

**Mental Capacity Standards  
in West Virginia:  
A Handbook on Legal  
Decisionmaking Authority**

**December 2002**

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## **Section I: Introduction**

**The legal issues are also complicated by the very nature of mental capacity, which is difficult to quantify or qualify, and is often shifting and changing.**

The idea for this book came from Millie Karlin of the West Virginia Alzheimers Association. Millie found a disturbing pattern repeating itself through several of her cases: Families and healthcare facility personnel were turning to the wrong decisionmakers at critical points in the care of dementia patients. Sometimes the discharge decisions of patients with advanced dementia were relied upon instead of consulting with a representative decisionmaker who had the proper authority to make those decisions. And sometimes the opposite was occurring, where personal decisions that were well within the patient's capacity were ignored in favor of a person who merely had financial power of attorney. Clearly there was confusion about the roles, scopes, and limits of decisionmaking devices in West Virginia, including powers of attorney, healthcare advance directives, guardianship and conservatorship, and healthcare surrogacy. Because the authority of these decisionmaking devices is derived from law, Millie contacted Cathy McConnell at West Virginia Senior Legal Aid, Inc. She hoped Senior Legal Aid would have some good materials or resources to clarify these issues, and to share with facility personnel, other service providers, and families. No such materials existed. Together Millie and Cathy decided to identify the people in West Virginia who could help create such a resource. They assembled a small roomful of people including lawyers, social workers, researchers in aging, ethicists, and service providers, and this project was born. The group then sought funding for the development, printing, and distribution of this booklet on mental capacity standards and devices in West Virginia. Fortunately the Elaine Borchard Foundation and the American Bar Association's Commission on Legal Problems of the Elderly generously agreed to fund the project. Issues of legal decisionmaking authority can be very complex and often arise when families are least able to tackle them - when a vulnerable elderly person faces a deterioration of mental capacity. The legal issues are also complicated by the very nature of mental capacity, which is difficult to quantify or qualify, and is often shifting and changing. So often when we ask about a person's mental capacity, a care giver will answer "well, she has good days and bad days." We intend this publication to help you in many phases of dealing with capacity and legal decisionmaking, from planning for incapacity to choosing which steps to take where planning was inadequate or non-existent. We hope this publication helps you clarify the roles of decision makers and their principals. Above all, we hope that this information helps seniors preserve as much of their autonomy as possible, and that effective, informed, and concerned surrogate decisionmakers are ready when necessary.

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**It is important to note that you cannot be deemed incapacitated, legally or medically, merely because you make decisions others would consider unwise.**

## **Section II: Definitions**

To understand legal decision-making devices and their impact, one must understand the vocabulary. We will define many of the important terms here. Many of these terms are used in a different sense when discussing other matters related to older adults. The definitions given here are those used in West Virginia law.

### **ADVANCE DIRECTIVE**

An advance directive is a legal document explaining one's wishes about medical treatment if one becomes unable to act for oneself. Medical Power of Attorney and Living Will are advance directives.

### **AGENT**

An agent is a person authorized to act in the place of another. When you execute a power of attorney, the person you designate to act in your place in the event you cannot act for yourself is called your agent. An agent is also sometimes called a representative.

### **ALLEGED PROTECTED PERSON**

The alleged protected person is an individual who is the subject of the guardianship petition proceeding. If at the guardianship hearing the alleged incapacitated person is found to be incompetent, he or she is then deemed a protected person. (See also, GUARDIANSHIP PETITION.)

### **CAPACITY/INCAPACITY**

The term "capacity" has different meanings among different professions. In the legal profession capacity is defined as a legal qualification, fitness, or competency. For example, for a person to have the "capacity to contract" he or she must be of legal age and have the mental competency to enter into contract. Under the law, capacity is decision-specific. This means that the capacity required under one law may be completely different than what is required under another law. For example, a person may have the capacity required to execute a will, for example, but may not necessarily have the capacity necessary to enter into a contract. In healthcare, social work, and some other professions, capacity refers to an individual's ability to perform different tasks and functions. It is possible someone may have the capacity for one task but not for another. For example, a person may have the mental capacity needed to provide for her own basic nutritional needs, but at the same time, cannot manage her money without assistance. When mental capacity is measured by a health professional (i.e. physician, licensed psychologist) it is based on a set of medical criteria.

**Capacity is decisionspecific.**

**You may  
have the capacity to do**

**some things, but not others.**

## COMPETENCY\INCOMPETENCY

Competency is not the same thing as capacity, however, the two terms are often confused. Whereas capacity relates to specific abilities of the person and is measured by a health care professional and, competency is a legal determination that can only be made by a judge. The judge examines specific criteria to determine whether a person possesses the mental ability to (1) ability to meet the essential requirements for their health, care, safety, habilitation, or therapeutic needs and (2) ability to manage property or financial affairs. If the judge rules that an individual cannot do these things, he or she will find the individual lacks competency and will identify that person as a protected person. It is important to note that you cannot be deemed incapacitated, legally or medically, merely because you make decisions others would consider unwise.

## CONFIDENTIALITY

In West Virginia, the court records and proceedings related to guardianship are considered confidential and are not open to public inspection either during the proceedings or after the case has been closed.

## CONSERVATOR

A conservator is someone appointed by a judge to manage your estate and financial affairs if the judge determines you are not able to manage your own money. The court order appointing a conservator will specify the scope and limits of these responsibilities.

