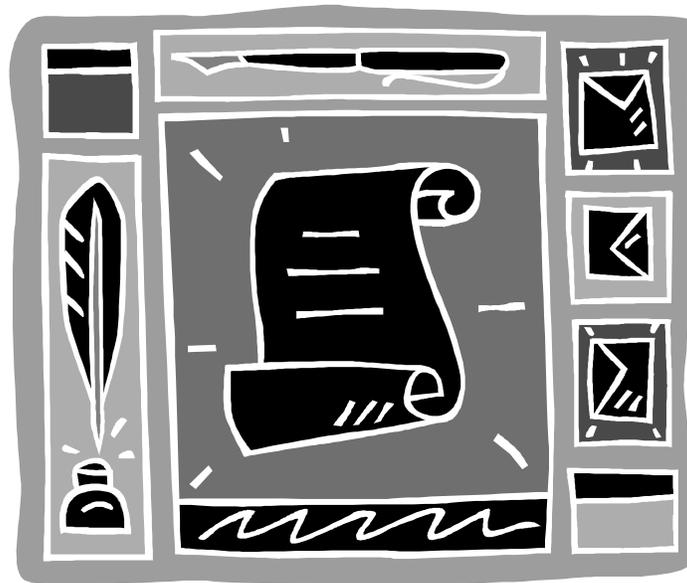


ALTERNATIVES TO GUARDIANSHIP

**With
Advance
Directives**



Revised April 2012

ADVANCE DIRECTIVES

When an individual is ill or is preparing in the event of future illness, there can sometimes be confusion about what the person's wishes are for his or her own treatment. There might be disagreement among family members about the person's decisions concerning his or her health care. Allowing an individual to make advance directions concerning his or her health care lets each person control the direction of his or her own health care and eliminates that burden from other family members who may be in disagreement or who simply may not know what to do.

In Georgia, advance directives refer to documents like the **Georgia Advance Directive for Health Care** and the **Do Not Resuscitate Order**, although **Living Wills and Durable Powers of Attorney for Health Care validly executed** in Georgia before July 1, 2007 will still be honored. Similar documents from other states are also recognized.

These documents provide the mechanism for conveying decisions that have been made about health care and treatment choices before one becomes incapacitated and can no longer make these decisions known. It is important to make these decisions while one is still able to make them, in advance of incapacitation.

The individual making them can revoke any advance directive choice at any time, as long as the capacity to do so still remains. If one expresses a choice for a directive in a document and wishes to change that directive, destroying the document by tearing it up and retrieving all of the copies or executing a written revocation and sharing that new decision with all who have been informed of the previous choice is effective. If the individual communicates the choice orally, then he/she may either orally revoke the decision or put the revocation in writing and make sure all physicians, health care facilities, and individuals to whom it was given receive it.

Information about the Georgia Advance Directive for Healthcare is provided below:

The three parts of the Georgia Advance Directive for Health Care

Part One: allows an agent to be appointed to carry out health care decisions (formerly the Durable Power of Attorney for Health Care)

Part Two: allows choices about withholding or withdrawing life support and accepting or refusing nutrition and/or hydration (formerly the Living Will)

The new law provides new terminology and new criteria for making decisions about withholding or withdrawing life support and accepting or refusing artificial nutrition and/or hydration. There is a certification process that must take place.

Before any action can be taken to withdraw or withhold life sustaining procedures or to withdraw or withhold nourishment or hydration for a declarant who is in a state of permanent unconsciousness or is in a terminal condition, that condition **must** be certified in writing. The attending physician **and** one other physician must personally examine the declarant and certify in writing based upon the declarant's condition found during the course of their examination and in accordance with current accepted

medical standards that the declarant does meet the criteria for terminal condition or state of permanent unconsciousness as defined in the law.

'State of permanent unconsciousness' means an incurable or irreversible condition in which the declarant is not aware of himself or herself or his or her environment and in which the declarant is showing no behavioral response to his or her environment.

