

Advance Health Care Directives and Property Power of Attorney



Presentation by Denise Kaplan for

CVLS

March 16, 2022

Rivkin, Rivkin, & Kaplan LLC
— ESTATE PLANNING —

475 Half Day Rd., Suite 100 • Lincolnshire, IL 60069
PHONE: (847) 793-2484 • FAX: (847) 793-2485 • WEB: www.rivkinlaw.com



ADVANCE HEALTH CARE DIRECTIVES

Types

- Durable Power of Attorney for Health Care
- Living Wills
- Five Wishes
- Mental Health Treatment Declaration (not covered today)

Goals

- Ensure optimal decision-making even after one's incapacity
- Avoid guardianship
- Choose specific people to carry out wishes
- Express philosophy regarding life-sustaining treatment

Rivkin, Rivkin, & Kaplan LLC

DURABLE POWER OF ATTORNEY FOR HEALTH CARE

- “New” IL statutory form effective January 1, 2015; slightly modified in 2016
- More clear on when agent can make decisions
- Presumption in favor of organ donation
- Offers simplified choices on life-sustaining treatment
- Contains built-in HIPAA release

ILLINOIS STATUTORY SHORT FORM
POWER OF ATTORNEY FOR HEALTH CARE

NOTICE TO THE INDIVIDUAL SIGNING THE
POWER OF ATTORNEY FOR HEALTH CARE

No one can predict when a serious illness or accident might occur. When it does, you may need someone else to speak or make health care decisions for you. If you plan now, you can increase the chances that the medical treatment you get will be the treatment you want.

In Illinois, you can choose someone to be your “health care agent.” Your agent is the person you trust to make health care decisions for you if you are unable or do not want to make them yourself. These decisions should be based on your personal values and wishes.

It is important to put your choice of agent in writing. The written form is often called an “advance directive.” You may use this form or another form, as long as it meets the legal requirements of Illinois. There are many written and on-line resources to guide you and your loved ones in having a conversation about these issues. You may find it helpful to look at these resources while thinking about and discussing your advance directive.

WHAT ARE THE THINGS I WANT MY HEALTH CARE AGENT TO KNOW?

The selection of your agent should be considered carefully, as your agent will have the ultimate decision-making authority once this document goes into effect, in most instances after you are no longer able to make your own decisions. While the goal is for your agent to make decisions in keeping with your preferences and in the majority of circumstances that is what happens, please know that the law does allow your agent to make decisions to direct or refuse health care interventions or withdraw treatment. Your agent will need to think about conversations you have had, your personality, and how you handled important health care issues in the past. Therefore, it is important to talk with your agent and your family about such things as:

- (i) What is most important to you in your life?
- (ii) How important is it to you to avoid pain and suffering?
- (iii) If you had to choose, is it more important to you to live as long as possible, or to avoid prolonged suffering or disability?
- (iv) Would you rather be at home or in a hospital for the last days or weeks of your life?
- (v) Do you have religious, spiritual, or cultural beliefs that you want your agent and others to consider?
- (vi) Do you wish to make a significant contribution to medical science after your death through organ or whole body donation?

