

## **HEALTH CARE POWERS OF ATTORNEY & LIVING WILLS: ADVANCE HEALTH CARE DIRECTIVES**

### DISCLAIMER

*This article is intended for informational purposes, only. It does not constitute legal advice. Nor is it a substitute for legal advice.*

Each competent adult among us has a right to make his or her own health care decisions. This right includes a decision to refuse, or withdraw from, life sustaining medical treatments. Medical science can sometimes sustain life where no cure is possible. What would any of wish for ourselves in such circumstances? What kind and extent of treatment? Under what circumstances? For how long? An advance health care directive attempts to answer these questions, in advance, against the possibility that we may confront such circumstances and not be able for ourselves at that time to make decisions. A health care directive therefore undertakes to do at least two basic things. First, to name at least one person who can make health care decisions for us, should we ourselves not be able. Second, to state our wishes and instructions with respect to life sustaining, or life-prolonging, medical treatment.

A health care power of attorney (“health care POA”) names the person who will make medical decisions for us, in consultation with medical personnel, should we not be able to make decisions for ourselves. This person is often called the attorney-in-fact, or agent, and becomes the substitute decision-maker.<sup>1</sup> A health care POA may also contain a statement of wishes and instructions with respect to making health care decisions, such as, in particular, decisions related to life-sustaining or life-prolonging treatments and procedures. These latter instructions are also sometimes separately set out in a document called a *living will*. A person may have one of each document, or they may be combined into a single health care POA. Together they may be referred to as advance health care directives and they are a critically important part of estate planning documentation.

In the absence of such valid documentation in the estate plan, should a person become incapable of making necessary health care decisions, it is likely that a court proceeding would occur in order to name a guardian for that person. This may result not only in the legal costs of such a proceeding and the emotional difficulty of attempting to prove the incapacity or disability of a family member, but a court-ordered loss of rights.

All states have advance directive laws. In Nebraska, that law pertains to health care powers of attorney (Neb. Rev. Stat. §§ 30-3401 to 30-3432). Our discussion will focus in part on the Nebraska law, but will also cover general considerations in preparing advance directives, choosing an agent, and engaging in family conversations on this issue.

There are numerous tools available to help a person carefully consider the decisions that go into a health care directive. In particular, the American Bar Association has made available free, useful on-line information, including practical questionnaires, to assist in

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<sup>1</sup> For convenience, we will refer to the attorney-in-fact as the *agent*, and we will refer to the person for whom the agent acts as the *principal*.

understanding what goes into advance directives and how they are used. In addition, the ABA makes available a form health care POA that is acceptable in most states.<sup>2</sup>

### What It Is About

The agent under Nebraska's health care POA is someone named and authorized to make *health care decisions* for the principal. (The principal, recall, is the person who is making and executing the POA.) A health care POA is therefore not a durable power of attorney for management of property. The durable power of attorney for property management and the health care POA should not be the same document. (See article on *Durable Powers of Attorney* for discussion of property management POAs.)

*Health care* is broadly defined to include "procedures, interventions and treatments related to disease, injury and degenerative conditions." A *health care decision* is the "consent, the refusal to consent or the withdrawal of consent to health care." However, a health care decision does not include decisions with respect to withdrawal or withholding of a) routine care necessary to maintain patient comfort, and b) usual and typical provision of nutrition and hydration. This latter is defined as "delivery of food and fluids orally, including by cup, eating utensil, bottle, or drinking straw." So, routine nutrition and hydration does not include providing nutrition or hydration through a feeding tube.

Finally, the law provides that the decisions to withdraw or withhold *life-sustaining procedures* or *artificially administered nutrition or hydration* are decisions that the agent can take only as provided under the statute.

### When Does a Health Care POA Take Effect?

The person named as the agent for health care decisions acquires the authority to act under the POA only after it has been determined that the principal is incapable of making health care decisions. What does *incapable* mean?

Incapable shall mean the inability to understand and appreciate the nature and consequences of health care decisions, including the benefits of, risks of, and alternatives to any proposed health care, or the inability to communicate in any manner an informed health care decision.

