

# INCAPACITY AND HEALTH CARE DECISIONS

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## When Incapacitated, Who Will Make Your Health Care Decisions?

When I ask clients what an advance directive, health care proxy or living will is, a typical response is “it tells them to pull the plug.” Well, there is some truth to that statement; however, following is a little more you will want to know about this topic.

### What is an advance directive?

An advance directive is a document executed by a competent person (the principal, you) giving another person (the agent; often a spouse, son or daughter) the authority to make health care decisions on your behalf if you are unable to communicate decisions for yourself (you are incapacitated). In New Hampshire this is referred to as a Durable Power of Attorney for Health Care.

### Why have an advance directive?

When you become incapacitated (and you will sometime), by executing an advance directive, the individual you appoint as agent steps into your shoes and thereby ensures that the instructions you have given him or her will be carried out. In the alternative, if you don't have an advance directive, those you trust most in the world may be shut out of the decisions regarding your medical care.

You may also want to know that if you have not appointed a decision maker, then your family may very well end up in a probate court proceeding to have an individual appointed. The person ultimately appointed may or may not be the person you would or could have picked. Think time, money, lack of control over your affairs and all it being completely avoidable.

I'm sure we can all agree, as a practical matter, having a trusted loved one directing and overseeing your medical treatment may very well result in a more positive outcome.

### Whom should I appoint as my agent?

It goes without saying - someone you trust who will follow your wishes. Before executing an advance directive, you should talk to the person whom you want to name as your agent about your wishes concerning medical decisions, especially life-sustaining treatment. If you want to avoid family conflict, you may want to inform all those concerned of your wishes.

I would also point out that not everyone is capable of act-



ing as an agent. For many people the idea of acting as an agent is simply deferring to the doctor's opinion (not saying this is a poor decision, after all he/she is a doctor) or stating to the doctor “please do everything you can to save my loved one.” This is not the role of the agent. The agent should be someone who will ask good questions, direct the doctor in their actions and follow up. A “squeaky wheel” if you will.

Also, if you do decide to name an agent, don't name everyone (the first person named should be seen as the primary decision maker). Why? If you name everyone there is the opportunity for your agents to disagree about your medical treatment. Will they disagree? From my experience, yes they will disagree. I often say to clients, “your children can't agree on which restaurant to eat lunch, how are they going to agree on what type of action to take in regards to a serious health care matter involving your life?”

Perhaps a story will be instructive: Alycia was insistent her five children be named as co-decision makers. I told Alycia that at least one of her children would be unable to direct her medical care and went on to tell her my restaurant analogy, but she was unmoved. Almost two years later I received a call from a local hospital “are you Alycia's Attorney?” I could hear her children literally yelling in the background, in the intensive care unit. Apparently, they could not agree on a restaurant or the menu of items available in regards to Alycia's medical treatment (by the way, Alycia returned to good health and named her oldest son as her new agent).

### Health Insurance Portability and Accountability Act (HIPPA)

There is also the small matter of a Federal Law often referenced as HIPPA. In a nutshell healthcare professionals are not allowed to disclose your individual health information to your

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family without being authorized by their patient (you), generally by signing a HIPPA release prior to becoming incapacitated.

Imagine, you have signed an advance directive naming your daughter, Tammy, as your agent with the authority to make medical decisions on your behalf. You fall ill. Tammy arrives at the hospital ready to do a great job for you. Tammy provides the doctor with your advance directive, including a living will. Clearly, Tammy has the authority as the agent to make medical decisions on your behalf. So far so good, right?

Tammy then asks a very important question “Doctor, what is wrong with my mother?” The doctor reviews the advance directive and then informs Tammy that he cannot disclose your medical information to Tammy as you failed to include a HIPPA release allowing the doctor to share your protected health information. I'm sure you can see the dilemma for both the family and the medical professionals involved.

### Living Will?

How do you want your last days, weeks or months on this planet to be? A living will provides your agent with instructions on what types of care you would like at the end of life. The living will includes specific instructions concerning the initiation or termination of life-sustaining treatment, to include your wishes regarding medically administered nutrition and hydration (note that these instructions should also be stated in your Durable Power of Attorney for Health Care).

If you don't have a living will what is the result? Perhaps some of you remember the Terri Schiavo case. Terri suffered massive brain damage and her husband wanted to remove life support and her parents did not. The court battle lasted seven years. If Terri had signed a living will then her family and doctors would have known her wishes.

You will also want to know that: If you become able to competently express your wishes at any time, the power under the Durable Power of Attorney for Health Care will no longer be effective.

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