

Guardianships and Powers of Attorney

Why Plan?

Every day, families are placed in the painful position of having to make decisions for a sick or disabled person with no indication of what the person himself would have wanted. Further, without written evidence of the person's wishes, or without a formally designated decision maker, health care providers who fear being sued or criminally prosecuted may refuse to terminate treatment, even if it merely prolongs the patient's suffering while offering no hope of recovery. Families may be forced to go to court to obtain permission to carry out the decision that they believe the patient would have made. Not only can the involvement of outsiders be an unwelcome intrusion into this private matter, but the publicity that such cases often generate can be painful.

You can try to avoid these problems by planning ahead. You can document your wishes regarding medical care, name a person you would like to have make medical decisions for you in the event that you become incapable of doing so, or both.

Planning Ahead

Three forms of advanced directives are widely recognized:

1. The Living Will for death with dignity,
2. Durable Power of Attorney for Health Care, and
3. Durable Power of Attorney for Financial Management.

Living Wills

A living will is a document in which you state that you do not wish to receive life prolonging treatment in the event you suffer a terminal illness or become permanently unconscious and become incompetent to make health care decisions.



Living will laws require health care providers to follow the instructions in a living will or to transfer the patient to a provider who will. They also protect health care providers from being sued or criminally prosecuted for following the instructions in a living will.

It is a good idea to notify your family and physician of your living will and ask to have a copy placed in your medical records. A health care provider must enter the declaration into your medical record after receiving a copy of it. Your physician must notify you if he is unwilling to comply with your instructions. You also should keep a copy with your other im-

ABOUT US

We are an Elder Law and Special Needs Trust Law Firm. Located in Little Rock, Arkansas, we focus on helping individuals obtain Medicaid benefits without losing their home, Long Term Care Planning for victims of Alzheimer's Disease and other related disorders, Special Needs Trust solutions for families with children with special needs, and Preserving Eligibility for Public Benefits for personal injury victims.

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Guardianship and Advance Directives

portant papers and consider asking a close friend or relative, and perhaps your lawyer, to keep a copy. Living wills are usually effective for an unlimited time unless revoked by the maker. They may be revoked at any time, whether the patient is competent or incompetent.

The living will becomes "operative" when the attending physician learns of the declaration and two physicians have determined that the patient is in a "terminal condition" or "permanently unconscious" and are incapacitated.

Power of Attorney

An ordinary power of attorney is a legal document, signed by a competent person, which gives another person the authority to handle some or all the first person's affairs. The first person is called the "principal." The individual acting on behalf of the principal is called the "agent" or "attorney-in-fact" (although he or she need not actually be an attorney). Powers of attorney are usually prepared by lawyers.

A power of attorney is only valid if the principal was mentally competent when he or she signed it, and powers of attorney end automatically when the principal dies or becomes incapacitated.

What Are Durable Powers of Attorney?

As noted above, an ordinary power of attorney is good only as long as the principal is mentally alert. A *durable* power of attorney is a special kind of power of authority that continues to operate even after the principal becomes incompetent. With both an ordinary power of attorney and a durable power of attorney, it is presumed that the agent's power begins when the power of attorney is signed.

Durable Powers of Attorney for Health Care

Because living wills only cover end of life, many people

prefer an advanced directive called a durable power of attorney for health care decision-making (DPAHC). These allow for health care decisions to be made by an agent or proxy chosen in advance. DPAHC's are health-oriented variations of a general form for proxy decision-making known as a power of attorney.

Where a Living Will is only effective when you are incapacitated and either dying or permanently unconscious, a DPAHC is in effect all the time. You may be ill or seriously injured but not dying. You may simply need someone to advocate for you and see that appropriate decisions are made concerning your health care.

Your health care agent could:

- Access your medical records.
- Employ or discharge your healthcare providers.
- Decide about your acute or long term care needs.
- Consent to psychiatric treatment.
- Authorize relief from pain.
- Direct your medical care.

