

What Does an Agent Under a Medical Power of Attorney Do?

Informed consent in medicine is an ethical and legal requirement for treatment. It is one of the core principles of the American Medical Association and ensures that patients can ask questions and obtain information about a treatment or procedure and explicitly consent to it.

There are recognized exceptions to the explicit patient consent requirement, including when the patient is in a medical emergency but unable to make or communicate their own decisions (for example, the client is under anesthesia during surgery or is unconscious). In such cases, a stand-in decision-maker (usually the next of kin) may step in and authorize treatment on the patient's behalf.

For nonmedical emergency situations, clients with a comprehensive estate plan can control their future medical treatment by naming a person or people to act and provide consent for them when they are unable to do so (e.g., because of dementia, stroke, a closed head injury, or various other medical conditions and situations). People who lack key estate planning documents could be at the mercy of the courts or medical professionals (who are subject to facility policies and procedures) if they become unable to make or communicate their medical wishes, possibly resulting in care that is different from what they would have chosen.

The Role of Medical Directives

Medical directives are a series of legal documents that name a medical decision-maker and outline a person's medical wishes if they become *incapacitated* and therefore unable to make or communicate their own healthcare decisions.

Two medical directives crucial for every estate plan are a *medical power of attorney* and a *living will*.

- A **medical power of attorney** is a legal document that gives a designated person (referred to as an *agent* or *healthcare proxy*) the authority to make or communicate healthcare decisions for another individual (the *principal*) if the principal is unable to do so. These decisions include consent to or refusal of treatments, surgeries, medication, and other interventions. The agent can also access the principal's medical records and information for decision-making purposes.
- A **living will** (also referred to as an *advance directive*) is a document that details an individual's wishes to receive—or not receive—specific medical treatments and interventions at a future time when the person is incapacitated and unable to consent or refuse. It often addresses life-sustaining measures in terminal situations. However, living wills are not legally recognized in all states.

The medical power of attorney and living will should be written to complement each other. Generally, an agent's power is limited by any instructions that the principal outlines in their living will, and the agent cannot make decisions that contradict those instructions. Depending on state law, the medical power of attorney may contain healthcare instructions usually contained in a living will as well.

A living will should clearly state someone's preferences for a number of end-of-life care decisions, including CPR, ventilation, dialysis, medications, tube feeding, pain management, and organ donation.

If these decisions are not addressed in the living will or the directives are unclear, the agent can use their judgment to make a decision they believe is in the principal's best interests and aligns with their values.

Most people choose an agent under a medical power of attorney who knows them well and understands their values and preferences, but clients are advised to thoroughly discuss intervention and treatment choices with the agent before their services are needed. It is also important to choose someone who can be available in case of an emergency.

What Can Happen When There Are No Medical Directives

When there are no medical directives and the patient's decision-making capacity is impaired, the court will appoint someone to serve as a stand-in decision-maker for the incapacitated patient. This appointment is made through a *guardianship* proceeding (sometimes called a *conservatorship* proceeding depending on the state) that is usually initiated by a family member. When there is no family involved, a hospital or a nursing home may reach out to the appropriate state agency to pursue guardianship or conservatorship.

When choosing a guardian for an incapacitated adult, the court considers a combination of the individuals set forth under state law and the person's best interests, prioritizing close family members such as a spouse, parent, or adult child. Once the patient is deemed incapacitated, the guardian has full authority to make most or all decisions for the patient unless the patient retains the capacity to make their own decisions.

While guardianship might seem like a reasonable solution to the issue of not having advance directives and a legally authorized representative, it presents problems as well. Namely, the process is slow. It may take months or more to establish a guardianship. During this time, the incapacitated person's necessary medical treatment may be put on hold or delayed.

However, what if a patient suffers a medical emergency and needs immediate care? This could happen from something as routine as a fall or a car crash that results in a traumatic brain injury, a leading cause of incapacitation. Stroke, organ failure, and sepsis can also come on suddenly and cause incapacity.

In these situations, the court may grant emergency guardianship on a temporary basis when someone's health is at risk, they lack capacity, or a crucial decision must be made and they do not have a validly appointed decision-maker available. This arrangement lasts for a limited period or until a hearing can be held to appoint a permanent guardian. Emergency guardianship proceedings are still not instantaneous, however, unlike a medical power of appointment.

Another drawback of guardianship proceedings is that they are usually expensive: there will be court fees and potentially attorney's fees if one is used, and most states require that an attorney represent the guardian or conservator in the court proceedings and throughout the duration of the case.

Lastly, a significant drawback of guardianship proceedings is lack of privacy. Since these proceedings take place in court, much of the information shared becomes part of the public record. This includes sensitive details about the individual's health, finances, and personal circumstances, which can feel invasive and could lead to embarrassment or stigma. Additionally, public disclosure may strain family relationships or invite unwanted attention, making the process emotionally challenging for everyone involved.

For these reasons, medical professionals and attorneys widely consider guardianship an inadequate solution that should be used only as a last resort.

If you have clients without friends or family to act as stand-in decision-makers, they can name a professional, such as a physician or social worker, to make important medical decisions for them and avoid needing a guardianship proceeding to be initiated.

Estate Planning Avoids Unintended Medical Consequences

The upshot of not having medical directives is that a client loses control over decisions that may be not only medically necessary but also highly personal. To ensure that their medical wishes are honored, they should have a medical power of attorney and a living will as part of their estate plan and regularly check to ensure that the stand-in decision-makers they name are still available, willing, and able to fulfill their duties.