

## YOUR PARENTS' LEGAL AFFAIRS

*“MY BROTHER RAY AND I DIDN'T KNOW IF DAD HAD DONE ANY PLANNING. WHAT DID HE WANT TO HAVE HAPPEN? WAS ONE OF US SUPPOSED TO HANDLE THINGS? WE WEREN'T SURE HE EVEN HAD A WILL. NOW HE WAS IN THE HOSPITAL. IT WAS ONLY A SCARE, BUT IT REALLY MADE US THINK. WE HELPED DAD FIND AN ATTORNEY. HE'S UPDATED HIS WILL (THERE WAS ONE) AND EVEN SIGNED A HEALTH CARE PROXY. I WISH WE HAD DONE ALL THIS EARLIER.”*

JUDY, AGE 54  
SOUTH CAROLINA

### *DO YOUR PARENTS HAVE AN ATTORNEY?*

It would be ideal, of course, if your parents' legal affairs were handled by an attorney who is expert in wills, estates, and similar matters and who is familiar with your parents and their lifestyle. If they do not have an attorney, a good way to find one is through referrals from trusted friends or relatives who have used the same type of legal and planning services and are satisfied. If they know an attorney who practices in a different field of law, they could ask that attorney for a referral. They could also contact the local bar association for referrals.

### *DO YOUR PARENTS NEED AN ELDER LAW ATTORNEY?*

The legal problems affecting the elderly have become increasingly complicated in recent years and, as a result, family attorneys are not always qualified to advise about specific issues concerning this population. In specialized areas such as the preservation/transfer of assets to avoid spousal impoverishment when one spouse enters a nursing home, and Medicaid, Medicare, Social Security, and disability claims and appeals, you may wish to consult with an attorney who practices the relatively new specialty of “elder law.” Working together, the family attorney and an elder law attorney can help your parents address the legal concerns and issues facing them or help you to help them.

As with other professional advisors, the best way to find help is generally through referrals. You might ask for referrals from social workers, doctors, or nurses who work with seniors; or your local bar association may have an elder law referral service. The National Academy of Elder Law Attorneys (NAELA) is a professional organization that publishes an “Experience Registry” of members who specialize in various aspects of elder law. See the Directory of Resources, page 60, for information on ordering a copy of the Registry. There is a charge for the Registry, so you will want to ask whether it includes attorneys practicing where your parents reside before ordering.

## ESTATE PLANNING

The main objective of estate planning is to preserve assets and protect loved ones. How do your parents want their assets to be distributed? How can they minimize federal and state estate and inheritance taxes? What should be done if they become unable to manage their affairs? Are your parents beneficiaries or grantors of any trusts? Some of the tools used in estate planning are legal instruments such as wills and trust agreements. The Financial Affairs section of this guide includes additional information about the financial aspects of estate planning.

### WRITING AND UPDATING WILLS

In almost every situation it's important to have a will. If your parents do not have valid wills, they should consult a skilled lawyer. Your parents' attorney, working with their professional financial advisor, is best able to ensure that all concerns, including tax issues, are taken into consideration and to draw up wills, trusts, or other instruments needed to assure their objectives are met. Before this process begins, your parents need to review their assets and create an organized, up-to-date list for use by their attorney and financial advisor.

Your parents should discuss with their attorney whether to have separate wills rather than a joint will. They should consider who would be an appropriate party to serve as the executor. In addition to immediate family and relatives, there may be friends or charitable organizations that your parents want to include as beneficiaries. If either parent is a grantor or beneficiary of a trust, they should discuss what their rights and obligations are under those agreements and what will happen under the agreements upon the death or incompetence of the individual. If your parents have definite preferences regarding burial or other funeral arrangements, they should discuss these with their attorney and executor, and put their wishes in their will.

If your parents already have wills, they should review them at least once a year, preferably with an attorney, to update their wishes. The existing wills should be reviewed for:

- changes in beneficiaries resulting from births, deaths, marriages, and divorces
- changes in circumstances such as illness, increases or decreases in assets, and/or age of children
- changes in tax, probate, or property law
- changes in executor, trustee, and guardians
- major sale or purchase of property or other assets

Absolutely no changes should be made, however, without consulting an attorney.

