

ESTATE PLANNING

Now Is the Time to Protect Your Health Care Decision-Making Rights

Ensuring that your wishes on your medical care are followed is up to you. Take action now while you're well, or you could lose a say in the matter during a crucial time later.



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As hard as it is to get some people to embrace estate planning, getting them to take seriously the need for a health care decision-making plan is even more difficult. At least, that was the case pre-pandemic.

We are no longer in an era of hypotheticals. There is a growing sense that being incapacitated by a disease or serious injury is not something conjectural or out of the realm of possibility. The last 12 months have reminded us all that our health is fragile, regardless of our age or if we have an existing medical condition.

For those who are waking up to this fact, it is important to recognize that, while making our own decisions regarding medical treatment is a fundamental right, getting those decisions honored is not assured. Without a well-considered health care decision-making plan, you may forgo your right of self-determination if you later become incompetent. It also leaves your family in a difficult position, potentially needing to go to court to settle a dispute among family members over who can make decisions on your behalf.

The most effective way to exercise your rights can vary, largely depending on your state's laws. Nevertheless, there are generally three statutory solutions that have

emerged from states' efforts to protect incompetent individuals' decision-making abilities.

Living Will

A living will addresses the situation where you are in an end-stage medical condition or permanently unconscious. In either case, a living will can serve as your advance written directions as to the kinds of treatment you want to be withheld or withdrawn, or the treatment you always want to be provided, if you are not able to communicate your own wishes at the time.

Health Care Durable Power of Attorney

A health care durable power of attorney has a broader scope than a living will, because it will cover health care decision-making in all situations when you cannot make or communicate your own decisions. With health care durable power of attorney, you can appoint one or more agents to make health care decisions for you, which they would base on their personal knowledge of what decision you would likely make if you were able to speak, or in the absence of such knowledge then what would be in your best interests.

Health Care Representative Laws

The third statutory solution is based on the recognition that most people have not signed a Health Care Durable Power of Attorney or a Living Will prior to their becoming incompetent. These statutes are intended to fill that gap by authorizing certain family members to step forward to act as an incompetent person's health care representative and make health care decisions for them.

Such statutes are best seen as a solution of last resort, and clearly are not the equal of a well-drafted health care durable power of attorney or living will. First, they let the state — not you — decide who can make important health care decisions on your behalf. Second, the multiple persons chosen by the statute can cause serious problems. For example, the statute might authorize all the patient's children to act as health care representatives, with each child having an equal voice, whereas the patient may have wanted only one child to act. A tie vote among the children on a particular treatment issue would result in a deadlock, which means that none of them could act.

As we see from any of these options, the more planning an individual has done, the better prepared they and any potential decision-makers will be in a situation when the individual is incompetent. Be it in writing or through discussions with a family member or trusted surrogate, individuals must share their choices concerning treatments.

For example, would they prefer not to remain on a ventilator if they are in a coma with limited brain function? Perhaps not. But what if it was a serious respiratory disease from which there is a greater chance of recovery? The decisions are not as "either/or" as they may seem at first. There are nuances when it comes to health care.

The discussions around these decisions can be difficult or feel abstract when an individual is younger and in the prime of health. Simply put, engaging in estate planning makes many of us uncomfortable, since it involves contemplating the world when we will no longer be around to enjoy it.

However, planning for health care decision-making can give us the peace of mind that, even if we later become incompetent, our right to make our own health care decisions can continue to be exercised by those we have chosen in advance.

NYSUT Note: Participants in the NYSUT Member Benefits endorsed [Term Life Insurance](#) and [Legal Service Plan](#) have access to various legal documents including Durable Power of Attorneys, Living Wills, and more.

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