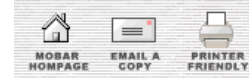


Personal Planning/Protection



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Wills, Non-Probate and Real Estate Transfers

Some Basic Facts about Wills

A carefully drafted will allows one to control the disposition of one's property (called an estate) after death. An estate consists of all property and cash assets owned at the time of death, including bank accounts, land, furniture, buildings, cars, stocks and bonds, proceeds of life insurance that are payable to the estate, and pension plan benefits payable to one or one's estate.

A will can help assure that one's property transfers to a spouse, children or relatives. In addition, provisions of a will can ease the tax burdens that may accompany the transfer of an estate to the individuals chosen. A will provides the probate court with guidance regarding the distribution of the decedent's property and the payment of debts.

In Missouri, a valid will must comply with these requirements:

1. The maker (called the testator if a man, or testatrix if a woman) must be at least 18 years of age except for a minor emancipated by adjudication, marriage, or entry into active military service;
2. The maker must be of "sound mind" at the time the will is prepared;
3. The will must be in writing and signed by the maker; and
4. The will must be witnessed by at least two people who will not receive any property under the will. The witnesses must sign their names at the end of the will in the presence of the testator.

A notary is not required to create a valid will. However, a notary is needed to create a **self-proving will**. A self-proving will is one in which the witnesses have sworn that they have signed the will in compliance with the requirements for a valid will. This eliminates the need for the witnesses to personally appear in court before the probate division to prove their signatures. A self-proving will is important because witnesses may pre-decease the maker of the will or be difficult or impossible to find.

Missouri law requires a will to name a personal representative (formerly called the executor) to administer the estate. One may appoint one or more persons age 18 or older to act as one's personal representative. An institution such as a bank or a trust company may serve in this way. One's personal representative need not be a resident of Missouri. It is prudent, however, to choose a representative who lives close enough to oversee your estate conveniently.

One's personal representative administers the estate during probate proceedings. This administration involves paying one's outstanding debts and taxes from the estate, as well as distributing the estate according to one's wishes. The personal representative, however, is not personally liable for debts and taxes. If the personal representative dies before the testator or is otherwise unable to carry out his or her duties, the court will appoint someone else to fulfill the personal representative's task. However, the situation is avoidable if one names a successor personal representative in the will to replace the first choice.

Restrictions on Distributing Property by Will

Missouri law gives a person broad freedom to distribute the estate as one desires. However, a surviving spouse can choose to either receive by the will or ask the probate division by petition for one-third of the estate if there are children or one-half of the estate if there are no children. This "right of election" allows the surviving spouse the opportunity to receive more than the share one has stated in the will. The right may or may not be exercised by the surviving spouse.

Joint property — property owned by two or more persons with a right of survivorship — is not distributed by will. Property jointly owned bypasses probate and automatically passes to the surviving joint owner(s). Joint tenancy between husband and wife in Missouri is called "tenancy by the entireties."

Joint Ownership As a Will Replacement

Because joint property automatically passes to surviving owners and thus avoids probate court, joint ownership simplifies distribution of one's estate after death. However, it can complicate affairs while one is still living because joint ownership gives away complete control of the jointly-owned property. One's control over jointly-held property is limited because the property is also owned and, thus subject to control, by the other joint owner(s). In addition, the creditors of the joint owner may seize it.

Keep in mind that using joint ownership as a means of helping the family avoid probate court after

one's death may end up causing considerable problems in one's lifetime. In conjunction with a will, cautious use of joint ownership is a helpful device for distributing an estate. Cautious use of jointly owned property is also necessary to avoid abuses by the other joint property owner or distortion of the distribution plan upon the death of one joint owner.

Living Trusts Avoid Probate

One method by which one can avoid probate while retaining control and use of the property during one's lifetime is the creation of a living trust. Usually these are revocable, which allows one to change the trust's provisions or to revoke the trust. One may serve as both the trustee and beneficiary of the trust during one's lifetime, and one may choose the successor trustees and beneficiaries. A living trust does not require the signature of two witnesses. However, a notary is often a good idea, as financial institutions often will not accept the trust without a notary's signature.

