Introduction

Today’s advanced medical technology may result in the possibility of being subjected to various invasive medical procedures, particularly life support systems, which you may not wish to undergo. In these circumstances, you cannot serve no purpose other than to prolong the process of dying. But each of us has the right to state our wishes in this regard, now, while we are still in command of our faculties and when our judgment is not challenged. This statement of your wishes can be made most effectively through two documents, 'A Living Will' and a 'Health Care Proxy.'

This pamphlet describes the background and the purpose of these two documents, and how they can effect the implementation of your wishes.

What is a Health Care Proxy?

A Health Care Proxy is a document which allows you, as a competent adult, to appoint another person as your “agent” to make decisions for you regarding your health care in the event you lose your decision-making capacity or the ability to understand and appreciate the nature and consequences of health care decisions. The Proxy can be general and apply to all medical decisions, or may impose limitations and spell out specific instructions. Some states may limit its applicability in certain situations.

Is the Health Care Proxy recognized in New York?

Yes. New York Health Law Section 2200(a)(1)(a) specifically recognizes the Health Care Proxy and establishes a procedure to allow you (the “principal”) to appoint someone you trust, often a family member or a close friend, to make decisions about your health care treatment on your behalf if you are no longer able to do so.

When does the Health Care Proxy become effective?

Your agent’s authority to make health care decisions under the proxy is activated upon a determination by your attending physician, to a reasonable degree of medical certainty, that you have sustained loss of your capacity to make such health care decisions. Your health care agent cannot act under the Proxy until such determination has been made.

Can your health care agent make all medical decisions for you when authorized to act?

Yes. Your agent can make decisions in accordance with your wishes, including your religious and moral beliefs, if you are no longer able to do so.

Are witnesses necessary?

Yes. Your agent can make decisions in accordance with your wishes, including your religious and moral beliefs, if you are no longer able to do so.

When does the health care agent have the authority to decide to withhold or withdraw life-sustaining treatment?

Your agent’s power to make such a decision comes into effect only after your attending physician and a second physician give written opinions that you lack medical decision-making capacity. If you are hospitalized and lack of capacity results from mental illness, then the second opinion must be that of a Board Certified Psychiatrist or Neurologist. In certain other cases the second opinion must be that of another relevant specialist.

Are witnesses necessary?

Yes. As principal should sign the Health Care Proxy in the presence of two witnesses, who must also sign and give their names and addresses. In fact, the New York statute requires that the witnesses state that the principal appeared to execute the Proxy willingly and free from duress. In New York, the person designated as agent or alternate agent may not act as a witness, and special witness requirements apply in health care facilities. Note that many states (not New York) require notarization as well as witnesses. Also, some states bar certain persons from acting as witnesses, and some states require a notation that the witnesses knew the principal.

It is also good practice to have two independent witnesses to the execution of your Living Will, if that is a document separate from your Health Care Proxy.
What is a Living Will?

A Living Will is a legal document in which you, as an adult who is now competent, can state your wishes regarding your future health care. It is used by those persons who want to express their feelings about the withholding or the withdrawing of life-sustaining treatment that prolongs the process of dying. Many persons want to make clear their wishes about types of life-sustaining treatment which should be used in advance; others wish to state that there are no life-sustaining measures to have all available kinds of life-sustaining treatment administered.

The Living Will is intended to anticipate the situation wherein you might be in an incurable or an irreversible condition where you can no longer make decisions on your own behalf. The Health Care Proxy does not come into play until you are no longer competent to make decisions and/or express your wishes.

The Living Will can also be used to provide for any express wishes you may have as to health care and treatment. A Living Will is sometimes called an Advance Directive for Health Care, or a Health Care Declaration.

How many copies should you sign?

You may execute more than one original copy of the Health Care Proxy, although the New York State Department of Health advises that photocopies are acceptable. Original photocopies may be given to your physician, your health care agent your alternate agent, your attorney or anyone else whose wishes you wish to carry out. You should keep onecopy, and should provide originals or photocopies to your physician or any other health care provider, and anyone who has copies of existing documents to make revocation or amendment easier.

You may also execute more than one original copy of the Health Care Proxy. It may not be necessary to give your physician a copy of the Living Will if you have stated a Health Care Proxy, since your proxy will serve as your attorney in fact. Your wishes should be clearly stated in writing. A Living Will is durable, having effect in any state in which it is executed, and being self-executing.

What if you move?

Generally, the “clear and convincing proof” standard is that a copy of the Health Care Proxy and Durable Power of Attorney shall be given to your physician, your health care agent and your attorney and anyone else whose wishes you wish to carry out.

Will other documents be helpful to ensure your wishes are carried out?

In New York, if a Health Care Proxy or similar document from another state is recognized by the laws of that state, it will be honored in New York. Correspondingly, most states generally consider a Health Care Proxy from another state to be valid. If you do not move, if you spend any significant amount of time in another state, you should have documents which comply with the laws of that state. A Living Will is not considered a Health Care Proxy and Durable Power of Attorney for property management so that your agent has power to provide funding for medical care and treatment. The agent may not do this, but need not be, the person who is the health care agent in your Proxy. Your Health Care Proxy should be combined with your Power of Attorney requirement for separate documents for the Health Care Proxy and Durable Power of Attorney.

Who can help you create a Living Will and a Health Care Proxy?

Start by talking to someone who knows you and can help you express your values and wishes in the context of your life.