CLIENT INFORMATION LETTER # 35

HEALTH CARE POWERS OF ATTORNEY AND LIVING WILLS

Health Care Powers of Attorney

On July 3, 1991, the North Carolina General Assembly adopted House Bill 821 which allows an individual to designate a Health Care Attorney-in-Fact (Health Care Agent). The new act is codified at G.S. 32A-15 et seq. In addition, the bill also amends the Natural Death Act, G.S. 90-321, and provides a new living will form. The law took effect October 1, 1991.

Pursuant to G.S. 32A-17, any person having understanding and capacity to make and communicate health care decisions, who is eighteen years of age or older, may make a Health Care Power of Attorney. Any competent person not engaged in providing health care to the principal [the one making the power of attorney] and who is over the age of eighteen may act as the designated health care agent. The Health Care Power of Attorney must be in writing and signed by two qualified witnesses who are not related to the principal and who are not providing medical care to the individual.

The Health Care Attorney-in-Fact may be granted full power and authority to make health care decisions for the principal, subject to the limitations set forth by the principal in the document. The decisions would include such matters as the choice of intravenous feeding or hydration, the use of drugs to alleviate pain, and the decision whether or not to resuscitate the patient/principal.

Some of the more pertinent provisions of the Act are as follows:

- The Power of Attorney does not become effective until the physician or physicians designated in the Power of Attorney determine in writing that the principal lacks sufficient understanding or capacity to make or communicate his or her own health care decisions.
- Once the Power of Attorney becomes effective, it remains so even if the principal is incapacitated.
- Determination of the individual's understanding or capacity to make or communicate health care decisions can be made by the principal's attending physician if the physician or physicians designated in the document are unavailable or unwilling to make such a determination.
- A Health Care Power of Attorney is revoked by death of the principal and may be revoked by the principal at any time so long as he or she is capable of making and communicating health care decisions.

- The execution of a Health Care Power of Attorney does not revoke, restrict or otherwise affect any non-health care powers granted in a general power of attorney. However, health care powers granted pursuant to a Health Care Power of Attorney are superior to any similar powers granted by the principal to an Attorney-in-Fact under a general power of attorney. A Health Care Power of Attorney may be combined with or incorporated into a general power of attorney.

In addition, the Health Care Power of Attorney can contain provisions relating to appointment, resignation, removal and substitution of the health care agent. The Power of Attorney is revoked upon the appointment by the court of a guardian of the person or a general guardian; however, the statute provides that the Health Care Power of Attorney may designate who is to be appointed guardian of the person of the principal and the court must appoint accordingly, except for good cause shown.

The Health Care Power of Attorney is not a substitute for a Living Will; in fact, it may be combined with or incorporated into a Declaration of a Desire for Natural Death, or "Living Will."

Living Will Revisions

G.S. 90-321 authorizes the execution of a Declaration of a Desire for Natural Death. Until recently modified, the statute provided that if a person's condition were found to be terminal and incurable, then the Declarant could authorize a physician to withhold or discontinue extraordinary means. Extraordinary means is defined as any medical procedure or intervention which in the judgment of the attending physician would serve only to post pone artificially the moment of death by sustaining or restoring or supplanting of vital function.

G.S. 90-321 was recently amended to broaden the circumstances under which a living will can be used. As modified, G.S. 90-321 provides that if a Declarant is found by the attending physician to be in a terminal and incurable condition or is diagnosed as in a persistent vegetative state, the physician can withhold or discontinue extraordinary means and/or artificial nutrition or hydration as specified by the Declarant. The old declaration form was a document which did not contain any alternatives; the new declaration form requires that the Declarant make decisions regarding the matters discussed above.

Please ask us if you would like our office to prepare either of these documents for you.