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Advance Medical Directive

Assume that health care decisions need to be made for a loved one immediately, and a family member comes forward with a durable, general power of attorney. The health care professionals correctly advise that the document they hold is only valid for financial transactions. The medical staff needs an advance medical directive, or health care power of attorney, to allow them to accept authorization for treatment and access to medical records. Lacking the proper documentation, the next visit is to a lawyer in order to petition the court for guardianship over the incapacitated loved one, delaying the treatment decisions for weeks.

Although emergency medical treatment will be provided in life-threatening situations without the consent of an authorized representative of the patient, most other health care decisions require the appointment of a guardian by the court or an agent by the patient. The advance medical directive is the name given to a power of attorney for health care, which designates an agent to make various decisions in the event that you are unable to give informed consent to treatment. The better instruments will include specific language for access to medical records and health insurance information to counteract the restrictions on disclosure imposed by HIPAA (the Health Insurance Portability and Accountability Act). The advance directive can give broad powers to a spouse, adult child, friend or family member, including the right to make organ donations, to arrange for a funeral or cremation and to admit you to a long-term health care facility. By the same token, such powers can be restricted and certain instructions can be given to the agent (e.g., “maintain my health care at home for as long as possible”).

The advance medical directive also includes the so-called “living will.” The living will, which typically states one’s wishes that life-prolonging procedures (including nutrition and hydration) be withheld or withdrawn in the event of a diagnosis of a terminal illness or persistent vegetative state. Most clients do not even appoint an agent under this section of the document because of the enormous emotional burden. However, the living will is an integral part of the advance medical directive, since your health care agent is made aware of your wishes regarding life-prolonging procedures by the clear language of the living will.

As with most estate planning documents, it is wise to name an alternate health care agent in the advance medical directive, in case the primary agent is unavailable, incapacitated or deceased. Far too often, advance medical directives are presented in a time of crisis where the only named health care agent had not only survived or was currently incapacitated from accident or illness, thus requiring the intervention of the courts. We also normally recommend that alternate agents be named to serve in succession, so that disagreements between co-agents do not foil your intentions and cause family disharmony. A properly drafted advance medical directive, including the health care power of attorney and the living will, is clearly a critical document in time of crisis, and no estate plan is complete without one.

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