

ARTICLE

The digital acceptance of the Dutch *levenstestament*

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1. Introduction (context and problem)

The term 'living will', as used in the Netherlands, is a document that encompasses a wide range of provisions in two main categories. The first category is a continuing power of attorney (CPA), which is a mandate given by a capable adult to a personal representative to act on his or her behalf to remain in force, or enter into force, in the event of the adult's incapacity. The CPA covers (a) economic and financial matters; and/or (b) health, welfare and other personal matters.¹ The second category is advance directives (AD). AD are instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity.² The living will is a legal concept developed in notarial practice. A growing number of older persons are drawing up a notarised living will. Since voluntary registration was introduced in 2012, the number of living wills registered by Dutch notaries increased from 22,739 to 197,159 (2013-2021).³ The number is still rising and is estimated to increase even further in the future.

The notaries in the Netherlands use a variety of formats to give shape to the living will in concrete cases. There is an ongoing debate on whether the living will is only a power of attorney or an assignment that goes beyond merely a power of attorney.⁴ One of the main issues in the ongoing debate is how to shape the monitoring and supervision of the legal representative, because cases of abuse have been increasingly reported.

1 H.N. Stelma-Roorda, C. Blankman & M.V. Antokolskaia, 'A changing paradigm of protection of vulnerable adults and its implications for the Netherlands', *Family & Law* Februari 2019; Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2009)11. Principles concerning continuing powers of attorney and advance directives for incapacity, 2009, p. 9.

2 Committee of Ministers of the Council of Europe 2009, p. 9.

3 Koninklijke Notariële Beroepsorganisatie, 'Opnieuw stijging aantal akten na dip in oktober' (9 December 2021), www.knb.nl/nieuwsberichten/opnieuw-stijging-aantal-akten-na-dip-in-oktober, last accessed 5 September 2022.

4 L.C.A. Verstappen, 'Het levenstestament: volmacht of toch opdracht/lastgeving?', *WPNR* 2013/6993, p. 931 e.v.; L.C.A. Verstappen, *Het levenstestament nader verrijnd* (WPNR boekenreeks), Den Haag: Sdu Uitgevers 2017, p. 154-157; L.C.A. Verstappen, 'Het levenstestament: een korte analyse van veel gebruikte modellen in de notariële praktijk', *WPNR* 2016/7132; R.E. Brinkman en J.M. van Anken, 'Levensexecuteur/volmacht', in: A.R. Autar, J.P.M. Stubbé & L.C.A. Verstappen (red.), *Compendium Levenstestament*, Den Haag: Sdu 2021/5.4.

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Because we focus on the continuing power of attorney in the living will and not so much on the advance directives, we use the terms ‘continuing power of attorney’, ‘principal’ and ‘personal representative’ hereinafter.

When drafting formats for living wills, one always wonders: does this document work in practice? In 2020, The Dutch Foundation for Consumer Complaints Boards, which offers complainants alternative dispute schemes, provided a judgement in a case concerning a bank that did not accept the use of a living will.⁵ Due to administrative difficulties as well as the fact that banks are not obligated by law to accept the living will, the Foundation concluded that the bank made a legally sound decision to refuse the acceptance of the living will.⁶ The aforementioned case was not brought before a Dutch court, therefore it is not possible to predict whether a court would have agreed with the Foundation. Nevertheless, this case does indicate that the living will might not yet be fully accepted in The Netherlands as a legal instrument as such by those organisations relevant for older persons, especially when it comes to online procedures. After all, it signifies that banks experience difficulties with their administrative systems when processing or accepting a living will.

For the effectiveness of the living will, it is necessary that such a legal instrument is accepted in practice, specifically by organisations which are relevant for older persons. In this small exploratory research we have tried to determine whether and to what extent the living will is accepted by those organisations, specifically focusing on their online procedures.

