ADVANCE DIRECTIVES & DURABLE POWERS OF ATTORNEY

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You direct your own decisions!

You have several options to direct your own health care in advance of any potential incapacity. Remember, incapacity is not limited to the aging process, but can result at any age due to accident, illness, anesthesia, medications, and other factors. Planning is essential to put in place mechanisms to ensure that another person is appointed by you to make your health care decisions if you are unable, and to ensure that your personal wishes are documented so that your right to choose can be protected.

Designation of a Health Care Surrogate

You have the **right** to designate or appoint in a written document a person to make all health care decisions for you if your attending physician certifies in your medical record that you are unable to make an informed decision about your own health care. The person you designate is called a **Health Care Surrogate**. That person "stands in your shoes" and is required to make a health care decision for you that you would have made for yourself. The person you designate must be an adult and must be competent.

** **Important:** You are presumed to capable of making your own health care decisions unless you are determined, in accordance with law, to lack the capacity to make a health care decision. Incapacity for health care decisions is defined by Florida law (section 765.101(8), Florida Statutes) as "the patient is physically or mentally unable to communicate a willful and knowing health care decision."

Incapacity cannot be assumed simply because a person has been voluntarily or involuntarily admitted to the hospital for a mental illness, nor can it be assumed due to a person's intellectual disability!

Some simple rules:

1. The surrogate may only act for you **IF** your primary or attending physician concludes that you lack capacity to make your own decision **AND** notes this finding in your medical record. **Exception:** If you have given your health care surrogate the right to access your health information and to make a health care decision for you even if you do have sufficient capacity, then the surrogate may access your information and make a decision without a finding by your physician of a lack of capacity to make an informed decision.

2. The surrogate is legally required to follow your oral or written wishes. This is very, very important – the **surrogate** may not legally impose his or her own views upon you in making a health care decision for you. Failure to follow your written wishes can result in removal of the person as your surrogate.

3. The person you designate as **surrogate** should know how you feel about medical treatment, any religious or other spiritual preferences, your choice of procedures, physicians, and residences.

If your surrogate does not have enough information about what you would have chosen if you were able to decide for yourself and cannot determine how you would have chosen by speaking with family, friends and others, then your surrogate can make a health care decision for you based on what the surrogate believes is "in your best interest." **It is vital that you communicate clearly with your named surrogate, or alternate surrogate, about your wishes regarding health care.** You may even choose to write down certain preferences, either in your Health Care Surrogate Designation or in a separate writing to your surrogate.

What decisions can a health care surrogate make?

* The surrogate can make all medical decisions for you if you are incapacitated.

* This includes determining your residence, such as home, assisted living facility, nursing home, rehabilitation facility, or psychiatric facility.

* The surrogate may also access your financial information for the purpose of applying for public benefits for you, such as Medicaid, Supplemental Security Income, Social Security Disability, Veteran's benefits and others. The surrogate will not have control of your finances as a surrogate, but will be entitled to access that information for your benefit.

* The surrogate has authority to make your medical as well as your mental health decisions, including administration of medication and application of therapies.

* The surrogate has a responsibility to see all of your medical records, to consult with all of your health care providers, and to obtain any information necessary to make an informed health care decision on your behalf.

Can you name more than one surrogate?

Yes. If you name more than one, a majority of your surrogates is required to make any decision. Naming one surrogate is often simpler and more manageable rather than having a committee decision, and naming an alternate surrogate is a good idea.

Does my surrogate have to be related to me?

No. The surrogate simply needs to be an adult (age 18 or over) who is not incapacitated. People often name a loved one as the surrogate because of the relationship and because that loved one is more likely to know your preferences in treatment. You may name a close friend or any other individual that you believe best knows your wishes and that would properly honor your wishes in making health care decisions for you.

What happens if my surrogate attempts to act against my wishes?

Any interested person can petition to review a surrogate's decision through an expedited hearing process under Florida law. This expedited process requires a preliminary hearing within 72 hours of the petition being filed and requires a final decision within 4 days of the preliminary hearing.

Does a health care surrogate have any authority after I die?

Yes, but very limited. If you state in your health care surrogate designation and/or living will your desire to donate some or all of your usable organs, your health care surrogate can authorize medical personnel to preserve your organs for donation and take other necessary steps in the organ donation process. Your surrogate may also authorize the disposition of your body after death, such as cremation or burial, if you give that power to your surrogate.