'Terminal condition' means an incurable or irreversible condition which would result in the declarant's death in a relatively short period of time.

Part Three: allows one to nominate someone to be appointed as Guardian if a court determines that a guardian is necessary.

In order for a person to make an advance directive for health care, he/she:

- ★ Must be of sound mind
- ★ Must be 18 years of age or older **Or** an emancipated minor

To execute the advance directive:

- 1) the declarant must sign or expressly direct someone else do it for him/her
- 2) two witnesses required, who are
 - of sound mind
 - 18 years of age or older

- Witnesses do not have to see the declarant sign
- Witnesses do not have to see each other sign the advance directive

3) the declarant must see both witnesses sign

4) Restriction on witnesses

- Not the health care agent
- Not knowingly be in line to inherit anything from or benefit from the death of the declarant
- Not directly involved in the health care of the declarant
- Only one of the two witnesses can be an employee, agent or on the medical staff of the health care facility where the declarant is receiving his/her health care

A physician or health care provider directly involved in the care of the declarant may not serve as health care agent.

Agents have certain duties that must be followed; they include:

- ♦ A health care agent has no duty to act, even if named.
- ♦ If the health care agent does choose to act, s/he must not make decisions that are different or that contradict the decisions of the declarant.
- ♦ All of the health care agent's actions must be consistent with the intentions and desires of the declarant.

- ♦ If those intentions and desires are not clear, the health care agent's actions must be in the best interests of the declarant considering all of the benefits, burdens, risks and treatments options.

There are also some responsibilities/duties that the health care agent have authorization to do related to the necessary care of the declarant:

- 1) Consent to, authorize, withdraw consent from, refuse, withhold, any and all types of medical/surgical care, treatment, programs and/or procedures
- 2) Sign and deliver all instruments (documents)
- 3) Negotiate and enter into all agreements and contracts binding the declarant
- 4) Accompany him/her in an ambulance or air ambulance
- 5) Admit to or discharge the declarant from any health care facility
- 6) Visit and consult with the declarant as necessary
- 7) Examine, copy and consent to disclosure of all the declarant's medical records deemed relevant
- 8) Do all other acts reasonably necessary and carry out duties and responsibilities in person or through those employed by the health care agent; **this does not include delegating the authority to make health care decisions**

9) Consent to an anatomical gift of the declarant's body, in whole or part, an autopsy and direct the final disposition of declarant's remains, including funeral arrangements, burial, or cremation (**Note: the law states that the agent can bind the declarant to pay but does not expressly mention binding the estate of the declarant. It may be a good idea to make all arrangements prior to the death of the declarant.**)

The health care agent may not consent to psychosurgery, sterilization, or involuntary hospitalization or treatment under the Mental Health Code, Title 37.

Honoring the Advance Directive for Health Care

When the attending physician, health care provider and/or health care facility refuse to honor the advance directive for health care the law states for health care decisions with which health care providers are unwilling to comply, after this decision is communicated with the agent, the agent is responsible for arranging for the declarant's transfer to another health care provider. [O.C.G.A. §31-32-8(2)] This section of the law does not expressly include life-sustaining procedures, nourishment or

hydration in “health care decisions.”

For a declarant’s decision to withhold or withdraw life-sustaining procedures or withhold or withdraw the provision of nourishment or hydration, attending physicians who fail or refuse to comply are responsible for making a good faith attempt to effect the transfer of the declarant to *another physician* who will comply **or** must permit the agent, next of kin or legal guardian to obtain another physician who will comply. [O.C.G.A. §31-32-9 (d) (1-2)]

If it is the health care facility that refuses to comply with the declarant’s decision to withhold or withdraw life-sustaining procedures or nutrition or hydration, the law does not expressly state whose responsibility it is to ensure the declarant is transferred to another health care facility.

