

Preparing Advance Health Care Directives for the Snowbird

By Howard S. Krooks

There are more similarities than differences between New York and Florida with respect to end-of-life decision-making and the documents we elder law attorneys prepare in order to assist our clients with these important issues. Still, the differences are important enough that if you are working with a client who is bound for Florida or “snowbirding” during the Winter months, additional language in your documents will help the New York-based client significantly. Of course, if your client plans to spend a great deal of time in Florida and New York, it is probably best to have him/her sign advance directives in both jurisdictions. Alternatively, if your client does not wish to sign Florida documents, consider having them add the following language to the New York documents:



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of an advance directive. This enumeration of individuals is similar to the persons specified in New York’s Family Health Care Decisions Act that has been proposed (but not yet enacted) since 1992.

Since “Proxies” are treated differently than “Surrogates” under Florida law, the New York “Proxy” designation may not be honored expeditiously, if at all. A relatively simple solution would be to add a clause to the New York document that expresses the principal’s intention that the “Proxy” be treated as a “Health Care Surrogate” under Florida law as that term is defined in Chapter 765 of the Florida Statutes. By including this clause, the “proxy/surrogate” is more likely to be able to act swiftly and in the best interests of your client/the principal.

1. Florida uses the term “Health Care Surrogate” to refer to the agent acting under the health care advance directive (New York uses the term “Health Care Proxy”). Florida health care providers sometimes decline dealing with a “Proxy.” This problem is exacerbated by the fact that Florida also uses the term “Health Care Proxy,” but this term is used only to describe a person who is acting without actually being appointed by the patient (i.e., Michael Schiavo acting on behalf of his wife). A “Proxy” under Florida law is permitted to act in a certain order of priority in the absence of an advance directive. Thus, a judicially appointed guardian, a patient’s spouse, an adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation, a parent of the patient, the adult sibling of the patient, or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available, an adult relative of the patient who has exhibited special care and concern for the patient and who has maintained regular contact with the patient and who is familiar with the patient’s activities, health, and religious and moral beliefs, or a close friend of the patient may make health care decisions in the absence
2. Without specific guidance otherwise, the administration of pain medications can be deemed artificial procedures in Florida. Pain medications are therefore sometimes withheld when a document mandates that no artificial procedures be used. Most people want to die in as painless a fashion as possible. Therefore, be specific in your New York document to indicate that your client **wants** pain medications to be used if they will lessen suffering even if those pain medications may dull consciousness or indirectly shorten life.
3. Make sure your principal/surrogate has all necessary powers/authority. The health care advance directive law is found in Chapter 765 of the Florida Statutes. However, as in New York, there are other state and federal laws that affect the agent’s ability to act. For example, our documents take into consideration Chapter 470 of the Florida Statutes, which allows for a “legally authorized person” to be designated to make funeral arrangements. Therefore, it would be a good idea to include a reference to this authority in the New York document. Also, although this is much less of a problem than even just last

year, many Florida lawyers report that hospitals and nursing homes have refused to allow a Health Care Surrogate to access clinical records unless the documents explicitly reference HIPAA and related privacy laws.

4. Florida has no statewide registry for advance health care directives. In addition to you and their proxies keeping a copy, the client should be counseled to give a copy of the document(s) to their Florida primary care physician upon their arrival to their Florida home.

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