

Legal Steps In Advance Care Planning: Planning For Incapacity

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Imagine you are in a hospital
and you can't speak,
who will speak for you?

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If you aren't able to swallow or
breathe,
what will happen to you?

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Without a plan,
how will your healthcare
providers know your wishes?

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Imagine you need
rehabilitation, and you are not
able to sign your admission
papers, who will sign you in?

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Without a plan,
who will pay your bills?

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We all hope to be able to
communicate until the end . . .
but it doesn't always happen
that way.

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In the Absence of a Healthcare Directive,
Health Care Power of Attorney and Power
of Attorney for Finances. . .

Who Decides? The Doctors? The Nurses? Your Family?
The Hospital Ethics Team? The Courts?
Who Makes the Decisions For You?



Planning for Incapacity: Different Types of Powers of Attorney

Power of Attorney for Healthcare
Power of Attorney for Finances

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Common Terms

- ❖ Principal = Person who makes the Power of Attorney (POA)
- ❖ Principal appoints an Agent
 - ❖ Attorney in Fact (AIF)
- ❖ Agent = Person appointed to act in the Principal's best interests

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Not All Power of Attorneys are Alike

It's Not One Size Fits All

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Different Types of Powers of Attorney

- ❖ Limited
 - ❖ To a certain time period or event
- ❖ Springing
 - ❖ Become effective upon some event
 - ❖ Generally upon the certification of 1-2 physicians
 - ❖ Normal POA's terminate if and when the principal becomes incapacitated
- ❖ Immediately Effective
 - ❖ Opposite of a springing power of attorney
- ❖ Durable

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What is Important?

The Language in The Power of Attorney Controls

Only the Actions Expressly Stated in the Power of Attorney Can Be Performed

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What are the Agents duties?

- ❖ Fiduciary relationship
 - ❖ Trust
 - ❖ Exercise high degree of care
- ❖ Duty to:
 - ❖ Act in the best interest of the Principal
 - ❖ Maintain contact with the Principal
 - ❖ Communicate with the Principal
 - ❖ Follow Principal's wishes
 - ❖ Avoid self-dealing

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Capacity

We Have to Talk About It...

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Legal Capacity is Not the Same as
Medical Capacity

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Medical Capacity

- ❖ Generally, the determination is based on whether the person is:
 - ❖ Alert and Oriented x3
 - ❖ Person, place and time

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Dictionary Definition of Capacity

- ❖ Ability to receive or contain
- ❖ Maximum amount or number that can be received or contained
- ❖ Power of receiving impressions, knowledge, or mental ability

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Legal Standard for Capacity

- ❖ Attorney determines
- ❖ Law doesn't specify what is the "requisite capacity" needed
- ❖ Generally, Principal must understand the nature of the act and its legal consequences
- ❖ This is a legal determination
- ❖ Differs from the medical definition

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Capacity

- ❖ Time-at the moment of execution
 - ❖ Lucid at the moment
- ❖ Principal must understand that the Agent can act for the Principal
- ❖ Actions of the Agent binding



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Level of Capacity Varies

Capacity for What?
To Make Decisions?
To Express Preferences?
Understand Consequences?

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Challenges to Capacity

- ❖ Most common challenge - Person lacks capacity
- ❖ A diagnosis of dementia or appearance of dementia *may* provide the basis for a will contest
- ❖ 2nd most common-undue influence
- ❖ Person with marginal capacity is more likely to be unduly influenced than someone with no capacity issues

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Testamentary Capacity

- ❖ Testamentary capacity-viewed as the lowest
 - ❖ Know what they have and who are the “natural objects of their bounty”
 - ❖ Even a person who may not have the capacity to enter a contract or who has a legal guardian may execute a valid Will

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Capacity and the Courts

- ❖ Level of capacity needed depends on the act
- ❖ Courts have repeatedly held that even those persons with diminished capacity may retain sufficient overall capacity to execute a Will

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Missouri's Definition of a Competent Person

