

Advance Directives: Speaking for You When You Cannot Speak for Yourself

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When most folks think of estate planning, death immediately comes to mind. Perhaps this is why so many of us procrastinate when it comes to developing an estate plan of our own. The truth is, though, that a large part of estate planning actually concerns planning for the possibility of future incapacity during your lifetime. With the use of a durable power of attorney, health care power of attorney, and living will, you can ensure your financial and medical decisions are made in accordance with your wishes in the event that you become incapable of making them for yourself.

A power of attorney is a document in which you give another person, called your attorney-in-fact, certain powers to make financial and business decisions and engage in financial transactions on your behalf. Your attorney-in-fact is legally obligated to make decisions in accordance with your wishes or, if your wishes are unknown, in your best interests.

You may choose for your power of attorney to become effective upon signing or, alternatively, it can be a springing power of attorney that does not become effective until the happening of a specific event. Typically that event is a certification of incompetence by one or more physicians.

Your power of attorney must be durable to remain effective after you become incompetent. To be durable, the power of attorney must include specific language to that effect and must be recorded in the Register of Deeds office in your county of residency. You must satisfy both of these requirements; otherwise, your attorney-in-fact will have no power to transact business on your behalf in the event you become mentally incompetent.

If you become incompetent and do not have a durable power of attorney, a court will appoint a guardian to handle your financial and business affairs. Appointment of a guardian is a time-consuming and expensive process, and the person appointed by the court may not be the person you would have chosen for yourself. Furthermore, a guardianship is burdensome, as it requires the guardian to provide regular accountings to the court and to seek court approval for many transactions, such as the sale of property.

A health care power of attorney allows you to designate a person, called your health care agent, to make medical decisions on your behalf in the event you either cannot communicate your wishes or a doctor determines that you cannot make those decisions for yourself. You may also use a health care power of attorney to provide specific instructions to your health care agent regarding the types of mental and medical treatments you do and do not want. In the event of your death, a health care power of attorney can also authorize organ donation and autopsy.

A living will is a document in which you state your wishes regarding life-prolonging treatment in the event you suffer from an incurable or irreversible condition that will result in imminent death, are in a persistent vegetative state, or suffer from advanced dementia causing an irreversible and substantial loss of cognitive ability. With a living will, you may authorize or direct that treatments such as artificial nutrition, hydration, and ventilation be withheld or

withdrawn in any or all of the above situations.

Unlike a health care power of attorney, which is effective in any situation in which you cannot communicate your decisions, the living will is effective only in the three end-of-life situations previously described. If you have executed both a living will and a health care power of attorney, you may direct within the living will document whether the living will or the decision of your health care agent controls when decisions about life-prolonging treatment must be made. If no direction is given, your doctors will follow your living will and ignore the instructions of your health care agent.

A living will should not be confused with a Do Not Resuscitate order (DNR). A DNR instructs your doctors not to perform cardiopulmonary resuscitation (CPR) in the event your heart or breathing stops. In other words, the DNR gives instructions with regard to life-saving measures whereas the living will gives instructions with regard to life-prolonging measures.

If you do not have a health care power of attorney, your spouse may make your emergency health care decisions; a guardian must be appointed to make all other health care decisions. Without a living will, your spouse and adult children will make decisions regarding life-prolonging treatment. If you do not have a spouse or adult children, your parents (if living) or your siblings will make that decision. Your physician will make the decision only in the event that no next of kin or other person with a close relationship to you is available.

Documents such as the durable power of attorney, health care power of attorney, and living will are the only way you can be certain your wishes known when you cannot communicate them for yourself. Even if you are confident that your loved ones know what your wishes are and are prepared to carry them out, these documents will help take the burdens of difficult decision-making off of your family. While no one can know what exactly the future holds, you can achieve peace of mind today by planning for tomorrow.

DISCLAIMER: The content of this article is provided for informational purposes only and is not intended to constitute legal advice. You should not rely solely on the information herein to make legal decisions. You should consult an attorney for specific advice tailored to your unique situation.

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