Organisations nowadays have their own online environment in which they provide all kinds of information, forms and application procedures. All kinds of contracts are concluded via internet. This applies to organisations that are relevant for older persons as well. The question arises whether these organisations take the increasing use of the living will into account. Does the online ‘do-it-yourself-society’ sufficiently provide for the use of a living will?

In order to obtain insight into the effectiveness of the living will in light of the online society, we have surveyed various organisations that older persons commonly encounter in order to find out whether and to what extent the living will is accepted in practice. Potential causes for lack of acceptance include: unfamiliarity with the legal concept, acceptance of the living will with poor implementation of the concept and a lack of willingness to accept the living will altogether. Lack of acceptance also includes poor implementation in the digital environment of organisations because of difficulties they face with their administrative systems when processing or accepting a living will.

2. Methodology

We surveyed a total of 26 organisations. These organisations include:

- four banks: ING, Rabobank, ABN Amro and SNS Bank;

5 Uitspraak Geschillencommissie Financiële Dienstverlening nr. 2020-324 (mr. R.J. Paris, voorzitter en mr. L.T.A. van Eck, secretaris), 14 april 2020.

6 *Ibid.*

- three health insurance companies: Menzis, Zilveren Kruis and CZ;
- the Care Needs Assessment Centre (hereafter: CIZ);
- three insurance companies: Centraal Beheer, Asr and Aegon;
- four pension funds: SVB, ABP, PFZW and PHENC;
- four utility companies: Waterbedrijf Groningen, Eneco, Vattenfall and Greenchoice;
- three internet service providers: Ziggo, Tele2 and Online.nl.

In addition we surveyed housing corporation Nijestee, the municipality of Groningen, the Tax Administration and a foundation, *Stichting Pensioenregister*, which provides insight into the pension that you have already accrued and the expected pension amount after retirement.

The criteria to choice of organisations are based on their relevance for older people and are grouped around main topics:

- banking;
- health care;
- pension and insurance;
- energy and water;
- internet services;
- housing;
- taxes.

The choice of organisations is mainly based on size and national coverage. We can reasonably expect that within those organisations the living will probably is (best) arranged, as older persons are most likely an important part of the customers.

We investigated their online environment, approached these organisations and asked two main questions: (1) whether it was possible to use the continuing power of attorney in their online environment and (2) whether there are any additional requirements for this. We contacted the most obvious functionaries within the organisation as if we wanted to conduct matters as a representative on the basis of a living will and asked them the aforementioned questions. We did not investigate why it is or is not possible to use a living will in the online environment of a certain institution, although occasionally they explained why they made specific choices in policy.

Moreover, we examined the organisations' websites to see whether they offer any information about acting as a personal representative on the basis of a living will. We did this by searching the respective websites for the terms 'living will' and 'power of attorney'. The aim of this was to grasp whether online systems and online environments are open to the use of a continuing power of attorney or one has to rely on alternatives. We also tried to assess whether there are any additional requirements for doing so, and the organisations' websites offer adequate information on how to act as personal representative on the basis of continuing power of attorney. With adequate information, we mean information that can be grasped by a reasonably competent representative. We visited the websites and contacted the customer service employees in February, March and April of 2022.

3. The use of DigiD

3.1 DigiD

During our research we found that there are organisations that use their own online environment for identification of users, and organisations that use DigiD for that purpose. DigiD is a uniform login identification method used primarily by government organisations.⁷ By logging in with DigiD, the user can prove their identity. DigiD is linked to the user's Citizen Service Number, which is a number the government uses to process their citizens' personal data. For this reason, only organisations that are legally authorised to use or process Citizen Service Numbers can use DigiD.⁸ The organisations that use DigiD are usually government organisations, but it is also common for pension funds and insurance companies to use DigiD. Therefore, we have made a distinction during our research between organisations that use DigiD and organisations that do not.