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Competent Person

- ❖ Person 18 or older
- ❖ Of sound mind
- ❖ Able to receive and evaluate information and to communicate such decision
- ❖ MO statutory definition of Competent person

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Advance Healthcare Directives

The Law of Power of Attorney for Healthcare
Historical Perspective
Healthcare Directive
The Decision-Making Process

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The Law

Governed by State statute

- ❖ Person must give their Agent the authority to direct a health care provider *to withhold or withdraw* artificially supplied nutrition and hydration
 - ❖ Expressly stated in the document
 - ❖ 1990 Cruzan case

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Missouri Law about Withholding Nutrition and Hydration

- ❖ Nancy Cruzan case
- ❖ 25 year old involved in an MVC, sustained severe head injuries, was without oxygen for extended period of time
- ❖ CPR administered by rescue team, she responded but only to live life in a persistent vegetative state in state institutions, requiring artificial nutrition and hydration

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Impact of the Cruzan Case

- ❖ After 3 years, family requested withdrawal
- ❖ Hospital personnel would not withdraw without a court order
- ❖ Mo State court held:
 - ❖ Parents had the authority to withdraw
 - ❖ Fundamental right under the state and federal constitution to
 - ❖ direct or refuse life prolonging treatment
 - ❖ Nancy's comment to a housemate showed her wishes

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Cruzan continued

- ❖ Mo State Supreme Court *reversed and refused* to apply the doctrine of informed consent
 - ❖ Recognized the state's strong public policy for preservation of life embodied in the Living Will statute
 - ❖ Comments to her housemate are not reliable indication of her intent
 - ❖ Parents are not entitled to order the termination of her treatment
 - ❖ No person can make the choice without the formalities of the document or clear and convincing evidence

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Final Decision...What this means...

- ❖ United States Supreme Court held:
 - ❖ The US constitution does not forbid (allows) Missouri to require evidence of an incompetent's wishes as to the withdrawal of life sustaining treatment
 - ❖ To be proven by clear and convincing evidence
- ❖ Clear and convincing evidence for Missouri means explicit language in documents

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Patient Self-Determination Act of 1990

- ❖ Adopted by Congress in 1990
- ❖ Obligations of Healthcare providers were clearly spelled out, requiring healthcare institutions to:
 - ❖ Provide to patients at the time of admission
 - ❖ Written summary of healthcare decision-making rights; and
 - ❖ Facility policies for recognizing advance directives

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The Act

- ❖ Staff education
- ❖ Education of patients, families
- ❖ Required to inquire about a patient's Advance Directive
- ❖ Not allowed to discriminate

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The Health Care Power of Attorney Law

- ❖ Cannot require:
 - ❖ To withdraw with intent to cause death
 - ❖ Artificial means of nutrition and hydration if:
 - ❖ Principal can ingest through natural means
- ❖ Must consider appropriate measures:
 - ❖ *Within the current standards* of medical practice to provide comfort to the patient

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The Missouri Bar Form

- Part I: DPOA for Healthcare
- Part II: Health Care Directive
- Part III: Notarization Section for Part I

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Part I: DPOA for Healthcare

- ❖ Pages 1-2 of the 4 page document
- ❖ Naming an Agent
- ❖ Successor or Alternate Agents
 - ❖ Naming a First and/or Second Alternate
 - ❖ Resigns, unable, unwilling, unavailable
 - ❖ Issues with Co-Agents

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Durability

- ❖ Once effective, it does not expire or terminate
- ❖ Survives any later incapacity
- ❖ Can be revoked by the Principal

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What Is The Effective Date For Healthcare Decision-making?

