



**SURROGATE DECISION MAKING
ADVANCED DIRECTIVES
AND GUARDIANSHIP**

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I. INTRODUCTION

A. The Importance of Capacity and the Role of Advanced Directives

All persons, regardless of age, health, and circumstances, should take the time to contemplate the need and appropriateness of having another person act in their stead should the circumstances require it. It is almost always preferable to make decisions about one's own care - whether it be financial management, health care, or asset management and disposition - rather than leaving those decisions to others, or to the government. Planning for each eventuality while mentally and physically capable, allows each person to have peace of mind in knowing his or her affairs are in order, and allows each person designated to act in the other's behalf to have clear guidance as to the other's wishes.

Capacity in New York State for the execution of legal documents is a fairly low threshold. A person must understand the nature of the document he or she is signing, and know the overall ramifications of doing so. For example, someone signing a Power of Attorney must know that the document he is signing is giving someone else the authority to make financial decisions for him. He does not need to understand that this means the agent may liquidate particular stock, or perform a particular task.

When a person is capable, and has not been declared incompetent, signing advanced directives can ensure that the person's wishes are followed with respect to his finances and health care decisions. Putting simple documents in place while capacity remains is a valuable and simple tool that can save lots of time, money, and struggle down the road if the person loses capacity. A Power of Attorney, Health Care Proxy, Living Will, Designation of Agent to manage disposition of

remains, and a Do Not Resuscitate Order are basic documents that may prove invaluable in the future. Executing these documents while capacity exists should be a priority of every able adult.

II. ADVANCED DIRECTIVES

A. Power of Attorney.

1. *What is a Power of Attorney?*

A Power of Attorney is a legal document that is used to delegate legal authority to another person. The person who executes a Power of Attorney is called the Principal. The Power of Attorney gives legal authority to another person (called an Agent or Attorney-in-Fact) to make property, financial and other legal decisions for the Principal.

A Principal can give an Agent broad legal authority, or very limited authority. The Power of Attorney is frequently used to help in the event of a Principal's illness or disability, or in legal transactions where the Principal cannot be present to sign necessary legal documents.

A Power of Attorney enables a Principal to decide in advance who will make important financial and business decisions in the future.

They are also helpful in avoiding the expense of having a court appoint a Guardian to handle the Principal's affairs in the event of incompetence or disability.

2. *Are there different types of powers of attorney?*

Yes. New York State recently amended the General Obligations Law, which is the law that creates a Power of Attorney. This new law, effective September 1, 2009, provides for one statutory short form Power of Attorney. This statutory form will be the most common Power of Attorney used. However, it is possible to modify or customize this statutory short form Power

of Attorney to meet your needs, and it is possible, although not advisable, in general, to use non-statutory Powers of Attorney.

3. *Statutory Short-Form Powers of Attorney.*

Effective September 1, 2009, New York State has adopted a statutory short form Power of Attorney. That means that the State Legislature has written a model form for a Power of Attorney, and that New Yorkers can rely on this statutory "short form" as being legal. This model form can be found in the New York General Obligations Law, beginning at Section 5-1501.

Printed short-form Powers of Attorney can also be purchased from legal stationers and office supply stores. However, due to the complex nature of Powers of Attorney, it may be more prudent to use the services of a skilled attorney to prepare a Power of Attorney for you.

Statutory "short-form" Powers of Attorney may also be customized to fit the needs of the Principal by adding to the powers that are listed on the statutory short-forms.

4. *Will a Power of Attorney be effective if I become incapacitated?*

The New York State statutory short form Power of Attorney is "durable." This means that the authority given under the document survives incapacity of the Principal. While it is possible to remove the durability provision of a Power of Attorney, it is advisable to leave such durability provisions in the document as this durability feature is used to plan for a Principal's future incapacity or disability and loss of competence resulting, for example, from Alzheimer's Disease or a catastrophic accident.

By appointing an Agent under a durable Power of Attorney, the Principal is establishing a procedure for the management of his or her financial affairs in the event of incompetence or disability.

5. *How can I tell if a Power of Attorney is a "Durable" one?*

The new provisions of the law, effective September 1, 2009, mandate that all statutory short form Powers of Attorney be durable, unless explicitly stated otherwise. For Powers of Attorney executed prior to September 1, 2009, the word "Durable" should appear somewhere on the document.