Of the surveyed organisations, nine use DigiD as a login method for their online portal. These are several insurance companies, such as Menzis, Zilveren Kruis and CZ, as well as some pension funds, namely SVB, ABP, PHENC, along with *Stichting Pensioenregister*. Government institutions, such as the Tax Administration and the municipality of Groningen also use DigiD.

3.2 Organisations that use DigiD

If an organisation uses DigiD, they can choose to provide the user with the option to authorize someone to arrange matters on their behalf through DigiD. This authorisation is given by the user and can only be used in a specific time frame, and to arrange matters with a specific organisation.⁹ The majority of the surveyed institutions have chosen not to set up an authorisation option. Only pension fund SVB has included an authorisation option. In practice, this authorisation option is of no use for a continuing power of attorney. This is because the principal must explicitly grant authorisation via DigiD, and this is legally not possible if the living will is invoked because of incapability of the principal.

The question is whether, in the absence of alternatives, one can log in to the principal's DigiD account. DigiD's customer service department states that DigiD is strictly personal, and is not transferable or lendable. Because of this, DigiD states that it is not legally permitted for someone else to apply for, activate or use a principal's DigiD. This is not just a problem for personal representatives, but also for other legal representatives, trustees, administrators and mentors.

In short, the aforementioned organisations do not provide the possibility to use their online environment to handle matters on behalf of the principal. This must be done by mail or telephone. DigiD is currently working on facilities to ensure that legal representatives, trustees, administrators and mentors can handle matters securely for the person they represent.

7 DigiD, 'What is DigiD?', www.digid.nl/en/what-is-digid/, last accessed 9 September 2022.

8 *Ibid.*

9 DigiD 'Wat is DigiD - Machtigen?', <https://machtigen.digid.nl/machtigen>, last accessed 9 September 2022.

However, from legal practice we learned that creative representatives know how to deal with this problem in a practical way, *i.e.* by persuading organisations to accept the living will as a legal instrument or by using the principal's DigiD, so that they can still act on behalf of the older person as if they were that person.

3.3 Organisations that do not use DigiD

Most organisations that do not use DigiD use their own login systems. This means that these organisations do not have a uniform identification procedure. It differs per organisation whether or not it is possible to use the online environment when acting on the basis of a continuing power of attorney. The problems that arise using DigiD, as described above, do not occur when using the online environment of these organisations. Generally, it is possible to use their online environment on the basis of a continuing power of attorney. Although they all have their own identification procedures, they resemble each other very much.

For example, all four banks we surveyed (ING, ABN Amro, Rabobank and SNS Bank) provide the possibility to use internet banking on the basis of a continuing power of attorney. Each of these organisations require a visit to the office beforehand and need to be provided with a copy of the living will and proof of identity. ING is the only bank that requires an additional condition for internet banking: the personal representative must also have an ING bank account. Except for this one requirement, a personal representative can access internet banking easily. This may be due to the fact that the template for the living will used by the notaries was changed in 2015. Because the diverse content of living wills was impractical for banks, the Royal Dutch Association of Civil-law Notaries (KNB), after consultation with the Dutch Banking Association and the major banks, introduced uniform bank clauses in the template.¹⁰ In the new template the powers of the personal representative were broadened and, because of the broadened powers, a protection was built in for the benefit of the principal. As a result of this cooperation between the banks and the notaries, the banks not only accepted the living will, they also saw it as an opportunity to broaden their services to the growing number of older persons. They even began to promote the living will.¹¹

Some organisations do not provide the possibility to use the online environments by a personal representative at all. In these instances the personal representative can submit a copy of the living will, and then handle matters concerning the principal by mail or telephone.

All in all, it seems easier for organisations that do not use DigiD to make the online environment available to a personal representative on the basis of a living will. They can set up an online environment using their own systems and are not bound by the shortcomings of DigiD. Still, we see that, in practice, not every organisation opts to make their online environment accessible to personal representatives. Also, we ran into difficulties using their online environment.

