LEGAL GUIDES

by Middle Alabama Area Agency on Aging

M4A | ASSISTING ALL AGES AT ALL STAGES

WHAT TO DO WHEN A LOVED ONE DIES

DESIGNING A LONG-TERM CARE PLAN

DEMENTIA FRIENDLY PROFESSIONALS AND CAREGIVERS

AUTHORITY ISSUES FOR CAREGIVERS

This book was created in partnership with the | **Jan Neal Law Firm**

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The Importance of Legal Authority

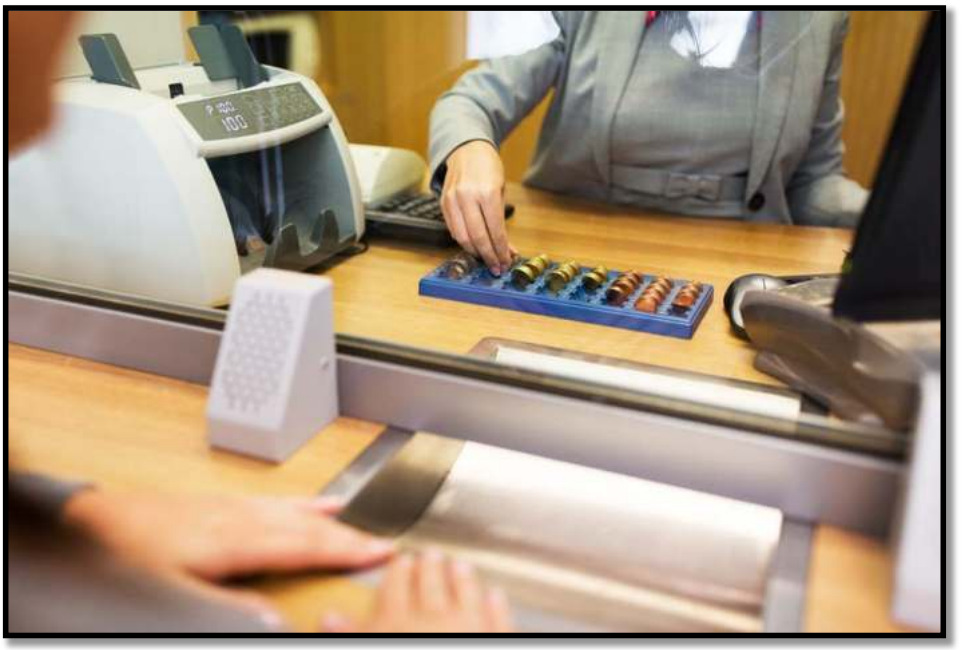
Most people know they need to plan for death with a last will and testament or trust to designate how their property will pass at the time of their death. Many people, however, do not realize that planning for disability is just as important, if not more so, because planning for a time when a person can not act for himself or herself will have a greater impact on a person's quality of life and, possibly, death. While failure to make a will can create problems for relatives, failure to make an advance directive to document a person's wishes concerning the handling of his or her finances, medical care and end-of-life decisions can produce tragic situations for the person as well as the caregivers.

Often, and particularly within families, everyone assumes that he or she will be able to act for a relative if needed. Sometimes that is possible, and sometimes it is not. Caregivers are at risk of not being able to conduct the business they need to manage without having the authority to do so. In some respects, authority to act is the critical threshold issue for caregivers.

Issues of legal capacity to act for another come into play particularly in long-term care settings. Authority is needed to enter into contracts, sell property, set up income trusts, if needed, for Medicaid, give liens to Medicaid, access money in bank accounts, handle day-to-day financial transactions, etc. When an individual cannot direct his or her own medical care, the medical agent takes over to make routine medical decisions, and when a person is in a terminal or permanently unconscious state, the health care proxy can proxy can direct end-of-life decisions that need to be made.

What all legal authority roles have in common is that one person obtains authority to legally act for another as his or her agent or surrogate. But the ways that various agency arrangements arise differ, and because of that, authority issues can be complicated and confusing. Here we will explain multiple ways caregivers obtain authority to act for the person in their care.

Financial Authority: Durable Powers of Attorney Overview



The most flexible and least expensive way to obtain authority to conduct financial business for another is to be named as agent in a durable power of attorney created by the person who will need his or her business conducted by another. This power can only be given while the person needing help is still competent to give that authority to another person. In this way powers of attorney require pre-incapacity planning. Once a person is suffering from significant incapacity, a power of attorney cannot be signed, and if one is, the power given can be challenged by others who may want the power to be changed.

The law of surrogate financial decision-making is nothing new. Society has always recognized that situations arise where one person needs to act for another, for instance, land may have needed to be sold when the owner was out of the country. In those situations, the landowner known as the principal, would prepare a limited power of attorney to name a person, known as the attorney-in-fact, to handle the sale in his absence. At common law the power of attorney would remain in existence until revoked, or until the death of the principal or until the incapacity of the principal.

