

Who will make health care decisions when I can't?

By *Linda T. Cammuso*

Choosing someone to act as the agent for your health care proxy is one of the most personal and important decisions in the estate planning process. The agent is the person who will make your medical treatment decisions if your doctor finds that you lack the capacity to make and understand these decisions yourself.



Legal Briefs

The decision of who to name as agent is difficult for many clients, in part because they misunderstand or fail to consider certain key aspects of the health care agent's proper role.

Consider for a moment how the law defines the role of the agent under a health care proxy. In Massachusetts, we have a "substituted judgment standard" for health care agents, meaning that the agent stands in the shoes of the patient and is supposed to choose the course of action that the patient would have chosen. The agent's own beliefs

and opinions cannot have any bearing on these decisions.

Additionally, the authority of the health care agent only comes into effect after a doctor "invokes" the health care proxy upon a determination of the patient's physical or mental incapacity. Clearly, then, the agent must already have an understanding of the patient's wishes in order to make the proper decisions.

From this basic information, we can take away a couple key points. First, your agent must be someone who is capable of being objective and who will not allow his or her own feelings to come into play. Second, you must take the time to explain your wishes and preferences regarding medical care to your agent.

There are several common mistakes people make in choosing a health care agent:

- Picking someone just because the individual has a medical background. Clients often choose a particular daughter because she is a nurse or a son-in-law because he happens to be a doctor. In reality, no medical expertise is required to serve as a health



care agent. Think about it — most of us have no medical background, yet we make our own health care decisions every day. It's the same for your health care agent — that person doesn't need to understand the ins and outs of medicine, he or she just needs to understand your wishes and then make the best decision on that basis.

- Naming someone just because the individual is local. With today's technology, distance should not be the determinative factor in naming your agent. If the person you feel is best-suited to be your agent lives

out of state, don't write them off just on that basis.

- Naming someone because his or her feelings would be hurt if not chosen. This comes up frequently with clients who have several children. They may feel pressured to name the child that they spend the most time with, or with whom they are closest. However, that child may not be the best-suited to make difficult medical decisions when the time comes.

The bottom line when it comes to naming your health care agent is honesty — be honest with yourself in deciding what person in your life will best respect and honor your wishes, and then be honest with that person in clearly and openly making known your desires for your medical care.

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