

Taking Control

Your Future Needs Advance Directives

Many people believe that their spouses or their children will be able to make the necessary decisions. *This is not true.*

By David A. Cutner



This is the first in a series of articles on Elder Law.

Growing older often brings family, health, and financial issues to the fore, and most of us could use some sound advice and assistance in confronting and solving these issues. Many families are concerned about how to obtain and pay for long-term medical and health care, and how to make decisions about such care if the patient has diminishing mental capacity. Unfortunately, many people fail to deal properly with these issues because they are confused or misinformed, or because they are overwhelmed by the apparent complexity and magnitude of their problems.

Big issues and problems are often more easily solved by breaking them down into smaller, component parts. Many long-term care issues can be solved by the same approach. Today, let's take a look at "advance directives" and how they can help.

Advance directives are intended to address the question of who decides for someone with diminished mental capacity. Many people believe that their spouses or their children will be able to make the necessary decisions. This is not true, unless a spouse or a child has been properly authorized under a Durable Power of Attorney or a Health Care Proxy.

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Some people fear that they will be giving up control when they sign these documents, which allow another person to make decisions about their money and property, or their medical and health care. In fact, the opposite is true. People who have not selected their own agent to act under a Durable Power of Attorney, or their own health care agent to act under a Health Care Proxy, may find that a judge is required to select a guardian for them. The judge's selection might not be the person they would have chosen. Also, the judge will make his selection only after a lengthy and costly court proceeding. It is no exaggeration to say that, in some guardianship proceedings, the fees and costs involved consume a majority of the assets that the proceeding was instituted to protect.

So, what to do? Let's take a closer look at these critically important documents.

The Durable Power of Attorney

The Durable Power of Attorney is a document that sets forth your decision to give certain powers over your money and property to an agent. The agent should be someone you trust, such as a spouse, son, daughter, or other close relative or friend. (If possible, more than one agent should be named, to enhance the likelihood that at least one agent will always be available.) A valid power of attorney must be respected by banks, brokers, insurance companies, and others who hold your money or property.

When a power of attorney is "durable," it will continue in full force and effect even after the person who granted the power loses mental capacity. Of course, that is the point of the power of attorney, and when it is really needed. The power of attorney is not just about paying the rent, or rolling over a CD, although those are important matters too.

The Durable Power of Attorney frequently plays a critical role in planning and paying for long-term care. This is so often the case because the patient has not planned in advance, is in declining health, and the issues involved now appear overwhelming. However, the patient is still able to recognize that, if something isn't done, his or her life's savings will quickly be depleted by the costs of care. (In New York City, someone who needs 12 hours per day of home care might currently pay \$5,000 per month, and someone who needs to be in a nursing home might currently pay up to \$15,000 per month.) Even New York's highest court has recognized that long-term care is "ruinously expensive."

Here is where a well-drafted Durable Power of Attorney is essential. The agent (typically a trusted family member) can take the legal steps needed to obtain government benefits such as Medicaid, and to preserve assets or income of the patient so that adequate funds are available to supplement and assure proper care. Of course, strategies to preserve assets will often help with the patient's estate plan as well. (These legal steps and strategies will be the subject of future articles.)

Without a Durable Power of Attorney, usually nothing can be done to protect and preserve assets or income, without petitioning the court for the appointment of a guardian, with its attendant costs and delays. In addition, the guardian and the court, if unfamiliar with Elder Law planning, may have to be informed and persuaded of the correct steps to be taken to protect the best interests of the patient.

Some critics argue that a power of attorney can be abused by the agent, and this has happened in some cases. However, the possibility of abuse is not a good reason to "throw out the baby with the bath water." Agents are held to a high standard of fiduciary responsibility, and they are subject to civil and criminal laws governing their conduct.

While the power of attorney may not be perfect in every respect, its advantages far outweigh its disadvantages. The possibility of abuse simply underscores the importance of appointing agents in whom you have trust and confidence. Also, it is not necessary to deliver the power of attorney to the agent immediately. Instead, the agent can be advised where the document can be found should the need for it arise.

The Health Care Proxy

The Health Care Proxy gives an agent the power to make medical and health care decisions, including end-of-life decisions, for the person who grants the proxy if and when that person can no longer make these decisions. Only one health care agent can be named, but alternates should be included if possible.

In the absence of a Health Care Proxy, family members may find it difficult or impossible to convince doctors or hospitals to act on their instructions or choices for a parent or sibling. Again, family members will likely be compelled to commence a court proceeding to seek the appointment of a guardian, with all of the same inconveniences discussed above.

The Health Care Proxy will help resolve disputes within the family, and will normally avoid contentious and costly court proceedings about medical care and end-of-life decisions. This is so because the health care agent holds the sole power of decision. Other family members may disagree with the agent, but they will find it virtually impossible to obstruct his or her decisions.

When giving a Health Care Proxy, it is important that your agent understand your wishes and philosophy regarding your health and medical care. His or her responsibility is to make the decision that you would have made if you had been able to express your decision for yourself.

The Living Will

Sometimes, an individual who has reservations about granting a Health Care Proxy will propose to have a Living Will instead. For such a person, the idea of writing down his or her instructions feels more comfortable, and seems to provide a greater sense of control.

Unfortunately, this goal can rarely, if ever, be realized. The problem, as pointed out in Alice in Wonderland, is that "words mean so many different things." Consider, for example, a typical instruction found in a Living Will: "If there is little hope of recovery, I would not want heroic measures to be taken to preserve my life." Your view that there is "little hope" might be at odds with my view that there is plenty of hope. Your "heroic measure" might seem to me to be an ordinary medical procedure. Thus, far from providing clear instruction and avoiding dispute, a Living Will can easily lead to contention, and possibly a lawsuit that would be difficult to resolve.

For this reason, I do not favor Living Wills, and recommend instead that a Health Care Proxy be used.

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If you have executed a well-drafted Durable Power of Attorney and have signed a Health Care Proxy, you have laid the foundation for planning for long-term care. If you are able, you may still want to participate in the important decisions about your care and your finances. However, your agents will have the ability to put your plans into effect, and attend to all of the necessary details.

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