

Medical and Financial Decision-Making without Guardianship

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There are ways to make health care and financial decisions that do not involve a guardianship. Some are legal tools while others involve government programs, social services, and community supports. There are decisions you can make for yourself now while you understand your situation and in case you become unable to make decisions for yourself. Those decisions can take effect now or in the future. There are also decisions other people can make for you if you have not made any plans.

What's right for one person and situation is not right for another. You can choose the way you prefer. Each option has advantages and disadvantages. Although it's hard to think about the possibility of becoming unable to make your own decisions, if you make plans you will have more peace of mind about the future and so will your family and friends.

Community Supports

There are community supports you can call on to help you make decisions. You can start researching your options by exploring how community resources, as well as family and friends can help you live most independently.

Family and Friends

Family and friends know you best. Sometimes they want to help you but they don't know what to do. They may be waiting for you to ask them for assistance. They can help with bill paying and coordination of medical and social services. They may not have all the knowledge or expertise you might need for your situation but they can help you find it. You could form a circle of people who will help you with decisions about your health or finances. Keep in mind that some people, even family members, can be trusted more than others.

Care Managers

Care managers are professionals who come to your home and help you figure out what services you need to continue living in your home. Your family and friends are involved if you wish. Care managers are familiar with the services available in your community and will help you make a plan. Then the care manager will introduce services to you and coordinate them. Such services might include arranging for medical, dental and podiatry care, retaining in-home help for grocery shopping and meal preparation, and if needed, personal care such as bathing and dressing. Care managers may make referrals to adult day care programs, or arrange for assistive equipment to be installed in your home. They can also help you make medical or therapy appointments. They are aware of other services that can help you such as home delivered meals, homemaker assistance, transportation, counseling services and the various services at senior centers.

The largest no-fee care manager service in the country is Adult Protective Services (APS) which exists in every state and is funded by the federal government. APS will come to your home but only if you want them. They can perform all the functions of a care manager but usually can help you for short periods of time. APS staff also receives and investigates complaints about mistreatment of

elders or adults with disabilities. In most states, the law requires them to investigate such complaints.

Private fee care managers are also available in some areas and can help for longer periods of time. The National Association of Case Management is a voluntary member organization for private care managers. More information about organization can be found at www.yournacm.com

Money Management Assistance

Daily money management programs offer assistance to people who have problems managing their personal financial affairs. You still make the decisions about your money. Money management programs provide a wide variety of services for people with various disabilities. They can assist with bill paying, prepare checks for signature, make deposits to the bank, and dispense cash to their clients. They can also help by educating you about managing money, acting as debt managers, serving as coaches regarding handling money, as well as paying your bills. They may manage more complex tasks such as maintaining payroll records for home attendants and preparing documents for accountants for annual federal and state tax preparation. Some programs are non-profit but there are an increasing number of for-profit money management programs.

Money management programs are valuable for people who have disabling arthritis or visual disabilities, those who are widowed and have little experience managing money, those who have limited ability to read and write or are unfamiliar with bank practices. They are also helpful for people with mild to moderate cognitive impairment.

Some programs ask their clients to sign a power of attorney for finances that allows them to continue providing services if you lose the ability to make the best decisions for yourself. This is called a durable power of attorney. You can find out more information about the durable power of attorney under [here](#).

Advantages

- The programs are usually flexible and can adapt to your needs as they arise.
- No court process is involved.
- There may be no charge for services if the program is not for profit.

Disadvantages

- Money management programs do not manage or handle investments or real estate transactions.
- The field is unregulated. You don't have to have a license to be a money manager. However, there is a professional organization you can consult. The American Association of Daily Money Managers has standards of practice and a code of ethics. You can find out more by consulting their website at www.aadmm.com
- Qualifications of the people doing money management vary considerably.
- The person helping you with your money is not insured ("bonded") against making mistakes or using your money for themselves.
- There is no oversight.

