *supra* note 18, §§ 299-303, at 712-16 (E. Cleary 2d ed. 1972). For caselaw interpreting this exception, see, e.g., United States v. Kelly, 349 F.2d 720, 770-71 (2d Cir. 1965); Kinsey v. State, 49 Ariz. 201, 65 P.2d 1141 (1937).

53. *See, e.g.*, FED. R. EVID. 803(6); MCCORMICK'S LAW EVIDENCE, *supra* note 18, §§ 304-14, at 717-34 (E. Cleary 2d ed. 1972). For caselaw involving hospital records, physicians' reports, and this exception, see, e.g., Kuhnee v. Miller, 37 Mich. App. 649, 195 N.W.2d 299 (1972); La Mantia v. Bobmeyer, 382 S.W.2d 455 (Mo. Ct. App. 1964); Hytha v. Schwendeman, 40 Ohio App. 2d 478, 203 N.E.2d 312 (1974); Bradley v. Maurer, 17 Wash. App. 24, 560 P.2d 719 (1977). *Cf.* McBrady v. State, 460 N.E.2d 1222 (Ind. 1984) (videotape business record).

54. *See, e.g.*, FED. R. EVID. 804 (unavailability); *Id.* 804(b)(5) ("all-purpose" exception); MCCORMICK'S LAW OF EVIDENCE, *supra* note 18, § 324.1 at 95-97 (E. Cleary 2d ed. Supp. 1978). For caselaw pondering this exception, see, e.g., Dartez v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985); United States v. Weisman, 624 F.2d 1118 (2d Cir. 1980) (concerning audio recording); United States v. Toney, 599 F.2d 787 (6th Cir. 1979); United States v. Kim, 595 F.2d 755 (D.C. Cir. 1979).

may crawl by loosening an occasional slat.

Ultimately, videotaped evidence will be admitted or excluded subject to sound judicial discretion.[55] The court will evaluate the evidence based upon the fairness doctrine, relevancy, the balancing test between probative value and undue prejudice or surprise, hearsay, incomplete foundation, and similar evidentiary criteria.

Regardless of these evidentiary puzzles, videotape presently may only be employed to supplement a written living will. In order for a videotaped living will to function as a separate legal instrument, legislative sanction will be essential. The following section discusses model video legislation for living wills.

VI. A Model Video Living Will Statute

Using the Uniform Rights of the Terminally Ill Act[56] as an example, a specific videotape provision could be inserted with reference to the other terms of the statute. Under Section Two of the Uniform Act,[57] the language could be amended accordingly (with new portions italicized):

> §2. Declaration Relating to Use of Life-Sustaining Treatment.
>
> (a) An individual of sound mind and [18] or more years of age may execute at any time a declaration governing the withholding or withdrawal of life-sustaining treatment. *The declaration may be made in writing or videotape recorded.*
>
> *(1)* The declaration, *if written,* must be signed by the declarant, or another at the declarant's direction, and witnessed by two individuals.
>
> *(2) The declaration, if videotape recorded, must be accompanied by a verified*

55. *See, e.g.*, Roberts v. Hollocher, 664 F.2d 200 (8th Cir. 1981); Pritchard v. Downie, 326 F.2d 323 (8th Cir. 1964); Pisel v. Stamford Hosp., 180 Conn. 314, 430 A.2d 1 (1980); State v. Giles, 253 La. 533, 218 So. 2d 585 (1969); Owens v. Thornton, 349 So. 2d 431 (La. Ct. App. 1977); Reggio v. Louisiana Gas Service Co., 333 So. 2d 395 (La. Ct. App.), *cert. denied*, 337 So. 2d 526 (La. 1976); Ashley v. Nissan Motor Corp., 321 So. 2d 868 (La. Ct. App.), *cert. denied*, 323 So. 2d 478 (La. 1975); Terrio v. McDonough, 16 Mass. App. 163, 450 N.E.2d 190 (1983); Hueper v. Goodrich, 263 N.W.2d 408 (Minn. 1978); Butler v. Chrestman, 264 So. 2d 812 (Miss. 1972); Lawton v. Jewish Hosp. of St. Louis, 679 S.W.2d 370 (Mo. Ct. App. 1984); Caprara v. Chrysler Corp., 71 A.D.2d 515, 423 N.Y.S.2d 694 (1979); O'Neill v. State, 681 S.W.2d 663 (Tex. Ct. App. 1984); Air Shields, Inc. v. Spears, 590 S.W.2d 574 (Tex. Civ. App. 1979); Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979); State v. Newman, 4 Wash. App. 588, 484 P.2d 473 (1971).