## DURABLE POWER OF ATTORNEY

A durable power of attorney (DPOA) is a type of power of attorney document that is often used to grant someone the authority to manage your finances. It is called a "durable" power of attorney because the document remains effective even after you lose capacity. While you have capacity, you can grant as much or as little control over your finances to your agent as you would like. Later, when you become incapacitated, the agent will assume full control.

## GUARDIAN

A guardian is a person appointed by the court to take responsibility for your personal affairs if the court finds you are unable to take care of them yourself. A guardian is authorized to make decisions about your person. For example, your guardian could decide where you live, what you eat or which doctor you see. However, the guardian does not make decisions about your finances; these decisions are left to a conservator if needed.

## GUARDIAN AD LITEM



If an incompetent or incapacitated person is involved in a court proceeding, the judge may appoint a guardian ad litem to protect that person's interests in the proceeding. "Incompetent person" is interpreted broadly in this context, and can include a child, as well as an adult who has a disability that limits his or her ability to protect her own interests in court. However, the guardian ad litem is not necessarily acting in your defense and does not represent you in the traditional sense as appointed legal counsel does. In guardianship proceedings in WV the court appoint legal counsel for the alleged protected person. Appointed legal counsel are not guardians ad litem, but instead must zealously represent the alleged protected person.

### GUARDIANSHIP PETITION

The guardianship petition is an official written request to appoint a guardian and/or conservator for you. It is submitted to the circuit court where you reside or, if you are in a facility, to the circuit court where the facility is located. The petition must include specific information including an evaluation by a licensed physician or psychologist. Details about who may submit a petition and what elements the petition must contain are explained in a later section of this publication.

### HEALTH CARE SURROGATE

A health care surrogate is an adult who is appointed to make healthcare decisions for you when you become unable to make them for yourself. If you do not execute a medical power of attorney and you become incapacitated, your doctor may appoint a health care surrogate.

### LIMITED GUARDIANSHIP/CONSERVATORSHIP

Limited guardianship or limited conservatorship refer to court orders that restrict, or limit, the guardian's or conservator's scope of responsibilities for the protected person in some manner. These restrictions are specified in the order of appointment.

### LIVING WILL

A living will is a legal document that tells the doctor that you don't want to be put on life-support machines or kept alive artificially when it won't help you get any better.

### MEDICAL POWER OF ATTORNEY

A medical power of attorney is a legal instrument that allows you to select the person you want to make healthcare decisions for you if and when you are unable to make them for yourself. The person you chose in your medical power of attorney is called your representative or agent.

### ORDER OF APPOINTMENT

At the end of a guardianship proceeding, an order of appointment is issued if the alleged protected person is found to be incompetent. The order of appointment is

a legal order that outlines the scope and limits of the guardianship and/or conservatorship. (See also, **GUARDIAN** and **CONSERVATOR**.)

#### **POWER OF ATTORNEY**

A power of attorney is a document that you sign to give someone else the power or authority to handle your personal affairs. There are different types of power of attorney documents. (See also, **DURABLE POWER OF ATTORNEY**, **MEDICAL POWER OF ATTORNEY** and **SPRINGING POWER OF ATTORNEY**.)

#### **PRINCIPAL**

A principal is a person who authorizes another to act on his or her behalf as an agent. The person who executes an advance directive is the principal in that document.

#### **PROTECTED PERSON**

A protected person is an adult who has been found mentally incompetent by the court. Once you have been deemed a protected person, the court may appoint a guardian and/or conservator to act in your best interests.

#### **SPRINGING POWER OF ATTORNEY**

A springing power of attorney is a power of attorney that does not confer any power or authority on your agent until you become incapacitated or disabled. You have sole control of your affairs until you lose the ability to act for yourself. At that point, your agent is authorized to act.

#### **SURROGATE**

A substitute, or replacement, decisionmaker. See also "Health Care Surrogate."

#### **TEMPORARY GUARDIANSHIP**

A temporary guardianship is one that has been restricted in its duration in the order of appointment. In West Virginia, temporary guardianship will expire within forty-five days unless extended an additional forty-five days is given after a showing of good cause. Temporary guardianships are often granted in cases where the protected person may be expected to regain capacity after a certain period of time, where re-evaluation of capacity may be required, or when the need for guardianship is limited to a specific situation. (See also, **GUARDIAN**)

### Section III: The Devices

This handbook discusses the mental capacity standards relevant to six different devices available under West Virginia law for surrogate decision-making. The chart below divides the devices into different categories based upon two important considerations: 1) who chooses the decision-maker or agent, and 2) what kinds of decisions does the agent have authority to make.

Legal Device	Who gets to choose decisionmaker			Type of decisions it covers	
	Individual	Doctor	Court	Personal or Healthcare	Financial or Property
Living Will	n/a	n/a	n/a	T	
Medical Power of Attorney	T			T	
Healthcare Surrogate		T		T	
Financial Power of Attorney	T				T
Guardian			T	T	
Conservator			T		T

The handbook has a section devoted to each of the six devices. For each device the following information is addressed:

- A. Brief **description** of the Device
- B. **Who chooses** the decision-maker and how?
- C. The relevant **mental capacity standards** regarding this device
- D. The **scope, limits, and other specific information** about the device
- E. How can the device be **revoked or changed**?
- F. When does the device become **invalid**?

