



Guide to Alabama Advance Directives

Jan Neal Law Firm, LLC

***Getting Your Business in Order* ebook series, Vol I**

Jan Neal, Attorney
Jan Neal Law Firm, LLC
207 N. 4th Street
Opelika, Alabama
36801 (334)-7
45-2779
1-800-270-7635
neal@janneallaw.com
www.janneallaw.com



This publication contains general information for educational purposes only. No attorney-client relationship is intended or established by providing this information. All persons accessing this information are encouraged to seek legal representation before relying on information herein for specific purposes and legal planning. Because laws change over time, it is important to recognize that **this publication is effective February 1, 2019**, and may become outdated in part after that time.

Understanding Types of Legal Authority

Legal authority for one person to act for another person comes about in multiple ways and at various stages of life and death. Preferably we select the persons we want to act for us, and, in those situations, the question becomes "*what type of authority do I want or need to give?*" to determine the document I need to prepare. That is the best scenario, but that is not always how life plays out. To that end, there are multiple ways others can act for us, and to that end we may have no say.

Obviously most people want to make decisions for themselves, and that is why planning for the contingencies of life and death is preferable to lack of planning resulting in our having no say.

Most people know they need to plan for death with a last will and testament or trust to designate how their property will pass at the time of death. Many people, however, do not realize that planning for disability is just as important, if not more so. Planning for a time when a person cannot act for himself or herself will have a tremendous impact on a person's quality of life and death. While failure to make a will can create problems for relatives, failure to make an advance directive to document a person's wishes concerning the handling of his or her finances, medical care and end-of-life decisions can produce tragic situations for the person as well as his or her caregivers.

Often, and particularly within families, everyone assumes that he or she will be able to act for a relative if needed. Sometimes that is possible, and sometimes it is not. Caregivers are at risk of not being able to conduct the business they need to manage without having the authority to do so. In some respects, authority to act is the critical threshold issue for any caregiver.

Issues of legal capacity to act for another come into play particularly in long-term care settings. Authority is needed to enter into contracts, sell property, set up income trusts, if needed, for Medicaid, give liens to Medicaid, access money in bank accounts, handle day to day financial transactions, etc. When an individual cannot direct his or her own medical care, the medical agent takes over to make routine medical decisions, and when a person is in a terminal or permanently unconscious state, the health care proxy can direct end-of- life decisions that may need to be made.

A person may name an individual or co-agents to serve in any of these capacities.

What all legal authority roles have in common is that a person or persons obtain authority to legally act for another as his or her agent(s) or surrogate(s). All states have agency laws to define who may act for another, but those state laws may vary significantly. Further, the ways that various agency authority arrangements can be made differ. Because of that, authority issues can be complicated and confusing.

Here we will look at multiple ways people plan for disability and designate caregivers in Alabama to have authority to act for them if needed and how you might want to name agents to act for you when or if you cannot act for yourself.



Financial Directives

The most flexible and least expensive way to obtain authority to conduct financial business for another is to be named as agent in a durable power of attorney created by the person who will need his or her business conducted by another. This power can only be given while the person needing help is still competent to give that authority to another person. In this way powers of attorney require pre-incapacity planning. Once a person is suffering from significant incapacity, a power of attorney cannot be signed, and, if one is, the power given can be challenged by others who may not want the power to be given to the agent.

The law of surrogate financial decision-making is not new. Society has always recognized that situations arise where one person needs to act for another. For instance, land may have needed to be sold when the owner was out of the country. In those situations the landowner, known as the principal, would prepare a limited power of attorney to name a person, known as the attorney-in-fact, to handle the sale in his absence. At common law the power of attorney would remain in existence until revoked, or until the death or incapacity of the principal.

Understanding the terminology is important:

The person who makes a power of attorney is the principal. The person appointed to make decisions for the principal is the agent or attorney-in-fact. You will also run into terms such as surrogate or proxy, but these are more likely to be used in a medical decision-making setting.

