

Health & Financial Decisions

Legal Tools for Preserving
Your Personal Autonomy



American Bar Association Commission on Law and Aging

There are decisions to be made every day in life . . .

Financial Decisions

- ◆ Making bank account deposits and withdrawals
- ◆ Buying/Selling a home or other property
- ◆ Paying bills and Managing debts
- ◆ Maintaining your will, deeds, life insurance, and other papers
- ◆ Dealing with Social Security, Medicare, and other benefit programs.

Personal Decisions

- ◆ Choosing where to live
- ◆ Socializing with the people or groups you choose
- ◆ Planning recreation, travel, or transportation
- ◆ Fulfilling spiritual or religious customs
- ◆ Making funeral plans or burial arrangements.

Health Decisions

- ◆ Choosing a health or long-term care facility
- ◆ Employing home care providers
- ◆ Consenting to or refusing treatment
- ◆ Obtaining or releasing medical records
- ◆ Deciding the course of treatment in case of serious illness.

Under the law, these are **YOUR** decisions to make and not somebody else's.

You have the right to make choices based upon your own values, beliefs, and wishes, even if others disagree with you. Courts have almost always followed the expressed wishes of competent adults, especially for health care. Therefore, it is important to state your desires in writing about health and financial decisions when you are capable of clearly expressing your wishes.

But what happens if you are too sick or disabled and can't manage these decisions?

The answer depends on whether you have made use of key legal planning tools. For financial matters, the legal tools you can use are:

- ◆ A **Durable Power of Attorney**
- ◆ A **Trust** (in selected cases)

For health-related, personal choice matters, the legal tool you can use is:

- ◆ An **Advance Directive for Health Care**, which includes:
 - A Health Care Power of Attorney, and may include
 - A Living Will.

If you do not take advantage of these legal tools, then decisionmaking becomes much more difficult. Decisions that are made for you may not be the ones you would make.

For health care decisions, some states have “family consent” laws permitting other family members to make certain kinds of health care decisions for you. But in most states, no one—not even a spouse—has an automatic right to make most decisions on your behalf. For financial decisions, authority to act normally requires an ownership interest in the property. Joint ownership, discussed on the next page, does not necessarily solve the problem.

If you have not made use of legal planning tools, a court proceeding may be needed to obtain decisionmaking authority. This is usually called a **Guardianship** or **Conservatorship** proceeding, and it can be time consuming, costly, and restrictive for everyone involved.

Why do I need these legal planning tools if I have a Will and all my property is jointly owned?

Wills

A **Will** is an important part of planning for the future, but it deals only with events after your death. The legal tools described here are separate from your will—they deal primarily with **lifetime** events up to the point of death.

Joint Ownership

Holding property **jointly**, such as a joint bank account, is a common and simple way to enable someone else to have automatic access to your property. However, it should be used cautiously. Joint owners can use the property as their own, and you may have little control over what a joint owner does. Debts of the joint owner could subject your property to legal action. Moreover, a joint ownership is not helpful in handling property matters that may require your signature—such as transferring a house, car, or investments. Joint ownership does not protect you nearly as well as a durable power of attorney.

What are my chances of becoming disabled and needing these tools?

Most adults will experience one or more temporary periods of incapacity due to illness or injury. As to permanent incapacity, no one can say what your chances are personally, but nearly 10 million persons in the United States need help in performing basic life activities due to mental or physical health problems.* Moreover, the chances of disability increase with age. About 1 in 8 persons over age 65 suffers from Alzheimer's disease or other forms of dementia. In the over-age 85 population, the number rises to nearly 50 percent.**

* Georgetown University Long-term Care Financing Project, *Fact-sheet: Who Needs Long-term Care?* (May 2003).

** Alzheimer's Association, *2008 Alzheimer's Disease Facts and Figures*.

Durable Power of Attorney (for Property)

What Is It?

A document by which one person (the “principal”) gives legal authority to another (called the “agent” or “attorney-in-fact”) to act on behalf of the principal. “Durable” means that the agent can act when the principal becomes too sick or disabled.

