

Elder & Special Needs Law: Considerations for Caregivers

Healthcare Power of Attorney, Living Will, & Advance Directive

What are these documents?

- They give another person the authority to make healthcare decisions in the event the principal is unable to make those decisions.

Important things to look for:

- Does your document name a successor agent?
- Is it HIPPA compliant?
- Does it provide for cremation if the Principal wants to be cremated?
- Does it specify the Principal's wishes as to end-of-life issues such as feeding tubes, pain control, and other issues?

What if someone does not have these documents?

- Healthcare surrogate: chosen by physician
- Conservatorship

Financial Power of Attorney

What is this document?

- Gives another person (the Agent) authority to make financial decisions for the Principal.
- Can be limited or broad. The document controls the Agent's authority.
- "Durability" means it remains effective even when the Principal is incapacitated or incompetent (when it is really important).

Important things to look for:

- When is it effective?
 - Immediately or upon Principal's disability?
- Does it include at least one successor agent?
- Does it include an accounting clause so that the Agent must account to someone else for fund management?
- What authority does the Agent have?
 - Make property transfers
 - Establish trusts and make transfers to the trust
 - Make gifts

Important Considerations When Choosing Agents

Healthcare and Financial Agents

- Time and interest
- Successor Agent
- Avoid dual Agent when possible
- The Agent needs to know they have been appointed
- The Agent needs to know where important documents are kept

Financial POA

- Financially stable and sophisticated
- Honesty and trustworthy
- Organized

Healthcare Agent

- Is the person accessible?
- Can the person handle the weight of end-of-life care decisions?

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Wills

What is this document?

- Contains your wishes as to the distribution of your real and personal property after you pass away
- Must be properly executed (signed and witnessed)
- Must have “testamentary capacity” to make a Will

Important things to look for:

- Description of immediate family
- Appointment of Executor and Successor
- Appointment of guardian for minor or disabled children
- Appointment of a Trustee and successor, if applicable

Common questions:

- What happens if I die without a Will?
- What is probate?
- Is a handwritten Will a good idea?

Trusts

What is this document?

- A separate legal entity that can own assets

How does it work?

- Used to manage assets for an individual’s benefit
- Authority to act
- Established during life or at death

Three roles:

- Grantor
- Trustee
- Beneficiary

Supplemental Needs Planning/Trusts

What is this document?

- Used to improve the quality of an individual’s life without disqualifying him/her from eligibility for public benefits
- When properly created and funded, the disabled person can continue to receive government benefits that are means tested such as Supplemental Security Income (SSI) and TennCare Medicaid benefits, either currently or in the future.
- The funds in the special needs trust are used to provide for the disabled person's "supplemental needs." There are restrictions on the use of the funds.
- Fully discretionary distribution standard, all spending is in the Trustee’s discretion
- Beneficiary can never be the Trustee

Self-Settled Trusts

- Person is under 65
- “Payback provision”

Third party trusts for the benefit of another person of any age

- For a spouse, only in a Will
- Anyone else in the world, at any time