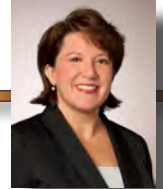




The Importance of a Health Care Directive

By: Olga Álvarez, Esq.



As soon as people find out what area of law I practice, they usually say, “I don’t know if I need a trust.” My response to them varies, but always ends with, “I am certain that you need a Health Care Directive.” Their eyes widen when I provide the following reasons:

Everyone over the age of eighteen (18) should have a health care directive (HCD). Life presents so many surprises and challenges including incapacity, at any age. The statutes in most states will, at the very least, place a family member or next of kin in charge of making those decisions. But, is that the person who knows and understands your client and her wishes? The three issues that arise regarding health care directives are (a) who will serve as agent?; (b) what are the client’s wishes?; and (c) what happens if they don’t have an HCD?

The Health Care Agent

Selecting a Health Care Agent is the first critical step in implementing an HCD. Yet, there is no way to predict who the client will choose as an agent. Often, names spring forth out of a sense of duty or obligation. Hence, it is our responsibility to investigate whether the person mentioned is suitable for the task.

There are wives who have chosen their sibling to serve as their agent over their spouse, simply because the couple shares different religious or philosophical beliefs. There are also those who feel they cannot entrust their family or friends with these decisions, and turn to a private fiduciary. Some choose co-agents and others feel comfortable with a panel of friends and family. Although in my opinion, some options are better than others, it is important that we pose the questions regarding beliefs, the ability of the agent to carry out the client’s wishes, and whether the client trusts the agent.

Although similar beliefs and the capacity to trust the agent are important, the person’s ability to follow the wishes of the client plays a big part in who is actually chosen. For instance, I had a married couple where the wife believed that her husband would be incapable of carrying out her end-of-life decisions, so she chose her brother to serve with her husband as co-agents. In another case, a mother of four chose the child who was likely to question the doctor to ensure an accurate diagnosis and who felt confident enough to deliver the medical course of action, no matter how difficult, to each of her children.

The Client’s Wishes

At the heart of any HCD are the wishes and instructions of the client. The decisions to be made not only include end-of-life decisions, but also whether there should be an aggressive approach to treating a chronic illness, whether there is a preference to stay at home, and whether there should be anatomical gifts or autopsies conducted. The HCD may also grant certain rights to the agent including access to medical records and information, the right to receive the client’s remains, the right to sign an arbitration clause or purchase annuities, the right to serve as conservator, and the ability to employ or discharge health care personnel.

It is important that we outline the options for our clients and present them with the scenarios regarding each choice. Their wishes will change over time depending on a client’s age and health. Nevertheless, guiding them through their options is the only way to ensure that the HCD is an accurate representation of their intent.

The Glitches Without an HCD

Most states do have a next of kin statute that allows family members to make decisions on behalf of the incapacitated person, if there is no HCD in place. In some instances, the

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person selected may be estranged from family members, yet, she has the power to make decisions. Does this newly selected agent understand the beliefs and wishes of the incapacitated person? The answer is likely no, even if the family agent does know the person. End-of-life decisions are very personal and are rarely discussed even in close families. The battle then begins on who knew the incapacitated person best.

Although most state laws provide the appointment of a family member or next of kin, there is usually no authority that permits the agent to have access to medical records without going to court. This is a problem in cases where a client is believed to have become incapacitated as a result of poor medical care. Of course, if an HCD had been in place, access to medical information and records would have been given to the agent, alleviating court costs.

In addition, state laws regarding the disposition of a person's remains vary. Most states use a next of kin statute or require that instructions regarding the disposition of remains be written in the form of either a Will or HCD. I had a client whose fiancé had passed away. The fiancé had been estranged from his family for years and none of the family members responded to my client's phone calls. She waited weeks before his body was finally released to her. What was frustrating is that she was the designated agent in her fiancé's health care power of attorney, but the paralegal whom the fiancé paid to draft the HCD failed to provide a provision to release his remains to his agent. Under the state's statute, if there are no next of kin willing to dispose of the remains, then reasonable inquiries must be made and satisfied before the body may be released. Even some statutory health care directives do not address the disposition of remains.

As we strive to provide our clients with the best possible advice regarding the disposition of their assets after death, it is also important that we counsel them thoroughly on the documents that will heavily impact them while they are alive – such as the health care directive. Highlighting

the importance of the HCD usually convinces the client to procrastinate no longer in creating her estate planning documents.

About the Author:

Olga Álvarez is an Attorney with Sullivan Hill Lewin Rez & Engel based in San Diego, California. She was named one of the Top Young Attorneys in 2009 and was recently recognized as one of the top 25 trusts and estates attorneys by The San Diego Daily Transcript. Her primary area of focus is trust and estates planning, probate, trust administration, and elder law.