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# Advance Directives & Guardianships

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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 – lifetime financial management, health care, or wealth distribution at death – rather than leaving those decisions to others, or to the government. Planning for each eventuality while 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. Powers of Attorneys are state-specific contracts, governed by state law. In 2009, New York State amended the Power of Attorney statute when it amended New York's General Obligations Law Article 5, Title 15. A further revision occurred in 2010. These revisions attempted to clarify the rights and responsibilities of the parties to the Power of Attorney. The law also provided a statutory short form Power of Attorney, and introduced an additional document called the "Statutory Gifts Rider," which is required when the Agent under the Power of Attorney is to make gifts or transfers of the Principal's assets. Many persons are unaware of this nuance, and many persons are unaware of what is considered a gift under the law for which the Statutory Gifts Rider must be used.

Due to the complex nature of Powers of Attorney, it is advised to use the services of an experienced attorney to prepare a Power of Attorney. 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" by default, even though that word no longer appears at the top of the document. Durable indicates that the authority given to the Agent remains in effect even if the Principal becomes incapacitated. While it is possible to override 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 encourages the appointment of a Successor Agent in the event that the primary Agent is unable or unwilling to act for the Principal. It is also our firm's practice to recommend the appointment of a Successor Agent.

The selection of an Agent and Successor Agent should be done with care. Oftentimes, a trusted family member, a proven friend, or a professional with an outstanding reputation for honesty are good options for this important fiduciary responsibility. Signing a Power of Attorney is sometimes likened to signing a blank check – and it is critical that the person who receives the power as Agent is going to act in the Principal's best interests. 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. The courts have examined what constitutes an Agent acting in the Principals' "best interests" and Agents needs to be aware of these cases and their obligations to the Principals they serve. 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.

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

If a person becomes unable, even temporarily, to make health care decisions, someone else must make those decisions. A Power of Attorney does not enable the Agent to make health care decisions. It is important that all competent adults, 18 years of age or older, appoint a Health Care Agent by signing a form called a Health Care Proxy. Health care providers often look to family members for guidance. While New York law has a default order of priority for health care decision making in a hospital setting under the Family Health Care Decisions Making Act, the law does not extend beyond the four walls of the hospital and does not distinguish among members of the same group. For example, the FHCDA says an adult child may make decisions for a parent if there is no spouse of the parent available, but fails to say what happens if there are multiple adult children.

While the FHCDA is important, it is insufficient. Appointing an Agent under a Health Care Proxy allows the Principal to control future medical treatment and care by designating an Agent to make health care decisions and specifying the types of decisions desired. Selecting the person who will serve as Agent and make health care decisions often leads to increased quality of health care and quality of life, and often reduces conflict or confusion among family members and/or significant others.

It is only possible to appoint one (1) Health Care Agent to act at any one time, but it is recommended that an alternate Health Care Agent be appointed in the event the primary Agent is unable to act.

Appointing a Health Care Agent through a Health Care Proxy is advisable for *anyone* over the age of 18, not just the elderly or terminally ill. A Health Care Agent can act on the Principal's behalf temporarily (for example, in the event the Principal is under general anesthesia or have become comatose because of an accident), or permanently after a medical doctor opines that the

Principal is unable to make informed medical decisions. In situations of temporary incapacity, upon the Principals regaining the ability to make own health care decisions, the Health Care Agent's authority will be suspended.

A Health Care Proxy Agent must follow the wishes of the Principal, as well as the Principal's moral and religious beliefs. Instructions may be written on the Health Care Proxy form itself or memorialized in a Living Will. Clients who are uncomfortable writing down instructions are advised to discuss these difficult issues with the Agent. Having an honest discussion about medical wishes with the Health Care Agent will put the Agent in the best position to carry out the Principal's wishes. If the Agent does not know the Principal's wishes or beliefs, the Agent is legally required to act in the Principal's best interest. Because this is a significant responsibility for the Health Care Agent, discussion should be had with the Agent, before surrogate decisions need to be made, about what types of treatments the Principal would or would not care to receive under different types of circumstances, such as:

1. whether life support should be initiated, continued, or removed if the Principal is in a permanent coma;
2. whether treatments should be initiated, continued, or stopped if the Principal has a terminal illness;
3. whether artificial nutrition and hydration should be initiated, withheld, continued or withdrawn and under what types of circumstances.

