

What you should know about Guardianship, Living Wills, And Powers of Attorney For Older People And Their Families

Introduction

Adults who become incapable of caring for themselves, their property or their dependents may have a guardian appointed for them. However, guardianship can be avoided through the use of living wills and powers of attorney. In such circumstances, personal preferences can be respected without the need for court-appointed guardians.

Living wills and powers of attorney can provide that they become effective when a person is temporarily or permanently unable to handle his or her financial or personal affairs due to illness or injury.

This pamphlet explains how your lawyer can help you plan ahead by using living wills and powers of attorney. It also discusses guardianship procedures and the advantages of using powers of attorney to avoid them.

Making a Living Will

Advance instructions about health care preferences are commonly given in documents called living wills. The laws of every state allow individuals to use living wills to direct health care providers on the use or withholding of life-sustaining medical treatment.

Should an individual be incapable of stating his or her wishes at the time such major life decisions must be made, the living will specifies these wishes.

Some people think that living wills can only be used to limit the use of life-prolonging treatment. However, these documents can also be used to direct health care providers to administer all available medical treatment, even experimental procedures.

A living will can help your loved ones avoid family discord or even a lawsuit over medical care. The law ordinarily requires health care providers to follow the directives of a valid living will, even if they conflict with medical advice or the wishes of family members. Without a living will, disagreement among medical care providers or family members can result in costly legal battles over proper treatment.

Your lawyer can help you prepare a living will that includes the specific instructions you want. For example, you may want to state your preferences regarding particular treatments such as dialysis, chemotherapy, radiation, surgery and the use of respirators, feeding tubes or other methods of life support.

A living will can be changed at any time. If your preferences change with regard to more, or less, treatment, you can use a new living will to express your wishes.

Your living will is only followed if you become permanently unconscious or otherwise unable to make medical decisions. If you understand your medical condition and the effect of proposed medical treatment, it will be unnecessary for your health care providers to consult your living will; they will ask you instead.

USING A POWER OF ATTORNEY

A power of attorney is a document that authorizes one person, the agent, to act on behalf of another person, the principal. Powers of attorney are commonly used to allow an individual to appoint someone else to handle the sale of a car or house. Powers of attorney can also be used to appoint someone else to handle the following kind of routine chores and decisions:

- selecting a place to live
- paying bills
- collecting social security and retirement benefits
- investing money in stocks, bonds and mutual funds
- handling checking and savings accounts
- filing tax returns
- authorizing medical treatment (in certain states)

A power of attorney can be limited so that it expires if you become incapacitated. Alternatively, it can be "durable" and not be affected by any later incapacity. A durable power of attorney remains in effect even if you become unable to handle your own affairs. However, both limited and durable powers of attorney terminate at your death.

The powers granted to your agent can be broad or limited. You can give your agent complete authority to manage all your affairs and make all decisions for you. Or, you can limit your agent's power. You can specify a termination date and put restrictions on your agent's authority to act. You retain the power to revoke your power of attorney at any time while you are competent. You can also discharge one agent and appoint another.

A limited power of attorney is useful if you expect to be away from your home or business for an extended period of time. For example, if business takes you on an overseas assignment, you may wish to give your spouse a power of attorney. Or, if you are taking a long vacation with your spouse, you can give a power of attorney to an adult child, a trusted friend, an advisor, or your bank.

A durable power of attorney can be used to authorize an agent to handle financial and other matters. For example, your power of attorney can authorize your agent to invest your money and pay for the support of the persons that you designate. The power of attorney can authorize your agent to pay your bills, collect interest, dividends and rent, and to take care of personal matters that arise during your absence.

A durable power of attorney can be invaluable if you are unable to make decisions as a result of incompetence or unconsciousness. If you are facing a serious operation or suffering from an incapacitating illness, a durable power of attorney can be prepared to take effect as soon as you sign it. Or your durable power of attorney can provide that it should become effective only when a doctor certifies that you have become incapacitated.

