Decision-Making Issues – Advanced Directives Q&A

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In the November 2009 edition of *EndNotes*, we published a Q&A tailored specifically to assist hospice providers with common decision-making issues related to hospice patients (those with a medical condition that a physician has certified as incurable or irreversible and likely to result in death in a relatively short period of time). No Q&A can exhaust the plethora of unique issues a provider might face in dealing with advance directives made by its patients. The following series of questions and answers is intended to supplement the first series published in November 2009. This edition of EndNotes also includes a workplace poster designed to help your staff understand health care decision-making processes for those patients who cannot make or communicate their own decisions.

Q My patient suffers from memory loss, intermittent confusion and disorientation, and his physician thinks that my patient has not been competent to make or communicate his own health care decisions for some time now. My patient has no power of attorney with health care decision-making powers nor does he have a living will. His wife is deceased, but he has one adult daughter. He also has an elderly girlfriend who sometimes visits and frequently calls him. The girlfriend has just provided me with a copy of a health care power of attorney, naming her as agent to make health care decisions for my patient, but the health care power of attorney was signed by my patient just yesterday. Is this health care power of attorney valid? May the girlfriend make health care decisions for my patient now?

A Probably not. A person can make an advance directive only while he or she is of sound mind and able to make and communicate health care choices. Given what you know of your patient's mental status and the timing of the execution of the power of attorney, it is questionable at best that your patient was "of sound mind and able to make and communicate health care choices" at the time he executed that health care power of attorney. Normally, a health care provider is statutorily protected from civil or criminal liability for relying in good faith on an advance directive that later turns out to be invalid. See N.C. Gen. Stat. § 32A-40. But in this case, you have reason to doubt the validity of the health care power of attorney.

When a patient has no valid advance directive and is incompetent to make/communicate his own health care decisions, there is a statutory line-up of individuals who have priority to make health care decisions for that patient. See N.C. Gen. Stat. § 90-21.13 and the workplace poster in this publication. The patient's adult daughter has priority over the patient's girlfriend (with the invalid health care power of attorney) to make health care decisions for the patient. It may be necessary, however, should the girlfriend persist in her attempts to control the patient's health care choices, for the daughter to bring a petition in superior court for adjudication of incompetency of and appointment as

guardian for the patient, in order to assert her decision-making priority over that of the girlfriend.

Q My patient might need a guardian, but what is a guardianship and how is it implemented?

A A guardian is an individual or an agency (like the county Department of Social Services) that is court-appointed to manage a person's financial affairs (guardian of the estate) and/or personal decisions and affairs (guardian of the person). Pursuing guardianship is a multistep process, beginning with petitioning the superior court to declare a person incompetent to manage his or her own decisions and affairs and identifying an appropriate person or agency to be appointed as guardian for the incompetent person (the ward). A guardian will not be appointed unless and until the court has received sufficient evidence that the proposed ward is incompetent. Once a person is adjudicated incompetent, the person becomes a ward of the state and a guardian of the person and/or estate (or a general guardian) is appointed. According to NC statutes, a guardian of the person (or a general guardian) has first priority to make health care decisions for her ward, with one exception . . .

Q My patient has a recently appointed general guardian – her son. Ever since I began to provide care to her, she has had an agent under a health care power of attorney – her daughter. The son and daughter seemed to harmoniously work together to make the best decisions they could for their mother. But my patient's son and daughter are now at odds over an important decision about my patient's health care. There is no one else to intercede. To whom do I listen – the guardian (son) or agent under the health care power of attorney (daughter)?

A Look at the statutory order of priority (set forth in our workplace poster). You will see that a guardian like your patient's son has first order of priority for health care decision-making, UNLESS there is an unsuspended health care power of attorney. Your patient's daughter holds a health care power of attorney, so the question is whether the order appointing the son as guardian of your patient expressly suspended the powers of the daughter as agent under the health care power of attorney or whether the son as guardian separately petitioned the court for suspension of the health care power of attorney and prevailed. If not, the daughter's agency under the health care power of attorney still trumps the son's ability as guardian to make health care decisions.

As always, the goal is to act in the patient's best interest and in accordance with his or her wishes, subject to the parameters he or she has put in place while competent. For more specific issues with regard to advance directives, consult legal counsel.