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FACT SHEET:
Durable Powers of Attorney and Revocable Living Trusts

Various legal mechanisms can assist in the management of assets and health care when a person becomes incapacitated. Below we discuss three of them: **Durable Power of Attorney, Durable Power of Attorney for Health Care, and Revocable Living Trusts**. Because laws vary from state to state, you should consult with an attorney who is knowledgeable in estate and assets management for assistance in legal planning.

For additional information, also see the **FCA Fact Sheets** on *End-of-Life Decision Making, Legal Planning for Incapacity* and *Conservatorships.*

Durable Power of Attorney

Q: What is a Durable Power of Attorney for Property?

A Durable Power of Attorney for Property (DPA) is a document that allows you (the *principal*) to give authority to another person (your *agent* or *attorney-in-fact*) to make financial/legal decisions and financial transactions on your behalf. It is called "durable" when, by its terms, it remains effective even if the principle becomes mentally incompetent.

Q: Who can serve as attorney-in-fact?

It need not be an attorney: any trusted adult, such as a spouse, partner, relative or friend, can serve as attorney-in-fact. Also, there are several nonprofit agencies that can fill this role. It is always a good idea to name at least one *alternate* attorney-in-fact to

serve in the event that your first choice becomes disabled or dies. Your attorney-in-fact will have broad authority, and it is critical that the person or agency you choose be trustworthy and sensitive to your wishes.

Q: What powers can I give to my attorney-in-fact?

The powers you give your attorney-in-fact can be as limited or as broad as you like, and can include the power to buy property, to invest, to contract, to engage in tax planning, to make gifts, and, very importantly, to plan for government benefits, such as Supplemental Security Income and Medicaid (Medi-Cal in California).

Q: What is a "springing" Durable Power of Attorney?

Ordinarily, a DPA is effective as of the day it is signed and executed. This means that even if you are competent to make your own decisions, your attorney-in-fact will also have the legal authority to act on your behalf and engage in financial transactions.

A "springing" DPA, on the other hand, becomes effective at a later date, usually when the principal becomes mentally incompetent – it "springs" into effect at the point you lose capacity, as certified by a physician or other designated individual.

Note: Some banks are reluctant to accept a "springing" DPA because of the possible ambiguities involved in deciding when a person is "mentally incompetent." You should consult with your bank about its requirements for accepting a DPA.

Q: What are the advantages of a Durable Power of Attorney?

A DPA is a relatively easy, inexpensive mechanism for allowing another person to handle your legal and financial affairs. Unlike a joint tenancy bank account, which people often use as a management device in the event of incapacity, a DPA does not give your attorney-in-fact legal access for his or her own use. Your attorney-in-fact must use your assets for your benefit.

Also unlike joint bank accounts, a DPA allows you to transfer decision-making power without disrupting your estate plan. When you create a joint tenancy bank account, you not only give your "joint tenant"

access to your funds, but on your death, all of the funds in that account will automatically go to the joint tenant by right of survivorship. Assets in a joint tenancy account are not subject to your Will. A Durable Power of Attorney, on the other hand, in no way affects the disposition of your assets upon your death and, in fact, ceases to be effective when the principal dies.

A properly drafted DPA can give you the flexibility to plan for government benefits such as Medicaid. For example, the attorney-in-fact can be given authority to transfer the principal residence to your spouse if you need to be in a nursing home or require government assistance.

Q: What are the disadvantages of a Durable Power of Attorney?

The main disadvantage of a DPA is that it is subject to abuse because there is no ongoing court supervision of the attorney-in-fact. This differs from a conservatorship or guardianship, under which a conservator is required to submit an ongoing accounting to the court. If the attorney-in-fact abuses his or her authority and acts improperly, a court may step in and take action. However, in many cases, the damage is already done, and it is difficult to undo it. Thus, you should take great care in selecting your attorney-in-fact.

Q: Do I need a lawyer to have a Durable Power of Attorney drafted?

There are advantages to having a lawyer draft a DPA. First, a qualified attorney will be familiar with the state-specific requirements for DPA forms. Second, an attorney can draft the DPA to meet your individual needs. Although pre-printed forms are available, they are worded broadly and may not succeed in delegating the range of authority you intend. Third, since a DPA is subject to abuse, it is a good idea to meet with an attorney to make sure both the principal and attorney-in-fact understand the document and the attorney is assured of the principal's competency.

Note: Some banks and brokerage companies will require you to use their DPA forms in order to carry out financial transactions with them. You may want to complete the DPA forms provided by these institutions in conjunction with a form drafted by your attorney.

Q: How do I execute a Durable Power of Attorney?

An adult must be competent in order to execute a valid DPA. If there is a question regarding competency, it is a good idea to get a doctor's letter or declaration regarding the principal's capacity to understand and sign a DPA at the time the document is executed. You must sign your DPA in the presence of either two qualified witnesses or a notary public (some states may require both).

For real estate transactions, you will have to file your DPA with a county land records office. To be sure you meet your state's legal requirements for a DPA, you should consult with a qualified attorney.

Durable Power of Attorney for Health Care

Q: What is a Durable Power of Attorney for Health Care (DPAHC)?