6. *What kinds of legal authority can be granted with a Power of Attorney?*

A Power of Attorney can be used to grant any, or all, of the following legal powers to an Agent:

- a. Buy or sell your real estate
- b. Manage your property
- c. Conduct your banking transactions
- d. Invest, or not invest, your money
- e. Make legal claims and conduct litigation
- f. Attend to tax and retirement matters

7. *Can a Power of Attorney grant an Agent the authority to make medical decisions for the Principal?*

No. In New York State, the proper legal instrument for delegating health care decisions to another is called a Health Care Proxy. There is a statutory short form approved by the State Legislature for that purpose.

8. *How do I select an Agent for a Power of Attorney?*

You should choose a trusted family member, a proven friend, or a professional with an outstanding reputation for honesty. Remember, signing a Power of Attorney that grants broad authority to an Agent is very much like signing a blank check.

9. *Can I appoint more than one Agent in a Power of Attorney?*

Yes. You may appoint multiple Agents. If you appoint two or more Agents, you must decide whether they must act together in making decisions involving your affairs, or whether each can act separately.

There are advantages and disadvantages to both forms of appointment. Requiring your Agents to act jointly can safeguard the soundness of their decisions. On the other hand, requiring agreement among each of your Agents can result in delay or inaction in the event of a disagreement among them, or the unavailability of one of them to sign legal documents.

Allowing your Agents to act separately may ensure that an Agent is always available to act for you. But it may also result in confusion and disagreements if the Agents do not communicate with one another, or if one of them believes that the other is not acting in your best interest.

The statutory short-form Power of Attorney provides space to appoint an alternate or substitute Agent. A substitute Agent can act if the first Agent is unable or unwilling to act for you. It is generally a good idea to appoint a substitute Agent.

Note: Powers of Attorney are only as good as the Agents who are appointed. Without a trustworthy Agent, a Power of Attorney becomes a dangerous legal instrument, and a threat to the Principal's best interests.

10. *Once I sign a Power of Attorney, may I continue to make legal and financial decisions for myself?*

Yes. The Agent named in a Power of Attorney is your representative, not your "boss." As long as you have the legal capacity to make decisions, you can direct your Agent to do only those things that you want done.

11. *What are an Agent's obligations to a Principal?*

The Agent is obligated to act in the best interests of the Principal, and to avoid any "self-dealing." Self-dealing means acting to further the selfish interests of the Agent, rather than the best interests of the Principal.

An Agent appointed in a Power of Attorney is a fiduciary, with strict standards of honesty, loyalty and candor to the Principal. An Agent must safeguard the Principal's property, and keep it separate from the Agent's personal property. Money should be kept in a separate bank account for the benefit of the Principal. Agents must also keep accurate financial records of their activities, and provide complete and periodic accountings for all money and property coming into

their possession. The statutory short form Power of Attorney in effect as of September 1, 2009 contains a page clearly listing the Agent's fiduciary duties to the Principal. Even if an Agent is acting under a Power of Attorney executed prior to September 1, 2009, the Agent is still bound by these fiduciary duties.

Make clear to your Agent that you want accurate records of all transactions completed for you, and to give you periodic accountings. You can also direct your Agent to provide an accounting to a third party-a member of your family or trusted friend-in the event you are unable to review the accounting yourself. The statutory short form Power of Attorney in effect as of September 1, 2009, also permits for the appointment of a Monitor. A Monitor is a person who will not have a fiduciary duty to the Principal, but will be given the authority to review the Agent's actions. The Monitor may request statements from financial institutions, and may even request the Agent to account for his or her actions.

12. *Is it possible for an Agent to steal my money and property?*

Yes. A Power of Attorney can be abused, and dishonest Agents have used Powers of Attorney to transfer the Principal's assets to themselves and others. That is why it is important to appoint an Agent who is trustworthy, and to require the Agent to provide complete and periodic accountings to you or to a third party.

13. *Can a transfer of a Principal's assets to other people be a good thing?*

Yes. A Principal may want to authorize transfers or gifts of property for estate planning, long term care planning, and other valid purposes. The new law governing Powers of Attorneys, effective September 1, 2009, mandates that any authority the Principal wishes to give the

Agent with regard to gifting must be done in a separate document, called the Statutory Major Gifts Rider. This Statutory Major Gifts Rider is a separate document, executed by the Principal at the same time as the Power of Attorney, and witnessed by two individuals not named as Agents or potential recipients of gifts under the document. This Statutory Major Gifts Rider can permit gifts to persons other than the Agent, to the Agent, or to both. The Principal is able to limit the amount and types of gifts, or can include broad gifting authority. A properly drafted and executed Statutory Major Gifts Rider is vital if the Principal wishes the Agent to engage in estate or long term care planning that will involve transfer of assets or gifting.