One of the principal advantages of a living trust is that one can avoid the publicity and expense of probate. The probate procedure interrupts the flow of income to one's spouse or other family members. In addition, the costs of administration, such as court costs, attorneys' fees and executor's commissions, always reduce the net value of the devise or bequest. Also, a living trust can help with property management during one's lifetime in the event one should become incapacitated. A living trust can also help reduce estate taxes.

To be effective, a living trust must be funded. Funding is simply the process of changing title of assets to the living trust. The living trust only affects assets to which title has been transferred to the trust. Assets can also be transferred to the trust upon the death of the trust maker by the use of a "pour-over" will. A "pour-over" will places assets into the trust upon the death of the trust maker. A "pour over" will is a safety net in case assets have not been transferred during the trust maker's life. Assets that are put into a trust by the use of a "pour-over" will have to go through probate because the title still has to be changed by the court into the name of the trust. The reason a pour over will is used is to make sure that the assets are dealt with as the trust maker desires.

Non-Probate Transfers

The transfer on death (TOD) law in Missouri offers another way to avoid probate. Sometimes TOD designations are also referred to as "payable-on-death" designations. Property that is placed in TOD form will automatically pass to the person named as the beneficiary upon one's death. There are a number of advantages to placing property in TOD form:

1. One can avoid the expense and delay of probate.
2. In contrast to joint ownership, one has more control; one can change the beneficiaries at any time.
3. If a beneficiary pre-deceases the account holder, the property will pass to that person's descendants or an alternate beneficiary, if named.
4. It is less expensive than the creation of a living trust.

While TOD designation is becoming better recognized by the security and banking industries, its primary use has been in placing a person's principal residence in TOD form so that it may pass directly to the designated beneficiaries at the death of the owner. The TOD form in this context is called a "beneficiary deed," and an attorney should prepare this document.

Transfer on death laws enable one to place bank accounts and automobiles in non-probate form. One will need to check with one's financial institution to confirm if they offer the TOD form for their accounts and to obtain the proper form to complete.

There are several drawbacks to the use of TOD designations. Unlike a living trust, they provide no protection if the properties' owner becomes disabled. Also, they must be used wisely to prevent a distortion of the distribution scheme that a person has developed. Finally, they are not useful in tax planning. They are best used when the estate has only one intended beneficiary.

Real Estate Transfers

Many senior citizens, especially those who are retired, for various reasons attempt to sell or give away their property. Some persons need the income, while others want to help their families avoid the delays of probate and administration. Senior citizens planning a property transfer or a change in title (for example, adding a name to a deed) should consider the following points before acting:

1. If a homeowner who deeds his or her house to someone without keeping his or her name on the deed, the new person on the deed can force the other to move out of the house and can sell the house whether the homeowner wants them to or not.
2. If one wants to add a person to the deed as a joint tenant (a person with an equal property share and a right of survivorship), the deed must say "as joint tenants with right of survivorship."
3. If one adds another to the deed as a joint tenant, one *cannot* sell the property later without the other's consent. Also, upon death, the property will automatically belong to the other person if that person has survived.
4. If one wants to sell one's property, the deed must reflect the name of the present owner. If the property has someone else's name on it (such as that of a deceased family member), one will need to remove them from the title. Contact an attorney to find out what must be done.

Costs of Probate

Missouri law prescribes a minimum compensation for the personal representative's services. This compensation, paid out of the estate, is a percentage of the value of the estate.

On the first	\$5,000	5%
On the next	\$20,000	4%
On the next	\$75,000	3%

On the next	\$300,000	2 3/4%
On the next	\$600,000	2 1/2%
On all over	\$1,000,000	2%

The personal representative may waive this compensation. Because the personal representative fees are taxable, many personal representatives waive the fee if they are beneficiaries of the will or trust.

The attorney who performs services for the estate is also entitled to at least the compensation listed above. The court can allow additional compensation if such is reasonable. One's family can also negotiate a fee with the lawyer that is different from above.