A DPAHC is an advance directive that allows you to appoint a *health care agent* (also known as an *attorney-in-fact*, a *proxy*, or a *surrogate*) to make health care decisions for you in the event that you can no longer speak for yourself. Every state recognizes a DPAHC, but laws governing directives vary from state to state. Some states consolidate the DPAHC with other advance directives. For example, California's Advance Health Care Directive consolidates the DPAHC, the Natural Death Act, and the Directive to Physicians into one form.

For additional information on advance directives, see the **FCA Fact Sheet**: *End-of-Life Decision Making.*

Q: What if I am competent to make my own health care decisions?

Unless you stipulate otherwise, your health care agent makes decisions for you only if you are no longer able to make health care decisions for yourself.

Q: If I have filled out a Living Will, do I also need a DPAHC?

It is a good idea to complete a DPAHC in addition to a Living Will, or to combine them in one document. A Living Will usually allows you to state your desires regarding life-sustaining treatment in the event that you become terminally ill or permanently unconscious. Most states include these types of instructions in their DPAHC forms. By selecting a health care agent through a DPAHC, you ensure that someone you trust will oversee decisions and implement

your wishes regarding any treatment, not just life-sustaining treatment.

Q: What powers can I give my health care agent?

A DPAHC allows you to give your health care agent as broad or as limited powers as you like. While state laws may vary, the powers you can give to your agent usually include:

- The right to select or discharge care providers and institutions;
- The right to refuse or consent to treatment;
- The right to access medical records;
- The right to withdraw or withhold life-sustaining treatment;
- The power to make anatomical gifts.

Note: A health care agent does not have the authority to make legal and financial decisions for you. Legal and financial decisions are made through a separate Durable Power of Attorney for Property as discussed at the beginning of this fact sheet.

Q: Who should I choose as a health care agent?

You should choose a person whom you trust, such as a spouse, partner, family member or close friend. The person you choose should know your personal values and beliefs. If possible, you will want to choose someone who lives in your area in case he or she is called upon to direct your treatment for an extended period of time. You will want to discuss your health care wishes with your agent and be sure he or she is willing to act on your behalf. Many states will not allow your health care provider or anyone working in a health facility to be a health care agent.

Q: Can I choose an alternate health care agent?

Yes. You should choose at least one alternate person to act as your health care agent in case your first choice is unable or unwilling to make health care decisions for you.

Q: How do I execute a DPAHC?

You must be at least 18 years of age and mentally competent to execute a valid DPAHC. You must sign your DPAHC form. Most states will also require qualified adult witnesses and/or a notary public to sign the DPAHC, acknowledging that you are competent and acting under your own volition. No attorney is required. *If you are in a nursing home, other witnessing requirements may apply*.

Q: Where can I find DPHC forms and instructions?

A local hospital, Long-Term Care Ombudsman program, senior legal service or senior information and referral program, a local or state medical society, or your physician will usually have forms appropriate for your state. Some medical centers offer classes in preparing advance directives. Attorneys may also draft their own forms. Partnership for Caring, Inc. (formerly Choice for Dying) has forms and instructions for each state that can be ordered by phone at (202) 338-9790, or downloaded from the web at *www.partnershipforcaring.org* or *www.choices.org*.

Revocable Living Trust

Q: What is a Revocable Living Trust?

A Living Trust is an arrangement in which a person transfers ownership of their assets from themselves to another entity, the trust. The person creating the trust is the *settlor*. The person who manages the trust is called the *trustee*. The person for whose benefit the trust is being managed is called the *beneficiary*. The same person can be *settlor*, *trustee* and *beneficiary*.

Thus, you can set up a trust with your own assets and retain complete management and control of the assets by acting as your own trustee, or you can designate someone else as trustee to manage the assets for you.

It is called a “Living Trust” because it is created during the settlor's lifetime. This is different from a “Testamentary Trust” which is created upon the death of the settlor.

Q: How does a Living Trust function as a management device if I am incapacitated?

In the event that you are incapacitated, the trust can provide for an alternate trustee, whom you have selected, who will manage the trust funds for you. The trust document should spell out how the determination of incapacity is made.

Q: How does a Living Trust serve as a substitute for a Will?

The trust document provides for the distribution of the settlor's assets upon the settlor's death. On the death of the settlor, the trustee distributes the trust

assets directly to the beneficiaries designated in the trust instrument. There is no automatic court supervision or probate of this distribution process as there is under a Will. This is generally faster and less costly than the distribution of assets pursuant to a Will.

Note: In order for a Living Trust to function as a Will substitute and avoid probate, the settlor's assets must be transferred into the Living Trust during the settlor's lifetime.

Q: Does a Living Trust save taxes?

You can utilize the same tax planning strategies in a Will as in a Living Trust. The use of a Living Trust does not in and of itself save taxes, but a Living Trust may be one vehicle for tax planning. You should consult an attorney to find out ways in which you might limit taxes on your assets.

Q: Can a Living Trust be used to obtain Medicaid benefits?

People who are facing the need for long-term custodial care often explore Medicaid as a source of coverage. Putting your own assets into a Revocable Living Trust does not shield or protect those assets for Medicaid purposes.