Understanding the terminology is important:

- The person who makes a power of attorney is the principal.
- The person appointed to make decisions for the principal is the agent or the attorney-in-fact.
- You will also run into terms such as surrogate or proxy, but these are more likely to be used in | a medical decision-making capacity.

In the early 1980s society began to recognize the need for a power of attorney that would continue to be in effect if the principal became incompetent, allowing caregivers to act for the disabled person. Along came the durable power of attorney, which legally required specific language in the document indicating that "this power of attorney shall not be affected by disability, incompetency or incapacity of the principal" or equivalent language (meaning the document was durable enough to survive the incapacity of the person who made the document). The special language remained a requirement in the law until the state passed The Alabama Uniform Power of Attorney Act effective January 1, 2012. That law eliminated the special language requirement by making the presumption of durability for powers of attorney signed on or after January 1, 2012. Before 2012, the law presumed the power of attorney not to be durable (thus the special language requirement); after January 1, 2012, the law presumes the power of attorney to be durable.

Understanding this significant legal distinction, it is obvious that in order to determine whether a person has authority to act under a power of attorney for a person who does not have capacity to act for himself, it is essential to look for the date the document was signed. While older powers of attorney are still recognized as valid documents, if signed before January 1, 2012, the special language needs to be recited in the power of attorney to make it durable. If the document was signed on or after January 1, 2012, it is presumed to be durable with or without the special language.

A power of attorney is effective the day it is signed unless it is a springing power of attorney that "springs" into effect only after the principal becomes incapacitated. While some people like the idea of a springing power of attorney because they fear the agent may take over their business before it is absolutely necessary, in practice the springing power of attorney can create some definite problems. The document must define who decides when incapacity has happened, and that is usually, but not always, a doctor or psychologist. Obtaining a doctor's opinion can cause delay, and with state and federal privacy laws, particularly Health Insurance Portability and Accountability Act (HIPAA), the patient's medical records may be protected and unobtainable. Signing a HIPAA release for your doctor's file prior to incapacity may resolve the problem, but defining incapacity can still be a potential beaurocratic problem. Another negative related to the springing power of attorney is the fact that many people want help prior to becoming completely incapacitated. The nature of incapacity is that of a person being able to perform some activities while being unable to perform others, or perhaps, wanting help with certain activities. For maximum flexibility, the principal would want a document that enables a trusted agent to act only when necessary or at the will of the principal.

Power of Attorney

Capacity Required to Create a Power of Attorney

Caselaw in Alabama has established the legal capacity required for a person to make a power of attorney as follows: that he or she have "sufficient capacity to understand in a reasonable manner the nature and effect of the act which he or she is doing," Ex Parte Chris Langley, 923 So. 2d 1100, 1105 (Ala. 2005)(quoting earlier Alabama cases) and whether the person was able " to understand and comprehend what he was doing" at the time of execution. Queen v. Belcher, 888 So. 2d 472 (Ala. 2003). This standard is referred to as a general business affairs standard, which is a higher standard than testamentary capacity (the capacity required to make a will).

Assessing capacity can be a difficult matter, and certain behaviors will make a drafting attorney to unwilling to create the document. This is very important for caregivers to understand why a document cannot be prepared at the sole request of a relative or professional caregiver. The person making the power of attorney must provide his or her instructions for the document to be prepared. When an individual has been diagnosed with dementia, the attorney may request a medical statement from the principal's doctor or psychologist addressing the person's ability to handle his or her business. If a person requesting the power of attorney is confused, unresponsive or has difficulty providing instructions, the attorney will most likely decline preparing the document.

When a client needs assistance accessing legal services, it is important that they be free of influence from others and express their wishes without caregivers present.

Lack of Capacity Triggering Appropriate Use of a Durable Power of Attorney

A person may still have capacity and request that his or her agent handle some of his or her business pursuant to the durable power of attorney. Otherwise incapacity is defined as "inability of an individual to manage property or business affairs because the individual has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance."

It is so critical that the person making the power of attorney trust the agent to take over his or her business when necessary but not to prematurely do so. This is why communication is key between the principal and the agent so that they are operating in harmony with a clear understanding of when the agent will take over handling business.

Powers Included in a Durable Power of Attorney

The January 2012 Alabama Uniform Durable Power of Attorney Act requires the principal to give specific authority for an agent to do particular things. These include:

1. Create, amend, revoke or terminate an inter vivos trust (a living trust created during life rather than a testamentary trust created in a will);

2. Create or change rights of survivorship;

3. Create or change a beneficiary designation;

4. Delegate authority granted under a power of attorney (name a successor financial agent upon his or her resignation or while temporarily unable to act);

5. Waive the principal's right to be a beneficiary of a joint and survivor annuity including a survivor benefit under a retirement plan; or

6. Exercise fiduciary powers that the principal has authority to delegate.

The Act also defines general types of power that may be granted to the agent that do not require an express grant in the document. In the statutory form these powers are listed, and the principal has the right to grant all these powers or choose those he wants to include or exclude.

