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Managing Your Property and Personal Affairs [1]

There are many decisions to be made every day in life, even late in life. This is called life-time planning. Some of these decisions are of a financial nature, while others are of a personal nature, and still others are health-related.

Financial decisions might include whether or not to have a joint bank account, how to go about paying bills and arranging finances, and drafting and maintaining legal papers.

Personal decisions might include making funeral plans or burial arrangements, choosing where to live, and fulfilling spiritual or religious preferences.

Health decisions could include consenting to or refusing treatment, deciding upon the course of treatment in case of terminal illness, and appointing someone to make health care decisions for you should you become incapacitated.

Each of us have the right to make our own choices and decisions based upon our own values and our own desires, even if others disagree with us. Courts have almost always followed the express wishes of competent adults. Therefore, it is important to state your desires in writing about health decisions, financial decisions, and personal decisions when you are clearly capable of expressing those wishes. It is important to plan now for a possible period of your life when your physical, medical, or mental conditions may require the involvement of another individual to assist you with the activities of daily living. Some questions you should consider when you begin planning for the future are:

- Who should you authorize to have access to your bank accounts or other financial arrangements if you are not able to take care of them yourself?
- Who should you give authority to make health care decisions on your behalf if you are unable to do so?
- At what point in your life should you authorize the people to take over your financial and/or health care decision making?

Ideally, we all should make lifetime plans when we are healthy and do not need someone to make decisions for us. Practically speaking, many people do not begin making lifetime plans at an early age. The objective of advanced planning or lifetime planning is to maintain control over

your life in the scenario that you become impaired and are unable to maintain the control over your life that you like to at that time. It is important to have someone ready and available to step into your shoes should the time come.

Shared Bank Accounts

Most financial institutions have various options allowing more than one person to have access over funds in a bank account. The most common type of shared bank account is called a **joint bank account**. This allows two or more people to deposit and withdraw money from the bank account. The persons whose names are on the account do not need permission from the other to utilize that bank account. If one of the account holders dies, the funds in the bank account belong to the other individual. Before considering this type of arrangement, you would need to fully trust the person(s) that you place on the account.

There are various **disadvantages of joint ownership**. For instance, the person you list as the joint holder could withdraw all of the monies without your permission or knowledge. In such an event, you probably would not ever be able to recover those monies.

Another disadvantage is that these types of accounts could negatively affect the ability of you to access public benefits, such as Medicaid or the SSI program. This is because programs such as Medicaid consider a joint bank account to be 100 percent available to the Medicaid applicant. As a result, you could be denied benefits, because it is assumed that you have more money in the bank than is allowed.

Where there is a significant amount of money involved, it is always best to consult an attorney before setting up a joint bank account. For more information, see " Transfers of Property and Estate Planning".

Power of Attorney

A durable power of attorney is a document by which one person ("principal") gives legal authority to another ("agent") or ("attorney in fact") to act on his/her behalf. A power of attorney is a simple method to appoint someone that you want to manage any part or all of your affairs. A power of attorney can be very broad or it can be very limited. A limited power of attorney could grant permission to another person to perform only certain acts, such as the authority to sign a deed transferring a specific piece of real property to someone. A broad power of attorney could enable the person to handle a broad range of financial and personal affairs. A power of attorney can only be created when you have the mental ability to know what the creation of the document means and that you are acting at your own free will.

It is advisable that you seek a durable power of attorney rather than a regular power of attorney. A regular power of attorney is usually valid while you have the mental capacity to inform your agent of your desires and to oversee his/her actions. It becomes useless when you lose that ability and become incapacitated. A durable power of attorney, on the other hand, survives incapacity. A durable power of attorney indicates in the document that the power of attorney will remain in effect despite the incompetence or incapacity of the principal. A durable power of

attorney is more useful than a regular power of attorney, since the agent can continue to take care of your affairs after you can no longer do so yourself. **That is exactly when you need an agent to act in your behalf--that is when you would need him or her the most.**

A power of attorney can be effective as of the date of execution (the date it is signed by the principal), or it can spring into effect at a future point in time. Most powers of attorney spring into effect at a time when you have determined that it should. This means that you could appoint someone today to be your agent but his/her ability to act in your stead would only occur when a certain event has taken place. The most common springing durable power of attorney is that the one which would kick-in at such time as you became incompetent or incapacitated. In those situations, language is usually included that a physician would be required to provide a letter and attach it to the durable power of attorney attesting to the incompetence or incapacity of that individual.

