

Advance Directives: Is Disability Planning Necessary?

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Practice Areas

• Estate Planning & Probate

Absolutely! While most individuals in one way or another make some preparation for retirement or death, few prepare for disability because they don't view disability as inevitable. Yet, for individuals under the age of 50, a serious disability is twice as likely to occur as death, and the average length of a disability is from four to six years.

Not only are more and more people reaching retirement age in historically unprecedented numbers, but more significantly, many are living well into their retirement years. The fastest growing part of our population is the over age 85 group. As people age, there is a greater likelihood that they will suffer some incapacity - whether it relates to their inability to handle one or more activities of daily living (toileting, bathing, grooming, dressing, feeding, etc.), inability to handle their financial affairs or inability to make health care decisions. For example, it is estimated that Alzheimer's disease will strike 1 in 12 over the age of 65 and 1 in 3 over the age of 80. We are the first generation of Americans to be fearful not of dying too soon, but of living too long.

Planning for disability does not mean that we have to fear the worst. Instead, with some very simple legal tools known as "advance directives," you can enhance your control over your future affairs and take the pressure off family and friends who may otherwise have the difficult burden of trying to figure out what you want at a time when you cannot express yourself.

What is the option if I don't plan for disability?

If you fail to plan ahead, the Louisiana Medical Consent Law establishes a hierarchy of individuals authorized to make medical decisions for you, starting with a legally appointed curator (guardian), if any, followed by your spouse, then adult children, etc. If there is more than one person in the category, then medical consent is given by a majority vote. The decision is made only by the person or persons in the highest available statutory category, even if persons in lower categories disagree or you might have preferred someone else to make medical decisions. A similar hierarchy is used in the absence of a Living Will to make decisions concerning the use or non-use of artificial life-sustaining procedures for you if you are terminally ill.

There is no statutory hierarchy of persons authorized to make financial decisions for you, except that a spouse may seek court approval to exclusively manage community assets if you become disabled. The default option in Louisiana without proper planning is the limited or total interdiction. This is a judicial proceeding instituted by any interested party, usually a family member, seeking to appoint a curator (guardian) to care for your person, property or both. You must be served with the legal papers and have a right to independent legal counsel. The court will appoint a lawyer to represent you if you fail to or are unable to select a lawyer. The curator must post a bond and generally is required to seek prior court approval for all actions, including the investment or disposition of your property. The curator is required to file an annual report and accounting with the court. An interdiction proceeding can be expensive, time-consuming and emotionally draining on the family. More importantly, the person appointed by the court as your curator may not be the person you would have wanted to make your health care or financial decisions.

Can't I just add the name of my spouse, my child or a trusted friend on my bank accounts and certificates of deposit?

Rather than go to the expense of having an attorney draw up appropriate legal documents, some individuals simply add the names of a family member or friend on their bank accounts and certificates with the expectation that the designated person will withdraw funds from the account for the owner's benefit

when disability occurs. The approach is easy to understand, convenient and inexpensive.

For married couples, naming each other as joint signatories usually presents no problem, except if both become disabled. However, naming children or a trusted friend can have serious drawbacks. The account may become vulnerable to the designee's creditors. At your death, the designee may claim that the balance left in the account was intended as a gift for care given during lifetime, setting the stage for expensive litigation among family members.

What are some of the legal tools available to preserve my personal autonomy should I become disabled?

The primary legal tools are:

A Living Will;
A Health Care Power of Attorney;
A Financial Power of Attorney.

What is a "Living Will"?

A "Living Will" is a written declaration which allows you to state in advance your wishes regarding the use of artificial life-prolonging medical care if you become terminally ill and unable to communicate your treatment decision. Eighty percent of all deaths in this country occur in hospitals and seventy percent of these cases require the patient or a family member to make a decision about withholding or withdrawing life support. Your Living Will avoids the emotional trauma and anxiety of leaving the decision to a loved one if you are dying and lack decision-making ability. Without a Living Will, family members will have to make decisions for you. Family members may disagree. Sometimes they are wrong in guessing what your choice would be. A Living Will gives you the right to choose how, and to what extent, medical technology will be used to prolong your life if you cannot speak for yourself. It is your Declaration of your own treatment desires and must be respected by your health care provider. The key is to tailor the Living Will to what you want, not what someone else guesses you want.

The Living Will is effective only if you are suffering for a terminal and irreversible condition whereby artificial or heroic measures would serve only to prolong the dying process. Your treating physician and one other physician are required to certify that you are suffering from a terminal and irreversible condition before the Living Will becomes effective.

The Living Will must be witnessed by two persons other than members of your family who may inherit from you. You should furnish a copy to your doctor to be made part of your medical records. Your Living Will can be filed in Baton Rouge with the Secretary of State for a \$20.00 filing fee, and you will be sent a wallet size, laminated card reflecting that it is filed. Any health care provider will have access to a copy of your Living Will if the need arises regardless of where you are physically located.

What is a Health Care Power of Attorney?

Unlike the Living Will which is merely a direction and applies only to the use of artificial life support systems if you become terminally ill, the Health Care Power of Attorney permits someone you choose to make any and all other health care decisions for you if you become incompetent, such as the selection of health care providers, consent to particular treatments, etc. The Health Care Power of Attorney can be as broad or as narrow as you desire. You can spell out specific instructions on the Power, such as a desire to be maintained and cared for in your own home as long as economically, physically and medically feasible.

What is a Durable Power of Attorney?

Simply put, a Power of Attorney ("procurator") is a written legal authorization for someone to act on your behalf for whatever purposes you desire. It can be a limited power to do only specific acts (such as handling a bank account or selling particular real estate), or a general power to handle all of your financial

affairs. A "Durable" Power means that the power of attorney continues to operate even if you should become incapacitated or incompetent. In Louisiana, the power of attorney automatically is "durable" unless the power specifically provides otherwise. The power of attorney can be effective immediately or only if you become incompetent (sometimes referred to as a "conditional procuracy" or "springing" power of attorney).

The advantage of a durable power of attorney is that you appoint someone you want to manage any part or all of your affairs rather than a court. If a interdiction becomes necessary, you can name the person in your power of attorney who will be your curator. The chief disadvantages of a power of attorney are that it becomes "stale" over time and that it is only effective to the extent a third party such as a bank, brokerage house, or real estate title examiner is willing to recognize it. If you maintain accounts at banks, brokerage houses or own property in other states, it is advisable to execute multiple powers on forms recognized by the particular financial institutions or by other states.

In Louisiana, the agent you designate under your financial power of attorney does not have the right to perform certain acts unless the power is specifically authorized in the document. For example, an agent has no power to make gifts of your assets, even though such gifts may be desirable to reduce your death taxes or for Medicaid planning. An agent can not accept or renounce an inheritance due to you or borrow money on your behalf. An agent may not contract with himself. Because of the peculiarities of Louisiana law, you should not use a boilerplate or "do it yourself" form, but rather seek the help of a competent lawyer who can tailor the document to your own specifications.

A Financial Power of Attorney can include a medical power of attorney or you can execute a separate health care power of attorney.

When should I sign Advance Directives?

Planning for disability is difficult for most of us at any age, partly because of a general lack of understanding of these simple legal tools, but even more so because we are dealing with events that are so unpredictable for most of us. However, these planning tools must be executed while we are competent - before the crisis of disability strikes. Your personal autonomy in making these important lifetime decisions is in your hands. You must plan ahead. Otherwise, the default option of interdiction may be the only route available, with no certainty as to the person who will be appointed as your curator.

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