56. Unif. Rights of Terminally Ill Act §§ 1-18, 9B U.L.A. 611-23 (1987).

57. *Id.* § 2, 9B U.L.A. 614 (1987).

statement, in writing, signed by the declarant, or another at the declarant's direction, and two witnesses, in which the declarant and witnesses shall attest to the truth and the accuracy of the videotape recording and shall state that the declarant intends the videotape recording to operate as his declaration.

(3) A written transcription of a videotaped declaration shall be available to be made part of the declarant's medical record.

(4) A videotaped declaration must possess a soundtrack recording, and the audio and visual recording must be of a sufficiently clear and intelligible quality as to be readily comprehended upon display.

(5) During the videotape recording, the declarant, or another at the declarant's direction, must recite aloud the entire contents of the declaration. The contents of the declaration may, but need not, be in the form expressed in the subsection (b) of this section.

(b) A declaration may, but need not, be in the following form:

DECLARATION

If I should have an incurable or irreversible condition that will cause my death within a relatively short time, and I am no longer able to make decisions regarding my medical treatment, I direct my attending physician, pursuant to the Uniform Rights of the Terminally Ill Act of this State, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary to my comfort or to alleviate pain.

Signed this ___ day of _____, _____.

Signature _____
Address _____

Produced by The Berkeley Electronic Press, 1987

This declarant voluntarily signed this writing in my presence.

Witness _____
Address _____

Witness _____
Address _____

(c) A physician or other health-care provider who is furnished a copy of the declaration shall make it a part of the declarant's medical record and, if unwilling to comply with the declaration, promptly so advise the declarant.

(1) A videotaped declaration may be made a part of the declarant's medical record either by a copy of the videotaped recording or by a written transcription thereof.

Of course, the suggested phrases above must be adapted to each state's own living will statute.

Production Criteria and Inherent Risks

Aside from the evidentiary and statutory considerations, the videotaping of living wills involves a myriad of "practical" hurdles which the attorney and client must overcome. Production values, cost, and medium vulnerability present perplexing obstacles.

Initially, counsel must decide whether to hire professional videotaping services or to record "in-house." For many clients, expense may discourage expert consultation. Although videotaping charges vary geographically, typical hourly rates range between $40 or $150 nationally.[58] Different video

58. *See, e.g., Colorado*: $140/1st hr., $55/add'l. hr. Maven Video Productions, Arvada, Colorado, Aug. 14, 1987 (telephone conversation with author); *Hawaii*: $150/2 hrs., $65/add'l. hr. Phil Bergh, C.L.V.S., Hawaii Video Productions, Honolulu, Hawaii, Rate Card, Aug. 14, 1987 (letter to author); *Illinois*: $150/1st hr., $35/add'l. hr. Video Data Services, Oak Park, Illinois, Aug. 14, 1987 (telephone conversation with author); *Iowa*: Equipment: $135/ ½ day, $270/day. Labor: $40/1st hr., $20/add'l. hr. David Hellburg, C.L.V.S., Fidelity Video Services, Inc., Marshalltown, Iowa, Aug. 18, 1987 (telephone conversation with author); *Kentucky*: $100/1st hr., $50/add'l. hr. Wilson & Associates, Inc., Louisville, Kentucky, Aug. 14, 1987 (telephone conversation with author); *Louisiana*: $100/hr. Sharon O. Kleinpeter Legal Video Service, Baton Rouge, Louisiana, Aug. 14, 1987 (telephone conversation with author); *New Jersey*: $150/1st hr., $100/add'l. hr. Ira Goodman, C.L.V.S., Video Data Services, Union, New Jersey, Aug. 17, 1987 (telephone conversation with author); *New York*: $100/1st hr., $60/add'l. hr. Mill-Lane Productions, Inc., Bayside, New York, 2 In Focus, Fall 1986, at

tasks often carry separate price tags. For example, the average "day-in-the-life" video can be recorded at a special "all-day" price, usually around $500 in many areas.[59] Editing and courtroom playback services are gauged between $22 and $100 per hour.[60] These costs may seem steep, but the legal video industry has become increasingly competitive in recent years, and charges have gradually declined. In 1983-84, the standard hourly fee in large metropolitan regions was $185,[61] and figures as high as $250 to $300 per hour were not uncommon.[62]

