
CLIENT BULLETIN

A PUBLICATION FROM



MCGRATH
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ADVANCE DIRECTIVES: ARE YOU PREPARED FOR YOUR FUTURE? LIVING WILL OR DURABLE POWER OF ATTORNEY FOR HEALTH CARE

You may believe that your living will is sufficient for all of your health care planning needs. However, a living will addresses only the withdrawal of life support. It does not address treatment, medication, and residential placement. The durable power of attorney for health care is a more comprehensive planning method for health care contingencies. Following is a brief explanation of these advance directives.

Living Will

A living will is a document that is signed, dated, and witnessed in compliance with the Illinois Living Will Act. When properly executed, a living will enables you to dictate directly, not through an agent or surrogate, your desires with respect to the use of life-sustaining procedures during a terminal illness. A living will generally contains a provision that permits a person to die naturally under the following circumstances: (1) the person has an incurable and irreversible injury or illness that is determined by the attending physician to be a terminal condition; and

(2) death is imminent without the implementation of death delaying procedures.

The Illinois Living Will Act states that food and water shall not be withdrawn or withheld if doing so would result in death solely from dehydration or starvation rather than from the existing terminal condition. Despite judicial interpretation of the statute, the precise circumstances under which a feeding tube can be withdrawn remain unclear. Consequently, health care providers proceed conservatively and many refuse to terminate tube feeding, citing the statutory prohibition. Because the living will has a very narrow purpose and application, it is not the instrument of choice for most people. However, if you fall into one of the following categories, the living will can be an appropriate advance directive:

1. Persons in the final stage of a terminal illness for whom death-delaying procedures may soon be necessary;
2. Persons who wish to relieve family members of the burden of terminating life-sustaining treatment; or
3. Persons who cannot decide whom to name as their agent under their durable power of attorney.

Durable Power of Attorney for Health Care

A "durable" power of attorney is one that is effective until your (the principal's) death unless you revoke or amend it. A durable power of attorney for health care permits you to delegate health care decisions to a trusted person (your agent) in the event that you become incapacitated and unable to make your own health care decisions.

The Durable Power of Attorney Act sets forth a statutory short form power of attorney for health care, but non-statutory forms may also be drafted. The statutory short form requires the signatures of the principal and one witness. The durable power of attorney for health care can do everything a living will can do and much more. For example, the agent may be given broad authority to order the withholding of death-delaying procedures, including tube feeding and hydration, without regard for statutory prohibitions under the Illinois Living Will Act. Your agent can also be given authority to make other health care decisions for you, including admission to or discharge from a hospital or long-term care facility, medical consent, and anatomical gifts. Agents may also be specifically forbidden from making certain decisions on your behalf.

With our counsel you can tailor the durable power of attorney to your wishes.

A durable power of attorney for health care becomes effective upon execution unless otherwise specified in the document. You can make the power of attorney effective at a future date or upon the happening of a certain event (such as a medical disability). The durable power of attorney for health care may be revoked or amended at any time regardless of the mental or physical condition of the principal, but only by using one of the methods described in the statute.

Failure to Execute an Advance Directive

If no advance directive is executed, the Illinois Health Care Surrogate Act allows an attending physician to recognize a surrogate for those patients who lack competence or decisional capacity. The surrogate is empowered to make decisions about life-sustaining treatment on the patient's behalf. While the Illinois Health Care Surrogate Act offers families an alternative to a court proceeding, execution of a living will or durable power of attorney will provide you with more control and flexibility in making decisions about your medical treatment. To spare your loved ones the uncertainty and anguish of a statutory surrogacy, contact us for counseling about the use of a living will or durable power of attorney for health care. □

POWERS OF ATTORNEY FOR PROPERTY

How can you pay your bills if you become incapacitated by a serious illness? How can you sign documents at a real estate closing if you are unable to attend? A power of attorney can be a useful tool to help you manage your property and facilitate business transactions when you are unable or unavailable to act. Through a power of attorney, you (the principal) can appoint another person (your agent) to act on your behalf.

Under the Illinois Power of Attorney Act, powers of attorney are effective

until the principal's death unless revoked or amended. Powers of attorney may become effective on the date they are signed, at a future date, or on the happening of a certain event (such as medical disability). Powers of attorney for property may be revoked or amended at any time and in any manner that communicates the desired change to your agent.

Third persons who in good faith rely upon a power of attorney are protected as long as the agency was properly created and the agent is acting within the scope of his or her power. If the principal fails to communicate to third parties that the power of attorney has been revoked or amended, the principal will be bound by actions of the agent, even though these actions are contrary to the revocation or amendment. For example, if a principal decides that she no longer wants her agent to be able to contract to sell real property, the principal must immediately make this amendment to the power of attorney known to the agent and to any persons who may rely upon the power of attorney. Otherwise, the principal may be forced to complete a contract for sale executed by the agent prior to the agent or the third person learning of the amendment. While the death of a principal terminates the powers of the agent, the estate of the principal may be bound by actions of the agent that occur after the principal's death if the agent or a third person is unaware of the principal's death.

The power of attorney for property is a statutory form. It gives the agent broad powers to manage all of the principal's real and personal property. If you do not wish to give your agent such broad powers, you may limit authority by striking certain powers from an enumerated list. The form also provides a section in which you may include other appropriate limitations or special instructions to your agent. Your agent may have broad powers to act on your behalf and should therefore be trustworthy. The Illinois Power of Attorney Act also provides general

guidelines for the agent's actions. Under Illinois law, the agent does not have to exercise the power of attorney. However, once the agent begins to act, he or she must use due care in following the instructions and wishes of the principal. An agent will be held responsible for losses due to misuse or negligent exercise of his or her authority but not for any loss due to an error in judgment. The agent also has a duty to keep good records and to account for his or her actions. The agent will have access to and a right to copy your will, trusts, and other personal papers or records but will not have the right to hold the originals. If the agent knows your estate plan, he or she must try to preserve it as much as possible.

The power of attorney for property can be a convenient means of managing your property and business affairs. Illinois law may not require that a lawyer prepare the form, but you need to fully understand the implications of executing this important document. We invite you to call our offices for assistance. □

Legal advice varies depending on the facts. For that reason, the information in *Client Bulletin* should not be acted on without consulting a lawyer. This publication is Advertising Material.