Remember, you can only create a power of attorney when you are of sound mind or in a lucid interval. No one else can create a power of attorney for you or sign a power of attorney for you. Thus, if you have never had an opportunity to draft a durable power of attorney and you then become incompetent or incapacitated and unable to manage your finances and affairs, this option is unavailable and other courses of action may be necessary, such as guardian and/or conservatorship. When creating a durable power of attorney it is important to remember that you want to appoint someone who is extremely trustworthy and someone who is willing and able to take on the responsibility of managing your affairs.

In Idaho, a durable power of attorney may **not** necessarily need to be signed in front of a notary public when executed by the principal. A power of attorney does **not** need to be recorded unless it is being used in connection with a real estate transaction. If using the power of attorney in connection with a real estate transaction, the power of attorney would **need** to be notarized. Therefore, it is always best to sign a power of attorney in front of a notary.

As you can see, there are great advantages to a durable power of attorney. By carefully drafting a legal document that fits your needs when you are of sound mind, you can be assured that you affairs will be taken care of, that bills will be paid and that your general lifestyle will not be affected too much by your inability to manage your own affairs. On the other hand, there is always the possibility of being harmed by an untrustworthy agent. There is no mechanism in Idaho which provides for a formal oversight of the agent. Therefore, if there is no one you fully trust to act as your agent, don't use this important tool.

On a side note, it is a good idea to put a gifting clause in your durable power of attorney for the purposes of Medicaid and spousal impoverishment. This is discussed further in the Chapter on Medicaid. Another clause that would be helpful to have in a power of attorney is that the power of attorney shall not be affected by lapse of time.

Important points about Power of Attorney

- The person who gives a power of attorney to another person is called the **principal**.
- The person appointed and authorized to use the power of attorney is called the **attorney-in-fact**

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- It is best to sign a durable power of attorney before a notary. Unless it is notarized it cannot be recorded, and unless it is recorded it cannot be used to deal with real property. (See " Transfers of Property")
- The principal, by giving a power of attorney to the attorney-in-fact, does not give up the right to continue transacting his or her own affairs.
- After it is signed, the original of the power of attorney should be given to the attorney-in-fact. The attorney-in-fact may then give copies of it to other parties, but should always retain the original. The principal should also keep a copy.
- The attorney-in-fact may use the power of attorney only for the benefit of the principal; the attorney-in-fact may not use the power of attorney for his or her own benefit.
- Whenever signing a document for the principal, the attorney-in-fact should sign as follows: "[name of principal] by [name of attorney-in-fact] as attorney-in-fact for [name of principal]." For example, if Mary Smith has given a power of attorney to her husband, John, then John should sign documents when using the power of attorney as follows: "Mary Smith by John Smith as attorney-in-fact for Mary Smith."
- A power of attorney may be revoked by the principal at any time by giving written notice to the attorney-in-fact. If the power of attorney is recorded, then the revocation must be recorded.
- If a power of attorney is a **durable** power of attorney it will remain in effect, unless it explicitly states an earlier expiration, until the principal revokes it or the principal dies. A durable power of attorney contains the following or similar language: "This power of attorney shall not be affected by subsequent disability or incapacity of the principal." If it is not a durable power of attorney it will remain in effect, unless it explicitly states an earlier expiration, until the principal revokes it or the principal dies or the principal becomes mentally disabled or incompetent.
- A power of attorney need not be recorded at the county recorder's office unless it is being used in connection with a real estate transaction.
- The attorney-in-fact is **NOT** financially responsible for the principal's debts.
- A power of attorney ceases to be effective once the principal passes away.

Durable Power Of Attorney For Health Care

This document is similar to a durable power of attorney, but it is directed exclusively to health care decisions and health care concerns. The power is effective **only** when the principal is unable to communicate rationally. Once again, the principal must be of sound mind or must at a time of lucid interval, execute this document for himself. He can do so in front of a notary public and/or two witnesses. By way of this document, the principal would appoint someone he trusted to make any and all health care decisions and to spell out some guidelines for those decisions. If the document is witnessed:

- the witness cannot be the person you designate as your agent or alternate agent
- a healthcare provider
- an employee of a healthcare provider
- the operator of a community care facility
- the employee of an operator of a community facility

One of the greatest advantages of a durable power of attorney for healthcare is not only that your health care wishes can be carried out to the fullest extent, but it helps to relieve the potential stress of the conflict of decision making for family, friends, and loved ones.