14. *Who monitors the actions of my Agent?*

As mentioned above, the new law effective September 1, 2009, permits the Principal to name a Monitor to oversee the actions of the Agent.

Should a Principal, member of the Principal's family, or a friend have grounds to believe that an Agent is misusing a Power of Attorney, there are provisions in the new law that permit a lawsuit to be brought in Court seeking to hold the Agent accountable. The law makes provisions for who can bring the lawsuit and lists the remedies available if it is discovered that the Agent acted inappropriately.

15. *What can I do if my Agent does not follow my instructions?*

- a. Revoke your Power of Attorney;
- b. Inform your Agent, in writing, that you are revoking the Power of Attorney;
- c. Request the return of all copies of your Power of Attorney.

d. Notify your bank or other financial institution where your Agent has used the Power of Attorney, that it has been revoked.

e. File a copy of the revocation with the County Clerk if your Power of Attorney has been filed in the Clerk's office.

16. *Am I required to file a Power of Attorney in a government office?*

No. It is not required that a Power of Attorney be recorded with any government agency unless the Power of Attorney is used in a real estate transaction. In that case, it must be filed in the County Clerk's office. And when you file in the County Clerk's office, the Power of Attorney is a public record open to inspection by the public. A writing that revokes a filed Power of Attorney should also be filed in the County Clerk's office.

If you file a Power of Attorney in the County Clerk's office, you will be able to get additional "certified" copies from the County Clerk for a small fee. A certified copy is legally equivalent to the original document. It is often convenient to have certified copies of your Power of Attorney on hand.

17. *How many copies of a Power of Attorney should I sign?*

You are required to sign (execute) only one copy. However, it is not unusual for a Principal to sign several original copies. Banks and financial institutions, for example, generally require an original or a certified copy before allowing an Agent to transact business on the Principal's behalf. And banks frequently provide customers with their own Power of Attorney forms.

18. *Do I need to have my signature witnessed on a Power of Attorney?*

Yes. Your signature on the Power of Attorney must be witnessed by a Notary Public.

19. *Does my Agent have to sign my Power of Attorney?*

Yes. The authority that you grant your Agent under a Power of Attorney executed after September 1, 2009 does not take effect until the Agent has signed the document. It is not necessary to have the Agent sign at the same time as the Principal, although it may be advisable to do so based upon your own particular circumstances.

20. *Do I need a lawyer to prepare a Power of Attorney?*

No. You're not required to hire a lawyer. However, because a Power of Attorney is such an important legal instrument, the careful consumer will consult a lawyer who can:

- a. provide legal and other advice about the powers that are appropriate to be delegated;
- b. provide counsel on the choice of an Agent;
- c. outline the Agent's legal and fiduciary obligations while acting under a Power of Attorney; and
- d. ensure that the Power of Attorney is properly executed and meets all legal requirements.

B. Health Care Proxy/Living Will

1. *Why should I choose a Health Care Agent?*

If you become unable, even temporarily, to make health care decisions, someone else must make such decisions on your behalf. Health care providers often look to family members for guidance. While family members may express what they think your wishes are related to a particular treatment, only a duly appointed Health Care Agent has the legal authority to make such treatment decisions in the event you are unable to make such decisions.

- a. Appointing an Agent lets you control your medical treatment by:
 - (1) allowing your Agent to make health care decisions on your behalf as you would want them decided;
 - (2) choosing the person who will make such decisions;
 - (3) choosing one person to avoid conflict or confusion among family members and/or significant others.

You may also appoint an alternate agent to take over if your first choice cannot make decisions for you.

2. *Who can be a Health Care Agent?*

Anyone 18 years of age or older can be a Health Care Agent.

3. *How do I appoint a Health Care Agent?*

All competent adults, 18 years of age or older, can appoint a Health Care Agent by signing a form called a Health Care Proxy. You may only appoint one (1) Health Care Agent to act at any one time, but it is recommended that you name a primary agent and a successor/alternate agent in the event your primary agent is unable to act.

