

POWERS OF ATTORNEY FOR HEALTH CARE

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POWER OF ATTORNEY FOR HEALTH CARE

ADVANCED DIRECTIVES

Plans for the future which are triggered by certain circumstances.

Example One: Paul has a living will which directs his health care providers to withhold cardiopulmonary resuscitation (CPR) if his heart stops.

Circumstance = Paul's Heart Stops

Plan = Withhold CPR

Example Two: Paul has a power of attorney naming Angie as the person to make all of his health care decision if Dr. Dean determines Paul is unable to make health care decisions for himself.

Circumstance = Dr. Dean determines Paul is unable to make health care decisions for himself

Plan = Angie will make Paul's healthcare decisions for Paul

In the examples above, Paul knows that he does not want to have CPR in the event that his heart stops beating but he also has decided that other decision about his health care should be made by Angie if he is unable to make those decisions for himself. He has entrusted his doctor with the power to determine his ability to make health care decisions.

HEALTH CARE SUBSTITUTE DECISION MAKERS

Health Care Surrogates are legally empowered by the Health Care Surrogate Actⁱ to make health care decision on behalf of patients who lack decisional capacity, and they are empowered to terminate life-sustaining treatment. The surrogate may make such decision without judicial involvement of any kind.

Personal Guardians appointed under Articles XI & XIa of the Probate Actⁱⁱ may be empowered by judicial order to make health care and end of life decisions. Furthermore, personal guardians are first among health care surrogate candidates under the Health Care surrogate Act.ⁱⁱⁱ

Health Care Agents designated under the Illinois Power of Attorney Act,^{iv} or similar law from another state, are agents who are duly designated by a patient to make health care decisions for the patient upon the patient's incapacity.^v

POA AGENT'S ARE THE SUPREME SUBSTITUTE DECISION MAKERS

- POA health care agents are chosen by the patient and given specific authority to carry out the patient's wishes in a manner the patient specifies in the event the patient loses their capacity to make reasoned decisions about their care.
- POA health care agents may be empowered to admit a patient to a psychiatric facility and consent to treatment with medication or electroconvulsive therapy (ECT); whereas, surrogates empowered under the Health Care Surrogate Act and Guardians do not have these powers.^{vi}
- POA health care agents, as a general rule, retain their powers as an agent even after a court grants a personal guardianship.^{vii}

EXECUTING A HEALTH CARE POWER OF ATTORNEY

A principal grants an agent specified powers, in writing, to make health care decision upon the principal's incapacity.^{viii} The written document is the POA for health care. A principal should have legal capacity to execute a POA; meaning, the principal should be at least 18 years of age or an emancipated minor and have the capacity to understand what they are doing. This can be difficult to discern when a principal is in the early stages of dementia or has certain forms of mental illness. Note: at least one appellate case has held that disabled adults under a guardianship have the fundamental right to make their own health care decisions regarding end-of-life care.^{ix}

The Statutory Short Form Power of Attorney for Health Care (See 755 ILCS 45/4-10 (West 2019)). Requires the principal to select certain powers to grant or exclude for a specified agent. The agent, and successor agent, if any, will be listed with their contact information. The document is signed by the principal and witnessed by at least one person 18 years of age or older who can attest that the principal either signed the document in front of them or the principal affirmed the affixed signature was their signature. There are limitations on who can witness a POA for health care. Generally, a witness cannot be a health care provider who has the power to direct care, a health care owner-operator who can bill the principal for services, a family member or someone who is going to be the POA's agent.^x Upon satisfying these minimal conditions, a POA for health care has been executed and may be relied upon.^{xi}

Principals may execute any other form of POA for health care they wish as long as they designate an agent, the agent's powers and the designated agent is not a healthcare provider or professional administering care to the principal.

Unless revoked, amended, or otherwise specified the POA is valid until the principal's death^{xii} and if specified by the principal, the agent's powers may extend beyond death to address such things as anatomical gifts, autopsy, and disposition of remains.^{xiii}

INVOKING A POA FOR HEALTH CARE

There is no need from a POA to go into effect until the principal is incapacitated and cannot make informed decisions about their own healthcare. The principal can and should define incapacity in the POA. The short form POA for health care allows the principal's physician to determine the principal's capacity.^{xiv} Note: it is the principal or agent's responsibility to inform the physician the POA exist; thereafter, it is the physician's responsibility to make the POA part of the medical record.^{xv}

Upon a physician documenting in the medical record that the principal is incapacitated the POA will go into effect. At that time, the agent upon acceptance of their duty as agent has the power to make the healthcare decisions granted in the POA.^{xvi} An agent who is unable or unwilling to make appropriate decisions may be removed in accordance with Section 45/2-10 of the Illinois Probate Act (755 ILCS 45/2-10)(West 2019)). The POA will remain in effect until the principal regains capacity.

