

Advance Planning: An Overview for Advocates

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The American Bar Association Commission on Law and Aging

The American Bar Association Commission on Law and Aging has led the ABA's work to educate and advocate to protect the rights and dignity of adults as they age for over 44 years. The Commission does this by doing research, developing resources, providing training, developing policy, and providing technical assistance to professionals in law and aging. The vision of the ABA Commission on Law and Aging is a society where the rights of every adult as they age are acknowledged, respected, and protected.

Key Lessons

The goals of advance planning are to develop and articulate wishes, values, and goals. It also involves selecting supporters to help a person live their life in accordance with personal desires, should illness or injury result in an increased need for support. Every adult should consider planning for how they would want to live, what help they would want, and who they would want to have support them in doing so.

Planning starts with thinking about what is important to a person, and there are a variety of tools available to help people do this. Part of this is selecting supporters to help, if additional support is needed, and deciding how and when that support should be provided. Supporters can be legally empowered to support the person using a variety of tools that are described below. Without planning, the supporter may not know how the person wants to live, and may lack authority to support as needed. A variety of advocates can help with advance planning, and this is a good field for pro-bono assistance, since the work is naturally limited in scope. A failure to plan sometimes results in easily avoidable guardianship or conservatorship.

Planning Starts with Thinking

Successful advance planning starts with thinking about what is important to the person. It can take time for a person to develop and articulate wishes, values, and goals. One way an advocate can facilitate this process is to ask questions about a person's values, goals, and how they want to live. Values are strongly held beliefs that shape our decisions. Goals are what someone realistically wants to achieve or experience in life. And if a person needs support in achieving their wishes, values, and goals, the advocate can ask who do they believe would do the best job of supporting them? There are a variety of tools to help facilitate this, and the resource list in this chapter summary has links to many of them.

Every adult should be encouraged to engage in advance planning. Illness or injury can result in anyone needing increased support. Planning should take place before it is needed. The need can emerge quickly, and illness or injury may impair planning. Advance plans should be revisited and updated at least once every ten years, when there is a change in family status, or after an injury or diagnosis with a serious injury. The plan should have flexibility, as the choice we make when we are at our best may not be the same choice we will make when faced with a life changing event.

Health Care Planning

Few choices are more personal than the health care we want to receive or do not want to receive. Both the law and medical ethics ask for informed consent from the patient for anything beyond emergency care. Modern health care is complex, and people often need help or support in understanding the options, risks, and benefits of treatments, and assistance in making a choice. All states recognize the legal right to name someone in writing to assist with making health care choices before support is needed. The most widely used legal document for this is a **Health Care Power of Attorney or HCPOA**. The primary purpose of an HCPOA is to name someone to consent to care at any time that the patient is unable to do so. To be most helpful, the person that is named needs to enter the role of a health care supporter.

A health care supporter should always work with the person to make health care choices. This includes asking questions and seeking explanations that the person and the supporter can understand on diagnosis, treatment options, possible outcomes, and recommendations. It involves always consulting with the person, allowing the person to make choices, and keeping the person informed, even if the person seemingly is unable to respond. This is a broader role than the minimum role of a health care agent, proxy, or surrogate. To get this level of support, a person needs to ask for it upfront, draft it into documents, and demand it on an ongoing basis.

Some states have separate forms for naming a health care surrogate or proxy, and a few states allow an oral naming of a health care supporter with special conditions (generally in the presence of the health care provider who documents the name in the person's health care record).

Some states have a statutory or regulatory form for a **Living Will Directive**. A Living Will was one of the earliest forms of a written advance health care directive. Some Living Will forms include the option to name a health care agent or supporter. A Living Will form leaves specific directions about care when the person is permanently unconscious or death is imminent. The major limitation of a Living Will is that it is specific to end of life, and a lot of health care decision-making takes place before death is likely or a person is unlikely to ever regain consciousness.

Physicians or Medical Orders on Life Sustaining Treatment (POLST/MOLST) are now recognized either by law or regulation in all states. These are medical care orders written in consultation with the patient or health care supporter about the care a person wants or does not want when the person is seriously or terminally ill. This can include the kinds of choices in a Living Will, but also may include directions on pain control, consciousness, care settings, and specific treatment options. Because POLST/MOLST's are medical orders created near the time that they are likely to be needed, the instructions are based on what is actually happening in the person's life at the time. These orders are also portable, meaning the orders travel from one care setting to another, and from provider to provider as part of the medical records. They are created by health care providers. An advocate's role is to let people know that these are an option and what they mean. If the person thinks this might be something they want and the health care provider does not suggest them, the person should ask their health care provider.

Nearly every state has a statute that names a default health care decision-maker or supporter; absent this, the prevailing standard of care is to accept consent from the nearest family member. Most of the statutes turn to biological and marital family as a default health care decision-maker and create a hierarchy of family members who can consent. The weakness in this is that the default person may not be the person most trusted to support the patient on health care decisions. It is limited to health care decisions, and determining who is qualified to help may cause delays at critical times.

Financial Advance Planning: Direct Deposit and Automatic Payment

Standard advice today is to place all income on **Direct Deposit**. The leading sign that an adult has experienced a decline in health is difficulty in managing money. All government benefits require direct deposit and virtually all pensions offer or require it. Placing income on direct deposit assures that it will be available when needed to pay expenses.