Remember that lawyers are compensated out of the estate; therefore, you do not have to pay them "up front" to help probate an estate.

What Happens When One Dies Without a Will Or Living Trust?

If one dies intestate (without a valid will) all of the property — other than what is held jointly, in TOD form, or in a living trust — will be distributed among surviving relatives according to Missouri law. With a will or living trust, one can distribute one's property according to family need. Likewise, one can remember friends and charitable organizations in a will or living trust. Remember also that a husband and wife who own everything jointly still need a will or living trust in the event that they die simultaneously; and if one of them dies first, the other one will need a revised plan.

Wills and Life Insurance

Life insurance policies do not take the place of a will. If the policy benefits are payable to the estate after death, the proceeds will be distributed according to the will. If the policy benefits are payable to a beneficiary other than the estate, such as a spouse or other relative, the will has no effect on the distribution and the named beneficiary will receive the proceeds.

Estate Taxes

An estate tax is a tax imposed by the federal and Missouri governments. The gross estate for estate tax purposes is all property owned at death, certain property transferred during one's lifetime in which an interest was retained, and property transferred in contemplation of death. Included in the gross estate are joint property, life insurance and retirement benefits. The tax is then imposed on the taxable estate after deductions and exemptions. The federal estate tax liability is reduced dollar for dollar by estate tax paid to the State of Missouri.

An individual must have a gross taxable estate of more than \$1,000,000 before any tax will be imposed under either federal or Missouri law. The amount exempt from estate taxes will change as follows:

2003	\$1 million
2004	\$1.5 million
2005	\$1.5 million
2006	\$2 million
2007	\$2 million
2008	\$2 million
2009	3.5 million
2010	unlimited
2011	\$1 million

What to Do When Someone Dies

When there is a death in a family, surviving relatives seldom know how to start the legal distribution of the estate. The first step is to determine whether the deceased left a will.

If an individual dies leaving property that is not transferred by other means (joint ownership with right of survivorship, trust, etc.), it must go through probate court proceedings. When there is a valid will, the personal representative named by the will should be contacted (if he or she is not already aware of the individual's death). The personal representative should contact a lawyer (preferably one who is familiar with estate law). In the absence of a will, a friend or relative should contact a lawyer.

Changing Your Will or Living Trust

A will or living trust that meets all of the specifications described earlier is valid until changed or revoked.

A will or living trust validly executed in another state is also valid in Missouri. However, it is often advisable to contact a Missouri attorney to have the will or living trust reviewed. If one changes one's mind about a particular distribution of property, or if circumstances force the modification of a will or living trust, one can execute a codicil to a will (a document stating alterations or changes to the original will) or a trust amendment to change a living trust. The codicil or trust amendment must be executed and witnessed just as with the original will or living trust. While a codicil or trust amendment is a convenient method for making minor changes to a will or living trust, significant modifications may require a re-drafting of the original document. One should never write on a will or living trust after it is executed. Such writing is not effective and may invalidate the entire document. Always consult an attorney concerning how to change a will or living trust.

Types of Probate

There are four different procedures available to distribute an estate. The choice of procedures depends primarily upon the value of the estate.

When a will is involved, the court first calls in the witnesses to the will, who testify to the validity of the will. (If the will is self-proving, which means that the witnesses' signatures are notarized, this step is eliminated.) After that is done, or if there is no will, the court moves directly to the next step, which is called **administration**.

When the value of the estate is less than the exemptions allowed to the surviving spouse and minor children (which includes a maximum \$7,500 homestead allowance and a reasonable living expenses maintenance allowance for one year), the court may allow immediate distribution if the spouse requests a **refusal of letters**. This also is allowed when there is no surviving spouse, the estate is less than \$5,000 and a creditor has a claim against the estate. A friend or relative may be able to use this procedure to be re-paid for funeral bills they have paid.

If the entire estate consists of personal items of little monetary value, or if the entire estate, including real property, is worth less than \$40,000, the property is a **small estate**, and the court will allow distribution without lengthy proceedings after a simple document filing.

