

# Wills and Estate Planning

Estate Planning used to be not much more than deciding to write a Last Will and Testament, and hiring a lawyer to follow through with this decision. As with the rest of life, Estate Planning has become more complicated. Generally, estate planning includes advance planning for handling your financial and personal affairs should you become incapacitated, as well as planning how you want to dispose of the assets held in your name after your death (this is your estate). Even this last part of planning is more complicated because there are more choices. Now, not only can you use a Will to distribute your assets, but a Statutory Will, a living trust, a pour-over trust, and many other possibilities need to be considered.

## Wills

A Power of Attorney can handle your financial affairs during your lifetime. It does not have any legal authority for disposing of your assets *after* your death. For this you must use a testamentary document, such as a Last Will and Testament.

Most people go to a lawyer to have a will written for them. The will sets out

1. How they want to pass on their belongings, and
2. Who they want appointed to administer their estate (the probating).

In Michigan, there are two variations that also are legal wills. One is the Statutory Will; the other is a Holographic Will.

For one reason or another, many people die without any estate planning or a will. It's a good idea for everyone to have a will. Because it's easily available and free, a Statutory Will is a good choice for a basic estate planning option. There are some good, sensible reasons to have a will: -

- A will ensures that your assets will go to who you want to receive them upon your death;
- A will allows you to name the person to be in charge of administering your estate;
- A will can save some costs of probate; and
- A will can bring peace of mind knowing your affairs are in order.

## Durable Power Of Attorney

With age comes the probability of an individual suffering an unfortunate disability that may render that person legally incapacitated. To address this concern, a person can sign a *Durable Power of Attorney*, authorizing an individual other than themselves to make financial decisions.

## **Wills Continued:**

To qualify as a Durable Power of Attorney the document must have specific language which states that you intend for the authority of the Durable Power of Attorney to continue while you are legally incapacitated. Such language is required by Michigan law. This is also what makes it "durable" and what differentiates it from a regular Power of Attorney. You must be legally competent to sign either form of Power of Attorney.

A Durable Power of Attorney can begin when you sign it or it can be triggered into affect at a later date, or under certain circumstances as stated by you. If it takes affect at a later date or at the time of your stated circumstance, it's called a "springing" Power of Attorney; it springs into affect later.

### **Health Care Power of Attorney**

As with planning for authority over finances, planning may also be made for the possibility of health care needs or living arrangements should a person become incapable of giving direction. Again, a clear understanding of what legal arrangements are available and when they are useful allows you to keep control of these choices as much as possible.

While a *Durable Power of Attorney* is needed to give your agent authority to make financial decisions, a *Health Care Power of Attorney* is needed to give another person authority to make health care choices for you. The *Health Care Power of Attorney*, like the *Durable Power of Attorney*, is authorized by Michigan law and, when properly completed, the patient advocate (the appointed person) speaks for you when you are not able to communicate your own wishes.

A patient advocate only has the authority to act for you while you are unable to communicate. If you get better, their authority ends. Further, the patient advocate does not have the authority to end medical treatment if it is likely to cause your death *unless* you have specifically given the patient advocate the authority to also make life and death decisions for you. This must be spelled out in your Health Care Power of Attorney. It is important to know some of the details of properly filling out a Health Care Power of Attorney.

- You must understand the form you are signing;
- Your signature must be witnessed by at least two other adults.  
Certain people are not allowed to be a witness to your Health Care Power of Attorney because of the possible conflict of interest they may have. Your spouse, child, grandchild, brother, sister, parent, possible heir, person benefiting from your will, your doctor, the person you are appointing patient advocate in the document, an employee of your life insurance, health insurance or the medical facility where you are staying, cannot be a valid witness to your Health Care Power of Attorney.

Many hospitals provide Health Care Power of Attorney forms at no charge After you sign, give a copy to your doctor and other regular medical providers

## **Wills Continued:**

### **Conservator**

At the point where a ward's assets are valuable enough to require some investment management, the appointment of a conservator will be necessary. Upon the filing of the petition with the Probate Court a conservator can be appointed to handle the ward's financial affairs. A showing to the court that the person is confused and displays an inability to handle their business is the standard that is required. Like the guardian, the conservator must file an inventory and annual accounts with the court.

### **Guardianship**

Most Americans have not completed a Health Care Power of Attorney nor a Living Will. If you do not complete an advance directive before you are unable to act for yourself, who makes the personal decisions? These are handled by a guardian, appointed by the Probate Court after a hearing determining your legal capability to handle your personal affairs.

This process begins with a petition for guardianship in which someone (often a family member) files papers in court stating that they do not think you can take care of your personal affairs, and asks that someone be appointed to handle them for you. The standard the court uses to determine if you need a guardian is: are you capable of making an "informed decision" about your affairs and is a guardian deemed necessary to provide continuing care and supervision.

### **Ward**

The person appointed by the court is the guardian, and the legally incapacitated person is referred to as the ward. No matter who requests to be your guardian, you may express your preference as to who you want appointed, and the court is to take your wishes into account unless that person is not "suitable and willing to serve." Perhaps a petition has been filed but you don't feel you need a guardian; you can request a lawyer be appointed to represent you. The court should not appoint a guardian who will financially benefit from you, by providing paid housing or medical services. Thus, your adult foster care owner should not be appointed your guardian. If you also need someone to handle your business affairs, a petition to appoint a conservator would also be filed in Probate Court.

If the court appoints a guardian, you have a right to later petition to have the guardianship changed or terminated. Under Michigan law you, as a ward, may write an informal letter to the Probate Court, requesting a change or termination. The court may decide to have a hearing on the matter.

### **Representative Payee**

If a disabled adult only has financial income from Social Security or SSI checks, you might be able to avoid seeking a court ordered conservatorship by using the Social Security Administration (SSA) equivalent, called the representative payee. A representative payee, appointed by SSA after applying and providing medical documentation that the adult needs assistance in handling the check, will have the authority to cash the SSA/SSI check and use it for the adult's benefit.

## **Wills Continued:**

### **Living Will**

In addition to a Health Care Power of Attorney, another document, known as a Living Will, is used to plan future health care choices. The Health Care Power of Attorney and the Living Will are called advance directives. A Living Will sets out medical treatments you choose to have, as well as the procedures or treatments you do not want to have in some or all circumstances. Note that a Living Will is different than a Last Will and Testament. A Living Will is instructions for your doctor, while you are still alive. A Last Will and Testament is instructions to your personal representative and the probate court, only to be used after your death.

A Living Will is different from a Health Care Power of Attorney in that the Living Will does not appoint another person to speak for you. It speaks for you in writing. While a Health Care Power of Attorney can include written instructions for your patient advocate to follow, the choices do not have to be included for the Health Care Power of Attorney to be used. If a Living Will also includes your choice as patient advocate, it automatically becomes a Health Care Power of Attorney and must follow the state law requirements for witnesses, required language, etc. Since a Health Care Power of Attorney form is widely available, and is enforceable by Michigan statute, it is the smartest choice if you are concerned about these issues.

*Excerpted with permission from Advancing Smartly: A Legal Handbook for Michigan Women Age 60+. Published by Elder Law of Michigan ([www.elderslaw.org](http://www.elderslaw.org))*

### **Michigan State Long Term Care**

#### **Ombudsman Program**

1-866-485-9393

#### **American Bar Association**

Provides FAQ's and information on Wills and Estate Planning.  
Has a guide for purchase on the site.

<http://www.abanet.org/rppt/public/home.html>

[www.michigan.gov/miseniors](http://www.michigan.gov/miseniors)

<http://www.aarp.org/research/endoflife/wills/>