

The Importance of Advance Directives in Cryogenic Planning

By Peggy Hoyt

In a traditional estate plan, advance directives such as health care powers of attorney and living wills are essential. They permit the appointment of a surrogate (and alternates) for the purpose of making health care and end of life decisions in the absence of the decision maker's ability to do so independently. In the context of cryogenic planning, these directives along with a financial power of attorney and preneed guardian declaration, become even more important.

Financial Power of Attorney

The purpose of a financial power of attorney is to allow the creator (principal) to appoint an agent or attorney in fact for legal and financial decision making. Typically, a financial power of attorney will be comprehensive and broad-based allowing the agent to make most of the legal and financial decisions the principal could have made. An example of the powers included in a financial power of attorney are paying bills, managing investments, defending or pursuing law suits, filing tax returns, and managing real and personal property.

Powers of attorney can be immediately effective or "springing." An immediately effective power of attorney is effective on its execution; no proof of mental disability is required. A springing power of attorney generally has a trigger mechanism requiring a finding of mental incapacity. In cryogenic planning, the immediately effective financial power of attorney is preferred. That way, there is no delay in the authority of the agent to act on behalf of the principal for legal and financial decision making.

A financial power of attorney should appoint a primary agent, with one or more alternate agents in the event the primary agent is unable or unwilling to act for any reason. In addition, more than one agent could be appointed as primary, but caution should be used not to appoint persons who are not aligned with the needs and desires of the principal. A disagreement between the agents could result in delays in the decision making ability of the

agents.

Most importantly, the financial power of attorney needs to be drafted with powers appropriate to cryogenic planning. This may include specific directives related to working with Alcor (or other organizations) to coordinate the details related to cryogenic preservation. An ineffective or poorly drafted financial power of attorney is as bad as no power of attorney at all. Both can result in unnecessary delays and may require a formal guardianship. A guardianship can be costly, time consuming and public. Depending on the nature of the activities required by the guardian, court approval may be required. Obtaining court approval can result in further delays, costs and creates uncertainty regarding outcomes.

Health Care Power of Attorney

A health care power of attorney or health care surrogate is an advance directive that appoints an agent (surrogate) to make everyday health care decisions for the principal in the event he or she is unable to make their own health care decisions. A health care power of attorney is most always springing, if the principal is capable of making their own health care decisions, they can, and should. These every day decisions include things like consent to surgery, consent to treatment, transfer to or from a medical facility, release of medical records and the hiring and firing of doctors, nurses, therapists, etc. A health care power of attorney is essential in cryogenic planning allowing the surrogate to make those critical health care decisions that may allow sufficient time for a medical preservation team to arrive timely.

In the absence of a health care power of attorney decisions concerning health care may be made by a proxy. State law will determine who will be appointed for this purpose. The statutory preference for appointment may not be consistent with your desires and wishes. This is particularly true for people in committed, but unmarried relationships. A written health care power of attorney is your best defense.

Living Will (Will to Live)

A traditional living will sets forth directions regarding end of life decisions. If a person is mentally incompetent; has a terminal illness, end

stage condition or is in a persistent vegetative state; and the doctors have determined there is no reasonable medical probability of recovery, the living will directs the removal of life-prolonging procedures. Life prolonging procedures generally include respiration, hydration and nutrition, but permit the performance of any procedure or medication that will keep the individual comfortable and free from pain. The named designees are not making the decision regarding the termination of life-prolonging procedures, they are acting in accordance with the principal's stated intentions.

A cryogenic estate plan may instead include a "will to live." This declaration, instead of requiring the removal of life-prolonging procedures, requires that best efforts be used to maintain an individual on life support. Crafted properly, this directive could state the principal's intention regarding the removal of life support, but only after a medical preservation team was in place to assure timely action.

In the absence of a living will or "will to live" the decision to withhold or withdraw life-prolonging procedures from an individual may require court intervention and the appointment of a proxy.

Pre-need Guardian Declaration

A pre-need guardian declaration sets forth the names of the individuals who should be appointed as either guardian of the person or guardian of the property in the event of a formal guardianship hearing. In the absence of the advance directives named above, or in the event of a legal challenge to a written directive, it is likely a guardianship hearing will be required. A guardianship is a formal legal proceeding whereby the alleged incompetent is evaluated by an examining committee, their report is filed with the court, the judge makes a determination of capacity (or incapacity) and a guardian is appointed. After appointment, the guardian must seek court permission to make decisions on behalf of the ward. There is no guarantee of the outcome of any proceeding in the guardianship context. Guardianships are generally expensive, time consuming and public.

The best cryogenic estate plan is a written plan clearly stating the intentions of the creator. The plan should be comprehensive, well-counselled and crafted to anticipate the many different scenarios that could arise within the context of cryogenic preservation.

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