This is the definition, under the Nebraska statute, of incapacity. This incapacity is a necessary precondition to allowing an agent to substitute his or her decision-making for the principal. Who makes the determination that a person is incapable of making a health care decision? It is the attending physician, together with any other consulting physician, who makes the decision as to incapacity. This decision must be set down in writing by the physician(s). The physician(s) must document the cause and the nature of the

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<sup>2</sup> The booklet and standard form are available at:

[http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011\\_aging\\_hcdec\\_univhcpaform.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_hcdec_univhcpaform.authcheckdam.pdf)

The consumer's tool kit, questionnaires, is available at:

[http://www.americanbar.org/groups/law\\_aging/resources/consumer\\_s\\_toolkit\\_for\\_health\\_care\\_advance\\_planning.html](http://www.americanbar.org/groups/law_aging/resources/consumer_s_toolkit_for_health_care_advance_planning.html)

incapacity. It is only after this has been done that the health care agent's authority to make decisions for the principal commences.

If a dispute arises as to the incapacity determination, the dispute may be taken to court. This type of court proceeding includes the appointment of a guardian ad litem and establishes a 14-day period for the court's decision. The decision is a determination as to whether or not the patient is incapable of making medical decisions. The outcome of the court proceeding is therefore either that the agent's authority becomes effective or does not become effective.

### The Agent's Authority

In addition to the instructions and limitations imposed within the health care POA itself, the Nebraska statute imposes conditions and restrictions on the agent's authority, as follows:

- The agent cannot consent to any act or omission to which the principal could not consent under law. (So, an agent cannot do more than the principal could do.)
- The agent cannot make any decision when the principal is known to be pregnant that will result in the death of the principal's unborn child and it is probable that the unborn child will develop to the point of live birth with continued application of health care.
- The agent is not personally liable for the costs of the principal's treatments.
- The agent is to have full access to medical records.
- If the principal disagrees with the incapacity determination, or with any of the agent's instructions as to health care, the principal's decision prevails unless the county court has determined that the principal is incapable. (So, if the family/agent and the relevant medical staff believe the principal is incapable of making health care decisions, but the principal objects, the statute seems to state that the court must become involved.)
- The agent must consult with medical personnel, including the attending physician, in making health care decisions for the principal. The decisions must be consistent with the wishes of the principal as set forth in the health care POA or "as otherwise made known" to the agent. If the principal's wishes cannot be determined, the standard for decision making becomes the principal's best interests, "with due regard for the principal's religious and moral beliefs if known."

### Life Sustaining Procedures: The Living Will Directive

Finally, and perhaps most critically, comes the question of life sustaining procedures. The statute states that the agent can only make decisions as to withholding or withdrawing a life-sustaining procedure, or withholding or withdrawing artificially administered nutrition and hydration, as provided under the statute. What does the statute provide?

First the definition of *life-sustaining procedure* and *artificially administered nutrition and hydration*:

Life-sustaining procedure shall mean any medical procedure, treatment, or intervention that (a) uses mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function and (b) when applied to a person suffering from a terminal condition or who is in a persistent vegetative state, serves only to prolong the dying process. Life-sustaining procedure shall not include routine care necessary to maintain patient comfort or the usual and typical provision of nutrition and hydration.

Although *artificially administered nutrition and hydration* is not defined, it appears to include all administration of nutrition and hydration that is not administered orally: “orally” being the definition of the usual and typical provision of nutrition and hydration.

Decisions with respect to withdrawing or withholding life-sustaining procedures or artificially administered nutrition and hydration occur only in the context of a *terminal condition* or a *persistent vegetative state*. Therefore, these decisions, and the advance directives concerning these decisions, whether included in the health care POA or in a living will, apply only in very narrow circumstances. What are those circumstances? First, the existence of either a terminal condition or what is called a persistent vegetative state:

*Terminal condition* shall mean an incurable and irreversible medical condition caused by injury, disease, or physical illness which, to a reasonable degree of medical certainty, will result in death regardless of the continued application of medical treatment including life-sustaining procedures.

*Persistent vegetative state* shall mean a medical condition that, to a reasonable degree of medical certainty as determined in accordance with currently accepted medical standards, is characterized by a total and irreversible loss of consciousness and capacity for cognitive interaction with the environment and no reasonable hope of improvement.

