

PART SEVEN

**When You
Can't Make
the Decision**

*Confronting Your Biggest Fear Now Can
Make a Big Difference Later*

CHAPTER 23

Delegating Decisions

Advance-Directives

A sudden stroke has left you unable to move and unable to speak—but in constant pain. You can see and hear, though, and you understand that your condition is probably irreversible, and there's a good chance that you'll die soon. What you see now is your partner and children gathered around your hospital bed, asking each other and your doctor, "What would she want us to do?" You're unable to tell them.

Most of us think of estate planning as something that really doesn't bear fruit until we're dead. But technology has changed all that. Modern medicine can now keep alive indefinitely many people who would have died a few years ago. Alive, but not necessarily able to take care of themselves. Nowadays, a good estate plan must take into account the possibility that you may someday be unable to care for yourself, make decisions, or even regain consciousness—but remain alive.

You may remember the Nancy Cruzan case, in which a Missouri woman suffered a head injury in an auto accident that rendered her unlikely ever to escape from an unresponsive, coma-like state. She had left no written instructions about what doctors were to do if she ever became so disabled. Her family wanted to discontinue intravenous feeding, but the hospital—and the state—refused to allow it. Finally, the U.S. Supreme Court ruled that although individuals do have the right to refuse medical treatment, they must express their wishes clearly enough to meet the standards set by the state in which they live.

The controversy surrounding Jack Kevorkian, the Michigan doctor who assists people to commit suicide, indicates just how touchy and ambivalent our society remains about euthanasia (mercy killing) and the right to die.

Let's hope that you never have to face the choices that the Cruzan family and Kevorkian's patients faced. But there are more-common and less-spectacular situations in which you may have to let someone else make important decisions for you because you aren't able to do so.

Twenty years ago, half of Americans died in institutions such as hospitals or nursing homes; today, it's almost four out of five. The medical personnel in those institutions will look to you for instructions on whether to resuscitate you or let you die in life-threatening situations. If such procedures would only mean great pain for you and prolonged anguish for your family, or would leave you in a vegetative state, you might not want them performed. But you may not be in a condition to refuse them. Or you may be in a situation where you want to live but can't manage your affairs.

THE LEGAL SITUATION

The courts have ruled that all mentally competent adults have the right to refuse medical care. If you're suffering from a condition that leaves you unable to communicate, and there is clear evidence of your wishes regarding treatment (such as a living will or other **advance directive**), those intentions must be obeyed. As a practical matter, your instructions must be written down, preferably in a formal document, if there is to be a good chance that they will be obeyed. And they have to conform to your state's laws. Even then, there's no guarantee.

There are some planning tools that can help. For financial matters, you can use trusts and durable powers of attorney to help you manage. For health-care decisions, you can name a health-care power of attorney (HCPA; sometimes called a **health-care proxy**) to act for you when you cannot act for yourself.

This chapter outlines some of the strategies you can map out right now so that your affairs are managed the way you want when you might not be able to make decisions regarding your

**DON'T WAIT TOO LONG**

In considering lifetime-planning or advance-directive documents, remember that they're only valid if made while you are competent—not when you've entered an advanced state of, say, Alzheimer's disease. Also, state laws about how these documents must be created and witnessed vary greatly.

While you aren't formally required to use a lawyer to prepare yours, a lawyer experienced in doing advance-directives is very helpful. A lawyer can draft a personalized document that reflects your particular wishes and ensures that all legal formalities are followed. A lawyer is especially helpful if potential family conflicts or special legal or medical concerns are present.

property, your medical treatment, and even your life. The following section covers situations in which you turn financial decision making over to others; the section after that explains the advance-directives you can create now to guide doctors and others in how to follow your wishes when you may not be able to tell them yourself.

MANAGING YOUR PROPERTY

Even if you become disabled, life will go on. Bills (rent, mortgage, utilities) will have to be paid. Form 1040 will have to be filed. If you own a business, you may want it to carry on without you. Your property will have to be managed.

You may expect your spouse to do all this for you, but what if he or she is killed or disabled in the same event that renders you unable to manage your affairs? What if he or she dies before you do? What if he or she is simply not capable of handling your affairs? Your estate plan must anticipate such a situation.