Revoking the advance directive for health care

The Georgia Advance Directive for Health Care may be revoked at any time, regardless of the declarant’s mental state or competency. **It remains effective even if a Guardian is appointed for the declarant unless a court specifically orders otherwise.**

Revocation can occur in any of the following ways:

- ♦ By completing a new advance directive for health care

- ◆ By burning, tearing up, or otherwise destroying the existing advance directive for health care
- ◆ By writing a clear statement expressing the intent to revoke the advance directive for health care
- ◆ By orally expressing the intent to revoke the advance directive for health care in the presence of a witness 18 years of age or older who confirms this in writing within 30 days. The revocation is effective when the treating physician documents it in the medical record.
- ◆ Marrying after executing an advance directive for health care revokes any agent other than the declarant's spouse
- ◆ Divorcing or otherwise dissolving a marriage after the execution of an advance directive for health care revokes the designation of the spouse as the health care agent

Do Not Resuscitate Orders

Orders surrounding the administration of cardiopulmonary resuscitation (CPR) are recognized by a number of names:

- DNR
- Do Not Resuscitate
- Order Not to Resuscitate
- No Code

Definitions:

CPR: measures used to restore or support cardiac or respiratory function in the event of cardiac or respiratory arrest.

Candidate for Non CPR: a patient who based on a determination to a reasonable degree of medical certainty by an attending physician with the concurrence of another physician:

- a) has a medical condition which can reasonably be expected to result in the imminent death of the patient;
- b) is in a noncognitive state with no reasonable possibility of regaining cognitive functions; or,
- c) is a person for whom CPR would be medically futile in that such resuscitate will likely be unsuccessful in restoring cardiac and respiratory function or will only restore cardiac and respiratory function for a brief period of time so that the patient will likely experience repeated need for CPR over a short period of time or that such resuscitation would be otherwise medically futile.

Every adult is presumed to have the capacity to make a decision regarding CPR and every patient shall be presumed to consent to the administration of CPR unless there is consent or authorization for the

issuance of an order not to resuscitate.

Persons authorized to issue an order not to resuscitate:

- attending physician which authorizes a physician, health care professional, or emergency medical technician to withhold or withdraw CPR
- an adult person with decision making capacity (even if they lose capacity in the future)
- Appropriate authorized person: agent under an advance directive for health care or DPOA-HC , and in such case of an agent, the attending physician would not require a concurring physician's consent; spouse; guardian of person; son or daughter 18 years of age or older; parent; brother or sister 18 years of age or older (in good faith)
- parent for a minor child
- as last resort an attending physician may issue an order not to resuscitate if: he or she has the concurrence of a second physician in writing that the patient is a candidate for nonresuscitation; an ethics committee or similar group which concurs in the opinion of the attending and the concurring physician; and the patient is receiving inpatient or outpatient treatment from or is a resident of a health care facility other than a hospice or a home health agency.

Carrying out a DNR order when the patient is not in a hospital or nursing home is legal as long as the order is evidenced in writing containing the patient's name, date of the form, printed name of the attending physician, and signed by the attending physician on a form similar to the one in the law.

The patient must also be wearing an identifying bracelet on either the wrist or the ankle or an identifying necklace. The bracelet or necklace shall be substantially similar to the ID bracelets worn in hospitals and must be on an orange background with required

information provided in boldface type.

Liability

No authorized person is subject to any criminal or civil liability for carrying out a DNR order in good faith as long as it was carried out in compliance with the standards and procedures set forth in the law.

Requirement to Carry Out Advance Directives

The law does not force doctors or hospitals to carry out the decision in advance directives. If a doctor informs you that he or she has decided not to carry out the request in an advance directive, the next of kin or legal guardian has the right to elect that the patient be transferred to a different doctor or if necessary, a different hospital.

Even if you lose your mental capacity after making an Advance Directive, the directive will continue to be legally effective. Your decision will not be changed unless someone can prove that you had really changed your mind about the directive.

Directives will typically not be affected by the appointment of a Guardian unless the Court determines in the Court Order that there is a specific reason to overturn the directive or remove the health care agent that was elected.