ILLINOIS STATUTORY SHORT FORM POWER OF ATTORNEY FOR HEALTH CARE PAGE 1



EFFECTIVE DATE OF POWER OF ATTORNEY FOR HEALTH CARE

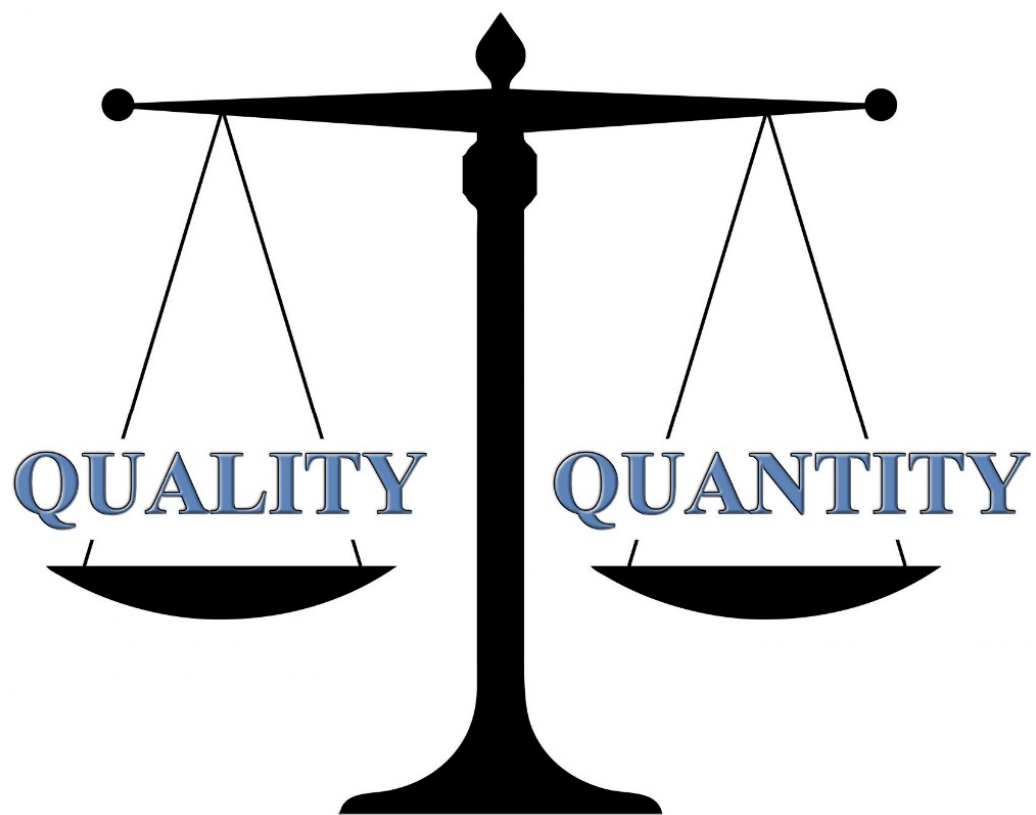
- When physician determines principal lacks decision-making capacity
- When physician determines principal lacks decision-making capacity, but grants the agent immediate power, for the purpose of assisting in health care plans and decisions, to communicate with providers and to access and share records
- Immediately, but principal may still make decisions if desired



TERMINATION DATE OF POWER OF ATTORNEY FOR HEALTH CARE

- Extends past death
- Autopsy
- Anatomical gifts
- Disposition of body
- Access to medical records

LIFE-SUSTAINING TREATMENT CHOICE



Rivkin, Rivkin, & Kaplan LLC



CAPACITY TO EXECUTE POWER OF ATTORNEY FOR HEALTH CARE

- Lowest bar of all documents
- Presumed to have capacity absent notice to contrary
- Advanced age, diagnosis of mental illness, or development disability is not a strict bar to decisional capacity



REVOCAATION OF POWER OF ATTORNEY FOR HEALTH CARE

- Obliterate or destroy
- By written revocation
- By verbal or other expression in presence of a witness
- In any manner communicated to the agent or any other person
- *Can be done even if principal is no longer decisional (statute says “without regard to the principal’s mental or physical condition”)*

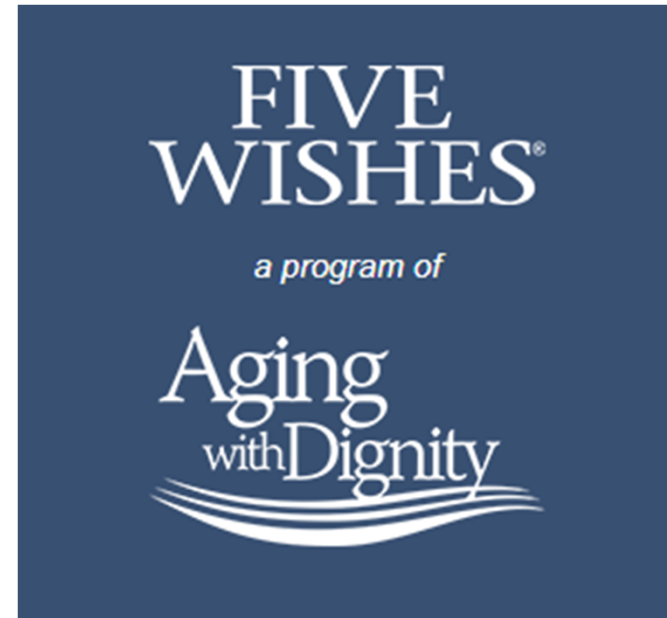


LIVING WILL

- Codified by statute in 1984
- Governs only in limited circumstances
- Only if no health care agent
- Less useful since advent of Power of Attorney Act and Health Care Surrogate Act

FIVE WISHES

- Offered by
Aging with Dignity
- Highly detailed
- Available for \$5 at
fivewishes.org
- Beware of potential conflict with
health care power



DURABLE POWER OF ATTORNEY FOR PROPERTY

- Act authorizing and statutory form revised in 2011
- Authorizes a competent adult to direct the handling of their financial affairs, including in the event of subsequent disability

**NOTICE TO THE INDIVIDUAL SIGNING THE ILLINOIS
STATUTORY SHORT FORM POWER OF ATTORNEY FOR PROPERTY**

PLEASE READ THIS NOTICE CAREFULLY. The form that you will be signing is a legal document. It is governed by the Illinois Power of Attorney Act. If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you.