10 KNB, 'Banken accepteren nieuw model *levenstestament*', knb.nl, last accessed 9 September 2022; L.M. de Hoog, 'Een nieuw KNB-model *levenstestament*', *JBN*, June 2015.

11 *Ibid.*

3.4 *Organisations with accessible online environments*

When a person needs care on a permanent basis, they can submit an application to CIZ.¹² When a personal representative wants to submit such an application, they can do so by uploading the living will under 'additional documents'. The personal representative can then submit an application on behalf of the principal. However, it is not possible to view the status of the submitted application, as this is only possible via mijnOverheid – a government website which uses DigiD. Because of the use of DigiD, it is not possible to gain access to the online environment of this website.

Unlike the other pension funds we investigated, PFZW does not use DigiD. At this pension fund, a personal representative is given access to a PFZW account if they provide a copy of the living will. As soon as this has been registered, the personal representative can create an account and in this way handle matters digitally.

At housing corporation Nijestee, it is possible to use the online forms for e.g. repair requests as a representative if the living will is registered with Nijestee. You can only use the online forms as a representative, after providing Nijestee with the living will.

Insurance companies use a wide range of login methods. Some use DigiD, others use their own online environment. At Centraal Beheer, a personal representative can use the online environment if they provide the appropriate department of the organisation with a copy of the living will. Subsequently, the personal representative can apply for login credentials. However, it is important to note that only one account may exist per client. If the principal, and therefore the client, already set up an account, his login details must be used or they must be deleted to set up a new one for the personal representative.

Utility company Eneco provides the personal representative with the possibility to use the online environment as well. The personal representative only needs to identify him- or herself and provide a copy of the living will. This is the same for utility company Vattenfall. Providing the necessary personal details and supplying a copy of the living will is enough to gain access to the online environment. *Waterbedrijf Groningen* does not allow clients to register with more than one email address per customer. This means that, whenever a personal representative wants to handle matters concerning the principal, they would have to ask the principal for the login details, which is not always possible. If absolutely necessary, the utility company could delete the account of the principal and provide the personal representative with a new account that is only linked to the email address of the personal representative, and thus provide the personal representative with access to the online environment.

Each of the three internet service providers we surveyed – Ziggo, Tele2 and Online.nl – grant access to their online environment when the personal representative provides their personal data and the data of the customer, and therefore principal, as well as a copy of the living will.

Again, we learned from legal that creative representatives know how to deal with this problem in a practical way.

12 CIZ, 'Over het CIZ', www.ciz.nl, last accessed 9 September 2022.

3.5 *Organisations with inaccessible online environments for personal representatives*

Insurance companies Asr and Aegon do not provide the possibility to use the online environments by a personal representative. The personal representative can supply a copy of the living will, and can then handle matters concerning the principal by mail or telephone. In addition, Asr only accepts a power of attorney, and thus a living will, to grant the personal representative information. Any changes in the insurance policy can only be made by the policyholder. If they are incapable, it seem no one is able to make changes or handle matters on their behalf, which – of course – is absurd. Whatever an organisation wants, a legal representative has this authority.

4. Information on using a continuing power of attorney

The amount of information that organisations provide on their websites about acting as a personal representative is minimal. While some organisations offer information on acting on the basis of a continuing power of attorney, others do not provide any information at all.

It is noteworthy that, although not many organisations supply information, three out of the four banks surveyed provide information on acting as personal representative on the basis of a continuing power of attorney on their website.¹³ A possible cause of this may be that, because of the aforementioned template of the living will that was created in consultation with banks, the banks generally accept the living will and would like to make the use of a living will as accessible as possible for their clients.