# **1. THE LIVING WILL**

West Virginia Code §16-30-1, et seq.

## **A. BRIEF DESCRIPTION OF THE LIVING WILL**

A Living Will is a legal document that tells the doctor that you don't want to be kept alive on a life-support machine when it won't help you get any better.

## **B. WHO CHOOSES THE DECISION-MAKER IN THE LIVING WILL AND HOW?**

For this device, there is no surrogate decision-maker chosen. The Living Will is a legal statement of your own choices regarding life-prolonging intervention (see D. within this section for more information about life-prolonging intervention). You can use a fill-in-the-blank form for this, and you must sign it before a notary and witnesses. You can download the blank form at <http://www.hsc.wvu.edu/chel/wvi/>, and you can get this form at any healthcare facility in West Virginia.

## **C. THE MENTAL CAPACITY STANDARDS RELEVANT TO THE LIVING WILL**

To execute a Living Will: The law requires that you be a "competent adult" in order to execute a Living Will, but does not define competent. You are generally presumed to be competent unless a court has determined that you are not.

Your Living Will takes effect when two things happen:

1. When you are very sick and are not able to communicate your wishes yourself. In legal terms, this is referred to as incapacity or a lack of capacity. And,
2. When you are certified by a doctor who has examined you personally to have a terminal condition or to be in a persistent vegetative state.

In order to meet the first condition, a doctor, psychologist or advance nurse practitioner must evaluate your ability to:

1. Appreciate the nature and implications of a health care decision (are you able understand what your doctor is telling you and understand the consequences of any choices that you make?);
2. Make an informed choice regarding the alternatives presented (are you able to process the information the doctor gives you and make your decision based on this process?); and
3. Communicate that choice in an unambiguous manner (are you able to let your doctor know what you have decided? You may state your choice, write it

down, or in some case, just nod your head. The important thing here is that there must be no doubt about what you are trying to express.). If the doctor, or psychologist or advance practice nurse working with a doctor, determines that you are unable to do these things, he or she must write this in your medical records. The doctor's statement must include the reason why you were found to lack capacity. Simply being old or having a mental illness is not enough to support a finding that you do not have the capacity to make healthcare decisions. The doctor must complete the three-part evaluation discussed above before he or she determines that you do not have the capacity to make health care decisions. If the doctor finds you meet both criteria, the directives stated in your Living Will will control regarding your care.

#### D. THE SCOPE, LIMITS, AND OTHER SPECIFIC INFORMATION ABOUT THE LIVING WILL

To be valid, a Living Will must be:

1. In writing
2. Dated
3. Signed:
  - + by you or by another person at your direction in your presence
  - + in the presence of two or more witnesses, persons who are at least eighteen years old and NOT on the list below\*
  - + by the witnesses who watch you sign your name.
4. Notarized, meaning a notary public must be present and acknowledge these signatures.

\*The law says that the following people CANNOT be a witness to your Living Will:

- + The person who signed your Living Will on your behalf and at your direction (if you were unable to sign for yourself)
- + Anyone who is related to you by blood or marriage
- + Anyone who will inherit from you (This means anyone who receives property from you under the terms of your will or under the laws that provide for the distribution of your property if you die without a will.)
- + Anyone who is legally obligated to pay for your medical care
- + Your doctor
- + The person you have named as your Medical Power of Attorney or the person you have named as successor Medical Power of Attorney

***What is life-prolonging intervention?*** Life-prolonging intervention means any medical procedure or intervention that would artificially prolong the dying process or maintain the person in a persistent vegetative state.

- + Life prolonging intervention DOES include artificial feeding, whether through an intravenous line or through a tube feeding.
- + Life prolonging intervention DOES NOT include administration of medication or the performance of any medical procedure deemed necessary to relieve pain or provide comfort.

***What is a persistent vegetative state?*** "Persistent vegetative state" is a term that describes the condition of patients with severe brain damage who appear awake but are unaware of themselves or the surrounding environment. The distinguishing feature of the persistent vegetative state is an irregular state of sleep and wake cycles, without any detectable expression of awareness of self or others.

When patients are in a persistent vegetative state, the part of their brain that controls all of the emotions, sensations and understanding that makes them human does not work. A patient in a persistent vegetative state only displays reflexes. Consequently, a patient in a persistent vegetative state can open his or her eyes, make meaningless grunts or moans or even smile, but he/she does not show any voluntary reactions or responses reflecting consciousness, choice or emotion. Although they may move their eyes, such patients neither focus on an object nor follow a moving target with their eyes. Because these patients do move their eyes, families and other loved ones sometimes think that these patients do recognize them and know them. However, patients in a persistent vegetative state are incapable of recognizing loved ones. Patients in a persistent vegetative state cannot eat and will need a feeding tube if a decision to prolong their lives with medically administered nutrition and hydration is made. All patients in a persistent vegetative state lose control of their bladder and bowels.

A persistent vegetative state follows different types of injury to the brain. The injury can be the result of a stroke; of trauma, like in a car accident; of dementia, including Alzheimer's disease; and of conditions where the brain does not receive enough oxygen, like carbon monoxide poisoning, during a CPR attempt, or a heart attack. A persistent vegetative state is considered to be permanent or irreversible when a doctor determines that the chances the patient will regain consciousness are very small.

