Recent, well-publicized events have focused attention on the benefits of an advance directive for health care regarding end-of-life medical decisions. The existence of an advance directive can, in fact, ease your family’s burden in both determining and carrying out your wishes. In addition, the advance directive should be supplemented with a durable medical power of attorney (“MPOA”) naming another person as your agent to make healthcare decisions on your behalf under any circumstances in which you would not be able to do so personally.

Nearly all states, including Pennsylvania, New Jersey, New York and Delaware, permit adult individuals to execute an advance directive and/or an MPOA. While most of these states allow family members, such as a spouse or child, to make decisions even in the absence of an advance directive or MPOA, recent cases have shown that there may be differing views among family members about end-of-life decisions. The advance directive and MPOA removes any uncertainties about what your wishes might be.

An advance directive, also commonly known as a living will, is your written expression of how you want to be treated in certain medical situations. For example, the advance directive may state whether you wish to receive food and water via intravenous devices, and other life sustaining treatments — such as the use of heart-lung machines, ventilators or experimental surgeries — that will sustain or extend your life, but which will not ultimately cure you. The advance directive generally permits you to express whether or not you wish to receive life-sustaining treatments in the event you are terminally ill or permanently unconscious due to disease, illness, or injury. As such, the advance directive generally applies only in situations where the decision to use such treatments prolongs your life for a limited period of time. Advance directives do not govern your medical treatment in situations that do not affect your continued life, such as routine medical treatment and non life-threatening medical conditions. Executing an advance directive does not require that medical professionals withhold pain medications and other treatments that would make you more comfortable.

An MPOA (also called a “health care proxy”) is the appointment of another person (your “agent” or “surrogate”) to make medical decisions in the event you are unable to express your preferences. This situation usually occurs because you are unconscious or do not have the legal capacity to make your own decisions. A single individual is usually appointed as your agent, though one or more alternates may also be named to act in the event the first agent is unable to do so for any reason. Like an advance directive, medical professionals will determine whether or not you have the capacity to make your own medical treatment decisions. It is also important that the MPOA grant your agent the right to receive medical information in accordance with HIPAA — the federal legislation governing the release of medical information. The MPOA is specifically designed to cover both routine and end-of-life medical treatment and may be combined with the advance directive or set forth in a separate document.
Without an advance directive or MPOA, critical health care decisions may not be made in a manner that reflects your wishes, or by the person that you wish to make those decisions. Most importantly, without them, your family may need to seek judicial intervention in order to determine and carry out your wishes. In the event you do not wish to receive extraordinary medical care under the circumstances, the court must have clear and convincing evidence that you would not wish to receive such care.

On the other hand, the existence of an advance directive does not necessarily ensure that a family disagreement over end-of-life medical decisions will not end up before the court. As the recent case in Bucks County, Pennsylvania illustrates, however, an advance directive is likely to be upheld by the court. In that case, the patient had executed an advance directive some years before falling into a state of permanent unconsciousness resulting from the advance stages of Alzheimer’s Disease.

The patient’s wife was named as his surrogate under the advance directive. Notwithstanding the patient’s stated intention to forego artificial feeding and water, the wife wished to have a feeding tube inserted. The patient’s daughter brought an action to uphold her father’s stated wishes and prevent her mother from having the feeding tube inserted.

The legal issue before the Court was the extent of the designated health care surrogate’s powers under Pennsylvania law — which is largely silent on the issue — to make health care decisions that are contrary to those stated in the advance directive. The Court found that the patient had the legal capacity to execute the advance directive before becoming ill. It ruled that the patient’s stated wishes were to be carried out and ordered that no feeding tube be inserted. Unfortunately, the Court’s decision did little to clarify the extent of a health care surrogate’s power under the Pennsylvania statute — presumably because the wishes were so clearly stated in the advance directive itself.

In considering whether you should have an advance directive or MPOA, remember that they are only valid if executed while you are competent to do so. Thus, they should be drafted and signed before you have entered an advanced state of illness or had a severe injury. While most states do not require an attorney to prepare the documents for you, it is strongly advisable that you seek professional help. This is particularly true if there may be family conflict, or if you have specific spiritual, legal or medical issues that need to be addressed.

Finally, you should consider all of your estate planning and lifetime decision-making needs when preparing an advance directive and MPOA. That is an opportune time to also review your other basic (or advanced) planning documents, including your general power of attorney (which will allow another to handle your financial affairs in the event of your incapacity during your life) and your will (which will govern the distribution of your assets after your death). You should review these documents every two or three years to ensure they remain consistent with your current beliefs, goals and objectives.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult a lawyer concerning your own situation and legal questions.