

SELECTING THE RIGHT PEOPLE

SELECTING A HEALTH-CARE AGENT (POWER OF ATTORNEY)

The term health-care decision means a decision made by an individual or the individual's agent, guardian or surrogate, regarding the individual's health care, including:

1. selection and discharge of health-care providers and institutions;
2. approval or disapproval of diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate; and
3. directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care.

Any adult or emancipated minor may execute a health-care power of attorney, which may authorize the agent to make any health-care decision that the principal could have made while having sufficient capacity to do so. Capacity means an individual's ability to understand the significant benefits, risks and alternatives to proposed health care and to make and communicate a health-care decision. A health-care power of attorney must be in writing and signed by the principal. This gives rise to the distinction in the Act between a health-care power of attorney, which must be in writing, and an advance health-care directive, which includes both the health-care power of attorney and the individual instruction, the latter of which can be oral.

Unless the health-care power of attorney otherwise provides, the individual's primary physician makes the determination that an individual lacks or has recovered capacity, or that another condition exists affecting individual instruction or the authority of an agent. An agent is required to make a health-care decision in accordance with the principal's individual instruction, as well as the principal's other wishes, to the extent that the agent knows those wishes. Otherwise, the agent is required to make the decision in accordance with the agent's determination of the principal's best interest. In determining the principal's best interest, the agent is required to consider the principal's personal values to the extent that the agent knows the principal's personal values. The Act does not contain a list of factors that the agent could consider in determining what actions would be consistent with the principal's personal values, leaving that up to the agent. The Official Comment to Section 2 of the Act, however, does indicate that several states have enacted a list of such factors.

LIVING WILLS

Regardless of what state law provides, the preferable approach is to execute a living will that sets forth the individual's wishes with respect to key aspects of any of life decision making. In many cases people do not have conversations with the persons named to serve as agent as to these wishes. Too often the living will signed is a form that people assume is somehow "standard" and which is therefore not tailored to reflect their specific wishes. One of the most philosophical issues that warrants carefully addressing in the documentation is religious issues. If an individual does not want religious restrictions to apply that must be specified. Otherwise, the agent and others may be left wondering whether or not religious restrictions were important and merely forgotten, or intentionally left out.

In practical terms, families sometimes intentionally withhold the existence of a health care directive and even a health proxy. Whether this is done intentionally, or through ignorance of the existence of documents, or for other reasons, the consequences can undermine fundamental wishes of the individual. It is important to have discussions with the named agent, with other family members that may have concerns

with how decisions are carried out, and provide copies of their documents to physicians to include in their patient chart.

If a patient who has lost capacity has not appointed an agent to make health-care decisions, or if the agent or the patient's guardian is not reasonably available, a surrogate may make a health-care decision for a patient. If the patient has not designated an agent under a health-care power of attorney, an adult or emancipated minor may designate any individual to act as surrogate to make the health-care decisions by personally informing the supervising health-care provider. In the absence of a designation, or if the designee is not reasonably available, any member of the patient's family who is reasonably available, in the following descending order of priority, may act as surrogate:

- (1) the spouse, unless legally separated;
- (2) an adult child;
- (3) a parent; or
- (4) an adult brother or sister.

Note the absence of an unmarried partner, which is why it is so critical that unmarried partners have health-care powers of attorney in place. While some state statutes have addressed this, it remains preferable to document the one's intent. If none of the individuals eligible to act as surrogate in the above list is reasonably available, an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values and who is reasonably available, which certainly would include an unmarried partner, may act as surrogate.

The purpose of seeking out professional guidance in these matters is to avoid the complications and difficulties apparent in the summary of the rules above. If no documentation is created, which sibling would govern under the above common default rule? If the one's parents are divorced, which parent will make decisions? What if siblings and parents disagree? The objective is to create unambiguous documents that provide the certainty of what the individual's wishes are and who specifically should be charged with carrying them out.