4. *When would my Health Care Agent begin to make health care decisions for me?*

Your Health Care Agent would begin to make health care decisions after your doctor decides that you are not able to make your own health care decisions. As long as you are able to make health care decisions for yourself, however, you will have the right to do so.

5. *What decisions can my Health Care Agent make?*

Unless you limit your Health Care Agent's authority, your Agent will be able to make any health care decision that you could have made if you were able to decide for yourself. Your Agent can agree that you should receive treatment, choose among different treatments and decide which treatments should not be provided, in accordance with your wishes and interests. However, your Agent can only make decisions about artificial nutrition and hydration (nourishment and water provided by feeding tube or intravenous line) if he or she knows your wishes. The Health Care Proxy form does not give your Agent the power to make non-health care decisions for you, such as financial decisions.

6. *Why do I need to appoint a Health Care Agent if I'm young and healthy?*

Appointing a Health Care Agent is a good idea even though you are not elderly or terminally ill. A Health Care Agent can act on your behalf if you become even temporarily unable to make your own health care decisions (such as in the event you are under general anesthesia or have become comatose because of an accident). When you again become able to make your own health care decisions, your Health Care Agent will no longer be authorized to act.

7. *How will my Health Care Agent make decisions?*

Your Agent must follow your wishes, as well as your moral and religious beliefs. You may write instructions on your Health Care Proxy form, Living Will or simply discuss them with your Agent.

8. *How will my Health Care Agent know my wishes?*

Having an honest discussion about your wishes with your Health Care Agent will put him or her in a better position to serve your interests. If your Agent does not know your wishes or beliefs, your Agent is legally required to act in your best interest. Because this is a major responsibility for the person you appoint as your Health Care Agent, you should have a discussion with the person about what types of treatments you would or would not care to receive under different types of circumstances, such as:

- a. whether you would want life support initiated/continued/removed if you are in a permanent coma;
- b. whether you would want treatments initiated/continued/removed if you have a terminal illness;
- c. whether you would want artificial nutrition and hydration initiated/withheld or continued or withdrawn and under what types of circumstances.

9. *Can my Health Care Agent overrule my wishes or prior treatment instructions?*

No. Your Agent is obligated to make decisions based on your wishes. If you clearly expressed particular wishes, or gave particular treatment instructions, your Agent has a duty

to follow those wishes or instructions unless he or she has a good faith basis for believing that your wishes changed or do not apply to the circumstances.

10. *Who will pay attention to my Agent?*

All hospitals, nursing homes, doctors and other health care providers are legally required to provide your Health Care Agent with the same information that would be provided to you and to honor the decisions by your Agent as if they were made by you. If a hospital or nursing home objects to some treatment options (such as removing certain treatment) they must tell you or your Agent BEFORE or upon admission, if reasonably possible.

11. *What if my Health Care Agent is not available when decisions must be made?*

You may appoint an alternate agent to decide for you if your Health Care Agent is unavailable, unable or unwilling to act when decisions must be made. Otherwise, health care providers will make health care decisions for you that follow instructions you gave while you were still able to do so. Any instructions that you write on your Health Care Proxy form will guide health care providers under these circumstances.

12. *What if I change my mind?*

It is easy to cancel your Health Care Proxy, to change the person you have chosen as your Health Care Agent or to change any instructions or limitations you have included on the form. Simply fill out a new form. In addition, you may indicate that your Health Care Proxy expires on a specified date or if certain events occur. Otherwise, the Health Care Proxy will generally be valid indefinitely.

13. *Can my Health Care Agent be legally liable for decisions made on my behalf?*

No. Your Health Care Agent will not be liable for health care decisions made in good faith on your behalf. Also, he or she will not be personally responsible for the cost of your care.

14. *Is a Health Care Proxy the same as a Living Will?*

No. A Living Will is a document that provides specific instructions about health care decisions in the event you become gravely ill. The Health Care Proxy allows you to choose someone you trust to make health care decisions on your behalf. Unlike a Living Will, a Health Care Proxy does not require that you know in advance all the decisions that may arise. Instead, your Health Care Agent can interpret your wishes as medical circumstances change and can make decisions you could not have known would have to be made.

15. *Where should I keep my Health Care Proxy form after it is signed?*

Give a copy to your Agent, your doctor, your attorney and any other family members or close friends you want. Keep a copy in your wallet or purse or with other important papers, but not in a location where no one can access it, like a safe deposit box. Bring a copy if you are admitted to the hospital, even for minor surgery, or if you undergo outpatient surgery.