Professional video companies offer greater flexibility in filming and production techniques while the "do-it-yourself" approach can result in amateurish efforts. Most law firms lack a sufficient number of video clients to justify the purchase of sophisticated video equipment. Consumer-grade video cameras and VCRs may be obtained for less then $300 each, and although they are primarily designed for family use, recording quality is quite satisfactory. Lack of production acumen is another headache. Many law office personnel may be inexperienced in film production techniques and unfamiliar with the video devices even though modern VCRs and cameras are extremely simple to operate.[63] "Home movie"-style videotaped depositions have been criticized as poorly lit, with awkwardly positioned witnesses or cameras, sloppy make-up, and unsatisfactory recording locations.[64] Clients deserve and expect more polish for their dollars.

Lawyers opting for the "home-grown" video route must select to rent

---

2 (advertisement); *Texas*: $150/2 hrs., $80/1st 1-½ hr. Video Documentation Services, Inc., Dallas, Texas, Aug. 14, 1987 (telephone conversation with author); *Virginia*: $250/5 hrs., $45/add'l. hr. John T. Silver, C.L.V.S., Magnetic Deposition Services, Virginia Beach, Virginia, Aug. 17, 1987 (telephone conversation with author) [hereinafter by jurisdiction as *Video Companies Price List*].

59. *See, e.g., Video Companies Price List, Louisiana, supra* note 58 ($500/day for "day-in-the-life" tapes, $600/day for other legal videotaping); *Id., Texas* ($600/day).

60. For editing costs, see, e.g., *id., Colorado* ($85/1st hr., $40/add'l. hr.); *id., Hawaii* ($50/hr.); *id., Illinois* ($22.50/hr.); *id., Iowa* ($60/hr.); *id., Kentucky* ($35/hr.); *id., New Jersey* ($30/hr.); *id., Louisiana* ($50/hr.); *id., Virginia* ($30/hr.). For playback costs, see, e.g., *id., Colorado* $250/½ day); *id., Hawaii* ($35/hr.); *id., Illinois* ($35/hr.); *id., Iowa* (Equipment: $121/½ day, Labor: $40/1st hr., $20/add'l. hr.); *id., Kentucky* ($75/1st hr., $35/add'l. hr.); *id., Louisiana* ($50 set-up fee, $50/1st hr., $30/add'l. hr.); *id., New Jersey* ($150/½ day); *id., Virginia* ($100/1st hr., $25/add'l. hr.).

61. McCrystal & Maschari, *PRVTT: A Lifeline for the Jury System*, 19 TRIAL, March 1983, at 70, 72.

62. *See, e.g.*, Beyer, *supra* note 28, at 33 [$90 to $250 hourly average]; Indiana Video Productions, Inc., Rate Card, Feb. 13, 1984 (letter to author); Jupiter Legal Video Services, Rate Card, March 13, 1984 (letter to author) [$45 to $300 per hour average].

63. Heller, Buchanan & Bos, *Using Videotape to Effectively Prepare and Present Your Case*, in LITIGATION AND ADMINISTRATIVE PRACTICE SERIES, VIDEO TECHNIQUES IN TRIAL AND PRETRIAL, *supra* note 29, at 12; Merlo & Sorenson, *supra* note 31, at 56.

