



Legal Devices When One Cannot Make Decisions

Most of us, at some time in our lives, will need help in managing our affairs or in taking care of ourselves. This can happen at any age for many different reasons. It's most likely to happen in the years prior to death—a time often characterized by increasing mental and physical frailty. A variety of legal documents are available to assist during these periods; some provide temporary help, others offer more permanent assistance. Planning ahead enables each of us to make important decisions in how our personal and financial affairs will be handled if one day we are unable to manage these tasks.



What end-of-life decisions might you or your family members face? How can you best prepare for the potential of mental or physical incapacity? What preparations, including the creation of legal documents, should you consider?

At first, it might seem that the “real” issue is deciding to what length extraordinary measures will be used to sustain life. However, there are numerous issues to consider. Many individuals will be disabled six months or longer before they die and may be unable to make their own decisions.

Older people and their families need to consider a variety of choices such as long-term care, guardianship designation, power of attorney, and dispersal of property and household items. Who will execute the last will and testament? And choices need to be made regarding heroic measures to prolong life and the possibility of organ donation.

These are not pleasant issues to consider. But when possible, we need to plan ahead. We need to discuss the issues with our families or persons we

trust. Early discussion helps to avoid decisions that are in opposition to one's lifestyle and wishes, as well as decisions that are unacceptable to family members or significant others.

Legislation and legal documents available to assist individuals and permit them to exercise more control over their lives include:

PATIENT SELF DETERMINATION ACT

Under the Federal Patient Self Determination Act, healthcare facilities must: a) inform all adult patients of their rights to create an advance directive, such as a living will, designation of a healthcare surrogate or durable power of attorney; b) explain the facility's policies for carrying out patient decisions; and c) provide education for staff and the community about advance directives, including when and how they may be used.

This law, although very important for the terminally ill, applies to any person using the healthcare system. The law states that hospitals,



hospices, nursing homes, and all other healthcare facilities that receive Medicare funding must provide patients with written information regarding their rights to accept or refuse any medical treatment.

ADVANCE DIRECTIVES

An advance directive is any written document giving explicit instruction regarding healthcare treatments prior to a serious or life-threatening illness. Advance directives usually take the form of a *living will*, *healthcare surrogate*, or *durable (or springing) power of attorney*.

Living will: A living will is a document that assists an individual in making his or her wishes known regarding life-prolonging treatment. This allows individuals to prepare in advance for the time that they can no longer actively participate in making decisions about their healthcare. In Kentucky, this document must be signed by you and two other people, each of whom must be at least 18 years old, of sound mind, and of no relation to you. They cannot be your doctor or employed by your doctor. They also cannot be employed by the healthcare facility where you are a patient or anyone responsible for paying for your healthcare.

If you cannot arrange for these witnesses, you may have your living will notarized instead. Be sure to keep at least one copy in a safe, easily accessible place. You may wish to carry a copy with you when traveling. Your wishes may not be honored in another state or country if they conflict with its existing laws. It's also a good idea to provide copies to your doctor and attorney or to close relatives with whom you might live or visit.

Healthcare surrogate: A healthcare surrogate has durable power of attorney for making medical decisions when you are unable to do so. This is a simple document that does not require an attorney's assistance. In Kentucky, you can designate a healthcare surrogate in your living will.

Durable Power of Attorney: This is a more comprehensive document since it can give an individual or individuals decision making power



when you are disabled. It can cover healthcare decisions and personal matters, such as living arrangements and financial decisions. You might want to grant durable power of attorney to the same person you name as your healthcare surrogate. On the other hand, you might feel more comfortable having someone else manage your financial decisions because of their expertise. An attorney can assist you in specifying which medical procedures and treatments you want and which you do not want.

For more information on advance directives, contact your attorney or regional hospice.

Substitute Payee. A substitute payee is typically used only for the purpose of providing you with help in cashing and writing checks. Your bank will provide you with the appropriate forms for designating a substitute payee.

Representative Payee. A representative payee is used in a government benefit program such as Social Security. The person asking to be named a representative payee must file an application and must provide the Social Security Administration with evidence of the relationship to the person to whom the checks are made out. The representative payee must use the payments for taking care of the Social Security recipient and must submit a written report on how the funds are actually spent.

COURT APPOINTED REPRESENTATIVES

In some cases, a court will appoint a representative for individuals who can no longer handle their own affairs and who have not made arrangements, such as durable power of attorney, for executing their wishes. For this to happen, the court must conduct a trial by jury to determine the individual's ability to manage personal or financial affairs. While the specific terms of these positions vary from state to state, they are found nationwide. If a person is judged to be incapable of managing his or her affairs, the court may appoint another person to one of the following positions:

Conservator. A conservator is the person who has control in managing the business and financial affairs of an individual for reasons of mental illness or other incapacity. This person can provide

assistance either temporarily or permanently, depending on the duration of the disability.

Guardianship. Guardianship can be granted for any person who is incapable of managing his or her personal affairs. A district court appoints an individual to act on behalf of the disabled person.

OTHER IMPORTANT LEGAL DOCUMENTS

Power of Attorney. Power of attorney is used when you can still make your own decisions, but you want someone else to act on your behalf. It gives another individual legal authority to manage some or all of your personal affairs. A power of attorney is created in a signed document that states who is the principal agent for an individual. It also describes what powers are being given to another individual on your behalf. A power of attorney does not have to be an attorney, but can be any trusted individual who can act on your behalf or the behalf of a loved one. He or she does not have to reside in the same state.

Be specific about what decision-making power you grant. Power of attorney can allow someone to make deposits into or withdrawals from your bank account or represent you upon the selling of your home if you move out of state. So, you need to be careful to limit the power of attorney action. Power of attorney may end in several ways: a) when you remove power of attorney (this can be done at any time); b) when the individual has completed the designated task; c) if you become unable to make decisions, and d) upon your death.

Will. The main purpose of a will is to carry out your wishes in disbursing your property (assets) and to allow you to identify guardianship for a minor child, or incompetent child or adult. Without a will, the laws of Kentucky will guide the distribution of assets among your relatives, including the decision of who will be designated as the guardian for individuals who need such oversight.

Trust. A trust is a legal document in which legal title of property is held (e.g. home, investments, etc.). A person or institution then manages the property for the benefit of another. This relieves the burden of managing finances from an individual who is inexperienced in handling finances. It also

avoids the process of going through probate court. In Kentucky, the probate process is usually simple and relatively inexpensive for small estates. It allows the individual to decide how and when money will be disbursed from one generation to the next.

A personal trust is advantageous in the event that you become unable to manage your own assets. However, a trust is not for everyone. You should consult an attorney before deciding to set up a trust.

Letter of Last Instruction. Upon your death, your loved ones will need information to collect death benefits and settle your estate. Last instructions should include your full name, birth date and place. It should contain the location of important records, such as marriage certificates, Social Security papers, life and other insurance policies. It also should contain the location of any other legal documents, including wills, deeds to property, automobile titles, and income tax records for the last seven years.

AFTER DEATH

Organ Donation. If you decide to donate your organs after death, you need to make your wishes known to others. If your state provides for this, make sure you note your wishes on the back of your driver's license. ☺

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