

If You Became Incapacitated, Who Would Make Decisions for You?

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Tractor overturns, 40-year-old comatose.

Seventy-year-old is bedridden and unable to care for herself after stroke.

Fifty-year-old suffers brain damage in accident.

Illness and accidents cannot always be prevented, and the situations they create for families are never easy. Imagine that, as a result of an accident or illness, you were unable to make decisions. What would happen? Could someone pay family bills? Who would make medical decisions for you?

You can appoint another person to make decisions on your behalf in case you become incapacitated.

Now, while you are competent, is the time to make plans. Now, while you are competent, is the time to discuss your plans with family members.

Health decisions

The Oregon Advance Directive lets you control decisions about your health care if at a later time you can't make those decisions on your own. The Advance Directive has two main parts: it appoints a person to make your health decisions, and it says which medical treatments you do and do not want.

You don't need to hire an attorney to complete the Advance Directive. The form, which includes instructions, is available from health care facilities such as hospitals, nursing homes, and federally funded health maintenance organizations. Also, it may be available from your doctor or attorney or in a stationary or business supply store that sells legal forms.

If some time ago you prepared a document called a Health Power of Attorney, review it. It probably has

expired and, if so, needs to be replaced with the Oregon Advance Directive.

If you become incapacitated before completing an Oregon Advance Directive, there are other ways a decision maker can be appointed for you.

The most common way is to ask the court to appoint a guardian. That involves time and legal expense and often is emotionally difficult for family members. The biggest disadvantage is the guardian doesn't know what kind of care you would have wanted, though guardians typically do the best they can to make appropriate health care decisions on your behalf.

The Oregon Advance Directive cannot give a person the power to make decisions about mental health treatments for you. If you might want to give instructions about psychoactive medication, convulsive therapy, and short-term admission to a treatment facility, talk with your mental health care professional about preparing a Declaration for Mental Health Treatment.

Financial decisions

The most common tools used to give someone the power to make your financial decisions are the *durable power of attorney* and the *revocable living trust*.

Durable power of attorney This is a written document by which one person (called the *principal*) gives another person (called the *attorney in fact*) the power to make his or her financial

decisions and to carry out financial transactions. A durable power of attorney continues in effect if you become incompetent. The word "durable" does not have to be used in the actual document. The power is durable unless the document says the power will end at a certain time or event. As long as you are competent, you can change or revoke a power of attorney.

When you create the power, you state when it becomes effective: when the document is signed, or at some future time. For example, it could take effect only if you become incapacitated. The document also may say who will determine that you're unable to make financial decisions.

A power of attorney can be *general* or *specific*. A general power gives the attorney-in-fact the power to do anything you can do. A specific power applies to specific types of financial transactions.

You don't always need an attorney to create a power of attorney. Often, a financial institution such as a bank or brokerage has a power of attorney form to use for an account at that institution.

If you are unsure what power you really want or need to give, or if you want to include specific instructions, have an attorney draft the document.

Revocable living trust This transfers ownership of assets to a trustee who manages the assets for the trust beneficiaries, as directed by the trust agreement. The same person can serve

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simultaneously as the creator of the trust (the *grantor*), the trustee, and the beneficiary. The trust agreement provides for a successor trustee if the trustee becomes incapacitated or dies. The successor trustee must follow the trust agreement, which you prepared. To create a revocable living trust, you need a trust agreement, and you must transfer assets into the trust. Do **not** do this without an attorney's services.

If you become incapacitated without either a durable power of attorney or a revocable living trust, a conservatorship must be created. The court appoints a person (or a financial institution) to manage your financial affairs. Appointing a conservator involves time and legal expense and often is emotionally difficult for family members.

Personal decisions

If you became incompetent, someone would have to make personal decisions for you, such as where you live, what you eat, and what you wear. Usually a family member makes these decisions. However, if the person you would want to make these decisions is not legally related to you, you may nominate that person to be appointed as your guardian if needed. Sometimes this nomination is an additional condition or instruction in the Advance Directive for health care. Other times, it may be in a separate document.

Discuss your planning with family members

The better your family members understand your wishes and decisions, the better they'll be able to cooperate and support the person(s) with the decision-making responsibilities. Family members should know the location of your documents.

Location of the documents

Oregon Advance Directive Give copies to your primary-care doctor and/or medical clinic, to the person who would be contacted if you were ill or in an accident, and to the person who would have the power to make your decisions. Keep a list of who has copies. Later, if you change the directive, you'll be able to recall and destroy the old copies.

The power of attorney If the power of attorney is effective immediately, give a copy of the document to the person who has the power. Or, if the power isn't effective until you're incapacitated, keep the document but let someone know its location and how to get it. A safe deposit box is a good place for the original *if* another person is authorized to get into the safe deposit box.

Revocable living trust Keep a copy at home; on it, write the location of the original. A safe deposit box is a good place for the original.

Other important papers Someone making your health care and/or financial decisions needs information about your health insurance, finances, etc. "Where Are Your Valuable Papers?" (EC 1234) will help you compile this information.

For further reading

Making Health Care Decisions When You Can't Speak for Yourself: Consumer Guide. Oregon Health Decisions, 812 SW 10th Ave., Suite 203, Portland, OR 97205. 503-241-0744 or, outside Portland metro area, 1-800-422-4805. \$3.00

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