Editorial

An Important Step in the Promotion of Patients’ Self-Determination

1. Introduction

On 9 December 2009, the Council of Europe’s Committee of Ministers adopted the Recommendation (2009)11 on “continuing powers of attorney and advance directives for incapacity”.¹ This document is of great relevance for the field of health law, as it represents an important step forward in the promotion of patients’ self-determination regarding medical care to be implemented in the event that the individual becomes incapacitated. Although the scope of the recommendation is actually much broader than health care, since it also covers decisions regarding welfare, and economic and financial matters, this commentary only focuses on those provisions that are relevant for health care issues.

The key concept of the recommendation is clearly self-determination of incapacitated adults. This is not surprising, since the value today attached to advance directives responds to a growing commitment to patient autonomy. Furthermore, this tendency seeks to promote the well-being and dignity of patients by offering them a way to better deal with the burdens and diminishing benefits of aggressive medical treatments in situations of futility or very poor prognosis.

It is worth remembering that advance directives may take three forms: a living will, a continuing power of attorney, or a combination of both. Living wills are (usually written) instructions that specify ahead of time what types of medical treatment are desired or not; lasting or continuing powers of attorney are documents which allow individuals to appoint someone to make health care decisions on their behalf and in their best interests should they become incapable of doing so themselves.

Although in Europe it is still unusual to base clinical decisions on patients’ previous instructions, the situation has been changing during the last few years. An increasing number of countries are now realizing the value in promoting patients’ self-determination and enacting legislation on advance directives, in

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particular, to specify their scope, formalities, and legal efficacy. The Council of Europe's Convention on Human Rights and Biomedicine made a first significant effort in this direction by recognizing that advance directives “shall be taken into account” (Article 9). This norm is nevertheless insufficient, first, because it does not indicate what it concretely means by “taken into account”; second, because it is exclusively focused on living wills, while it ignores lasting or continuing powers of attorney.2

The Recommendation (2009)11 seeks, to some extent, to fill these two gaps by providing a set of standards relating to continuing powers of attorney, and by trying to strengthen, as far as possible, the legal efficacy of living wills.

Before briefly presenting the key provisions of the recommendation, it is worth noting that it uses terminology that differs from that usually employed in the literature, which is the one mentioned above. The recommendation uses the term “advance directives” in a narrow sense, as a synonym for “living wills”. Continuing powers of attorney are treated as a separate category. In order to avoid misunderstandings, this commentary below will follow the terminology used by the recommendation.

2. An Understandable Focus on Continuing Powers of Attorney

The Recommendation (2009)11 consists of a preamble and seventeen principles. The preamble draws attention to previous international and regional instruments relating to the protection of incapacitated adults. Special emphasis is placed on Recommendation N° R(99)4 of 23 February 1999, which is recognized as a “valuable and up-to-date international instrument” in this field. At the same time, it is stressed that the new recommendation “supplements” the 1999 one by giving prominence to the principle of self-determination. In this regard, there is a substantive difference between the approaches adopted by both documents: the 1999 recommendation deals with measures of protection provided by competent authorities (i.e., courts), while the new instrument covers decisions made privately by the persons concerned themselves. This second strategy for protecting the interests of incapable persons is not only more in line with the principle of self-determination, but it also allows for the avoiding of time-consuming and sometimes costly, sensitive and burdensome judicial and administrative proceedings.3

The reader of the recommendation might be surprised that most of its provisions (Principles 3 to 13) concern continuing powers of attorney, while advance