These powers include:

- Real Property;
- Tangible Personal Property;
- Stocks and Bonds;
- Commodities and Options;
- Banks and Other Financial Institutions;
- Operation of Entity or Business;

• Insurance and Annuities;
• Estates, Trusts, and Other Beneficial Interests;
vClaims and Litigation;
• Personal and Family Maintenance;
• Benefits from Governmental Programs or Civil or Military Service;
• Retirement Plans.

A critical distinction between the older and newer powers of attorney needs to be understood concerning whether an agent may sell real property belonging to the principal. For powers of attorney signed before January 1, 2012, an agent would not have the authority to convey the principal's real property unless the power of attorney clearly granted the authority. For powers of attorney signed on or after January 1, 2012, the agent does not need express authority to convey the principal's real property. In fact, the agent can even convey the property to the agent himself/herself with just a general grant of authority to handle real property.

Technical Requirements

The Act states that "a power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney.

While the power of attorney can be signed in this manner, it is not recommended. It is better for the principal to make a mark, even with the help of another.

When any legal document is signed, the witness and/or notary should not be interested parties (caregivers, family members, heirs, etc.).

The new power of attorney should be notarized to be considered valid.

Revoking Powers of Attorney

Powers of attorney stay in effect until revoked, or at the death of the principal, or when the agent dies, becomes incapacitated or resigns and no successor agent has been appointed. Powers of attorney do not expire over time unless the power contains instructions concerning a given date of expiration.

While the law does not require the revocation of the power of attorney to be in writing, as a practical matter, the document needs to be revoked by written instrument in order to put on notice the agent and all places (banks, financial institutions, etc.) where the document has been used so there is documentation to prove that notice was given for the former attorney-in-fact and institution(s) to cease relying on the now revoked power of attorney.

An important issue to keep in mind is the capacity requirement not only to make a power of attorney, but to revoke a power of attorney. If a person should lose the capacity to make informed decisions, he or she will be legally unqualified to revoke a power of attorney.

Recognize that a power of attorney is null and void at the time of the principal's death. At that time a will or estate administrator takes over handling the business for the deceased.

The Agent's Duty

An agent under a power of attorney must act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest; in good faith; and only within the scope of authority granted in the power of attorney.

An agent who breaches a fiduciary duty is liable to the principal or the principal's successors in interest (e.g. heirs) for the amount required to restore the value of the principal's property to what it would have been had the violation not occurred. Further, the violating agent is liable for the amount required to reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid by the principal in recovering the estate.

Selecting an Agent

Selecting an agent who will honor the wishes of the principal and act with great care with finances is of utmost importance. Frank discussion needs to be had so that the principal is assured that the agent named will follow his or her wishes.

Alternate Agents may be designated. For instance, a man may select his wife as his agent but designate his child or children to act for him if the wife should become unable to serve. It is always a good idea to name alternate agents.

Multiple agents may be named. If so, and unless otherwise provided, each agent may act independently, and each agent may be liable for a breach of fiduciary duty conducted by the other agent if the agent participants in or conceals the breach of fiduciary duty. Also, a co-agent or successor agent may be liable for breach of fiduciary duty by another agent if they have actual knowledge of a breach and fails to notify the principal or take action to safeguard the principal's best interest.

When the Bank Will Not Accept Your Power of Attorney

One of the reasons the Power of Attorney statute in Alabama was amended in 2012 was to promote the reliance upon powers of attorneys. With some regularity, bank customers were told they had to use a particular power of attorney created by the bank, and that became a problem when the principal had lost capacity and could not execute a new power. The new law provides a statutory form that banks and other financial institutions can rely on.

If your power of attorney complies with the 2012 law and is notarized, a bank has a reasonable time (7 days) to affect a transaction relying on the power of attorney. The bank may also request an agent's certification under penalty of perjury of any actual matter concerning the principal, agent or power of attorney; an acknowledged or properly authenticated English translation of the power and an opinion of their counsel as to any matter of law concerning the power of attorney. The bank may not require an additional or different form of power of attorney, and if it refuses to accept the power of attorney in violation of the law, the principal can bring a claim to court and ask the court to order reasonable attorney's fees and costs incurred in any action the confirms that validity of the power of attorney.

Other Financial Authority Arrangements

Trusts are documents created to hold and manage a person's property. Only the property titled to the trust is managed by the trustee (person named to be in charge of the trust). In some situations, someone may have a trust, but some of his or her property may be in the trust, and other property may be outside the trust. A trust can also name a health care decision-maker.