JOINT TENANCIES MIGHT NOT DO IT

One way to give someone else authority to manage your property is to put it into joint tenancy. This will give your co-owner the power to handle your property should you become disabled. But, of course, if your joint tenant is your spouse, he or she might also become disabled and not be up to managing the property; or he or she might die before you, terminating the joint tenancy. In many cases, joint tenancies are a bad idea, or at least insufficient to take care of all possibilities; chapter 5 explains why.

Living trusts

A good method of preserving or protecting assets is through a revocable living trust. (See chapters 11–12.) You name yourself and someone you trust as cotrustees (or name the other person as your alternative trustee). You transfer the assets that need managing (especially things like investments, rental property, and bank accounts) to the trust. You can give the cotrustee or alternative trustee as much or as little power over the assets as you want (you can, for example, require that until you are incapacitated, he or she must obtain your approval before taking any action). If you become incapacitated, your cotrustee or alternative trustee will manage the assets for you. If you die, the assets can pass into your estate, continue in the trust, or be paid to a beneficiary.

However, a living trust may not be appropriate for your situation. It can be cumbersome in that it entails transferring assets into the trust while you're alive.

Durable powers of attorney

A durable power of attorney (DPA) protects against the consequences of becoming disabled. A DPA is a document in which one person (the **principal**) gives legal authority to another per-

son (the **agent**) to act on the principal's behalf. State laws vary, but a DPA generally has to be signed and notarized and state that it shall be "durable"; that is, that it will continue in effect after you become incapacitated. It terminates at your death or at a time you specify. You can also cancel it at any time while you are competent.

Your agent does not have to be a lawyer. In most states, the agent can be any adult or an institution. However, it should be someone who knows you well and whom you trust completely to manage your affairs.

The DPA lets you appoint an agent to manage all or part of your business or personal affairs. The law does impose the responsibility on the agent to act as your fiduciary, but it might be difficult for you or your family to take him or her to court. Since this person can in effect do anything with your money, you should be sure to appoint someone you trust and in whose judgment and ability you have confidence.

A DPA's flexibility is one of its main advantages. You can limit the authority of the agent in the document, giving him or her as many or as few powers over your property as you wish.

While it's not required that you hire a lawyer to draft your durable power of attorney for property, one should be consulted to make sure that your document meets your state's requirements and that the powers you wish to give your agent are actually spelled out in language that will be legally effective.

Some powers may not be presumed to be within the scope of the power of attorney unless they are specifically spelled out—for example, the power to make gifts or loans, or file tax returns. Some states require a specific format or specific wording in the document. Certain states provide a do-it-yourself "short-form durable power of attorney" that allows you to select the powers you wish to grant to the agent, with state law providing an interpretation of what each power means. Even with these simplified forms, legal consultation is advisable.

Another alternative is the springing power of attorney, which becomes operative ("springs to life") if certain conditions are met. (See chapter 14 for more details.)

MAKING TREATMENT DECISIONS

You now have several ways to prepare for the possibility that you may someday be unable to decide for yourself what medical treatment to accept or refuse. This chapter concludes with a discussion of health-care advance directives; the next chapter covers living wills and organ donation.

Remember, federal law now gives you the right to consent to or refuse any medical treatment, and to receive information about

- **the risks and possible consequences of the procedure,**
- **advance-directives (such as living wills), and**
- **life-sustaining medical care and your right to choose whether to receive it.**



COMPREHENSIVE HEALTH-CARE ADVANCE DIRECTIVES

The third appendix to this book provides a sample health-care advance directive prepared by the AARP, the ABA, and the American Medical Association (AMA). It not only permits you to name a health-care agent and specify his or her powers (a health-care power of attorney), but it also provides instructions about end-of-life treatment (a living will). It also enables you to state in advance whether you want to donate organs at death, and permits you to nominate a guardian of your person should one be required.

Using this comprehensive single document obviously is more convenient and less prone to confusion than having several documents covering portions of your health-care wishes. It meets the legal requirements of most states. Even if it does not meet the requirements of your state, it may provide an effective statement of your wishes if you cannot speak for yourself.

**BUT I'M HIS WIFE . . .**

To many couples, it seems natural that one spouse should be able to speak for the other if he or she is disabled. The law doesn't always see it that way. Many states have **family consent** (or **health surrogate**) laws permitting other family members, in order of kinship, to make some or all health-care decisions on your behalf. Even without such laws, doctors routinely rely on family consent, as long as decisions are not controversial and are made by close family members. But without an advance-directive, decisions may not be made the way you would want, or by the person you would want to make them. Making an advance-directive also benefits your family members, because it spares them the agony of having to guess what you would really want.

