Advance directives in a mobile society

By Robert W. Kaufman, Esq.,

Advance Directive Background

You may recall that, long before the less than stellar rollout of the 2010 Patient Protection and Affordable Care Act (ACA), and before passage of the final bill, there were provisions in the proposed legislation which would have enabled physicians to be reimbursed for having advanced care planning discussions with patients. Those provisions were subsequently deleted from the final bill after claims of "death panels" and the like reverberated through certain media outlets. Even that proposed legislation, however, would not have addressed the hodgepodge of state legislation which now exists with respect to advance directives, nor would it have addressed the problems which we face in a mobile society with each state, and the District of Columbia, taking its own approach on this subject.

Ironically, as far back as 1993, the Uniform Law Commissioners attempted to address the then emerging body of state law with the Uniform Health-Care Decisions Act. Unfortunately, however, only six states have gone in the direction outlined by the Uniform Law Commissioners. The consequence of this impacts clients who have multiple residences and/or travel throughout the United States on a regular basis.

A Survey of Advance Directive Legislation

In an extraordinary 2011 survey done by Ruth F. Maron in the Regent University Law Review,[1] the author highlights the advance directive legislation which exists throughout the country. Aside from the technicalities dealing with what triggers the effectiveness of these directives, and the execution requirements thereof, the forms adopted by the various states are as varied as the states themselves. For example, Nebraska[2] has what amounts to a four paragraph directive in which there is a blank for the individual's name and residence, a blank to direct the attorney-in-fact to comply with certain limitations, a blank in which one gives direction regarding life-sustaining treatment, and another blank in which one gives direction on artificially administrated nutrition and hydration. The form is then signed and either notarized or witnessed by two individuals.

On the other end of the spectrum, Florida law[3] suggests that two primary documents are required. One is called the Designation of Health Care Surrogate. The second is a Durable Power of Attorney for Health Care, which, then references a Declaration of Living Will, introducing yet another document into the mix.

Recognition of Out-of-State Advance Directives

Aside from the differences in form and format, a critical issue relates to whether the form utilized in your jurisdiction will be honored elsewhere. The answer to that question appears to be generally yes, but many times with a big caveat. For example, Alabama[4] will honor out of state forms, but not unless they are in compliance with Alabama law. Similarly, Idaho[5] will honor an out of state form if it substantially complies with Idaho law. Indiana[6] will honor such a form if it is executed in accordance with Indiana law, and Pennsylvania[7] will honor the same unless it is inconsistent with its law. Illinois[8] appears to be among the most liberal on this issue, and will respect a Power of Attorney which is executed in compliance with the laws of either this state, the state in which it was executed, the state in which the principal is domiciled, or the state in which the agent is domiciled.

Conclusion

Illinois is again revisiting its form of Statutory Short Form Power of Attorney for Health Care, with many advocating for a more simplified approach to the subject. While we are hopeful that an agreement on a substantive approach can be reached, we would also hope that the states would work together so that our clients can feel safe freely traveling through the country and knowing that the advanced directives which they executed in their home state will be honored everywhere. ■

Robert W. Kaufman, Esq., is a member of the ISBA Trusts & Estates Section Council, and a principal in the Chicago law firm of Fischel & Kahn, Ltd. He specializes in estate planning and trusts and estates administration and litigation. He extends his thanks to Amanda M. Bryne, an associate with the firm, for the research which she provided. He can be reached at 312.726.0440, ext. 214.

1. 24 Regent U. L. Rev. 169
2. Neb. Rev. Stat. Ann. §§ 30-3401 et seq.
3. Fla. Stat. Ann. §§ 765.101 et seq.
4. Ala. Code §§ 26-1-2 et seq.
5. Idaho Code Ann. §§ 39-4501 et seq.
6. Ind. Code Ann. §§ 16-36.4 et seq.
7. 20 PA. Code Stat. Ann §§ 5421 et seq.
8. 755 ILCS 45/2-10.6(a)