64. Murray, *supra* note 27, at 1402; Doret, *Trial by Videotape — Can Justice be Seen to be Done?*, 47 TEMP. L.Q. 228, 237 (1974).

or own among numerous product lines. Video recording equipment is available in ½-inch VHS and Beta, or ¾-inch U.[65] The latter is employed by most professional video businesses and television stations.[66] VHS and Beta VCRs have inundated the public market and are most affordable, although the degree of picture resolution is fuzzier than ¾-inch U.[67] Improved technologies, however, have lessened the "resolution gap." New Super-VHS and Ed-Beta formats offer images so sharp that average television sets are inadequately sensitive to reproduce the complete signal.[68]

Equipment combinations force further choices. Camera-VCR tandems are now inexpensive, but less bulky "camcorders" are portable and, thus, are more convenient to use "in the field."[69] A single camera suffices for most recording sessions, but multi-camera angles and switching paraphernalia may be advantageous in situations in which one camera cannot adequately encompass the entire recording site. Cameras should always include a zoom lens for close-ups and panoramic shots as well as a time/date generator which superimposes the time sequence onto the recorded images. This guards against tampering since erasure or re-recording would clearly disturb the temporal continuity captured on tape.[70] VCRs with remote control and remote microphone capability (for lapel or "boom" microphones) are another essential. Microphones should be sufficiently mobile to accommodate the ambulatory declarant and witnesses.[71] Most recorders can function at various speeds, but the fastest rates produce the clearest picture resolution. Supplemental illumination of the recording location enhances resolution and color reproduction, even though modern video cameras are sufficiently photo-sensitive without additional lighting.[72] Triangular

---

65. P. UTZ, *supra* note 43, at 70-71; Dr. Peter Utz, Director of Department of Instructional Media, County College of Morris, Randolph, N.J., Video Technology and Equipment, Lectures before the Seminar on Videotaping Legal Proceedings, National Network of Legal Video Companies, Inc., New York City, New York, July 11, 1987 [hereinafter *Utz Lectures*].

66. P. UTZ, *supra* note 43, at 71; *Utz Lectures*, *supra* note 65.

67. *Utz Lectures*, *supra* note 65.

68. *Id.*

69. Interestingly, many professional videotape technicians dislike camcorders and will not utilize them. *Id.*

70. Beyer, *supra* note 28, at 26, 35-36, 49; Murray, *supra* note 27, at 1405.

71. P. UTZ, *supra* note 43, at 105; Beyer, *supra* note 28, at 35; Murray, *supra* note 27, at 1405.

72. *See* P. UTZ, *supra* note 43, at 152; Doret, *supra* note 64, at 231; Galluzzo, *Bright Ideas on Correct Lighting: Indoor-Lighting Tips for Your Home Video Movies*, HIGH FIDELITY, Feb. 1981, at A-6; Lachky, *How to Light for Video*, POPULAR PHOTOGRAPHY, Aug. 1982, at 100, 186. Additional lighting assists the videotape camera in capturing clearer color signals to reproduce the recorded event as it actually appeared to the human eye. P. UTZ, *supra* note 43, at 150; Galluzzo, *supra*, at A-6; Lachky, *supra*, at 100, 186. One must be cautious not to flood the recording site with excessive illumination, as this generates glare and shadows. P. UTZ, *supra* note 43, at 153; Galluzzo, *supra*, at A-8; Lachky, *supra*, at 186. Video cameras are also sensitive to different colors of light. Even though room illumination appears white to

arrangements of three spotlights best illuminate recording subjects and erase shadows.[73]

Finally, the recording forum should be carefully selected to accommodate visual and auditory concerns. Areas with as little extraneous noise as possible are ideal. Windows should be isolated from the background since sunlight tends to blind the camera's photo-monitor which forces it to adjust to the brightness of the window and, consequently, darken all adjacent objects. Unquestionably, the "attorney-director" must contemplate an array of pre-production queries.

Videotape is susceptible to several hazards endangering the integrity of the medium as a record-keeping device. Erasure, either accidental or deliberate, is the primary risk. The contents of videotape may be eliminated merely by recording over earlier images. Exposure of a videocassette to strong electromagnetic fields can expunge recorded images. A videotaped living will, absent a written transcription, could disappear in a flux of magnetic pulses.

Intentional erasure is no greater threat to videotaped living wills than any other tampering would be to a written version. If some unscrupulous interloper elects to sabotage a living will, either on paper or magnetic tape, the document is imperiled. Pages can be replaced more easily than recorded images since the videotaped sequence of events would be obviously disrupted by new pictures or a conspicuous "blank spot" of static. This is particularly true if a time/date generator is employed. If total annihilation is the objective, paper is as perishable as videotape, and ultimately ashes of both are equally indiscernible.

