Introduction

In 1901, the first successful open-chest cardiac massage was performed to save a person from an anesthesia-induced cardiac arrest.\(^1\) Almost 60 years later, after discoveries were made while a scientist was researching defibrillation in dogs, external cardiac massage (aka chest compression) became widely used in patient care.\(^2\) Since then, even more advancements have led to technologies that can now assist patients in breathing or provide artificial nutrition and hydration to patients.\(^3\) These technological medical advancements have continued to help save and extend lives.

However, ever-advancing medical technology begs the question of patient autonomy and the use of extraordinary measures to save or extend a patient’s life. This book focuses on a person’s ability to make decisions regarding end-of-life medical treatment and health care decisions and how each state’s laws allow a person to make these decisions ahead of time—specifically using an advance directive for health care. However, this book will touch on other end-of-life planning devices and look at special problems that may come up when an individual is considering end-of-life planning and executing an advance directive.

What Is an Advance Directive for Health Care?

The *Attorneys’ Dictionary of Medicine* defines an advance directive as “[a]n oral or written statement of an individual’s wishes regarding the medical care he

\(^2\) *Id.*
Getting Started with Advance Directives

or she would want if unable to make his or her own decisions.”  

Essentially, an advance directive helps give a person some control over medical decisions needing to be made at a time when he or she may be unable to express what medical treatment or care he or she would like to receive.

Generally, an advance directive will involve a living will and/or a nomination of a health care proxy.

Living Will

“The living will has been defined as ‘a document that gives instructions to health care providers about particular kinds of health care that an individual would not want to have to prolong life.’” In *Cruzan v. Director, Missouri Department of Health*, the Supreme Court stated that “[i]t cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment.” However, the Court went on to state “that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state,” noting that some courts have limited “consideration of evidence to the prior expressed wishes of the incompetent individual.” Although asserting individuals have a right to refuse medical treatment, the opinion ultimately left it up to the states to regulate this right.

Every state has statutes regarding end-of-life decision making. However, the decision-making powers and the forms used to make those decisions vary from state to state. What is included in or excluded from the living will may be vastly different in each state. Therefore, it is important to ensure you are familiar with your state’s laws on living wills, have your state’s living will form or an acceptable variation of it, and understand the options presented in the living will when going over it with a client.

Health Care Proxy (or Agent)

The National Hospice and Palliative Care Organization defines a health care proxy as a document that “allows you to appoint a person you trust as your healthcare agent (or surrogate decision maker), who is authorized to make medical decisions on your behalf” if you are unable to make your own medical decisions on your own.
decisions. This gives people the power to have someone they trust and know will make the best decision for them act as their voice when they are unable to make medical decisions for themselves. This also gives people the opportunity to discuss their wishes concerning their health care with whomever they select as their health care proxy before the health care proxy must act.

The American Bar Association lays out ten qualifications one should consider when deciding on a health care proxy:

1. Meets the legal criteria in your state for acting as agent or proxy representative.
2. Would be willing to speak on your behalf.
3. Would be able to act on your wishes and separate his or her own feelings from yours.
4. Lives close by or could travel to be at your side if needed.
5. Knows you well and understands what is important to you.
6. Is someone you trust with your life.
7. Will talk with you now about sensitive issues and will listen to your wishes.
8. Will likely be available long into the future.
9. Would be able to handle conflicting opinions between family members, friends, and medical personnel.
10. Can be a strong advocate in the face of an unresponsive doctor or institution.

Why Is Having an Advance Directive for Health Care Important?

There are two main reasons having an advance directive for health care is important: (1) it gives people autonomy over decision making involving their health care at a time when they are unable to make decisions, and (2) it can give family members peace of mind knowing what their incapacitated family member wanted.

Although filling out an advance directive for health care is often intimidating for people, it truly empowers them to take control and prepare for a time when they may not be able to express their wishes concerning their health care. And for this reason, it is important for estate planning and elder law attorneys to offer an advance directive for health care in their estate planning documents.