

**WHAT YOU SHOULD KNOW**

**ABOUT THE ARRAY OF LEGAL DOCUMENTS AND**  
**PROCEDURES**

**AVAILABLE TO ASSIST THE ELDERLY AND YOURSELF:**

**HIGHLIGHTS OF BASIC ESTATE PLANNING DOCUMENTS**

**This entire article is used with thanks and by permission of**

**Mary Anne Vance, Attorney, Seattle, Washington**

## TABLE OF CONTENTS

- I. Powers of Attorney
  - A. Financial Powers of Attorney
  - B. Medical Powers of Attorney
- II. Health Care Directives (Living Wills)
- III. Last Wills and Testaments
- IV. Revocable Living Trusts
- V. Guardianships
- VI. The Vulnerable Adult Statute
- VII. Physicians' Orders for Life Sustaining Treatment
- Appendix I. Wills and Estate Planning FAQ
- Appendix II. Guardianships FAQ

**Good news!** Each of us has the ability to designate who we want to help us with our financial and medical decisions when we are disabled. We also have a simple way to designate who we want to inherit our "fortune" when we die. There are several easy documents we can sign to make life easier for ourselves and our friends and family.

## I. Powers of Attorney

Powers of Attorney are probably the most popular and widely used device for managing the affairs of persons who are either incapacitated or temporarily away from the place where they usually make property and financial decisions. Attorneys prepare them as part of their client's package of estate planning documents, or as a stand alone document. Special Powers of Attorney are often executed to close sales in real estate transactions. Preprinted Power of Attorney forms are available in office supply stores. Using a Power of Attorney avoids the costs and complexity of a guardianship proceeding.

The person who is named in the Power of Attorney and acts for our benefit is called the attorney-in-fact. The person signing the Power of Attorney is often referred to as the principal. Sometimes the attorney-in-fact is an attorney or accountant, or has other specialized training, but usually not. The attorney-in-fact may or may not have expertise in financial matters.

Even if the attorney-in-fact is well equipped to perform her duties, her principal's incapacity may bring latent dysfunctional relationships into plain view: sibling rivalries, the blood relatives' dislike of a spouse (especially a new spouse) or domestic partner, and professional advisors being displaced by the attorney-in-fact. Worse still are the situations where the attorney-in-fact is already financially dependent upon the principal and is determined to use the Power of Attorney document to advance his own financial interests.

The two basic types of Powers of Attorney are Financial Powers of Attorney and Medical Powers of Attorney. (RCW 11.94) Often the Powers of Attorney are referred to as "Durable" which means the documents remain effective even if we become disabled. Powers of Attorney become invalid at death or if a court ordered guardianship is created.

### A. Financial Powers of Attorney

A Financial Power of Attorney allows us to name a person or an institution such as a trust company to make financial decisions for us. This Financial Power of Attorney can be effective either immediately on signing or we can make it effective only when our doctor says we have become disabled or incompetent. You should only select a person who you trust completely to serve for you. The attorney-in-fact can go to the bank and deposit or withdraw money for your benefit and can even sell your home if he or she

thinks it is in your best interest. Often people select a close friend or family member to perform this role. You can also select a professional institution such as a bank trust department or a licensed guardianship service.

It is a good idea for the Financial Power of Attorney to be signed by you along with a Notary Public. The Financial Power of Attorney is valid without the notarial seal, but if you ever wanted to record the Financial Power of Attorney with the county recorder's office, you would need a notarial seal to do so.

Many people think that the Power of Attorney gives the attorney-in-fact unlimited power, but this is not true. The Power of Attorney can NEVER give a person the power to change your Will. If you want your attorney-in-fact to have special powers to gift money to heirs before your death or to transfer funds to others for purposes of qualifying for Medicaid, then you must be certain these specific powers are itemized in the Financial Power of Attorney document.

If you think someone is abusing the Power of Attorney, the law allows any interested person to ask the Court to hear the complaint.

## B. Medical Powers of Attorney

Washington law gives a limited Power of Attorney by statute to certain family members. The best practice is for each of us over the age of 18 to write a Medical Power of Attorney and name the person we want to make medical decisions for us when we are incapacitated. We can name one or more persons and we can also name back-up persons. This is especially important if you do not think your next of kin would be the best person to discuss your medical care with your health care providers.