A mischanced erasure, however, presents a threat to videotape which written instruments avoid. Fortunately, this pitfall has been minimized thanks to continuing technological improvements. Today's videotape bonds images so persistently that an immeasurable amount of erasure occurs when high-intensity magnetic fields come even as close as three inches to the

---

the casual observer, fluorescent lights emit bluish hues, and incandescent lights tend toward the reddish end of the spectrum. P. UTZ, *supra* note 43, at 151. Photoflood bulbs illuminate with the proper balance of colors for video cameras. *Id.*

73. Three-light arrangements have been classified as a "key light, fill light and backlight." P. UTZ, *supra* note 43, at 154-55; Lachky, *supra* note 72, at 186. The key light is the strongest source, usually positioned above the subject at a 45-degree angle on one side of the camera. The fill light serves to erase shadows. The backlight should be located behind and above the subject, outside of the camera's field of vision. The backlight illuminates the subject's contour so that residual shadows fade and the subject "stands out" from the background. P. UTZ, *supra* note 43, at 154-55; Lachky, *supra* note 72, at 186. Lighting should be even over the entire videotape setting, particularly if subjects move during filming. Lachky, *supra* note 72, at 186. Small, portable spotlights are easiest to arrange and operate. *Id.* at 186, 192.

Produced by The Berkeley Electronic Press, 1987

tape.[74] Housing cassettes in plastic containers at least two feet from electrical fixtures or strong magnetic sources should preclude this calamity.

Environmental fluctuations also menace videotape. The ideal surroundings for videotape are those that maintain low humidity, minimal dust contamination, and a relatively constant temperature.[75] Wherever the videotape is stored, temperature and humidity should be kept within +/-5° and +/-10%, respectively.[76]

For archival storage, such as videotaped wills, cassettes may be victimized by years of dust, humidity, and temperature changes. As is true with most legal video applications, videotaped living wills would most likely be replayed within a few weeks or months of original recording. Therefore, such environmental distress should be minimal, and resulting damage improbable. Periodic rewinding of cassettes prevents stretching that occurs with rising and falling temperature and humidity.[77] Rewinding might be unnecessary since most tapes presently available have polyester backings and superior bindings to protect against such concerns.[78]

VII. CONCLUSION

Living wills attempt to negotiate the treacherous tightrope between the conflicting goals of individual self-determination and the medical oath to preserve life whenever possible. The introduction of videotape technologies will not resolve the moral and ethical issues with which courts, legislatures, and academicians will continue to struggle. But videotape may expedite and personalize the living will process, so that the dying declarant may best express her concerns about terminal medical treatment at a time when declining health prevents normal self-expression. Legislatures should permit videotape to assist in this cause.

---

74. R. SARGENT, PRESERVING THE MOVING IMAGE 141 (1974) [hereinafter THE MOVING IMAGE]; 3M Company Magnetic Audio/Video Products Division, *The Handling and Storage of Magnetic Recording Tape*, RETENTIVITY 2 (Technical Publication No. M-VC-209(761.5)II) (undated) [hereinafter 3M Technical Publication]. "Protection of the tape from accidental erasure is of little concern . . . it is unlikely that uncontained magnetic fields strong enough to cause erasure would be found in ordinary storage or shipping conditions." 3M Technical Publication, *supra*, at 2.

75. NATIONAL CENTER FOR STATE COURTS, COURTS' EQUIPMENT ANALYSIS PROJECT, AUDIO/VIDEO TECHNOLOGY AND THE COURTS: GUIDE FOR COURT MANAGERS 43, 46 (1977); C. BENSINGER, THE VIDEO GUIDE 75 (3d ed. 1982); THE MOVING IMAGE, *supra* note 74, at 139; P. UTZ, *supra* note 43, at 87; 3M Technical Publication, *supra* note 74, at 1-2.

76. 3M Technical Publication, *supra* note 74, at 1. Various air conditioning filters can alleviate dust contamination. *Id.*

77. THE MOVING IMAGE, *supra* note 74, at 139, 141.

78. 3M Technical Publication, *supra* note 74, at 3.