

Advance Planning Documents: Planning and Prevention

CHAPTER SUMMARY • February 2019

David Godfrey, ABA Commission on Law and Aging

American Bar Association Commission on Law and Aging

The mission of the American Bar Association Commission on Law and Aging (ABA Commission) is to serve as the collaborative, interdisciplinary leader of the Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons, particularly low-income and vulnerable elders. Since 1979, the ABA Commission has carried out this mission through research, policy development, technical assistance, advocacy, education, and training.

Key Lessons:

1. Advance planning includes plans for money, personal decisions, and health care.
2. Attorneys should help clients carefully select agents and make provisions for oversight to reduce the risks of abuse, neglect, and exploitation.
3. Providing information about options empowers adults to know what to do and when.

Introduction

Advance Planning is the planning process an individual undergoes to ensure their values and goals are honored in the event that they need assistance making decisions. Only a little over one in three adults has a plan in place for decision-making in the event of a loss of ability or a decline in memory or cognition.¹ Research by the Alzheimer's Association tells us that at least one in three adults will develop dementia, and dementia is the sixth leading cause of death for Americans.²

Lawyers play an important role in helping older adults create a plan for future decision making. Lawyers can help older adults take steps to appropriately select decision making agents, and draft documents that build in oversight and accountability to their plans. By taking these two steps, lawyers help older adults reduce risk and increase the likelihood that if someone does something wrong, it is discovered sooner rather than later.

This Legal Basics Chapter Summary will examine the role of the attorney in two areas of advance planning: Financial and Health Care.

1) Advance Planning for Financial Decisions: Appointing Agents and Managing Oversight

Basic Planning: Direct Deposit, Automatic Payment, and Authorized Signers

The simplest step an older adult can take to plan for financial management is to put their money on auto pilot by setting up direct deposit and automatic payments.

Setting up direct deposit assures that money is deposited into the accounts and available to pay needed expenses. All Social Security and all other Federal retirement or disability income benefits are paid by direct deposit. If the person receiving benefits does not supply banking information, an account is created for the beneficiary and the person is mailed a debit card to access their benefits. Most other sources of income offer (and may require) direct deposit.

PRACTICE TIP

Direct deposit requires minimal oversight. The individual, or their caregiver, should check on a monthly basis to see that the individual receives their expected income and that the amounts deposited are correct.

Online payment and autopayment of expenses such as utility bills, mortgage or rent payments, HOA or condo fees, property taxes, and insurance can be set up through a bank or with the provider or creditor. Automatic payment requires some oversight. It is important to review the billing statements to assure that the amounts are correct. Someone should also verify that the bills have been paid from the account, and that no mistakes in payment have occurred. Online banking makes it possible to set up access for third parties to monitor deposits and payments. Increasingly, financial institutions are providing “monitoring only” access to accounts online, making third party oversight much easier.

Setting up an automatic payment for certain bills can cover a lot, but not everything. There may be circumstances where the individual is too sick to sign checks or withdraw cash, and someone needs to be able to help pay the bills. There are three ways to do this: 1) adding an authorized signer; 2) adding a joint account owner; or 3) designating a power of attorney recognized by the bank.

Authorized signer

An authorized signer is not an owner of the account, but is authorized to sign checks on the account. This type of account is most commonly used for businesses—banks may be reluctant to create these accounts for an individual, and these accounts may have service charges. The advantage of an authorized signer is that it does not create a right of inheritance in the account.

Joint account owner

Joint account ownership is much more common. The joint account holder can transact any business on the account. Joint accounts commonly create a presumption that the surviving joint account holder owns the account on the death of one of the joint account owners. Joint accounts can have a major impact on estate plans.

Power of attorney and banking

The individual can also use a power of attorney to authorize a person to do banking. The key is to assure that the bank will recognize the authority of the agents named in the power of attorney. Some states have state-specific forms and laws that obligate banks to honor a power of attorney, unless the bank believes the document is invalid or is being abused. [The American Bar Association Commission on Law and Aging has a listing of states](#) with statutory forms and provisions required for recognition. In other states, it is common for banks to have a bank approved form that they will recognize — it can be difficult or impossible to get the bank to recognize other forms. When the Power of Attorney is created, it is important to deliver a copy to the bank and address any concerns about recognition while it is possible to make changes.

Oversight of Financial Management

All of the tools that allow a third party to make business transactions on behalf of the person have a risk of abuse and exploitation. The individual needs to carefully select the person authorized to transact business needs.

If the individual has any doubt about the trustworthiness or reliability of the person being considered, then they should not name that person. For information on selecting an agent, please watch the [NCLER webcast on drafting advance planning documents](#).

