
Agnew Law Office, P.C.

A Family Estate Planning Law Firm

POWER OF ATTORNEY FOR HEALTH CARE

Background

The Illinois Powers of Attorney for Health Care Law was created by the Legislature in 1987 and provides for a Statutory Short Form of Power of Attorney for Health Care.

The Power of Attorney for Health Care is designed to make it possible for families to handle problems of disability without resorting to the Probate (Guardianship) Court. It provides the structure for personal care and medical decisions to be made by an “agent” (Power of Attorney) during disability. This document is important to all persons, regardless of age, due to the authority that can be transferred under it without court intervention during those periods in which a person becomes disabled, which are often unpredictable and unexpected.

Purpose

Historically, an individual has the right to control all aspects of his or her personal care and medical treatment, including the right to decline certain treatment.

However, if an individual becomes disabled, his or her right to control the aspects of his or her medical care and treatment may be denied unless that person has previously delegated this authority to another person. This is even true of spouses since, contrary to popular belief, marrying an individual does not give you any guardianship rights over that person. The only guardianship that is created inherently by a relationship is that of a parent over a minor child. All other guardianships must be approved and authorized by the Court.

Typically, in the case of disability, a guardian is appointed, and that guardian makes decisions on behalf of the disabled person based on what the guardian believes to be in the best interest of the disabled person. However, the appointment of a guardian can be a cumbersome and expensive process and does not assure the disabled person that his or her desires will be carried out.

The Powers of Attorney for Health Care Law provides an alternative to the appointment of a court ordered guardian. Essentially, through the Power of Attorney, the disabled person (the Principal) can delegate his or her decision making power to a trusted person (the Agent) and can make sure that the Agent's power to make personal and health care decisions for the Principal will be effective to the same extent as though made by the Principal. The Power of Attorney for Health Care not only avoids the need for a court appointed guardian, but also allows the Principal, before he or she becomes disabled, to set forth specific instructions and preferences with respect to health care decisions to be acted upon after disability.

Choices

The basic form of the Statutory Short Form Power of Attorney for Health Care is set forth in the Powers of Attorney for Health Care Act. However, the form is very flexible and provides for numerous alternatives and modifications that may be made to the basic form in order to tailor it to the wishes and desires of the Principal executing the document. A summary of some of these choices and alternatives follows. You should carefully consider these choices when reviewing the Power of Attorney that has been prepared for you, and you should feel free to incorporate any of these alternatives into your particular document.

□ Section 1: Designation of “Agent”

In the first section of the document, you indicate who you want to be your Agent. You may name successor Agents to act in the event the originally named Agent is unable or unwilling to, but you may not name co-agents. The grant of power that is included in the first section is intended to be as broad as possible so that your Agent will have authority to make any decision you could make to obtain or terminate any type of health care, including withdrawal of food and water and other life-sustaining measures, if your Agent believes such

action would be consistent with your intent and desires. If you wish to limit the scope of your Agent's powers or prescribe special rules or limit the power to make an anatomical gift, authorize autopsy or dispose of remains, you may do so in the following paragraphs.

☐ **Section 2: Life Support and Other Options**

Section 2 allows you to include any specific limitations you deem appropriate, such as:

- ✓ Your own definition of when life-sustaining measures should be withheld.
- ✓ A direction to continue food and water in all events.
- ✓ Instructions to refuse any specific types of treatment that are inconsistent with your religious beliefs or unacceptable to you for any other reason, such as blood transfusion, electro-convulsive therapy, amputation, psychosurgery, voluntary admission to a mental institution, etc.
- ✓ Burial instructions (i.e. desire to be cremated).
- ✓ Instructions regarding your desires for organ donation.