If a person did not create a power of attorney prior to incapacity, the caregiver will sometimes be able to handle business for a while without the formal grant of authority. For instance, the caregiver may be a co-owner on bank accounts and will be able to pay bills. The caregiver may also be the Social Security Representative Payee or the Veterans Administration Fiduciary designated by those agencies to use the person's funds to meet his or her needs.

A pseudo-authority role is that of Sponsor in a long-term care setting, but do not mistake Sponsorship for legal authority. A Sponsor is more of a long-term care industry term for "the person to contact in an emergency". To further complicate matters, Medicaid uses the term Sponsor as well and will accept applications from the person who fills out the application when the applicant cannot make the application himself or herself.

Problems are likely to arise, and legal authority is needed when persons need long-term care and application is made for Medicaid with property involved. When a person needs to sell property, give a lien to Medicaid, create a Medicaid Qualifying Income Trust (MQIT for Medicaid applicants with income over $2,205 in 2017) formal authority is needed. Without a power of attorney, the caregiver will likely have to file for guardianship and conservatorship in the Probate Court.

The Probate Court can appoint a person known as the guardian to have authority over the body of an "incapacitated person" defined as the Alabama Uniform Guardianship and Protective Proceedings Act as:

"any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities, accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions."

The guardian will have authority to make health care decisions which are discussed at length below.

The Court can appoint a conservator to manage the estate (finances) of a person in need of protection who is found to be:

"unable to manage property and business affairs effectively for such reasons as mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic intoxication, confinement, detention by a foreign power, or disappearance;" and whose "property will be wasted or dissipated unless property management is provided" or for whom "funds are needed for the health, support, education or maintenance of the person or of those entitled to the person's support and that protection is necessary or desirable to obtain or provide the funds."

The law provides the authority list of those the court should first appoint as guardian. They include:

1. Person named in a durable power of attorney
2. Spouse or spouse's nominee
3. Adult child
4. Parent or parent's nominee
5. Relative with whom person has lived the prior six months
6. Nominee of caretaker of the person

The law also provides a priority list of those who should be appointed conservator including:

1. Conservator appointed in another jurisdiction
2. Person selected by incapacitated person
3. Person designated by incapacitated person's power of attorney
4. Spouse
5. Adult child
6. Parent
7. Relative with whom ward has lived last six months
8. Nominee of person caring for incapacitated person
9. General guardian or sheriff

The conservator must post bond based on the value of the estate and account to the court at least every three years for all income and expenditures.

Health Care and End-of-Life Decision Making

Surrogate medical decision-making law has been developing and expanding with precision over the last 30 - 40 years in America and in Alabama, primarily spurred on because of several high publicity cases that captured the attention of the nation. We will look at some of those cases as well as the cases that reached the appellate level in Alabama to understand what is available in Alabama and why.

It is helpful to understand that there are multiple documents available for a person to record their wishes, and it is not unusual to find people with multiple documents – trusts, powers of attorney, older living wills, advance directives for health care – prepared in different jurisdictions and in sequence without revoking earlier documents. When conflicting provisions exist in different documents it may be impossible to determine with certainty a person's wishes.

Worst still, a person may have executed documents but they cannot be found or they are secreted by relatives who cannot bring themselves to permit the person to die. It is wise to have outdated documents revoked and documents containing current wishes kept in a safe place where they could be located when needed (note: not a safe deposit box unless the agent has access to the box). It is also wise to think carefully about the individual named to make health care decisions, particularly end-of-life decisions, and to make sure the agent would follow your wishes rather than his or her wishes.

How the National Right-to-Die Movement Influenced Alabama Law

Removal of Ventilator in the Quinlin Case, 1975

The debate over end-of-life decision-making, known as the "right to die" movement, began in 1975 when a 21 year old woman in New Jersey, **Karen Ann Quinlin**, overdosed on alcohol and sedatives and became unresponsive. She was placed on a ventilator and feeding tube and was thought to be in a persistent vegetative state. Her parents wanted the ventilator removed, but the doctor and hospital refused on the basis that she did not meet the criteria for brain death and they feared criminal and civil liability for her death if the ventilator were removed.

There were no medical advance directives at the time, so Karen did not have a written document stating her wishes. The New Jersey Superior Court, and later The New Jersey Supreme Court, ruled in favor of her parents removing the ventilator on the basis of the patient's constitutional right to bodily privacy that would have permitted her to refuse treatment if she were capable. The court ruled that Karen's right to refuse treatment should not be discarded due to her inability to exercise that right, so her guardian could exercise the right for her. After the ventilator was removed Karen lived for nearly ten years and died of pulmonary failure in 1985.

The Alabama Living Weill was Enacted, 1981

Resulting from the Quinlan debate California passed the first living will statute in 1976, and Alabama followed suit in 1981, becoming one of the first states to do so. Alabama's first living will only permitted a person to instruct his or her physician to cease artificial life sustaining treatment if the patient should be terminal (meaning when death was imminent). It did not apply to cases of persistent vegetative states that had only been recognized and named as a medical condition in 1972. The early Alabama living will also did not address the removal of nutrition and hydration. It took other tragic cases for us to learn how much more expansive our Living Wills needed to be.