In addition to the three banks, the websites of CIZ, health insurer Zilveren Kruis, pension fund SVB and the Tax Administration also contain information about acting as a personal representative. The CIZ website contains information specifically for personal representatives.¹⁴ The Zilveren Kruis website contains information for a personal representative – whether or not they are authorised on the basis of a living will. It is notable that the online environment of Zilveren Kruis is not accessible; the website states that a personal representative is required to use the telephone to arrange matters for the principal.¹⁵ Both the Tax Administration's and SVB's websites refer to the DigiD website for more information on acting as a

13 ING, 'Gevolmachtigde aanmelden', www.ing.nl/particulier/klantenservice/gegevens-wijzigen/beheer-bankzaken/volmacht-uit-notariele-akte.html, last accessed 9 September 2022; ABN AMRO Bank, 'Notariële volmacht of levenstestament', www.abnamro.nl/nl/prive/themas/nu-regelen-voor-later/notariele-volmacht.html, last accessed 9 September 2022; Rabobank, 'Iemand machtigen om bankzaken te beheren', www.rabobank.nl/particulieren/service/betalen-en-opnemen/iemand-machtigen-bankzaken-beheren, last accessed 9 September 2022.

14 CIZ, 'Wanneer moet ik een machtigingsformulier meesturen met mijn aanvraag?', www.ciz.nl/client/veelgestelde-vragen-clienten/van-aanvraag-tot-besluit/wanneer-moet-ik-een-machtigingsformulier-meesturen-met-mijn-aanvraag, last accessed 9 September 2022.

15 Zilveren Kruis, 'Iemand machtigen', www.zilverenkruis.nl/consumenten/service/wijzigen/iemand-anders-machtigen, last accessed 9 September 2022.

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personal representative.¹⁶ The DigiD website contains information on acting as a personal representative, which is possible through the aforementioned authorisation, but this is of no use for a personal representative who has a continuing power of attorney.¹⁷

5. Conclusion

More and more matters are being handled online in our current society. The living will can only reach its full potential when it is widely recognized and accepted, also in online environments. This means that, for the instrument to be effective, it is important that organisations are aware of and accept the living will, and set up their online environments and forms accordingly. Our research shows that the living will is generally accepted among organisations that work with their own login method. This is not the case for organisations which use DigiD as a login method. It is striking that DigiD is not only inaccessible to personal representatives, but also to administrators, trustees or mentors, who have a legal position based in statute law. Like personal representatives, they cannot handle affairs for their principal. As long as an identification tool as widely used as DigiD does not facilitate access to online environments for personal representatives, the living will cannot be optimally utilised.

Since the websites of only eight of the surveyed organisations provide any information about being a representative, the information various organisations provide about acting as a personal representative on the basis of a continuing power of attorney is scarce. Because this information is not easily accessible, there could be an inhibition to use the online environments when acting as a personal representative. It is noteworthy that banks generally accept the living will and that this could be due to the model living will that was constructed with the consultation of banks. If the KNB were to make a model living will in consultation with other major organisations that older persons usually come in contact with, that might lead to a situation in which the websites of these organisations provide more information on the use of a living will.

It seems that the full potential of the living will can only be achieved if various organisations offer more information to clients about acting as a personal representative, and take into account the possibility of a client making use of a living will when designing their online environments and identification methods. We reckon that it is desirable to inform organisations and their employees of the existence of the living will as a legal instrument and the role it can play in their contact with clients, as well as the conditions attached to its use. However, we only assessed whether it was possible to use the living will in the online environments and if there are any additional requirements for the use of the living will in that

16 SVB, 'U wilt iemand machtigen', www.svb.nl/nl/aow/uw-zaken-online-regelen/u-wilt-iemand-machtigen, last accessed 9 September 2022; Belastingdienst, 'DigiD Machtigen aanvragen', www.belastingdienst.nl/wps/wcm/connect/nl/contact/content/digid-aanvragen-digid-machtigen, last accessed 9 September 2022.

17 DigiD, 'Wat is DigiD Machtigen?', <https://machtigen.digid.nl/machtigen>, last accessed 9 September 2022.

context. Future research is needed to determine why it is that the living will is not broadly accepted by the online environments of these organisations and what is needed for the living will to be accepted in the online environments.