***Can my son or daughter make a Living Will if he or she is under 18?*** Yes, if he or she can meet certain requirements. Any person who wants to make a Living Will must have the capacity to do so. Persons under 18 are presumed to lack capacity. In order to defeat this presumption, persons under 18 must undergo an examination by a doctor, or psychologist, or an advance practice nurse who is collaborating with a doctor and found to have the capacity to make health care decisions. Once this determination is made, these individuals are referred to as "mature minors" and may make Living Wills.

***How is a Living Will different from a Medical Power of Attorney?*** A Living Will is a statement of decisions you made yourself. It tells the doctor that you do not want to be kept alive by machines, if there is no hope of getting better. A Living Will does not give this decision-making power to anyone else; a Medical Power of Attorney does. A Medical Power of Attorney gives someone else the authority to make medical decisions for you if you are unable to make them yourself.

**Should I have both a Living Will and a Medical Power of Attorney?** Yes. If you make both a Living Will and a Medical Power of Attorney, then the decisions in your Living Will must be followed by the person you name as your Medical Power of Attorney.

## E. REVOKING OR CHANGING THE LIVING WILL

So long as you have the capacity to do so, you can revoke your Living Will at any time by any of these methods.

- + You can destroy the Living Will. Tear it up or burn it.
- + You can tell someone else to destroy your Living Will. They must destroy it in your presence.
- + You can write out a statement that you are revoking your Living Will.
- + This statement must be signed and dated by you. This revocation does not become effective until you give it to your doctor.
- + If you are not able to write, you can tell someone to write out a statement that you are revoking your Living Will. This person must be over 18 years old. This statement must also be signed and dated. You can tell the other person to sign your name on your behalf. This revocation does not become effective until your doctor gets it. You can have the other person give it to him or her if you are not able to.

Once you have been determined to be incapacitated and your Living Will has become effective your doctor must follow the instructions in your Living Will. If you ask your doctor not to follow those instructions, he or she can only do so if it is determined that you have regained capacity. Two doctors or one doctor and one psychologist must certify that you have regained the capacity to make this determination.

**Who decides whether I have capacity regarding a Living Will?** Every person over the age of 18 is presumed to have capacity. You may still have capacity to create a Living Will even though you are very old or suffer from a mental illness. In order to determine that you lack capacity, or are incapacitated, a doctor or psychologist or advance practice nurse working with a doctor must write this in your medical records. This statement must include the reason why you were found to lack capacity.

**Can someone prevent the doctor from carrying out my Living Will after I have been determined to lack capacity?** No. You make a Living Will precisely because you want your wishes to be followed in the event you lose capacity to make decisions for yourself. The law does not permit anyone, including your family, to prevent healthcare providers from carrying out your legally-valid Living Will. A healthcare provider can even be penalized for failing to respect your Living Will. Once you make a Living Will, it is presumed to be valid, unless you revoke it.

**What should I do with my Living Will after I make it?** You should give a copy of your Living Will to your doctor. If you do not have a doctor, you should give a

copy of your Living Will to someone else to give to a doctor in case you are not able to. It is your responsibility to make sure that the doctor knows that you have a Living Will. The doctor is not legally obligated to follow the directions in your Living Will until he or she knows that you have made one.

***When I made my Living Will, I lived in another state. Is my Living Will still good in West Virginia?*** Probably. As long as your Living Will complies with either the laws of the state you were living in when you signed it or with the laws of West Virginia, your Living Will is valid in West Virginia.

***The hospital or nursing home says that I cannot be admitted unless I have a Living Will. Can they do this?*** No. A hospital or nursing home is not allowed to condition your admittance on executing a Living Will. However, the hospital or nursing home is allowed to give you information about Living Wills and to help you execute one if you want to.

## F. WHEN DOES A LIVING WILL BECOME INVALID?

A Living Will does not generally expire, and is valid as long as it has not been revoked.



## **2. THE MEDICAL POWER OF ATTORNEY**

West Virginia Code §16-30-1, et seq.

### **A. BRIEF DESCRIPTION OF THE MEDICAL POWER OF ATTORNEY**

A Medical Power of Attorney is a legal document that allows you to select the person that you want to make healthcare decisions for you if and when you become unable to make them for yourself. The person you choose is called your agent and is your representative for purposes of healthcare decision-making.

### **B. WHO CHOOSES THE DECISION-MAKER IN A MEDICAL POWER OF ATTORNEY AND HOW?**

You get to choose who will be your representative when you properly make out a Medical Power of Attorney. You can use a fill-in-the-blank form for this, and you must sign it before a notary and witnesses. You can download the blank form at <http://www.hsc.wvu.edu/chel/wvi/>, and you can get this form at any healthcare facility in West Virginia.

### **C. THE MENTAL CAPACITY STANDARDS RELEVANT TO THE MEDICAL POWER OF ATTORNEY**

To execute a Medical Power of Attorney: The law requires that you be a "competent adult" in order to execute a Medical Power of Attorney, but does not define competent. You are generally presumed to be competent unless a court has determined that you are not.

For your Medical Power of Attorney to take effect: Your Medical Power of Attorney takes effect when you are very sick and are not able to communicate your wishes yourself. In legal terms, this is referred to as incapacity or a lack of capacity. In order to determine your capacity, a doctor, psychologist or advance nurse practitioner must evaluate your ability to:

1. Appreciate the nature and implications of a health care decision (are you able understand what your doctor is telling you and understand the consequences of any choices that you make?);

2. Make an informed choice regarding the alternatives presented (are you able to process the information the doctor gives you and make your decision based on this process?); and

3. Communicate that choice in an unambiguous manner (are you able to let your doctor know what you have decided? You may state your choice, write it down, or in some case, just nod your head. The important thing here is that there must be no doubt about what your are trying to express.).

