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WHAT YOU SHOULD KNOW ABOUT THE CHANGES TO NEW HAMPSHIRE'S ADVANCE DIRECTIVE LAW!

The law is everchanging and our New Hampshire Advance Directive was the latest to receive a face lift. Senate Bill 74 "An Act relative to advance directives for health care decision, was signed into law by Governor Sununu earlier this month.

The updated law changes, among other things, who can make health care decisions on your behalf should lose the capacity to make such decisions.

Side Bar: One of the things it may shock you to learn is that your spouse does not automatically have the authority to make health care decisions on your behalf if you should become incapacity. If you desire to provide this authority in your spouse, then you will need to sign a document that complies with RSA 137-J:35, also known as an advance directive.

If not my spouse, then who can step in to make health care decisions on my behalf? Great question, so glad you asked.

Now there are three distinct positions of authority under NH law:

1. A person nominated as your **Agent** by you in a properly executed document that complies with RSA 137-J:35 (an Agent is a person appointed under a **durable power of attorney for health care**);
2. A person appointed as your Guardian via a probate court action;
3. The new kid in town - the "**Surrogate Decision-Maker.**"

The Agent and Guardian have been a part of New Hampshire Advance Directive law for many years. The Surrogate Decision-Maker is a new position. Why add a Surrogate Decision-Maker you ask another very good question (you are so inquisitive)?

There is certainly room for disagreement on how best to respond to this question. Let me utilize a made-up scenario to illustrate:

Buster has a stroke and has lost the capacity to make his own health care decisions. If Buster has appointed his wife, Wanda, as his Agent under a durable power of attorney for healthcare (that complies with New Hampshire law), Wanda would be Buster's health care decision maker. What if Wanda was in a car accident on the way to the hospital to see Buster (he did just have a stroke after all) and is now unable to act as Buster's Agent? If Buster appointed a person as a back-up to his wife, perhaps his daughter, Jerilyn (who is a scientist), then Jerilyn would be Buster's health care decision make. Okay, now I have to knock Jerilyn out of the picture, so we are going to say she is attending a conference on sub-zero water removal at the Geneva Convention and cannot be reached. Now What?

Historically, someone, in this case Buster's son, Travis, who was not named in the advanced directive, would need to apply to the appropriate New Hampshire probate court to be appointed as Buster's Guardian and thereby may be provided with the authority to make health care decisions.

Historically, there is no step in between the two options discussed above. You may be thinking, and most people would agree that a family member should be able to make the health care decisions for Buster if he has not appointed anyone. The family members may even ask,

why don't the doctors let Travis make the decision? Why does Travis have to go to the probate court to get the authority? Wow, more good questions.

Here is what you have been waiting for (insert drum roll here...). Under the modified Statute, if Buster has named Agents and they are not available to act or if Buster did not choose to hand pick his Agents and left it to fate (not the best way to go in my opinion as you really want to hand pick the best person for the job), then a person who qualifies as a Surrogate Decision-Maker would be able to step in and make Buster's health care decisions.

What is that you say, another question? Oh, who qualifies as a Surrogate Decision-Maker? Following is an excerpt from the new Statute which answers your question (okay, we all know it is my question, but writing this way is more fun).

"When a patient lacks capacity to make health care decisions, the attending practitioner shall make a reasonable inquiry pursuant to 137-J:7 as to whether the patient has a valid durable power of attorney for health care and, to the extent that the patient has designated an agent, whether such agent is available, willing and able to act. When no health care agent is authorized and available, the health care provider shall make a reasonable inquiry as to the availability of possible surrogates listed under this paragraph. A surrogate decision-maker may make medical decisions on behalf of a patient without court order or judicial involvement in the following order of priority:

- (a) The patient's spouse, or civil union partner, unless there is a divorce proceeding, separation agreement, or restraining order limiting that person's relationship with the patient.
- (b) Any adult son or daughter of the patient.
- (c) Either parent of the patient.
- (d) Any adult brother or sister of the patient.
- (e) Any adult grandchild of the patient.
- (f) Any grandparent of the patient.
- (g) Any adult aunt, uncle, niece, or nephew of the patient.
- (h) A close friend of the patient.
- (i) The agent with financial power of attorney or a conservator appointed in accordance with RSA 464-A."

In short, this will decrease the need for families to make applications for Guardianship in cases where their loved one has become incapacitated for the purposes of making his own health care decisions and has either not appointed an Agent or has appointed an Agent(s) who is unable to act. This is good in that it decreases the amount of the State's involvement in your personal affairs and matches up with what many people would agree to do in the case of a person not having hand picked someone to make their health care decisions.

The information provided in this article does not constitute legal advice. Can you acquire legal advice from an article? I would think not. In order to constitute "legal advice" I would argue that you would have to establish lawyer-client relationship and likely need to pay a reasonable fee for the legal advice.