If an estate cannot be administered by a refusal of letters, or as a small estate, it must go through a full administration. The court directs this administration unless either the deceased in the will specifically authorized an **independent administration** or all the heirs so agree. Independent administration means that the personal representative may distribute the entire estate with the help of an attorney without having a court order. The personal representative is required to only make a final report to the court.

An estate, whether administered independently or supervised, must remain open for at least six months to allow creditors to file claims and to give individuals the opportunity to challenge the will, if they choose.

Both full administration and independent administration of an estate normally take at least nine months to complete, but can take longer if more complicated property is involved or claims are filed against the estate.

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Power of Attorney, Personal Custodian, and Guardianship

Power of Attorney

If illness or disability confines you to home or a hospital, you may find it hard to take care of your personal business. One solution to this problem is to create a **power of attorney**. A power of attorney is created when one person (the "principal") gives someone else (the "attorney in fact") written authority to act in the principal's name. Normally, the attorney in fact is not a lawyer, but rather a friend or relative. Because the power of attorney may be used to your disadvantage, you should be very careful in choosing an attorney in fact.

A power of attorney is created by a written document stating the names of both the principal and the attorney in fact, along with the specific powers given to the attorney in fact. You should make the document as specific as possible because banks and other institutions may refuse to honor an overly broad or vague document.

Example: Mr. A broke his hip and therefore cannot visit his bank for several months. His Social Security check is directly deposited in his bank account, and he needs cash for his groceries. Mr. A can give a neighbor or relative a power of attorney to make cash withdrawals from his bank account. Because Mr. A can manage the rest of his personal business himself, he does not give his attorney in fact any additional powers.

Durable Power of Attorney

One problem with the power of attorney is that the principal may give away only the powers he or she actually possesses. If the principal later becomes incompetent to conduct his or her affairs, the attorney in fact likewise becomes unable to act. The power of attorney thus ends with either the incompetence or death of the principal. A Missouri law, the **Durable Power of Attorney Act**, provides a solution to this problem. A power of attorney will continue after you become incompetent if:

1. The power of attorney is entitled a "durable power of attorney;" or
2. The document states that the power is "durable" and includes a provision specifying that the power of attorney will not terminate in case of disability or incapacity; and
3. The document is signed by the principal, dated and notarized. The durable power of attorney need not be filed with the local Recorder of Deeds to be valid unless real estate transactions are involved. A durable power of attorney may have "springing powers." This means that the powers conferred to the attorney in fact are only effective when the principal becomes incompetent and is unable to conduct his or her affairs. The durable power of attorney usually will require that two doctors certify that the principal is incompetent.

The power of attorney may be cancelled or modified in one of several ways. You can stipulate a date for the power of attorney to expire in the initial agreement. Changes can also be made simply by notifying the attorney in fact by oral or written communication. However, whenever possible, oral communication should be avoided in favor of written notification.

The power of attorney may also be modified or terminated by filing a written notice in the office of the Recorder of Deeds in the city or county of the principal's residence.

Note: The Recorder of Deeds does have a charge for recording or revoking the power of attorney.

A durable power of attorney will be revoked automatically if the attorney in fact is no longer qualified to act for you. If your attorney in fact is your spouse and you divorce, the power of attorney automatically ends. The durable power of attorney will also automatically terminate at the time of your death. You may provide for a successor or contingent attorney in fact, or you may establish a procedure to select a successor, in the event that the attorney in fact is unwilling or unable to act on your behalf. An attorney in fact with general powers also has all the rights, powers or purposes that are conferred in the durable power of attorney. Missouri Law requires that a durable power of attorney specifically grant authority for the attorney in fact to have the power to carry out any of the following actions:

1. To execute, amend, or revoke any trust agreement;
2. To fund with principal's assets any trust not created by the principal;
3. To make or revoke a gift of the principal's property in trust or otherwise;
4. To disclaim a gift or devise of property to or for the benefit of the principal; and
5. In some circumstances an attorney in fact can create or change survivorship interests in the principal's property or property in which the principal may have an interest;
6. To designate or change the designation of beneficiaries to receive any property, benefit or contract right on the principal's death;
7. To give or withhold consent to an autopsy or post-mortem examination;
8. To make a gift of, or decline to make a gift of, the principal's body parts under the Uniform Anatomical Gift Act;
9. To nominate a guardian or conservator for the principal; and if so stated in the power of attorney, the attorney in fact may nominate himself as such;
10. To give consent to or prohibit any type of health care, medical care, treatment or procedure;
11. To designate one or more substitute or successor or additional attorneys in fact.

