

PLANNING FOR INCAPACITY

Health Justice Clinic

Powers of Attorney

Health Care Powers of Attorney

Living Wills

Planning for Incapacity

- **What happens if someone becomes incapacitated and has no plans in place?**
- If client becomes incompetent;
 - no one authorized to handle affairs
 - sign checks and pay bills
 - transact any business
 - Make health care and other personal care decisions
- **Must go through cumbersome process to:**
 - Have person declared incompetent, and
 - have a guardian appointed.

Financial Planning Tools

- Create joint ownership vehicles
 - Joint ownership with right of survivorship
 - Real estate
 - Bank accounts
 - Annuities

Be aware of downsides of these

- Instruments with beneficiaries
 - Life insurance
 - Annuities
 - Retirement accounts
 - Annuities

Financial Planning Tools

- Personal Agency Accounts
 - allows someone to handle specific account at bank
- Social Security Representative Payee
 - Social Security Administration has internal process for appointing payee of benefits for people who can't handle it themselves
- Powers of attorney

POWERS OF ATTORNEY

- Legally recognized document
- By which one person gives another
- The power or authority to act on his or her behalf
- Document can specify
 - Broad or narrow powers
 - General, or aimed at a specific task (eg real estate closing)
 - Effective now, effective later
 - Effective for a limited time or indefinitely

North Carolina Uniform Power of Attorney Act

- New law that went into effect 1/1/2018
- Chapter 32C of NC General Statutes
- Supersedes previous law, Chapter 32A

Some Definitions

Chapter 32C, Article 1

- “Principal”:
 - Person who gives another a power to act through a power of attorney.
- “Agent”:
 - Person to whom power is given.
- Co-agent:
 - When more than one agent is appointed to serve at the same time
 - Default rule is that co-agents can act independently
 - If client wants co-agents to act together, that can be specified, but is unwieldy
- Successor Agents
 - Back-up in case Agent can't serve
 - Do not get authority until all co-agents are gone (revoked, resigned, deceased, incapacitated)

“Durable”

- Means that the Power of Attorney is still in force after the Principal becomes incapacitated.
- Under new law, POA is durable by default

Powers/Authorities granted in a POA

- General Authorities
- Specific Authorities

General authorities (powers) § 32C-2-204 through § 32C-2-216

- Real Property
- Tangible Personal Property
- Stocks and Bonds
- Commodities and Options
- Banks and Other Financial Institutions
- Operation of Entity or Business
- Insurance and Annuities
- Estates, Trusts, and Other Beneficial Interests
- Claims and Litigation
- Personal and Family Maintenance
- Benefits from Governmental Programs or Civil or Military Service
- Retirement Plans
- Taxes

Specific Authorities – “hot powers” § 32C-2-201(a)

- **Gifts:** Make a gift
- **Survivorship:** Create or change rights of survivorship (e.g. on jointly owned properties)
- **Beneficiary Designations:** Create or change a beneficiary designation (e.g. on life insurance or a retirement account)
- **Delegate** authority granted under the power of attorney

Specific Authorities – “hot powers” § 32C-2-201(a)

- Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
- Exercise fiduciary powers that the principal has authority to delegate
- Renounce or disclaim an interest in property, including a power of appointment
- **Exercise authority over the content of electronic communications** sent or received by the principal

Restrictions on exercising specific authorities, § 32C-2-201(b)

- *Must be exercised in accordance with ---*
- the principal's objectives, if known, or
- If unknown the principal's best interest, based on all relevant factors, including
 - The value and nature of the principal's property
 - The principal's foreseeable obligations and need for maintenance
 - Minimization of taxes
 - Eligibility for a benefit, program or assistance under a statute or regulation
 - The principal's personal history of making or joining in making gifts
 - The principal's existing estate plan

Exercising Specific Authorities in Favor of Agent, § 32C-2-201(c)

- Agent can't exercise specific authorities in favor of the agent or an individual to whom the agent owes a support obligation UNLESS the power of attorney provides for that.

Danger of “Hot Powers”

- Potential to change principal’s estate plan through
 - Gifts
 - Changing/creating survivorship designations (e.g. joint bank accounts)
 - Changing beneficiaries (eg of life insurance, retirement accounts)
- Especially a concern when these powers can be exercised in favor of the agent
- If the client is competent, the client can exercise these powers herself – so we’re just dealing with incapacity situations
- Considerations:
 - Does the client even have any property/accounts with survivorship designations? With beneficiaries?
 - Is the agent an especially trusted person? (spouse, child, parent)
 - Are there complex/hostile family dynamics?

