

Who Will Make Decisions When You No Longer Can

In Florida, when a person becomes incapacitated and is no longer able to give informed consent, the health care provider must look to someone else to make the health care decisions for that individual. Absent there being a court appointed guardian for the incapacitated person, the law provides for two options: a health care surrogate or a health care proxy. A health care surrogate is a person designated by the incapacitated individual in a document (known as a Designation of Health Care Surrogate) to make the health care decisions on behalf of the individual. A health care proxy is a person designated by Florida statute to make the health care decisions for the individual.

Under Florida law, any person may designate someone to make health care decisions on their behalf should they become incapacitated. Incapacity, according to Florida statute, occurs when a physician designates in the individual's medical file that they can no longer give informed consent. Once that occurs, the health care surrogate takes over making the health care decisions for the incapacitated person.

But what happens if an incapacitated individual hasn't executed a Designation of Health Care Surrogate? Well, in this situation, the Health Care Proxy statute becomes applicable. The Health Care Proxy statute provides a pecking order of persons to make decisions on behalf of the incapacitated individual. That pecking order is as follows:

- (a) Judicially appointed guardian of the person;
- (b) Patient's spouse;
- (c) Adult child of the patient or, if more than one adult child, a majority of the adult children;
- (d) Adult sibling of the patient, or if more than one adult sibling, a majority of the adult siblings;
- (e) Adult relative who has shown special care and concern and maintained regular contact;
- (f) Close friend of the patient;
- (g) Social worker selected by bioethics committee of health care provider.

Each of these individuals is bound by something known as "substituted judgment". "Substituted judgment" means that if they know the patient's wishes, then they must follow them. This would also include the incapacitated person's wishes regarding life support and end of life issues normally spelled out in a Living Will. If the patient's wishes are unknown, then the decision maker must do what is in the "best interests" of the patient.

The bottom line here is that you are free to designate whomever you want as your health care decision maker. Absent some bad behavior on that person's part, they will be the one to make your health decisions on your behalf should you become incapacitated. Absent a Designation of Health Care Surrogate, the Health Care Proxy statute will nominate a health care decision maker for you. Keep in mind, however, that this might

not be the person that you want making your health care decisions. Thus, to ensure that your wishes are carried out, it is best to have everything in writing.