Removal of Nutrition & Hydration in the Cruzan Case, 1983

In 1983 the debate over self-determination sharpened when a 25 year old woman, Nancy Cruzan, had an automobile accident that rendered her permanently unconscious after loss of oxygen to the brain. This highly publicized Missouri case became the first United States Supreme Court right-to-die case. Nancy's parents wanted to remove her feeding tube, but the medical professionals refused without a court order. In this case evidence was presented that Nancy had stated that she would not wish to be kept alive if she could not live "at least halfway normal."

Though the trial court in Missouri ruled for Nancy's parents, the Missouri Supreme Court reversed the ruling and said that the state had a legitimate interest in preserving life regardless of the quality of life and that "clear and convincing" evidence had not been produced to permit removal of the feeding tube. On appeal, The United States Supreme Court made some significant points about self-determination, included the fact that the 14th Amendment of the United States Constitution would grant a competent person a protected right to refuse artificial hydration and nutrition and that artificial hydration and nutrition were, in fact, medical treatment. Still, the Court upheld the state's right to determine the standard needed to remove life sustaining treatment, in other words, leaving each state to make its own rules. After Nancy's parents won a new trial in Missouri, the court ruled in favor of Nancy's parents' request to remove artificial nutrition and hydration. The State of Missouri did not appeal. The feeding tube was removed, and Nancy died twelve days later in 1990.

The Cruzan case was a heartbreaking family story that was document by William H. Colby, the attorney who represented Nancy's parents, in his book Long Goodbyes: The Deaths of Nancy Cruzan.

The Federal Patient Self Determination Act, 1990

As a result of the Quinlin and Cruzan cases Congress passed the Patient Self Determination Act in 1990. This law requires hospitals, home health care agencies, hospices, nursing homes and other in-care treatment facilities to inform patients of their rights under their particular state's laws relating to self-determination, place a copy of any advance directive in the patient's file and provide to the patient the facility's policy concerning use of advance directives. This was a good thing, but it was the beginning of the multiple document dilema as a patient would execute a new document with each admission to a facility and forget to revoke it after going home.

The Legal & Political Family Dispute in the Schiavo Case, 1990

In 1990 a 27 year old woman named Terry Schiavo suffered cardiac arrest thought to be a result of hypokalemia (low potassium blood levels) secondary to an eating disorder. She was in a vegetative state, and her husband wanted the feeding tube removed in opposition to her parents' wishes to keep her alive. The Schiavo case became a media circus and a legal nightmare involving 14 appeals and numerous motions, petitions, and hearings in the Florida courts; five suits in federal district court; political intervention in the Florida legislature and the United States Congress; and four denials of review at the United States Supreme Court level. The case attracted activism from pro-life and right-to-die movements. Eventually, despite the political maneuvering, Florida's law allowing removal of a feeding tube prevailed, and Terry died in 2005 after her feeding tube was removed for the last time.

Alabama's Current Natural Death Act

From 1981 until 1997 Alabama's Living Will continued only to allow a patient to give the physician instructions concerning artificial life sustaining procedures that should be used if the patient should be terminal. Originally there was no document authorized by Alabama law that would allow the patient to give instructions should be or she be in a persistent vegetative state.

Perhaps even more remarkable is the fact that there was no statutory authority in Alabama law permitting the patient to name a surrogate to make routine medical decisions that did not involve end of life. During this time many attorneys added this routine medical decision-making power to durable powers of attorney, and this power became widely accepted, though not specifically authorized by Alabama statute.

In 1997 the Alabama legislature amended the Natural Death Act (commonly referred to as the Living Will Statute). With the 1997 amendment came a new and improved Living Will, now called The Advance Directive For Health Care (ADHC).

The ADHC, originally authorized in 1997, and amended in 2001, allows the maker to create a document giving directions to a doctor for care to be provided if the patient should become terminal or permanently unconscious (thought to be equivalent to the persistent vegetative state). The maker of the document could specify the desired treatment, such as removal of nutrition and hydration should he or she be determined to be terminal or permanently unconscious by his or her attending physician and another doctor qualified and experienced in making such determinations. The maker could also name a person to serve as health care proxy (agent) to make these end-of-life decisions as well as name a proxy to make routine health care decisions should the person be unable to speak for himself or herself.

Perhaps the most useful provision in the 1997 amended Natural Death Act was the endorsement of a designation of a health care surrogate, or attorney-in-fact, to make end-of-life decisions in a Durable Power of Attorney provided the power given as it relates to end-of-life decisions is consistent with the Natural Death Act and are specifically stated in the Durable Power of Attorney, including the right to withdraw nutrition and hydration.

