

Focusing on Advanced Directives

By Maureen A. Lyons

Estate planning involves much more than deciding who will receive our property after we are gone. A high-quality estate plan considers all the twists and turns life might take that may impact health, wealth, and independence, and provides a guide for those we will rely on to carry out our plan. Potential health issues are often treated as an afterthought rather than key components of a plan. But all of us should take the time to provide the appropriate legal authority and guidance to those who may need to make healthcare decisions for us in the event of a serious accident or illness that renders us incapacitated and unable to speak for ourselves.

Such provisions are found in what are commonly referred to as advance directives, which address healthcare decision making and end-of-life wishes. Advance directives may involve multiple documents including a healthcare power of attorney, living will, and Health Insurance Portability and Accountability Act (HIPAA) authorizationâ??or one document incorporating some or all of these provisions.

How often do we hear of someone elseâ??s health crisis and say emphatically, â??Iâ??d never want to live like that.â?• What have you done to make those wishes part of your planning? Consider Joe and Maryâ??s storyâ?¦

Joe and his wife Mary were retired and enjoying the good life. Their children were doing well and their grandkids even better. One Friday afternoon, they decided to take a quick road trip to visit their eldest,

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Linda. All was well until the traffic began to back up on the highway. In an instant, tires screeched and the unmistakable sound of metal on metal filled the air as cars collided. Ambulances delivered the couple to a local emergency room.

Joe suffered extensive trauma, including several broken bones and a neck injury. He was given strong painkillers. Maryâ??s skull was crushed and she was on life support. Things were not looking good. After a few hours, the hospital contacted Linda, who immediately shared the news with her three siblings. They waited anxiously to speak with the doctors.

One of the first questions Linda and her siblings were asked was whether Joe and Mary had healthcare powers of attorney or advance directives. They were not certain. Joe Jr. remembered his dad talking about their estate plan the previous Christmas. He volunteered to go to the house immediately and look for their documents. He found documents titled *Advance Healthcare Directives and Living Wills* in his parentsâ?? estate planning files. In their directives, both Joe and Mary appointed each other to serve as their agent or healthcare decision maker. They also named all four children as coagents in the event either parent was unable to serve. The directives also authorized the doctors to share Joe and Maryâ??s confidential health information with their agents to comply with HIPAA healthcare privacy laws.

Armed with this information, the doctors updated the children regarding Joeâ??s prognosis. They recommended emergency surgery to stop internal bleeding. Everyone agreed with the doctorsâ?? recommendation, and the operating room was booked.

Maryâ??s prognosis was much more dire. She suffered severe head injuries, along with multiple other injuries to her chest and spine. Immediate surgery could repair some injuries, but the doctors indicated that rehabilitation would be long and painful. Moreover, the possibility of brain injury meant that her ability to participate in rehabilitation was uncertain.

Linda and Joe Jr. favored authorizing immediate surgery. Their siblings wanted to wait. Harsh words were spoken and tears were shed. Meanwhile, the doctors waited in limbo. Maryâ??s condition worsened before the situation was resolved; surgical intervention was no longer indicated. In Maryâ??s living will, she expressed her desire to have a peaceful transition if her doctors believed that she would not recover sufficiently to live without machines breathing for her. No further treatments were undertaken. Because she had created a living will, her children did not have to make this decision for her. Mary was prescribed pain medications and peacefully passed away three days later with her family at her side.

Part One: Identify Your Healthcare Decision Makers

As an attorney, one of the most common responses I hear when I start to talk to people about medical decision making is along the lines of â??My husband/wife/family knows what I want.â?• While that is a great place to start the process, it certainly should not be the end. The first priority should be to determine who to entrust to speak for you and carry out your wishes. As Joe and Maryâ??s situation demonstrates, it is not enough to provide your spouse with that authority. It is best to also have a backup plan. The bench may be shallow or deep, but it makes great sense to build in some options in

case your first choice is not available.

I also typically recommend to my clients that they avoid appointing coagents. Parents may think that the fairest thing to do is to name all of the children as coagents; however, giving joint authority to two or more people can create unnecessary delays, especially if disagreements arise. If you are determined to name more than one healthcare agent, consider providing each agent with independent authority to make decisions rather than requiring unanimous agreement among all agents.

Part Two: Get Specific on Care Issues

After clarifying who can speak for you, the next priority is to address what sort of decisions your agent can make. Doing this requires asking yourself some very specific care questions:

- Do you have strong feelings regarding quality-of-life issues?
- If you are conscious but permanently unable to recognize and communicate with people, do you want aggressive treatment designed solely to prolong your life?
- What if you are living with advanced Alzheimerâ??s disease?
- If you cannot eat on your own, what are your feelings about tube feeding? For a week? For the rest of your life?
- Would these choices be the same if you become permanently unconscious? Are they dependent on your age?

Two topics that deserve specific discussion include how you feel about hospice care and the end-of-life wishes you would like to see carried out:

- **Hospice care.** Many seriously ill individuals whose illness has progressed to the point where curative treatments are thought to be futile choose hospice care. Those receiving hospice care have chosen to stop treatments designed to cure the condition. Instead, they opt for care that address their comfort as they approach the end of life. It is important to consider that many treatments designed to stop or slow down disease also carry unpleasant side effects that may significantly interfere with the quality of a personâ??s remaining days. If you would want your agent to have the power to arrange for hospice care, that preference, too, should be included in your advance directive.
- **End-of-life wishes.** A living will is the document or the provisions in a healthcare directive that addresses more immediate end-of-life wishes. In a living will, a person can direct care providers to withhold or withdraw life-prolonging procedures if that personâ??s medical condition becomes irreversible and terminal and death is believed to be imminent but for those life-prolonging procedures. Living wills are unique in that they do not require the agent to make a personal end-of-life decision. Rather, a living will is designed to express the individualâ??s legal right to refuse medical or surgical treatment and an understanding of the consequences of such refusal. The living will, then, is the most critical part of advance planning for those who have strong preferences regarding end-of-life care.

Part Three: Communicate Your Wishes

There are no right or wrong answers to these questions. It is also acceptable to be unsure and rely on your agentâ??s best judgment at the time a decision must be made. Regardless, it is critical to communicate your wishes. Joe and Mary almost lost out on the benefits of creating advance directives because they hadnâ??t discussed their planning with their children. They were lucky that their son was able to locate the appropriate documents. Making critical life and death decisions for another person is a daunting responsibility. Your advance guidance can reduce the burden on those you have entrusted and provide them with the comfort of knowing that they are carrying out your sincere wishes. In most or all states, photocopies are legally valid. Thus, after creating your advance directives, provide your agents and healthcare providers with copies for their files.

Part Four: Review and Adjust as Necessary

You should review your planning and related documents every few years to confirm that they still reflect your desires; even more frequently in the event of any change in health status. This is an important and sometimes overlooked need. Medical technologies and treatment options advance over time. Meanwhile, many emergency procedures can have vastly different results depending on the age and physical condition of the patient. For example, cardiopulmonary resuscitation (CPR) performed on a frail elderly person may be more traumatic than beneficial. Make changes on an ongoing basis, as necessary.

The requirements for creating legally valid advance planning documents are state specific. Please consult with an experienced estate-planning attorney to insure that your planning addresses your specific concerns and complies with the laws of your state of residence.

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