16. *May I use the Health Care Proxy form to express my wishes about organ and/or tissue donation?*

Yes. Use the optional organ and tissue donation section on the Health Care Proxy form. You may specify that your organs and/or tissues be used for transplantation, research

or educational purposes. Any limitation(s) associated with your wishes should be noted in this section of the proxy.

Failure to include your wishes and instructions on your Health Care Proxy form will not be taken to mean that you do not want to be an organ and/or tissue donor.

17. *Can my Health Care Agent make decisions for me about organ and/or tissue donation?*

Yes, and No. The power of a Health Care Agent to make health care decisions on your behalf ends upon your death. Therefore, the Agent cannot make decisions concerning your body after death. However, while you are living, your Agent can express your wishes as he or she knows them to be. Noting your wishes on your Health Care Proxy form allows you to clearly state your wishes about organ and tissue donation.

18. *Who can consent to a donation if I choose not to state my wishes at this time?*

It is important to note your wishes about organ and/or tissue donation so that family members who will be approached about donation are aware of your wishes. However, New York Law provides a list of individuals who are authorized to consent to organ and/or tissue donation on your behalf.

C. DNR Orders

1. *What is a DNR Order?*

A do-not-resuscitate (DNR) order tells medical professionals not to perform CPR. This means that doctors, nurses and emergency medical personnel will not attempt emergency

CPR if the patient's breathing or heartbeat stops. CPR ("cardiopulmonary resuscitation") refers to the medical procedures used to restart a patient's heart and breathing when the patient suffers heart failure. CPR may involve simple efforts such as mouth-to-mouth resuscitation and external chest compression. Advanced CPR may involve electric shock, insertion of a tube to open the patient's airway, injection of medication into the heart and in extreme cases, open chest heart massage.

DNR orders may be written for patients in a hospital or nursing home, or for patients at home. Hospital DNR orders tell the medical staff not to resuscitate the patient if cardiac arrest occurs. If the patient is in a nursing home or at home, a DNR order tells the staff and emergency medical personnel not to perform emergency resuscitation and not to transfer the patient to a hospital for CPR.

2. *Why are DNR orders issued?*

CPR, when successful, restores heartbeat and breathing and allows a patient to resume his/ her previous lifestyle. The success of CPR depends on the patient's overall medical condition. Age alone does not determine whether CPR will be successful, although illnesses and frailties that go along with age often make CPR less successful.

When patients are seriously ill or terminally ill, CPR may not work or may only partially work, leaving the patient brain-damaged or in a worse medical state than before the heart stopped. In these cases, some patients prefer to be cared for without aggressive efforts at resuscitation.

3. *Can I request a DNR order?*

Yes. All adult patients can request a DNR order. If you are sick and unable to tell your doctor that you want a DNR order written, a family member or close friend can decide for you.

4. *Is my right to request or receive other treatment affected by a DNR order?*

No. A DNR order is only a decision about CPR and does not relate to any other treatment.

5. *Is my consent required for a DNR order?*

Your doctor must speak to you before entering a DNR order if you are able to decide, unless your doctor believes that discussing CPR with you would cause you severe harm. In an emergency, it is assumed that all patients would consent to CPR. However, if a doctor decides that CPR will not work, it is not provided.

6. *How can I make my wishes about DNR known?*

During hospitalization, an adult patient may consent to a DNR order orally or in writing, if two adult witnesses are present. When consent is given orally, one of the witnesses must be a physician affiliated with the hospital. Prior to hospitalization, consent must be in writing in the presence of two adult witnesses. In addition, the Health Care Proxy Law allows you to appoint someone you trust to make decisions about CPR and other treatments if you become unable to decide for yourself.

Before deciding about CPR, you should speak with your doctor about your overall health and the benefits and burdens CPR would provide for you. A full and early discussion between you and your doctor will assure that your wishes will be known.

7. *If I request a DNR order, must my doctor honor my wishes?*

If you don't want CPR and you request a DNR order, your doctor must follow your wishes or:

- a. transfer your care to another doctor who will follow your wishes; or
- b. begin a process to settle the dispute if you are in a hospital or nursing home.

8. *If I am not able to decide about CPR for myself, who will decide?*

First, two doctors must determine that you are unable to decide about CPR. You will be told of this determination and have the right to object.