In certain states, a power of attorney may be used to designate another to make health decisions. In other places, this may be done with a health care proxy or living will. Your lawyer can prepare a power of attorney that meets the requirements of your state. Your lawyer can also help you select a trusted family member, friend or advisor under your power of attorney. Your lawyer may recommend that you select two agents - one to administer your medical care and another to manage your financial affairs.

APPOINTING A GUARDIAN

Should you become incapacitated without having made a durable power of attorney, you may need a guardian. Guardianship is a legal procedure by which a court declares an adult incompetent and appoints someone to manage financial matters, living arrangements and medical care decisions. The procedure is sometimes referred to as conservatorship, custodianship or civil commitment.

Older adults do not need a guardian simply by reason of age or minor mental or physical impairments, provided they are still able to manage their personal and financial affairs. The courts will not appoint a guardian for you merely because your family believes that you are making foolish or risky decisions. Courts will appoint a guardian if you have a physical or mental condition which impairs your decision-making capacity or your ability to avoid harm to yourself or disagree, you can fight the proceedings for guardianship. This may be appropriate if you can't decide who to select as your agent or what to specify in a living will. Guardianship may also be preferred if you fear that your family members will try to force their interests, rather than yours, upon your agent or doctor. However, guardianships are more expensive than powers of attorney because of court fees, bond premiums, and the fees of experts who will testify during the legal proceedings.

PROTECTION AGAINST UNSCRUPULOUS AGENTS AND GUARDIANS

Guardians and agents are required to act in your best interests, keep accurate records, and treat your property separately from their own. You retain the right to revoke a power of attorney while you are still able to handle your own affairs. The courts can remove an agent or guardian who does not act in your best interests even after you are incapacitated.

SAFEKEEPING FOR YOUR LIVING WILL AND POWER OF ATTORNEY

Your living will and power of attorney should be kept in a safe place where they can be located when needed. You may wish to have your lawyer retain a copy in case the original is damaged or lost. You should also tell a trusted friend or family member where the signed documents are stored.

SEEING A LAWYER

A visit with a lawyer provides an opportunity to ask for help in planning for incapacity. Your lawyer can advise you about using living wills and appointing agents and guardians--either for yourself or for aging family members or friends. Your lawyer can also answer your questions about the matters listed to others.

Guardianship is ordinarily not necessary for an incapacitated person who has appointed an agent under a durable power of attorney. However, if an agent has not been appointed, your friends or family may start legal proceedings to have a guardian appointed. If you on the Planning Checklist at the end of this guide. Your lawyer will meet with you in private, allowing you to express your preferences.

CONCLUSION

You should plan ahead so that your needs and desires can be followed in the event of an incapacitating illness or injury. Your lawyer can explain the benefits of advance planning to avoid guardianship should you become incapable of taking care of your personal affairs. If you wish to appoint an agent, your lawyer can prepare a power of attorney naming someone you trust to handle your affairs if you cannot. Your lawyer can also prepare a living will or a health care proxy that complies with your wishes as well as the detailed requirements of your state.

PLANNING CHECKLIST

- Anatomical Gifts
- Community Service Organizations
- Consumer Credit
- Consumer Fraud
- Custodial Bank Accounts
- Do Not Resuscitate Orders
- Elder Abuse
- Employment Discrimination
- Estate Planning
- Estate Taxes
- Executors and Trustees
- Financial Powers of Attorney
- Food Stamps
- Funeral Arrangements
- Guardianship
- Health Care Powers of Attorney
- Health Insurance - Medigap and Long-Term Care
- Home Equity Conversion
- Home Health Care
- Housing Discrimination
- Income Tax
- Individual Retirement Accounts
- Joint Tenancy Accounts
- Living Trust
- Living Wills
- Medicaid
- Medicare
- Nursing Homes
- Pensions
- Probate
- Representative Payee for Social Security
- Retirement Housing
- Safe Deposit Boxes
- Social Security Disability Benefits
- Social Security Retirement Benefits
- Supplemental Security Income
- Taxes - Income and Estate
- Transportation
- Veterans Benefits
- Wills and Testamentary Trusts

This pamphlet provides general information. Laws develop over time and differ from state to state. This pamphlet does not provide legal advice about specific legal problems. Let us advise you about your particular situation.