In the early 1980s society began to recognize the need for a power of attorney that would continue to be in effect if the principal became incompetent, allowing caregivers to act for the disabled person. Along came the durable power of attorney which legally required specific language in the document indicating that "this power of attorney shall not be affected by disability, incompetency or incapacity of the principal" or equivalent language (meaning the document was durable enough to survive the incapacity of the person who made the document). The special language remained a requirement in the law until the state passed The Alabama Uniform Power of Attorney Act effective January 1, 2012. That law eliminated the special language requirement by making the presumption of durability for powers of attorney signed on or after January 1, 2012. Before 2012 the law presumed the power of attorney not to be durable (thus the special language requirement); after January 1, 2012, the law presumes the power of attorney to be durable. Understanding this significant legal distinction, it is obvious that in order to determine whether a person has authority to act under a power of attorney for a person who does not have capacity to act for himself, it is essential to look at the date the document was signed. While older powers of attorney are still recognized as valid documents, if signed before January 1, 2012, the special language needs to be recited in the power of attorney to make it durable. If the document was signed on or after January 1, 2012, it is presumed to be durable with or without the special language.

A power of attorney is effective the day it is signed unless it is a springing power of attorney that "springs" into effect only after the principal becomes incapacitated. While some people like the idea of a springing power of attorney because they fear the agent may take over their business before it is absolutely necessary, in practice the springing power of attorney can create some definite problems. The document must define who decides when incapacity has happened, and that is usually, but not always, a doctor or psychologist. Obtaining a doctor's opinion can cause delay, and with state and federal privacy laws, particularly Health Insurance Portability and Accountability Act (HIPAA), the patient's medical records may be protected and unobtainable. Signing a HIPAA release for your doctor's file prior to incapacity may resolve the problem, but defining incapacity can still be a potential bureaucratic problem. Another negative related to the

springing power of attorney is the fact that many people want help prior to becoming completely incapacitated. The nature of incapacity is that of a person being able to perform some activities while being unable to perform others, or, perhaps, wanting help with certain activities. For maximum flexibility the principal would want a document that enables a trusted agent to act only when necessary or at the will of the principal.

The January 2012 Alabama Uniform Power of Attorney Act requires the principal to give specific authority for an agent to do particular things. These include:

create, amend, revoke or terminate an inter vivos trust (a living trust created during life rather than a testamentary trust created in a will); create or change rights of survivorship; create or change a beneficiary designation; delegate authority granted under a power of attorney (name a successor financial agent upon his or her resignation or while temporarily unable to act); waive the principal's right to be a beneficiary of a joint and survivor annuity including a survivor benefit under a retirement plan; or exercise fiduciary powers that the principal has authority to delegate.

The Act also defines general types of power that may be granted to the agent that do not require an express grant in the document. In the statutory form these powers are listed, and the principal has the right to grant all these powers or choose those he wants to include or exclude. These powers include:

real property; tangible personal property; stocks and bonds; commodities and options; banks and other financial institutions; operation of entity or business; insurance and annuities; estates, trusts, and other beneficial interests; claims and litigation; personal and family maintenance; benefits from governmental programs or civil or military service; retirement plans.

A couple of distinctions between older and newer powers of attorney need to be understood. Durable powers of attorney created prior to 2012 had to contain language specifically making the power survive the subsequent incapacity of the person making the document. But powers of Attorney created on or after January 1, 2012, are presumed to be durable (surviving the subsequent incapacity of the maker) without special language. Another important distinction is that for powers of attorney signed before January 1, 2012, an agent would not have the authority to convey the principal's real property unless the power of attorney clearly granted the authority. For powers of attorney signed on or after January 1, 2012, the agent does not need express authority to convey the principal's real property. In fact, the agent can even convey the property to the agent himself/herself with just a general grant of authority to handle real property.

While there is an Alabama form power of attorney, it does not include all potential necessary powers to plan for disability and long-term care, such as the need to create a special needs trust or a Medicaid Qualifying Income Trust. For this reason I recommend talking with an elder law attorney to have the document prepared.

