

CHAPTER FIVE

Legal Considerations

The Importance of Being Prepared

*No right is held more sacred, or is more carefully guarded than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clean and unquestionable authority of law.**

When considering long-term care options for a loved one, there are many legal issues which should be examined. This chapter is by no means meant to replace an experienced, competent attorney; it is designed to help the caregiver identify and understand some of the most important legal considerations related to long-term care.

Also included in this chapter is a section on “Where to Turn for Help” that lists some national organizations specializing in elder care law that can either assist a caregiver directly or help the caregiver find appropriate legal assistance. The “Resources” section at the end of this chapter includes helpful organizations, sources of free information and a suggested reading list.

**A quotation from 110 x. Ct. 2846, Union Pacific Railway Co. V. Botsford, 141 U.S. 250, 251 (1891)*

Legal Documents

DURABLE POWER OF ATTORNEY

Durable Power of Attorney (DPA): with this legal document, a person (“principal”) is able to give a designated person (“agent” – which can be an attorney, financial advisor, friend, or loved one) the authority to act in his or her behalf. It is “durable” because these powers continue even if the principal becomes incapacitated. The DPA can be changed or revoked at any time while the principal is still competent. A power of attorney can be either **general** (concerning property management, financial affairs, commercial transactions, etc.) or **specific** (e.g. health care decisions).

Advance Directive for Health Care: this legal tool includes both a Durable Power of Attorney (Health Care) and a Living Will (see “Wills”). Most states have “statutory forms” that are available at most hospitals and Area Agencies on Aging. Forms can also be obtained from the AARP/Legal Counsel for the Elderly Program, at (202) 434-2170.

Things to consider. . . .

- If the power of attorney isn’t durable, it becomes useless when the principal becomes incapacitated.
- Whoever is given the DPA must be fully trustworthy.
- There are special cases; however, most advisors agree that the DPA should not be given to a primary physician or any other person with professional responsibility for the principal’s care or an employee of a health care facility where the principal is or might receive care.
- State laws vary, but it is a good idea to get the DPA witnessed and notarized.
- Also, local requirements should be determined, including whether or not the DPA must be recorded in the county records.

Legal Documents

TRUSTS

Trusts: a trust allows a person to transfer legal title of his or her property to a “trustee” who manages the property under strict trust rules to the benefit of other people (“beneficiaries”) designated by the original property owner.

Types of Trusts:

Testamentary: The trust is established in a person’s will and takes effect at time of death.

Living: This type of trust is created while a person is living. The trust can be run by the original property owner with a trustee named to take over only if the person becomes incapacitated.

Revocable: the terms of the trust can be changed in case the original property owner changes his or her mind as to the disposition of the property.

Irrevocable: the terms cannot be changed after the trust has been established. This type of trust may provide possible savings on estate taxes and prevention of loss of government benefits for loved one(s).

Things to consider. . . .

- A trust can be set up so that it is only used as a “standby.”
- Eligibility for Medicaid and Supplemental Security Income could be affected by a trust.
- A trust can eliminate family politics by appointing a neutral, third party as trustee.
- An experienced attorney and/or tax consultant should be consulted for advice on taxation, including possible tax consequences.

Legal Documents

WILLS

Will: this familiar document allows a person to spell out his or her wishes now to take effect upon that person's death.

Living Will: instead of being activated upon death, this will allow a person to identify his or her wishes regarding medical treatment while still alive. This is particularly important should the person become incapacitated by a terminal illness or a persistent vegetative state and does not desire sustaining life-support.

Things to consider. . . .

- A living will is not viable in all states.
- Use a form that follows state guidelines or have an attorney create one for you.
- Make sure your physician understands and respects your wishes.
- Address in the living will whether food and fluids should be withheld.
- Follow any witnessing and/or notarizing requirements closely.

