



Legal Planning When Living with a Chronic Medical Condition

Presented by:
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HDSA encourages all attendees to consult with their primary care provider, neurologist or other healthcare provider about any advice, exercise, medication, treatment, nutritional supplement or regimen that may have been mentioned as part of any presentation.

Presenter Disclosures

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The following personal financial relationships with commercial interests relevant to this presentation existed during the past 12 months:

No relationships to disclose or list



ITEMS TO BE DISCUSSED

- Financial Decision-Making and Management
- Health Care Decision-Making and Management
- Care Planning
- Long-Term Care Costs

POWER OF ATTORNEY FOR PROPERTY



POWER OF ATTORNEY FOR PROPERTY

The Power of Attorney for Property allows an individual, referred to as the "principal" in the document, to designate another person, known as the "agent" to act for the principal as described in the document for purposes of financial and other property transactions. The agent stands in the shoes of the principal and is then legally authorized to act.

A principal must have mental capacity to execute a power of attorney: ability to comprehend the document and the effect of signing the document.

A. Advantages

1. Durable -effective beyond mental incapacity
2. Revocable if competent
3. Amendable
4. Low cost to set up

POWER OF ATTORNEY FOR PROPERTY

B. Disadvantages

1. Easily abused - no accountability
2. Difficult to remove a “bad” agent if principal incapacitated
3. Often difficult to use with out-of-state institutions
4. Allows principal to continue to contract despite incapacity, potentially making bad decisions and jeopardizing assets
5. Agent has no duty to act

C. Special Powers which must be added

1. Gifting - for Medicaid planning or other purposes
2. Transferring Assets to a Trust (for self or others)
3. Establishing OBRA Trusts
4. Representation in legal separations\domestic relations actions

POWER OF ATTORNEY FOR PROPERTY

D. Duties of an Agent

1. Accounting

documentation of receipts, disbursements, significant actions

2. Loyalty, acting for the welfare of the principal

3. No self-dealing, comingling of assets

TRUSTS



DEFINITION

What is a trust?

- A legal arrangement through which one person or an institution holds legal title to property for another person. The rules/instructions under which the trustee operates are set out in the trust instrument.

Types of Trusts:

- Revocable and Irrevocable

REVOCABLE TRUSTS

Revocable Trusts

Gives the donor complete control over the trust, can take back the funds he or she put in the trust or change the trust's terms.

Used For:

1. Asset Management: Allows the trustee to administer and invest the trust property for the benefit of one or more beneficiaries of the trust.

2. Probate Avoidance: at the death of the person who created the trust, the trust property passes to whomever is named in the trust. It does not come under the jurisdiction of the probate court and its distribution need not be helped up by the probate process. However, the property of a revocable trust will be included in the donor's estate for tax purposes.

REVOCABLE TRUSTS

3. Tax Planning: While the assets of a revocable trustee will be included in the donor's taxable estate, the trust can be drafted so that the assets will not be included in the estates of the beneficiaries, thus avoiding taxes when they die.

4. Disability Planning: Wills only provide for death. Trusts can help a person have a plan in place in the event of their own illness.

Important to Know:

Assets must be transferred to the trust and held in the trust, which requires lifetime administration.

REVOCABLE TRUSTS

Disadvantages:

1. More expensive to create - legal fees.
2. Assets must be transferred to the trust – time consuming effort.
3. Assets must be held in the trust – requires lifetime administration.
4. Trustee has authority over Trust assets and is limited by the terms of the trust document.

Duties of the Trustee

1. Prudently invest and administer trust assets.
2. Loyalty to trust beneficiaries: no self-dealing.
3. Accounting to trust beneficiaries.
4. Compliance with the terms of the trust document.

IRREVOCABLE TRUST

- Cannot be changed or amended by the donor.
- Any property placed into the trust may only be distributed by the trustee as provided for in the trust document itself. For instance, the donor may set up a trust under which he or she will receive income earned on the trust property, but the trust bars access to the trust principal.

TESTAMENTARY TRUSTS

- A trust created by a will.
- No power or effect until the will of the donor is probated.
- Although this trust will not avoid the need for probate and becomes a public document as it is a part of the will, it can be useful in accomplishing other estate planning goals. For example, this trust can be used to provide funds for a surviving spouse who would be protected if they required Medicaid-covered facility care, an option that is not available through the use of a revocable trust.