If the doctor, or psychologist or advance practice nurse working with a doctor, determines that you are unable to do these things, he or she must write this in your medical records. The doctor's statement must include the reason why you were found to lack capacity. Simply being old or having a mental illness is not enough to support a finding that you do not have the capacity to make healthcare decisions. The doctor must complete the three-part evaluation discussed above before he or she determines that you do not have the capacity to make health care decisions.

#### D. THE SCOPE, LIMITS, AND OTHER SPECIFIC INFORMATION ABOUT THE MEDICAL POWER OF ATTORNEY

In order to be valid, a Medical Power of Attorney must meet the following requirements:

1. You must be an adult or have been determined to be a mature minor;\*
2. The Medical Power of Attorney must be in writing.
3. You must sign it.
4. You must date it.
5. You must sign it in the presence of at least two witnesses, age 18 or older.
6. A Notary Public must acknowledge these signatures.

7. It should contain the following language or substantially similar language: "This Medical Power of Attorney shall become effective only upon my incapacity to give, withdraw, or withhold informed consent to my own medical care."

\*People under 18 are presumed to lack capacity. In order to defeat this presumption, persons under 18 must undergo an examination by a doctor, or psychologist, or an advance practice nurse who is collaborating with a doctor and found to have the capacity to make health care decisions. Once this determination is made, these individuals are referred to as "mature minors."

***What kinds of things can the person I name as Medical Power of Attorney do?*** The person that you name as your Medical Power of Attorney representative can make any decisions related to your healthcare that you allow. These decisions could include giving, withholding or withdrawing informed consent to any type of health care, including but not limited to, medical and surgical treatments. Other decisions that may be included are life-prolonging interventions, psychiatric treatment, nursing care, hospitalization, treatment in a nursing home, home health care and organ donation. Your representative can have or control access to your medical records and decide about measures for the relief of pain. Your Medical Power of Attorney can be as broad or as narrow as you want it to be. You can specifically write that your Medical Power Attorney Representative shall not have the power to make one of these decisions. Or, you can specifically state exactly what decision you want your Medical Power of Attorney Representative to make. For example, you might say that your representative cannot give a certain person access to your medical records.

***What healthcare decisions are you talking about?*** Any kind of decision that is related to your health that you allow your representative to make. You could limit your representative to certain types of decisions. (For example, the decision to put you on life support when there is no hope of you getting better.) On the other hand, you could allow your representative to make any healthcare decision that might come up. This includes decisions to give, withhold or withdraw informed consent to any type of health care, including but not limited to, medical and surgical treatments. Other decisions that may be included are psychiatric treatment, nursing care, hospitalization, treatment in a nursing home, home health care and organ donation.

***How is this different from a Living Will?*** A Living Will is a statement of decisions you made yourself. It tells the doctor that you do not want to be kept alive by machines, if there is no hope of getting better. A Medical Power of Attorney gives someone else the authority to make medical decisions for you if you are unable to make them for yourself. It is meant to deal with situations that you cannot predict. Because you cannot predict these situations, you cannot decide in advance what choice you would make. The Medical Power of Attorney allows you to pick the person that you trust to make to these kinds of decisions when you cannot make them yourself.

***Do I still need a Living Will if I have a Medical Power of Attorney?*** Yes, if you do not wish to have your life artificially prolonged. Any decisions that you make in your Living Will must be followed by the person you name as your Medical Power of Attorney.

***When would I need a Medical Power of Attorney?*** A Medical Power of Attorney is used when you become unable to make healthcare decisions for yourself. For example, if you are unconscious after a car accident and you need a blood transfusion; if you are under anesthesia and you need to have a more extensive procedure than you initially consented to; or if you become mentally incompetent as a result of Alzheimer's Disease and you need medical treatment. But once you need a Medical Power of Attorney, it is too late to make one out. In order to be ready if the time comes, you must make out a Medical Power of Attorney while you are still able to make your own decisions.

***How will I know if I am able to make healthcare decisions for myself?*** A doctor, psychologist, or advance practice nurse working with a doctor will make this determination. Commonly, the doctor will say that you lack the capacity to make healthcare decisions. He or she may also say that you are incapacitated. If you are conscious, you will be told that you have been found to be incapacitated and that your Medical Power of Attorney Representative will be making decisions regarding your treatment.

***Can the doctor say that I do not have the capacity to make healthcare decisions just because I am old or have a mental illness?*** No. Simply being

old or having a mental illness is not enough to support a finding that you do not have the capacity to make medical decisions. The doctor must complete the three-part evaluation discussed above before he or she determines that you do not have the capacity to make healthcare decisions.

***Does the person I name as Medical Power of Attorney have any control over my medical care if I can still make my own decisions?*** No. The person you name as your Medical Power of Attorney has no authority until you become unable to make your own decisions.

***Can I name an alternative or a back-up representative in addition to my first choice?*** Yes. You may name one or more "successor representatives" to fill this role if your first choice is unable, unwilling or disqualified to serve.

