

Planning Ahead to Avoid Guardianship

We have talked about how a guardianship or conservatorship results in the loss of an individual's decision-making rights. When someone is appointed a guardian, the guardian makes decisions for the "incapacitated person." Not that everyone will become incapacitated, but if you were, would you want a court to decide who makes decisions for you? Or someone you choose, on your own terms? Probably someone you choose, voluntarily. You can do that using different kinds of advance planning legal documents. We will discuss those documents in this video and see how they can provide the help you need, when you need it, and avoid a court-ordered guardianship or conservatorship.

Let's start with powers of attorney. A power of attorney is a legal document in which you appoint someone you *trust* to conduct your affairs and make decisions for you if you can't. You are called the "principal" in this relationship. The person you appoint is called your "agent." You sign the power of attorney document appointing your agent. In it, you spell out what you want your agent to do for you. You grant them *power* to act on your behalf. You can give your agent just a little bit of power, or a lot of power. You decide now who you want as your agent and what you want them to do. And if you become incapacitated, you already have decision-makers in place and shouldn't need a court-appointed guardian or conservator.

There are two basic kinds of powers of attorney. One is for financial, property, and other business affairs. This is typically called a "financial" power of attorney. In a financial power of attorney, you give your agent the authority to make financial transactions for you, manage your property, and take care of your other business affairs. This can be everything from paying your bills to selling your home. Financial powers of attorney are very powerful legal tools that carry some risk and need to be carefully considered. That's why, in video four, we provide additional tips on completing powers of attorney.

The other kind of power of attorney is for "medical" or "healthcare" decisions. In a healthcare power of attorney, you give your agent the authority to make medical and other personal decisions for you if you become incapacitated. This can be everything from consenting to medical treatment to determining your residence. It's important to remember that you have the right to make your own medical decisions, even to refuse treatment. If you sign a healthcare power of attorney you haven't given up your decision-making rights. But if you get in a position where you can't make or communicate healthcare decisions, you have a trusted agent in place to do so for you.

Another advance planning document is a living will. This is also known as an Advance Directive for Health Care in Alabama. A living will is where you express your choices about end-of-life care and treatment. These are some of the most difficult decisions a person can make. In your living will, you write down what you want to happen so your family and friends know what to do. You decide if you want to continue, or stop, life sustaining treatment if you are terminally ill or in a coma. You decide if you want tube feeding. These are weighty and emotional decisions. That's exactly why you should do a living will instead of leaving it unsaid. In your directive, you will also appoint what's called a healthcare proxy to make your end-of-life decisions, and avoid the need for a court-appointed guardian.

For money and property, there are other ways to plan ahead. Living trusts are one way. One particular kind we want to mention is a Special Needs Trust. They are intended for disabled persons. A trustee, rather than a court-appointed conservator, holds money and property for the benefit of the disabled person. These trusts can be especially useful if the disabled person qualifies for government benefits such as SSI and Medicaid. And speaking of government programs, the Social Security Administration allows the advance appointment of a “representative payee” to manage someone’s Social Security income. You can designate someone you trust to handle your Social Security check if you are unable to do so yourself.

With all of these tools, it is important to remember that whoever you appoint – as your agent, as your healthcare proxy, as trustee, as representative payee – has the duty to act for *your* benefit, not their own. We have a guide on our website called “Managing Someone Else’s Money in Alabama - Help for Agents under a Power of Attorney.” It explains the responsibilities of agents. The U.S. Consumer Financial Protection Bureau has similar guides for trustees and government fiduciaries like Social Security representative payees.

The other thing we encourage is that you get a lawyer to prepare and help you execute these advance planning documents. The Alabama State Bar has a lawyer referral service if you don’t have an attorney. They can also connect you with a volunteer lawyer if you qualify. The Area Agencies on Aging provide some legal services to individuals 60 years of age and older. The Alabama Disabilities Advocacy Program provides legal services to Alabamians with disabilities. There are pro bono Elder Law Clinics at both the University of Alabama and Faulkner University. And, Legal Services Alabama provides civil legal aid to low-income individuals.

Next up, we will talk more about the risks and benefits of powers of attorney.