

LEGAL ASPECTS

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ADVANCED MEDICAL DIRECTIVES

Using available legal tools, you can ensure your loved one's health care wishes will be carried out even if he or she becomes incapacitated. Here's a process for putting these documents in place:

- 1) Find out about Advance Medical Directives.
- 2) Hold a family discussion.
- 3) Examine state guidelines.
- 4) Look into model forms.
- 5) Consult an attorney.
- 6) Decide on witnesses.

1) Find out about Advance Medical Directives.

Most states recognize three different legal documents that help ensure that incapacitated patients receive only the care they desire. These are: A living will, a durable power of attorney for health care, and a combination of the two. Additionally, a doctor may write a do-not-resuscitate (a DNR or "No Code") order in response to an existing medical directive or simply by patient request.

- l The durable power of attorney for healthcare appoints a person to make medical decisions for a patient if the patient becomes incapacitated.
- l A living will outlines the types of treatment a patient desires in the event that he or she receives a terminal diagnosis.
- l Because the living will applies only in narrow and sometimes undefined circumstances, your loved one may want to consider combining both a living will and a durable power of attorney for health care into one document. In this case, the durable power of attorney states who should make decisions, while the living will tells that agent what to decide.
- l A do-not-resuscitate (DNR) order stipulates that the patient has decided to forgo CPR or "heroic" lifesaving measures.

The durable power of attorney for health care is a signed, dated, and witnessed legal document (also called a "health care proxy" or "health care power of attorney"). In this document, your loved one appoints an individual—known as an "agent," or "proxy"—to make medical decisions on his or her behalf.

- l The agent can be any competent adult.
- l This document differs from other durable powers of attorney (see **Additional Powers of Attorney**) in that it is limited to medically related decisions.
- l The document should name a backup agent if the original agent is unavailable. It should also spell out clearly what matters the agent can and cannot handle.



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- | Prior to signing a durable power of attorney for health care, the principal and agent must designate under what conditions the document becomes effective. Your loved one does not “give up” control over health care decisions until those conditions are met.

A living will (also known as a “treatment directive”) states how health care should proceed if your loved one becomes incapable of making decisions about medical treatment. The document specifies whether or not your loved one wants to have his or her life prolonged through artificial methods.

- | Living wills are usually designed to address situations of terminal illness.
- | Most living wills direct that only “life-sustaining” or “life-prolonging” treatments be withdrawn. These are generally defined as treatments that prolong the dying process, but won’t prevent someone from dying.
- | Even family and health care providers cannot change a living will.

The DNR is placed directly into a patient’s medical file so that medical staff will be on notice not to attempt CPR.

- | DNR orders are usually made during the final stages of terminal illness.
- | The DNR should be filed with all doctors or care institutions that your loved one anticipates using, as it is not transferable between institutions.
- | One may even be filed with your local Emergency Medical Service.

A more thorough examination of all Advance Medical Directives can be found at www.CaregiversLibrary.org.

2) Have a family discussion.

It’s best to discuss health care decisions in advance, while everyone is still healthy and thinking clearly. This will ensure peace of mind, and prevent potential legal delays or setbacks at the most urgent of times.

- | All these documents should be thoroughly understood by your loved one, your doctor, and your family.
- | Most states require that a person be “competent” or “of sound mind” in order to execute an advance directive.
- | Some states allow persons to draft a living will or other directive on behalf of incompetent adults. Such statutes often provide a list of individuals who are authorized to execute the document.

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ADVANCED MEDICAL DIRECTIVES

If your loved one decides to draw up a durable power of attorney for healthcare, he or she will want to choose a trustworthy agent. Whether this is you, another family member, or a friend, keep the following in mind:

- | Your loved one should also choose someone to act as a replacement in case the first agent is unable to fulfill these duties.
- | Your loved one should discuss his or her choice with the agent beforehand, and carefully consider whether this individual will be able to spend the necessary time managing these affairs.

3) Examine state guidelines.

Different states have different guidelines for advance medical directives, so it's best to consult a lawyer concerning the requirements that govern such documents in your loved one's state. In general, however:

- | Most states do not allow comfort care and pain-relieving treatment to be withdrawn.
- | States with living will statutes usually provide protections for life insurance benefits that might otherwise be jeopardized.
- | An advance medical directive may not take effect until it has been delivered to certain individuals. Generally, a copy must be provided to the physician responsible for treatment. A few states also require the document to be filed with a state agency or court.
- | A properly executed advance directive will remain in force throughout your loved one's life, unless revoked. Some states, however, impose a time limit on how long a directive is effective without being re-executed.
- | Most states prescribe specific methods for revoking medical directives.

4) Look into model forms.

Some states require persons who wish to execute an advance directive to use a model form. Others allow for modifications, and still others offer a model form only as a suggested guide. While forms for advance directives are available at office supply stores and on the Internet, it's best to consult an attorney before signing any legal documents.

5) Consult an attorney.

Keep in mind that the information provided in this section is not intended to serve as a substitute for legal counsel; rather, it's intended to help you explore your options and to familiarize you with some alternatives.



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ADVANCED MEDICAL DIRECTIVES

Ask trusted friends and associates for recommendations. Other professionals like bankers, accountants, and insurance agents may also have suggestions.

Local bar associations often have referral services to help you find a lawyer with expertise in the area you need. (Look in the Yellow Pages).

6) Decide on witnesses.

In most states, advance directives must be signed in the presence of two witnesses. Each state has different requirements regarding who may or may not be a witness. In general, however, anyone who could stand to benefit from a person's death—such as an heir to the estate—cannot be a witness.