The subject of life-sustaining treatment is of particular importance. Three general statements concerning the withholding or removal of life-sustaining treatment are included in this section. If you agree with any one of these statements, you may initial that statement, but you may not initial more than one. A summary of the statements is as follows:

- (1) The first statement allows your Agent to make the determination as to whether or not to withdraw life-sustaining treatment based upon a balancing of the burdens of treatment (including pain and suffering and expenses involved) with the expected benefits. Under this alternative, the Agent essentially looks at the quality of life you would lead and compares it to the burdens of the treatment necessary to sustain that

quality. The specific language is as follows:

I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burden of the treatment outweighs the expected benefits. I want my agent to consider the relief of suffering, the expense involved and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

- (2) The second alternative is much less subjective and bases the decision to withdraw life-sustaining treatment on a medical diagnosis. Under this alternative, life-sustaining treatment will only be withheld or discontinued when you are in a coma, which your attending physician believes to be irreversible. The specific language is as follows:

I want my life to be prolonged and I want life-sustaining treatment to be provided or continued unless I am in a coma which my attending physician believes to be irreversible, in accordance with reasonable medical standards at the time of reference. If and when I have suffered irreversible coma, I want life-sustaining treatment to be withheld or discontinued.

- (3) The third alternative essentially provides that you are to be kept alive at all costs and life-sustaining is not to be withdrawn. The specific language is as follows:

I want my life to be prolonged to the greatest extent possible without regard to my condition, the chances I have for recovery or the cost of the procedures.

Interaction With Living Will

If you choose to execute a Living Will in conjunction with your Health Care

Power of Attorney, under Illinois law the Power of Attorney will prevail *unless* we eliminate the three choices relating to life sustaining treatment on your Power of Attorney and replace them with a statement directing your agent to comply with the terms of the Living Will and to refrain from taking any action that is inconsistent with that document.

A Living Will is a document which is similar to alternative number (2) set forth above in that it directs life sustaining treatment to be withheld or withdrawn if your attending physician medically determines that you have an incurable and irreversible injury or illness and that your death is imminent except for death delaying procedures. The difference between a Health Care Power of Attorney and a Living Will is that the Living Will is a specific directive that you make concerning the withdrawal of life sustaining procedures upon a certain event. The Health Care Power of Attorney is not a specific directive, but is instead a document whereby you nominate someone to make decisions for you.

Even though you may indicate your desires concerning life sustaining treatment to the Agent under this Section, there is no guarantee that the Agent will carry out your wishes. In fact, Section 2-7 of the Act specifically provides that the Agent "shall be under no duty to exercise the powers granted by the agency." With a Living Will, on the other hand, your wishes are provided to your physician and made a part of your medical record. There is no reliance upon someone else to make the decision on your behalf. If the conditions as contemplated under the Living Will ever exist, the medical determination will be made and your desires as expressed under the Living Will should be carried out.

It is therefore common to execute both a Living Will and a Health Care Power of Attorney in conjunction with each other. If it is your desire that your Agent make the determination as to whether or not life sustaining treatment will be withheld or withdrawn, you should execute the standard form of Health Care Power of Attorney. If you wish to have life sustaining treatment withheld or withdrawn upon a determination by a physician (i.e. not your Agent) that you are in an irreversible and incurable condition, you should execute both a Health Care Power of Attorney and a Living Will in conjunction with each other.

□ **Section 3: Effective Date**

This section sets forth the effective date of the Power of Attorney. The Power of Attorney may become effective on a specific date, such as the execution date of the document, or at a future event during your lifetime, such as a determination by a physician of your disability.

☞ *As a result of the HIPPA Privacy Laws it has now become much more difficult to make a Power of Attorney effective upon incapacity due to the fact that the HIPPA Laws may very well prevent the physician from disclosing the medical information needed to prove incapacity and permit the named Power of Attorney to step up and Act. For this reason, consideration should be given to creating a Power of Attorney that is effective immediately (and does not require the disclosure of private information by a physician to make the Power of Attorney effective).*

□ **Section 4: Termination Date**

This section sets forth the termination date of the Power of Attorney. The Power of Attorney may be terminated on a future date, on a future event, upon your written revocation, or upon a court order.

□ **Section 5: Successor Agents**

If you wish to name a Successor Agent or Agents, their names should be included in this section.