Oversight is important. If the bank does not have a provision to review access, online banking information can be shared with a trusted third party who has been asked to monitor account activity.

Power of Attorney for Financial and Personal Decisions

A Power of Attorney is a document that appoints a person, known as an agent or attorney in fact, to act on behalf of the person who created the power. This is a private agency agreement. The scope of authority is as described in the document or in state law. About half of the states have a model or standard form in their statutes.³ Some states require specific language on certain authority such as health care decisions or gifting. While standard forms are available, each one should be customized to include the authority the person wants to include, place limitations or prohibit certain acts, and to provide accountability. Oversight should be drafted into the document. For details, please see the [NCLER webcast on drafting advance planning documents to reduce risk and exploitation](#).

Study Question:

James is 64 and just starting early retirement. He has health insurance from a previous employer, income from Social Security, and income from a 401K. He owns his home. He has a car payment, electric, internet, and phone bills. He set up Social Security as an automatic direct deposit and he set up a periodic withdrawal plan in his 401K with the income direct deposited into his bank account. He has set all of his utilities and his car payment on automatic payments from his bank account. Which bills risk going unpaid if he becomes unable to manage his money?

Checklist for Financial Planning

- Direct Deposit
- Automatic Payment
- Authorized signer on accounts
- Power of Attorney
- Oversight— access to account records by a trusted third party

2) Advance Planning for Health Care Decisions

An adult has a constitutional right to make health care decisions.⁴ As long as they can, most adults prefer to make their own health care decisions in consultation with trusted health care providers. Health care decisions can also be made by agents appointed by the person, based on specific instructions, and by default agents appointed by state law or by court appointed guardians.⁵ This section will explore various forms of health care decision-making.

For adults with limited capacity, or who are experiencing a decline in memory or cognition, the Supported Decision-Making model leverages the residual capacity by using advisors or supporters to explain the issue, explore options, make recommendations, and then ask the person for a choice or preference. For more information, please see the [NCLER Supported Decision-Making webcast](#).

Appointing an Agent for Health Care Decisions

Most adults prefer to make their own health care decisions in consultation with supporters. In the event an individual is unable to make their own decisions, the next preference is appointing an agent for health care decisions. An adult can name a health care agent in writing in a power of attorney, or in a separate document naming a health care agent, proxy, or surrogate. All states recognize powers of attorney for health care and some states have a separate statutory form that includes naming a health care agent or surrogate. The legal formalities for appointing a health care agent vary from state to state. There is a standard form available that works in 45 states while five states have unique requirements that are not met by any standard form.⁶ Links to state specific advanced health care directives can be found in a [guide from the American Bar Association Commission on Law and Aging](#).

All states have rules about who can witness and/or notarize the signature on an advance health care directive. Several states have special witnessing requirements for residents in long-term care who are signing a health care directive.⁷ The authority of the agent, is as described in the document and as limited by state law. Generally, the authority does not become effective until health care providers have determined that the person is unable to give informed consent.

Written Instructions: Living Wills and Beyond

Many people first think of a **living will** when they think of a directive leaving specific directions about health care at the end of life. These documents leave directions for “life prolonging care” such as mechanical interventions and feeding tubes that only serve to delay an imminent death. Some living will forms decline all life-prolonging care, other living will forms give the option of demanding or declining life-prolonging care. When needed, these directions can be very helpful to loved ones and health care providers, but the instructions only guide health care when death is imminent with no reasonable expectation of recovery. There are three challenges with this: death can be hard to predict, reluctance to talk about imminent death, and lots of other health care decisions that need to be made before a person is expected to die—no matter what medical care is provided.

The spectrum of illnesses, injuries, and treatment options make it impossible to create a single document that covers all options. Because of the unpredictability, documenting the person’s health care goals, values, and preferences is a helpful first step. Guides like the [Conversation Project](#), [Five Wishes](#), or the [Stanford Dear Doctor](#) project, allow a person to leave general guidance and document and discuss the personal values, goals, and preferences that shape decision making.

Do Not Resuscitate orders (DNR) are a form of advance directive that specifies that if heartbeat or respiration stop, no steps should be taken to restart them. There are two varieties of DNRs—inpatient and emergency medical services (EMS-DNR). Inpatient DNRs are created in a health care facility. Inpatient DNRs are generally limited to the facility that created them. EMS-DNRs vary from state to state, with some states allowing anyone to sign one, and other states requiring a health care professional to sign the form for it to be effective. EMS-DNRs may be ignored by emergency personnel and state laws generally waive liability for honoring or ignoring an EMS-DNR.