***How can I make sure that the decisions my Medical Power of Attorney representative makes are ones that I would agree with?*** There are several things that you can do to help your representative make decisions that you would agree with.

- + Write it down. You can include specific instructions in your Medical Power of Attorney to cover particular circumstances. You can also include a statement of your personal values to help your representative make decisions.

- + Talk about your wishes. Discuss your wishes with the person you appoint as your Medical Power of Attorney representative. Tell them about your religious beliefs and personal values. Make sure that they know the things that you definitely would want as well as the things that you absolutely do not want.

***Who should I name as my Medical Power of Attorney Representative?*** You should choose someone who knows you well and whom you trust to make healthcare decisions for you based on your personal wishes and values. You may or may not want to name a family member as your Medical Power of Attorney Representative. Keep in mind, that some of the decisions your representative will have to make will be very difficult. It might be difficult for some family members to overcome their own emotions and make decisions that are based on your personal values. The most important consideration in naming a Medical Power of Attorney Representative is to choose someone you trust to be able to make decisions based on the values and directions you have set out.

***Can I appoint my doctor as my Medical Power of Attorney?*** No, the law says that you cannot appoint your doctor as your Medical Power of Attorney. Additionally, the following people cannot serve as your Medical Power of Attorney:

- + Any doctor, dentist, nurse, physician's assistant, paramedic, or psychologist who is treating you, cannot serve as your Medical Power of Attorney representative
- + Any other person who is providing you with medical, dental, nursing, psychological services or other health services of any kind, cannot serve as

your Medical Power of Attorney representative;

- + Any employee of any doctor, dentist, nurse, physician's assistant, paramedic, or psychologist who is treating you cannot serve as your Medical Power of Attorney representative, UNLESS the employee is your relative
- + Any employee of any other person who is providing you with medical, dental, nursing, psychological services or other health services of any kind cannot serve as your Medical Power of attorney representative, UNLESS the employee is your relative
- + An operator of the hospital, psychiatric hospital, medical center, ambulatory health care facility, physicians' office and clinic, extended care facility operated in connection with a hospital, nursing home, a hospital extended care facility operated in connection with a rehabilitation center, hospice, home health care, and any other facility established to administer health care that is currently serving you cannot serve as your Medical Power of Attorney representative.
- + Any employee of an operator of a hospital, psychiatric hospital, medical center, ambulatory health care facility, physicians' office and clinic, extended care facility operated in connection with a hospital, nursing home, a hospital extended care facility operated in connection with a rehabilitation center, hospice, home health care, and any other facility established to administer health care cannot serve as your Medical Power of Attorney representative, UNLESS the employee is your relative.

***Does my Medical Power of Attorney representative have to pay my medical bills?*** No. A Medical Power of Attorney only gives the person you appoint authority to make healthcare related decisions. This does not include authority to pay your bills. For that you need a Durable Financial Power of Attorney. It is entirely possible that the same person may hold both your Medical Power of Attorney and your Financial Power of Attorney. However, if this is not the case, your Medical Power of Attorney Representative has no financial authority.

***What happens if I appoint a Medical Power of Attorney and then someone petitions to have a guardian appointed for me?*** If you appoint a Medical Power of Attorney and then someone petitions to have a guardian appointed for you, the court will give the person you appointed as Medical Power of Attorney special consideration. In other words, the court will appoint the person you name as a Medical Power of Attorney to be your guardian unless it finds that there is a good reason not to.

***Is my Medical Power of Attorney affected if I get a divorce?*** Yes, if you named your spouse as your Medical Power of Attorney Representative or successor representative. When a final divorce decree is granted, the appointment of your spouse is automatically revoked. You will need to sign a new power of attorney. If you still want your former spouse to serve as your representative, he or she may do so, provided that you reappoint him or her in a new Medical Power of Attorney.

***What is required to make a valid Medical Power of Attorney?*** Who can be a witness for my Medical Power of Attorney? The law only requires that a witness to your Medical Power of Attorney be over eighteen years old. Additionally, the law says that the following people cannot be a witness to your Medical Power of Attorney:

- + The person who signed your Medical Power of Attorney on your behalf and at your direction,
- + Anyone who is related to you by blood or marriage,
- + Anyone who will inherit from you, whether by will or under the laws that provide for the distribution of your property if you do not have a will,
- + Anyone who is legally obligated to pay for your medical care,
- + Your doctor, or
- + The person you have named as your representative in your Medical Power of Attorney, or the person you have named as successor representative. As part of the Medical Power of Attorney your witnesses must sign a statement that they do not fit any of these categories.

## E. HOW CAN THE MEDICAL POWER OF ATTORNEY BE REVOKED OR CHANGED?

As long as you have the capacity to do so, you can revoke your Medical Power of Attorney at any time by any of these methods.

- + You can destroy the Medical Power of Attorney. Tear it up or burn it.
- + You can tell someone else to destroy your Medical Power of Attorney. It must be destroyed in your presence.
- + You can write out a statement that you are revoking your Medical Power of Attorney. This statement must be signed and dated by you. This revocation does not become effective until you give it to your doctor.
- + If you are not able to write, you can tell someone to write out a statement that you are revoking your Medical Power of Attorney. This person must be over 18 years old. This statement must also be signed and dated. You can tell the other person to sign your name on your behalf. This revocation does not become effective until your doctor gets it. You can have the other person give it to him or her if you are not able to.

