

Mom Can't Tell You What She Wants, But I Can - Advance Directives Q&A

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You are all too familiar with situations in which the wishes of your patient regarding life-sustaining care are either unknown or conflict with the expectations of the patient's family. A person can make an advance directive while he or she is of sound mind and able to make and communicate health care choices, for the purpose of "memorializing" the person's health care choices in the event that the person can no longer make or communicate those choices. The main types of advance directives that you will and probably already have encountered include the living will, the health care power of attorney (POA), the durable power of attorney, the medical order for scope of treatment (MOST), and the do not resuscitate (DNR) order.

What do these documents or the absence thereof mean for you and your hospice patient? The following series of questions and answers is designed to pinpoint common points of confusion, with the underlying presumption that each patient has 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.

Q. My patient is competent, but he also has a living will and health care POA in place. The physician wants to know whether or not the patient wants artificial nutrition. The living will states that the physician "may" withhold artificial nutrition in the event that the patient is determined to have a terminal illness. The agent under the health care POA is my patient's son, and the son wants us to do everything possible for his dad short of CPR. What do I do?

A. Ask the patient! If your patient is competent (able to make and communicate health care decisions), there is no need to refer to his advance directives or to consult the agent under the health care POA.

Q. My patient can no longer make or communicate health care decisions. He has a health care POA in place. But he also has a living will that directs the physician to withhold all life-sustaining treatment and directs his agent under the health care POA to follow the instructions in the living will. The agent under the health care POA wants to override the living will and direct us to deliver artificial hydration and nutrition. Do I follow the living will instructions or those of the health care POA?

A. A living will can either direct an agent under a health care POA to follow the instructions in the living will or authorize the agent to exercise discretion and override the living will instructions. In this

case, the living will directs the agent under the health care POA to follow the living will, so the agent must act in accordance with the living will.

Q. My patient wants to make a living will and to designate an agent to act under a health care POA. Can I help her get these documents in place, and can I use my agency's staff to assist?

A. No and yes. You can refer your patient to appropriate sources to assist her in preparing these advance directives, but your agency should not fill that role. In fact, our state statutes prohibit any paid employee of your agency from serving as a witness for a patient's living will or health care POA. A paid employee of your agency can, however, serve as a notary for either document, and agency volunteers can serve as witnesses.

Q. My patient is incompetent, has no advance directive in place, and is widowed. She has two living, competent adult daughters, but the daughters cannot agree on the parameters of their mother's medical care — one daughter wants her mother to receive full artificial nutrition and hydration, and the other daughter wants all artificial nutrition and hydration to cease and only comfort measures to continue. What do I do?

A. When an incompetent patient has no advance directive and no guardian to make decisions for him or her, our state statutes allow a physician to make the decision if the physician certifies that the patient meets certain "trigger conditions" as defined by statute, a second physician validates that certification, and an appropriate person consents to withhold or discontinue a life-sustaining function that is being performed artificially, such as artificial hydration and nutrition. By statute, the appropriate person to consent to withholding or discontinuing life-sustaining treatment is determined in the following order of priority:

- Guardian (unless there is an unsuspended health care POA)
- Health Care POA
- General agent under a durable POA, if the scope of the agent's authority covers health care
- Resident's spouse
- Majority of reasonably available parents and children over 18 years of age
- Majority of reasonably available siblings over 18 years of age
- Person with an established relationship with the patient, acting in good faith, who can reasonably convey the patient's wishes

In this case, since there is no guardian, POA, or spouse, the patient's adult daughters would be the appropriate persons to give consent. However, since they do not agree on whether or not to withhold life-sustaining artificial hydration and nutrition, you cannot obtain the consent of the "majority of reasonably available children." It may be best for you to tell the daughters to pursue a guardianship over the patient, whereby a court appoints someone to act in the best interests of the patient and to whom you can go for resolution of the issue of whether or not life-sustaining care will be withheld.

For more information in the meantime, see www.secretary.state.nc.us/ahcdr and www.ncdhhs.gov/dma/medicaid/AdvancedDirectCondensed.pdf, or consult your attorney for guidance on specific issues.

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