Q: Who can serve as a trustee of a Living Trust?

A trustee can be an individual, such as a family member or friend, or it can be a bank or other financial institution. If you choose an individual to serve as your trustee, you want to make sure that he or she is both trustworthy and able to manage your assets. Some people prefer a neutral third party, such as a bank or trust company. These institutions do charge fees, usually based on a percentage of the trust estate, and you may want to interview several trust companies before you choose one.

Q: Is a Living Trust right for everyone?

For many people, a Living Trust is an ideal arrangement both for management of assets and as a Will substitute. However, it is not right for everyone. Under a Living Trust, the trustee who manages the assets has an obligation to use trust assets only for the beneficiary's benefit, but there is no ongoing court supervision of the trustee. Thus, there is less protection in case of mismanagement of assets than there is in a conservatorship (see the **FCA Fact Sheet**: *Conservatorships*).

Also, a Living Trust is more costly to have drafted than a Will. These are costs that you will pay up front, as opposed to probate costs, which are paid after a person's death by his or her heirs. In the long run, the cost of a Will and the cost of a Living Trust may be about the same. Furthermore, in order for a Living Trust to function effectively, it must be fully funded. This entails, in some cases, considerable effort on behalf of the settlor to transfer assets into the trust.

Q: If I have a Living Trust, do I need a Will?

Although a Living Trust functions as a Will substitute, it is necessary even with a Living Trust to have a "pour-over" Will. A pour-over Will makes sure that any assets that were not transferred into the trust during the settlor's lifetime are poured over into the trust on the settlor's death. If all of the settlor's assets have been transferred into the trust during the settlor's lifetime, the pour-over Will will never be used or admitted into probate.

Q: If I have a Living Trust, do I still need a Durable Power of Attorney for Property?

It is usually advisable to have a DPA for Property in addition to the Living Trust. This is because some decisions that must be made on your behalf do not fall within the powers of a trustee.

Q: If I have a Living Trust, do I still need a Durable Power of Attorney for Health Care?

Yes. A trustee under a Living Trust does not have the authority to make medical decisions on behalf of the settlor. A trustee can use trust assets to pay for medical care, but they cannot make medical decisions. If you would like your trustee to make medical decisions for you, you will need to appoint him or her as your health care agent through a separate Durable Power of Attorney for Health Care (see previous section of fact sheet).

Q: How do I establish a Revocable Living Trust?

If you choose to establish a Living Trust, it is a good idea to do so through a qualified attorney who is knowledgeable in estate planning and assets management. Trust documents can be very complicated.

Credits

This fact sheet was written by Harriet P. Prensky in 1997 and updated in October 2001. Ms. Prensky is a

certified elder law attorney and partner in the law firm of Prensky & Tobin in Mill Valley, California. She focuses on legal problems of the elderly and disabled, estate planning and probate, and is a Fellow on the National Academy of Elder Law Attorneys.

AARP (2001). ***Wills and Living Trusts*.** *www.aarp.org/confacts/money/wills-trusts.html*

Elder Law Answers (2001). ***Estate Planning*.** *www.elderlawanswers.com/test2_new.asp?menuitem=Estate+Planning*

MetLife (1999). ***Benefits of Establishing a Trust Fund*.** *www.metlife.com/Lifeadvice/Money/Docs/trust1.html*

NOLO: Law for All. (2001). ***Durable Powers of Attorney for Finances FAQ*.** *www.nolo.com/encyclopedia/articles/ep/ep95b-98.html*

NOLO: Law for All. (2001). ***Healthcare Directives FAQ*.** *www.nolo.com/encyclopedia/articles/ep/ep100b-104.html*

Recommended Readings

American Bar Association Guide to Wills and Estates. Order on the web at *www.abanet.org/store/order.html* or by phone at (800) 285-2221.

Health Care Agents: Appointing One and Being One. This question and answer booklet can be ordered from Partnership for Caring by the web at *www.partnershipforcaring.org/Store/order_set.html* or by phone at (202) 338-9790.

Make Your Own Living Trust, Denis Clifford, 1996, Nolo Press, 950 Parker St., Berkeley, CA 94710. (800) 992-6656.

The Five-Minute Lawyer's Guide to Estate Planning, Michael Allan Cane, 1995, Dell Publising, 1540 Broadway, New York, NY 10036.

Resources

Partnership for Caring: America's Voices for the Dying
1620 Eye St. NW, Suite 202
Washington, DC 20006
Phone: (202) 296-8071
Fax: (202) 269-8352
Hotline: (800) 989-9455
Website: *www.partnershipforcaring.org*
Email: pfc@partnershipforcaring.org

Advance Directive forms for all States can be ordered by mail for $5.00 or downloaded for free from the Partnership for Caring website.

National Academy of Elder Law Attorneys
1604 North Country Club Road
Tuscon, AZ 85716
Phone: (520) 881-4005
Fax: (520) 325-7925
Website: *www.naela.org* (includes a directory of elder law attorneys)

American Bar Association (ABA)
Website: *www.abanet.org*
Lawyer Referral Services:
www.abanet.org/referral/home.html

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