No one else, not even a family member, has the right to make these kinds of decisions, unless you've been adjudged incompetent or are unable to make such decisions because, for example, you're in a coma or it's an emergency situation. No one can force an unwilling adult to accept medical treatment, even if it means saving his or her life.

Society has gradually come to a rough consensus on these principles, and almost all medical providers follow them. However, difficulties can still arise when your wishes or intentions aren't clear. That's where the next planning tool comes in.

Health-care advance directives

In an emergency, the law presumes consent. In all other instances, someone else must make decisions for you. The best way to ensure that decisions are made the way you would want, and by the person you want, is to prepare a **health-care advance directive** before you become incapacitated.

An advance-directive is generally a written statement, which

you complete in advance of serious illness, about how you want medical decisions made. The two most common forms of advance-directive are a living will and a health-care power of attorney, although in many states you may combine these into a single advance-directive document.

An advance-directive allows you to state your choices for health care or to name someone to make those choices for you should you become unable to make decisions about your medical treatment. In short, an advance-directive enables you to have some control over your future medical care.

A health-care power of attorney (sometimes called a health-care proxy) is a document that appoints someone of your choice to be your authorized agent (or “attorney in fact” or “proxy”) for purposes of health-care decisions. You can give your agent as much or as little authority as you wish to make some or all health-care decisions for you.

The health-care power of attorney is a more comprehensive and flexible document than a living will. It can cover any health-care decision and is not limited to terminal illness or permanent coma. More important, it authorizes someone of your choice to weigh all the facts at the time a decision needs to be made and to speak legally for you according to any guidelines you provide.

No one can tell you exactly what to say in your advance-directive. Consider addressing these points:

1. *Alternate proxies.* Whenever possible, name one or more alternate or successor agents in case your primary agent is unavailable.

2. *Life-sustaining treatments.* Are there any specific types of treatment you want or don't want under any circumstances? Your personal or family medical history may make certain conditions or treatments more likely.

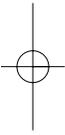
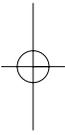
3. *Artificial nutrition and hydration.* Some states will presume that you want nutrition and hydration under all circumstances unless you instruct otherwise.

4. *Organ donation.* In many states, you can include instructions about donating organs in your advance-directive or, better yet, on the back of your drivers' license. The idea is to have the

 **TALK IT OUT**

The most important point to remember about forms is that they are supposed to aid discussion and dialogue, not take their place. Therefore, a form ought to be a starting point, not an end point, for making your wishes known. There is no ideal form. Any form you use should be personalized to reflect your values and preferences. Before doing an advance-directive, talk with your doctor, family members, and advisers. Opening yourself up to different perspectives will help you to understand the medical possibilities you may face and clarify your values and choices.

information known while there is still time to harvest the organs and put them to use.

**AFTER YOU'VE COMPLETED
YOUR DIRECTIVE**

In most states, lawyers recommend that you tell your doctor and lawyer about your decisions regarding health care in the event that you later become unable to speak for yourself, and give each of them a copy of any document you have prepared to keep in your file or permanent medical record. It's also a good idea to give a copy to the executor of your regular will and, of course, to the person you've chosen to act for you if you cannot act for yourself.

You may also want to make a small card for your purse or wallet that states that you have an advance-directive and provides the name, phone number, and address of your agent or another person who can provide a copy of it.

You can revise or revoke the HCPA at any time, including during a terminal illness, as long as you are competent. To revoke it, notify the people to whom you gave the copies, prefer-



ably in writing. To change it, execute a new document. The same formalities of signing and witnessing are required for changes.

It's a good idea to prepare the DPA, the HCPA, and living will all at once, and make sure they're compatible with each other and the rest of your estate plan. These days, all should be regarded as essential components of any estate plan.

Some attorneys advise using different people to serve as agents under your HCPA and DPA. The former is usually a spouse, a child, or another close relative who can make health-care decisions; the latter, a lawyer or other moneywise friend, relative, or professional competent to make business and financial decisions.