Missouri law prohibits the attorney in fact from making or revoking a will for the principal or from making or revoking a living will for the principal.

Adult Personal Custodian Law

Another method of allowing another person to conduct your business for you is to appoint them as your **personal custodian** under the Missouri Personal Custodian Law. Under this law, you can transfer some or all of your property, both personal property and real estate, to another person to hold for you as custodian of the property. Title to the property remains with you. The custodian holds, manages and invests the property for your benefit and in the way you direct. The custodian is a property manager only.

To transfer the property to the custodian, you must execute a written document describing the property that is being transferred and, if the property is real estate, you need to execute a deed transferring the property to the custodian. *The written documents should always state that the person receiving the property is a personal custodian acting for you under the Missouri Personal Custodian Law.*

Similar to a durable power of attorney, a personal custodianship may be effective even after you become incompetent. The custodian administers the property for your benefit as you directed before you became incompetent or as the custodian deems advisable if you did not so direct.

You may revoke the personal custodianship during your lifetime unless you are not competent or have stated in writing that the custodianship is irrevocable. The custodian must transfer the property back to you if you revoke the custodianship and are competent to receive the property.

The personal custodianship may be a beneficial tool for you in managing your affairs. It provides an alternative method for older persons to avoid the necessity of a conservatorship as well as transferring property into joint tenancy or outright to another person. Discuss your situation thoroughly with an attorney before you decide to institute a personal custodianship.

Guardianship and Conservatorship

A **guardian** is a person appointed by the court to have care and custody of a person (the "ward") who is unable, because of illness, accident or advanced age, to care for him or herself. A **conservator** is a person appointed by the court to manage the financial resources of a person (the "protectee") who is unable, because of illness, accident or advanced age, to manage his or her own financial resources.

Guardianships and conservatorships deprive the incapacitated or disabled person of many civil rights. It may have far-reaching implications for all persons involved. Before you begin guardianship or conservatorship proceedings, you should be certain such steps are absolutely necessary. Consider whether the proposed ward or protectee is able to make decisions concerning his or her personal or business affairs.

Because guardianships and conservatorships have such serious consequences, the law provides special protection for the person over whom a guardianship or conservatorship is sought. If you are that person, you must receive notice of the impending proceedings. If you object to the proceedings, you have the right to challenge the guardianship or conservatorship in court. You have the right to a court-appointed lawyer (if you cannot afford a private lawyer) and to a hearing. This hearing will determine whether a guardianship or conservatorship is necessary. You may bring your personal doctor or other witnesses to testify on your behalf. In addition, your attorney can question the witnesses appearing against you.

If the court finds that you need a guardian, the court will appoint someone to so act. The guardian must provide for the ward's basic needs: food, shelter and medical care. The guardian must not impose excessive restraints upon the ward's freedom, limiting only those acts necessary to ensure safety. Each year the guardian must prepare a report for the court on the personal status of the ward.

If the court finds that you need a conservator, the court will also appoint someone to so act. The conservator may or may not be the same person who is appointed as your guardian. The conservator must skillfully and prudently manage the protectee's financial resources. The conservator may pay bills, receive public benefits, sell and buy real estate and personal possessions, and otherwise control the protectee's assets. The conservator must file with the court an annual report describing all transactions made in the protectee's name. In addition, the conservator must deposit with the court an amount of money, called a bond, to ensure honest and prudent management of the protectee's estate.

