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WRITER'S DIRECT DIAL NO.

June 7, 2004

Dr. Peter V. Rabins  
Dr. Patrick Triplett  
Johns Hopkins Hospital  
Department of Psychiatry and Neurosciences  
Meyer 279  
600 N. Wolfe Street  
Baltimore, Maryland 21287

Dear Drs. Rabins and Triplett:

You have requested my advice whether certain documents contain a legally effective appointment of a health care agent. None of these documents is labeled as an "advance directive" or a "durable power of attorney for health care." Rather, they are all general powers of attorney. The question is whether any provision in the documents constitutes an act of appointment under the pertinent section of the Health Care Decisions Act, § 5-603(b) of the Health-General Article, Maryland Code: "Any competent individual may, at any time, make a written advance directive appointing an agent to make health care decisions for the individual under the circumstances stated in the advance directive."

This language, reflecting underlying ethical principles, requires that the appointment of a health care agent be a knowing act. That is, the document must contain language evidencing (1) awareness by the individual making the advance directive that he or she is appointing someone "to make health care decisions," as distinct from the myriad of other decisions that may be delegated by a power of attorney<sup>1</sup>; and (2) a description, be it broad or

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<sup>1</sup> To underscore the distinction, the Maryland durable power of attorney statute, which is aimed at preserving an attorney-in-fact's authority after the principal's disability or incapacity, is expressly made inapplicable "to an instrument or portion of an instrument that is an advance

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narrow, of "the circumstances" under which the health care agent may exercise authority flowing from the appointment. In addition, to be recognized as a valid written advance directive appointing a health care agent, the document must have been properly witnessed.

Applying these criteria, my conclusions are as follows about the particular documents that you asked me to review:

*Document 1.* This document, executed in Maryland and dated 2 December 1993, is titled "Durable Power of Attorney" and appoints an individual as "Attorney." The document is wholly devoted to financial and property matters, contains no mention of health care, and has only a single witness, rather than the two required by the Health Care Decisions Act. Consequently, it is not valid as an advance directive appointing a health care agent.

*Document 2.* This document, executed in Maryland and dated 14 July 1998, is titled "Power of Attorney" and appoints an individual as "Attorney-in-Fact." It is almost entirely devoted to financial and property matters. It does contain a provision authorizing the attorney-in-fact to "engage, employ, supervise, dismiss and discharge such counsel, attorneys at law, accountants, physicians, nurses, home companions, aides, servants or other persons with or without compensation, in connection with any of my personal affairs ...." In my opinion, however, this passing reference to the engagement of medical professionals, in a listing of a variety of other professionals, is neither an explicit appointment of a health care agent nor a description of the circumstances under which authority over health care decision making is granted. Consequently, it not valid as an advance directive appointing a health care agent.

*Document 3.* This document, executed in North Carolina and dated 26 October 1993, is titled "Durable Power of Attorney" and appoints an individual as "Attorney-in-Fact." Although the document contains no witness signatures, it was notarized and so appears to have been validly executed under North Carolina law. N.C. Gen. Stat. § 32A-16. Therefore, the lack of two witnesses does not invalidate it.<sup>2</sup> Most of the provisions in the document relate to financial and property matters. However, the document begins with a broad grant

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directive appointing a health care agent under [the Health Care Decisions Act]." § 13-601(e) of the Estates and Trusts Article.

<sup>2</sup> An advance directive is valid in Maryland if it was executed in compliance with the Health Care Decisions Act or the laws of the state where it was executed. § 5-617.

of discretion "to do and perform for me anything of any character which I might do or perform if I were personally present and acting" *and* contains in a later paragraph (titled "Personal Relationships and Affairs") a provision authorizing the attorney-in-fact to "provide medical, dental, and surgical care, hospitalization and custodial care for the principal." In my opinion, these two provisions together can reasonably be understood as evidencing an intent to appoint the attorney-in-fact as health care agent, with discretion to provide care under any circumstances in which the principal would choose to do so.<sup>3</sup>

*Document 4.* This document, executed in Maryland and dated 4 March 1986, is titled "Power of Attorney" and appoints an individual as "Attorney." The document is a short preprinted form that simply authorizes the attorney to "act without restriction on my behalf." The document contains no mention of health care. Consequently, it is not valid as an advance directive appointing a health care agent.

*Document 5.* This document, executed in Maryland and dated 4 March 1993, is titled "General Power of Attorney" and appoints an individual as "Attorney-in-Fact." It is almost entirely devoted to financial and property matters. It also contains boilerplate language generally authorizing the attorney-in-fact to "exercise or perform any act, power, duty, right or obligation whatsoever that I now have ... the legal right, power or capacity to exercise or perform in connection with ... any ... matter whatsoever." The document goes on to state an intent that the powers of the attorney-in-fact "shall broadly include and embrace full and unlimited power and authority to handle, control and manage all of my affairs, undertakings and business and to do and perform on my behalf and in my place and stead, any and all other lawful acts, matters and things whatsoever which I could do if personally present." Like everything else, health care falls within this limitless description of the attorney-in-fact's authority. In my view, however, such language, at least when it is not coupled with an explicit reference to health care and instead prefaces or follows a list of specific *financial* powers, fails to evidence the individual's decision to entrust health care to the attorney-in-fact and fails to identify the circumstances under which decisions may be made. Consequently, the document is not valid as an advance directive appointing a health care agent.

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<sup>3</sup> In my view, if the document contained only the boilerplate grant of discretion, without the specific language about the provision of health care, it would not qualify as a valid advance directive appointing a health care agent. I discuss this point further in considering Document 5, below.

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I hope that this letter of advice, although not to be cited as an opinion of the Attorney General, sufficiently addresses your question. Please let me know if I may be of further assistance.

Very truly yours,



Jack Schwartz  
Assistant Attorney General  
Director, Health Policy Development