Advance Health Care Directives and Property Power of Attorney

Presentation by Denise Kaplan for CVLS

March 16, 2022
ADVANCE HEALTH CARE DIRECTIVES

Types
- Durable Power of Attorney for Health Care
- Living Wills
- Five Wishes
- Mental Health Treatment Declaration (not covered today)

Goals
- Ensure optimal decision-making even after one’s incapacity
- Avoid guardianship
- Choose specific people to carry out wishes
- Express philosophy regarding life-sustaining treatment

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DURABLE POWER OF ATTORNEY FOR HEALTH CARE

- “New” IL statutory form effective January 1, 2015; slightly modified in 2016
- More clear on when agent can make decisions
- Presumption in favor of organ donation
- Offers simplified choices on life-sustaining treatment
- Contains built-in HIPAA release

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EFFECTIVE DATE OF POWER OF ATTORNEY FOR HEALTH CARE

- When physician determines principal lacks decision-making capacity

- When physician determines principal lacks decision-making capacity, but grants the agent immediate power, for the purpose of assisting in health care plans and decisions, to communicate with providers and to access and share records

- Immediately, but principal may still make decisions if desired
TERMINATION DATE OF POWER OF ATTORNEY FOR HEALTH CARE

- Extends past death
- Autopsy
- Anatomical gifts
- Disposition of body
- Access to medical records
LIFE-SUSTAINING TREATMENT CHOICE

QUALITY

QUANTITY
CAPACITY TO EXECUTE POWER OF ATTORNEY FOR HEALTH CARE

- Lowest bar of all documents

- Presumed to have capacity absent notice to contrary

- Advanced age, diagnosis of mental illness, or development disability is not a strict bar to decisional capacity
REVOCAUTION OF POWER OF ATTORNEY FOR HEALTH CARE

- Obliterate or destroy
- By written revocation
- By verbal or other expression in presence of a witness
- In any manner communicated to the agent or any other person
- Can be done even if principal is no longer decisional (statute says “without regard to the principal’s mental or physical condition”)
LIVING WILL

- Codified by statute in 1984
- Governs only in limited circumstances
- Only if no health care agent
- Less useful since advent of Power of Attorney Act and Health Care Surrogate Act
FIVE WISHES

- Offered by Aging with Dignity
- Highly detailed
- Available for $5 at fivewishes.org
- Beware of potential conflict with health care power
DURABLE POWER OF ATTORNEY
FOR PROPERTY

- Act authorizing and statutory form revised in 2011

- Authorizes a competent adult to direct the handling of their financial affairs, including in the event of subsequent disability
EFFECTIVE DATE AND TERMINATION DATE OF POWER OF ATTORNEY FOR PROPERTY

- Immediately, unless a specific date or event is inserted
- Terminates at death, unless an earlier date or event is inserted
- Beware trigger of incapacity (triggering event, ease of access to making a determination, can it be reversed, etc.)
- Must follow formalities to alter effective date
CAPACITY TO EXECUTE POWER OF ATTORNEY FOR PROPERTY

- No statutory authority setting forth a requirement

- Less than testamentary capacity
AUTHORITY UNDER POWER OF ATTORNEY FOR PROPERTY

- Listed powers

- Can modify

- No gifting unless specifically authorized (consider Medicaid planning purposes)

- No changing beneficiaries of accounts, contracts, documents or otherwise unless specifically authorized
REVOCATION OF POWER OF ATTORNEY FOR PROPERTY

- Obliterate or destroy
- By subsequent property power or separate written instrument
- By verbal or other expression in presence of a witness
- In any manner communicated to the agent or any other person
- *Statute requires capacity to revoke*
Health Care Power

Consider adding wishes for disposition of the body, funeral, and long-term care (in the form or via a supplemental document)

Health Care and Property Power

- Not required to use statutory form
- May grant authority to agents to designate one or more successor agents
ACTING AS AGENT UNDER A POWER OF ATTORNEY

- No duty to act
- If choose to act, are a fiduciary and must act for benefit of the principal
- How to facilitate acting
- Certification of agent/successor agent and acceptance of authority
**PREVENTING ISSUES**

- Assess capacity at outset
- If using the statutory form, follow the rules regarding naming of agents
- Beware restrictions on witnesses and signing formalities
- Consider obtain a physician letter regarding capacity prior to signature
- Meet with client alone in advance of signature to confirm the choices are theirs
- Recommend that principal discuss wishes with family at time of signature and distribute copies to the named agents ("This Is Us")
- Suggest that principal provide health care provider with a copy of the health care power (becomes part of medical records)
- Advise to collect and destroy all originals and copies of revoked powers of attorney

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WHEN POWERS OF ATTORNEY ARE NOT AN OPTION

- Client lacks requisite capacity to sign
- Health Care Surrogate Act
- Guardianship
A power of attorney remains valid even if subsequent guardianship proceeding

Exception for agent acting against principal’s wishes or risk of substantial harm to principal

Court order must set forth the power of the guardian
QUESTIONS