Gifting

- This is a power that has potential for abuse, and many clients will not want to include it
- If the document is silent on gifting, no gifting allowed except by court order
- Unless otherwise specified, gifting authorities subject to limitations in
 - § 32C-2-201(b) (objectives/best interests)(which applies to all specific authorities)
 - § 32C-2-217 – (gifts by general authority)

Gifts – § 32C-2-217

- Unless otherwise provided, general gifting power allows only:
 - Gifts to individuals that do not exceed the greater of
 - An amount that is in accordance with principal's history of making gifts, or
 - The annual dollar limit of the federal gift tax
 - Gifts to charities in accordance with principal's history of making such gifts.

Gifts – for benefit eligibility

- Sometimes there's a need to make gifts beyond those for which the principal has a historical pattern, e.g.
 - to facilitate eligibility for government benefits (e.g. Medicaid for nursing home)
 - Need special language for that
 - Other conveniences
- Gifting for eligibility is only an issue when the client has some assets, e.g. owns a home
- By permitting gifting, client may try, if desired, to preserve assets for heirs
- Most of our clients don't have many assets, but some do own a home.

Duties of Agent – Non-waivable

G.S. § 32C-1-114(a)

- Act in accordance with the principal's reasonable expectations to the extent actually known by the agent, and otherwise, in the principal's best interest.
- Act in good faith
- Act only within the scope of authority granted in the power of attorney.

Duties of Agent – waivable

G.S. § 32C-1-114(b)

- Act loyally for the principal's benefit
- Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest.
- Act with reasonable care, competence, and diligence
- ***Keep a record of all receipts, disbursements and transactions***
- Cooperate with the health care agent
- Attempt to preserve the principal's estate plan to the extent actually known, if preserving the plan is consistent with the principal's best interests
- ***Account to the principal or a person designated by the principal.***

Termination/Revocation of POA § 32C-1-110(a)

- POA terminates when:
 - Principal dies
 - If not durable, when principal becomes incapacitated
 - Principal revokes POA
 - Date specified or purpose accomplished
 - Agent dies, becomes incapacitated, resigns, and there is no successor agent
 - A guardian of the estate or general guardian is appointed for the principal and the guardian terminates the POA
- Authority of an agent can terminate without terminating the entire POA, including if the agent is a spouse and the parties divorce (unless otherwise specified)

When effective § 32C-1-109

- Default rule is “live when signed” – alternatively,
- Springing Powers –
 - Principal can specify an event or contingency upon which the POA will go into effect
 - Typically – when principal becomes incapacitated
 - Other possible condition –
 - Principal authorizes in writing
 - POA can specify who will determine if the condition (eg incapacity) has been met
 - If no one specified, statute provides mechanism

Definition of “Incapacity” § 32C-1-102(6)

- the inability of an individual to manage property or business affairs because
 - a) the individual has “an impairment in the ability to **receive and evaluate** information or **make or communicate decisions** even with the use of technological assistance,” or
 - b) the individual is “missing, detained, including incarcerated . . . or outside the United States and unable to return.”

Problems with Springing Powers of Attorney

- Establishing that the condition has been met (particularly if condition is incapacity)
- Inconvenient or difficult at a difficult time
- Reluctance of some banks, etc. to accept springing powers of attorney.

Our Recommendation

- Durable Power of Attorney
- Effective immediately
- With broad powers

Revocation of POA

- **Does client already have POA?**
 - Find this out & get copy
- **Revoke old POA –**
 - If client wants to remove a previously-named agent.
 - Do a written revocation (we have form)
- **Serve revocation –**
 - If the previous POA was recorded, we must serve the revocation on former agent, and record the revocation, with proof of service

Potential ethical issues

- Who is the client?
 - Be careful when a friend or relative brings infirm client for a POA that names that person as agent
 - Watch out for undue influence
- Is the client competent to execute a POA?

Power of Attorney Procedures

- Document protocols
 - Interview (for all documents together) – almost always in person
 - Opening memo
 - Draft documents
 - Review by Client
 - Signing – in person

Forms

- Power of Attorney Intake Form – p 26
- Durable Power of Attorney – p 28
- Durable Power of Attorney – Springing – p 33
- How to revoke – p 39
- Important Information for Agent – p 41

Health Care Advance Directives

- Combined HCPOA & LW intake form – p 45
- Health Care Power of Attorney – p 49
- Advance Directive for a Natural Death (“Living Will”) – p 67

The Need for Planning....