SPECIAL NEEDS TRUSTS

- Established by the Omnibus Reconciliation Act of 1993. Often called OBRA Trusts.
- Irrevocable
- Can be used to assist a person who is, or may become, eligible for SSI or Medicaid.
- **Two Types:**
 - (D)(4)(A)- for people under 65 years old & disabled
 - (D) (4)(C)-for people over 65 years old

(D)(4)(A)- For PEOPLE UNDER AGE 65

- Irrevocable
- In the past, the trust needed to be established by parent, grandparent, court or guardian. However, the Special Needs Trust Fairness Act, which recently became law, allows individuals who have a disability to create their own trust.
- If proceeds of trust are from personal injury action, a lien from Medicaid must be paid off before transferring the proceeds to the trust.
- Trustee can be an individual or corporate trustee.

(D)(4)(C) – FOR PEOPLE OVER AGE 65

- Irrevocable
- Established by parent, grandparent, court or guardian or the beneficiary him or herself
- Referred to as ‘pooled trust’ as assets are pooled together with assets of other people for investment purposes
- Administered by a non-profit organization partnered with a corporate trustee.
- The SMART Act (effective July 1, 2012) restricts the use of this type of trust as a transfer into the trust is considered a ‘transfer of asset for less than fair market value’ which results in period of Medicaid ineligibility.

WHAT CAN THE FUNDS BE USED FOR?

- Funds are to be used only for the beneficiary but are NOT distributed to the beneficiary.
- Used for items Medicaid and SSI do not pay for.
Examples: clothing, companion care, taxes, debt, furniture, transportation, accessibility devices, education, eyeglasses, dental care, etc.

WHAT HAPPENS TO THE FUNDS WHEN THE BENEFICIARY DIES ?

- Any state which paid out Medicaid benefits on behalf of beneficiary is paid back before any other payment except taxes and reasonable expenses of administration.
- If there is any money left over, funds may be distributed to other beneficiaries
- Some pooled trusts require that a portion of the remaining funds be kept by the non-profit trustee.

JOINT TENANCY



JOINT TENANCY

A form of joint ownership whereby each owner owns one hundred percent of the property; at the death of one of the joint owners, the surviving owners own the entire property.

Advantages

1. No cost to set up.
2. Effective way to avoid probate.
3. Effective way to arrange estate so that others will be able to manage during incapacity.

JOINT TENANCY

Disadvantages

1. Risky - joint tenancy has an ownership interest in the property and the property is available to the creditors of the joint tenant, as well as may become subject to the marital disputes, disabilities, and other problems of the joint tenant.
2. Does not allow for contingent beneficiaries if the joint tenant predeceases.
3. Surviving joint tenant is entitled to the entire property at death of a joint tenant - where there are several persons who are the beneficiaries of the owner's estate, difficult to name all as joint tenants, and more risky.
4. For Medicaid purposes, Medicaid applicant presumed to be 100% owner of all personal joint property.

POWER OF ATTORNEY FOR HEALTHCARE



POWER OF ATTORNEY FOR HEALTHCARE

The Power of Attorney for Health Care allows an individual, referred to as the "principal" in the document, to designate another person, known as the "agent" to act for the principal as described in the document to make health care decisions for the principal. The agent stands in the shoes of the principal and is then legally authorized to act, including acting to withhold or withdraw life support as well as make any other type of health care decisions. The principal must have mental capacity to execute a power of attorney for health care.

A. Advantages

1. Amendable
2. Revocable regardless of mental status

B. Disadvantages

1. Revocable regardless of the mental condition of the principal.
2. If designate a person who is unaware of principal's values, they may make a health care decision contrary to principal's wishes.

LIVING WILL

A Living Will is a document that expresses your preferences to forgo life support in the circumstances that it would only prolong the dying process. It does not authorize another person to make a decision, but is a form of communication to a health care provider.

A. Advantages

1. Allows a method of communicating values to health care providers that death-delaying life support is not wanted.

B. Disadvantage

1. May be ignored

5 WISHES AND POLST

5 Wishes

It is often called the “living will with a heart and soul” because it includes the things that matter the most.

www.agingwithdignity.org

Provider Orders for Life Sustaining Treatment (POLST)

A POLST is completed by a health care provider after a conversation with the patient about treatment decisions. It is a signed medical order reflecting a person's wishes that travels with the person across all settings of care that must be honored by all healthcare providers.

www.polstil.org

HEALTH CARE SURROGATE ACT



HEALTH CARE SURROGATE ACT

Routine medical decisions:

When a person lacks “decisional capacity” and has no Power of Attorney for Health Care, persons, in order of hierarchy, may make routine medical decisions.

Decisions to refuse or discontinue life support:

When a person both lacks “decisional capacity” and has a “qualifying condition” and has no Power of Attorney for Health Care, persons, in order of hierarchy, may make decisions to refuse or discontinue life support.

