

Idaho Legal Aid Services, Inc.

Advocacy. Education. Representation.

www.idaholegalaid.org

Your Future ^[1]

Advance Directives

You may have had a doctor or friend tell you that you need a legal document called a “power of attorney.” Sometimes these documents are called “advance directives.” There are several different kinds of “power of attorney” documents but they all have a similar purpose: they let you decide who will make important decisions for you if you can’t. Because this is a very important power, you should take care that you know what you are signing and talk to an attorney if you have any questions or concerns.

Capacity: know what you’re doing

To make a “power of attorney” document, you must have legal “capacity.” That is, you must know what it is you’re signing, and why you’re signing it. You must also know who you’re picking to have your legal powers, what powers they’ll have, and when.

Durable: Lasting your whole life

Before signing any type of “power of attorney,” you should make sure that it is “durable.” Durable means that it will last even beyond the point where you cannot make decisions (when you lack capacity).

Immediate vs. Springing: Now vs. Later

You can decide if you want your powers of attorney to be “immediate” or “springing.” Immediate means exactly that: the agent will have power to decide about your health care or finances right after it is signed. You might want to have the document be “springing” however. That is, it will “spring” into action when some condition happens. Most commonly, people will make their power of attorney become effective only after a doctor has stated in writing that they are no longer competent to make those decisions themselves.

Revocability: You can change your mind.

You can change the person who you name as power of attorney at any time, as long as you have capacity. You can simply revoke your current document or execute a new one, dating it so it is clear that it replaces the first document. These are your legal powers, so you should be the one to choose who gets to have them! If you revoke or change a power of attorney document, make sure that anyone who may have dealt with the old document, gets copies of your new or updated power of attorney or revocation.

Who should you pick as your agent?

The person you choose to have your Powers of Attorney should be a trusted friend or family member. It is a very important decision and you should not be pressured into choosing someone against your wishes. You should have serious talks with your agent so you know they understand what your wishes and beliefs are and are capable and comfortable acting in your best interest.

Powers over Health, Powers over Money

There are two main types of “power of attorney” documents: Power of Attorney for Health Care and Power of Attorney for Financial Affairs. The first document lets everyone know who you want to make decisions about your health when you cannot communicate with your health care providers. For example, the person you name could make the decision about whether or not to allow a surgery if you were unconscious. A power of attorney for finances gives your agent powers over your financial and legal matters such as accessing bank accounts, paying debts, signing contracts, signing up for government benefits, etc. You get to choose which specific powers to give to your agent and which powers she will not need to have. If your agent will deal with real property (a house or land) for you, make sure to have the power of attorney notarized.

Living Will

A “Living Will” is often made at the same time and in the same document as a power of attorney for health care. A Living Will gives your health care providers instructions regarding what life sustaining systems you want to have provided or withheld, in the event you are unable to express your own wishes due to an incurable and terminal condition or persistent vegetative state. A Living Will allows you to decide ahead of time what will happen in these situations. You have three main options:

1. provide all life sustaining measures;
2. remove life sustaining measures except to provide hydration (via an IV) and/or nutrition (via feeding tube); or
3. remove all life sustaining measures. A Living Will form is available at idaholegalaid.org [2], or you can discuss this document with your doctor.

Durable Power of Attorney for Health Care

A Durable Power of Attorney (DPOA) for health care is a document where you declare who you want to make health care decisions when you are unable to make them. A common example is

when you are unconscious after an auto accident. It tells your doctors who to talk to about different medical options or procedures on your behalf. If you wish, you can leave specific, special instructions about your care for your agent.

The living will and DPOA for health care do not have to be witnessed or notarized. After you sign, keep the original and give copies to your agents and doctors. You can also register the documents for free with the Idaho Secretary of State. Low income seniors may be able to get free help drafting advance directives and powers of attorney by contacting Idaho Legal Aid Services.

Leaving a Will or Dying “Intestate”

Most people know that it's important to create a will to show who should get their property when they die. Yet most people do not have a will. If you die in Idaho without a will (that is, you die “intestate”), the state will determine how your property will be distributed through laws called “intestacy statutes.” These laws are the state's attempt to distribute your property as you would have probably wanted. It's easy to imagine that the laws might distribute your property in a way that you wouldn't necessarily have wanted. That's why having a valid will is important as it will carry out your wishes and determine who gets what. You do not necessarily need a lawyer to help write your will. However, it may be best to ask for help from a lawyer, especially if you own significant assets like land or a house, or you have family members who don't get along with each other.

Requirements for a typed will:

- A statement of testamentary intent (basically, a sentence saying you want this to be your final will)
- Capacity (you are over 18, of sound mind, not signing under duress)
- Your signature and date
- Two witnesses who swear that you signed the will and then must sign the will themselves.

Requirements for a handwritten (“holographic”) will:

- All the important parts of the will must be in your handwriting (not typed).
- A statement of testamentary intent (basically, a sentence saying you want this to be your final will)
- Capacity (you are over 18, of sound mind, not signing under duress)
- You must sign it.
- You must date it.

Changing your Will

You can add something to a valid will or change it by doing a “codicil.” You can make a codicil in the same way you execute a will. (For example, signing, dating, having two witnesses).

Revoking a Will

- Tearing it up (along with all copies)
- Writing “revoked” on it
- Writing a new will dated after the old one

These requirements are VERY general. The laws of wills and probate are complex. Contact an attorney if you have any questions.

Avoiding Probate?

Probate is a court process where the estate of someone who has died is administered. Probate has a bad reputation and many people think they should “avoid probate.” Probate does not have to be time-consuming or expensive, especially for people with relatively small estates (less than \$100,000). In rare cases, however, (often involving family disputes over large estates), probate can be expensive and take years. You also may believe that you need to avoid probate to avoid estate taxes. However, estate taxes only apply to estates valued at over \$5 million (in 2015) and therefore are not a concern for most Idahoans.

In some circumstances, simplified probate procedures can be used:

- If your spouse dies, and you were the sole heir, you may be able to use an Affidavit in Lieu of Probate or Summary Administration for a Surviving Spouse.
- If an estate is smaller than \$100,000 and contained no real property, \$100,000, the heir(s) can fill out an Affidavit for Collection of Personal Property that allows him or her to collect personal belongings and documents of the deceased person.

It’s probably best to contact an attorney with questions about probate if your spouse or relative dies because there are many variables. If you do use a lawyer to go through probate, it is usually preferable to have them charge you a flat fee (for very small estates) or an hourly rate or and not a “percentage fee.” Don’t be afraid to go to a different attorney if you think you’re being charged too much.

Should I get a living trust?

Property placed into living trusts does not have to go through probate, so this may simplify transfers of ownership after your death. Because factors such as the size of your estate and your unique estate planning goals, you should consult with a licensed Idaho attorney if you have questions about living trusts. Living Trusts are not for everybody. Take time to make decisions about your estate and talk to a trusted attorney before buying a living trust.

