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***DON'T LET ANOTHER DAY GO BY WITHOUT THESE  
IMPORTANT DOCUMENTS***

# Advance Health Care Directives

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## End-of-Life Decision Making

Modern medicine can now keep a person alive in situations that, in years past, would have resulted in the individual's death. Frequently, a patient in such a condition is unable to communicate his or her wishes with regard to the type of medical care to be provided. In the absence of any other guidance, the attending physician will typically use all available means to keep the individual alive, even when death is certain, with no hope of recovery.

However, many individuals feel that once death is inevitable, life should not be artificially prolonged through the use of such technology. The decision to start or withdraw such life-sustaining support, although always difficult, can be made easier with advance planning.

The term "advance health care directives" is commonly used to describe two key documents (sometimes combined into one) designed to address these end-of-life decisions:

- Living Will
- Durable Power of Attorney for Health Care

Individual state law governs the use of these documents, and such legislation can vary widely. Individuals who live in more than one state may need to execute a living will and a durable power of attorney for health care for each state.

## Living Will

A living will, also known as a "directive to physicians," is a written statement of the individual's health care wishes should he or she become seriously ill and unable to communicate. The document is designed to provide guidance to someone else appointed to make health care decisions for the individual, or to the attending physician if there is no health care agent. A living will might include:

- Directions as to pain medication.
- Directions as to when to provide, withhold, or withdraw artificial nutrition and hydration, and all other forms of health care, including cardiopulmonary resuscitation.
- A discussion of any religious beliefs that might impact medical treatment.
- Instructions for funeral and burial services.

Because it is impossible to foresee the future, the living will should be written in the broadest possible manner, to cover a wide range of situations.

# Advance Health Care Directives

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## End-of-Life Decision Making

### Durable Power of Attorney for Health Care

In a durable power of attorney for health care, sometimes known as a "health care proxy," an individual (the principal) appoints another person (the agent) to make health care decisions if the principal is incapable of doing so.<sup>1</sup> A durable power of attorney may employ a "springing" power, which means that the power "springs" into life when the principal becomes incapacitated.<sup>2</sup> Additional powers granted to the agent could include:

- Access to medical records.
- Authority to transfer the principal to another facility or to another state.
- Ability to authorize a "Do Not Resuscitate" (DNR) order.
- Postmortem powers to dispose of the remains, to authorize an autopsy, or to donate all or part of the principal's body for transplant, education, or research purposes.

### Other Points

- **Talk about the issues:** the individual should spend time talking with family, friends, clergy, and physician about his or her wishes in end-of-life decisions.
- **Make the documents available:** if a living will and/or a durable power of attorney exist, be sure that those involved know where to locate the documents.
- **Revocation:** an individual can generally revoke a living will or durable power of attorney at any time.

### Additional Resources

Non-profit organizations such as the following provide support and education on end-of-life issues:

- **National Hospice and Palliative Care Organization:** (800) 658-8898, on the internet at: [www.nhpco.org](http://www.nhpco.org)

### Seek Professional Guidance

The counsel and guidance of legal, religious, and medical professionals is essential to the successful preparation of advance health care directives.

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<sup>1</sup> Many states have provision in their laws for the appointment of a surrogate such as a spouse, domestic partner, or other close family member to make health care decisions for the principal, in situations where no durable power of attorney for health care exists.

<sup>2</sup> Under the Health Insurance Portability and Accountability Act (HIPAA), a physician is prohibited from discussing a patient's medical condition without the patient's consent. Thus, if an individual becomes incapacitated, the person named as agent under a durable power of attorney for health care may not have access to the principal's health-care information. Without this information, the agent would be unable to legally establish that the principal had become incapacitated, and would not be able to trigger any "springing" power. A HIPAA authorization can be used to give the agent access to the principal's health-care information.

# Advantages of a Will

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## **Avoids Distribution Under the Law of Intestacy**

The state intestacy law will pass property to certain relatives of the decedent. These laws have been drafted to be fair in the average situation, but most persons would like to choose who will receive their estate when they die.

## **Permits the Nomination of a Guardian for Minor Children**

Without a nomination in a will, the court will appoint a guardian of the person for minor children. Relatives are not always the best choice for a guardian and consideration must be given to the financial situation of the potential guardian, as well as his or her health, age, willingness and ability to care for your children.

## **Waiver of the Probate Bond**

In the absence of a will, the court will require a fiduciary bond to be posted by the administrator (executor) of the estate to guarantee the replacement of any funds embezzled or diverted by him. Since this additional cost must be borne by the estate, the estate owner may want to waive the bond requirement in the will. Great care should be used in selecting an executor.

## **Choosing the Executor**

The duties of the executor of an estate can be very time consuming and frustrating, especially to a spouse who has just lost his or her loved one. In the will, a qualified individual and/or a corporate trust company can be chosen to handle these responsibilities.

## **Making Specific Bequests to Individuals**

An individual may bequeath specific items of jewelry, heirlooms and furniture, or make cash bequests, and be certain that they will pass to the proper persons. Without a will, written or oral instructions may not be followed.

## **Sale of Assets During the Administration of Probate**

Additional expense to the estate can generally be avoided by permitting the sale of assets without the executor having to publish a notice of sale in the newspaper. A sale of assets may be necessary in order to pay death taxes and expenses of probate.