Mediation and Guardianship

If there is conflict in your family, or between you and your family, you might want to think about mediation as a way to reach solutions that everyone agrees on. It is a process in which a trained professional mediator helps people in conflict state their opinions and concerns and then work through open conversation to come up with solutions. People who have decision-making problems are wise to have someone who can help them speak up in the process. The outcomes of the mediation are the responsibility of the participants. They are the ones who find and agree on the solutions. The mediator cannot impose decisions. Using mediation standards and communication techniques geared toward problem-solving and settlement of the dispute, the mediator helps the parties understand their issues, become sensitive to each other's point of view, and work towards mutually acceptable solutions. For instance, one person may need only an apology from another person to resolve a dispute. The goal is a win-win solution for everyone. Mediation can strengthen relationships and create understanding, rather than leaving a problem to fester or going to court as adversaries.

Advantages

- Mediation is more flexible in time and process than court procedures which are more formal.
- Everyone who is in the conflict can have their say and then go on to develop solutions that fit their situation. It can be a very empowering process.
- It is usually less expensive than court proceedings.
- It can be less damaging to your relationships than court proceedings which can pit people against each other.
- It is a private process.

Disadvantages

- Finding mediators who are trained in the issues affecting people with disabilities and elders can be a challenge.
- Some people are uncomfortable with this form of dispute resolution. They want a judge to make the decision.
- Not all conflicts are suitable for mediation. For instance, in cases of elder mistreatment, mediation may not be appropriate.

Legal Tools

Health Care Issues

Health Care Advance Directives

You can use documents that give directions to others in case you become unable to make your own medical decisions. In most states there is one document that is called a Health Care Advance Directive and it includes a *power of attorney for health care*. In some states, the same information is separated into two documents: *power of attorney for health care* and *living will*. A *living will* often applies only to the very end of life and you do not choose a person to carry out your wishes. It is simply a document that states your wishes.

Health Care Powers of Attorney

A health care power of attorney is a written, witnessed document that gives authority to another person to act for you or to represent you in medical situations. The person granting the power is called the principal. The person exercising the power is the agent. A power of attorney for health care can take effect at the time you sign it, but most likely you will want it to take effect only when you decide it should or if a physician thinks you have lost the ability to make a medical decisions.

It is very important for you to pick someone you trust and that you discuss what is important to you with that person. You also need to let the person know who your medical providers are, what treatments you do not want and if there is anyone in your family who might disagree with your wishes. You can include statements such as: "Should I be in an incurable or irreversible mental or physical condition, I direct my physician to withhold or withdraw treatment that merely prolongs my dying. I further direct that my treatment be limited to measures to keep me comfortable and to relieve pain." Or, you could say, "I want everything possible done to keep me alive."

If there is a medical crisis, the agent will need to be prepared to let people and medical providers know about the power of attorney and be ready to produce a copy. You need to give your doctor a copy of the power of attorney for health care. It's a good idea to give a copy to at least two other people so they know what you want too. The health care power of attorney has advantages and disadvantages.

Advantages

- The powers delegated to the agent can be as broad or narrow as you want.
- Your family and friends hopefully know you and understand what is important to you, especially if you have talked with them about medical treatment.
- It is inexpensive to prepare and does not necessarily involve an attorney. Stationary stores may have forms or they can be found online.
- A power of attorney for health care may provide guidance to a court if a controversy develops or if a guardianship request is filed with the court.
- Appointing an agent will give you a voice in your health care in the future, when you otherwise may have no voice.
- The power of attorney for health care often will be honored even if a guardianship becomes necessary.
- Powers of attorney for health care can contain end-of-life decision-making directions.

Disadvantages

- No one supervises your agent.
- The power of attorney for health care may or may not be valid from one state to another.
- Often people don't have advance directives, the document is not available in the medical record, or the directives don't give the guidance the physicians need.
- People change over time. Medical treatments change. It is hard to anticipate in advance what will be needed.

