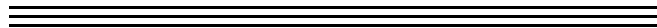


ADVANCED DIRECTIVES

Health Care Proxies and Living Wills

Written by
Emily S. Starr



The Law Office of
Ciota, Starr & Vander Linden LLP

625 Main Street
Fitchburg, MA 01420
(978) 345-6791
Fax (978) 345-6935

Seven State Street
Worcester, MA 01609
(508) 754-8882
Fax (508) 754-3639

info@csvlaw.com

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So long as a patient has the capacity to make and communicate informed decisions about medical treatment, the patient alone has the authority to make decisions regarding care. To have the capacity to make a health care decision, the patient must have the ability to understand and appreciate the nature and consequences of health care decisions, including any risks and benefits of, and alternatives to, proposed treatments.

The capacity to communicate health care decisions is not defined in the law. Most persons believe it requires the complete absence of any physical ability to communicate even by the smallest action such as the blink of an eye.

If someone lacks the capacity to make or communicate informed decisions, there are two formal ways in which an alternate decision maker can be empowered. One is through a guardianship proceeding in the probate court. A second is through the implementation of a document that was signed by the patient while still competent. In Massachusetts, the appropriate document is called a health care proxy. In other states, it may be called a Health Care Power of Attorney. This type of document offers the opportunity to choose one's decision maker and, for that reason, is preferable. This paper discusses the Massachusetts health care proxy.

1. What is a Health Care Proxy?

A Health Care Proxy is a document by which one person, the principal, appoints another person to serve as his health care agent in the event the principal becomes unable to make or communicate health care decisions. The Health Care Proxy gives an individual a way to make sure that his or her values and wishes regarding medical care will be represented if capacity to make or communicate decisions is lost. A Health Care Proxy is simple to create and is not ordinarily filed with a court so there is no filing fee. It can be completed without an attorney, notary public or other professional assistance. Various forms are available since the law does not prescribe a single model.

2. How does a Health Care Proxy differ from a Living Will?

A Health Care Proxy and a Living will are both advance directives used by individuals to attempt to control their medical treatment in the event they become incapable of making or communicating health care decisions in the future.

The Health Care Proxy relies upon the appointment of a health care agent to carry out the wishes of the principal. The appointed health care agent is expected to step into the shoes of the principal and serve as the decision maker at such time as the principal is determined to lack capacity or ability to communicate. The agent is to have all the power to make treatment decisions that the principal would have (if the principal were competent) subject to any specific limitations stated in the Proxy or specific Court Order.

A Living Will, in contrast, sets forth the specific written instructions of the principal regarding his or her treatment preferences in various hypothetical medical situations. Living Wills tend to focus on end-of-life situations and decisions about pursuing or terminating treatment, including life-sustaining measures.

Massachusetts gives explicit recognition and protection only to Health Care Proxies. For this reason alone, persons seeking to execute an advance directive to guide medical care in Massachusetts should execute a Health Care Proxy. Persons who have already completed Living Wills should be counseled to complete a Health Care Proxy as well.

A Living Will may be a useful supplement to the Proxy in cases where an individual wishes to provide detailed written guidance to his or her health care agent. A Living will may also be useful where an individual is unable to identify a suitable agent for a Health Care Proxy.

3. Who can Execute a Health Care Proxy?

Any competent adult can execute a Health Care Proxy. The law's requirements are few: the principal must be at least 18 years old, of sound mind and under no constraint or undue influence. If the principal cannot physically sign the form, the law provides that someone may sign it at his or her direction. Under the law, every adult is presumed to be competent and every Proxy is presumed to be properly executed unless a court determines otherwise. There is no Massachusetts residency requirement.

4. Who can serve as Health Care Agent?

The law allows the principal to appoint almost any adult as a health care agent. Most people select a family member or close friend to be their agent. However, if the principal is a patient or resident of, or applicant to, a nursing home or hospital, then the principal may not appoint an operator, administrator or employee of the facility as an agent. This restriction does not apply if this employee is a relative by blood, marriage or adoption.

It is very important that the principal select someone who the principal **trusts** to be the health care agent. It is a great responsibility to make health care decisions for another person which may include decisions about life-sustaining treatment.

If an individual does not trust anyone to this extent, then the Health Care Proxy may not be suitable for that individual. However, it should be noted that, if an individual becomes incapacitated and health care decisions are needed, decisions will be made either by consensus of members of the immediate family, by the medical practitioner, or by Court Order. The Proxy law gives the individual the power to determine who will make these decisions.

5. **What does a Health Care Agent do?**

The health care agent makes health care decisions for the principal in the event the principal is determined to lack the capacity to make or communicate health care decisions. This authority covers any and all health care decisions, including decisions about life sustaining treatment, unless the principal has specifically limited the agent's power in the Health Care Proxy. The agent is to make decisions for the principal in accordance with the agent's assessment of the principal's wishes, including religious and moral beliefs. If the principal's wishes are unknown, then the agent is to decide based on the agent's assessment of the principal's best interest. If the principal wants the agent to follow his or her wishes, it will be necessary for the principal to communicate those wishes to the agent.