Other Provisions in Act

Some other pertinent provisions contained in the Powers of Attorney for Health Care Law are as follows:

- ❑ Neither your attending physician nor any other health care provider may act as an Agent, except that a person who is not administering health care to you may act as a health care agent even though that person is a physician.
- ❑ A health care provider that is furnished with a copy of a Power of Attorney for Health Care is required to make it a part of your medical records. Whenever the health care provider feels that you lack capacity to give informed consent to medical treatment which the health care provider deems necessary, the provider must consult with the Agent named under your Health Care Power of Attorney.
- ❑ A health care decision made by your Agent in accordance with the terms of the Health Care Power of Attorney shall be complied with by every health care provider to whom the decision is communicated, subject to the provider's right to administer treatment for your comfort, care or alleviation of pain. If, for some reason, the provider is unwilling to comply with your Agent's decision, the provider is required to promptly take all steps reasonably necessary and appropriate to transfer responsibility for your care to another provider designated by your Agent.
- ❑ No health care provider or other third party shall be subject to any type of civil or criminal liability or discipline for complying with any direction or decision by your Agent, even if death or injury ensues.
- ❑ Although empowered, your Agent is under no duty to exercise the powers granted by the Power of Attorney or to assume control of or responsibility for any of the Principal's property, care or affairs, regardless of the Principal's physical or medical condition.
- ❑ Whenever a power is exercised, the Agent shall use due care to act for the benefit of the Principal in accordance with the terms of the Power of Attorney and shall be liable for negligent exercise.

Powers of Agent

Some of the specific powers that are granted to an Agent under the Powers of Attorney for Health Care Law include, but are not limited to, the following:

1. The Agent is authorized to give consent to and authorize or refuse, or to withhold or withdraw consent to, any and all types of medical care, treatment or procedures relating to the physical or mental health of the Principal, including any medication program, surgical procedures, life-sustaining treatment or provision of food and water for the Principal.
2. The Agent is authorized to admit the Principal to or discharge the Principal from any and all types of hospitals, institutions, homes, residential or nursing facilities, treatment centers and other health care institutions providing personal care or treatment for any type of physical or mental condition. The Agent shall have the same right to visit the Principal in the hospital as is granted to a spouse or adult child of the Principal, any rule of the institution notwithstanding.
3. The Agent is authorized to contract for any and all types of health care services and facilities in the name of and on behalf of the Principal and to bind the Principal to pay for all such services and facilities, and to have and exercise those powers over the principal's property as are authorized under the statutory power, to the extent the Agent deems necessary to pay health care costs; and the Agent shall not be personally liable for any services or care contracted for on behalf of the Principal.
4. At the Principal's expense and subject to reasonable rules of the health care provider to prevent disruption of the Principal's health care, the Agent shall have the same right the Principal has to examine and copy and consent to disclosure of all the Principal's medical records that the Agent deems relevant to the exercise of the Agent's powers, whether the records relate to mental health or any other medical condition and whether they are in the possession of or maintained by any physician, psychiatrist, psychologist, therapist, hospital, nursing home or other health care provider.

5. The Agent is authorized to direct that an autopsy be made or the Agent may make a disposition of any part or all of the Principal's body pursuant to the Uniform Anatomical Gift Act, and to direct the disposition of the Principal's remains.

Any limitations that you desire on these powers, if any, should be set forth in Section 2 (as mentioned above).

Validity

As a document created under the authority of the Illinois State Legislature and the Illinois Probate Laws, a Power of Attorney for Health Care executed in the State of Illinois pursuant to this Act may only be valid in the State of Illinois. However, because many states have now adopted Power of Attorney statutes, it is possible that a Power of Attorney for Health Care drafted and executed in Illinois will meet the requirements of a Health Care Power of Attorney statute in another state and *may* therefore be valid in that state. However, this determination must be made on a state by state basis. If you have a question as to whether or not a Power of Attorney for Health Care executed in Illinois would be valid in a particular state outside of Illinois, Agnew Law Office would be happy to review the Power of Attorney for Health Care Act of that State and make the determination for you.

This document was prepared by:

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