Physician Orders for Life-Sustaining Treatment (POLST)

These are doctor orders for the treatments you want to receive at the very end of life. They are used when you already have a serious, progressive, chronic illness. You decide how much care you want and the doctor makes an order. This means that all health care providers are legally bound to follow the directions on the order. The order covers such things treatments to get your heart and lungs

started again if they stop, the amount of medical treatment you want including control of pain, and the use of feeding tubes. If you are not able to participate in making plans, the person who is your guardian or who you've chosen in your Health Care Power of Attorney can do it. You keep the original of the POLST and copies are kept in your medical records.

Advantages

- You can make the decisions about end of life treatment when you are already ill. The decisions needed are not in the future. They are in the present time.
- If you cannot make the decision, someone else can do it depending on your state law.
- This is a doctor's order which means it is legally enforceable.
- Your doctor has clear instructions as to your wishes.
- Family and friends know what you want.

Disadvantages

- Not every state has a POLST law. Many are in the process of developing one.
- It might be hard to make these decisions when you are already ill.

Health Care or Family Consent Laws

Most states have laws that permit family members (or others who know the patient) make health decisions for you even when you haven't made any written plans. The laws have a priority list of people who can make medical decisions for you. If there is no guardian, family members come in order of relationship to you. A friend of yours may be at the end of the list in some states.

By law medical practitioners can provide emergency care and routine care to adults who cannot give informed consent. No decision-maker is needed. But major non-emergency medical care requires a decision-maker to consent to the treatment, such as surgery, medication, placement of feeding tubes, use of antibiotics, and breathing tubes. State laws differ as to what decisions family and friends can make. Usually these situations come up when someone is in a nursing home or a hospital. Some states have laws and procedures that deal with these situations but they are different in each state. Sometimes, when there is no one to make the decisions, doctors are left to decide what to do and they have to act according to the ethics of their profession.

Advantages

- No court proceeding is necessary.
- No prior documents need to be prepared.
- No cost to you or your family.
- You do not have to do anything.

Disadvantages

- Your wishes may not be known or taken into account.
- Decision-making is done by others who may or may not have your best interest at heart.
- The person called on to make decisions may be unprepared and not know what to do.
- Family members may disagree.
- The health care treatment decisions covered vary by state.

Single Court Transactions

Some states have laws that permit a judge to make a single financial decision or medical decision for you without a guardianship. Doctors at a hospital might ask the hospital attorney to officially request that a judge make the medical decisions if your family members cannot agree or are uncertain what to do for you. Family members themselves can also officially ask a judge to make the medical decision. In a single court transaction for finances, the circumstances may involve asking a judge to freeze assets if there is evidence someone is draining your bank account or trying to sell your house without your permission. Often the police or adult protective services make these requests of the court.

An attorney may be appointed to represent your wishes depending on your state law. The judge then hears or reads the evidence about your situation including any statements you have made. Your personal history and values, to the extent that they are known, are taken into account. The judge makes the decision.

Advantages

- A judge's order will settle dispute, at least legally.
- Your side of the story will be acknowledged and taken into account if it is known.

Disadvantages

- Most people are not familiar with courts.
- Court decisions can be seen as taking the power away from you or your loved ones.
- Attorneys are needed, and there is a cost involved.
- There may be delays in court proceedings.

Financial Issues

Powers of Attorney

A power of attorney is a written, witnessed document between you and another person. In it you give authority to the other person to act for you or to represent you in financial matters. The person granting the power is called the *principal*. The person exercising the power is the *agent*. It is very important for you to pick someone you trust and who is capable of helping you with your finances. You must be able to understand what you are doing when you sign a financial power of attorney. Otherwise, the power of attorney is not legal.

There are three types of powers of attorney: *limited* or *specific*, *general*, and *durable*. A *limited* or *specific power of attorney* can be given for a limited or a single action. For instance, if you are traveling out of the country, you might authorize a family member or friend to sign the closing documents on the refinancing of your investment property. A person who has severe arthritis in her hands might sign a power of attorney specific only to one of her bank accounts so that her sister can write out her monthly bills. Most financial institutions have their own power of attorney documents. A *general power of attorney* usually gives your agent the right to handle all your financial affairs. Both the specific power of attorney and the general power of attorney become invalid if you lose the ability to make decisions due to an illness or accident. Physicians usually make the decision as to whether you cannot make your own decisions.

