

Advance Directives and Decision Making

Susan Stuart, BUS, CMC, NMG
Decisions in Care, LLC



About Susan Stuart

- Over thirty years of experience in long term care
- A Nationally Certified Master Guardian, a Nationally Certified Long Term Care Manager, an Aging Life Care Professional™ and a Certified Legacy Facilitator
- The founder and principal of Decisions in Care, LLC, providing care management, healthcare power of attorney, guardianship, court visitor, mediation and consulting services throughout New Mexico
- A founding board member of the New Mexico Guardianship Association, an affiliate chapter of the National Guardianship Association
- An instructor at Central New Mexico (CNM) teaching The Ethics and Fundamentals of Guardianship and Conservatorship Series

Disclaimer

The information in this presentation does not constitute legal advice. Please consult with an attorney regarding your specific situation.

Provides instructions about your health care

- Designate an agent to make health care decisions for you if you become unable to make your own decisions

In New Mexico the advance directive:

- can be filled out partially
- can be added to
- Is not time limited unless the directive states that is the case

Older forms of Power of Attorneys (POAs) and Living Wills or Right to Die Statements are still valid



Advance Healthcare Directive

Revocation

- A Healthcare Directive can be revoked by the individual
 - If incapacity is in question this may lead to a Guardianship Proceeding
- The validity of the document can be challenged if there is a question regarding capacity at the time the document was drafted
- POAs can be revoked in a guardianship proceeding

Power of Attorney for Healthcare

- Durable
- Springing
- Limited to a specific time frame or purpose

Validity of Power of Attorney for Healthcare

Check for type of document (medical, financial, durable or springing)

Can be witnessed but is not required to be

Is not required to be notarized

Some Types of Advance Directives

- MOST (is a medical order)
- DNR (is a medical order)
- Power of Attorney for Healthcare
- Financial Power of Attorney
- Advance Directive for Mental Health Treatment
- Five Wishes

How to Choose an Agent

- Would the agent honor your wishes?
 - Even if his/her wishes differ from yours?
- Does the agent have the time required?
- Does the agent live at a distance? Is local support available or needed?
- Will the agent advocate for your wishes?
 - Asking questions of medical professionals
 - Asking for clarification of information needed

How to Choose an Agent (continued)

- Will the agent's emotions prevent him/her from making certain decisions you would want? (life support, for instance)
- Can the agent make decisions in changing circumstances?
- Would the agent stand up to other parties who are not in agreement with your wishes and may challenge the agent?

Important Communication Tips Regarding Advance Directives

- Speak with the agent before you name him/her
 - Ensure that the agent would be able and willing to serve and to follow your directives
- Communicate your specific wishes to your decision maker
 - Consider the use of a Values History
- Provide a copy of the advance directive to your physician, medical providers, healthcare facility, family members and other significant individuals in your life

Helpful Resources

- The Conversation Project
- UNM Health Sciences Center Institute for Ethics
- Values History
- Mydirectives.com

- Statutory form
coc.unm.edu/common/pdf/nmpoa.pdf
- Sometimes found on same document as healthcare Power of Attorney
- Consider consulting with an Elder Law or Estate Planning Attorney regarding your specific situation



Financial Power of Attorney

Mental Health Advance Directive

While having capacity, an individual with mental health issues can identify:

- Preferred physicians
- Medications that have and have not been effective
- Concerning side effects of medications
- Requested intervention
- Surrogate decision maker for mental health care treatment



MOST

- Medical Orders for Scope of Treatment (MOST)
- Must be signed by individual or authorized representative to be valid
- Must be signed by physician
- Should not designate decision maker if there is a guardian appointed
- Wishes can change (often after a major health event)

- Many ethical Issues exist
- The individual may want resuscitation/intubation temporarily (for a time frame) that would not be wanted generally

Advance Directives Related to Covid-19

Decisional Capacity

- Involves more than just a diagnosis
- Is used to enacting springing POAs
- The surrogate (not necessarily family) is still responsible to consult with the individual even after he/she requires assistance
- POA (if in effect) should be contacted regarding all matters requiring consent
 - Requests for information require a release to be signed
- A surrogate is not appropriate to recommend to force a particular treatment

- A decision maker may be designated
- According to NM Statute:
- The order of decision making priority:
 - Spouse
 - Significant other
 - Adult child
 - Parent
 - Adult brother or sister
 - Grandparent
 - Close friend



New Mexico Uniform Healthcare Decisions Act

Ethical Standards for Decision Making

- Informed Consent
- Self Determination – Respect Personal Preferences
- Least Restrictive Alternative
- Substituted Decision Making vs Best Interest
- Gather important information prior to making decision
- Consult with the person

- Based on a full disclosure of facts needed to make the decision intelligently.
- Clear understanding of options, risks, benefits, alternatives and expected outcome
- Maximize the participation of the individual in the decision
- Review previously expressed wishes
 - Values History
- May require a second opinion



Informed Consent

- Emphasize the individual's strengths, skills, and abilities
- Ask the individual what he or she wants
- Ask others in the person's life about the person's preferences only if he/she is unable to convey
- Identify and advocate for the person's goals, needs and preferences



Self Determination

- Take into account the goals and preferences of the individual
- Maximize independence
- Maintain dignity and safety of the individual
- Decisions must be individualized
- Guardian must be knowledgeable of available resources and options

Least Restrictive Intervention

Substituted Judgment vs. Best Interest

Substituted Judgment

Substitutes the decision the person would have made when the person had capacity as the guiding force

Best Interest

Best Interest

Should be used only when:

- The person has never had capacity
- When the person's goals and preferences cannot be determined
- When following the person's wishes would cause substantial harm

When is The Appointment of A Guardian or Conservator Necessary?

NM Statute 45-5-301.1

Guardianship for an incapacitated person shall be used only as is necessary to promote and to protect the well being of the person, shall be designed to encourage the development of maximum self reliance and independence of the person and shall be ordered only to the extent necessitated by the person's actual functional mental and physical limitations. An incapacitated person for whom a guardian has been appointed retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court.



Thank You!

Questions?