Healthcare Proxies – Avoiding the Terri Schiavo Dilemma

by Attorney Michael Hooker

Massachusetts law allows a competent person to designate a surrogate (substitute) medical decision-maker (the "proxy") for a resident, in the event that resident is later incapable of making health care decisions.

Massachusetts' health care proxy law arose in response to other high profile end-of-life cases many years ago. The legislature reacted at that time, not by allowing "living wills" but by allowing the appointment of a surrogate decision-maker. A living will is a statement as to your wishes regarding end-of-life treatment. Massachusetts does not recognize such a document as legally binding. It can be used, however, as evidence of what a person would want were they in such a predicament. In the Schiavo case I believe the evidence was that Terri had made oral statements that she wouldn't want her life to be artificially sustained.

The Schiavo case was the rare end-of-life case that makes its way into the courts and the newspapers. The vast majority of these cases are decided by the family without controversy. That being said, I still believe it is important for every person to designate a health care Proxy. It is my opinion that every person should have at the very least, the following estate planning documents: Power of Attorney, Health Care Proxy ("HCP") and Will.

HCP's can help avoid family conflict. They can also avoid potential legal and court fees. In simpler times, hospitals and medical providers looked to family members and spouses when an incompetent elder was mentally unable to provide informed consent to treatment. Those days are fading away. Increasingly, health care providers require a Health Care Proxy. Nursing homes and hospitals routinely request that one be signed on admission. If you have waited too long, haven't signed one and are then incompetent to sign one, your family may have problems getting you necessary treatment. Under such circumstances the provider may require that you pursue guardianship. Guardianships are costly, time consuming and take time.

The HCP form requires two witnesses who are not the proxy. A notary public is not required. I recommend you name an alternate other than your spouse, in case the spouse cannot serve the role. You can name two people to be joint HCP though I am not a big fan of that. You can include language in the HCP regarding end-of-life treatment and the withholding of treatment.

You can later revoke the HCP and appoint someone else (provided you are competent to do so). HCP's are very helpful in affording direction to the proxy. They do have their limitations though. Should you, for example, give your proxy the authority to treat you with antipsychotic medications? Should you authorize your proxy to admit you to a nursing home against your will?

I have been in Probate court many times seeking a guardianship even where there was a HCP because the elder did not want to go to a nursing home. I'm not sure language about involuntary admission would hold up in court. I just raise the issue to illustrate that it is very difficult to imagine all the circumstances that may arise during the aging/dying process and to try to include them in your HCP.

Attorney Michael Hooker, Elder Law | 25 Main St, Suite 439 | Northampton, MA 01060
T 413-582-0200 | F 413-582-9006