A *durable power of attorney* permits your agent to continue to make financial decisions for you in case you lose the ability. A durable power of attorney may take effect either at the time it is signed or later with a “springing” clause, which means it takes effect only if you lose the ability to make decisions or at the specific time you want your agent to start having authority.

Advantages

- Powers of attorney are private arrangements.
- You can revoke the power of attorney at any time unless you become unable to make decisions. Then, only a court can change it.
- Guardianship may be avoided.
- You can decide which specific powers to give your agent or you can give your agent generalized authority.

Disadvantages

- Your agent is not supervised by anyone and is not accountable to anyone except you -- and perhaps the court if someone files a request with the court for the court to order an accounting. So you can only use a power of attorney if you have someone you really trust to be your agent.
- It is best to consult an attorney familiar with powers of attorney, to make a document suited to your needs, so there is usually a cost involved.
- Unless specifically stated, powers of attorney do not address decisions about your living circumstances.
- You are not required to tell anyone about your power of attorney. This means that family members or other people who care about you may not know about the power of attorney.
- There is no bonding, which means that if your agent mishandles your assets or uses them for himself, there is no way to reimburse you for the lost assets.
- Banks may not honor power of attorney forms other than their own.
- Courts can review powers of attorney but they may be handicapped by lack of documentation because there may be no requirement that agents keep records of how they deal with the principal's assets.
- Few educational materials are currently available for agents that outline their responsibilities and liabilities or guide them in their duties.
- Many third parties, such as title companies, will not honor a durable power of attorney if you have diminished decision-making capacity.
- Many agents, especially family members, do not know that they cannot mix your money with theirs.
- There are no requirements at the time of the execution of the power of attorney to determine if you have full decision-making capacity and are not being unduly influenced.
- It is very easy for an agent to begin using your money for herself or to give gifts to others.
- Your agent can resign at any time which would leave you without someone to handle your affairs.

Trusts

Trusts are written legal agreements that provide for money and property management. An attorney is involved in drawing up trusts. The person who establishes a trust is termed the *trustor* or the *grantor* or the *settlor*. The person or institution that manages the trust is termed the *trustee*. The person who receives funds from the trust is termed the *beneficiary*. There are three types of trusts: *revocable or inter vivos*, *testamentary*, and *special needs*. Special needs trusts are created when you are already disabled and there are funds coming to you from a lawsuit or an

inheritance. Testamentary trusts take effect upon your death. By far, the most common trust is the revocable or inter vivos trust.

Revocable Living Trust

This is the most common type of trust. Most people name themselves as the trustee at first and at the same time name another person or institution to take over as successor trustee if they lose the ability to make financial decisions. Losing capacity to make decisions may be gradual. Some trusts say when the successor trustee should take over while others say that one or two physicians can evaluate you and decide when your successor trustee should take over. Or, you might resign as the trustee and have your successor trustee take over. You will need to change the title of ownership on all your assets from your name to the trust. The new owner of all the assets becomes the trust. This is called "funding" the trust. Attorneys also recommend that you have a will that states that all your assets, either current or acquired in the future, are meant to be part of the trust. This is called a "pour over" will.

Advantages

- You can change the trust at any time as long as you still have the ability and understanding to do so.
- These trusts are private and confidential. However, if there is no pour over will and assets that are not in the trust, probate court action may be necessary.
- Having this type of trust shortens or eliminates delay in distributing your property to your heirs upon your death. A successor trustee can usually act more quickly than an executor.