One final issue. Do you need more than one advance-directive if you spend considerable time in more than one state? In many states, the law expressly honors out-of-state directives. But in some states, the law is unclear. Realistically, providers will normally try to follow your stated wishes, regardless of the form you use or where you executed it. However, if you spend a great deal of time in more than one state (for example, summers in Wisconsin, winters in Arizona), you may want to consider executing an advance-directive for each state. Or you may want to find out whether one document meets the formal requirements of each state. As a practical matter, you may want different health-care agents for each state if one agent is not readily available in each location.

GUARDIANSHIPS AND CIVIL COMMITMENT

The goal of many of the devices described in this section is to enable you to avoid court-appointed guardianships. The law authorizes courts to designate **guardians** (or **conservators**) for adults judged to be incompetent. Guardians are usually appointed to protect people who are mentally ill or mentally challenged, who are senile, or who are addicted to drugs or alcohol. Depending on

**SOME QUESTIONS
TO ASK YOURSELF**

Advance-directives are tools to make sure that your wishes are carried out. Here are some of the issues you need to explore (perhaps with your family, friends, spiritual advisor, or doctor) before preparing an advance-directive.

1. What are my values?
 - How important is independence and self-sufficiency in your life?
 - What role should doctors and other health professionals play in medical decisions that affect you?
 - What kind of living environment is important to you?
 - What role do religious beliefs play in such decisions?
 - How should your family and friends be involved, if at all, in these decisions?
2. Who should be my agent?

This is the person who will have great power over your health if you become incapacitated. Who can you trust to know what you would want if unexpected situations arise? Who will be able to handle the stress of making such decisions? (Remember, state laws sometimes prevent doctors and others from acting as agents in these circumstances.)
3. What guidelines should I impose?

You don't have to spell out every contingency. In fact, you need to leave your agent some flexibility should unexpected circumstances arise. But if you have specific intentions (not being kept alive by feeding tubes if you are brain-dead, for example) you can help your agent by writing those out.
4. How can I deal with reluctant doctors?

The medical establishment has been slow to recognize a patient's right to make these kinds of decisions in advance. If you have a regular physician or hospital, you might want to discuss these issues with your health-care providers now to make sure your wishes, and those of your agent, will be carried out.

the law, there can be two kinds of guardians: **guardians of the estate**, who are authorized to manage property, and **guardians of the person**, who make medical and personal decisions for the incompetent person, who is known as a **ward**. (The latter is similar to the guardianships set up for children, which are discussed in chapter 13.)

You establish a guardianship by petitioning a court to hold a competency hearing, at which testimony (usually medical) is introduced to prove that the person can't handle his or her own affairs. If the court agrees, it appoints a guardian (usually the petitioner). The guardianship continues until the ward regains the capacity to handle his or her own affairs, which seldom happens. The ward loses most of his or her civil rights, often including the right to make a binding contract, to vote, and to make medical decisions.

A guardian's power varies with the state and the court's decree. It may be broad or limited. The duties and responsibilities will be enumerated in the appointment document. Usually the guardian will be required to post a bond, and an inventory of the ward's property will be required. Annual reports will have to



WHO MAY BE A GUARDIAN?

Laws vary from one state to another. In most states, the courts may appoint almost anyone as guardian if the person meets legal requirements. The court often appoints the person filing the petition. Most courts like to appoint a relative who knows the person and is most likely to act in his or her best interests. However, the courts may appoint a friend or an attorney, especially if no family members are available. The courts also may appoint co-guardians, who either share the duties or split the responsibilities between them. If there are no friends or family members willing or able to serve as guardian, many states permit public or private agencies to act as the guardian and to charge fees for that service if the estate of the incapacitated person is able to pay.

be filed with the court. The guardian may receive a fee, which is often waived by family members.

Guardianships are relatively clumsy and inefficient ways of taking over decision-making power. For example, the guardian usually must get the court's permission before spending money or selling assets. Notice, public hearings, or other red tape may be required. You should explore (with a lawyer's advice) the other possibilities listed in this chapter before undertaking one.

If you are afraid someone is seeking a guardianship over you against your wishes, you should see a lawyer. If you agree with the need for guardianship, you can ask the court to appoint a guardian of your choice. The best protection against involuntary guardianship, though, is to have a health-care power of attorney and a durable power of attorney in place before someone tries to impose one on you.