The purpose of this Power of Attorney is to give your designated "agent" broad powers to handle your financial affairs, which may include the power to pledge, sell, or dispose of any of your real or personal property, even without your consent or any advance notice to you. When using the Statutory Short Form, you may name successor agents, but you may not name co-agents.

This form does not impose a duty upon your agent to handle your financial affairs, so it is important that you select an agent who will agree to do this for you. It is also important to select an agent whom you trust, since you are giving that agent control over your financial assets and property. Any agent who does act for you has a duty to act in good faith for your benefit and to use due care, competence, and diligence. He or she must also act in accordance with the law and with the directions in this form. Your agent must keep a record of all receipts, disbursements, and significant actions taken as your agent.

Unless you specifically limit the period of time that this Power of Attorney will be in effect, your agent may exercise the powers given to him or her throughout your lifetime, both before and after you become incapacitated. A court, however, can take away the powers of your agent if it finds that the agent is not acting properly. You may also revoke this Power of Attorney if you wish.

This Power of Attorney does not authorize your agent to appear in court for you as an attorney-at-law or otherwise to engage in the practice of law unless he or she is a licensed attorney who is authorized to practice law in Illinois.

The powers you give your agent are explained more fully in Section 3-4 of the Illinois Power of Attorney Act. This form is a part of that law. The "NOTE" paragraphs throughout this form are instructions.

You are not required to sign this Power of Attorney, but it will not take effect without your signature. You should not sign this Power of Attorney if you do not understand everything in it, and what your agent will be able to do if you do sign it.

Please put your initials on the following line indicating that you have read this Notice:

(Principal's initials)



EFFECTIVE DATE AND TERMINATION DATE OF POWER OF ATTORNEY FOR PROPERTY

- Immediately, unless a specific date or event is inserted
- Terminates at death, unless an earlier date or event is inserted
- Beware trigger of incapacity (triggering event, ease of access to making a determination, can it be reversed, etc.)
- Must follow formalities to alter effective date



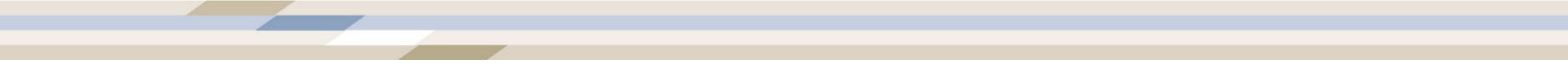
CAPACITY TO EXECUTE POWER OF ATTORNEY FOR PROPERTY

- No statutory authority setting forth a requirement
- Less than testamentary capacity



AUTHORITY UNDER POWER OF ATTORNEY FOR PROPERTY

- Listed powers
- Can modify
- No gifting unless specifically authorized
(consider Medicaid planning purposes)
- No changing beneficiaries of accounts, contracts, documents
or otherwise unless specifically authorized



REVOCAATION OF POWER OF ATTORNEY FOR PROPERTY

- Obliterate or destroy
- By subsequent property power or separate written instrument
- By verbal or other expression in presence of a witness
- In any manner communicated to the agent or any other person
- *Statute requires capacity to revoke*



POWER OF ATTORNEY DRAFTING TIPS

Health Care Power

Consider adding wishes for disposition of the body, funeral, and long-term care (in the form or via a supplemental document)

Health Care and Property Power

- Not required to use statutory form
- May grant authority to agents to designate one or more successor agents



ACTING AS AGENT UNDER A POWER OF ATTORNEY

- No duty to act
- If choose to act, are a fiduciary and must act for benefit of the principal
- How to facilitate acting
- Certification of agent/successor agent and acceptance of authority



PREVENTING ISSUES

- Assess capacity at outset
- If using the statutory form, follow the rules regarding naming of agents
- Beware restrictions on witnesses and signing formalities
- Consider obtain a physician letter regarding capacity prior to signature
- Meet with client alone in advance of signature to confirm the choices are theirs
- Recommend that principal discuss wishes with family at time of signature and distribute copies to the named agents (“This Is Us”)
- Suggest that principal provide health care provider with a copy of the health care power (becomes part of medical records)
- Advise to collect and destroy all originals and copies of revoked powers of attorney



WHEN POWERS OF ATTORNEY ARE NOT AN OPTION

- Client lacks requisite capacity to sign
- Health Care Surrogate Act
- Guardianship



IF GUARDIANSHIP IS NEEDED DESPITE POWERS OF ATTORNEY

- A power of attorney remains valid even if subsequent guardianship proceeding
- Exception for agent acting against principal's wishes or risk of substantial harm to principal
- Court order must set forth the power of the guardian

QUESTIONS



This image is licensed under CC BY-SA

Rivkin, Rivkin, & Kaplan LLC

Advance Health Care Directives and Property Power of Attorney • March 16, 2022 • Page 21