HEALTH CARE SURROGATE ACT

1. The patient's guardian of the person;
2. The patient's spouse;
3. Any adult son or daughter of the patient;
4. Either parent of the patient;
5. Any adult brother or sister of the patient;
6. Any adult grandchild of the patient;
7. A close friend of the patient;
8. The patient's guardian of the estate.

GUARDIANSHIP – IF YOU DON'T PLAN



GUARDIANSHIP

A Court May Appoint a Guardian for a Person Who;

- Is over age 18; and because of
- Mental deterioration or physical incapacity is unable to fully manage their person or estate; **and** Is totally or partially unable to make responsible decisions for their person or estate.

UNCONTESTED GUARDIANSHIP

- Based upon the Report of the Guardian ad Litem
- Must present Original Physician's Report
- Proposed Guardian must present Oath and Bond
- Proposed Guardian should be present to present Care Plan

CONTESTED GUARDIANSHIP

- Based upon the Report of the Guardian ad Litem (stating respondent objects and wants attorney) OR based upon a Cross-Petition
- Parties may ask for mental exam of respondent
- Respondent may ask for jury trial
- Expensive. Usually if a guardian is appointed, the fees are paid from Estate

CARE COSTS



PLANNING FOR LONG-TERM CARE COSTS

The cost of long term care-meaning either in-home care or nursing home care for individuals requiring assistance with activities of daily living- is largely an uninsured healthcare cost for most individuals. Planning for possible exposure to these costs is necessary for effective retirement planning.

A. Medicare Coverage

1. Covers up to 100 days of skilled nursing care provided in a Medicare certified nursing facility following an in-patient hospitalization of at least 3 midnights. Medicare pays the full cost of the first 20 days. There is a coinsurance payment of \$164.50 (for 2017) per day for days 21 through 100 which many Medicare supplemental policies cover.

2. Medicare provides home care to those individuals needing intermittent skilled care, usually post hospitalization only, although long term part time skilled home care services are covered. Skilled care does not include custodial care, which is the type of long- term care most individuals require.

LONG-TERM CARE INSURANCE

Long Term Care Insurance is the only health insurance that pays for custodial long term care, either at home, or in a nursing home.

MEDICAID

- ◆ Federal – State Program
- ◆ Federal Law and Monitoring
- ◆ State Law – Regulations and Policy
- ◆ State “Medicaid Agency” – Illinois Department of Healthcare and Family Services
- ◆ State Eligibility Determinations – Illinois Department of Human Services

MEDICAID

- Nursing Homes
- Supportive Living- “Waivered”
- Community care program (over 60) – “Waivered”
- In-Home services (under 60) – “Waivered”

MEDICAID

- Residency and Citizenship
- Categorical eligibility
- Need

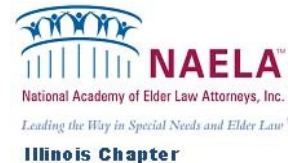
MEDICAID RULES AND PAYMENTS TO FAMILY CAREGIVERS

- Personal Care Contracts must be established prior to the receipt of services;
- Services must be clearly identified and reimbursed consistent with the prevailing cost in the service area;
- Contemporaneous receipts, logs or other credible documentation showing actual delivery of services;
- Presumption that services provided by friends or family are “gratis” unless there is contemporaneous written agreement.

RESOURCES

- National Academy of Elder Law Attorneys
Helen Mesoloras is President of the Illinois Chapter

www.naela.org



- National Elder Law Foundation
www.nelf.org



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Janna Dutton and Kathryn Casey have been named two of the “Top 10 Elder Law Attorneys in Illinois”, by the Leading Lawyers Network. Helen Mesoloras is President of the National Academy of Elder Law Attorneys, Illinois Chapter.

Both Janna Dutton and Kathryn Casey are Certified Elder Law Attorneys (CELA). The Certified Elder Law Attorney is the only American Bar Association approved designation for elder law.

ABOUT OUR FIRM

At Dutton & Casey, P.C., we provide comprehensive and personally tailored elder law, estate planning, guardianship, and probate services. Through our expertise of over 100 years of combined legal experience, personal attention, and commitment to service, we assist our clients in achieving their goals and finding peace of mind. Our clients can depend on our team for the knowledge, advice, and support they require to resolve their legal needs.

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- ◆ Litigation for Vulnerable Adults Against Abuse, Neglect, and Financial Exploitation
- ◆ Care Navigation and Advocacy
- ◆ Senior Housing Contracts, Admissions and Discharges

ESTATE PLANNING

- ◆ Estate Planning
- ◆ Long-Term Care Planning
- ◆ Special Needs Planning

GUARDIANSHIP

- ◆ Guardianship and Contested Guardianship
- ◆ Financial Exploitation Litigation

PROBATE

- ◆ Probate and Trust Administration
- ◆ Will and Trust Litigation