Physicians’ Orders on Life Sustaining Treatments (POLST) also known as Medical Orders on Life Sustaining Treatments (MOLST) and other names, are medical orders specific to the kinds of care a patient and their health care providers agree is appropriate for a person who is seriously or terminally ill. POLST and MOLST are state specific, with a growing number of states creating provisions for them. POLST/MOLST differ from DNRs in that the orders are only created in consultation with health care providers for persons who are seriously or terminally ill. POLST/MOLST are intended to be portable, to travel with the person from one health care setting to another.

All lawyers should be familiar with DNR, POLST/MOLST, and hospice. It is important to educate adults, especially those with a serious or terminal illness, what options are available. When a person reaches a point in health care treatment that they feel it is time to focus on comfort instead of a cure, the person should know that they can ask their health care professionals if DNR, POLST/MOLST, or hospice is appropriate.

Default Agents for Health Care Decisions

Most states have a state statute allowing the state to name a surrogate to make health care decisions for an adult who lacks the ability to give informed consent. The statutes and accepted medical practice focus primarily on family and legal next of kin.⁸ Thirty-seven states use a hierarchical model, where the highest-ranking person available becomes the default agent to make health care decisions. Five state statutes provide a list of permissible surrogates and asks the group to select a spokesperson from among them. Nine states have no default surrogate law that applies to health decisions in general, although some of these have limited statutes applicable to specific decisions such as consent to medical research.

The default agent statutes do not address the issue of appointing an agent whom the individual most trusts to make health care decisions.⁹ The person named may have no idea, until asked to make health care decisions, that the responsibility will fall to them. Laws vary in the scope of family members recognized, the extent of their authority, and whether they recognize close friends or other nonfamily as default surrogates. The person given priority in the statute may not be the person most trusted by the patient. Health care providers are more likely to ask next of kin to make health care decisions than they are to be aware of the laws authorizing them to do so. In the nine states without these laws, health care providers typically ask next of kin for consent as a matter of custom and practice.¹⁰

A court order appointing a guardian or conservator may also include authority to make health care decisions. Sometimes limited guardianships are granted specifically to authorize health care decisions or consent to admission to health care facility. To understand the authority of a guardian, read the order, and understand the limitations imposed by state law.

Checklist for Health and Personal Decision-Planning

- Name a trusted agent named in Power of Attorney
- Leave specific directions in living will or other document for end of life
- Document personal health care goals, values, or preferences and discuss with agent, family, friends, and health care providers
- Understand when to ask health care providers about DNR, POLST, or Hospice

Conclusion

Advance Care Planning allows adults to name the person they most trust to help and to leave directions for decisions in the event of incapacity. Every advocate should be familiar with the basic techniques and documents for advance planning so you can educate clients and recognize what planning has been done and what additional planning might be of use.

Resources

- [Giving Someone Your Power of Attorney For Health Care](#)
- [ABA Listing of Links for State-Specific Health Care Advance Directives](#)
- [What States have a Statutory Power of Attorney Form and other Characteristics](#)
- [Six Pathways to Health Care Decision Making](#)
- [Drafting Advance Care Planning Documents to Reduce the Risk of Abuse and Exploitation](#)
- [Training on Supported Decision Making](#)

Endnotes

- 1 Over one third of U.S. adults have advanced medical directives, Reuters, C. Crist, July 11, 2017. See at <https://www.reuters.com/article/us-health-usa-advance-directives/over-one-third-of-u-s-adults-have-advanced-medical-directives-idUSKBN19W2NO>
- 2 Facts and Figures, Alzheimer's Association, 2018. See at <https://www.alz.org/alzheimers-dementia/facts-figures>
- 3 Selected Issues in Power of Attorney Law, ABA Commission on Law and Aging, December 31, 2016, https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartpoa.pdf
- 4 Griswold v. Connecticut, 381 U.S. 479 at 485, 1965. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990)
- 5 See Pathways to Health Care Decision-Making, ABA Commission on Law and Aging, December 2018, available at https://www.americanbar.org/content/dam/aba/administrative/law_aging/pathways-7.pdf
- 6 Giving Someone A Power of Attorney for Health Care, ABA Commission on Law and Aging, 2011, available at https://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_aging_hcdec_univhcpaform.pdf
- 7 STATE HEALTH CARE POWER OF ATTORNEY STATUTES: Selected Characteristics, American Bar Association, January 2018, available at https://www.americanbar.org/content/dam/aba/administrative/law_aging/state-health-care-power-of-attorney-statutes.pdf
- 8 Default Surrogate Consent Statutes, ABA Commission on Law and Aging, 2018, available at: https://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_default_surrogate_consent_statutes.pdf
- 9 Default Surrogate Consent Statutes, ABA Commission on Law and Aging, 2018, available at: https://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_default_surrogate_consent_statutes.pdf
- 10 Id iv

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.