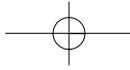
The same goes for commitment to a mental hospital. State laws govern the circumstances in which someone may be invol-



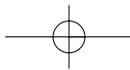
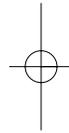
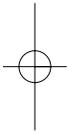
A LEGAL TEST OF CAPACITY

There is no universal legal test of mental capacity or incapacity. Laws vary from state to state, but some general principles apply everywhere.

Incapacity is always evaluated in connection with specific tasks. The question is always "Incapacity to do what?" Different legal standards of capacity may apply to different tasks, such as the capacity to do a will, to drive, to enter contracts, to manage money, or to make medical decisions. In a typical guardianship proceeding, most but not all states use a two-part test to determine incapacity (sometimes called incompetency). First, some type of disability must be verified—for example, mental illness, mental retardation, and/or Alzheimer's disease. Second, there must be a finding that the disability prevents the person from performing activities essential to take care of his or her personal needs or property. Most courts will also insist that all feasible alternatives to guardianship must have been explored before appointing a guardian.



untarily committed to institutional care. A court hearing is required; the standard is whether a person is dangerous to him- or herself or others, or can't care for him- or herself. A lawyer is usually appointed to represent the person whose commitment is sought. If you are committed to an institution, you retain certain rights. If you feel someone is wrongly seeking to have you committed to an institution, see a lawyer immediately.

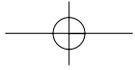


THE WORLD AT YOUR FINGERTIPS

- Information about health-care advance directives is available from most area agencies on aging and from many state bar associations and medical societies.
- State-specific information and forms can be requested from the National Hospice and Palliative Organization at www.caringinfo.org. Also check local hospitals, local agencies on aging, or bar associations.
- The ABA's Commission on Law and Aging has a consumer tool kit for health-care advance planning available at www.abanet.org/aging.
- Americans for Better Care of the Dying (www.abcd-caring.org) publishes *Handbook for Mortals*, an excellent guide for dealing with serious and eventually fatal illness.
- Last Acts provides a wealth of similar information on its website (www.lastacts.org).

YOU MUST REMEMBER THIS

- Advance planning for financial and health-care decision making is the most effective means of ensuring that your wishes will be followed if you become incapacitated.
- Methods for dealing with financial incapacity or difficulties in managing finances include a durable power of attorney, a living trust, and joint ownership.
- You can use health-care advance directives, such as a living will and a health-care durable power of attorney, to provide instructions about your medical care in the event you are incapacitated.
- In the absence of advance planning, a petition for guardianship may be necessary in cases of serious incapacity.



CHAPTER 24

Planning for End-of-Life Decisions

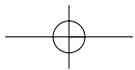
Living Wills and Organ Donation

Most elder-law specialists recommend that you execute documents that authorize someone to act for you in the event you are unable to act for yourself. That's the point of the previous chapter, where we discuss health-care advance directives, trusts, durable powers of attorney, and other ways of having a person stand in for you. But maybe there is no one you trust to act for you. In this chapter, we look at documents that state your wishes but don't name someone to stand in your stead.



A living will is a written declaration that lets you state in advance your wishes about the use of life-prolonging medical care if you become seriously ill and are unable to communicate. It lets your wishes be carried out even if you cannot state them. If you don't want to burden your family with the costs (medical expenses in the last month of life average over \$20,000) and the prolonged grief that are involved in keeping you alive when there's no reasonable hope of revival, a living will typically authorizes withholding or turning off life-sustaining treatment if your condition is irreversible.

Living wills typically come into play when you are incapable of making and communicating medical decisions. Usually you'll be in a medical state such that if you don't receive life-sustaining treatment (intravenous feeding; breathing with a respirator), you'll die. If your living will is properly prepared and clearly states your wishes, the hospital or doctor will normally abide by it, and will in turn be immune from criminal or civil liability for withholding treatment. If the doctor or institution cannot go along with your wishes as a matter of conscience, they must make an effort to transfer you to another provider.



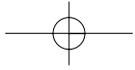
Some people worry that by making out a living will, they are authorizing their own abandonment by the medical system. They need to understand that a living will can also be used to state their desire to receive life-sustaining treatments. Thus, even if you prefer to receive all possible treatment whatever your condition, it's a good idea to express those wishes in a living will.