Penalties

There are penalties for falsifying or forging advance directives; forcing someone to make or preventing someone from making an advance directive; concealing or withholding an executed advance directive; and, witnessing an advance directive for health care when you are knowingly not qualified to do so. The penalties range from misdemeanors to criminal homicide, depending upon the effect on

the patient.

Other Alternatives to Guardianship

Frequently, family members feel it is necessary to pursue guardianship over a loved one in order to gain authority to assist them with financial matters or disposal of property. While it is true that guardianship is sometimes necessary to protect the health, safety and welfare of one who has lost the capacity to make sound judgments to ensure his/her health, safety and welfare, this should be a last resort as opposed to a first response mechanism. Some other documents are discussed in the remainder of this booklet to provide other alternatives to guardianship.

LAST WILL AND TESTAMENT

A Will is a person's last legal opportunity to personally direct how his or her property will be disposed and distributed at their time of death. To make a Will, you must be at least 14 years old. A person making a Will must be of sound mind to understand that he or she is making a Will and what that process means.

In Georgia, no particular format is necessary to constitute a valid Will. The law instructs that the whole document is to be considered to determine the intent of the maker of the Will.

Names used to refer to different types of Wills include:

- 1) Nuncupative or Oral: a Will made orally by one in the last stages of illness;
- 2) Holographic: a Will that is completely handwritten by the one making the Will; and
- 3) Self-Proved: This Will has an affidavit by two witnesses

attesting under oath and in the presence of a Notary that the person making the Will declares to them that the document is actually his or her Will, and that he/she is the one actually signing the Will. A self-proved Will eliminates the need for the witnesses to testify during the probate process. A self-proving affidavit can be added to an existing Will any time before the person who made the Will dies.

A Will normally requires at least two witnesses in order to be valid and does not currently have to be notarized. Unless the Will is self-proved as described above, the witnesses' presence will be required during the Will's probation.

It is a common myth that if a person dies without a Will “*the person’s property goes to the state*”. If a person dies without a Will, as long as they leave relatives that can be found, the property that they leave does not go to the State, but instead, the State's law determines which surviving relatives are entitled to the property.

Therefore, the only danger in dying without a Will is that it is possible that relatives that you did not want to share in your estate **may** be in a position to receive your property at your death.

Here are some points to keep in mind concerning Wills that usually come up as questions:

- ◆ There are certain kinds of gifts that cannot be made in a Will and there are certain directions or wishes that cannot be carried out by a Will. If you are unsure about a particular gift, direction, or wish, contact the Elderly Legal Assistance Program provider in your area, the State Bar of Georgia, or a private attorney.

- ◆ Some forms for Wills that you buy in stores and from other places, may not allow you to accurately convey the wishes that you want to express and some of them are not in valid form according to Georgia Law.
- ◆ Wills executed in other states **may** be valid in Georgia, but it is best to have an attorney review the Will first before making a decision to make or not to make another Will.
- ◆ A person can only have one valid Will at a time. A later executed Will revokes the previous Will, if that second Will is in valid form.
- ◆ You cannot add something to a Will by just writing the changes on the Will or by crossing out some terms that you no longer want. This will in fact destroy your Will. If there is something that you want to change, you can amend the Will by adding a "Codicil".
- ◆ A codicil is a formal document that allows you to add to or take things out of your Will. A codicil must be executed with the same formality as the Will and it too can be self-proved.
- ◆ You should review your Will periodically to make sure that it still says what you want it to say.
- ◆ It is not a good idea to leave instructions for your burial in your Will. Typically, the Will is not looked at until after you are laid to rest and any special requests that you have may be overlooked. There are other documents such as *Details of My Final Arrangements* that can be used for this purpose.