Health Care and End of Life Directives

Health Care Agent/Proxy Appointed in a Durable Power of Attorney

A health care directive can be incorporated into a Durable Power of Attorney to permit the agent named to make health care decisions for you if you either cannot make or communicate decisions. This is probably the most direct and effective way to appoint a health care decision-maker. Different individuals can be named for different jobs in the Durable Power of Attorney, so your financial agent may or may not be your health care agent. It is also possible to name a proxy to make end of life decisions including withholding or withdrawing life-sustaining treatment and artificially provided nutrition and hydration if two doctors have determined that you have an incurable terminal illness or injury which will lead to death within six months or less or if you are permanently unconscious.

Advance Directive For Healthcare (ADHC)

An Advance Directive For Healthcare is a document that permits the maker to name a healthcare proxy to make medical decisions if he becomes too sick to speak for himself. This document also allows the maker to state whether he would want life sustaining treatment and artificial nutrition and hydration if he should be terminally ill or injured or if he is permanently unconscious, and it lets him select to either let the healthcare agent make final decisions that might disagree with his choices or not. The ADHC form is available from The Alabama Hospital Association.

Old Living Wills do not name an Agent

Alabama's Living Will introduced into law in 1981 only allows a patient to give the physician instructions concerning artificial life sustaining procedures that should be used if the patient should be terminal. Originally there was no document authorized by Alabama law that would allow the patient to give instructions should he or she be in a persistent vegetative state. Even though Alabama law advanced over the years to provide agent designation, the old living wills were grandfathered in, and many people still rely on only this very limited document that is basically a direction made to a doctor.

Certification of Healthcare Decision Surrogate

There is a procedure under Alabama law that permits a self-appointed surrogate (agent) to make end-of-life decisions when the patient failed to make an advance directive. This is The Health Care Decision Surrogate (CHCDS). Under the law there are people named in a line of priority who may serve as the self-appointed surrogate. At the top of the line of priority is a court appointed guardian, followed by the spouse, adult child, parent, sibling, other next of kin and, finally, the ethics committee for the facility. The person or committee can create a document certifying that no advance directive exists of which he, she, or they are aware; contact either was made with one or more of the persons who are higher in priority, and they consented or expressed no objection; or no contact was made because the person or persons in higher priority could not be reached because their whereabouts are unknown or they are in a remote location and cannot be contacted, or the person in higher priority has been adjudged incompetent.

Through the use of the CHCDS life-sustaining treatment may be removed with a finding by two physicians that the patient is terminal or permanently unconscious; that, to a reasonable degree of medical certainty, removal of life-sustaining treatment will not result in undue pain or discomfort; and, if removal of nutrition and hydration is required to end life, that clear and convincing evidence exists that the patient would have wanted the removal of nutrition and hydration. While this can be done without court intervention, as a practical matter, it is doubtful that a medical facility would remove medical treatment, including food and water, without a court order because of liability issues. A form CHCDS is made available at the State Board of Health Administrative Code 420-5-19 Appendix 1.

Do Not Attempt Resuscitation Orders

A Do Not Resuscitate Order (DNR) or Do Not Attempt Resuscitation Order (DNAR) can be signed by a doctor instructing that resuscitative measures not be provided to a person under a physician's care in the event the person is found with cardiopulmonary cessation. DNARs can be issued either:

with the consent of the patient, if competent; or

pursuant to instructions in an advance directive if the patient is not competent or is no longer able to understand, appreciate and direct his or her medical treatment and has no hope of regaining that ability; or

with the consent of a health care proxy designated under the Natural Death Act; or at the instructions of an attorney-in-fact under a durable power of attorney that grants the agent the power to make end-of-life decisions in accordance with the Natural Death Act.

For many years DNAR orders have been used in health care facilities, but those orders were valid only in the facility where ordered. If the patient left one facility and entered another, a new order had to be signed. In 2016 Alabama law addressed DNAR orders and provided for a "Portable DNAR" that will be valid across multiple health care settings. A form that meets the requirements of law to make it portable is provided at the State Board of Health Administrative Code 420-5-19 Appendix 2. While health care providers may continue to make facility specific DNARs, to create a portable DNAR, the state prescribed form needs to be used.