## II. Health Care Directives (Living Wills)

You may have heard Health Care Directives popularly referred to as Living Wills. They are not a Will, which is a document that directs who should inherit your money if you die. The Health Care Directive is your statement as to whether you want certain types of life sustaining medical treatment when you are seriously ill. The Health Care Directive is created in the Washington Natural Death Act (RCW 70.122). Generally, the Health Care Directive allows you to specify whether you want artificially provided nutrition and/or hydration when you are in a permanent unconscious condition. Each of us can change the wording on this statutory form and we can even create our own form using our own words.

### III. Last Wills and Testaments

A Will is a written statement signed by you and two adult witnesses who do not inherit under the Will. The Will typically names people or organizations who will inherit your assets after your death. It is a good idea to have a notary public also sign the Will. You are free to leave your assets to anyone you choose.

You are not required to leave your estate to your spouse or your children. However, if you decide to disinherit your spouse or children, the Will should name those people and specifically state you wish to leave them nothing. The Will can be creative. You can select certain personal items such as a treasured wedding ring and leave it to a specific person. You can also create a trust so that if your young children inherit, their money will be managed by someone you trust until they are grown. A trust created by a Will is called a Testamentary Trust. (Another type, the Revocable Living Trust, is discussed below.) Usually, parents of young children will also name a guardian to care for the personal needs of their kids.

There is no limit to the number of Wills we can create. The most recent Will is typically the Will that is probated. A difficult issue arises when someone wants to do a Will and they are very ill or aged. The law requires that you have minimum competency in order to sign a Will (as well as a Power of Attorney).

The long existing legal test for competency for Wills is:

1. Does the person know what a Will is?
2. Does the person know in general terms what their assets are?
3. Does the person want to leave their estate to "the natural objects of their bounty"?

If you are in doubt as to whether a person has capacity, a good practice (though not often used) is to have the medical care provider serve as one of the witnesses to the Will. The medical provider knows the person and knows the medical condition of the person. They can sign as a witness and can also sign an additional Affidavit that says that they are aware of the three pronged test for competency, they have discussed each of the three prongs with the person, and they are satisfied that the testator is competent to sign a Will.

It is important to understand that the level of competency required to sign a Will is less than the competency that is required to establish a guardianship. Therefore, even if a person is in a Guardianship, the Court has the power to grant the person the right to create a valid Will.

See Appendix I for frequently asked questions regarding Wills and Estate Planning.

## IV. Revocable Living Trusts

When you create a Revocable Living Trust, you must transfer ownership of all your property, including all real estate, personal property, bank accounts, and pension accounts to the name of the Trust while you are alive. This is very different from a Testamentary Trust, which is created by your Will in the event of your death. Both of these types of Trust, however, direct how your estate should be distributed after your death.

There are several reasons to create a Revocable Living Trust. The most common reason, as a way to avoid probate, is not usually needed in Washington. In many states, a Revocable Living Trust is very useful in avoiding the high cost of probating an estate. Washington State, however, has low probate costs, so it is usually less expensive to write a Will and probate it than to create and manage a Revocable Living Trust through your entire life. In addition to the expense of managing a Revocable Living Trust, it is all too easy to forget to transfer some of your assets into the trust's name. If any of your assets are in your own name at the time of your death, your estate may need to go through the probate process even if you have created a Revocable Living Trust.

Another motivation is privacy. Since Revocable Living Trusts are not usually filed with the Court, having such a Trust gives you a greater degree of privacy than a Will, which becomes part of the public record once it has been filed after your death. If you are concerned about family disputes surrounding financial matters, for example, you may wish to keep the distribution of your assets from becoming public record.

A properly created Revocable Living Trust can also avoid the necessity of having a Guardianship established if you become disabled in the future. Once again, however, there is a less expensive way to accomplish this goal. Durable Powers of Attorney can cover both health care issues and financial issues and can be written by an attorney for much less than the cost of a Revocable Living Trust.

## V. Guardianships

Washington State has a detailed guardianship law designed to protect incapacitated persons. There are many safeguards in this process and attorneys are generally involved as the procedure is complex and can be expensive. For persons who have no resources or family, Adult Protective Services can initiate guardianship proceedings with the help of an assistant attorney general for the State of Washington.

