FLORIDA LIVING WILL &

FLORIDA HEALTH CARE POWER OF ATTORNEY

In the second in a series of articles about same sex relationships and financial, medical and estate planning issues, I address the Florida Living Will and the Florida Health Care Power of Attorney. These legal issues apply to single as well as partnered gays and lesbians. Courts repeatedly have ruled that a competent adult patient has the right to refuse treatment, even if the patient's family or doctors disagree. You are the person who may decide.

If you lack the *mental capacity* to make an informed decision about medical treatment, your doctor or another person (a surrogate) ordinarily will decide for you. The surrogate could be your legal guardian if a judge has appointed one, a family member, a close friend, or your health care "agent" if you have named one in an advance directive document. What is “mental capacity”? When a patient is unconscious, severely brain damaged, highly intoxicated, or for other reasons cannot understand the available treatment options, the patient clearly is incapacitated, or unable to make his or her own decisions. However, if the patient has some understanding of what is happening but judgment is clouded by factors such as fear or mental or physical illness, then determining mental capacity is more difficult. Florida laws on advance directives define "incapacity" as the inability to receive and evaluate information effectively or to communicate decisions to such an extent that the individual is not able to manage his or her health care decisions. Usually, the patient's doctor initially determines incapacity, often with input from family members. When the patient's doctor has doubts about the patient's comprehension, he or she often consults with another health care provider with appropriate expertise.

An advance directive is a written instruction that you make while you are mentally competent. The advance directive states how you want health care decisions to be made for you if you become incapacitated. Florida laws recognize two forms of advance directives - the living will and the health care power of attorney, you should have both.

A living will describes the kind of life-sustaining care you would want if injury or illness leaves you in a terminal condition (dying) or a persistent vegetative state (permanent unconsciousness) with no hope of recovery. An advance directive allows you to make your wishes clear to your family, friends, and health care providers while you are still able to do so. The advance directive helps prevent disagreements among your family members about what treatment you should receive if you are incapacitated. Some people do not want to ask someone else to decide when and if artificial life support should be withheld. Instead, they want to make those decisions in advance by signing a living will.

With a health care power of attorney, you appoint someone to be your "agent" to make all health care decisions - not just those involving life support (the living will) - for you if you lose the ability to make decisions for yourself. You also may include a description of your treatment preferences and special desires in this document, to help

guide the person making decisions for you. In this document you also may authorize your agent to admit you to a nursing home or community-based residential facility, and you may indicate your wish to donate body parts after death. A health care power of attorney is more powerful and flexible than a living will. A health care power of attorney can be drafted so that your health care agent has the authority to make a variety of medical decisions for you, as opposed to a living will, which only directs when artificial life support is to be withheld.

If you have both a living will and a health care power of attorney, be sure they are consistent. If there is any conflict between the two, the health care power of attorney will overrule the living will. Both the living will and the health care power of attorney last from the time they are created until your death, unless they are revoked or changed. Your living will and health care power of attorney can be revoked or changed, regardless of your mental or physical condition, at any time if you do any of the following:

- tear, burn, obliterate, or destroy the document or direct someone else to do so in your presence;
- write and sign a document canceling the directive (a revocation);
- verbally express your intent to cancel the document in the presence of two witnesses and notify your doctor of the revocation; or
- write a new document.

A general durable power of attorney, which usually applies to financial matters, is not sufficient to appoint someone to make health care decisions for you. Often, people appoint one agent for health care decisions and another agent to handle financial matters. If you do not have an advance directive or a surrogate, then your doctor, will make treatment decisions for you if you are unable to decide for yourself. In some cases a guardian may be appointed.