Disadvantages

- This type of trust does not reduce taxes.
- Trusts are usually not useful for small estates
- Sometimes people neglect to "fund" the trust, and then it has no effect.
- Transfer to a trust may have negative consequences on eligibility for public benefits. There are still costs
- Attorney fees are involved to set up the trust and to distribute the trust after your death. Trustees are entitled to fees for such things as preparing documents, tax returns, transfers of property and other costs involved in running and distributing the assets of trust.
- There is no court supervision unless you specify it in the document.
- There is no bonding requirement, which means that you are not protected if the trustee mishandles the funds or uses them for herself. Recovery of funds will involve attorneys and court costs and may even be impossible if all the assets have been spent.
- Because of the privacy of a trust, no notice is given to family members or other parties that it exists. This can cause confusion in families.
- A durable power of attorney, representative payee or even guardianship may still be needed for such things as final funding of the trust and dealing with special services, Medicare and Medicaid, personal income taxes, health care, medical decision-making, and daily living expenses.
- So-called "trust" mills are increasingly common. Employees of these organizations call people on the telephone promising that they can avoid taxes, costly attorney services, and the probate court process if only they will draw up a trust. The person establishing the trust may never meet an attorney. The "trust advisor" comes to the person's house with a "one-size fits all" document that may be inappropriate, unnecessary, or poorly crafted. Expensive lawsuits can result from these poorly drawn trusts.

Joint Ownership

Cash assets and real property can be jointly owned with another person. You can put someone else's name on your home or other property or your bank account. There are several types of joint bank accounts and they are different in each state. Even though the money was yours to start with, once you create a joint bank account, it legally belongs to you and the person whose name is now on your account. Most banks will allow you or the other people add or withdraw funds from the account without any questions and without contacting the other joint owner.

Advantages

- Joint tenancy allows another person to get your property handled or get your bills paid if you cannot do it.
- There is usually no cost to set it up with a bank.
- Joint tenancy arrangements are best used when there are few assets and when you have someone you totally trust.
- You can discontinue the joint tenancy arrangement at any time.

Disadvantages

- You lose exclusive control over your house and/or your finances.
- The joint owner has the legal right to remove all money from a joint account, even if you are the only person who deposited the money.
- Conflict over the management of your assets may arise.
- Both owners have to pay taxes on bank accounts.
- There is no bonding or insurance available to protect your assets if the other person takes the money or mishandles it.
- Assets that were previously yours are now subject to the other person's debts including taxes.
- Creating a joint account is considered by Medicaid a gift to the other person, which could make you or the other person ineligible for Medicaid.

Representative Payee

Several federal agencies are authorized to appoint a person, or institution (bank, nursing home) to receive federal benefits on behalf of the recipient. These agencies include:

- Social Security Administration
- Veteran's Administration
- Department of Defense
- Railroad Retirement Board
- Office of Personnel Management

The person or institution that receives the check is termed a representative payee, or federal fiduciary. This arrangement is meant to assist adults with diminished capacity who are unable to handle their own benefits. Physician statements as well as those by relatives and friends are accepted as evidence that a representative payee may be needed. Federal programs have different rules concerning who can serve as a representative payee.

Advantages

- There is no cost to set up a representative payee arrangement.
- It is a very helpful arrangement if this is the only income you have.

Disadvantages

- Although representative payees are required to give an accounting of your funds to the government agency, the requirement is not rigorously enforced. There is generally little oversight, and it is possible that representative payees may misuse your benefits.
- There is little investigation of proposed representative payees.
- A representative payee arrangement pertains only to benefits from the federal government. If you have other money or property, you will need some other arrangement.
- A doctor's statement is required.