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## PRACTICAL HINT

*The American Bar Association Commission on Legal Problems of the Elderly, listed on page 59 of this guide, can be a source for finding help. You should also be aware that many states have programs for the elderly who cannot afford a private attorney. Contact your parents' county Area Agency on Aging (AAA) for more information on what options may be available.*

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## PRACTICAL HINT

*If your parents decide to execute a durable power of attorney, one individual should be named, with a second person as successor in case the first person is unable to serve.*

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## PRACTICAL HINT

*It is generally useful to execute more than one copy of a power of attorney and provide these certified copies to key people, such as the individual having the power of attorney and your parents' physicians, bankers, or attorneys.*

## POWERS OF ATTORNEY

There is a difference between a power of attorney your parents may have arranged for a specific purpose and a durable power of attorney.

A power of attorney is a legal document in which an individual gives another person the authority to act on his or her behalf in specified types of transactions. It terminates if the individual dies or becomes incapacitated or incompetent.

A durable power of attorney remains valid and enforceable despite the incompetency or incapacity of the principal. It terminates upon death of the principal. Powers may include financial decisions such as purchasing and selling properties, making gifts, managing bank accounts, and insurance and medical decisions such as whether or not to use heroic medical treatments.

## GUARDIANSHIPS AND CONSERVATORSHIPS

If one or both of your parents can no longer make their own decisions, and a durable power of attorney or other arrangements are not in place, a court will determine your parents' competence and then appoint a guardian if necessary. The guardian can be authorized to make decisions about living arrangements, financial matters, medical care, and related matters. The guardian appointed by the court may be a relative, friend, hired professional, or even a court, state, or county agency. There are several types of guardianship – voluntary, involuntary, permanent, temporary, limited, and total – and all are regulated by the laws of the state in which your parents reside. The actions of a guardian are subject to review by the court and in some circumstances, where wrongdoing or negligence can be shown, a guardian may be removed by the court. If one or both of your parents need a guardian, you should consult with an attorney on how to have one appointed or how you can be appointed yourself as guardian for your parents.

Conservatorship is different from guardianship in that a conservator is responsible only for an individual's financial affairs. Again, state laws govern establishing a conservatorship.

## ADVANCE MEDICAL DIRECTIVES

Advance medical directives are legal documents that put in writing an individual's instructions about his or her future medical care. They are designed to help guide medical professionals, family members, and friends should the individual no longer be able to make medical decisions. Laws regulating medical directives vary by state, so it's important to contact an attorney familiar with the requirements of the state in which your parents reside, or their county Area Agency on Aging, for help in putting their wishes in writing. Three types of advance medical directives available in most states are:

#### DURABLE MEDICAL POWER OF ATTORNEY

This document allows your parents to designate someone they trust to make medical decisions on their behalf, should they become incapacitated. Because the durable medical power of attorney eliminates the need for your parents to know in advance all the decisions that may arise, it is important that they discuss their feelings and intentions regarding medical decisions with the persons they designate. An attorney should be consulted for help in drawing up a durable medical power of attorney.

#### HEALTH CARE PROXY

A health care proxy has the same effect as a durable power of attorney with one difference: a lawyer is not usually required to complete the simple preprinted form. If the state in which your parents reside has a health care proxy law, you can usually get the appropriate form from hospitals or other medical facilities or from the county Area Agency on Aging. Again, the individual your parents designate to make decisions should have a clear understanding of their wishes regarding medical treatment.

#### LIVING WILL

This legal document differs from the above in that instead of naming another person to make decisions, it specifically authorizes doctors to discontinue medical care under certain circumstances. For example, it may direct a doctor to cease life-prolonging medical treatment when the patient is unable to participate in the decision and is terminally ill, permanently unconscious, or severely brain damaged. If your parents have a durable medical power of attorney or a health care proxy, but also have a living will, the living will provides written instructions for the individual they have designated to make decisions. An attorney can assist in preparing a living will.

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#### PRACTICAL HINT

*Keep in mind that if your parents relocate to another state, their existing wills may not be valid in the new state of residence. Thus, new wills drafted by an attorney in that state would be appropriate.*

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#### PRACTICAL HINT

*Check out the following Web sites for end of life legal issues:*  
[www.agingwithdignity.org](http://www.agingwithdignity.org)  
[www.lastacts.org](http://www.lastacts.org)