- Terri Schiavo case underscored importance of planning for incapacity
 - Deciding preferences, values
 - Sharing desires with family and friends
 - Choosing a trusted person who can implement wishes
 - Executing appropriate documents
 - Giving the documents to persons who will carry them out --- health care agent (proxy), physicians, health care facilities

Health Care Power of Attorney

- Specialized power of attorney:
 - grants agent power to make health care related decisions;
 - allows client to also specify wishes about health care;
 - Addresses any medical decision a client could make for her/himself, major & minor
 - Admission to facilities
 - Consent to treatment, e.g. surgery, medication
 - Review of/access to medical records
 - Withholding/withdrawal of life prolonging measures

When does the HCPOA come into effect?

- Only upon the mental incapacity of the principal.
- As long as the principal is competent, s/he will make his/her own health care decisions.

How is Incompetence Determined?

- By a physician named by the principal in the document, or, if that physician is not “reasonably available,”
- By the attending physician, if so stated in the health care power of attorney
- Patient can name the physician they want to make the determination of incapacity, but physicians say it’s more convenient if this is left to the attending physician

2. Effectiveness of Appointment.

My designation of a health care agent expires only when I revoke it. Absent revocation, the authority granted in this document shall become effective when and if one of the physician(s) listed below determines that I lack capacity to make or communicate decisions relating to my health care, and will continue in effect during that incapacity, or until my death, except if I authorize my health care agent to exercise my rights with respect to anatomical gifts, autopsy, or disposition of my remains, this authority will continue after my death to the extent necessary to exercise that authority.

1. _____ (Physician)

2. _____ (Physician)

If I have not designated a physician, or no physician(s) named above is reasonably available, the determination that I lack capacity to make or communicate decisions relating to my health care shall be made by my attending physician.

Powers of Health Care Agent

- Can be broad--any health care decision the principal could make if competent, or
- Can be limited.

Life-Prolonging Measures

- Paragraph 4(G) of statutory form:
- Authorize withholding or withdrawal of life-prolonging measures.

Statutory Definition of Life-Prolonging Measures

- “Medical procedures or interventions which in the judgment of the attending physician would serve only to postpone artificially the moment of death by sustaining, restoring, or supplanting a vital function, including mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and similar forms of treatment. **Life-prolonging measures do not include care necessary to provide comfort or to alleviate pain.**”

When life prolonging measures may be withdrawn/withheld

G. Authorizing the withholding or withdrawal of life-prolonging measures. If:

NOTE: YOU MAY INITIAL ANY OR ALL OF THESE CHOICES:

(Initial) I have an incurable or irreversible condition that will result in my death within a relatively short period of time.

(Initial) I become unconscious and my health care providers determine that, to a high degree of medical certainty, I will never regain my consciousness.

(Initial) I suffer from advanced dementia or any other condition which results in the substantial loss of my cognitive ability and my health care providers determine that, to a high degree of medical certainty, this loss is not reversible.

- Client can choose which one(s) will apply

Artificial Hydration/Nutrition

- Can choose not to have life-prolonging measures used except for artificial hydration or nutrition

<p>..... (Initial)</p>	<p>B. Limitations About Artificial Nutrition and Hydration. In exercising authority to make health care decisions <u>on</u> my behalf, my health care agent:</p> <p>Shall not have the authority to withhold either artificial hydration or artificial nutrition (for example, through tubes) unless my attending physician determines that artificial hydration or nutrition would decrease my comfort, increase pain and distress, or increase risk of harm to me (e.g. aspiration, fluid overload or other complications) while failing to prolong my life.</p> <p>NOTE: DO NOT initial unless you insert a limitation.</p>
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Directive for Maximum Treatment

- Some clients want to have everything done at the end of their life.
 - I do not authorize my health care agent to withdraw, withhold or discontinue any life-prolonging measures. I want my life to be prolonged to the greatest extent possible, within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery or the cost of the procedures.

Mental Health Planning

- “Advance Instruction for Mental Health Treatment” (can incorporate into hcpoa)
- Permits a chronically mentally ill person to make decisions about treatment in the event s/he becomes “incapable” of making those decisions.
 - Treatment (medications, ECT)
 - Inpatient Admission
 - Appointment of mental health care agent, if desired.

Health Care Power of Attorney Forms & Protocols in Clinic Binder

- Protocols
- Topics to Discuss with Agent–
- HCPOA/LW Intake form

Living Will—Advance Directive for a Natural Death

- States client's wishes regarding the use or removal of life-prolonging measures if client lacks capacity to make or communicate health care decisions.

