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6 risks to consider in retirement planning

Don't let your clients be derailed, 8

Planning for tomorrow and beyond

8 common gifting mistakes, 10

The lowdown on health care directives, 12

Learn to think like a futurist in 3 steps, 16

The lowdown on health care directives



By: Stuart C. Bear
Chestnut Cambronne PA

The lowdown on health care directives

What you need to know when advising your clients

By Stuart C. Bear, J.D., Chestnut Cambronne PA

Prior to the 1950s, doctors made nearly all decisions affecting their patients' medical treatment, and patients simply followed their doctors' orders.¹ Starting in the 1950s, courts began to recognize the patient's right to be informed about their medical treatment, the right to consent (or not to consent) to medical procedures, and even the right to refuse life-sustaining treatment.²

In recent years, the right to refuse life-sustaining treatment has taken center stage in several highly publicized cases, most notably the case of Terri Schiavo, a young woman kept on life support for 15 years while family members battled over health care and end-of-life wishes that may or may not have matched Schiavo's wishes.

As a CPA, you can help your clients understand why it's imperative to have a health care directive in place and how to properly execute it.

What did we learn from the Terri Schiavo case?

This case renewed national interest in advance health care directives and served as a cautionary tale about what can happen when an individual does not adequately plan for incapacity.

In 1990, Terri Schiavo unexpectedly suffered cardiac arrest at age 27 as a result of a potassium imbalance.³ The incident

ADVANCE HEALTH CARE DIRECTIVE

DEFINITIONS

This form lets you name another individual as agent to make health care decisions if you are unable to make those decisions on your own, or if you want someone else to make those decisions for you even though you are still capable. You may also name an alternate agent to act for you if you are unable to do so. Your agent must be willing, able, or reasonably available to make decisions for you.

Your agent must be your supervising health care provider. Your agent also may not be a resident of a long-term care facility or a residential care facility where you are receiving care, or a person who is receiving care in a long-term care facility where you are receiving care.

When you sign this form, your agent will have the right to consent to, refuse, or discontinue any care, treatment, service, or procedure that you would not want to maintain, diagnose, or treat your current condition.

Your agent may also have the right to consent to, refuse, or discontinue any care, treatment, service, or procedure in long-term care facilities and institutions.

Your agent may also have the right to consent to, refuse, or discontinue any care, treatment, service, or procedure that you would not want to maintain, diagnose, or treat your current condition, including diagnostic tests, medical procedures, and procedures of medical care, such as artificial nutrition and hydration, and artificial ventilation, and artificial life support, including cardiopulmonary resuscitation.

Your agent may also have the right to consent to, refuse, or discontinue any care, treatment, service, or procedure that you would not want to maintain, diagnose, or treat your current condition, including the donation of organs or tissues, authorize an autopsy, and the disposition of remains.

Your agent will not be able to commit you to a mental health facility or to a nursing home.

“ A health care directive has become a critically important component to any complete estate plan. ”

left her in a persistent vegetative state, which required the insertion of life-sustaining feeding and hydration tubes.⁴ Prior to the incident, Terri had not executed an advance health care directive providing instructions about her wishes in the event of her incapacity. A dispute ensued between Terri's husband, who petitioned the court to have Terri removed from life support, and Terri's parents, who insisted that Terri remain on life support.

In 2005, after nearly 15 years in a vegetative state and having her life support periodically removed and then reinserted per the latest court order, Terri finally passed away when her life support was ultimately removed.

Schiavo was young and seemingly healthy. Her case illustrates the need for health care directives for adults of any age. It also serves as an unfortunate example of the trauma, stress, heartache and financial and legal expenditures that a directive can help prevent.

Minnesota's health care directive form

In 1993, Minnesota enacted Minnesota Statutes Chapter 145C, which deals exclusively with advance health care directives and provides a suggested form. These statutes indicate that a health care directive may include a health care power of attorney appointing a health care agent to act on behalf of the principal in the event the principal becomes incapacitated; and a health care declaration (also known as a "living will") providing health care instructions to doctors and/or named health care agent(s) regarding the principal's wishes for things like end-of-life care, or both.⁵

When making health care decisions for an incapacitated principal, a health care agent must follow any instructions provided in the declaration section of the principal's health care directive. As Minnesota's suggested health care directive form indicates, these instructions may cover a broad spectrum of topics, ranging from religious beliefs to pain medications, from the continuance/termination of life support to burial arrangements.⁶ If no health care agent is named, these instructions will still be used by health care providers, family members and others charged with making health care decisions for the principal.⁷

Minnesota does not *require* that its suggested statutory health care directive form be used.⁸ There are many other

health care directive forms available, including forms provided by hospitals, religious organizations and other national organizations (e.g., the Five Wishes form provided by the Aging With Dignity organization), all of which may be used in Minnesota so long as they meet certain statutory requirements. Namely, a health care directive must (1) be in writing; (2) be dated; (3) state the principal's name; (4) be signed by a principal with the capacity to execute the document; (5) contain verification of the principal's signature through notarization or the signature of two witnesses; and (6) include health care instructions, the appointment of a health care agent, or both.⁹

A signed HIPAA release form authorizing any named health care agent(s) to receive and share medical information related to the principal should be attached to the health care directive. This authorization gives added assurance that the named health care agent(s) will not face roadblocks in obtaining information that is critical to making medical decisions for the principal. The HIPAA release does not need to be specifically tied to end-of-life care. Instead, it should provide for a general release of information at any time.