What Is It Good For?

Provides a simple way to appoint an agent or agents whom you want to manage any part or all of your affairs: financial, personal, or both. You can include instructions, guidelines, or limitations as you wish.

Creating

Generally must be signed and notarized. A few states have additional requirements.

Important: In most states, it is durable only if the document states that it shall continue in effect (or take effect) after incapacity occurs.

Things to Think About

- ◆ Think about what process you want to use for determining when the principal has become “incapacitated.” You can define the process—for example, “when a doctor confirms in writing”
- ◆ **Caution:** Even though your agent must follow certain legal rules as a “fiduciary,” there is no formal oversight of the agent. If there is no one you trust fully to act as your agent, don’t use this tool.
- ◆ Banks, brokers, and others sometimes hesitate to recognize Durable Powers of Attorney, but most will. Check with them ahead of time if you can.

Trust

What Is It?

An arrangement under which one person or institution called the *Trustee* holds the title to property for the benefit of other persons called *Beneficiaries*.

A trust created for the lifetime management of property is called an *inter vivos* or *living* trust. Trusts that begin at death are *testamentary* trusts.

What Is It Good For?

Especially useful for lifetime management of property where there is a substantial amount of property, and professional management is desired. May also be written to continue even after your death.

Has a high level of acceptance in business and finance community.

Creating

There is no special language, but trusts can be complicated and need to be carefully drafted. Professionally managed trusts can be costly to set up and manage.

Things to Think About

- ◆ Trust can be set up as a “standby” to be used only in the case of incapacity.
- ◆ A trust can sometimes create problems for public benefit eligibility (in programs such as Medicaid and Supplemental Security Income).
- ◆ A trust may also have important estate tax consequences and should be drafted in coordination with your will.
- ◆ Beware of high pressure sales tactics about the benefits of Living Trusts. Each case is different and sweeping generalizations are usually wrong.

A Health Care Power of Attorney

(May Be Part of an Advance Directive for Health Care)

What Is It?

This is similar to a Durable Power of Attorney for property management but directed exclusively at health care concerns. It also has other names, such as “health care proxy.”

What Is It Good For?

Enables you to appoint someone to make any or all health care decisions for you if you become too sick or disabled to make your own decisions. You may also include guidelines for those decisions.

Helps ensure that your doctor and family will know and respect your wishes. It also helps relieve the stress and conflict caused when family have to guess what you would have wanted.

Creating

Most states have special witnessing requirements. Learn what they are in your state.

Many states have statutory forms that may be used. A few states require that you follow all or part of the statutory form.

Things to Think About

- ◆ Choosing your agent is your most important decision. Make sure your agent knows your wishes, values, and preferences, and will be a strong advocate for you.
- ◆ If you use a form document, do not just sign it. Read it carefully. Tailor it so that it clearly expresses your values and wishes.
- ◆ Make sure your doctor understands and will respect your wishes. The document should be made part of your medical record.

Living Will

(May Be Part of an Advance Directive for Health Care)

What Is It?

A written instruction that allows you to spell out your medical treatment wishes (usually about life support) if you become unable to speak for yourself.

What Is It Good For?

Helps ensure that your wishes are known and carried out.

It is different from a Health Care Power of Attorney in that a Living Will does not appoint an agent and, in some states, applies only to terminal illness or a coma-like state.

Creating

Most states have a statute with a suggested form to use and instructions to follow for creating.

Witness requirements vary from state to state and should be strictly followed.

Things to Think About

- ◆ Because the Living Will applies only in narrowly and sometimes unclearly defined circumstances, it is best to have both a Living Will and Health Care Power of Attorney or to combine them both in one Advance Directive.
- ◆ Make sure your doctor understands and will respect your wishes. The document should be made part of your medical record.
- ◆ For persons with advanced progressive illness, ask your doctor about providing a Do-Not-Resuscitate order or Comfort Care order or POLST form (Physician's Orders for Life Sustaining Treatment) that will be effective in any care setting.

Who can help me do advance planning?