All states recognize living wills, or **medical directives** as they are sometimes called, but such documents are far from uniform. There are two kinds of living wills: **statutory** (those that comply with the state's statute) and **nonstatutory** (those that don't). The principal difference is that statutory living wills are thought to give medical providers more-certain immunity from liability if they comply with your wishes. Moreover, statutory living wills generally address only terminal illness and permanent unconsciousness. Depending upon the state you live in, they may not address advanced illnesses, such as late-stage Alzheimer's disease, in which death is not yet imminent.

A statutory living will complies with all the formalities required under the living-will statute of your state. Typically, the requirements involve detailed witnessing or notarization requirements and sometimes the use of specific warnings or other language. Most of the statutes include a form that may be mandatory or merely optional. But even if the form is mandatory, you have the opportunity to add to or expand on its instructions, and it is usually advisable to do so. Standard living-will language is usually too broad and general to be of much guidance when a real decision about continuing treatment has to be made. It is important to individualize your living will by stating your preferences and adapting the general language to the specifics of your medical condition, if that is possible.

The form required for a valid living will differs in each state. Be sure to get advice from a lawyer. You can also obtain a copy of a living-will form and instructions (as well as other advance-directive forms) valid for your state by contacting the National Hospice and Palliative Care Organization at 800-658-8898 or www.caringinfo.org.

Usually, the decision to write a living will should be made after consulting with your doctor and a lawyer. Your particular



▶ IF I HAVE A LIVING WILL, DO I STILL NEED A HEALTH-CARE POWER OF ATTORNEY?

Absolutely. An HCPA (see chapter 23) appoints an agent to act for you; a living will doesn't. Moreover, an HCPA applies to all medical decisions (unless you specify otherwise); most living wills typically apply only to a few decisions near the end of your life, and are often limited to use if you have a "terminal illness," which has become a slippery term. An HCPA can also include specific instructions to your agent about the issues you care most about, or what you want done in particular circumstances.

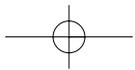


medical history may make some treatments more likely in your future. If you are writing a living will yourself, consider explaining the kinds of circumstances in which you believe continuing to live would be worse than death. That will help you to explain when you would or would not want any form of life-sustaining treatment. Also describe what you would want at the end of life (e.g., good pain management; expressions of forgiveness or thanks) and not just what you don't want. You do not have to list particular treatments you want or don't want unless you wish to do so, although it is advisable, and in some states necessary, to make clear your wishes about artificial nutrition and hydration. If you have a medical condition that makes certain unwanted treatments more likely, you may want to address those treatments. (For example, someone with chronic obstructive pulmonary disease may want to be very specific about when a respirator is to be used or not used.)



SOME PROBLEMS WITH LIVING WILLS

Living wills are typically either vague ("I don't want to be kept alive if I'm a burden to anyone." What does that mean?) or so



specific as to be inflexible. In the twilight world at the end of life, all lines are blurred, all colors are gray. It's simply impossible to predict every possible contingency.

Since living wills are so limited, it is definitely better to use a health-care power of attorney unless you have no one whom you can trust to make life-and-death decisions for you. Some lawyers recommend that you have both a living will and an HCPA, with the HCPA handling other kinds of disability, or gray-area cases in which it's not certain that you're terminally ill or your doctor or state law fail to give your wishes due weight. A living will by itself wouldn't have helped Nancy Cruzan (see chapter 23) in 1990, for instance, because she wasn't considered terminally ill by her doctors, and with artificial nutrition and hydration she could have lived as long as thirty more years in a persistent vegetative state. Today, most states cover persistent vegetative states in their living-will laws. In any case, a health-care power of attorney would have permitted a designated person to make the decision for Nancy Cruzan.

If you use a living will, be sure to update it every few years. Your values and wishes may change, and the law itself may change. A very old living will may not be given as much weight as a more current one.

Finally, despite recent changes in laws, old habits die hard, and many doctors and nurses are still reluctant to turn off life



WHAT HAPPENS IF I DON'T HAVE A LIVING WILL OR AN HCPA?

If you don't have a living will or an HCPA, someone who is not of your own choosing will be making the most important decisions of your life—or death. As a result, those decisions will not necessarily be made the way you would have made them. The consequence can be continued suffering with unwanted treatment or, conversely, the refusal of treatment you may have wanted. Yet most Americans still don't have advance-directives such as living wills or HCPAs.