If you become unable to decide about CPR, and you did not tell your doctor or others about your wishes in advance, a DNR order can be written with the consent of the person highest on the following list:

- a. your Health Care Agent – the person chosen by you to make health care decisions under New York's Health Care Proxy Law (if you have appointed one)
- b. a court appointed Guardian (if there is one)
- c. your closest relative (spouse, child, parent, sibling)
- d. a close friend

9. *How can I select someone to decide for me?*

The Health Care Proxy Law allows adults to select someone they trust to make health care decisions for them when they are no longer able to do so themselves, including decisions about CPR. You can name someone by filling out a health care proxy form.

10. *Under what circumstances can a family member or close friend decide that a DNR order should be written?*

A family member or close friend can consent to a DNR order only when you are unable to decide for yourself and you have not appointed a Health Care Agent to decide for you.

Generally, your family member or friend can consent to a DNR order when:

- a. you are terminally ill; or
- b. you are permanently unconscious; or
- c. CPR will not work (would be medically futile); or
- d. CPR would impose an extraordinary burden on you given your medical

condition and the expected outcome of CPR

Anyone deciding for you must base the decision on your wishes, including your religious and moral beliefs, or, if your wishes are not known, on your best interests.

11. *What if members of my family disagree?*

In a hospital or nursing home, your family can ask that the disagreement be mediated. Your doctor can request mediation if he or she is aware of any disagreement among your family members.

12. *What if I lose the ability to make decisions about CPR and do not have anyone who can decide for me?*

A DNR order can be written if two doctors decide that CPR would not work or if a court approves of the DNR order. It would be best if you discussed your wishes about CPR with your doctor in advance.

13. *What happens if I change my mind after a DNR order has been written?*

You or anyone who consents to a DNR order for you can revoke consent for the order by telling your doctor, nurses or others of the decision.

14. *What happens to a DNR order if I am transferred from a nursing home to a hospital or vice versa?*

The DNR order will continue until a doctor examines you and decides whether the order should remain or be canceled. If the doctor decides to cancel the DNR order, you or anyone who decided for you will be told and can ask that the DNR order be entered again.

15. *If I am at home with a non-hospital DNR order, what happens if a family member or friend panics and calls an ambulance to resuscitate me?*

If you have a non-hospital DNR order and family members show it to emergency personnel, they will not try to resuscitate you or take you to a hospital emergency room for CPR.

16. *What happens to my DNR order if I am transferred from a hospital or nursing home to home care?*

The order issued for you in a hospital or nursing home will not apply at home. You, your Health Care Agent or family member must specifically consent to a non-hospital DNR order. If you leave a hospital or nursing home without a non-hospital DNR order, a DNR order can be issued by a doctor for you at home.

D. Disposition of Remains.

1. *Who has authority to determine what happens to my remains after death?*

Absent your written direction, New York state law says that the following people, in the following order, have authority to make decisions regarding the disposition of another's remains: the surviving spouse; the surviving domestic partner; any surviving children eighteen years of age or older; either surviving parents; any surviving siblings eighteen years of age or older; a guardian appointed by the Court; anyone eighteen years of age or older who would be entitled to share in your estate (with the person closest in relationship having the highest priority); a duly appointed fiduciary of yours (Executor, Trustee); or, in some rare circumstances, a close friend or relative who is reasonably familiar with your wishes, including your religious or moral belief.

2. *How can I express my wishes?*

You may execute a document called "Appointment of Agent to Control Disposition of Remains" in which you can specify who you would like to make those decisions on your behalf. This document will also give you an opportunity to express any wishes you may have concerning the disposition of your remains.

3. *Is inclusion of my wishes in my Last Will and Testament Sufficient?*

If your Will is specific enough to demonstrate your intentions, that it may serve in place of a separate designation. There are risks, however, with using this approach. If your Will is lost, or if you have executed a later Will without carrying forward the disposition direction, your wishes may not be followed. In addition, if your Will is not readily available and the contents of it known, your wishes may not be followed.

4. *What is considered a “disposition of remains”?*

Disposition of remains means the care, disposal, transportation, burial, cremation or embalming of the body of a deceased person, and associated measures.

5. *Are there penalties against someone if they do not follow my wishes?*

If a person acts reasonably and in good faith, that person will not be liable for any mistaken acts. However, any dispute over the disposition of remains will be settled in an appropriate Court.