Second, there must be a determination that the life sustaining procedure would serve only to *prolong the dying process*. These are clearly medical determinations beyond the scope of authority of the agent or the reach of the health care directive itself. Finally, the agent’s decisions apply only to a procedure or treatment that uses “mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function.” Again, this is a medical determination. The essential decisions are medical, as we would expect.

It is worth noting as well that the statute casts the agent in a sense in a responsive role:

The attorney in fact [agent] shall not have the authority to consent to the withholding or withdrawing of a life-sustaining procedure or

artificially administered nutrition or hydration unless (a) the principal is suffering from a terminal condition or is in a persistent vegetative state and (b) the power of attorney for health care explicitly grants such authority to the attorney in fact [agent] or the intent of the principal to have life-sustaining procedures or artificially administered nutrition or hydration withheld or withdrawn under such circumstances is established by clear and convincing evidence.

The agent can only “consent” to the withdrawal of life-prolonging procedures. The law seems to imply that the initial recommendation for withdrawal must be medical.

### Who Is An Agent

The agent, obviously, is a person authorized to act for the principal under the health care POA. But more broadly the agent should be a person who knows the patient’s wishes and has a sense of the patient’s values. It is also essential that the agent have full access to all medical information, including treatment evaluations. The agent ought to be a person who will act according to the principal’s wishes even in the face of opposition from family. If possible, a person should consider naming a successor agent, in case the first agent is unwilling or unable to serve. If a person names co-agents, the health care POA must be explicit as to whether or not they can act independently or whether unanimous consent is required. And if there are two co-agents, how will a disagreement between them be resolved, should it arise? The advice of professionals is that two co-agents should not be named if the reason is merely to spare the feelings of one of the children who might not otherwise be named.

Choosing the right agent is an important decision. This person may participate in making life or death decisions on the principal’s behalf. There are certain statutory requirements that should first be considered. The agent/attorney-in-fact should not be one of the following:

- The principal attending physician
- An employee of the attending physician who is unrelated by blood, marriage or adoption to the principal,
- A person who professionally evaluates the principal’s capacity to make decisions,
- A person who works for a governmental agency that is financially responsible for the principal’s care,
- A person that a court has already appointed as the principal’s guardian or conservator,
- A person unrelated to the principal by blood, marriage, or adoption who is an owner, operator, or employee of a health care provider in which the principal is a patient or resident, and
- A person unrelated to the principal by blood, marriage, or adoption if, at the time of the proposed designation, he or she is presently serving as an attorney in fact for ten or more principals.

More positively, the agent should be someone who is willing to be the agent, someone with whom the principal can discuss his or her wishes, and who will both understand and honor those wishes. It is best if the person lives near the principal or can travel to be with the principal, if needed. The person should be someone the principal trusts, who can deal effectively with conflicting family opinions and who is able to be a strong advocate for the principal with the medical community.

If the agent is not the principal's closest relative, under Nebraska law, he or she has a duty, once the incapacity determination has been made, or is about to be made, promptly to inform family members of that an incapacity determination. The statute provides a priority of notification from spouse to adult child to parent to adult sibling to "next closest kin."

#### Miscellaneous

A health care POA is revocable by the principal at any time provided the principal is competent.

A health care POA will likely be HIPAA-compliant. HIPAA, the Health Insurance Portability and Accountability Act, seeks, among other things, to protect patient health care information with certain privacy requirements. The Nebraska statute states that the agent shall have access to all medical information. If there is a concern, the POA might contain an express HIPAA authorization, similar to the following:

Any person authorized by the principal in this health care power of attorney as agent may act as the principal's personal representative pursuant to the Health Insurance Portability and Accountability Act, sections 1171 to 1179 of the Social Security Act, 42 U.S.C. 1320d, as amended, and applicable regulations, to obtain access to the principal's health care information and communicate with the principal's health care provider.

After the health care POA and living will (if not part of the POA) have been prepared, it should be stored in a place where it might easily be found, preferably not a safety deposit box. The principal should transmit a copy to his or her primary care physician and to those people who would appear on the hospital's emergency contact list for the principal. Keep a list of the people to whom it is sent, in the event you later change the POA.

Joe Hawbaker  
Hawbaker Law Office  
Omaha, Nebraska  
[jmhawbaker@gmail.com](mailto:jmhawbaker@gmail.com)