- ◆ A Will does not have to be probated unless a court, at someone's request, orders it probated. The law only **requires** that a Will be filed. Any person who is in possession of another person's Will must by law **file** that Will with the Probate Court in that person's county of residence upon his or her death.
- ◆ Without proper planning, certain events may automatically revoke your Will, such as:
 - 1) Birth or adoption of a child;
 - 2) Divorce; or
 - 3) Marriage.
- ◆ Your Will has no affect on you, your property or those mentioned in your Will as long as you are alive. You are not restricted from using any property mentioned in your Will and there is no legal obligation to make sure that property exists upon your death.
- ◆ Generally, estates (the name given to everything you own at your death) that are less than \$3,500,000 in 2009, are excluded from tax. The tax exemption is automatically repealed in 2010 but reinstated in 2011 with an exclusion of \$1,000,000.
- ◆ An executor (male) or an executrix (female) is the one who presents your Will for probate and makes sure that the wishes expressed in your Will are carried out.

LIVING TRUSTS

An agreement that controls how your assets will be distributed after your death without going through the Court's probate proceeding is a Living Trust. The Living Trust, unlike a Will, starts to take effect while you are still alive, and should you desire, can continue to be effective after you die. All of your assets must be transferred to the Living Trust. Once you transfer assets to the Trust, you no longer own them; they are the property of the Trust. The Trustee is the person who manages the Trust and controls the assets. You are allowed to be Trustee of your own Living Trust.

There are different kinds of Living Trusts, such as:

- 1) Standby Trust - no assets are transferred to the Trust until you become disabled; but someone has to have the authority to transfer the assets or the Trust is empty and worthless;
- 2) Irrevocable Life Insurance Trusts - which plan for your life insurance policy proceeds;
- 3) Supplemental Benefits Trusts or Luxury Trusts - which provide transfer of assets to a person who may receive public benefits so that items not covered by the public benefits may be purchased without affecting the recipient's eligibility for the public benefit;
- 4) Irrevocable Trust - which once made cannot be changed or canceled; and
- 5) Revocable Trust - which can be amended or canceled after it is made.

Because these documents are so specialized, it is better to have an attorney prepare a Living Trust for you rather than use a form that

you purchase at an office supply store. If you decide to use an office-supply-store form, it is a good idea to allow an attorney who has experience in this area to review the papers to make sure they have been prepared properly.

DURABLE FINANCIAL POWER OF ATTORNEY

A financial power of attorney allows you to appoint another person or persons as agent(s) to conduct business transactions for you that you could do yourself if you were not ill, disabled or otherwise unavailable. The Power of Attorney permits someone else to handle these matters for you. Powers of Attorney can be limited to a certain act or acts, or they can extend to every aspect of business that you could do for yourself. A Power of Attorney ends at your death.

Unless a power of attorney states otherwise, it is common for it to be assumed that the person giving the power intends for it to end should they develop a condition, which would permanently keep them from being able to revoke the power of attorney, such as mental incapacity. It is possible to state within a power of attorney document that you do not want the power of attorney to end if you become incapacitated. A Durable Power of Attorney keeps working even if a person becomes mentally incapacitated. The Durable Power of Attorney must state within its text that it is meant to be durable and is meant to extend past mental incapacitation.

A Power of Attorney is a formal and important document. If the power of attorney grants an agent authority to transact business, concerning real property (land), the power of attorney **must** be notarized. Powers of attorney can be filed with the court to provide notice that the power of attorney exists. Powers of Attorney can be revoked at any time **prior** to mental incapacitation. It is best that your Power of Attorney provide for written revocation.

Once signed, Powers of Attorney are effective and the agent is authorized to act unless something is written into the Power of Attorney that prevents the agent's authority from taking effect until a certain event happens.

Georgia has authorized a statutory form within the law that can be used as a guide. This form is available from the Division of Aging Services' Information and Referral Specialist. One may also obtain forms from office supply stores, bookstores, some banks and some courts. Otherwise, an attorney can prepare such a document to meet specific needs.

This information is not intended to be legal advice but education to assist you in becoming aware of important issues that may affect various aspects of your life.



Natalie K. Thomas, Esq.
State Legal Services Developer
DHS Division of Aging Services
2 Peachtree Street NW, Ste 33.384
Atlanta, GA 30303-3142
1-866-55-AGING
nkthomas@dhr.state.ga.us