

Durable Power of Attorney for Health Care, Part II

By Attorney Ben Kiniry

Have you nominated an agent under a Durable Power of Attorney for Health Care yet? What are you waiting for? Is something holding you back? Need more information?

Six months ago I wrote an article in this publication which discussed naming someone to make health care decisions on your behalf if you should become incapacitated.

This month I would like to give you a little more detail on this topic. As I started to think about what I wanted to relay to you, it came to me that there already exists a writing that does a great job of explaining the law in this area. It is New Hampshire Revised Statutes R.S.A. 137-J:19, Durable Power of Attorney; Disclosure Statement (if you can't sleep at night, you should read the entire Statute).

The purpose of the "Statement" is to show that the person signing the document understands the nature of the power being given to the agent. By law, the "Statement" must accompany a durable power of attorney for

health care.

The following is, in large part, the language of the Statement, with my comments placed in brackets [like this] containing comments about the language of the Statute. Some of the statement has been omitted. I hope you find the information enlightening and will encourage you to move forward with creating your own Durable Power of Attorney for Health Care, if you don't have one already.

Beginning of Statement: "Except if you say otherwise in the directive, this directive gives the person you name as your health care agent the power to make any and all health care decisions for you when you lack the capacity to make health care decisions for yourself [in other words, you no longer have the ability to understand and appreciate generally the nature and consequences of a health care decision, including the significant benefits and harms of and reasonable alternatives to any proposed health care]. "Health care" means any treatment, service or procedure to maintain, diagnose or treat your physical or mental condition.

Your health care agent, therefore, will have the power to make a wide range of health care decisions for you. Your health care agent may consent [in other words, give permission], refuse to consent, or withdraw consent to medical treatment, and may make decisions about withdrawing or withholding life-sustaining treatment. Your health care agent cannot consent to or direct any of the following: commitment to a state institution, sterilization, or termination of treatment if you are pregnant and if the withdrawal of that treatment is deemed likely to terminate the pregnancy, unless the treatment will be physically harmful to you or prolong severe pain which cannot be alleviated by medication.

"You may state in this directive any treatment you do not



want, or any treatment you want to be sure you receive. Your health care agent's power will begin when your doctor certifies that you lack the capacity to make health care decisions [in other words, that you are not able to make health care decisions].

If for moral or religious reasons you do not want to be treated by a doctor or to be examined by a doctor to certify that you lack capacity, you must say so in the directive and you must name someone who can certify your lack of capacity. That person cannot be your health care agent or alternate health care agent or any person who is not eligible to be your health care agent. You may attach additional pages to the document if you need more space to complete your statement.

"If you want to give your health care agent power to withhold or withdraw medically administered nutrition and hydration, you must say so in your directive. Otherwise, your health care agent will not be able to direct that. Under no conditions will your health care agent be able to direct the withholding of food and drink that you are able to eat and drink normally.

"Your agent shall be directed by your written instructions in this document when making decisions on your behalf, and as further guided by your medical condition or prognosis. Unless you state otherwise in the directive, your agent will have the same power to make decisions about your health care as you would have made, if those decisions by your health care agent are made consistent

with state law."

"It is important that you discuss this directive with your doctor or other health care providers before you sign it, to make sure that you understand the nature and range of decisions which could be made for you by your health care agent. If you do not have a health care provider, you should talk with someone else who is knowledgeable about these issues and can answer your questions. Check with your community hospital or hospice for trained staff. You do not need a lawyer's assistance to complete this directive, but if there is anything in this directive that you do not understand, you should ask a lawyer to explain it to you.

"The person you choose as your health care agent should be someone you know and trust [yes, the statute is suggesting that you know and trust the person you appoint], and he or she must be at least 18 years old."

"You should consider choosing an alternate health care agent, in case your health care agent is unwilling, unable, unavailable or not eligible to act as your health care agent. Any alternate health care agent you choose will then have the same authority to make health care decisions for you [people often name someone in the next generation and believe that is good enough, however, even younger people have accidents, health issues and die].

"You should tell the person you choose that you want him or her to be your health care agent. You should talk about this directive with your health care agent [this should go without saying, however, you would be surprised how many people don't] and your doctor or advanced practice registered nurse and give each one a signed copy [medical providers are happy to retain a copy of your medical directives in your file]. You should write on the directive itself the people and institutions who will have signed copies. Your health care agent will not be liable for health care decisions made in good faith on your behalf [your agent will want to read this].

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