Many states prohibit health care practitioners, including attending physicians and nurses, from being witnesses.

Make sure that potential witnesses are familiar with your loved one's wishes and will be available to appear at a hearing should the validity of the directive be challenged.

Witnesses should be familiar enough with your loved one's condition that they can testify that your loved one was fully competent when he or she signed the document.

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ADDITIONAL POWERS OF ATTORNEY

Health care isn't the only area where your loved one can appoint an agent to step in and act on his or her behalf. He or she might also want to consider powers of attorney for financial matters.

By enacting a general power of attorney for finances, your loved one authorizes another person to conduct his or her entire business and affairs. Limited or "special" powers of attorney allow another person to conduct only a specific kind of duty, to make a certain kind of decision, or to perform a single act.

- | Your loved one does not give up their right to make transactions. He or she can continue to conduct his or her own affairs with the agent acting as co-owner. If your loved one is ruled incompetent, however, the agent's legal rights will end, unless the powers of attorney were made "durable."
- | Durable powers of attorney continue even if your loved one becomes incapable of making decisions.
- | Keep in mind that there may be a delay in getting a doctor or health professional to certify incapacity, which can prevent the agent from acting in a timely manner.
- | The legal section of www.CaregiversLibrary.org offers an overview of the varying types and degrees of powers of attorney. Consult a financial or legal professional for help drawing up documents to fit the specifics of your situation.

WILLS AND ESTATE PLANNING

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Simply put, the goal of estate planning is to distribute a person's assets and minimize taxes at death. For most people, that means making and periodically updating a will, although various types of trusts or gifts can also be arranged to help preserve assets for heirs. In general, wills and trusts should be set up with the help of an attorney experienced in estate tax issues and estate planning.

Whether your loved one is updating an existing document or starting from scratch, there are certain steps you can take before bringing a lawyer onboard.

- 1) Make it a priority
- 2) Describe all property involved
- 3) State what should happen to these assets
- 4) Appoint an executor
- 5) Estimate value
- 6) Consider living trusts

1) Make it a priority

Wills are a relatively simple way to distribute property, reduce the cost and time it takes to settle an estate, and reduce possible conflicts among heirs. But while the drafting procedure is usually clear-cut, it's important to start as soon as possible, preferably while everyone is in good health and thinking clearly. This will reduce the potential for future litigation and delays.

! In general, every individual should have his or her own will and mutual or joint wills (which actually decrease flexibility) should be avoided.

! Review **Making a Will** at the end of this section for general information regarding wills and the process of probate.

2) Describe all property involved

Help your care recipient identify all of the property he or she owns. A worksheet to help you with this can be found at www.CaregiversLibrary.org.

3) State what should happen to these assets

Make a list of who will receive what, and then assemble the names, addresses, and relationships of individuals who will be included in the will (as well as the names of any children or grandchildren who will be left out of the will). Prepare the names of alternate beneficiaries in case the primary beneficiary dies before or at the same time as the person making the will. Add these individuals' addresses to the list.

4) Appoint an executor

The executor of a will has the duty of carrying out your loved one's wishes, so choose an executor—a bank, lawyer, family member, or friend—who will be able to bring the necessary level of



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WILLS AND ESTATE PLANNING

time and organization to the job.

- | The executor's responsibilities include protecting and managing the estate, arranging for the payment of all debts and taxes, the collection of debts and insurance benefits, and the distribution of property.
- | Keep in mind that the law does not require an executor to be a legal or financial expert. The best choice is usually someone who is both diligent and vigorously honest, and who also stands to benefit from proper management of the estate.
- | If possible, your loved one should choose someone who lives nearby and is familiar with his or her financial situation.

5) Estimate value

This is done so the lawyer can decide whether tax planning will be necessary. Make a note regarding any out-of-state property, property held separately by either spouse, and property held in joint tenancy. Consider the following:

- | Real property, including both land and improvements.
- | Personal property, including automobiles, checking accounts, stocks, furniture, jewelry, machinery, or tools.
- | Separate property, including property acquired before marriage, by gift or inheritance to one spouse during marriage, by written contract between spouses, and by court order.

6) Consider living trusts

Because the probate process (which finalizes an individual's affairs after his or her death) is time-consuming, expensive, and usually unnecessary, many people choose to avoid it altogether by leaving their property in the form of trusts rather than wills. Ask a lawyer if this option is worth exploring.

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MAKING A WILL

The most basic and essential part of estate planning is a will. And yet, more than 60 percent of people never take the time to write one, leaving families confused and facing potential legal entanglements. Your loved one's desires concerning medical care should be left out of the will, because this document is usually not found until some time after a death. Specific healthcare wishes belong in an advance medical directive. The following list offers important reminders for preparing a will.

A will:

- | Should be prepared by a lawyer, on behalf of anyone over the age of 18.
- | Should be double-checked when new laws or changing circumstances may affect the distribution of property.
- | May need to be redrafted if an accident or sudden illness makes a family member something less than self-sufficient or solvent.
- | May need to be revised when the value of property changes substantially.
- | Should be checked for revisions after the birth of children or grand-children, after a divorce, after a death in the family.
- | Should name alternate beneficiaries.
- | Should be checked for validity after moving to another state.
- | Should substitute a new executor or personal representative if the one named can no longer serve.
- | Can be used to name legal guardians.
- | Should be placed in a fireproof safe or other secure place.
- | Should not be placed in a safe deposit box unless the executor has joint access, although the box may certainly contain a copy.
- | Should be drawn up while the maker is in good health and free from emotional stress.