



**ADVANCED DIRECTIVES  
AND GUARDIANSHIP**

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# Advance Directives and Guardianship

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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.

Signing advance 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, and Designation of Agent to manage disposition of remains are basic documents that may prove invaluable in the future. Executing these documents while capacity exists should be a priority of every able adult.

## **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) to make property, financial and other legal decisions for the Principal.

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.

In 2009, New York State amended the General Obligations Law, which is the law that creates a Power of Attorney. This new law provides for one statutory short form Power of Attorney. Due to the complex nature of Powers of Attorney, it is advised to use the services of a skilled attorney to prepare a Power of Attorney for you. Statutory "short-form" Powers of Attorney may be customized to fit the needs of the Principal by adding to the powers that are listed on the statutory short-forms.

The New York State statutory short form Powers of Attorney are "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 setting up a procedure for the management of his or her financial affairs in the event of incompetence or disability. 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.

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

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. 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.

A Principal may want to authorize transfers or gifts property for estate planning, long term care planning, and other valid purposes. The 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. 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.

Because a Power of Attorney is such an important legal instrument, the careful consumer will consult a lawyer who can:

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

## **Health Care Proxy**

A Power of Attorney allows you to designate an Agent to act on your behalf with respect to legal and financial decisions but does not cover health care decisions. All competent adults, 18 years of age or older, can appoint a Health Care Agent by signing a form called a Health Care Proxy. 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.

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

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.

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.

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. 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:

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

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.

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.

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.

## **Disposition of Remains**

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.

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.

## **Guardianship, (THE PROCRASTINATOR'S PENANCE)**

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



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."

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.

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.

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.

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).

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.

## **Conclusion**

In 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 advance 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.