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Medical Decision Making: It's Never Too Soon to Act

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Picture this scenario: You and your husband are in a terrible car accident in which your husband sustains multiple head injuries. You accompany him in the ambulance to a hospital where he undergoes emergency surgery. He survives the emergency surgery but needs further plastic surgery for cosmetic purposes. Two days later he takes a dramatic turn for the worse, slips into a comatose state, and requires a ventilator and feeding tube to keep him alive. Several weeks later he shows no signs of improvement. You and he have previously discussed the fact that he would never want to exist in this state, so you ask the doctor and the hospital to terminate all life sustaining measures.

Much to your shock, the doctor explains that you lack the legal authority to make this critical decision for your husband of thirty years. In fact, she tells you, you are lucky that the hospital agreed to do the cosmetic surgery upon your consent, given that, under New Hampshire law, the only persons who are expressly authorized to consent to medical procedures for an incapacitated adult are 1) a legal guardian appointed by a probate court, or 2) an "agent" appointed under a Durable Power of Attorney for Healthcare. (The doctor explains to you that she and the hospital were authorized to perform the emergency surgery not because you were there to give consent but because of the doctrine of "implied consent," i.e. a medical team is permitted to save life or limb under exigent circumstances.)

You respond that of course your husband doesn't have a "legal guardian" because, until the car accident, he was competent. And, although you and he had read about Living Wills and Durable Powers of Attorney for Healthcare (known as "Advance Directives") -- and had thought about executing one of these documents before you were to fly to Europe next year -- there had been no pressing need to execute one to date.

The doctor explains that although she and the hospital will do whatever they can to accommodate your wishes, you may be facing a lengthy legal process because of the lack of a Living Will or Durable Power of Attorney for Healthcare. Not only does your request to terminate all life sustaining measures involve the removal of the ventilator, but it also involves the removal of a feeding tube. Your doctor explains that even if your husband had had a pre-1991 Living Will, the law changed in 1991 to require special and specific consent with respect to the removal of feeding tubes or water.

(She explains that she has advised all her patients to be sure to update their Advance Directives to address this specific issue).

You consult your lawyer who explains that what the doctor and hospital have told you is, unfortunately, supported by New Hampshire law. Unlike other states, New Hampshire law does not recognize surrogate, family decision making regarding healthcare decisions. Therefore, your lawyer explains that the hospital and doctors are justified in insisting that you file legal process with the Probate Court, requesting the Court to appoint you as legal guardian over your husband and to grant court approval to withdraw his ventilator and feeding tube. He also warns you that the guardianship process can be expensive and time consuming.

While it is easy to think that this scenario “could never happen to me,” and while it is human nature to postpone legal decisions, there is no time like the present to take the relatively simple step of executing a Living Will and/or a Durable Power of Attorney for Healthcare. You will find that there are standard, statutory forms for these Advance Directives. You also will probably discover that the most complex part of executing a Living Will or Durable Power of Attorney for Healthcare is deciding under which circumstances you wish to have life-sustaining measures terminated and who should be the primary and secondary surrogate decision makers for your healthcare decisions. If you executed a Living Will or Durable Power of Attorney for Healthcare document prior to 1991, you should consider updating your Advance Directives in order to address intervening changes in New Hampshire law (for example, in 1991, the law changed to require those executing Advance Directives to give very specific instructions regarding the withdrawal of nutrition and/or hydration. Pre-1991 Advance Directives do not contain this required language.)

Once you have executed an Advance Directive, you need only to send a copy to your family physician and local hospital, and with few exceptions, they are legally required to honor your wishes. If you’ve just moved to New Hampshire, your out-of-state Advance Directives will also be honored, but only to the extent that they comply with the essential elements of New Hampshire law.

One final note: if you decide to execute a Durable Power of Attorney for Healthcare document by appointing one of your relatives or friends to serve as “Agent” for your healthcare decision making, don’t forget to tell your Agent that you’ve bestowed this distinction on him or her! Explain to your Agent that his or her authority will take effect only at such time as you are deemed by your attending physician to lack capacity to make your own health care decisions. Sit down with your Agent and discuss with him or her your philosophical, religious or other views about how you would want your Agent to handle your healthcare decision making (including end of life decisions) under that contingency. Your clear directives will not only help to assure that your wishes are carried out; such a dialogue will also assist your loved ones by guiding them through a potentially difficult maze of healthcare decision making and giving them confidence during a very difficult time that they are honoring your intentions.

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