There are three basic types of guardianships: Guardianship of the Person; Guardianship of the Estate; and Limited (temporary) Guardianship. Often, an incapacitated person needs guardians of both the Person and the Estate. Any interested person can Petition the Court for Guardianship. The Court will appoint a guardian ad litem to review the case and report back to the Court. The initial procedure takes about 2

months to complete. If the Court finds that the person is incompetent, they will appoint a Guardian who then takes on the burden of reporting its activities on a regular basis to the Court.

See Appendix II for frequently asked questions regarding Guardianships.

## VI. The Vulnerable Adult Statute

This statute allows an interested person to get a court hearing relatively quickly if they think an adult is being victimized by another person. This law gives definitions of abandonment, abuse, neglect, and exploitation. It allows the Department of Social and Health Services to get involved in helping an abused adult, and also allows private citizens to go to Court to seek help for a vulnerable adult.

The type of person who needs this protection is generally not someone who is already in a guardianship, and generally has no power of attorney or Living Trust document. However, this statute can also be used to protect someone who is being abused by their guardian or attorney-in-fact named by their power of attorney.

To report abuse, call the DSHS toll free hot line: 866 EndHarm or (866) 363-4276.

The following list of adults who may be classified as vulnerable is just one resource on the website.

A Vulnerable Adult includes a person who:

- Is at least age 60 and lacks the functional, mental, or physical ability to care for him/herself (in other words, at least age 60 + eligible to qualify for a Guardianship); or
- Has a Guardian; or
- Has a developmental disability as defined under RCW 71A.10.020; or
- Is admitted to any facility, such as a boarding home, a nursing home, an adult family home, a soldier's home, a residential rehabilitation center, or other facility licensed by DSHS; or
- Is receiving services from home health, hospice, or home care agencies licensed or required to be licensed under RCW 70.127; or
- Is receiving services from a person under contract with DSHS as an individual provider; or

- Is living at home and receives services from a paid personal aide and self-directs the care (RCW 74.34.021). RCW 74.34.020(13)

## VII. Physicians' Orders for Life Sustaining Treatment

Your physician can now use a new form to write orders that indicate what type of life-sustaining treatment you want or do not want at the end of life. The Physician Order for Life Sustaining Treatment ("POLST") form, recently introduced for physicians' use, is available from the Washington State Medical Association, who can be reached at (206) 441-9762 or (800) 552-0612. The form is intended for use by any person over the age of 18 with serious health conditions.

In addition to the POLST form, you should also have a Health Care Directive and a Medical Durable Power of Attorney. The Health Care Directive says whether you want to have your life prolonged by medical intervention if you are terminally ill. The Medical Durable Power of Attorney allows you to designate another person to make medical decisions for you if you are unable to do so.

We should all sign a Health Care Directive and Medical Durable Power of Attorney, and if we become terminally ill, we should also review the POLST form with our physician.

## Appendix I Wills and Estate Planning FAQ

### **What is a Will?**

A Will is a written document explaining how you want your possessions and assets to be distributed after you die. A Will is put into effect at your death. You can change your Will at any time, as long as you are legally competent to do so. Your Will is filed with the Court after your death and becomes a public record.

### **How do I know if I need a Will?**

If you have assets and want certain people or charities to inherit those assets, you should have a Will.

### **Why should I make a Will?**

You should make a Will so that your estate is distributed in accordance with your wishes. Since a Will has no effect until you die, you cannot personally direct the distribution of your estate. A Will must be properly executed to be valid. If you have a Will which is not properly executed, you are deemed to have died without a Will. Letters, notes, computer entries, or other informal documents stating how you want your estate divided are not a valid Will and have no effect on the distribution of your estate. If you have minor children, you should also make a Will to name the person you want to be your children's custodian.

### **What makes a Will invalid?**

There are many reasons a Will could be invalid. One of the common ways a Will is invalid is because it was not properly signed and witnessed. Washington State law is clear about the requirements for a Will: it must be signed by the Testator (the person signing the Will) in the presence of two witnesses, and the witnesses must also sign the Will on the same occasion. The witnesses must also sign an affidavit about their signing the Will, which they can do at the Will signing or some time later. Without the witnesses' signatures and affidavits, a Will cannot be admitted to probate. It is also a good idea to have the witnesses' signatures notarized.