Resources

Workbooks to Assist With Advance Planning

- **Consumer's Tool Kit for Health Care Advance Planning**, by the ABA Commission on Law and Aging is available for free download at http://apps.americanbar.org/aging/publications/docs/consumer_tool_kit_bk.pdf:
- **Caring Conversations Workbook**, published by the Center for Practical Bioethics, is both a workbook and advance directive. It can be downloaded for free from their web site at <http://www.cpbmembers.org/documents/Caring-Conversations.pdf>.
- **Caring Connections, a program of the National Hospice and Palliative Care Organization**. Their web page has several online resources at <http://www.caringinfo.org/i4a/pages/index.cfm?pageid=3277>.
- **"Good to Go" Toolkit and Resource Guide**, published by Compassion and Choices. It can be downloaded free at <https://www.compassionandchoices.org/userfiles/Good-To-Go-Resource-Guide.pdf>.
- **Thinking Ahead: My Way, My Choice, My Life at the End**. This workbook and video were created by California advocates with developmental disabilities. Available for free at <http://www.dds.ca.gov/ConsumerCorner/ThinkingAhead.cfm>.
- **The Go Wish Game is a card game for sorting out values related to end-of-life decision making**, created by the Coda Alliance, a community organization in Santa Clara County, CA. An easy, entertaining way to think and talk about what's important to you if you become seriously ill. Available for purchase at <http://www.codaalliance.org/>.
- **My Directives** is a free web-based service that walks you through the process of creating a Universal Advance Digital Directive which can be digitally signed. The directive is encrypted and stored in their secure database, available to you and your medical treatment providers 24/7. Go to <http://www.mydirectives.com/>

Tools for Health Care Proxies/Agents

- **Making Decisions for Someone Else: A How-To Guide, published by the ABA Commission on Law and Aging**, this guide is for anyone serving in the role of health care decision maker for someone else. Go to

http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011/2011_aging_bk_proxy_guide_gen.authcheckdam.pdf.

Multi-State Information:

- [Giving Someone a Power of Attorney for Your Health Care: A Guide with an Easy-to-Use Legal Form for All Adults](#), prepared by the ABA Commission on Law and Aging (2011).
- [Five Wishes Advance Directive](#). Published by Aging with Dignity. This nationally used, popular advance directive focuses on ways of talking about health care wishes and needs. Available for purchase/download.
- [A Guide to Living Wills and Health Care Proxies](#), by Harvard Medical School (for purchase).

State-Specific Information:

There are several places you can locate forms that have been published for specific states by bar associations or health organizations.

- [ABA Commission on Law and Aging](#)
- [National Hospice and Palliative Care Association](#).
- [NOAH](#) (New York Online Access to Health).

General End-Of-Life Care Resources

- [Handbook for Mortals: Guidance for People Facing Serious Illness](#) (2nd Ed., Oxford Univ Press, 2011) by Joanne Lynn, Joan Harrold, and Janice Lynch Schuster. A comprehensive and readable 320-page guide to dealing with serious, eventually fatal illness. Find on Amazon, Barnes & Noble, or in book stores.
- [Hard Choices for Loving People: CPR, Artificial Feeding, Comfort Measures Only and the Elderly Patient](#), by Hank Dunn. A&A Publishers, Inc. P.O. Box 1098, Herndon, VA 20172-1098 (Tel. 703-707-0169). A concise and helpful 48-page booklet on end-of-life decisions concerning resuscitation, food and fluids, hospitalization, and cure versus comfort care.
- [National Health Decisions Day](#). www.nhdd.org.

Selected Policy Literature

- [Elder Care and Elder Family Decision-Making Mediation: Training Objectives and Commentary](#)
- [MO Guardianship: Understanding Your Options and Alternatives](#), (2010) Institute of Human Development, University of Missouri, Kansas City, Kansas City, Missouri.
- [Physician Orders for Life-Sustaining Treatment Paradigm](#).
- C. Sabatino, "[The Evolution of Health Care Advance Planning Law and Policy](#)," 88(2) *Milbank Quarterly* 211-239 (2010).
- Susan P Shapiro, "[Advance Directives: The Elusive Goal of Having the Last Word](#)," 8(2) *NAELA J.* 205 (Fall 2012).

Fiduciary Guides

Managing Someone Else's Money for agents under a power of attorney, trustees, guardians, and government fiduciaries. Link to the guides at <http://www.consumerfinance.gov/blog/managing-someone-elses-money>.