Legal Documents

GUARDIANSHIP

Guardianship: if a person becomes incapacitated, a guardian may be appointed by the court to make decisions for the person. The guardian may or may not be someone the person would want in this powerful position. The process of appointing a guardian can be a long and rather expensive ordeal.

Conservatorship (limited guardianship): A conservator is appointed by the court to manage an incapacitated person's property. The court may give the conservator wide-ranging powers-or it may limit the conservator to more narrow responsibilities such a writing checks.

Things to consider. . .

- The court-appointed guardian/conservator is not required to make decisions based on your preferences.
- In order to make the court aware of your wishes, you may express your choice of guardian in a trust. Another option would be to execute multiple originals of a letter stating your choice and keeping originals with a spouse, a doctor or other healthcare professional, and your attorney. As mentioned above, the court does not have to honor your choice of guardian; however, at least the court will be aware of your desires. And, as with all legal documents, it is best to work with an experienced attorney.
- If a durable power of attorney is in place, a guardian/conservator may be avoided.

Other Matters

- **Property Ownership:** It is important to review who owns what property and how it is owned. In particular, property held in some sort of common ownership, which requires both parties to consent to its disposal, can create problems for married couples. For instance, a checking account in the names of John Doe and Jane Doe (instead of John Doe or Jane Doe), would require signatures from both parties to withdraw funds. If Jan Doe becomes incapacitated, John may not be able to readily access the funds.
- **Filing Tax Returns:** If a person becomes incapacitated, filing tax returns can become a problem. A power of attorney that specifically spells out the ability to file tax returns can be used in this instance.

Where To Turn For Help

- **Area Agency on Aging (AAA):** can provide information on local legal resources. A local AAA can be found in the Blue Pages of the phone directory under the heading “Aging.”
- **Bar Association:** local and state bar associations may provide information and materials on matters of interest to seniors. Local bar associations are typically listed in the business pages of the phone directory with the city or state named first (e.g. “Evansville Bar Association” or “Pennsylvania Bar Association”). The local bar association can provide the state bar’s address and phone number.
- **Eldercare Locator:** may be able to find free or reduced rate legal services for the elderly in a particular area. Call: 1-800-677-1116 (9 a.m. – 5 p.m. EST).
- **Law School Clinical Programs:** provide free legal help from law students (monitored by attorneys). Call the law school and ask if there are any “pro bono” services provided by students for elderly citizens.
- **Lawyer Referral Service:** run by local and state bar associations. Provide referrals of attorneys who specialize in elder law. Possible fee for referral. (See “Bar Association.”)
- **Legal Assistance Projects:** funded under Title III of the federal Older Americans Act; provides free legal help to seniors (age 60 or over). The local bar association would have information on any ongoing projects in the community. (See “Bar Association.”)
- **Legal Hotline for Seniors:** an 800 number which seniors can call for free legal advice, referrals to legal services in their area and/or attorneys who charge reduced fees. (Available in Arizona, Washington, D.C., Florida, Minnesota, Michigan, New Mexico, Ohio, Pennsylvania & Texas.) Call 1-800-555-1212 (information) for the hotline number in your state.
- **Legal Services Corporations/Legal Aid Programs:** designed to provide free legal assistance to those with low incomes. (No age requirements.) Legal Services Inc. and Legal Aid are listed in the business pages of the phone book.
- **Pro Bono Panels:** administered by local bar associations. Local lawyers volunteer to assist low-income people. Contact the local bar association for more information (see “Bar Association.”)
- **Reduced Fee Panels:** local and state bar associations may provide names of attorneys who charge reduced fees. Contact the local bar association for more information. (See “Bar Association.”)

- **Senior Attorney Projects:** free legal services provided by older, senior attorneys. Contact: AARP Legal Counsel for the Elderly (202-434-2170) or the ABA Commission on Legal Problems of the Elderly (202-331-2297).
- **Senior Centers:** many times these centers offer legal counseling services. Local centers can be found listed in the Blue Pages of the phone directory under the heading “Aging.”