Coordinating financial directives, directives for handling routine medical decisions and end-of-life decisions suddenly became much easier. All necessary issues could be addressed in one carefully constructed durable power of attorney.

It is this writer's opinion that, except in rare circumstances, including all powers in one document, pursuant to this legally permitted method, is the most effective way to document a person's wishes.

In situations where the health care agent is named in a durable power of attorney to make routine and end-of-life decisions along side the person named for financial decisions, it is possible to name different persons to fulfill different roles. Perhaps one person is better at business, and another is better at health care decision-making, while some persons want all those closest to them to agree on end-of-life decisions. Others will eliminate any person from consideration for end-of-life decision-making as a cautionary act to assure that their own wishes will be honored. Not all relatives are capable of honoring the wishes of the dying.

The Certification of Health Care Decision Surrogate (CHCDS) for End of Life Decision When a Person Did Not Make a Health Care Advance Directive

Another provision in the 1997 Natural Death Act created a procedure allowing a self-appointed surrogate (agent) to make end-of-life decisions when the patient failed to make an advance directive. This is The Health Care Decision Surrogate (CHCDS). Under the law there are people named in a line of priority who may serve as the self-appointed surrogate. At the top of the line of priority is a court appointed guardian, followed by the spouse, adult child, parent, sibling, other next of kin and, finally, the ethics committee for the facility. The person or committee can create a document certifying that no advance directive exists of which, he, she or they are aware; contact either was made with one or more of the persons who are higher in priority, and they consented or expressed no objection; or no contact was made because the person or persons in higher priority could not be reached because their whereabouts are unknown or they are in a remote location and cannot be contacted or the person in higher priority has been adjudged incompetent.

Through the use of the CHCDS life-sustaining treatment may be removed with a finding by two physicians that the patient is terminal or permanently unconscious; that, to a reasonable degree of medical certainty removal of life-sustaining treatment will not result in undue pain or discomfort; and, if removal of nutrition and hydration is required to end life, that clear and convincing evidence exists that the patient would have wanted the removal of nutrition and hydration. While this can be done without court intervention, as a practical matter it is doubtful that a medical facility would remove medical treatment, including food and water, without a court order. A form CHCDS is made available at the State Board of Health Administrative Code 420-5-19 Appendix 1.

Alabama End of Life Cases

While we can make documents and express our wishes, it is important to recognize that the courts have a great deal of authority over what our agents can and cannot do as they interpret our wishes and medical conditions. We will look at some of the Alabama cases to see the complexity involved in disputed end-of-life cases.

There have only been a limited number of reported cases in Alabama involving end-of-life decisions. There are surely many such cases that are resolved at the local level and not appealed to a higher court, thus not reported. Cases that are decided on the local level withut further appeal do not establish standards of law. There are,

however, two cases that were appealed to the Alabama Supreme Court, one resulting in an opinion that further defines what the standards are in Alabama to make end-of-life decisions.

In re: The Matter of Correan Salter, most likely Alabama's first right-to-die case, occurred in the mid-1990s in Baldwin County. It involved the issue of removing a feeding tube from a patient initially thought to be in a persistent vegetative state absent an advance directive.

Correan Salter was 60 years old when she suffered a cerebral hemorrhage. Her living will signed in 1981 could not be located. A neurologist diagnosed her condition as a persistent vegetative state, similar to "permanently unconscious" as referenced in the Natural Death Act. Ms. Salter remained on a feeding tube for six years, until her husband died, and her sisters took over caring for her. The sisters filed in the Circuit Court of Baldwin County requesting that the feeding tube be removed. During the litigation the family had another neurologist examine Ms. Salter. That doctor concluded that she was not in a persistent vegetative state, rather she suffered from akinetic mutism, meaning she had limited comprehension but was unable to move or communicate. The court ruled against removal of the feeding tube, and the family appealed. Ms. Salter died before the Alabama Supreme Court could decide the case, so it was dismissed.

Although the Salter case did not result in direction from the Alabama Supreme Court, it did have an impact. It showed the need for the 1997 amendment of the Natural Death Act permitting an individual to make an Advance Directive For Health Care addressing the removal of nutrition and hydration should he or she later become terminal or permanently unconscious. It also showed the need for safeguarding an advance directive by passing on a copy to one's family members and health care providers or having one retained in an attorney's file. It most likely would not have made a difference in the Salter case if Ms. Salter's living will had been located since the early living will likely would not have addressed removal of food and hydration and due to the fact that the removal of treatment failed due to the medical condition failing to meet the standard of being either terminal or permanent unconsciousness. Still the case shows the importance of properly storing any advance directive so that the person's wishes, to the extent communicated therein, can be located when needed.

Knight v. Beverly Healthcare Bay Manor Nursing Home (820 So. 2d 92, Ala. 2001), established a twist to the Alabama Natural Death Act statutory requirements to end life. This case did not involve a dispute over determining the patient's wishes, rather it involved determining whether the patient was in a permanently unconscious state like the Salter case.

