

The Law and You New Advance Directives for 2008 Part I

In last month's column I introduced the new advance directives for 2008. More space than is available here is needed to fully address these directives, but I will provide some of the basics in this and in subsequent columns.

To briefly review, Senate Bill 75 dramatically revises Utah's Code governing advance directives. Although passed during the 2007 Legislative Session, the new directives were delayed until January 1, 2008.

Utah's "Personal Choice and Living Will Act", has been repealed and replaced with the "Advance Health Care Directive Act" ("Act"). The Act is found in Sections 75-2a-101 thru 124, Utah Code Annotated.

The Act creates a presumption that an individual has capacity to make health care decisions and appoint an agent. And, the Act recognizes that a person may have capacity to appoint an agent even though that person may lack capacity to make health care decisions.

The following factors are considered by a health care provider, attorney, or court when determining whether an individual who lacks health care capacity has retained capacity to appoint an agent:

- *whether the individual has expressed over time an intent to appoint the same person as agent;*
- *whether the choice of agent is consistent with past relationships*

and patterns of behavior between the individual and the prospective agent, or, if inconsistent, whether there is a reasonable justification for the change; and

- *whether the individual's expression of the intent to appoint the agent occurs at times when, or in settings where, the individual has the greatest ability to make and communicate decisions.*

This is a significant change in the law. Previously, a person who lacked capacity for health care was deemed unable to appoint an agent or surrogate. Now, an incapacitated person may, based on the foregoing factors, retain capacity to designate or appoint an agent.

A person's agent, or surrogate decision maker, may make health care decisions for the person based on:

- *the person's current preferences, to the extent possible;*
- *the person's written or oral health care directions, if any, unless the health care directive indicates that the surrogate may override the person's health care directions; and*
- *other wishes, preferences, and*

beliefs, to the extent known to the surrogate.

If a surrogate doesn't know the wishes or preferences of the person, the surrogate may make a decision based upon an objective determination of what is in the individual's best interest.

A surrogate may also make health care decisions to terminate life sustaining treatment for the person.

In effect, the provisions of the Act give substantial authority to the agent that a person designates in advance. And this is good, since it is impossible to predict one's own medical circumstances in the future and the medical technology existing at that time.

The appointment of an agent or surrogate for health care is probably the most important act a person can take with respect to health care planning.

Notwithstanding this new power for surrogates, a surrogate may not admit the person for long-term custodial placement other than for assessment, rehabilitative, or respite care without the consent of the person.

A surrogate acting under authority of the Act is not subject to civil or criminal liability or claims of unprofessional conduct for surrogate health care decisions made in accordance with the Act and made in good faith.

If a surrogate is not available, the Act provides the following priority scheme for a person's family to act as surrogate:

- ▶ *the person's spouse, unless divorced or*

legally separated from the individual; or

- ▶ *a child;*
- ▶ *a parent;*
- ▶ *a sibling;*
- ▶ *a grandparent; or*
- ▶ *a grandchild.*

If the family members listed above are not reasonably available to act as a surrogate decision maker, a non-family member may act as a surrogate if he or she:

- *has health care decision making capacity;*
- *has exhibited special care and concern for the patient;*
- *is familiar with the patient's personal values; and*
- *is reasonably available to act as a surrogate.*

In my next column, I will introduce the process to appoint an agent and make advance directives for health care.

Consulting with an Elder Law Attorney may help you decide if you need to consider changes to your existing medical directives. To locate an Elder Law Attorney, check with the National Academy of Elder Law Attorneys at (520) 881-4005, or your local Yellow Pages.