It is important that when you choose your agent, you choose someone who is willing and able to carry out your wishes. In addition, make sure he knows your wishes, values, and preferences. It is best to put these in writing. Once executed, a copy of this document should be provided to your health care providers and should become part of your medical record.

A durable power of attorney for health care is usually done at the same time as a Living Will in order to implement the desires expressed therein. You can revoke your durable power of attorney for health care and/or execute another durable power of attorney for health care at any time as long as you are competent to do so.

Living Will

In Idaho, there is one health care decision which the law requires that you put in writing and that you do it at a time when you are of sound mind. This document is a living will. This document is made regarding your wishes of the use of life-prolonging medical care in the instance that you have an incurable injury, disease, illness, or condition certified by two medical doctors, where the application of artificial life-support will only prolong your life as death is imminent, or you have been diagnosed as being in a persistent vegetative state.

A living will must provide the directions and choices a person wishes. Basically, an individual can choose to have:

- all medical treatment provided to him or her including all artificial life-support procedures deemed necessary
- no artificial life-support provided, but that food and water be provided
- do nothing and let nature take its course

In all three options, you must be kept comfortable and free from pain. The important things you want to think about prior to completing your living will is whether or not you want artificial life support, and if not, whether or not you want food and water provided to you at that time.

Representative Payee

Some government programs allow benefits payable to one person to be paid to another person called a representative payee. Social Security, Railroad Retirement, and the Veterans Administration programs all use representative payees. The benefits are to be used for the person entitled to the money only.

A representative payee can be appointed to you if you are unable to manage the benefits you receive. You or someone on your behalf must apply to the agency paying the benefits. A power of attorney will not work to endorse or cash federal checks.

It is not necessary to be legally incapacitated or incompetent to qualify for a representative payee. If you do not want a representative payee or wish to have another person serve as payee, you can ask the agency to change its decision. The agency must review their decision to see whether or not you need a payee. It is important to know that you have the right to challenge an agency's decision to appoint a payee.

A representative payee must account for the funds used and saved. They are required to report this on a regular basis to the agency involved, usually on a yearly basis. If the representative payee purposely misuses the funds, he/she may be prosecuted. To get more information about representative payees, you should contact the paying agency directly.

Conservatorship

A conservatorship is the legal proceeding that gives a person (the conservator) power over the finances and estate of the incapacitated or incapable person (the protected person). A conservatorship is established when an individual or agency petitions the Court to have someone appointed to be conservator for the alleged incapacitated person. You can designate the person that you would want to be your conservator in the event that it become necessary by stating that in a durable power of attorney. If you do state a person, the Court can decide on a person that has priority and appointment him/her.

Idaho requires that a petition be served on the protected person at least fourteen (14) days prior to a hearing. A court visitor may be appointed by the Court as well as a doctor who would both submit reports regarding the protected person's physical and/or mental abilities as well as a recommendation as to whether or not a conservatorship may be necessary. If the protected person does not have counsel of his or her own, the Court may appoint an attorney to represent him who has the powers and duties of a guardian ad litem.

The Court will appoint a conservator if it finds that the protected person is unable to manage his property and affairs effectively and that the person has property which will be wasted or dissipated unless proper arrangement is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds.

Once a conservator is appointed, the Courts in Idaho require that the conservator file an inventory of the protected person within ninety (90) days of the court appointment. The Court then requires that the conservator file a yearly accounting with the Court. In that accounting, the conservator must tell the Court how he/she has managed the finances and estate of the protected person over the past year. An Inventory of Estate of Protected Person form and an Annual Account of Ward's Estate form are located at the end of this chapter.

The advantages of a conservatorship are that they are required to report to the Court. In addition, the Court can impose a fine not to exceed $5,000 if the Court finds that the conservator or guardian makes a substantial misstatement on the required annual reports or is guilty of gross impropriety in handling the property of the ward, or willfully fails to file the report within two (2) months after having received notice to do so. The disadvantage of a conservatorship is that it can

be expensive and it requires a certain amount of time to get put in place. In most cases, having in place the three advance directives (durable power of attorney, durable power of attorney for health care, and living will) can prevent the need for a conservatorship. This is not always the case and there are always exceptions where a conservatorship and/or guardianship may be necessary even though someone does have their advance directives in place.