Court Appointed Agents

When a person fails to make an advance directive, and action needs to be taken, the family or the state has no option other than to have a legal representative appointed by the court. The Probate Court can appoint a person known as the guardian to have authority over the body of an "incapacitated person" defined in the Alabama Uniform Guardianship and Protective Proceedings Act as:

"any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions."

The law provides a priority list of those the court should first appoint as guardian. They include: a person named in a durable power of attorney, spouse or spouse's nominee, adult child, parent or parent's nominee, relative with whom the person has lived the prior six months, and nominee of the caretaker of the person.

The Court can appoint a conservator to manage the estate (finances) of a person in need of protection who is found to be:

"unable to manage property and business affairs effectively for such reasons as mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic intoxication, confinement, detention by a foreign power, or disappearance;" and whose "property will be wasted or dissipated unless property management is provided" or for whom "funds are needed for the health, support, education, or maintenance of the person or of those entitled to the person's support and that protection is necessary or desirable to obtain or provide the funds."

The law provides a priority list of those the court should first appoint as conservator. They include: conservator appointed in another jurisdiction, person selected by incapacitated person, person designated by incapacitated person's power of attorney, spouse, adult child, parent, relative with whom ward has lived the last six months, nominee of person caring for the incapacitated person, general guardian or sheriff.

Besides attorneys fees and filing fees, the court is required to appoint a different lawyer to serve as guardian ad litem to represent the person who may need a guardian or conservator. Also the conservator has to be bonded based on the value of the estate and account to the court at least every three years for all income and expenditures. As such, this can be an expensive alternative.

Agency Appointed and Industry Appointed Agents

If a person did not create a power of attorney prior to incapacity the caregiver will sometimes be able to handle business for a while without a formal grant of authority. For instance, the caregiver may be a co-owner on bank accounts and will be able to pay bills. The caregiver may also be the Social Security Representative Payee or the Veterans Administration Fiduciary designated by those agencies to use the person's funds to meet his or her needs.

Medicare can't give personal health information about you to anyone unless you give permission in writing first. To do this, fill out **form CMS-10106: Authorization to Disclose Personal Health Information**. This designation can be made online at your MyMedicare.gov account.

Industry Appointed Agents

A pseudo-authority role is that of Sponsor in a long-term care setting, but do not mistake Sponsorship for legal authority. A Sponsor is more of a long-term care industry term for "the person to contact in an emergency." To further complicate matters, Medicaid uses the term Sponsor as well and will accept applications from the person who fills out the application when the applicant cannot make the application himself or herself.

The Alabama Medicaid Agency also allows a person to become the representative for a person who cannot represent himself before the agency, and that form is available at the Alabama Medicaid Agency web site.

Agency Created by Trusts

Trusts are documents created to hold and manage a person's property. Only the property titled to the trust is managed by the trustee (person named to be in charge of the trust). In some situations a person may have a trust, but some of his or her property may be in the trust, and other property may be outside the trust. A trust can also name a health care decision-maker.

Agents After Death

At death the power of attorney ceases to have any authority, so a new agency is required through the probate process to handle a person's business and property.

If the deceased had a will, the person named as the personal representative in the will after court approval has authority to pay off all debts and pass property according to the will (this agent used to be referred to as the executor of the will). If the deceased did not have a will, any interested party can petition the court to be named the personal representative to administer the estate (this agent used to be referred to as the administrator).

Property in a trust will be disposed of by the trustee according to the terms of the trust and the laws of the governing jurisdiction.

A will can include burial instructions, or an independent affidavit may be executed in compliance with **Code of Alabama** Section 34-13-11(a) which allows an Affidavit Concerning Disposition of My Body. In that affidavit you can designate the person who will have control to dispose of your remains, and specific instructions can be given. You sometimes see this when a person in a second marriage wishes to be buried beside a former spouse, or it can be a useful provision when families do not agree on burial or cremation.