If there is a clear expression of particular wishes, or particular treatment instructions are provided, the Agent has a duty to follow those wishes or instructions unless he or she has a good faith basis for believing that the Principal's wishes have changed or do not apply to the circumstances.

All hospitals, nursing homes, doctors and other health care providers are legally required to provide any Health Care Agent with the same information that would be provided to the Principal and to honor the decisions by the Agent as if those decisions were made by the Principal.

A copy of an executed Health Care Proxy document should be given to the Agent, a Principal's primary care doctor and any specialists, the Principal's attorney and any other family members or close friends. Keep a copy easily accessible and another copy with other important papers, but do not place it in a location where it cannot be easily accessed, such as a safe or safe deposit box. It would be preferable to bring a copy of the Health Care Proxy document upon admission to a hospital or upon meeting a new provider, even if the Agent is fully competent. It is important to remember that execution of a new Health Care Proxy revokes all prior Health Care Proxies, so having a single, comprehensive Health Care Proxy is recommended.

## **Disposition of Remains**

Making plans for your final resting place is often a concern for those making putting an estate plan in place. Absent 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 the deceased's wishes, including religious or moral beliefs.

Many persons preplan their funerals with a licensed funeral director. In the absence of such preplan, it is possible for a person to execute a document called “Appointment of Agent to Control Disposition of Remains,” specifying who would make funeral arrangements. This document is also an opportunity to express any wishes concerning the disposition of remains and funeral arrangements.

## **Guardianship (*THE PROCRASTINATOR’S PENANCE!*)**

Guardianship is a legal process whereby an individual (1) agrees that someone needs to be appointed to handle his or her financial affairs or personal decisions or (2) is judicially declared incompetent to make one or more of those types of decisions for himself or herself. The appointment of a Guardian is necessary when an individual loses the capacity to make decisions and has failed to adequately create advanced directives. Occasionally, even when advanced directives are in place, guardianship is needed if those appointed under the advanced directives fail to act or act in appropriately.

A Guardian is appointed by the court. Typically, upon application, the court will appoint a neutral person, known as a “Court Evaluator” to investigate the allegations made in the papers filed with the Court. After the investigation by the Court Evaluator, the Court will hold a hearing to determine whether the appointment of a Guardian is necessary to provide for the personal needs and/or the property management of the allegedly incapacitated person. The allegedly incapacitated person must consent to the appointment of a guardian or, in the absence of consent, must be proven to be “incapacitated.”

In New York State, incapacity must be established by clear and convincing evidence, and is 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.

The powers that a Guardian of the Person may be given include a wide variety of powers, including the power to decide where the incapacitated person lives, who he or she visits with, whether he or she can drive, what type of medical decisions will be made, and other social decisions. The powers that can be given to a Guardian of the Property are also very broad, but can be tailored to the particular needs of the incapacitated person. The Court may order a Power of Attorney, Health Care Proxy or Living Will revoked if the Court concludes it appropriate, but a Guardian himself or herself may never execute or revoke those documents on the incapacitated person's behalf, and a Last Will and Testament cannot be revoked during the course of a Guardianship.

When the Court selects a Guardian, the Court is determining who is best suited to serve the incapacitated person. It can be any competent adult, including those who have been named as Agent in the Health Care Proxy or Power of Attorney, provided the Court determines that person remains suitable. It could also be the incapacitated person's spouse, another family member, a

friend, a neighbor, or a professional Guardian (an unrelated person who has received special training and is selected by the Court).

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 you, 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 vital 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.