# Advantages of a Will

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## **Authorizing the Continuation of a Business**

Unless the will authorizes the continuation of a business, the executor must operate it at his or her own risk. Many executors may elect not to administer the estate unless this risk is borne by the estate.

## **Deferring Distributions to Minors**

When parents die leaving minor children, each child's share of the estate must be held in a guardianship account until he or she attains the age of 18 (or 21), at which time the entire remaining share is distributed outright. Trust provisions can be placed in the will to defer these distributions until a more mature age.

## **Peace of Mind**

Although this advantage cannot be measured in dollars and cents, when the estate is in order an emotional load is lifted from the person who is concerned for his or her family's well being.

# No Will? No Problem!

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## State Drawn Will in Common Law States

### Last Will of Paul Procrastinator

**First:** I direct the Probate Judge to appoint anyone of his choosing to administer all property in my name and distribute it under the terms of this will.

**Second:** I direct that all of my assets be converted to cash, all of my debts paid, including taxes, probate fees, administrative fees, and attorney's fee.

**Third:** I direct that one-half (if I am survived by one child) or one-third (if I am survived by two or more children) of my separate property, be paid to my spouse.

**Fourth:** I direct that the balance of my estate be distributed outright, and in cash, in equal shares to my children. If any child be a minor, I direct that his share be held by a guardian for his benefit. The guardian may be anyone of the court's choosing.

**Fifth:** When each of my minor children attains age 18, I direct that his share be then paid to him outright, regardless of his financial or emotional maturity.

**Sixth:** In the event that my spouse does not survive me, I direct that his/her share be added to the children's shares created under Articles Fourth and Fifth

**Seventh:** If none of my children survive me but my spouse does, I direct that the remainder under Article Third be distributed outright in the following manner:

- One-half of my separate property to my spouse.
- The balance to my parents, if living, otherwise to my brothers and sisters or their heirs.

**Eighth:** If I am not survived by my spouse, children or parents, I direct the Probate Court to seek out my closest blood relatives and divide my estate among them in a way which gives an equal share to my closest relatives or their descendants.

**Ninth:** If no relatives are located, I direct that all of my property go to the State.



# Durable Power of Attorney

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A power of attorney is a written document which one person (the principal) uses to empower another person (the agent or attorney-in-fact) to act on his or her behalf.

## Powers Which May Be Included

Non-Tax Powers	Tax-Related Powers
<ul style="list-style-type: none"><li>• To buy, sell or lease assets</li><li>• To sue on the principal's behalf</li><li>• To collect from creditors</li><li>• To change provisions in a living trust</li><li>• To operate the principal's business</li></ul>	<ul style="list-style-type: none"><li>• The power to make gifts to the spouse (to equalize the estates) and to children, grandchildren, etc. (to utilize the annual gift tax exclusions)</li><li>• The power to make disclaimers</li><li>• The power to create living trusts to benefit the principal, spouse and heirs</li><li>• The power to complete transfers to a living trust if the principal becomes incompetent</li><li>• The power to join the competent spouse in signing income and gift tax returns</li><li>• The power to exercise special powers of appointment</li></ul>

## Additional Considerations

Some powers, such as the power to execute and revoke a will, can not be given to another individual. In addition, powers of attorney are usually notarized and those affecting real property may need to be recorded.

A power can be a "general" power, giving the agent all powers held by the principal; a "limited" power restricts the agent to performing only those actions specifically listed.

The document can be written to empower the agent now, or to become effective only upon the occurrence of a specific event, such as the principal's incapacity (sometimes referred to as a "springing" power). A durable power of attorney may save the often-considerable costs of a conservatorship. A conservatorship, however, has the benefit of court supervision.

**Note:** Significant powers may be granted under a power of attorney. Before using a preprinted form, legal advice should be obtained.

# Revocable Living Trust

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## (Inter-vivos Trusts)

A trust is created when one person (the trustor or grantor) transfers to another person or a corporation (the trustee) a property interest to be held for the benefit of himself or others (the beneficiaries).

If the trust is created during the trustor's lifetime, rather than in his will, it is an inter-vivos or living trust. When the trustor retains the right to dissolve the trust arrangement, it is a revocable living trust.



## What Are Some of the Advantages?

- Assets in the trust are not subject to probate administration. This usually saves executor's and attorney's fees. It also grants more privacy as to who gets the trust assets, when they receive them and how much they get.
- Professional management is available if the trustor becomes incompetent, disabled or wants to be free of the worries of management.
- Should the trustor (also usually the original trustee) die, or be unable to serve, a successor trustee can step in and manage the trust assets without delay or red tape.
- Annual court accountings, with accompanying legal fees, are not required, although some states do not require annual accountings for testamentary trusts (will trusts), either.
- The trustee can collect life insurance proceeds immediately after the trustor dies and can (if permitted under the trust document) use the proceeds to care for family members without any need for court approval.

## What Are Some of the Disadvantages?

- Creditors may not be cut off as quickly as they are in probated estates, e.g., four months in some states.
- A little more effort is required to transfer assets into the trust and records should be kept of transactions by the trustee.
- The attorney usually charges a higher fee to establish a living trust, as opposed to a will with a testamentary trust. There may also be ongoing administrative charges.

**Note:** Assets in a revocable living trust are included in one's gross estate for federal estate tax purposes.