If disposition of remains instructions are given in a will, I recommend that the code section and name of the affidavit be cited as operative, whether the will has or has not been probated, because, as a practical matter, wills do not get probated until after burial arrangements have been made. For the will to be probated, it is filed with the probate court. Keep in mind that some wills never need to be probated, so you want the stand-alone burial affidavit to be honored.

It is very important that you have these specific wishes documented, especially if you want cremation and want someone other than your spouse or next of kin to make arrangements, because some funeral homes will refuse to cremate without these instructions or the permission of a spouse or next of kin. This can create a serious problem for an unmarried couple or a friend trying to make arrangements for cremation.

An Affidavit is self explanatory and can be located at the author's website at <https://janneallaw.com/2017/01/06/appointing-an-agent-for-disposal-of-remains-in-alabama/>

Practical Considerations

Storing the advance directive is of major importance. There are several commercial online programs that permit the individual to store documents online for a fee and allow relatives to access those documents, but little is known about the outcomes for customers of these programs. There is no online registry in Alabama, but some states administer legislatively authorized health care advance directive registries including Arizona, California, Idaho, Louisiana, Maryland, Michigan, Montana, Nevada, North Carolina, Oklahoma, Vermont, Virginia and Washington. Oddly enough, these registries only address medical directives, but not financial directives.

A power of attorney does not need to be filed with the court unless there will be a real estate transaction performed by the agent under authority of that power of attorney. In that case the document should be filed to create a clean chain of title by showing that the agent had the authority to conduct the transaction.

Giving a copy of the document to any named agent and placing the original in important papers where it would be found seems to be the best approach without considering the possibility of online storage at a commercial service or on a home computer with cloud or Dropbox similar storage and agent access.

An agent should always sign as follows:

Principal's name by Agent's Name, as Agent/Attorney-in-Fact or like designation.

Example:

Mary Jones by John Jones as Agent/POA

or Mary Jones by John Jones as Attorney in Fact

This is an important point to keep in mind to prevent the agent from incurring personal liability by making it clear that he or she is signing in a representative capacity.

Powers of attorney do not expire over time unless the power contains instructions concerning a given date of expiration.

In order to create a power of attorney a person must have the capacity to understand and comprehend what he was doing at the time of execution. This standard is referred to as a general business affairs standard, which is a higher standard than testamentary capacity (the capacity required to make a will).

An important issue to keep in mind is the capacity requirement is required not only to make a power of attorney, but to revoke a power of attorney. If a person should lose the capacity to make informed decisions, he or she will be legally unqualified to revoke a power of attorney.

Types of Alabama Advance Directives

DOCUMENT	WHAT IT ADDRESSES	WHEN IT BEGINS/ENDS
Durable Power of Attorney	Names agent to make financial decisions and may name agent for routine medical and end-of-life decisions if person should be terminal or permanently unconscious	Takes effect as stated in document; ends when revoked or at death
Trust	Names a trustee to take legal title of property titled to the trust for the benefit of another; may designate medical agent	Takes effect when signed but only permits power over property titled to the trust. Ends in accordance with instructions in the trust
Old Living Will (grandfathered in with passage of ADHC)	Instructs doctor to withhold treatment if terminal	Takes effect if patient is terminal. Ends at death
Advance Directive for Health Care (ADHC, also known as New Living Will since 1997)	Instructs doctor (and may name an agent) to withhold treatment if patient is terminal or permanently unconscious; may name an agent for routine medical decisions	Takes effect as stated in document; ends when revoked or at death
Certification of Health Care Decision Surrogate (CHCDS)	Guardian, relative or facility ethics committee can name itself as agent and make end-of-life decisions	Takes effect when executed; ends when power relinquished or by court order
DNAR	With permission of patient or legal agent doctor orders that no resuscitative measures be provided when patient has cardiopulmonary cessation	Takes effect when signed; continues indefinitely if portable from facility to facility; terminates at death
Last Will and Testament	Passes property at death to those the maker chooses to receive	Takes effect when filed with probate court within five years of death; ends when estate is closed
Affidavit For Disposal of Remains	Appoints an agent to dispose of remains	Takes effect at death and ends after disposal of remains