Before making any health decisions, the agent is required to consult with the principal's doctors and other health care providers and to give full consideration to all acceptable medical alternatives. The agent will have access to all necessary medical information including confidential information that would ordinarily be available to the patient.

It is desirable for the Health Care Proxy to give the agent specific authority to consent to anti-psychotic medication. This will go far toward avoiding the need to obtain a special guardianship over the person, called a "Rogers" guardianship. (A Rogers guardianship is a special probate court proceeding granting a guardian specific authority to consent to the administration of anti-psychotic medication).

Unless the agent's authority is limited, the agent can agree to Do Not Resuscitate Orders.

The agent's decisions are to be followed by health care providers as if they were made by a competent patient. The agent's decisions are to have priority over the decision of all other persons. This authority may only be curtailed by a specific limitation placed in the Health Care Proxy or by a specific Court Order overriding the Proxy.

If the principal objects to a health care decision made by the agent, the principal's decision will prevail. The principal's decisions will override the agent's unless a Court determines that the principal lacks capacity to make health care decisions.

The statute provides that an agent shall not be subject to any legal liability for making a health care decision in good faith under a Proxy.

Financial responsibility for the cost of health care provided pursuant to an agent's decision shall be the same as if the decision were made by the principal.

6. Who decides when a person lacks capacity?

The determination of incapacity is a medical determination made by the physician who has primary responsibility for the treatment and care of the principal. The physician is to follow accepted standards of medical judgment to determine whether the principal lacks the capacity to make or communicate health care decisions.

This determination of incapacity must be in writing and placed in the principal's permanent medical record. It must contain the physician's opinion regarding the cause, nature, extent and probable duration of the incapacity. If the cause is related to mental illness or developmental disability, the physician must have specialized training or experience in the relevant area or must consult with a health care professional who does.

In addition, a physician who has been appointed as a principal's health care agent may not make the determination of incapacity.

Once a determination of incapacity is made, notice must be given promptly, orally and in writing, to the agent, the principal (where there is any indication that the principal can comprehend the notice), and to the director of a mental health facility (if the principal is a patient at such facility).

It is possible that the principal may lose and then regain capacity. If the attending physician determines that the principal has regained capacity, then the authority of the agent ceases. The agent's authority may recommence if the principal later

loses capacity. Presumably, this would require another determination of incapacity by an attending physician.

7. How long does the Proxy last? How can it be revoked?

The Health Care Proxy will remain in effect indefinitely unless some action is taken to revoke it. The principal may revoke the Proxy by executing a subsequent Health Care Proxy or by notifying the agent or health care provider orally or in writing or by any other act evidencing a specific intent to revoke the Proxy. The principal will be presumed competent to revoke the Proxy unless a Court determines otherwise. The Probate Court also has authority to revoke or override a Proxy.

In cases where the principal has appointed his or her spouse as the agent, the Proxy will be revoked in its entirety if the couple should subsequently divorce or legally separate. Persons contemplating divorce who have appointed their spouses as their agents should be advised to execute new Health Care Proxies.

8. Must doctors honor the health care agent's decisions?

Doctors and all health care providers must honor the decisions of the appointed agent to the same extent as if the decisions were made by the principal. (This assumes there has been a medical determination that the principal lacks capacity and is subject to any express limitations in the Proxy or any specific Court Order).

This right to appoint a health care agent and to delegate health care decision-making to this agent is a legal right protected by law. The law also protects doctors and other health care providers from legal liability for carrying out in good faith a health care decision made by an agent pursuant to a Health Care Proxy.

Once a Proxy has been delivered to the physician, the physician must arrange for the Proxy to be inserted in the principal's medical record. As indicated above, the medical record should also contain any determination of lack of capacity and a record of any known revocation of the Proxy.

9. Can a patient be required to complete a Health Care Proxy?

The execution of a Health Care Proxy must be a voluntary act. The law specifically forbids anyone from requiring or prohibiting the execution of a Health Care Proxy as a condition for providing health care services or insurance.

The "Patient Self-Determination Act" is a federal law that prohibits most health care providers from conditioning care or otherwise discriminating against persons based on whether they have executed an advance directive. This law also requires most hospitals and other health care providers (technically those participating in Medicare Part A and Medicaid) to provide written information to patients and residents of their right to make decisions regarding their medical care and to formulate advance directives according to the law of their respective states. Health care providers are also required to document whether or not the patient has executed an advance directive, to comply with state law regarding advance directives, and to educate their staffs and communities about the issues concerning advance directives.

10. Is a health care proxy effective in other states?

The laws of other states generally recognize documents which comply with the laws of the state in which they were signed. However, a person who has a place of residence outside of Massachusetts should consider executing a similar document in the other state. Furthermore, it may be a good idea to register the document with a national registry so that it is available wherever the principal resides. US Living Will Registry is one such registry. They can be reached at 1-800-LIV-WILL or www.livingwillregistry.com.