Sometimes a person suffers from only a mild disability or partial incapacity. In such a circumstance, the court may appoint a "limited" guardian or conservator. This appointment can preserve many of the person's legal rights. A person retains power over those affairs he or she is capable of managing. The guardian or conservator manages the rest. The use of a living trust and durable powers of attorney can help avoid this procedure.

Procedure

The procedure for appointing a guardian or conservator is as follows:

1. A petition must be filed with the probate court.
2. The person for whom a guardian or conservator is sought must receive notice of the filing and be informed of his or her rights to have an attorney and a hearing. The court will appoint a lawyer to represent the potential protectee. If only a conservatorship is sought and the person agrees to appointment of a conservator, the court may make such appointment without further notice or hearing.
3. In all other cases, the probate court will hold a hearing on whether a guardian or conservator is required. Before the court will appoint a guardian or conservator, a finding must be made that the person is incapacitated, incapable or disabled. Evidence usually involves testimony by a doctor, either in person or in writing. The attorney representing the person may contest this evidence and offer alternative medical evidence.
4. If incapacity or disability is proven, the court will appoint a guardian, conservator, or both. If the ward or protectee is able to communicate his or her choice for the individual to serve as guardian or conservator, the court will give strong consideration to that choice. If no such choice is communicated, the court may look to the ward's or protectee's will document. You may specify in your will or other document the person you want as a guardian or conservator. Employees of nursing homes, the Department of Mental Health, and the Department of Social Services may not serve as guardians or conservators unless they are related to the ward or protectee.

If you wish to become a guardian or conservator, remember that you may need to post a bond. You will also need an attorney. Once appointed, you assume responsibility for your ward and may use the ward's assets only for maintenance and valid expenses. You must keep accurate records for use in making your annual reports to the court.

A guardianship or conservatorship can be terminated in several ways. A guardianship ends with the death of the ward. If the protectee's property is exhausted, the court may order the conservatorship ended. Also, a ward can request that the court re-determine or restore his or her capacity. A new hearing will be held and additional evidence will be considered. If the court finds that the ward or protectee has regained capacity or ability, the guardianship or conservatorship will be modified or ended.

If there is no one to act as a guardian or conservator for a person who needs help, contact the office of the public administrator for the county in which the person lives. They may be able to institute the proper proceedings and act as guardian and/or conservator.

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Protective Services and Adult Abuse

Protective Services

The term protective services may be used in several ways. In its broadest sense, it describes a network of public and private social services agencies available to assist individuals with their personal or financial affairs. Typically, these agencies aid mentally or physically frail persons who live alone and have become unable to take care of themselves. For persons unable to make necessary decisions, long-term assistance may come through the appointment of a guardian. (See Guardianship section.)

Missouri has two protective services laws. The **adult abuse law** protects adults of all ages, including senior citizens, from physical harm from a present or former household member. The **elderly abuse law** specifically targets senior citizens for protection against both physical harm and general neglect.

Elderly Abuse Law

The elderly abuse law directs the Missouri Division of Aging to establish an intervention program to respond to reports of alleged elder abuse, neglect and exploitation, and to work with older and handicapped adults in resolving the situations. The program is based on an individual's right to self-determination; no decisions are made about a competent adult without his or her involvement and consent. Every effort is made to keep an individual in his or her own home.

Missouri's law provides that people who in good faith report suspected abuse or cooperate with an investigation will be immune from criminal or civil liability. It further provides that the identity of the reporter shall not be disclosed except with the permission of the reporter or by order of a court. Anonymous reports are also accepted.

To report suspected abuse in Missouri, please call 1-800-392-0210 or 1-800-392-8819(TDD).

Callers should be prepared to give the alleged victim's name and address, an account of what happened, where and when it happened, and who the suspected abuser might be.

Note: Abuse is defined as the infliction of physical, sexual or emotional injury or harm, including financial exploitation by any person, firm or corporation.

After the Department of Social Services receives a report, it conducts an investigation to determine whether the elderly person is facing a likelihood of serious physical harm and is in need of protective services. If protective services are necessary, the department will diagnose and evaluate the needs of the person. With the consent of the elderly person, the department can provide casework, counseling and, if necessary, assistance in locating alternative living arrangements.