## F. WHEN DOES A MEDICAL POWER OF ATTORNEY BECOME INVALID?

The document itself does not generally expire, and is valid as long as it is not revoked. The authority of the representative chosen in the document to make medical decisions is only effective as long as the principal is incapable of making his or her own medical decisions, according to his or her physician.

### **3. Healthcare Surrogate**

West Virginia Code §16-30-1, et seq.

#### **A. BRIEF DESCRIPTION OF HEALTHCARE SURROGATE**

**A healthcare surrogate is an adult who is appointed by your healthcare provider to make healthcare decisions for you when you become unable to make them for yourself.**

#### **B. WHO CHOOSES THE HEALTHCARE SURROGATE AND HOW?**

Your attending physician or an advance practice nurse will appoint a Healthcare Surrogate for you if they determine you are no longer able to make your own healthcare decisions.

#### **C. THE MENTAL CAPACITY STANDARDS RELEVANT TO THE HEALTHCARE SURROGATE**

The doctor, psychologist or advance nurse practitioner will evaluate your ability to

- + Appreciate the nature and implications of a health care decision (are you able to understand what your doctor is telling you and understand the consequences of any choices that you make?);
- + Make an informed choice regarding the alternatives presented (are you able to process the information the doctor gives you and make your decision based on this process?); and
- + Communicate that choice in an unambiguous manner (are you able to let your doctor know what you have decided? You may state your choice, write it down, or in some case, just nod your head. The important thing here is that there must be no doubt about what your are trying to express.).

The physician who is attending to you, or the advance practice nurse working with the physician who is attending you, will select the person to serve as your healthcare surrogate.

Two things must occur before a healthcare surrogate will be appointed for you.

- + You must be unable to make healthcare decisions for yourself AND
- + Your attending physician or advance practice nurse must have determined that you did not appoint a Medical Power of Attorney and that you do not have a court-appointed guardian.

If you cannot make healthcare decisions for yourself and there is no representative or court-appointed guardian that is authorized or capable and willing to serve, then a healthcare surrogate can be selected. If the doctor determines that you are unable to do these things, he or she must write this in your medical records. The doctor's statement must include the reason why you were found to lack capacity.

**How is my Healthcare Surrogate selected?** The attending physician or advance practice nurse must make a reasonable effort to determine if any of the following people exist:

- + Your spouse
- + Your adult children
- + Your parents
- + Your adult brothers and sisters
- + Your adult grandchildren
- + Your close friends

If you have people in all of these categories, they are considered in decreasing order of priority. In other words, your spouse would be considered first, then your adult children, then your parents and so on down the list. Your attending physician or advance practice nurse considers whether the person is reasonably available and willing to make healthcare decisions for you. The first person on the list who is both available and willing to make these decisions for you will usually be appointed as your healthcare surrogate.

***I don't have anyone in those six categories, does that mean I won't have a healthcare surrogate appointed?*** No. These are just the six categories of relationships that the law requires that your attending physician or advance nurse practitioner consider first. If there is no one in those six categories who is available and willing to serve as your healthcare surrogate, then your attending physician is free to consider any other person or entity, including, but not limited to, public agencies, public guardians, public officials, corporations and any other person or entity allowed by law. If there is no one else, a representative of the Adult Services Division of the Department of Health and Human Resources is often appointed as healthcare surrogate.

## D. THE SCOPE, LIMITS, AND OTHER SPECIFIC INFORMATION ABOUT THE HEALTHCARE SURROGATE

***What healthcare decisions are you talking about?*** Any decision to give, withhold or withdraw informed consent to any type of healthcare, including but not limited to, medical and surgical treatments, life-prolonging interventions, psychiatric treatment, nursing care, hospitalization, treatment in a nursing home, home health care and organ donation.

***What is the difference between a Medical Power of Attorney and a Healthcare Surrogate?*** The main difference between a Medical Power of Attorney and a healthcare surrogate is that you appoint a Medical Power of Attorney representative to make healthcare decisions for you when you become unable to make them for yourself. You can specify what healthcare decisions your Medical Power of Attorney can make. A healthcare surrogate, on the other hand, is someone who is appointed to make healthcare decisions for you when you become unable to make them for yourself. You have no say in who becomes your healthcare surrogate. You can avoid having a healthcare



surrogate appointed if you have appointed a Medical Power of Attorney representative and that representative is still willing and able to serve.

***How will I know if I am unable to make healthcare decisions for myself?*** A doctor or psychologist or advance practice nurse working with a doctor will make this determination. Commonly, the doctor will say that you lack the capacity to make healthcare decisions. He or she may also say that you are incapacitated. If you are conscious, you will be told that you have been found to be incapacitated and that a surrogate decision maker may be making decisions regarding your treatment.

***I'm a widow with three adult children, how will my doctor decide which child will be my healthcare surrogate?*** When there is more than one person at the same priority level, like your three adult children, your attending physician or advance practice nurse must determine who is the best qualified. Your doctor will consider the following qualities in making this decision:

- + The potential surrogate's ability to make decisions in keeping with your known wishes or your best interests.
- + The potential surrogate's regular contact with you prior to and during your incapacitating illness.
- + The potential surrogate's demonstrated care and concern.
- + The potential surrogate's availability to visit with you.
- + The potential surrogate's availability to meet face to face with your healthcare providers in order to fully participate in the decision-making process.

