I. INTRODUCTION

It is now widely accepted that patients' right to informed consent presupposes the possibility for them to refuse treatments, especially when these are perceived by them as excessive, futile or psychologically harmful. Both consent and refusal of consent are indeed envisaged today as two different expressions of the same patients' right to self-determination. Thus, refusals of medical treatments are also to be respected, even if they might adversely affect patients' health or shorten their life.

But a problem emerges when patients have lost their decision-making capacity due to a condition that is not likely to be reversible (e.g. persistent vegetative state, severe head injury, dementia, etc.). Who shall decide for them in such cases? Which criteria should be used in the decision-making process? What if family members disagree about treatments to be provided or withheld? What if doctors and patient's relatives have different views on what is best for the patient? Here is where the potential utility of advance directives comes into play. Advance health care planning can take two different forms, which are not necessarily exclusive of each other, since they both can be combined in the same document:

a) The living wills, which are (usually written) instructions that specify ahead of time personal preferences regarding the provision—or the withholding—of particular treatments in the event that the individual becomes unable to make decisions in the future;

b) The lasting (or durable) powers of attorney for health care, which allow individuals to appoint someone as a “health care proxy” (for example a trusted relative or friend) to make health care decisions on their behalf once they lose the ability to do so.
At present, European countries have very different or no legal standards at all on this matter. The current situation may create problems with the increasing cross-border movement of EU citizens. In addition, the growing of the aging population of European societies is likely to create an increased demand for advance directives in the next years. What seems to be clear is that a reliable solution has to be found to solve the practical problem posed by advance directives made in one European country and implemented in another.

Since the end of the 1990s, especially with the adoption of the Convention on Human Rights and Biomedicine (thereafter "Biomedicine Convention" or "Oviedo Convention"), the Council of Europe has made significant efforts to set up common standards in this field. This paper will first outline the strengths and shortcomings of Article 9 of the Biomedicine Convention, which specifically deals with living wills. It will then analyze the Council of Europe’s Recommendation (2009)11 on continuing powers of attorney and advance directives for incapacity.

II. ADVANCE DIRECTIVES IN THE BIOMEDICINE CONVENTION

A. The Biomedicine Convention as a Framework Instrument

The Council of Europe is indisputably the leading intergovernmental organization in the development of common European norms relating to bioethics. It is worth remembering that this body, which gathers at present 47 Member States (that is, virtually all European countries), was established a few years after the end of the Second World War to promote respect for democracy and human rights across Europe. To achieve this purpose, it adopted in 1950 the European Convention on Human Rights and subsequently various mechanisms aimed at ensuring respect for human rights in the Old Continent such as the European Court of Human Rights.

It was the same foundational goal of promoting human rights that led the Council to address various bioethical issues since the early 1980s. From that time, the Parliamentary Assembly (the deliberative body of the Council of Europe) as well as the Committee of Ministers (composed by all Foreign Ministers of Member States) issued a number of recommendations on topics such as genetic engineering, embryo research, patients’ rights, health databases, etc.

The most significant step in this process was undoubtedly the adoption of the Biomedicine Convention. After four years of discussion and