

Elder Law: Advance care directives a must

Sunday, January 23, 2011

By Julian Gray and Frank Petrich

In previous columns, we discussed estate planning for the Adams family with regard to a will, what it can and cannot do, the importance of appropriate beneficiaries for those assets that would normally be distributed outside of the probate process (such as an IRA or life insurance proceeds) and the need for powers of attorney (documents to give someone authority to act on your behalf for financial or related transactions if you are unable or unwilling to do so).

In our scenario, Mr. and Mrs. Adams have three children, Elaine, who lives close to them and who is financially astute, and two sons who live out of state: John, a critical care nurse, and Matthew, who has been somewhat of a ne'er-do-well but who, nonetheless, loves his parents.

We now move on to the third document critical to a proper estate plan (by analogy, the three-legged estate planning stool) for adults of any age: the Advance Health Care Directive (health-care power of attorney and "living will"). This document can also be called an Advance Directive. It is often the most emotional of the estate planning documents to consider and to prepare.

What is it and why is it so important?

Generally speaking, a competent adult has the right to accept or forgo almost any type of medical treatment. However, let's assume that you never have talked to anyone about what your wishes are or might be. A good example is an elderly couple who started fighting with one another in our offices over their respective wishes because they had never broached the subject with each other in all of their 45 years of marriage.

It was much better for this couple to have this heated discussion in our offices rather than in a hospital emergency department or intensive care unit with all of the attendant stress normally found in such settings. Such stress gets even worse when family members (for example, children) get called on to make decisions on behalf of their parents and have never had discussions with their parents as to the parents' wishes. We call this situation "absolute chaos."

An Advance Health Care Directive is a written set of instructions that state your wishes for medical treatment. In these instructions, you name a "Health Care Agent" to either follow your express wishes or to decide treatment for you if you are unable to do so, whether or not you are terminally ill or permanently unconscious. As with a power of attorney, we like to use a "rule of three" in naming at least one primary person and two backups to that person in the event of the unavailability of the primary agent.

The appointment of a knowledgeable and assertive agent/advocate can help ensure that your health care wishes are made known and followed. The document also can make known your general values and philosophy and provide a guide for your care. The agent can be a trusted (same word as we used for the naming of an agent under a power of attorney) friend or family member who is close to you and understands your values. Never, however, name someone as an agent without first having a full and frank discussion of your wishes and his or her willingness to serve in such a critical role.

In the Adamases' situation, they named each as the primary agent for the other, named their son John because of his health care background as next in line, followed by their daughter Elaine because of her proximity to them and then Matthew, who even though unstable as to finances, nonetheless could be trusted to carry out their health care wishes. How did they achieve this? They held a family meeting when all three of the children were present. As part of these discussions, they also had a lengthy discussion as to the second part of the Advance Health Care Directive, the living will.

It is important to note that even though you may have the document, nothing is more important than having the conversation with your family as to your feelings about end-of-life treatment decisions and that the document can serve as a "backup" in the event there is disagreement over treatment or someone is simply not aware of the your desires.

The living will portion of a Health Care Directive is where you can state what, if anything, you would want done as to types of medical treatment you want or don't want. This document is generally used to describe when the individual would no longer want certain types of life-prolonging medical treatment. However, you also can direct more aggressive care even in very difficult circumstances, if this is what you want. Whatever your decisions may be, the living will portion of an Advance Health Care Directive makes your decisions known and helps minimize interfamilial conflict because these are your wishes, not those of family members.

Where can you obtain an Advance Health Care Directive? Your attorney can draft one for you. A copy of a Health Care

Directive developed cooperatively between representatives of the Allegheny County Bar Association and the Allegheny County Medical Society also is available at the Bar Association's website (www.acba.org).

Once you've made your choices, discussed them with not only your family and/or nonfamily agents but also with your physician so that he/she knows of your wishes and perhaps your clergy and signed the directive, what should you do with it? We normally tell the client to give copies to each of their agents, their primary care physician and their attorney and put the original of the document in a readily accessible place such as in a refrigerator in a sealed plastic bag. As one client proudly said after having gone through the steps above: "My Advance Health Care Directive's in the fridge right next to my cheese!"

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First published on January 23, 2011 at 12:00 am