### **Why can't I just cross something out on my old Will and change it?**

You cannot make any marks or changes to your Will once it has been signed and witnessed. If you do, you invalidate your Will because your changes are not properly witnessed according to Washington law. If you want to change the terms of your Will, you must execute a new document.

### **How do I know if I need a Testamentary Trust?**

If you have young children or if one of your heirs is disabled or unable to manage money well, you should speak with your estate planning attorney about creating a Testamentary Trust.

**What is a Power of Attorney?**

A Power of Attorney is a legal document that gives another person the right to act on your behalf under certain circumstances. A Power of Attorney can be for a limited purpose such as signing documents for you when you are out of town, or for general purposes (such as managing your financial affairs if you become unable to do so). Some Powers of Attorney deal specifically with making medical decisions.

**What does "Durable" mean?**

If a Power of Attorney is "Durable," this means that the person to whom you give your power can make decisions and act on your behalf even if you become disabled. One type of Durable Power of Attorney does not become effective until the Principal (the person giving the power) becomes incapable of managing his or her affairs. Having a Durable Power of Attorney can sometimes avoid the need to have a Guardian appointed.

**What is a Health Care Directive or Living Will?**

A Health Care Directive, sometimes called a "Living Will," or a "Directive to Physicians," is a written statement of your wishes in the event you are in a "persistent, vegetative state" (such as a coma). The Health Care Directive is given in RCW 70.122, et. seq., a state law entitled "The Natural Death Act." A Health Care Directive addresses issues such as life support, artificial nutrition, and artificial hydration.

**What does a Disposition of Remains form do?**

A Disposition of Remains form is a written expression of your wishes about funeral and burial. Having a Disposition of Remains form is especially important if you wish to be cremated. If you want to be cremated, and you have not signed a document to that effect, the funeral home will most likely require the consent of your relatives. If one relative does not consent, the funeral home may choose not to cremate your remains. Having a Disposition of Remains form can also be very helpful to your survivors. The death of a family member or close friend is always traumatic; having a clear expression of your wishes is one less worrisome issue for your family to handle.

**What is "Joint Tenancy with Right of Survivorship"?**

If you own property in "Joint Tenancy with Right of Survivorship," this means you own the property equally with another person and each person is entitled to the asset. When you die, the other person inherits that asset immediately, without a probate. A common example of Joint Tenancy with Right of Survivorship is a bank account in the names of both a parent and an adult child. Both people are owners of the account, and either one of them can withdraw money from the account at any time, even if one has not deposited money in the account. When one person dies, the other person becomes the sole owner.

When preparing your estate plan, you should check to see if any of your assets are held in Joint Tenancy with Right of Survivorship, as these assets will pass to the "Joint Tenant" and will not pass according to your Will.

**What does "Pay on Death" mean?**

"Pay on Death" accounts are more restrictive than Joint Tenancy with Right of Survivorship accounts. If you have a bank or investment account that is Pay on Death, you are the sole owner of the account during your life. When you die, your designated beneficiary inherits the account. You designate the beneficiary when you open the account. The beneficiary takes the money in the Pay on Death account and this money is not controlled by your Will.

**Can Estate Planning help my estate avoid paying taxes?**

To a certain extent, yes. A qualified estate planning attorney can explain different options for distributing your estate and can help reduce the amount of tax your estate will pay.

**Can't I just give everything away before I die?**

"Gifting," which is giving property and money away while you are alive, is a technique that can reduce estate taxes. If you gift more than \$14,000.00 to a single person in a calendar year, you must file a gift tax return with the IRS. (This amount is usually adjusted annually). Before you give property or money to someone, consult with a qualified estate planning attorney and a Certified Public Accountant.

**Doesn't my Community Property Agreement take care of everything?**

A Community Property Agreement is an agreement between a husband and wife that can affect probate or even eliminate the need for probate. Your estate planning attorney can explain how your particular estate can benefit from a Community Property Agreement.