E. Revocable Living Trust.

1. *What is a Revocable Living Trust?*

A Living Trust is an arrangement in which a person transfers ownership of his or her assets from themselves to another entity, the Trust. The person creating the Trust is the Grantor. The person who manages the Trust is called the Trustee. The person for whose benefit the Trust is being managed is called the Beneficiary. The same person can be Grantor, Trustee and Beneficiary.

Thus, you can set up a Trust with your own assets and retain complete management and control of the assets by acting as your own Trustee, or you can designate someone else as Trustee to manage the assets for you.

It is called a “Living Trust” because it is created during the Grantor's lifetime. This is different from a “Testamentary Trust” which is created upon the death of the Grantor.

2. *How does a Living Trust function as a management device if I am incapacitated?*

In the event that you are incapacitated, the Trust can provide for an alternate Trustee, whom you have selected, who will manage the Trust funds for you. The Trust document should spell out how the determination of incapacity is made.

3. *How does a Living Trust serve as a substitute for a Will?*

The Trust document provides for the distribution of the Grantor's assets upon the Grantor's death. On the death of the Grantor, the Trustee distributes the Trust assets directly to the Beneficiaries designated in the Trust instrument. There is no automatic court supervision or probate of this distribution process as there is under a Will. Generally, use of a Trust is faster and less costly than the distribution of assets pursuant to a Will.

Note: In order for a Living Trust to function as a Will substitute and avoid probate, your assets must be transferred into the Living Trust during your lifetime.

4. *Does a Living Trust save taxes?*

You can utilize the same tax planning strategies in a Will as in a Living Trust. The use of a Living Trust does not in and of itself save taxes, but a Living Trust may be one vehicle for tax planning.

5. *Can a Living Trust be used to obtain Medicaid benefits?*

People who are facing the need for long-term custodial care often explore Medicaid as a source of coverage. Putting your own assets into a Revocable Living Trust does not shield or protect those assets for Medicaid purposes.

6. *Who can serve as a Trustee of a Living Trust?*

A Trustee can be an individual, such as you, a family member or friend, or it can be a bank or other financial institution. If you choose an individual to serve as your Trustee, your Trustee should be trustworthy and able to manage your assets. Some people prefer a neutral third party, such as a bank or trust company. Trustees are entitled to fees.

7. *Is a Living Trust right for everyone?*

For some people, a Living Trust is an ideal arrangement both for management of assets and as a Will substitute. However, it is not right for everyone. Under a Living Trust, the Trustee who manages the assets has an obligation to use Trust assets only for the Beneficiary's benefit, but there is no ongoing court supervision of the Trustee. Thus, there is less protection in case of mismanagement of assets than there is in a Guardianship.

Also, a Living Trust is more costly to have drafted than a Will. These are costs that you will pay up front, as opposed to probate costs, which are paid after a person's death by his

or her heirs. In the long run, the cost of a Will and the cost of a Living Trust may be about the same. Furthermore, in order for a Living Trust to function effectively, it must be fully funded. This entails, in some cases, considerable effort on behalf of the Grantor to transfer assets into the trust.

8. *If I have a Living Trust, do I need a Will?*

Although a Living Trust functions as a Will substitute, it is necessary even with a Living Trust to have a “pour-over” Will. A pour-over Will makes sure that any assets that were not transferred into the Trust during the Grantor's lifetime are poured over into the Trust on the Grantor's death. If all of the Grantor's assets have been transferred into the Trust during the Grantor's lifetime, the pour-over Will will never be used or admitted into probate.

9. *If I have a Living Trust, do I still need a Durable Power of Attorney for Property?*

It is usually advisable to have a Durable Power of Attorney for Property in addition to the Living Trust. This is because some decisions that must be made on your behalf do not fall within the powers of a Trustee.

10. *If I have a Living Trust, do I still need a Health Care Proxy?*

Yes. A Trustee under a Living Trust does not have the authority to make medical decisions on behalf of the Grantor. A Trustee can use Trust assets to pay for medical care, but they cannot make medical decisions. If you would like your Trustee to make medical decisions for you, you will need to appoint him or her as your Health Care Agent through a separate Health Care Proxy.

III. THE PROCRASTINATOR'S PENANCE

A. Guardianship

1. *What is it?*

Guardianship is a legal process whereby an individual is judicially declared incompetent to make one or more decisions for himself or herself.