My Desire for a Natural Death

I, _____, being of sound mind, desire that, as specified below, my life not be prolonged by life-prolonging measures:

When the directive applies

I. When My Directives Apply

My directions about prolonging my life shall apply *IF* my attending physician (designated in my Health Care Power of Attorney) determines that I lack capacity to make or communicate health care decisions *AND*:

NOTE: YOU MAY INITIAL ANY OR ALL OF THESE CHOICES.

(Initial) I have an incurable or irreversible condition that will result in my death within a relatively short period of time.

(Initial) I become unconscious and my health care providers determine that, to a high degree of medical certainty, I will never regain my consciousness.

(Initial) I suffer from advanced dementia or any other condition which results in the substantial loss of my cognitive ability and my health care providers determine that, to a high degree of medical certainty, this loss is not reversible.

Artificial Hydration/Nutrition

- Client can exclude artificial hydration/nutrition from the directive to withdraw:

3. Exceptions – "Artificial Nutrition or Hydration"

NOTE: INITIAL ONLY IF YOU WANT TO MAKE EXCEPTIONS TO YOUR INSTRUCTIONS IN PARAGRAPH 2.

EVEN THOUGH I do not want my life prolonged in those situations I have initialed in Section 1:

(Initial)

I *DO* want to receive BOTH artificial hydration AND artificial nutrition (for example, through tubes) in those situations **unless** my attending physician determines that artificial hydration or nutrition would decrease my comfort, increase pain and distress, or increase risk of harm to me (e.g. aspiration, fluid overload or other complications) while failing to prolong my life.

Comfort care & pain medication

- Clients may worry that they will not receive pain medications or other palliative (comfort) care. This is addressed specifically in the living will form:

4. I Wish to be Made as Comfortable as Possible

I direct that my health care providers take reasonable steps to keep me as clean, comfortable, and free of pain as possible so that my dignity is maintained, even though this care may hasten my death.

Mandatory or Discretionary

- Client chooses whether the health care provider “may” or “shall” withhold or withdraw life-supporting measures under the circumstances provided in the Living Will.

2. These are My Directives about Prolonging My Life:

In those situations I have initialed in Section 1, I direct that my health care providers:

NOTE: INITIAL ONLY IN ONE PLACE.

(Initial) **may** withhold or withdraw life-prolonging measures.

OR

(Initial) **shall** withhold or withdraw life-prolonging measures.

Operation in Conjunction with a Health Care Power of Attorney

- HCPOA and Living Will should be consistent;
- Client can choose whether health care agent can override the instructions in the Living Will or whether the Living Will trumps the health care agent.

6. If I have an Available Health Care Agent

If I have appointed a health care agent by executing a health care power of attorney or similar instrument, and that health care agent is acting and available and gives instructions that differ from this Advance Directive, then I direct that:

(Initial) Follow Advance Directive: This Advance Directive will **override** instructions my health care agent gives about prolonging my life.

OR

(Initial) Follow Health Care Agent: My health care agent has authority to **override** this Advance Directive.

NOTE: DO NOT INITIAL BOTH BLOCKS. IF YOU DO NOT INITIAL EITHER BOX, THEN YOUR HEALTH CARE PROVIDERS WILL FOLLOW THIS ADVANCE DIRECTIVE AND IGNORE THE INSTRUCTIONS OF YOUR HEALTH CARE AGENT ABOUT PROLONGING YOUR LIFE.

If Patient does not have Living Will

- Life-prolonging measures may be withheld if:
 - Person lacks capacity to make or communicate health care decisions and will never regain that capacity, and;

If No Living Will--cont'd

- Patient has an incurable or irreversible condition that will result in the person's death within a relatively short period of time, or
- Patient is unconscious and, to a high degree of medical certainty, will never regain consciousness, and
- condition is confirmed in writing by physician other than attending physician, and
- Vital bodily function of the person could be restored or is being sustained by life-prolonging measures.

If No Living Will--cont'd

- May withhold or withdraw life-prolonging measures with concurrence of:
 - health care agent to the extent authority is granted in HCPOA
 - guardian of the person
 - person's spouse
 - majority of the patient's reasonably available parents and children who are at least 18 years of age;
 - A majority of the patient's reasonably available siblings who are at least 18; or
 - An individual who has an established relationship with the patient, who is acting in good faith on behalf of the patient, and who can reliably convey the patient's wishes.

If No Living Will, cont'd

- If none of the above are available, life-prolonging measures may be withheld at the discretion of the attending physician.