Delores Cameron and her husband lived in the Mobile area and had watched the Salter case with great interest. Not only was this a local case for them, but they had been acquainted with Ms. Salter. Ms. Cameron suffered a stroke and was diagnosed

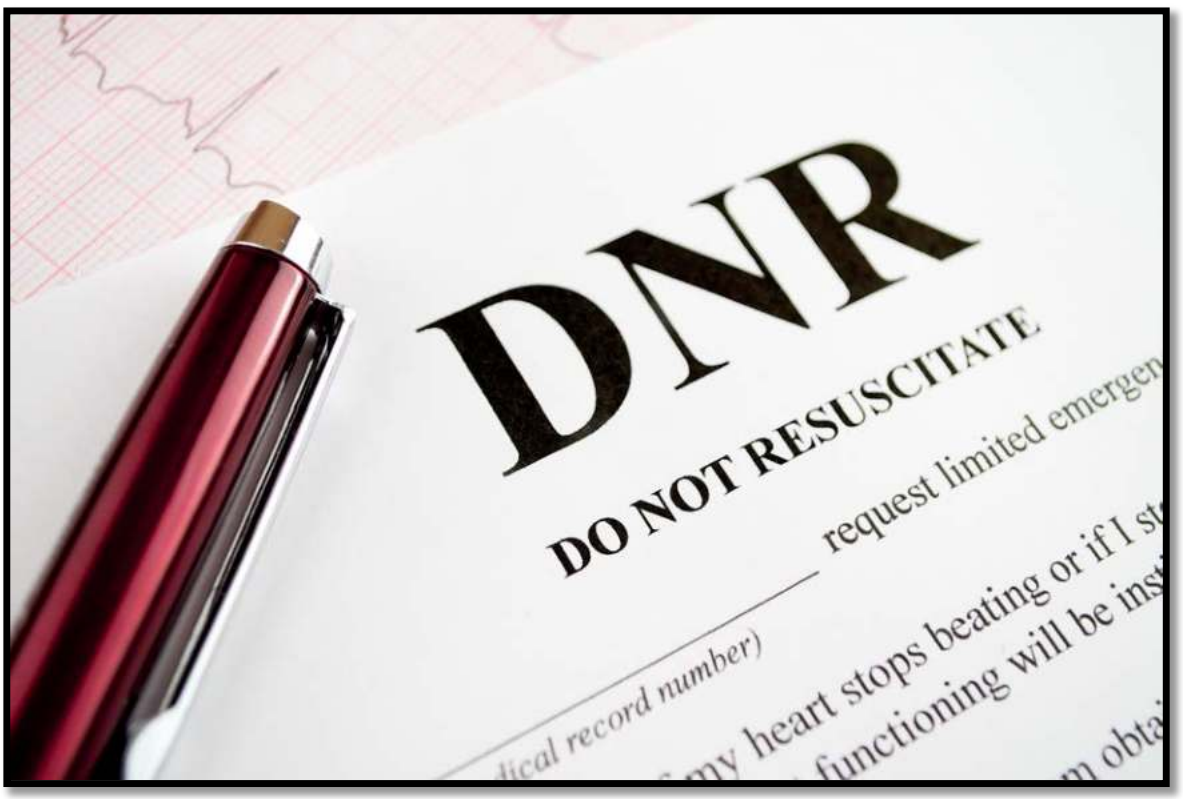
by multiple local physicians as being in a persistent vegetative state (PVS). A feeding tube was implanted. She did have a living will signed in 1995, and it was executed in substantial compliance with the 1997 Natural Death Act requirements directing that "artificially provided nutrition and hydration" should be withheld if she were ever in a persistent vegetative state.

Ms. Cameron's husband of 40 years came to a very painful decision that he needed to honor his wife's wishes and requested removal of the feeding tube. He met resistance from Ms. Cameron's children by a previous marriage who filed in court to stop the nursing home from withdrawing the feeding tube. In so doing, the children hired a neurologist from out of state who disputed the diagnosis of PVS.

The trial court ruled that it would not stop the withdrawal of the feeding tube, and Ms. Cameron's children appealed. Though the Alabama Supreme Court agreed with the trial court that there was "substantial" evidence that Ms. Cameron had a legal and effective living will, and that there was medical evidence to support the conclusion that she was permanently unconscious, it went on to adopt a specific standard required for the removal of life consistent with that of other jurisdictions in the country. The court sent the case back to the local level for the judge there to consider whether the medical condition of permanent unconsciousness had been proven by "clear and convincing" evidence. The local court did so find clear and convincing evidence that Ms. Cameron's condition was that of PVS.