**Where should I keep my estate planning documents?**

The originals of your estate planning documents, such as your Will, Durable Powers of Attorney, Health Care Directive, and Disposition of Remains Instructions, should be kept in a fireproof, locked container. You may store them in your safe deposit box or a fireproof safe. If you do, it's a good idea to give access rights to one other person so that when you die, that person can retrieve your Will from the box or safe.

**How much will estate planning documents cost?**

The cost for estate planning documents varies depending on the complexity of your estate and your estate planning goals. After you meet with an attorney, the attorney can give you an estimate of cost.

**Is it really worth the expense to have an attorney prepare my estate planning documents?**

Yes. Not only does having a complete professionally prepared estate plan give you peace of mind, it will help reduce the costs of administering your estate and will make the probate process easier for your loved ones. The forms you find online or in office supply stores are too general for most people to accomplish their estate planning goals. A qualified estate planning attorney can write documents specifically for your particular situation.

## Appendix II Guardianships FAQ

### **What is a Guardianship?**

A Guardianship is a Court approved arrangement that is useful when a person cannot manage their own financial or personal affairs. The Court sees Guardianship as a last resort and favors the use of a Durable Power of Attorney or other less restrictive alternatives to Guardianship when appropriate.

### **What is the difference between a Guardianship and a Conservatorship?**

Washington State does not have Conservatorships. A Conservator appointed in another state often has similar powers in that state to a Guardian in Washington State.

### **What is the difference between a Guardian of the Person and a Guardian of the Estate?**

A Guardian of the Person is responsible for decisions relating to an incapacitated person's health care and other personal matters. A Guardian of the Estate is responsible for decisions relating to managing an incapacitated person's financial affairs, such as paying their bills. Often, the Guardian of the Person and the Guardian of the Estate are the same person, but they can be different people.

### **What type of person needs a Guardian?**

Guardianships are for people who are incapacitated and unable to take care of their personal and/or financial affairs. Guardianships are also for children under the age of 18 years. Just because your grandmother sometimes forgets where she left her keys doesn't mean she needs a Guardian. Guardianship is a last resort; other, less restrictive methods should be considered first.

### **Why can't someone with dementia sign a Power of Attorney instead of getting a Guardian?**

In order to give your Power of Attorney to someone, you must be competent. If someone is already affected by mental illness, dementia, or some other disorder that affects their mental capacity, they may not be competent to sign a Power of Attorney. In these cases, Guardianships are the only alternative unless the person signed a valid Power of Attorney before they became incapacitated.

### **What if someone needs a Guardian but doesn't want one?**

The person who might need a Guardian has the right to object to having a Guardian if they do not want one. They also have the right to an independent attorney of their choice and an independent doctor's examination if they want. They can ask for a trial to be held to determine if they really need a Guardian. The Court considers all the evidence on both sides before appointing a Guardian.

**Can I become a Guardian?**

Any interested person can ask the Court to establish a Guardianship for another person who they think is incapacitated. The requirements for serving as a Guardian are established by Washington State statute. The Court may appoint any person meeting those requirements to serve the needs of the incapacitated person.

**What is a Guardian ad Litem and what do they do?**

When someone asks the Court to appoint a Guardian for an incapacitated person, the Court will appoint a Guardian ad Litem to investigate the situation. The Guardian ad Litem is required to meet with the alleged incapacitated person ("AIP"), talk with the person who filed the papers with the Court, obtain a medical report for the AIP, and then report back to the Court within 45 days with a recommendation. The recommendation will say (1) whether the person is incapacitated and needs a Guardian, and (2) if they do need a Guardian, who should be the Guardian.

**Is a Professional Guardianship service required?**

No. Although there are many good Professional Guardianship services available, any eligible person may ask the Court to be appointed as Guardian. Professional Guardianship services have expertise and can provide a great benefit to the incapacitated person. Being a Guardian can sometimes be a full-time job, and in some cases a Professional Guardian is best.

**How long will it take to get a Guardian?**

The initial Guardianship process usually takes about 60 days.

**How much will it cost to start a Guardianship?**

Starting a Guardianship is an involved process and because each case is different, there is no set fee. Though the Guardianship process costs money, establishing a Guardianship preserves the incapacitated person's money.