

Whom Do You Trust to Make Your Medical Decisions?

It might be a stretch to say that if you have your health, you have everything. However, to some people, decisions about their health are arguably more personal in nature and more important to their overall well-being than financial decisions.

This leads to the question of who will step in and make healthcare decisions for you if you are *incapacitated* (unable to make or communicate your medical wishes). You may have estate planning documents that allow someone else to manage your finances during a period of incapacity. But have you also appointed someone to step in and manage your medical care when you cannot make decisions or communicate your preferences on your own?

Without certain documents that allow you to control your future medical treatment in the event that you become incapacitated, you could be at the mercy of the courts or medical professionals who are bound by facility policies and procedures and end up receiving care that is different from what you would have wanted.

Medical Directives and Estate Planning

Maybe you have created a will that names your beneficiaries or set up a trust to hold your money and property for your loved ones. You have even thought of the little things, like property appraisals, life insurance, digital assets, and pet provisions.

Your loved ones will be well taken care of when you are gone. But a comprehensive estate plan is about more than that. It also involves ensuring that your loved ones can take care of your medical decision-making as you would like them to while you are still alive but incapacitated. This aspect of your estate plan is addressed with documents known as *medical directives*.

Medical directives are a series of legal documents that name a medical decision-maker and describe how your medical care should be handled if an injury or illness prevents you from making decisions or expressing your wishes. This could happen, for example, if you are under anesthesia, suffer from dementia, or experience a medical emergency.

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 as needed for decision-making.
- A **living will** (also known as an *advance directive*) is a document in which you specify the medical treatments you wish to receive—or not receive—at a future time when you are incapacitated and unable to consent to treatment or refuse it. A living will often addresses life-sustaining measures in terminal situations. However, living wills are not legally recognized in all states.

A medical power of attorney and living will should be written to complement each other. It is important to understand the interplay between these two documents. In some situations, the

power of the agent under a medical power of attorney may be limited by any instructions the principal outlines in their living will, and the agent may be unable to make decisions that contradict those instructions. A medical power of attorney may contain healthcare instructions as well.

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

If these decisions are not addressed in the documents or the directives are unclear, the agent can use their judgment to decide what they think 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 you should discuss intervention and treatment choices with your trusted decision-maker(s) before their services are needed. Choosing someone who will be available in case of an emergency is also important.

What Can Happen When There Are No Medical Directives

Your medical power of attorney allows you to choose a person or people to make decisions for you if you cannot make them yourself. In other words, you are *preauthorizing* a stand-in to provide informed consent on your behalf in the future when the need arises.

Without a valid medical power of attorney, the alternative—appointment of a court-ordered guardian for someone lacking capacity—can be very problematic.

When choosing a *guardian* or *conservator* (the term may vary by state) for an incapacitated adult who lacks a substitute decision-maker, 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 or conservator has full authority to make most or all decisions for the patient unless the patient retains the capacity to make decisions.

While guardianship might seem like a reasonable solution to the issue of not having medical directives, it is often too slow and cumbersome to respond proactively to a patient's immediate medical needs. Also, guardianship proceedings are usually expensive: there will be court fees and potentially attorney's fees if one is used (most states require that an attorney represent the guardian or conservator throughout the case). Further, another drawback of guardianship proceedings is the lack of privacy. Since these proceedings take place in court, much of the information shared becomes part of the public record.

The bottom line is that relying on the appointment of a court-appointed guardian or conservator is often considered by medical professionals and attorneys to be a last-resort option.

Take Control of Your Medical Future

When you do not have a medical power of attorney and a living will, someone else will still need to make decisions about your healthcare. But who that person is—and what they decide—may not accurately reflect your wishes.

Naming a stand-in decision-maker and stating your treatment preferences gives you some control over medical circumstances that may otherwise be outside of your control. If you have not yet named a medical agent or are having trouble identifying someone who is available, willing, and able to serve in this role, an attorney can help. To take control of your medical future today, reach out to us to schedule an appointment.