This case resulted in a requirement that in Alabama not only must one moving for removal of life support find by clear and convincing evidence that the patient would have wanted the removal of life sustaining treatment (e.g. as best evidenced by a written document), a finding must also be made by clear and convincing evidence that the patient is permanently unconscious. This happened because there were differing medical opinions presented, and the Alabama Supreme Court, seemed to want extreme care exercised to assure that the patient was, in fact, permanently unconscious. The court did not address whether this finding is required in a case where the patient is terminal, but it is likely that the court would apply the same standard of clear and convincing evidence to that condition as well.

The Alabama Portable DNAR



A Do Not Resuscitate Order (DNR) or Do Not Attempt Resuscitation Order (DNAR) can be signed by a doctor instructing that resuscitative measures not be provided to a person under a physician's care in the event the person is found with cardiopulmonary cessation. DNARs can be issued either:

- with the consent of the patient, if competent; or

- pursuant to instructions in an advance directive if a patient is not competent or is no longer able to understand, appreciate and direct his or her medical treatment and has no hope of regaining that ability; or

- with the consent of the health care proxy designated under the Natural Death Act; or

- at the instructions of an attorney-in-fact under a durable power of attorney that grants the agent the power to make end-of-life decisions in accordance with the Natural Death Act.

For many years DNAR orders have been used in health care facilities, but those orders were valid only in the facility where ordered. If a patient left one facility and entered another one, a new order had to be signed. There was actually no reference to DNARs in the Alabama Code.

In 2016 the Alabama Natural Death Act was amended to address DNAR orders and to provide for a "Portable DNAR" that will be valid across multiple health care settings. A form that meets the requirements of law to make it portable is provided at the State Board of Health Administrative Code 420-5-19 Appendix 2. While health care providers may continue to make facility specific DNARs, to create a portable DNAR, the state prescribed form needs to be used.

Practical Considerations for Caregivers

Storing the advance directive is of major importance. There are several commercial online programs that permit the individual to store documents online for a fee and allow relatives to access those documents, but little is known about the outcomes for customers of these programs. There is no online registry in Alabama, but some states administer legislatively authorized health care advance directive registries including Arizona, California, Idaho, Louisiana, Maryland, Michigan, Montana, Nevada, North Carolina, Oklahoma, Vermont, Virginia and Washington. Oddly enough, these registries only address medical directives, and not financial directives.

Giving a copy of the document to any named agent and placing the original in important papers where it would be found seems to be the best approach without considering the possibility of online storage at a commercial service or on a home computer with a cloud or Dropbox similar storage and agent access.

An agent should always sign as follows:

Principal's name by Agent's Name, as Agent/Attorney-in-Fact or like designation.

Example:

Mary Jones by John Jones as Agent, or
Mary Jones by John Jones as Attorney in Fact

This is an important point to keep in mind to prevent the agent from incurring personal liability by making it clear that he or she is signing in a representative capacity.

Advance directive documents can be provided by persons who are competent and 60 or older at no charge through Older Americans Act Legal Assistance provided through the Middle Alabama Aging and Disability Resource Center.

Summary of Alabama Advance Directives

Types of Alabama Advance Directives		
Document	What Document May Address	When Document Begin and Ends
Durable Power of Attorney (DPA)	Names agent to make financial decisions and may name agent for routine medical decisions and end-of-life decisions if the person is terminal or permanently unconscious.	Takes effect as stated in the document; ends when revoked or at death
Trust	Names a trustee to take legal title of property titled to the trust for the benefit of another; may designate medical agent.	Takes effect when signed but only permits power over property titled to the trust. Ends in accordance with instructions in the trust
Old Living Will (grandfathered in with passage of ADHC)	Instructs doctor to withhold treatment if terminal	Takes effect if patient is terminal. Ends at death
Advance Directive for Health Care (ADHC, also known as New Living Will since 1997)	Instructs doctor (and may name an agent) to withhold treatment if patient is terminal or permanently unconscious; may name an agent for routine medical decisions	Takes effect as stated in document; ends when revoked or at death
Certification of Health Care Decision Surrogate (CHCDS)	Guardian, relative or facility ethics committee can name itself as agent and make end-of-life decisions	Takes effect when executed; ends when power relinquished or by court order
DNAR	With permission of patient or legal agent doctor orders that no resuscitative measures be provided when patient has cardiopulmonary cessation	Takes effect when signed; continues indefinitely if portable from facility to facility; terminates at death
Last Will and Testament	Passes property at death to those the maker chooses to receive	Takes effect when filed with probate court within five years of death; ends when estate is closed

END OF BOOK

Do you need help obtaining medication?

The SenioRx program can help.

SenioRx is a prescription drug assistance program that can help you recieve FREE or LOW-COST prescription drugs.

The program is for Alabamians who have been diagnosed with chronic medical conditions that require daily medication.

SenioRx

FOR MORE INFORMATION CALL OUR SPECIALISTS AT

1-800-AGE-LINE

or visit our website at www.m4a.org