Choosing a health care agent

Selecting the proper health care agent is the most critical component of crafting any health care directive. The ideal representative is someone who is knowledgeable about the principal's condition, shares common beliefs and outlook regarding health care and treatment, and is capable of being a strong advocate.

In the movie "Terms of Endearment," Aurora (Shirley MacLaine), the mother of Emma (Debra Winger), is apparently Emma's health care agent. Aurora patiently waits until 10 p.m., when it is time for her daughter Emma to receive a pain medication shot. Exactly at 10, Aurora is at the nursing station, trying to get the attention of a nurse or someone who can "give my daughter the shot." She is unsuccessful, until she finally screams at the top of her lungs, "Give my daughter the shot!" A nurse quickly goes with syringe in hand toward Emma's room. Aurora composes herself and politely says, "Thank you." This is the ideal health care agent: someone who knows the principal's condition and is willing to be a strong advocate.

¹ See Ben A. Rich, *Advanced Directives*, 19 J. Legal Med. 63 (1998) (noting a mid-century paradigm shift away from the Hippocratic corpus that "the physician is the one who commands; the patient the one who obeys").

² See *id.*

³ *In re Guardianship of Schiavo*, 780 So.2d 176, 177 (Fla. Dist. Ct. App. 2001).

⁴ *Id.*

⁵ Minn. Stat. § 145C.02.

⁶ See Minn. Stat. § 145C.16.

⁷ See *id.*

⁸ *Id.*

⁹ Minn. Stat. § 145C.03, subd. 1.

“The health care directive provides another way for individuals to take control of their own planning to ensure that their wishes are known and followed.”



Characteristics of an ideal health care agent

A good health care agent is someone who:

- Is knowledgeable about the principal's condition
- Shares common beliefs and outlook regarding health care and treatment
- Is capable of being a strong advocate

An individual may name multiple health care agents in a health care directive, but there is reason for caution here. In the case of co-agents, the co-agents must act unanimously.

If co-agents fail to act unanimously, both the patient and medical personnel face the unfortunate circumstance of relying on one agent to make decisions on one day, only to have these decisions reversed or significantly modified the next day by a different agent.¹⁰ In order to avoid this, an individual should consider naming one primary health care agent and one alternative health care agent, who is only authorized to make decisions in the event the primary health care agent is unable to serve.

Distributing copies of the health care directive

Once a health care directive is created, it should be distributed to those who might need to reference it, including the named health care agent(s), all doctors and clinics, and possibly a lawyer or accountant who can keep record of the document.¹¹ As a practical matter, it is advisable to execute multiple duplicate originals of the health care directive to ensure that an original document is made available to all the appropriate individuals. In my practice, I typically have a client sign four to five duplicate originals.

An individual may also want to keep a copy of the health care directive in the glove box of a motor vehicle or in a carry-on suitcase in the event the instructions are needed when the individual is traveling. Many states have laws recognizing the validity of a health care directive executed in another state, so long as the health care directive was in compliance with state laws at the time it was executed.¹² Still, if a person is planning to spend more than one month outside of their state of residence, they may want to have their health care directive reviewed by a doctor in the state where they are spending significant time.

An important role in an estate plan

A health care directive has become a critically important component to any complete estate plan. It is an empowering document, allowing a person to name desired representatives to make health care decisions on their behalf in the event of incapacity, and to provide health care instructions, particularly regarding end-of-life care. The health care directive provides another way for individuals to take control of their own planning to ensure that their wishes are known and followed. ■



Stuart Bear is a partner and shareholder at Chestnut Cambronne in Minneapolis. He is a fellow of the American College of Trust and Estate Counsel and a member of the National Academy of Elder Law Attorneys. He also teaches courses on wills and estates as an adjunct professor at the University of St. Thomas.

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¹⁰ If co-agents cannot agree, a physician may step in to issue controlling Physician Orders Regarding Life-Sustaining Treatment (i.e., a "POLST Order"), which will order a course of treatment consistent with the instructions provided in the patient's health care directive. A POLST Order may also be issued if certain instructions in the health care directive are unclear or are not being followed correctly.

¹¹ Even if the lawyer or accountant did not actually prepare the health care directive, he or she can still keep the document on file and provide copies of the document, if needed, as a courtesy to the client.

¹² Minnesota has such a statute. See Minn. Stat. § 145C.04.