A durable power of attorney for health care decision-making gives the agent the power to make health care decisions on behalf of the principal in the event that the principal becomes unable to do so. Such powers of attorney may be very broad, covering all medical decisions, or may be limited to specific medical matters. They also may contain specific instructions to the agent or specific statements of the principal's preferences.

What if you have no Advance Directive

Guardianship is a tool to be considered only when a person cannot because of age or mental limitations, make competent decisions regarding his/her own affairs. It is the most restrictive and intrusive form of surrogate decision-making. Guardianship is necessary when access



Guardianship and Advance Directives

to the individual's assets is required (to pay for care or basic necessities) or healthcare and living decisions must be made. An individual, who has an appointed guardian, is called the ward.

Types of Guardianship

Arkansas Legislature has set out two basic types of guardianships: of the Person and of the Estate.

Guardianship of the Person that allows the Guardian to make decisions about where you live and the medical treatment you will receive.

A guardian with power over the person refers to the individual appointed by the circuit court to have legal rights and powers of personal decision-making over the individual. The Court may authorize a guardian to ensure the individual's personal needs and care needs are met. This includes housing and medical care.

A guardianship of the person grants the guardian powers over the ward's personal care, but not over his property. The guardian is generally responsible for the ward's care and protection. This means that the guardian must make decisions regarding the living arrangements, health care, personal care, meals, housekeeping, transportation, recreation, and all other aspects of the daily living needs of the ward.

Guardianship of the Estate that allows the Guardian to make decisions about and control your finances.

A guardian with power over the estate refers to the individual authorized by the Court to assume responsibility for the management of all or part of the individual's property. This might include the individual's income, stocks and bonds, certificates of deposit, real estate or other assets. These assets must be kept separate from the guardian's assets. The Court requires an accounting of all income and use of assets.



A guardianship of the estate only grants the guardian powers over the ward's property. The guardian is responsible for the financial management of the ward's assets. The ward's assets must be managed consistent with ward's needs.

Annual Reporting Requirements

The guardian is required to submit an annual report to the Court. The report details the current condition of the ward. It also reports on the income received by the ward, the assets owned and the expenses made for the ward.

Conclusion

The important thing is to make your wishes about medical treatment known by putting them in writing and discussing them with family members, friends, and your physician and lawyer. The more clear and specific the instructions you give, the more

likely it is that they will be followed. It is also important that someone can step in and manage your financial affairs should you need them.

Most important of all is to act *now* to put your preferences in writing. Many people tend to postpone this step, because the prospect of future illness and incapacity is disturbing, and seems remote. But incapacitating illness can strike at any time. You may avoid unnecessary suffering for yourself and your family if you execute a living will and durable powers of attorney now.

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Raymon Harvey

ELDER LAW & SPECIAL NEEDS TRUSTS

Raymon Harvey's family settled in Arkansas over 150 years ago. He grew up in El Dorado and studied in Jonesboro and Memphis. Raymon has a B.A. and M.A. from Arkansas State University and J.D. from Memphis State University. Since 1997 his law practice has been located in Little Rock where it is limited to Elder Law, Special Needs Planning and Estate Planning.

Raymon is a member of the National Academy of Elder Law Attorneys, the Arkansas Bar Association and the Arkansas Trial Lawyers Association as well as a Charter Member of the Special Needs Alliance. As member of the Arkansas Bar Association he served as Chairman of the Elder Law Section and served as Chairman and author for the Arkansas Elder Law Desk Manual published in 2013.

Raymon has been AV® rated (highest category) by Martindale-Hubbe® Attorney Peer Rating System for legal ability and ethical standards since 2008. The Arkansas Times named him the Best Lawyer in Arkansas for Elder Law from 2014 through 2018. Best Lawyers in America named Raymon as one of the Best Elder Law Attorneys in America from 2014 through 2018.

A frequent lecturer, Raymon has been a presenter for many national and state organizations and numerous local groups.

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