

**NAVIGATING LEGAL ISSUES
FOR FAMILY CAREGIVERS**

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Issues Involved in Planning and Caring

- Financial Decision-Making and Management
- Health Care Decision-Making and Management
- Care Planning
- Long-Term Care Costs

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**POWER OF ATTORNEY
FOR HEALTH CARE**

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Power of Attorney for Property

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The Power of Attorney for Property allows an individual, referred to as the "principal" in the document, to designate another person, known as the "agent" to act for the principal as described in the document for purposes of financial and other property transactions. The agent stands in the shoes of the principal and is then legally authorized to act.

A principal must have mental capacity to execute a power of attorney: ability to comprehend the document and the effect of signing the document.

A. Advantages

1. Durable -effective beyond mental incapacity
2. Revocable if competent
3. Amendable
4. Low cost to set up

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B. Disadvantages

1. Easily abused - no accountability
2. Difficult to remove a "bad" agent if principal incapacitated
3. Often difficult to use with out of state institutions
4. Allows principal to continue to contract despite incapacity, potentially making bad decisions and jeopardizing assets
5. Agent has no duty to act

C. Special Powers which must be added

1. Gifting - for Medicaid planning or other purposes
2. Transferring assets to a Trust (for self or others)
3. Establishing OBRA Trusts
4. Representation in legal separations\domestic relations actions

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D. Duties of an Agent

1. Accounting - documentation of receipts, disbursements, significant actions
2. Loyalty, acting for the welfare of the principal
3. No self-dealing, comingling of assets

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LIVING TRUSTS

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Living Trusts

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Allows for property to be owned in trust, with a designated trustee in control of the assets, and requires that the trustee manage the property according to the terms of the trust document.

A. Advantages

- B.
 1. Avoids probate at the death of the Grantor.
 2. Provides for effective management of property during the incapacity of the Grantor.
 3. Allows the Grantor to remain in control; easy to change the trust document. However, also may not prevent financial exploitation.

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Living Trusts

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B. Disadvantages

1. 1. More expensive to create (legal fees).
2. 2. Assets must be transferred to trust - time consuming effort.
3. 3. Assets must be held in trust - requires lifetime administration.
4. 4. Trustee has authority only over Trust assets and is limited by the terms of the trust document

C. Duties of Trustee

1. Prudently invest and administer trust assets.
2. Loyalty to trust beneficiaries; no self-dealing
3. Accounting to trust beneficiaries
4. Compliance with terms of trust document

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Joint Tenancy

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A form of joint ownership whereby each owner owns one hundred percent of the property; at the death of one of the joint owners, the surviving owners own the entire property.

Advantages

1. No cost to set up.
2. Effective way to avoid probate.
3. Effective way to arrange estate so that others will be able to manage during incapacity.

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Joint Tenancy

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Disadvantages

1. Risky - joint tenancy has an ownership interest in the property and the property is available to the creditors of the joint tenant, as well as may become subject to the marital disputes, disabilities, and other problems of the joint tenant.
2. Does not allow for contingent beneficiaries if the joint tenancy predeceases.
3. Surviving joint tenant is entitled to the entire property at death of a joint tenant - where there are several persons who are the beneficiaries of the owner's estate, difficult to name all as joint tenants, and more risky.
4. For Medicaid purposes, Medicaid applicant presumed to be 100% owner of all personal joint property

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POWER OF ATTORNEY
FOR HEALTH CARE

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Power of Attorney for Health Care

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- The Power of Attorney for Health Care allows an individual, referred to as the “principal” in the document, to designate another person, known as the “agent” to act for the principal as described in the document to make health care decisions for the principal. The agent stands in the shoes of the principal and is then legally authorized to act, including acting to withhold or withdraw life support, as well as any other type of health care decision, including placement.

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Power of Attorney for Health Care

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- Required "legal capacity" to execute
- May be customized to the values of the principal:
 - Organ donation
 - Autopsy
 - Medical Treatment
 - Life Sustaining Treatment
 - Consultation with Children
- Can be effective immediately or "spring" into action upon occurrence of incapacity
- Termination Date

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- Revocable (even without capacity) and amendable (with capacity)
- May name only one person to act at a time
- Successor Agents
- New statute is clear that signing new power revokes old powers
- Agent to use substituted judgment in making decisions if known otherwise to act in best interests
- Although agent has no duty to act, if agent does act, must be with due care for principal

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New Power of Attorney for Health Care Statute

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- SB 3228 effective January 1, 2015
- Replaced existing statutory form
- Eliminates "middle" choice for life sustaining treatment
- Clearly allows any other form to be used provided it names persons allowed by the statute to act as agent
- No specific format required

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Powers of Health Care Agent for Healthcare

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- Authority to make any and all decisions concerning personal care, medical treatment, hospitalization and health care and to require, withhold or withdraw any type of medical treatment or procedure, even though death may ensue
- Authority to access medical records
- Authorize an autopsy and direct the disposition of remains

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<h1>LIVING WILL</h1>	
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<h2>Living Will</h2>	
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PLANNING FOR LONG-TERM CARE COSTS

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II. Planning for Long-Term Care Costs

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The cost of long term care-meaning either in-home care or nursing home care for individuals requiring assistance with activities of daily living- is largely an uninsured healthcare cost for most individuals. Planning for possible exposure to these costs is necessary for effective retirement planning.

A. Medicare Coverage

1. Covers 100 days of skilled nursing care provided in a Medicare certified nursing facility following an in-patient hospitalization of at least 3 midnights. Medicare pays the full cost of the first 20 days. There is a coinsurance payment of \$157.50 (2015 rate) per day for days 21 through 100 which many Medicare supplemental policies cover.

2. Medicare provides home care to those individuals needing intermittent skilled care, usually post hospitalization only, although long term part time skilled home care services are covered. Skilled care does not include custodial care, which is the type of long-term care most individuals impaired by dementia require

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B. Long-Term Care Insurance

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Long Term Care Insurance is the only health insurance that pays for custodial long term care, either at home, or in a nursing home.

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Medicaid

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- Federal – State Program
- Federal Law and Monitoring
- State Law – Regulations and Policy
- State "Medicaid Agency" – Illinois Department of Healthcare and Family Services
- State Eligibility Determinations – Illinois Department of Human Services

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Illinois Medicaid Covered Long-Term Care

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- Nursing homes
- Supportive living- "Waivered"
- Community care program (over 60) – "Waivered"
- In-home services (under 60) – "Waivered"

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Medicaid Eligibility

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- Residency and Citizenship
- Categorical Eligibility
- Need

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National Elder Law Associations

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National Elder Law Foundation

www.nelf.org

National Academy of Elder Law Attorneys

www.naela.org

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