HOW HEALTH CARE DOCUMENTS SHOULD BE CREATED

Drafting Advance Health-Care Directives

Coordination of advance health-care directives with other documents is essential, particularly if different people are agents or power holders. Consider the following:

- The agent under the financial durable power of attorney, and if applicable a trustee under a revocable trust, should be directed to make financial provisions for health care decisions made by the health care agent appointed under the health care power of attorney. This is an important element of coordination to avoid the person designated to handle financial matters dictating medical decision making that has been delegated to a different person. This is particularly important if one specifies that experimental medical treatments may be approved as these might be quite costly.
- If a living will is completed providing health care directives, nothing inconsistent should be drafted in the health care proxy appointing a health care agent.

Living Wills (Health Care Directives) and Health-Care Powers of Attorney (Health Care Proxies) should be Separate Documents

Living wills and health proxies should be drafted as separate independent documents. Living wills have varying level of legal acceptance in different jurisdictions so that crafting separate documents is more assured to have one's wishes respected. Also, each document fulfills a distinct purpose. The health proxy designates an agent to make health care decisions. The living will provides statements of health care wishes.

Issues to Consider In Drafting the Health Care Power of Attorney

The following issues should be analyzed in the drafting of a health-care power of attorney:

1. Identity of agent(s), with alternatives or successors; and governance if there is more than one agent. There are strong opinions as to whether multiple co-agents should ever be used. Some state laws prohibit it. The practical concern of multiple agents is what should be done if in the emotional turmoil of a very difficult time the agents cannot agree? Too often people name, not the person they believe is best equipped emotionally, intellectually or from a perspective of compassion, to serve, but rather the person they believe they are obligated to name (e.g., the eldest child).
2. Statement of the principal's intentions concerning an array of health care and ancillary decisions. This might include any or all of the following:
 - Funeral services. Should religious observances prevail? If so which?
 - Burial or cremation and any vital details.
 - Should last rites or other end of life religious ceremonies be specified?
 - To what degree should pain relief be provided? What if pain relief hastens the onset of death? Can it still be given? Are there religious or spiritual end of life rituals or desires so the provision of pain relief should be tempered to permit these to be observed?
 - Should organ donations be permitted? All organs? Any limitations? Should the body be donated for medical research?
 - Should heroic measures be provided? To what degree and when? What is "heroic?"
 - Should experimental medical treatments be permitted? Mandated?
 - The provision of nutrition and hydration can be quite controversial for religious, emotional or philosophical reasons. Can nutrition and hydration ever be ceased? Must they be provided? Should they be subject to the general provisions in a living will as to when heroic measures might be ceased?
3. Powers that could be considered:
 - Change or retain domicile or residence.
 - Access and power to disclose medical records.
 - Consent to, authorize, withhold or withdraw any treatment.
 - Hire and/or fire medical personnel and institutions as well as others who may be giving assistance.
 - Give releases.
 - Authorize and pay medical bills, including, without limitation, insurance premiums. Caution should be exercised about permitting this in a health care related document as it may conflict with financial powers provided in a durable power of attorney or a revocable trust.
 - Authorize engagement, termination and payment of lawyers to encourage or force medical providers to respect your wishes.
4. Releases of agent and health care providers.
5. Third party reliance.

6. Coordination between various power holders and other documents. As noted above it may be preferable to have the agent under a financial power pay all bills and the health care agent direct which medical decisions should be pursued that create those costs.
7. Reimbursement of expenses of agent. It may be advisable to prohibit financial compensation for an agent making health care decisions unless a professional surrogate is hired.
8. A statement of applicable state law. This can be a complex issue when the one has strong ties to two or more states. It is likely inadvisable to create separate health proxies in different states because of the potential for confusion and conflicts.
9. Resignation procedure for a health care agent to resign.
10. Specification of a one's religious persuasion. It is just as important to specify if religious restrictions should not apply, as when they should apply. This is particularly important in light of the diversity within even the nuclear family.