

YOUR CHECKLIST WHEN GOING TO THE DOCTOR/DENTIST: *Health Care Surrogate Designation, HIPAA Release, and Living Will*

By Bonie S. Montalvo

The time has arrived. You cannot prolong it any longer, it is now time for your visit with the dentist. Did you thoroughly brush your teeth? Did you floss? Did you bring you HIPAA release?

Wait.

What?

Yes, you heard right, your HIPAA release, along with your Health Care Surrogate Designation and your Living Will. Imagine that you need to go under general anesthesia for a dental procedure, and while you are under anesthesia, a medical complication arises. Due to the anesthesia, you are now temporarily incapacitated and can no longer make decisions about to your general wellbeing, but who can make those decisions on your behalf?

If you arrive to the dentist's office without an advanced directive, under Florida Statute §765.401, a hierarchy of authorized family decision-makers are permitted to make medical treatment decisions on your behalf. In situations where there is no advanced directive or named guardian, the law gives preference to the individual's spouse to make medical decisions, and then gives preference (in descending order) to; adult children, parents, siblings, and other enumerated individuals.¹

You are not married at the time you arrive to the dentist's office, and since you know that at the time of your incapacity hits your parents will be overwhelmed with worry, you prefer for your sister to make medical decisions on your behalf. Therefore, in order to bypass the default statute, your will need a *health care surrogate designation* that names your sister as your surrogate.

Florida Statute §765.101 allows an individual to give a designated person instructions in regards to the individual's desire concerning any aspect of the individual's health care, which includes "the designation of a health care surrogate, a living will, or an anatomical gift." While there is misconception that health care directives are only necessary for the frail or the terminally ill, anyone can fall prey to health complications, and as such having an advanced directive now will save you and your loved ones from uncertainty in the future.

Back to our example, you are under general anesthesia and your dentist realizes that a dental extraction needs to be performed. Since due to the anesthesia you are now "incapacitated", your sister, as your designated health care surrogate, will now be able to make medical decisions on your behalf. While your health care surrogate will be able to make medical decisions on your behalf, these decisions must generally be in your best interest (i.e. surrogate should not go mad with power and decide to pull all your teeth out). Under Florida Statute § 765.205(1)(b) a surrogate shall "only make health care decisions for the principal which he or she believes the principal would have made under the circumstances if the principal were capable of making such decisions."

Now, presume that your dental procedure resulted in a freak incident. You are taken to the hospital and the physician recommends to amputate your arm. Your sister, as your health care surrogate, would like to get a second opinion from an outside physician before consenting to the recommended treatment. While your sister, as your surrogate, will be able to access your medical information under Florida Statute § 765.205(1)(b), it is recommended that you sign a HIPAA² authorization and release that will allow your surrogate access to your medical information (this will also expedite the release of information from the medical provider). A HIPAA authorization and release can also be made to regards to other individuals whom you wish have access to your medical information.

Many years later, you are playing baseball (after seeking a second opinion, your sister decided to go against the recommended amputation treatment). During the bottom of the fifth, you are suddenly knocked unconscious by a fast ball and are rushed into the emergency room. A month later, two independent physicians determine that you are in a persistent vegetative state with no reasonable medical probability of recovery. At this time, your family is at a heightened emotional state (even your accountant brother cannot keep it together) and no one can decide in regards to your artificial life support. This is a complex decision for your loved ones to make, and as such a living will can be used to save your family from having to make this emotionally draining choice. A living will, allows any competent adult to make a written declaration to "direct the providing, withholding, or withdrawal of life-prolonging

procedures in the event that such person has a terminal condition, has an end-stage condition, or is in a persistent vegetative state."³ Before spring training started, your revised your living will, and as such your family was able to honor your wishes.

Medical accidents and illness can strike at any time, for not even the young are immune to them, and as such everyone (including minors) should have advanced directives in place. Parents (or guardians) of minor children can designate a health care surrogate who will make medical decisions for their minor children if the parent/guardian is unable to do so.⁴

Lastly, advance directives are only useful when they are accessible, preferably before medical treatment commences. Once you execute your advanced directives, make sure that you do not drown them in a sea of documents, instead keep your medical provider and your family updated on their existence and on your wishes.

¹ Fla. Stat. § 765.401(1)(b).

² HIPAA (Health Insurance Portability and Accountability Act of 1996) is United States legislation that provides data privacy and security provisions for safeguarding medical information.

³ Fla. Stat. § 765.302.

⁴ Fla. Stat. § 765.2035. For example, if both parents are incapacitated, the designated health care surrogate will make decisions regarding the minor's health care during the time of the parents' incapacity.

This Article does not constitute legal advice and may not be relied upon as such. Each individual's facts and circumstances are different. If you have any questions regarding your particular situation, please consult with legal counsel.



**SALVATORI, WOOD, BUCKEL,
CARMICHAEL & LOTTES**

Attorneys at Law

REAL ESTATE • ESTATE PLANNING • CORPORATE • LITIGATION • TAX

Bonie S. Montalvo



Bonie S. Montalvo is an attorney with the law firm of Salvatori, Wood, Buckel, Carmichael & Lottes. Ms. Montalvo's practice is concentrated in the areas of estate planning, business succession planning, tax planning, and not-for-profit law. Ms. Montalvo has her LL.M. in Taxation from the University of Florida and is fluent in Spanish.

239.552.4100
WWW.SWBCL.COM