PRACTICAL MATTERS

Health care providers are supposed to honor health care POA's if they have a good faith belief the POA is valid, but just like banks, a health care provider has every right to question a POA. An unwitnessed document purported to be completed by a person with questionable capacity may not be worth the paper it is written upon. TIP if you have a questionable situation, find out what the health care provider will accept as an agent's authority to make healthcare decisions.

If you ever find yourself in a situation where a ward wants to execute advanced directives and you are unsure what to do seek legal counsel. If you are legal counsel and you are unsure, obtain court authorization as appropriate.

If your healthcare provider is ready and willing to accept a POA executed by a principal, these forms are readily available on the internet for your to execute on your own. If you have ANY questions, please seek legal advice.

You can find the Powers of Attorney for Health Care law by doing a Google search for 755 ILCS 45/4-1.

The Power of Attorney for Health Care Form may be found at the Illinois Department of Human Services website for advanced directives, along with other advanced directives at <http://www.dph.illinois.gov/topics-services/health-care-regulation/nursing-homes/advance-directives> (Last visited April 15, 2019).

You may obtain legal assistance with advanced directives from:

Legal Advocacy Services of the Illinois Guardianship & Advocacy Commission

STATEWIDE GENERAL INFO:

1-866-274-8023

INFO For Out-of-State Callers:

1-708-338-7500

STATEWIDE TTY:

1-866-333-3362

Equip for Equality

CHICAGO	CENTRAL ILLINOIS	NORTHWESTERN ILLINOIS	SOUTHERN ILLINOIS
800-537-2632 800-610-2779 (TTY)	800-758-0464 800-610-2779 (TTY)	800-758-6869 800-610-2779 (TTY)	800-758-0559 800-610-2779 (TTY)

END NOTES

ⁱ 755 ILCS 40/1 *et al.* (West 2019)

ⁱⁱ 755 ILCS 5/1 *et seq.* (West 2019), (Article XI is for minors and Article XIa is for disabled adults)

ⁱⁱⁱ 755 ILCS 40/25(a) (West 2019) (Enumerated adult candidates include: personal guardian, spouse, child, parent, sibling, grandchild, friend, estate guardian)

^{iv} 755 ILCS 45/1 *et seq.* (West 2019)

^v See 755 ILCS 45/4-4(e-5) (West 2019)

^{vi} 405 ILCS 5/2-107.1 *et seq.* and 3-600 *et seq.* (West 2019) (Note: personal guardians may consent to psychotropic treatment provided the patient is not objecting to said-treatment).

^{vii} 755 ILCS 5/11a-17(c) (West 2019), (See *In re Hatsuye T.*, 293 Ill. App. 3d 1046, 1051 (1st Dist. 1997), ([A] guardian cannot exercise authority over a matter covered by a power of attorney.); *In re Estate of Beetler*, 83 N.E.3d 1136, 1143 (Ill. App. Ct. 3d Dist. 2017) (Holding that the appointment of a plenary guardian did not automatically extinguish a patient’s preexisting and unchallenged power of attorney naming someone, other than the judicially appointed guardian, as the patient’s designated agent for health care; *C.f. In re Estate of Doyle*, 362 Ill. App. 3d 293, 301 (4th Dist. 2005) (Holding the probate court implicitly stripped the agent of her authority as POA when it appointed guardian.)/ 755 ILCS 45/2-6 (West 2019) (Agency terminates upon the principal’s divorce from an agent.)

^{viii} See 755 ILCS 45/2-1 and 4-1 (West 2019)

^{ix} *In re Guardianship of Austin*, 245 Ill. App. 3d 1042, 1052 (4th Dist. 1993) (Holding, “wards, not the guardian, retains the “fundamental right” to make decisions contemplated by the [Health Care Surrogate Act].

^x 755 ILCS 45/4-5.1 (West 2019)

^{xi} 755 ILCS 45/4-10 (West 2019)

^{xii} 755 ILCS 45/2-5 (West 2019)

^{xiii} 755 ILCS 45/4-7(d) (West 2019)

^{xiv} 755 ILCS 45/4-10 (West 2019)

^{xv} 755 ILCS 45/4-7 (West 2019)

^{xvi} 755 ILCS 45/2-7 and 4-7 (West 2019)