

WHAT DO YOU REALLY KNOW ABOUT ADVANCE DIRECTIVES?

BY BEN KINIRY, ESQ.

If you were to get curious (or are unable to sleep some night) and looked under Title X of the New Hampshire Statutes, you would find the title Public Health. If you continued to be so very curious, you may even read all the way down to subsection 137-J:19, look inside and see the words **disclosure statement**. The disclosure statement is a writing that anyone signing an advance directive would be wise to read (actually, the disclosure must accompany a durable power of attorney for health care). The goal of the disclosure statement is to aid you in best understanding the authority that can be provided to an agent under an advance directive.

Since I'm aware most of you are never going to have that much trouble sleeping and given this is such a serious topic, I thought it would be prudent to make an effort to educate you regarding advance directives. It is evident from my meetings with clients that this is an area of the law that is often misunderstood. Therefore *you likely need to know, and understand, more about Advance Directives*. Following is an excerpt from the Statute cited above, which I hope will enlighten you on this topic.

DURABLE POWER OF ATTORNEY FOR HEALTH CARE (notice this is the actual name utilized in the State of New Hampshire), **THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING IT, YOU SHOULD KNOW THESE IMPORTANT FACTS:**

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.

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, and he or she must be at least 18 years old. If you choose your health or resi-

dential care provider (such as your doctor, advanced practice registered nurse, or an employee of a hospital, nursing home, home health agency, or residential care home, other than a relative), that person will have to choose between acting as your health care agent or as your health or residential care provider, because the law does not allow a person to do both at the same time.

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.

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 and your doctor or advanced practice registered nurse and give each one a signed copy. 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. Even after you have signed this directive, you have the right to make health care decisions for yourself as long as you are able to do so, and treatment cannot be given to you or stopped over your clear objection. You have the right to revoke the power given to your health care agent by telling him or her, or by telling your health care provider, orally or in writing, that you no longer want that person to be your health care agent..." RSA Chapter 137-J:19 (2015).

If you have any questions concerning advance directives or wish to create one for yourself or a loved one, please feel free to contact us.



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