Living Will

A living will is an advance directive where you state your preferences when your life is nearly at an end. A living will is only effective if you have a terminal condition, an end-state condition, or are in a persistent vegetative state. A living will can state your preferences in terms of affirmative treatment that you want if you are near the end of your life, or it can state the treatment that you do not want in that case. Most individuals use a living will to state what they do not want if they are at the end of their life. For example, many people do not want resuscitation at the end of life, nor do they typically want to be fed or hydrated through a feeding tube. Again, this is only if your death is fairly imminent and expected.

Your Health Care Surrogate will have the authority to make end-of-life decisions for you, as well, and can act to enforce the provisions of your living will, an important factor to consider in naming a surrogate.

You may revoke your living will at any time and in any manner, including an oral revocation. Any oral revocation should be done in front of two people, one of whom should be your attending physician if that is possible. As long as you have capacity, you will be entitled to control your own decision-making.

Durable Power of Attorney (DPOA)

A power of attorney is "durable" if it states that the powers and the authority of the agent you name in the power of attorney will last beyond your incapacity. You want your power of attorney to be durable so that if you become incapacitated, your agent will have the authority he or she needs to manage your affairs at a time when you need help the most.

All durable powers of attorney signed on October 1, 2011 or after must be signed by the principal in front of two subscribing witnesses and must be acknowledged by the principal before a notary public.

Older powers of attorney: All durable powers of attorney signed before October 1, 2011 are still valid in Florida if they were executed in accordance with the applicable power of attorney laws at that time.

Powers of attorney from another state: A power of attorney executed in another state is valid and enforceable in Florida if it complied with the laws of the other state when it was executed. If a third party doubts the other state's power of attorney, it can demand a written legal opinion of validity from the state where the power of attorney was executed and may then completely rely on this legal opinion when relying on the other state's power of attorney.

A durable power of attorney is effective immediately upon your signature on the document and after all other legal formalities have been met.

* For this reason, a durable power of attorney can be abused and it is important that you only appoint an agent under the power of attorney that you trust and that you believe will manage your affairs the way you intended. The durable power of attorney is most often used to allow you to appoint an "agent" for yourself to assist you in managing your property and financial affairs.

Common confusion: You cannot "make" a DPOA for another person.

Appointment of agent: You may appoint more than one person to act as "co-agents" and unless your DPOA says otherwise, each of the co-agents may act independently from the other co-agents. You may also appoint a "successor" agent(s) to your initial agent who would be entitled to act if your initial agent dies, becomes incapacitated, resigns, is removed by a court, or simply declines to serve.

A DPOA is a **legal contract** between the person entering into the contract (called the "principal") who appoints an agent for himself or herself, and the person appointed to handle decisions should that become necessary. The agent has very specific duties and responsibilities under a DPOA, including, *but not limited to*:

1. Acting in good faith;
2. Not acting contrary to the principal's reasonable expectations actually known by the agent;
3. Not acting in a manner that is contrary to the principal's best interest;
4. Acting to preserve the principal's estate plan to the extent actually known by the agent, so long as preserving the estate plan is also consistent with the principal's best interest;
5. Keeping records of all receipts, disbursements, and transactions made on behalf of the principal;
6. Creating and maintaining an accurate inventory each time the agent accesses the principal's safe deposit box;
7. Acting with loyalty to the principal;
8. Not acting in a way that creates a conflict of interest between agent and principal that impairs the agent's ability to act impartially in the principal's best interest; and
9. Acting with the care, competence, and diligence ordinarily exercised by agents in similar circumstances.

Unless specifically authorized and in compliance with Florida law governing durable powers of attorney, the agent under the DPOA may not use the principal's money for the agent's own benefit. This means no borrowing, no gifting, and certainly no stealing. Using or removing property of another person without specific contractual or legal authority is theft and is a punishable crime.

What if the principal is vulnerable and gives a DPOA to a person who cannot be trusted? What if that agent steals from the maker or refuses to account for money spent?

* call 1-800-96-ABUSE and report the matter to Adult Protective Services.
* Call a Board Certified Elder Law Attorney for legal advice and potential emergency guardianship to stop the abuse or other appropriate legal action.

