



The Senior Alliance - Area Agency on Aging 1-C

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Questions and Answers about Legal Issues and Life-Planning . . .

The general information provided in this article is not intended to convey legal advice regarding individual circumstances. You should consult with an attorney for advice on your specific situation.

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What is Probate?

Probate is a court proceeding in which a person's estate (property they own at the time of their death) is distributed to their heirs or beneficiaries. The Court oversees the process and makes sure that property is distributed according to the terms of the person's will. If they did not have a will, then it will be distributed according to Michigan law.

I hear that Probate is time consuming and expensive. Do I need to plan to avoid it?

The probate process was greatly simplified in April of 2000. In most cases it does not cost nearly what it did years ago. Likewise, it takes much less time to probate an estate. An estate must be open for a minimum of four (4) months but it can be closed immediately after that period once all property has been distributed. Probate is not very difficult for many estates and often can be done without an attorney. Some of the ways people try to plan to avoid probate, however, can be very damaging. Often folks are scared into buying estate planning documents, such as **living trusts**, that they don't need and that end up costing them more money than both a will and probate.

Trusts can also cause future complications for people who need medical services. Another way people try to avoid probate is to put their property in their children's name. This too can be very dangerous. For example, a home in joint names can be lost to children's creditors. Again, an individual's unique situation must be evaluated before an estate or life-plan is developed. For individuals with substantial assets, or who are caring for someone who is receiving public benefits, a trust may be an excellent tool for establishing estate-plans. A consultation with an elder law attorney is strongly recommended.

Do I need a Will?

Everyone should have a will. It may even be crucial for a caregiver to have an updated will. In a will, you can name someone to take over as caregiver after you die. If there are any disputes as to who should take over, your will may be very helpful to solve them. You can make other provisions for the person you are caring for in your will. You can leave property to them in such a way as to provide them the maximum protection and/or value over time. If you are caring for someone who is receiving public benefits, you should contact an attorney who can draft wills and other documents such as a special needs trust document so as to avoid an interruption or disqualification of benefits.

What is a Power of Attorney?

There are two kinds of Powers of Attorney, one relates to health and the other to financial matters.

- **Health Care Power of Attorney** - It is almost always a very good idea to complete a Health Care Power of Attorney. In this document, you name an advocate to speak for you if, and only if, you are unable to speak for yourself. When this document is filled out properly, it is a legally enforceable document. That means if you have your wishes stated in the document, or your advocate is telling health care professionals what you want and yet your wishes are not being honored, your advocate could obtain a court order to ensure that you receive the type of treatment, or non-treatment, that you requested. You must be sure that your advocate knows what you want, that is, say what you would say to the greatest extent possible. Be sure that your advocate will speak “for you” if necessary. Decisions are made in some very grave times and your advocate will have to set aside their own wishes for your treatment and communicate your choices.
- **Financial Power of Attorney** - This is a document in which you name an Agent to handle your affairs. The document can be very flexible. **It can be as broad or narrow as you would like and be short in duration or last until your death.** Most people want a “durable” power of attorney. The term durable means that the document remains effective after a person becomes incapacitated. In the proper circumstances, a Financial Power of Attorney may well avoid the need for Guardianship (see below) and prevent other problems should you become incapacitated. **It can be effective immediately or only upon your incapacity.** This document can be revoked by you at any time.

YOU SHOULD NOT PREPARE EITHER A FINANCIAL OR HEALTH CARE POWER OF ATTORNEY UNLESS YOU HAVE AN AGENT OR ADVOCATE THAT YOU TRUST WITH YOUR LIFE!! IN THE WRONG HANDS, THESE DOCUMENTS CAN BE VERY DANGEROUS AND CAUSE A LOT OF DAMAGE.

What is a Living Will?

A Living Will is also a document that you prepare stating your wishes for medical treatment. It is different from a Health Care Power of Attorney in that you don't name an advocate to speak for you and it is not strictly enforceable in a court of law. A judge will consider this document as good evidence of your intent, so it is still very valuable to have.

This is a good alternative for someone who does not have an advocate that they can trust to speak for them.

What does it mean to be legally incapacitated?

Under the law, an “incapacitated individual means an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions.”

If a person is found to be legally incapacitated, they are no longer legally responsible and cannot sign contracts or execute documents such as Wills or Powers of Attorney.

What should I do to plan for the possibility that I may become incapacitated?

Everyone should plan for the possibility of future incapacity, particularly caregivers and care recipients. Each have special concerns which should be addressed. A caregiver should make

provisions, in legal documents, for the care of their loved one should they become unable to continue providing care.

A recipient of care may have medical (physical or mental) conditions that require special planning. Some examples are 1.) A person in the beginning stages of Alzheimer's Disease should take care of their life-planning immediately, while they are still competent to do so, and 2.) a grandparent raising a grandchild who has a disability and is receiving Medicaid and Food Stamps and wants to make provisions in case they should die or become incapacitated. The grandparent should have a special needs trust and a will, to provide for the grandchild without disqualifying them for public benefits.

What is a guardianship?

A **guardianship** is a court proceeding in which a judge determines that a person is legally incapacitated and in need of someone to handle some or all of their affairs. Anyone who is concerned that someone is incapacitated and needs a guardian to protect them can file a petition to have that person made a **ward of the court**. A hearing date will be scheduled when the petition is filed. The "subject of the petition," or proposed *ward*, has the right to be present at the hearing, to contest the guardianship or to name their own choice for guardian. This individual has the right to an attorney. By law, the court must consider whether there are any alternatives to a full guardianship.

If someone has legal capacity, a guardianship is not necessary and not appropriate. If a person is only slightly incapacitated, or perhaps in the beginning stages of a dementia related disorder, they are likely to be legally competent. If a guardian is appointed for someone who really doesn't need one, the ward, or anyone else interested in the ward's welfare, may petition the court to terminate the guardianship. Likewise, if an individual has a guardian who is not performing their duties, the individual, or anyone else interested in the welfare of the ward, can petition the court to modify the guardianship.

A guardian is **not personally liable for the debts of the ward**. A nursing home cannot insist that anyone else, including a guardian, spouse, child or other relative become personally responsible to pay the expenses. On the other hand, a legal representative (guardian or someone with power of attorney documentation) is permitted by law to sign a nursing home admissions contract.

There are many alternatives to guardianship that can assure that an individual will receive the type of assistance they need. Generally, most of us want to plan to avoid the need for a guardian in the future.

What is a Conservatorship?

A **conservatorship** is similar to a **guardianship** but it is related to a person's money or property (their estate). The person who has a conservator appointed for them is called a *protected individual*. The conservator manages the protected individual's estate. The proceeding is very similar to that used for a guardianship. The individual to be protected has the right to be present at the hearing, the right to an attorney, and the right to terminate or modify the conservatorship.

In general . . .

Each individual's circumstances and caregiving arrangement is unique. Therefore, consultation with an attorney who specializes in Elder Law is highly recommended. When you look for an

attorney, remember that you are the consumer and should shop around. Ask if the attorney specializes in Elder Law, Estate Planning, Medicaid, and Nursing Home Law. The law is very complicated in many of these areas and is always subject to change.

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