If the person in need of protective services is unable to consent to these services, then the director of the Department of Social Services can initiate court proceedings to obtain a guardian for the person. (See Guardianship section.)

Adult Abuse Law

In contrast to the elderly abuse law, the Missouri adult abuse law applies to anyone 18 years of age or older who is in danger of suffering physical injury from a present or former household member.

The abused adult may file a complaint (called the "petition") in court, and, if good cause is shown, immediately can obtain an **ex parte order of protection** that day. This order can prevent the abusive person from entering the complainant's home and generally can restrain the person from abusing, threatening, molesting, or disturbing the complainant. This *ex parte* order is served on the abuser by a sheriff and lasts for 15 days. There is also a procedure for filing for an order of protection during non-business hours – check with your local court.

Within 15 days after the filing of the petition, a hearing is held and the complainant must prove the accusations stated in the petition. The respondent (the accused abuser) receives notice of the hearing. If such proof is shown, the judge can issue or continue a protective order for up to 180 days. The protective order may be renewed, after a hearing, for a second 180-day period. The abusive party must comply with the order or face arrest.

If you desire protection under the Missouri adult abuse law, contact your county circuit court clerk. If the petitioner does not have counsel, the clerks of the court are required to provide guidance in filing the petition. You may also want to contact an attorney to assist you.

Offenses Against A Person

Elder abuse is against the law in Missouri, and an individual may be charged in connection with an act on acts that cause harm to a person 60 years of age or older.

The provisions of the elder abuse criminal law describe elder abuse in the first, second and third degree. While first and second degree abuse involve physical harm, third degree elder abuse can involve "grave emotional distress" as well as threats and intimidation.

It is also the law that, within the context of any long-term care facility, any person who knowingly abuses or neglects a resident of a facility shall be guilty of a class "D" felony.

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Statutory Living Will

Introduction

Missouri's living will law allows a person (the declarant) to direct his or her doctor and medical facility to withhold or withdraw medical procedures that merely prolong the dying process.

The "**living will**" must be in writing, dated, and signed by the declarant or by a person other than the declarant at the declarant's express direction. If the living will is not in the declarant's handwriting, two persons must witness it. The witnesses must be at least 18 years of age. Anyone making a living will should always keep the original and give copies to his/her doctor, hospital (for inclusion in medical files), and family members. If the living will is intended to include denial or withdrawal of artificial (intravenous or tube) nutrition and hydration, or breathing, the intention must be specifically stated.

The living will can be **revoked in any manner** by which the declarant can show he or she wants to revoke it.

When Does The Living Will Become Effective?

The living will becomes effective only when the declarant, suffering from a terminal condition, is no longer able to make and communicate treatment decisions. It is important to remember that so long as the declarant is able to make and communicate treatment decisions, those decisions control and the living will is not effective.

What The Living Will Does and Does Not Do

The living will directs the doctor and hospital not to perform any medical procedures that merely keep the declarant alive. The living will also prevents any health care professional or medical care facility that acts pursuant to a living will from being subject to civil or criminal liability. The living will does not authorize mercy killing or any affirmative act to shorten life. It also does not prevent

administration of medication or any medical procedure necessary to provide comfort or to reduce pain.

Dealing With Your Physician and Hospital

Some doctors and health care facilities do not recognize the **living will** as a means for a patient to control his/her own medical treatment. These doctors and facilities are required to take all reasonable steps to transfer the patient to a doctor and facility that will honor the living will. To prevent any complications in honoring your living will, it is very important that you discuss your wishes with your doctor before you sign one.

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Durable Power of Attorney for Health Care

Introduction

Missouri has enacted legislation providing citizens with a statutory right to designate another person to make health care decisions for them if they become incapacitated. The law allows what is known as a "durable power of attorney for health care." The person who executes such a document is called the "principal." The person who is designated to act is called an "attorney in fact." The attorney in fact may be any adult you trust to make important decisions for you, other than an attending physician or the owner, operator or employee of a health care facility where the person is a resident.

