

The Law and You Medical Treatment When You Can't Consent

I recently had a case involving an elderly woman who had a severe stroke but who had not prepared in advance any medical directives. There was no "Living Will" nor any "Medical Power of Attorney."

These documents are often referred to as advance directives, since they are directives that you make while you still have the capacity to do so. Often times, when a severe injury or medical condition arises, you don't have the capacity to give consent for medical treatment.

The recent case I mentioned above involved several children who disagreed over how their mother should be medically treated.

Initially, the physicians opined that the woman would not recover, or that if she did recover she would have no or very limited cognitive capacity.

Under those conditions, a majority of the children did not want any further treatment that might begin down a slippery slope toward the long-term storage of their mother. That is, they wanted to protect their mother's dignity and allow her to pass away without being artificially kept alive.

Unfortunately, one of the children disagreed and obtained from the court a temporary restraining order ("TRO"). Had the woman prepared in advance her Living Will or a special power of attorney for medical, the court would not likely have been involved.

Subsequent to the TRO, nobody could do

anything. The children were enjoined from acting and the medical professionals were enjoined from providing any further treatment for the woman except to continue providing nutrition, hydration, and oxygen.

Extensive litigation ensued.

Since the court was not familiar with the law on this subject, it took the more cautious route. But the TRO raised the question of whether additional evasive surgery constituted life support treatment.

In effect, the court became the medical decision maker.

However, the court should never have been involved in the first place. And, as it became clear that the woman was not being supported in an artificial way and was not terminally ill, the court had absolutely no business being involved in making medical decisions or even being the referee over the woman's children.

Section 75-2-1105 of the Utah Code expressly sets forth a legislative scheme for making medical decisions when a person lacks capacity to consent and when there is no agent appointed by a medical power of attorney.

This scheme provides seven levels of priority for making medical decisions when a person can't consent for him or her self:

1. An agent appointed by a power of attorney;
2. A previously appointed legal guardian

for the person;

3. The person's spouse if not legally separated;
4. The person's parents;
5. A majority of the children;
6. The person's nearest relative; or
7. By a legal guardian appointed for the purposes of this section.

The court in this case failed to acknowledge Section 75-2-1105 and completely ignored the wishes of the majority of the woman's children. Instead, the court allowed one child to control the situation, although the law clearly doesn't include the court in any medical decisions.

One of the surgeons suggested additional brain surgery that might relieve pressure but would also be very risky. A majority of the children declined to consent and the one litigious child wanted the surgery along with a tracheotomy. Because of the TRO, neither procedure was attempted.

Miraculously, the woman recovered on her own. That is the good part of this story.

The bad part is that tens of thousands of dollars was spent in unnecessary litigation when the court should have realized that it had no role in making medical decisions.

The moral to the story is that everyone should have medical directives. In particular, everyone should appoint an agent to make medical decisions for them when they can't consent for themselves.

Since medical technology is always changing, it is impossible to predict in advance exactly how you want to be treated.

Your agent, however, can evaluate the medical treatment available at the time. The agent can then make a decision based on how you might decide if you could.

If you need help and guidance with preparing estate documents and advance directives, you should contact an Elder Law Attorney. To locate an Elder Law Attorney, check with the National Academy of Elder Law Attorneys at (520) 881-4005, or your local Yellow Pages.

YOUR QUESTIONS: Do you have a particular question that you would like answered? To better serve the regular readers of this Elder Law Column, please direct your questions in writing to Michael A. Jensen, Elder Law Attorney, PO Box 571708, Salt Lake City, Utah 84157. From time to time, I will attempt to answer some of those questions. Also, you may send your questions to:

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