For a Health Care Advance Directive, a lawyer can be helpful but is not required. Many states have statutory forms, usually available from local hospitals or your local senior services organization. You can also obtain forms from organizations such as the National Hospice and Palliative Care Organization, on the Web at <http://www.nhpco.org>.

A form is only the starting point. Before signing one, read it closely, talk about your possible choices and wishes with your doctor, with the person you wish to name as your agent, and with others whom you trust. Better yet, use a workbook such as the *Consumer's Tool Kit for Health Care Advance Planning*, available on the Web at <http://www.abanet.org/aging>.

A lawyer can help you tailor an Advance Directive to meet your particular needs, especially if there are potential family conflicts or special concerns. For a Durable Power of Attorney for property or a Trust, standardized forms are not recommended. These documents need to be tailored to your legal needs. A lawyer who is familiar with “lifetime planning” or “planning for incapacity” will be your best resource.

Where to find a lawyer depends in part on your ability to pay. Publicly funded, or *pro bono* (free) Legal Assistance Programs are available in many areas to serve persons with limited incomes. Contact your local senior services organization for information.

If you can afford to pay a private attorney, choose carefully. There is no simple way to determine whether a particular attorney is experienced in lifetime planning. Seek referrals from:

- ◆ Friends or relatives who have had similar legal work done
- ◆ State or local bar associations
- ◆ Support groups such as the Alzheimer's Association
- ◆ The National Academy of Elder Law Attorneys through their lawyer directory, on the Web at <http://www.naela.org>.

After completing these legal tools . . . what's next?

It is up to you to make sure that these tools are available when needed.

- ◆ For the financial planning tools, your agent or trustee (if you establish a trust) should have access to an original copy. Follow your lawyer's advice.
- ◆ For your Health Care Advance Directive, make sure that your doctor places a copy in your medical record. Your agent should also have a copy and know how to get the original.

Under a federal law known as The Patient Self-Determination Act, most hospitals, nursing homes, home health agencies, and managed care organizations must ask if you have an Advance Directive, and they must document it in your record. They must also tell you about your rights under state law to make decisions about your medical care, including your right to have an Advance Directive. Finally, they must also tell you about their policies on following advance directives. This is very important, because the institution or individual doctor may not have to follow your advance directive if it is against their policies or conscience. If there is a potential problem, you may want to find another provider. Your medical provider should help you with any transfer, if needed.

Change your mind?

You always have the right, while you are still able, to change or revoke your Power of Attorney or Health Care Advance Directive. Your agent can only act with your consent and cannot override your wishes.

It is important to review your documents now and then to make sure they reflect any changes in your circumstances or your thinking.

Review your documents when any of the 5 Ds occur:

1. You reach a new DECADE.
2. You experience a DEATH of family or friend.
3. You DIVORCE.
4. You receive a new DIAGNOSIS.
5. You have a significant DECLINE in your condition.

Brief Planning Checklist

1. ___ I have a Durable Power of Attorney for property matters.
2. ___ I have determined that a Trust arrangement . . .
 - ___ is useful in my situation.
 - ___ is not useful in my situation.
 - ___ I don't know.
3. ___ I have a Health Care Advance Directive:
 - ___ Comprehensive (proxy and instructions).
 - ___ Health Care Power of Attorney only (proxy).
 - ___ Living Will only (instructions).
4. ___ I have a Will (for disposition of my property after death).
5. ___ I have chosen a trustworthy person (or persons) to be my agent under a Durable Power of Attorney for property.
 - ___ I have fully discussed my finances and plans with this person.
6. ___ I have chosen a trustworthy person (or persons) to be my agent (proxy) under a Health Care Power of Attorney.
 - ___ I have fully discussed my health care expectations and wishes with this person and other people.
7. ___ I have talked to my physicians about my wishes in case of serious illness and given the physician a copy of my Health Care Advance Directive to enter into my medical record.
8. ___ I have all my legal, personal, and financial papers located where they can easily be found by my agent or next of kin.
9. ___ I have identified where I can get legal help for lifetime planning questions.

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