



Making a Health Care Plan

A Conversation with Attorney Rebecca Benson

There may be many people - doctors, care managers, faith advisors, family – who are involved in a competent patient’s medical decisions. Whose choice is it to accept or refuse medical care?

It’s the choice of the patient and of no one else – that is the legal answer. But in real life, things can be more complicated. Until recently, patients looked to their doctors for the answers, but now the providers are required to obtain “informed consent” from their patients. In reality, these decisions may not be made by the patient alone – patients discuss medical decisions with their families and others who are close to them, and may have input from many different directions. And there are cases in which the patient’s own decision is contrary to the patient’s best interests – the principal of autonomy requires that the physician respect the patient’s decision, even if the decision seems unwise.

Who can make a health care plan and sign a Health Care Proxy?

Technically, any person over the age of 18 years old who is not under a guardianship is presumed to be legally competent. Any adult with the capacity to make health care decisions can make a health care plan – the tough question is whether the person has “capacity.”

What does it mean to have the capacity to make health care decisions?

Patients have capacity if they can understand the medical diagnosis and prognosis, appreciate the nature of the recommended care and the risks and benefits of each alternative, and use logical reasoning to make a decision. Capacity can vary over time and illness or medication can affect the person’s capacity. If you are unsure whether a person has capacity to make medical decisions, you can ask a doctor or clinician to make that determination.



Can adults with a diagnosis such as an intellectual disability or dementia sign a Health Care Proxy and make a health care plan?

The diagnosis alone doesn't tell the whole story. For example, I had a call from the parents of a young man with an autism spectrum disorder who was about to turn eighteen. They had been told to file for guardianship. I suggested the first step was to ask the son's clinician to assess whether he had the capacity to sign a Health Care Proxy, which could avoid the added intrusion and expense of a guardianship. In this case, the clinician determined that the son did have the necessary capacity, commenting that, in many ways, his decision-making ability was no different from that of many other 18-year-olds. It's always worth asking the question of your clinician no matter what the diagnosis.

What documents are most important to include in your health care plan?

Every adult with capacity should consider these essential documents:

1. Health Care Proxy, to appoint a trusted person as your agent to make health care decisions on your behalf if you cannot make or communicate those decisions yourself;
2. Advance Care Directive, or a documented conversation or letter that gives specific information to your health care agent about your values and wishes for future care;
3. HIPPA Release, which gives your health care agent the authority to review medical records and talk to your doctors about your care, and;
4. Durable Power of Attorney, to appoint a trusted person to make financial decisions on your behalf if you can't make financial decisions yourself.

Beyond that, there are valuable tools like Medical Orders for Life Sustaining Treatment (MOLST) and a Comfort Care/Do Not Resuscitate (CC/DNR) to consider. They may not apply to everyone, but it's always best to have the information about these documents ahead of time.

Why is a Durable Power of Attorney important for health care planning?

A Durable Power of Attorney allows a trusted agent to manage your money and assets on your behalf. Medical decisions often involve financial decisions, such as agreeing to pay for medical care. In Massachusetts there are two different statutes and two different documents that govern this: a Health Care Proxy gives your agent the authority to make decisions about your treatment and care, while a Durable Power of Attorney your agent the authority to make financial decisions and pay for the care.



Do I need an attorney to make a health care plan?

Although it is a legally binding document, you are not required to have an attorney draft your Health Care Proxy or help you sign it. An Advance Care Directive is guidance for your agent and not a legally binding document so consumers can do this on their own as well. Having said that, there may be situations where it would be better to have an attorney prepare and supervise the signing of a health care proxy. For example, if siblings disagree about the care of an elderly parent, the parent may feel pressured by one or more children to sign legal documents. Especially if there is a question about the parent's capacity, having a neutral professional meet with the parent and document the parent's wishes could ensure that the parent's own wishes are documented and honored and could reduce the likelihood of litigation in the future.

A Durable Power of Attorney is a legally binding document that can become immediately effective giving another person authority over your finances. The potential for abusive power can be high. I would recommend adults complete this document with an attorney. However, there is no requirement to have an attorney draft it or help you sign it.

In your experience, what do people say is the hardest thing about the planning process?

Simply confronting these issues is hard. Sometimes choosing the best person to be a health care agent is difficult. Probably the most difficult part is actually formulating your wishes for care and giving your agent some guidance to make decisions on your behalf. You can't think of every situation that might happen in the future and you don't need to. There are planning tools to help you document your wishes and update them over time that make this process much easier.

And do how people feel after making a plan?

Almost all of my clients express a great sense of relief that comes with making decisions and exercising some measure of control over situations that can be difficult and frightening to contemplate. There is a peace of mind that comes with making sure a person you trust is going to have the legal authority to make decisions for you if ever that is needed.

Biography

Rebecca J. Benson is Of Counsel to Margolis & Bloom, LLP. Her practice is focused on long-term care planning, estate planning for beneficiaries with special needs, and guardianship and conservatorship. She is also an experienced advocate for the rights of nursing home and assisted living residents. You can read articles by Attorney Benson including "The Rights of Nursing Home Residents" at www.margolis.com/attorneys/rebecca-j-benson/. Attorney Benson conversation appears here for informational purposes only and does not constitute legal advice, and viewing or using the information does not create an attorney-client relationship.