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HEALTH CARE PROXY

A well structured Estate Plan must consider the possibility that you will be alive but incapacitated and unable to make your own financial or health care decisions. A Health Care Proxy ("HCP") is the document in New York which allows you to select a person to make your health care decisions in the event you are unable to do so. Since a HCP is effective only after you are determined to lack capacity and because it is most useful in times of a medical emergency, you should make multiple copies of the HCP and distribute them widely. Persons to whom you should distribute a HCP immediately upon signing include: your primary care physician, your first named health care agent, your alternate health care agent, your spouse and adult children. It may be advisable to keep copies in a readily accessible place in your home (*i.e.*, your sock drawer) so that if one copy of the HCP has been mislaid there will be others easily available.

Most important in the consideration of a Health Care Proxy is to determine who will serve as your agent to make the health care decisions in the event of your incapacity. The person you appoint is called a "health care agent". Typically, the health care agent is your spouse. When your spouse is unavailable or an inappropriate choice, you should appoint the person closest to you: (i) who is calm and able to make a decision in a stressful environment; (ii) who is most knowledgeable about your health care wishes; and (ii) who has your implicit trust. This may be an adult child, a life partner or a close relative. Many times it is not the same person who you would select under a Power of Attorney to handle your financial affairs.

You should discuss the HCP with the health care agent and to go over with him/her your personal preferences, values and beliefs as they relate to medical treatment. If not contained in the Health Care Proxy itself, you should discuss preferences regarding the administration of artificial nutrition and hydration. If your views on the subject are not known by your health care agent, or they cannot reasonably be ascertained, the health care agent will not have the authority to make decisions regarding artificial means of administering food and water.

While you are not required to do so, you may include language in your HCP related to your wishes or instructions about health care decisions and limitations upon the health care agent's authority. In this way, you are able to provide for advance medical directives or a so called "living will". A living will usually covers specific directives given by you to the health care agent as to a course of treatment which you wish him to follow; or,

equally important, a course of treatment you wish him/her not to follow. Oftentimes these instructions cover end of life issues and use of artificial means to sustain life. You can, for example, instruct your health care agent to withdraw or withhold treatment that serves only to prolong the process of dying. As written in the Health Care Proxy, these instructions are generally restricted to situations in which you are unable to communicate your wishes and: (i) you are in a terminal condition; or (ii) you are permanently unconscious; or (iii) you are conscious but have irreversible brain damage and will not regain the ability to make decisions or express your wishes. Similarly, you may instruct your health care agent to authorize care that keeps you comfortable and relieves pain, including the pain that might occur by withdrawing or withholding treatment.

If you are competent, you may validly execute a HCP to appoint a health care agent! You are presumed to be competent unless you are adjudged by a Court not to be competent or a Court has appointed Guardian for you. Despite this presumption of your competency, you should not wait until you are in the hospital to sign a Health Care Proxy. Your medical condition upon entering the hospital may lead to a determination of your incapacity and thereby preclude you from validly executing a HCP at the very time it is most needed.

A Health Care Proxy must be signed and dated by you in the presence of two adult witnesses who must also sign the HCP. The person you appoint as health care agent can not act as witness to execution of the Health Care Proxy. If you are unable to sign your name, another person may do so at your instruction, in your presence, and in the presence of two adult witnesses who must also sign the HCP. An operator, administrator or employee of a hospital may not be appointed the health care agent by an adult who, at the time of the appointment, is a patient or resident of the hospital.

There is no prescribed form for a valid Health Care Proxy. The minimum requirements are that the HCP: (i) identify the adult making the Health Care Proxy (called a "principal") and the health care agent named; (ii) indicate that the principal intends the agent to have authority to make health care decisions on the principal's behalf; (iii) be signed and dated by the principal; and (iv) be witnessed by two witnesses who sign below a statement indicating that the principal acted willingly and free of duress. New York Law provides that you may not use one document to serve as both a Health Care Proxy and Power of Attorney. These documents serve distinctly different purposes and must be separate documents separately prepared and signed by you.

A Health Care Proxy or other document serving that purpose signed in another state in compliance with the law of that other state is considered valid and can be used in New York. Other states have different titles for a document which serves to appoint a health care agent, including "Delegation of Health Care Surrogate"; "Advance Directive for Health Care" and "Power of Attorney for Health Care".

You may name an alternate health care agent who will act in the event the primary agent is unavailable, refuses to act or is otherwise precluded from acting. The alternate health care agent may act when your attending physician has determined in writing that the principal agent is not reasonably available, willing or competent and is not expected to become reasonably available, willing and competent to make timely decisions. It is always a good idea to name an alternate health care agent who can act during the medical crisis which gives rise to the need for an health care agent. For example, who will act if you name your spouse as your sole health care agent and you are both incapacitated by the same occurrence?

Your health care agent's authority begins when there has been a determination that you "lack the capacity to make your own health care decisions." This determination is made by your attending physician to a reasonable degree of medical certainty. You will be deemed to lack "capacity" when your doctor determines that you are not able to understand or appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and to reach an informed decision. Your attending physician must make a written notation in your medical chart which includes his opinion regarding the cause and nature of your incapacity as well as its extent and probable duration. For decisions to withdraw or withhold life-sustaining treatment your attending physician must consult with another physician to confirm his determination. If your health care agent makes a request, your physician must make a determination of whether (or not) you lack capacity to make your own health care decisions.

Subject to any express limitations contained in your Health Care Proxy, your health care agent has authority to make any and all health care decisions on your behalf that you could make but for your incapacity. After consultation with a doctor or nurse, your health care agent will make health care decisions: (i) in accordance with your wishes, including your religious and moral beliefs; or (ii) if your wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with your "best interests." In all instances, your health care agent has the right to receive medical information and medical and clinical records necessary to make informed decisions regarding your health care. The hospital and your attending physician must give priority to the decisions of your health care agent over decisions of other persons unless you have expressly provided otherwise in the HCP. However, if you object to a determination that you lack capacity or to the decisions of your health care agent, your objections or decisions will

prevail unless you are determined by a Court to lack capacity to make your own health care decisions.

If you are competent, you may revoke your Health Care Proxy by: (i) notifying the health care agent or a health care provider orally or in writing; or (ii) by any other act evidencing a specific intent to revoke the HCP. You are presumed competent to revoke your Health Care Proxy unless you are determined to be incompetent by a Court Order. You can revoke a prior Health Care Proxy by signing a new Health Care Proxy. If, in a separate document, you make a living will, the living will not revoke a HCP unless the living will expressly provides otherwise. In other words, a living will supplements but does not revoke a HCP unless you expressly direct the revocation of the HCP. The appointment of a spouse as a health care agent is revoked upon the divorce or legal separation of the couple; unless, there is express instruction to the contrary.

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