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Public Information

Section of Real Property, Probate, and Trust Law

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The Public Information Web Site of the American Bar Association's
Section of Real Property, Probate and Trust Law

Estate Planning Answers

Living Wills, Health Care Proxies, and Advance Health Care Directives

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Introduction

With the increasing ability of medical science to sustain our lives, people are living much longer than ever before. Unfortunately, as we grow older and experience poor health, we may find ourselves in a position where decisions need to be made as to how we wish to be treated in a variety of medical situations at the end of our lives. Further, sometimes we find ourselves in a condition where we can no longer express our preferences. Advance health care directives allow us to deal with these situations. Without such directives, your family may find it necessary to obtain court orders to deal with your medical situation.

State laws vary concerning the appropriate documents to cover these situations. All fifty states permit you to express your wishes as to medical treatment in terminal illness or injury situations, and to appoint someone to speak for you in the event you cannot speak for yourself. Depending on the state, these documents are known as "living wills," "health care proxies," or "advance health care directives." Some states have a standardized document for this process, while other states leave the language up to individual lawyers and their clients.

Living Wills

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A living will is your written expression of how you want to be treated in certain medical conditions. Depending on state law, this document may permit you to express whether or not you wish to be given life-sustaining treatments in the event you are terminally ill or injured, to decide in advance whether you wish to be provided food and water via intravenous devices ("tube feeding"), and to give other medical directions that impact the end of life. "Life-sustaining treatment" means the use of available medical machinery and techniques, such as heart-lung machines, ventilators, and other medical equipment and techniques that will sustain and possibly extend your life, but which will not by themselves cure your condition. In addition to terminal illness or injury situations, most states permit you to express your preferences as to treatment using life-sustaining equipment and/or tube feeding for medical conditions that leave you permanently unconscious and without detectable brain activity.

A living will applies in situations where the decision to use such treatments may prolong your life for a limited period of time and not obtaining such treatment would result in your death. It does not mean that medical professionals would deny you pain medications and other treatments that would relieve pain or otherwise make you more comfortable. Living wills do not determine your medical treatment in situations that do not affect your continued life, such as routine medical treatment and non life-threatening medical conditions. In all states the determination as to whether or not you are in such a medical condition is determined by medical professionals, usually your attending physician and at least one other medical doctor who has examined you and/or reviewed your medical situation. Most states permit you to include other medical directions that you wish your physicians to be aware of regarding the types of treatment you do or do not wish to receive.

Health Care Proxy

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A "health care proxy," sometimes called a "health care surrogate" or "durable medical power of attorney," is the appointment of a person to whom you grant authority to make medical decisions in the event you are unable to express your preferences. Most commonly, this situation occurs either because you are unconscious or because your mental state is such that you do not have the legal capacity to

make your own decisions. Normally, a single individual is appointed as your health care proxy, though quite commonly one or more alternate persons are designated in the event your first choice proxy is unavailable. As with the living will, medical professionals will make the initial determination as to whether or not you have the capacity to make your own medical treatment decisions. The health care proxy is a durable power of attorney specifically designed to cover medical treatment. As with living wills, depending on your state of residence, it may be a state-determined form or may be drafted individually by your attorney.

Why Have Health Directives?

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Regardless of the name your state gives to these documents, their purpose is to allow you to express your preferences concerning medical treatment at the end of your life. By expressing such preferences in a written legal document, you are ensuring that your preferences are made known. Physicians prefer these documents because they provide a written expression from you as to your medical care and designate for the physician the person he or she should consult concerning unanswered medical questions. Rather than the physician having to obtain a consensus answer from your family as to your treatment, the physician knows your preferences and knows who you want to provide decisions when you cannot do so.

These documents provide your expressed wishes, rather than making the family guess your desires. Making your wishes known in advance prevents family members from making such choices at what is likely one of the most stressful times in their lives. Further, providing such information and designating a health care proxy means that the physician knows whose direction is to be followed in the event your family disagrees as to what medical treatment you would want.

Obtaining and Maintaining Living Wills and Health Care Proxies

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Your personal attorney can provide you with each of these documents. Generally, these documents require at least two witnesses. It is the policy of some hospitals and other medical institutions not to permit their employees to witness the signing of such documents. In most states there are other restrictions as to who may witness such documents. Generally, the persons who act as witnesses are not permitted to be individuals entitled to any inheritance as a result of your death, either by will or by state law. Often the law does not permit a person to witness such documents if they are related to you by blood or by marriage, or if they are responsible for payment of your medical bills. In any event, the witnesses must be adults as defined by your state law.

While all states recognize these advance health care directives, the law varies as to recognizing a document prepared in another state. It is not necessary to prepare additional documents in case you might vacation in another state. However, if you spend a considerable amount of time living in more than one state, you should consider having advance directives prepared in each of the states in which you spend significant periods of time.

Should you change your mind as to your living will decisions or your choice of health care proxy, you can simply destroy the document you have and create a new one. Once you have a living will, health care proxy, or advance health care directive, you should keep it among your important papers. Make sure a responsible adult, such as the named health care proxy, knows where you keep these documents. If you have a regular physician who keeps your medical records, you should provide a copy of the documents to him or her for your medical records. In the event you are admitted to a hospital you should take these documents with you at the time you are admitted and permit the hospital to place copies into your medical files. It is also a good idea to discuss the decisions you have made in your documents with family members so that they may better know and understand your wishes concerning these matters.

Organ and Tissue Donation

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In many states you can include in your advance directive your preference to become an organ or tissue donor at the time of death. State law varies, and you should check with your attorney. Even if your state is one in which your driver's license contains an organ or tissue donor statement, you need to express this by letting your health care proxy, your family, and your physician know your desire to become a donor. In some states you also need to be registered as an organ and tissue donor.

Communication is the Key

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Many people prefer to keep their legal documents private. With end of life issues, however, communicating your wishes is essential. An advance health care directive is the first step in this process. But, you also need to discuss your preferences with others. Take the time to discuss these issues with the person you appoint as your health care proxy. Talk to your physician. Make sure your family knows how you feel about end of life issues. The more these individuals know, the easier it will be for them to fulfill your wishes.

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