People may consider putting reoccurring expenses on automatic payment. This is done through the provider, merchant, or creditor by providing a source of payment (a bank account or credit card) the terms of payment, and authorizing the payment. When the bill comes due, a statement is sent, often by email, and unless a question is raised, the bill is paid in accordance with the terms agreed to (in the amount and on the date agreed to). Direct payment won't cover everything and credit and debit cards are rapidly replacing cash and writing checks. Credit cards can also be set up on automatic payment.

Both direct deposit and automatic payment need to have some oversight and monitoring. A trusted supporter or named agent may need to check the bank account to assure that income is received in the amount and as expected and monitor bills to assure that the charges are correct. Financial institutions are increasingly offering read-only access to financial records, or a shared email address often provides access to the records without authorizing access to the accounts.

Additional Financial Planning

Joint Bank Accounts are probably the most commonly used financial planning method. Most couples and many families have joint bank accounts, which allow any joint account holder to transact any business on the account. There are a few cautions on joint accounts. First, any account holder can withdraw all of the money because the funds are considered jointly owned and the financial institution has no liability. The issue of whose money is in the account is an issue between the account owners. Second, these accounts can be subject to liens against any of the joint account holders. Remedies to fight back based on whose money was in the account may be available, but that generally requires an attorney and a court to rule in your favor. Third, in most states, under most account holder agreements, the joint accounts create a right of inheritance, meaning that when one account holder passes away, the funds in the account belong to the other account holder or holders.

Financial Power of Attorney (POA) is a document authorizing an agent to transact business on behalf of the grantor. A POA can be used as a tool to legally empower a financial supporter. The authority granted is as described in the document or what is allowed by state law. Increasingly, states have standardized forms for creating a POA that can be used for do-it-yourself planning. These are very powerful documents and should be created with great care.

A **Representative Payee** is someone named by Social Security to manage the benefits payments of a person Social Security has determined needs help. One of the biggest changes in this field in the past decade is that Social Security now asks beneficiaries to pre-designate a Representative Payee. All new beneficiaries are asked to do this. Existing beneficiaries should be urged to go online or call Social Security if they wish to pre-designate a Representative Payee. Advocates should encourage people to select their named Payee with great care, as the person will serve the role of financial supporter should one ever be needed. The Veterans Administration has a similar system called a **VA Fiduciary**. These options are limited to SSA or VA benefits only, and do not empower help with other assets.

There are many different varieties of trusts. A Trust is a legal entity, created to own and manage assets, for a specific purpose or beneficiary and is managed by a trustee. The terms of the trust and state law control what the trustee can do and provide for replacement of a trustee if needed. Trusts are very strong advance planning tools but are complex and can be expensive to set up and manage.

Decision Supports

Utilizing **Decision Supports** is a process by which a person selects advisors to support them in decision-making. The role of the supporter is to help the person understand the issue in consideration, as well as the options, risks, and benefits. A supporter may help the person make a choice and, as needed, help carry out that choice. Unless other agreements are created, such as a POA or HCPOAs, the supporters have no legal authority to act on behalf of or consent for the person. The decision supports model is person-centered. It is personalized to the person, and it is person driven—no decision or choice should be made other than as directed by the person. That decision support model can be applied to other tools, so that the person is always involved to the greatest extent possible in every decision, and is always informed of events that affect their life.

Lastly, **Guardianship and Conservatorship** are the legal option of last resort. Either when no planning has been done, or the planning that has been done fails, these are the legal options available in every state (called by other names in a couple of states). These options should only be considered when the person has a pressing need that requires legal authority that no one has, and the person is truly unable to direct a choice even with support. Even in those cases, temporary or limited guardianship should be considered over full or plenary guardianship. This includes limited court orders granting legal authority for a specific and limited purpose when it is absolutely necessary to do so, without otherwise impacting the legal rights of the person.

Powers Granted by Advance Planning Tools

Document	Health	Money	Explanation
Health Care Power of Attorney	Yes	No	Limited to authority granted in document
Designation of surrogate or proxy	Yes	No	Health care decisions only
Living Will	End of life	No	May include naming of surrogate or proxy
Default surrogate	Yes	No	May not be the best supporter
Values Survey	N/A	N/A	Guide support, but lack legal impact
Medical Order on Life Sustaining Care	At end of life	No	Created by health care providers, for persons with serious illness
Financial Power of Attorney	No (unless included in text)	Yes	Statute and document define authority
Joint Account Holder	No	Yes, but only that account	Cautions on inheritance, and liens
Representative Payee	No	Yes, but SSA only	Limited to SSA Should pre-designate
VA Fiduciary	No	Yes, but VA only	Selection by VA
Trusts	No	Yes, but trust assets only	Can be costly to set up, and must be properly managed to be effective
Supported Decision Making	Possible	Possible	May lack legal authority to act, unless other documents are present
Guardian/Conservator	If ordered	If ordered	Failure to plan or when plans fail

Conclusion

The goal of advance planning should be to assure that when support is needed in making health or financial decisions, a plan is in place with supporters who understand the wishes, values, and goals of the person. There are a variety of tools available—no one tool covers every need.

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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