The durable power of attorney for health care must be in writing, signed by the principal, and notarized. It comes into effect only upon a certification of incapacity by two licensed physicians, unless the document provides for a different number. In any event, certification by at least one physician is required.

A competent patient may revoke the durable power of attorney for health care at any time and in any manner by which the patient can show that he or she wants to revoke it. The revocation is effective upon it being communicated by the principal to the attorney in fact or the attending doctor.

No doctor or treatment facility can require a patient to execute a durable power of attorney for health care as a condition of treatment. Also, no insurance company can require an insured to execute a power of attorney for health care as a condition for receiving benefits. Any third party acting in good faith may rely on the instructions of and dealings with an attorney in fact, pursuant to the authority granted in a power of attorney for health care, without liability.

What the Durable Power of Attorney for Health Care Does and Does Not Do

Under the durable power of attorney for health care, your attorney in fact may make every possible decision regarding health care. This includes decisions to enter a hospital, to undergo an operation and even to terminate life-support systems. If you want to enable your attorney in fact to authorize the withdrawing or withholding of food and water however, the document must provide a specific grant of authority to do so.

How Does a Durable Power of Attorney For Health Care Differ From a Living Will?

A living will is merely a statement saying that the person signing the document does not want any extraordinary procedures that simply keep the declarant alive. A living will does not authorize anyone else to make health care decisions for you, whereas a durable power of attorney does.

Do I Need Both a Living Will and a Durable Power of Attorney for Health Care?

If you decide that you want someone to speak for you concerning all of your future health care, including the removal of life-support systems, you will need to complete a durable power of attorney for health care. A living will merely helps make clear that you do not want certain life-prolonging medical procedures or treatments under specific conditions. A living will provides doctors and others with evidence concerning your wishes. It may also serve as a guide to your attorney in fact. The prudent course of action would be to have both a living will and a durable power of attorney for health care.

Information

The Missouri Bar has created a form health care directive and durable power of attorney for health care that is valid in Missouri. Single copies of the form are available at no charge by sending a written request to:

Health Care Proxy Form
The Missouri Bar
P.O. Box 119
Jefferson City, MO 65101

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Self-Determination Act

Introduction

An important federal disclosure law went into effect on December 1, 1991. The law, known as the

Patient Self-Determination Act (the act), was sponsored by Senator John Danforth of Missouri and is an amendment to the Medicare and Medicaid provisions of the Social Security Act.

Who the Act Affects

The act affects all Medicare and Medicaid provider organizations. These organizations include hospitals, skilled nursing facilities, home health agencies, hospices, and pre-paid health care organizations. In general, the act requires these organizations to provide written information to patients about their rights under state law to make their own medical care decisions. These rights include the patient's right to refuse medical treatment and formulate advance directives.

Advance directives are written instructions authorized by the patient concerning the patient's health care in the event the patient is incapacitated. Living wills and durable powers of attorney for health care are two forms of advance directives that are legal in Missouri. Both living wills and durable powers of attorney for health care are covered elsewhere in this chapter.

How the Act Applies to the Patient

To illustrate, if you are entering the hospital for surgery, the act would affect you. Upon your admission to the hospital, a hospital representative must provide you with written information about your health care rights under state law. This information should include information about living wills and health care powers of attorney. If you have a living will and a health care power of attorney, you should make them part of your hospital record at that time if you have not done so previously. The hospital representative should provide you with the hospital's policies surrounding your health care rights. At that time, the hospital representative will document in your medical record whether or not you have a living will and/or health care power of attorney.

Finally, the act specifically states that your care cannot be contingent upon whether or not you have an advance directive. The act exists to inform you of your rights. Therefore, those organizations affected by the act may not discriminate against you because you do or do not have an advance directive.

Of course, the time to make health care decisions is not at the time of admission to a hospital or other health care facility. You should make these decisions while you are healthy and not under any pressure. In addition, you should discuss your health care wishes with close family members, your doctor, clergy, and close friends in order to alleviate any future confusion or misunderstanding.

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