- ❖ Effective when...
 - ❖ 1 or 2 Physicians certify the Principal's incapacity
 - ❖ Letters of incapacity must be attached or accompany the POA



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Agent's Authority

- ❖ Based in the law
- ❖ Can consent and/or Prohibit but . . .
- ❖ Move in and out of treatment facilities
- ❖ Take any action necessary to carry out Principal's wishes
- ❖ Receive information pursuant to HIPAA
- ❖ Authorize or Prohibit anatomical gifts
 - ❖ Organ and tissue donation

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Appointing an Agent

- ❖ Must be 18 or older
- ❖ Should be a person who can communicate your wishes and choices to your healthcare providers
- ❖ Cannot be:
 - ❖ Your physician (unless related)
 - ❖ An employee of your physician
 - ❖ Owner/operator of the healthcare facility in which you are a resident (unless related)

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Authority Immediately Effective

- ❖ Physician's certification of incapacity is not needed here:
 - ❖ Right of Sepulcher
 - ❖ Consent for autopsy or postmortem
 - ❖ Delegate health care decision-making power to another person
 - ❖ Anatomical gifts

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Liability of the Agent?

- ❖ Agent incurs no personal liability when acting under the direction of the document
- ❖ Not paid for services
- ❖ Reimbursement for reasonable expenses is allowed when acting as an Agent for finances

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Part II: Healthcare Directive

- ❖ Optional section
- ❖ Pages 2 and 3 of 4 page document
- ❖ Specifically denote what life-prolonging procedures the person wants withheld or withdrawn
- ❖ Authorizes physician to treat “for a reasonable period of time” if can lead to recovery
- ❖ Allows body to be maintained if necessary for organ or tissue removal

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Part III: Witness and Notarization

- ❖ General Information and provisions
 - ❖ A copy is as effective as the original
 - ❖ Third persons can rely on this document
- ❖ Part I **must be signed** in the presence of 2 witnesses and a notary
- ❖ Witnesses and notary also sign the form
- ❖ Required for Part I to be effective and valid
- ❖ If only Part II, the Health Care Directive is completed, then the Principal signs, and **does not need** to be witnessed and notarized

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Agent's Decision Making Process

- ❖ If Agent knows the Principal's preferences, follow them
- ❖ Substituted judgment
 - ❖ If Agent does not know the Principal's wishes, decide *as the Agent believes the Principal would*
 - ❖ Even if it is not what the Agent would decide for themselves
 - ❖ Use past knowledge, discussion of preferences about these life-prolonging procedures
- ❖ Finally, what the Agent believes is in the Principal's best interests
 - ❖ Reasonable person standard

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Missouri's Informed Consent Law

- ❖ In the law there are 3 basic pre-requisites:
 - ❖ Have capacity to reason and make judgments
 - ❖ Decision must be voluntary
 - ❖ Must have a clear understanding of the risks/benefits of the proposed treatment and the
 - ❖ nature of the disease *and* prognosis

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Why aren't more people completing their health care directives?

Most Americans still trust their loved ones and their physicians to make these decisions for them

Even with no family, trust medical providers

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Adult Healthcare Consent Act Designated Healthcare Decision-Maker Act

HB 1133-reported “do-pass” from the House
Health & Mental Health Policy Committee
As Of 5/9/15

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Power of Attorney for Finances

Another Important Part of a Person’s
Planning for Incapacity

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Power of Attorney for Finances

- ❖ Governed by §404.700-404.737
- ❖ Durable Power of Attorney Act
- ❖ Several types of Power of Attorney documents
 - ❖ Not one type fits all
 - ❖ Goal specific

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Durable Power of Attorney

- ❖ Survives the later incapacity of the Principal
 - ❖ Provided properly written and executed
 - ❖ And the Principal had the capacity to execute
- ❖ Right of sepulcher
- ❖ Effective tool used to prevent guardianship
 - ❖ Make financial decisions
 - ❖ Prevent state/court involvement

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Financial Powers included:

- ❖ Manage property and business affairs
- ❖ Apply for government benefits
- ❖ Manage all bank accounts
- ❖ Hire a lawyer
- ❖ Enter into a contract
- ❖ Change Beneficiaries
- ❖ File taxes
- ❖ Pay bills

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Keep in mind . . .

- ❖ If a person has a legal guardian, he/she cannot give informed consent



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Questions?

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