CHAPTER 23

Advance Health Care Directives

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Some states, such as California, have combined the various legal documents concerning medical or health care into a single document known as an "Advance Health Care Directive" (also known as an AHCD). The purpose of an AHCD is to make it easier and more practical for you to state your medical care wishes in a legally binding format.

FOR WHOM IS AN ADVANCE HEALTH CARE DIRECTIVE APPROPRIATE?

AHCDs are appropriate for people who are residents of those states which recognize them, or for people who travel frequently to those states. For example, if you suffer an injury or accident in California, you will likely be treated at a California-based medical facility, at least on an emergency basis. In that instance, you would want the hospital to have access to a form the medical staff would find familiar.

Anyone who is an adult may sign an AHCD. The age of majority varies from state to state, but is usually 18. For minor children or others under the age of majority, the child's legal guardian would have the right to determine medical treatment. If that legal guardian has also been injured or has died, their wishes for the child would likely be honored by the medical staff and, if a dispute arises, the courts.

WHAT MATTERS DOES THE AHCD ADDRESS?

An AHCD combines four of your health care documents into one document: 1) your nomination of a health care agent, 2) your nomination of a conservator, 3) your wishes with regard to the continuation of medical treatment in the event you are in a persistent vegetative state (PVS) with no likelihood of recovery, and 4) your wishes regarding organ donation.

Why Would I Want To Set Forth All Of These Matters in an AHCD?

The consequences of failing to have health care documents in place can be expensive and even disastrous. In 2004, the life of Terry Schiavo of Florida took the national stage. Schiavo, who had suffered a severe brain injury, was receiving artificial nutrition and hydration for more than ten years while her relatives battled about whether to withdraw such treatment. Ultimately, the courts decided that her

husband's desire to withdraw her artificial feeding tubes should be honored, and shortly after those treatments were withdrawn, Ms. Schiavo died.

The Schiavo matter could have been avoided completely had Ms. Schiavo signed an AHCD nominating her agent (e.g., her husband or her parents) to make decisions for her, or stating whether or not she wanted to be kept alive with artificial nutrition or hydration if doctors determined she was unable to recover from her illness or injury.

Lawyers throughout the country could discuss similar matters or situations they've encountered where their clients were forced to go to court to decide the fate of a loved one. Medical staff is very reticent about making life and death decisions that relatives with different opinions can second guess and force into the courts.

Moreover, if you are injured or gravely ill, wouldn't you want your medical caregivers to know exactly from whom they needed to obtain permission in order to treat you? Similarly, you want those agents to have some idea of what your wishes are in the event there is an important medical decision to be made (for example, whether to undertake the risk of surgery to alleviate a condition where the risks and benefits can be explained to your agent and he or she can determine what you would want under the circumstances).

WHAT ARE MY OPTIONS FOR NOMINATING A CONSERVATOR IN THE AHCD?

In most instances, you will want your personal conservator (also called a guardian in some states) to be the same person as your health care agent. Occasionally, your health care agent will not be the appropriate choice. Perhaps he or she lives far away, or he or she has some medical knowledge, but no knowledge of your desires about your personal living situation. In those instances, the nomination of the conservator over your person might be someone more familiar with the local facilities and options for local long-term treatment and care, or perhaps someone more intimately familiar with your personal care needs, as opposed to merely your medical treatment desires.

Are There Different Kinds of Conservators?

Yes. In many states, there is a distinction between the conservator over your person and the conservator over your estate. The conservator over your person makes decisions about your personal care; while the conservator over your estate makes decisions regarding your property and financial affairs. In some cases, these may well be two different people.

Suppose, for example, that your sister is very loving and caring, and you respect her judgment when it comes to your day-to-day living wishes. She may know all about the local facilities for assisted living, or perhaps she has a medical background. But you may have concerns about her ability to manage your portfolio of stocks and your real estate. Suppose further that you have another sister who has an MBA

and who manages assets and properties of her own. She may not be as familiar with your personal care wishes as your loving sister, but she is good with money. In that instance, you may wish to nominate your loving, caring, familiar sister as the conservator over your person and your sharp, frugal, money-mogul sister as the conservator over your estate.

What if There Is No One in My Family Who Fits These Descriptions?

Sometimes there is no one among your family or loved ones who is an appropriate choice for conservator. In that instance, you might check with a "private professional fiduciary" — someone who provides these services for a living. If you are alive and well, you are in a position to interview possible nominees and determine whether he or she might be an appropriate person to serve in this role on your behalf.

WHAT ARE MY OPTIONS FOR ANATOMICAL GIVING?

Most states permit you to specify whether you wish to make anatomical gifts and, if so, for what purpose(s) you would like those gifts to be used. You can, for example, limit your gifting to organs to be used specifically for transplant. Other options are for therapy (e.g., tissues for therapeutic uses), research (e.g., to investigate possible cures for your condition), or education (e.g., to train medical students about the human body).

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Techniques to Use for Incapacity Planning

	DURABLE POWER OF ATTORNEY	HEALTH CARE DURABLE POWER OF ATTORNEY OR ADVANCE HEALTH CARE DIRECTIVE	LIVING WILL	REVOCABLE TRUST
When is it effective?	• Immediately or • Springing – Continues after incompetency – Ends at death	• Immediately or • Springing – Continues after incompetency – Ends at death	• Used only for a terminal condition • Only effective after incompetency	• Immediately if funded or • After incompetency if it is a standby trust – Can continue after death
Can it be used for estate planning after incompetency?	Yes, if attorney is given broad powers.	No.	No.	Yes, if a successor trustee is provided in the event of incapacity.
Is it useful for health care decisions?	No.	Yes, it can authorize health care decisions.	Yes, but only for terminal conditions.	No, the trustee makes decisions on property only.
What potential drawbacks exist?	• Third parties are not required to accept it. • Attorney-in-fact is not required to act.	• Third parties are not required to accept it. • Attorney-in-fact is not required to act.	Requires a terminal condition.	Attorney fees and title transfer costs will be incurred.