Powers of attorney executed October 1, 2011 or after must have the principal's signature or initials next to the following special provisions IF the principal wants the agent to have any of these authorities:

1. Authority to create an inter vivos trust (also known as "living trust").
2. Authority to amend, modify, revoke, or terminate a trust so long as the trust instrument itself allows for the DPOA agent to make such changes.
3. Make a gift.
4. Create or change rights of survivorship.
5. Create or change a beneficiary designation.
6. Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.
7. Disclaim property and/or powers of appointment for the principal.

Agent who is non-family (essentially) cannot exercise gifting authority for attempted gifts to the agent or the agent's family (essentially) UNLESS the DPOA specifically provides otherwise.

Third parties may not reject a DPOA unreasonably. Procedures of law must be followed, including written rejection within four business days. The third party (for example, a bank) may request that the agent execute an affidavit showing that the principal is not dead, that the DPOA has not been revoked, and that no petition to determine the principal's incapacity has been filed. Wrongful refusal to honor a DPOA can result in a court action wherein the third party pays damages, attorney's fees and costs.

Revoking a DPOA: The principal may revoke his or her DPOA by signing a writing (no witnesses or notary required), or by executing a new DPOA that specifically revokes all prior DPOAs. **A new DPOA does not automatically revoke prior DPOAs!!!**

Health care decisions: If you want, you can give the agent under the durable power of attorney authority to make health care decisions or access your personal medical and mental health information.

At your option, your agent under a durable power of attorney may also make health care decisions for you if you are unable to make them for yourself. Your agent could also obtain medical information on your behalf, speak with your medical providers, retrieve prescriptions and conduct other medical business on your behalf, even if you have capacity. Health care powers within a power of attorney permit you and your agent maximum flexibility to assist you in any way necessary whether or not you are incapacitated. Certainly, while you have capacity you will still be directing your agent and making decisions about your agent's role in your affairs.

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Last Will & Testament

The terms "Living Will" and "Last Will and Testament" are often confused, but they are very different documents. Your Last Will and Testament is a document directing how your property should be distributed, and how your estate should be administered, after your death.

* The Last Will and Testament has no power during your life and is only effective upon your death.
* Your will cannot even be contested until you die.

Your **Living Will** is a document that controls decisions necessary when you are at the **end of your life.** A Living Will can only come into effect if you have one of three medical conditions that "trigger" the use of the Living Will, and they are:

1. Persistent Vegetative State (i.e. Terri Schiavo case)
2. End Stage Condition (end stages of Alzheimer's disease)
3. Terminal Condition (terminal cancer; congestive heart failure)

The Living Will cannot be used unless your primary or attending physician, and a consulting physician, agree that you have one of these named conditions. Additionally, a physician must certify that you are not able to make your own informed decision regarding end of life treatment.

* When you are at the end of your life and unable to give instructions at that time about the health care you do or don't want, your Living Will is the document that gives those instructions for you and give direction to the doctors and nurses when you can no longer give your own verbal instructions.

* Your Health Care Surrogate must comply with your Living Will, unless there is indication it is fraudulent or does not comply with the law under which it was made.

The Living Will is not a document for disposition of your property and is only effective as to your person.

Summary

In the United States, we are living longer. Longer physical life does not necessarily mean we will retain the ability to think clearly, to remember, or to make good decisions for ourselves – long life can often bring with it very difficult situations regarding decision-making. It is vital that you plan for the possibility that you may live well into your 80's or 90's and that your mind may not keep up with your body's pace. By making your statements in writing, in advance of any potential incapacity, you preserve your constitutional right in Florida to make your own decisions and direct the care that your body and mind receive. In planning for the possibilities, you should involve investigate all of your options, obtain answers to your questions, and evaluate the potential scenarios where you might need a surrogate or agent to act for you. There are various sources of additional information and some of those sources are listed below.

Resources

National Academy of Elder Law Attorneys (NAELA)
www.naela.org

Academy of Florida Elder Law Attorneys (AFELA)
www.afela.org

Florida Department of Elder Affairs
1-800-96ELDER
www.elderaffairs.state.fl.us
(look for End of Life Choices PDF document on main page)

Aging With Dignity
Tallahassee, FL
www.agingwithdignity.org

AARP
www.aarp.org
(look for life issues and estate planning)

The Florida Bar
www.flabar.org