2. *When is Guardianship necessary?*

The appointment of a Guardian is necessary when an individual loses the capacity to make decisions for himself or herself and has failed to adequately create Advanced Directives in favor of persons capable of making such decisions on his or her behalf.

3. *How is a Guardian Appointed?*

A Guardian is appointed by the court. Typically, upon application, the court will appoint a person, known as a "Court Evaluator" to interview the allegedly incapacitated person. After the investigation by the Court Evaluator, the court will entertain a hearing to determine whether the appointment of a Guardian is necessary to provide for the personal needs and/or to arrange the property and financial affairs of the allegedly incapacitated person. The allegedly incapacitated person must consent or prove to be "incapacitated."

4. *What does it mean to be incapacitated?*

The definition of incapacity varies from state to state. In New York State, incapacity must be established by clear and convincing evidence, and based upon a finding that the allegedly incapacitated person is likely to suffer harm because of being unable to provide for his or her own personal needs and/or property management and cannot adequately understand and

appreciate the nature and consequences of such inability. A person cannot be declared incompetent merely because he or she makes irresponsible or foolish decisions. For example, a person may not be declared incompetent simply because he or she spends money in ways that seem odd to someone else. Also, a developmental disability or mental illness is not, by itself, enough to declare a person incompetent.

5. *What powers may the Court confer on the Guardian?*

The Guardian may be authorized to make legal, financial, and health care decisions for the incapacitated person. Depending on the terms of the Guardianship, the Guardian may or may not have to seek court approval for various decisions.

The powers conferred on the Guardian must be designed to accomplish the least restrictive form of intervention and limited to only the necessary powers. Such powers are divided into two categories - Property Management and Personal Needs. Examples of Property Management powers would include the authority to make gifts, create revocable or irrevocable trusts, exercise or renounce inheritance rights, and apply for government benefits. A concern for many is the preservation of assets. In this regard, courts have generally permitted Guardians to engage in Medicaid planning. Powers of a Guardian to provide for Personal Needs may include the ability to consent or refuse routine major medical or dental treatment, or choose a place of abode - e.g. a nursing home. However, a Guardian for Personal Needs generally may not revoke a Power of Attorney, a DNR Order, Health Care Proxy or Living Will.

6. *Who may serve as the Guardian?*

A Guardian can be any competent adult—the incapacitated person’s spouse, another family member, a friend, a neighbor, or a professional Guardian (an unrelated person who has received special training).

The Guardian need not be a person at all—it can be a non-profit agency or a public or private corporation. If a person is found to be incapacitated and a suitable Guardian cannot be found, courts in many states can appoint a public Guardian, a publicly financed agency that serves this purpose. In naming someone to serve as a Guardian, courts give first consideration to those who play a significant role in the incapacitated person’s life—people who are both aware of and sensitive to the incapacitated person’s needs and preferences. If two individuals wish to share Guardianship duties, courts can name co-Guardians.

7. *What are the duties of the Guardian?*

Guardians are expected to act in the best interests of the incapacitated person, but given the Guardian’s often broad authority, there is the potential for abuse. For this reason, courts hold Guardians accountable for their actions to ensure that they don’t take advantage of or neglect the incapacitated person. The Guardian must file periodic reports with the Court to demonstrate that the Guardian is properly performing his or her Guardianship duties. If the Guardian is performing poorly the Court may remove the Guardian.

IV. CONCLUSION

Taking the time to consider, and even execute, basic advance directives can be a valuable tool for your family, friends, and trusted confidantes as they try to honor your wishes and make decisions on your behalf when you are unable to do so. While the decisions as to whom to appoint and the authority to vest in them may seem daunting at first blush, the task is best suited to you during your capacity and can give those persons who agree to act on your behalf the comfort and guidance they need to carry out your wishes. Discussion and understanding of advanced directives is key, and a trusted and compassionate attorney can guide you through the process of evaluating, customizing, and executing these, and other estate planning and long term care planning documents. We, at Burke & Casserly, P.C, invite you to allow us to assist you in this very important and valuable endeavor and encourage you to contact us for a free one-half hour initial consultation to begin the process.

BIBLIOGRAPHY

AARP (2001). Wills and Living Trusts, www.aarp.org

Elder Law Answers (2001). Estate Planning, www.elderlawanswers.com

Family Caregiver Alliance (2004), <http://www.caregiver.org>

Your Rights as a Hospital Patient in New York State, (2004), <http://www.health.state.ny.us>

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