A conservatorship can be terminated if the protected person is no longer incapacitated or incapable of making financial decisions. A petition would need to be filed with the Court to terminate the conservatorship. Likewise, the conservator can petition the Court to have a particular conservator removed and someone else substituted in as conservator.

Idaho allows for a protective arrangement and single transactions without acquiring the appointment of a conservator. In such an action the Court may authorize or direct any transaction necessary or desirable to achieve any security, services, or care arrangements meeting the foreseeable needs of the protected person. Common examples include the establishment of a trust and transactions involving real property.

Guardianship

A guardianship is the legal proceeding that gives a person (the guardian) the power over all of the personal decision-making of the incapacitated person (the ward). A guardian is appointed by the Court when the ward becomes incapacitated or is in danger of serious physical injury or illness and is unable to make decisions. A person interested in the welfare of another person may petition the Court to become their guardian.

The Court requires that a visitor be appointed to interview the proposed ward, the petitioner, and the person who is nominated to serve as guardian. The court visitor is to visit the abode of the ward and the place where it is proposed he might soon be residing.

The Court will also appoint a physician to examine the proposed ward. Both are to provide reports to the attorneys of record and the Court with any written recommendations.

The Idaho Code create a list of priorities that will give guardianship to the person who has the highest priority. However, the Court will look to a ward's preference if the Court feels that it is in their best interests and they are capable of making such a preference. Remember, a preference can be stated in a durable power of attorney. The visitor will inquire of any preference.

It is required that the ward receive notice of the petition and proceeding at least fourteen (14) days prior to a hearing. In addition, the Court will appoint an attorney to represent the alleged incapacitated person/ward. Once again, a ward can object on the basis that he feels that he does not need a guardian and/or that he wishes for someone else to be the guardian.

The ward is entitled to be present at the hearing, to have legal counsel, to submit evidence and testimony, and to examine the court-appointed visitor and physician and all other witnesses. After a hearing, the Court can appoint an individual as guardian upon a finding that the ward is unable to make or communicate responsible decisions concerning his person and is otherwise incapacitated. At such time, the Court would also issue Letters of Guardianship, which is a Court

paper showing the authority of the person named as guardian.

The main role of a guardian is making personal decisions for the ward. If the ward is unable to communicate, a guardian should try to make his/her decision based on what is in the ward's best interest, or on what decisions the ward would have made were (s)he able to do so. It is important that a guardian allow the ward to participate in the decision making process as much as possible and to the extent of his capabilities.

The Idaho Legislature and the Courts in Idaho hold that the least restrictive alternatives should be sought. Therefore, if a limited guardianship is all that is needed, that is all that should be sought and that is all that the Court should appoint. For example, a person may only need assistance in making medical decisions. The guardianship could be limited for those areas only.

In Idaho, an emergency guardianship can be sought ex-parte. There must be an urgent situation which exists that will likely result in substantial harm to the allegedly incapacitated person's health, safety, or welfare and no other person appears to have authority to act. The petition should be supported by a doctor's letter or other evidence indicating the urgency. The emergency guardianship must be limited to only those powers absolutely necessary, or the least restrictive to the proposed ward, for his or her immediate health and safety and until a full hearing can be held. An appointment of temporary guardianship expires after sixty (60) days.

When a person needs help with all decision making, both of a personal nature and a financial nature, a petition for guardian and conservator can be sought at the same time. Just as with the conservatorship, guardianships can be terminated upon petition to the Court and a finding that the ward is no longer incapacitated or unable to make their own decisions regarding their personal affairs.

Likewise, a petition can be made to remove a particular guardian and substitute that guardian with another person. It should be noted that although not specifically set out in statute, the Courts will allow a successor guardian to be named in a petition. This is most commonly used when an elderly spouse petitions the Court to be guardian and/or conservator of their spouse. Because of advanced age themselves, they may request at the same time that the Court name a successor guardian in the event that they themselves should no longer be able to carry out the duties and responsibilities of guardian and/or conservator, become unwilling to do so, or predecease the ward/protected person.

For more information see, "The Guardianship and Conservatorship Handbook" prepared by the Tax Probate and Trust Law Section of the Idaho State Bar, or a pamphlet entitled, "Serving as Guardian and Conservator" prepared by the Idaho Office on Aging in cooperation with the Idaho Department of Law Enforcement.