 **TALKING TO
A LAWYER**

Q. In protecting assets in case of disability, is a living trust preferable to a durable power of attorney?

A. I think so. Your living trust will provide a trustee or trustees to protect your property. The trustees will follow the instructions you have set out in the trust. Your trustees will be held to the highest standard of care under the law. Also, your trust will be coordinated with your health-care documents to ensure that your interests are protected.

A trust can provide extensive instructions for disability planning, and the trustees are held to a much higher standard of care than an agent under a power of attorney. A trust is appropriate for smaller estates because it will better protect the client in the event of disability and save the costs inherent in probate. Also, most powers of attorney contain a list of powers with little or no instruction. They are like giving someone a blank check to one's assets.

I use special durable powers of attorney in conjunction with my trusts to address issues in which it may be inconvenient, imprudent, or inappropriate to get the trust involved. Resigning from fiduciary positions is an example of a matter addressed by my special powers of attorney.

Q. I'm concerned about the disadvantages of joint bank accounts. Is there another way that I can give someone access to my bank account without giving that person ownership of my money?

A. You can put your account into your revocable trust. Your trustees will then have access to your account. As trustees, they will be held to the highest standards under the law, and they will follow the instructions you established in your trust.

Q. I believe very strongly that healthy organs should be donated to help others—but how can I ensure that my wishes in this regard are followed for my organs?

A. There is a great need for **anatomical gifts** (transplantable organs and tissues). Besides filling out the donation information on your driver's license (if that's permitted by your state), you can see that your living will and health-care power of attorney also express your wishes regarding organ donation. It is also important to point out to your family that your directions have been expressed in your documents.

Q. I absolutely don't want rescue personnel to try to save me. Besides executing a health-care power of attorney and a living will, what can I do?

A. Many states have passed laws that protect individuals from unwanted intervention by rescue personnel. These states enable doctors to issue emergency medical system "do not resuscitate" (EMS DNR) orders for patients who want to die at home. Some states only enable doctors to issue DNR orders for those patients who are terminally ill or chronically ill.

Without such orders, emergency medical personnel are legally bound to resuscitate any patient who has a chance of being revived. Even with a living will, unless a doctor writes a DNR order, medical personnel are still required to do everything to resuscitate the patient.

If the patient has a DNR order, medics will not perform cardiopulmonary resuscitation (CPR) if the patient's heart or breathing has stopped, but they will treat other symptoms.

EMS DNR orders can be revoked by patients or by the person acting as the patient's attorney in fact under a durable power of attorney for health care.

—Answers by Lena Barnett,
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support—even if that's what a patient wants. Surveys show that medical institutions still routinely overtreat patients with no realistic hope of recovery, in the process ignoring living wills and often angering and tormenting the dying person's loved ones. That's why you need an advocate appointed by your HCPA to press your intentions.

ORGAN DONATION

The Uniform Anatomical Gift Act, along with similar provisions in most state laws, sets forth your wishes about whether, after your death, you want your organs donated to help other people who may need them to survive. Donating your body or organs to science or medicine has been called the greatest gift, as the thousands of people now on waiting lists to replace their failing organs would attest. You can direct hospitals to donate your organs by filling out a donor card, witnessed by two people. The card is often attached to the back of your driver's license. A card can be obtained at your state's motor vehicle department or by contacting the Living Bank in Houston, Texas, at 800-528-2971, or at www.livingbank.org. Doctors may also ask your family whether they will consent to organ donation on behalf of a terminally ill patient.

THE WORLD AT YOUR FINGERTIPS

- **Aging with Dignity (www.agingwithdignity.org) is a nonprofit organization that provides practical information, advice, and**

legal tools you need to ensure your wishes and those of your loved ones will be respected.

- **U.S. Living Will Registry (www.uslivingwillregistry.com) stores living wills and other advance-directives that are made available to health professionals. The idea is to make advance-directives more readily available when needed. The registry electronically stores advance-directives, along with organ donor and emergency contact information, and makes them available twenty-four hours a day to health-care providers across the country through an automated computer-facsimile system.**
- **The ABA's Commission on Law and Aging (COLA) (www.abanet.org/aging) examines law and policy issues affecting older persons. It seeks to improve legal services for the aging, particularly through involvement of the private bar.**

YOU MUST REMEMBER THIS

- **Living wills enable you to specify the treatment you want or do not want.**
- **They should be carefully worded and specific to your medical history if it is relevant.**
- **They should be reviewed periodically to see that they still reflect your wishes and are in accord with the law of your state.**