***Will my adult daughter, who is irresponsible, automatically be my healthcare surrogate just because she's higher on the list than my brother?*** Not necessarily. Your attending physician or advanced practice nurse can appoint a surrogate for you who is ranked lower on the priority list, if the doctor or nurse determines that the lower ranked individual is better qualified using the criteria discussed above. The attending physician or advanced practice nurse must document in your medical records why they appointed this person instead of the person with higher priority.

***Can my doctor be appointed as my healthcare surrogate if I do not have any family?*** No. The law states that THESE PEOPLE CANNOT BE A HEALTHCARE SURROGATE:

- + Your treating healthcare provider cannot be your healthcare surrogate.
- + An employee of a treating healthcare provider cannot be your healthcare surrogate, UNLESS you are related to that employee.
- + An owner, operator or administrator of a healthcare facility serving you cannot be your healthcare surrogate.
- + An employee of an owner, operator or administrator of a healthcare facility cannot be your healthcare surrogate, UNLESS you are related to that employee.

***Are there any rules or guidelines that my Healthcare Surrogate must follow***

**when making healthcare decisions for me?** Yes. The law requires that your healthcare surrogate make healthcare decisions for you that are:

- + In accordance with your wishes, including your religious and moral beliefs; or
- + If your healthcare surrogate does not know your wishes and could not find out about them using reasonable efforts, then he or she should make decisions that are in accordance with your best interests; and
- + A reflection of your values, including your religious and moral beliefs, to the extent that your healthcare surrogate knows about these values or could find out about them with reasonable effort.

**How is my healthcare surrogate supposed to know what is in my best interest?** There is no easy way for your healthcare surrogate to know what is in your best interests. The law requires that a healthcare surrogate consider the following things in order to determine what would be in your best interests:

1. Your medical condition and prognosis.
2. The dignity and uniqueness of every person.
3. The possibility and extent of preserving your life.
4. The possibility of preserving, improving or restoring your functioning.
5. The possibility of relieving your suffering.
6. The balance of the benefits of the proposed treatment against the concerns and values that a reasonable person in your circumstances would want to consider.

As you can tell, some of these concepts are very murky and there is no straightforward answer one-way or the other.

**From the way it sounds, I don't have much say in this process. Is there anything I can do to have some input into this selection?** Yes, but you must think about these issues ahead of time. If you wait until it is time to appoint a healthcare surrogate to think about them, it is too late. A determination must be made that you no longer have the capacity to make healthcare decisions before a healthcare surrogate will be appointed. Once it is determined that you no longer have capacity, you no longer have control over your decisions. To keep this from happening, it is important that you think about these issues ahead of time and execute a Medical Power of Attorney and perhaps a Living Will. These instruments will allow you to have the most input into healthcare decisions after you lose the capacity to make them for yourself. For more information about Medical Powers of Attorney and Living Wills refer to the sections on MEDICAL POWERS OF ATTORNEY and LIVING WILLS.

## **E. HOW CAN MY HEALTHCARE SURROGATE BE REVOKED OR CHANGED?**

Your attending physician or advance practice nurse have the authority to change or revoke your Healthcare Surrogate.

## **F. WHEN IS THE HEALTHCARE SURROGATE NO LONGER VALID?**

The authority of the Healthcare Surrogate to make medical decisions is only effective as long as you are incapable of making your own healthcare decisions as determined by your doctor.

## **4. Financial Power of Attorney**

West Virginia Code §39-4-1, et seq.

### **A. BRIEF DESCRIPTION OF FINANCIAL POWER OF ATTORNEY**

**Financial Power of Attorney is a document that you sign to give someone else the power or authority to handle certain kinds of affairs regarding money and/or property on your behalf. The type of authority you give, over which kinds of money and property, and when, are all specific to the actual document you signed. Every Financial Power of Attorney document is different, unlike Medical Power of Attorney. There are different kinds of powers of attorney, so it is important to be sure what specific type of power of attorney someone means when they use that phrase.**

### **B. WHO CHOOSES THE DECISIONMAKER IN A FINANCIAL POWER OF ATTORNEY AND HOW?**

You choose who will be your representative by signing a Financial Power of Attorney document. Though many people refer to the representative as “my power of attorney,” the power of attorney is actually the document itself rather than the person chosen as representative.

### **C. THE CAPACITY STANDARDS RELEVANT TO FINANCIAL POWER OF ATTORNEY**

You are presumed to have the mental capacity necessary to execute a Financial Power of Attorney. Evidence that could successfully rebut that presumption could include an adjudication where you were found incompetent. There is very little discussion of mental capacity in relation to executing Financial Power of Attorney in West Virginia law.

### **D. THE SCOPE, LIMITS, AND OTHER SPECIFIC INFORMATION ABOUT FINANCIAL POWER OF ATTORNEY**

***Can I have the same person serve as my Medical Power of Attorney representative and as my Financial Power of Attorney representative? Yes.*** You may appoint the same person to be both your Medical and Financial Power of Attorney representative or you may appoint different persons. (NOTE: This section primarily answers questions related to financial powers of attorney. For specific questions dealing with Medical Powers of Attorney, see, MEDICAL POWERS OF ATTORNEY)

***Can I have both my son and daughter to serve as my power of attorney representative? Yes.*** You can appoint more than one person to serve as your power of attorney representative. However, you should be sure to specify whether they can act individually or whether they must act jointly. For example, is

the signature of either your son or daughter sufficient or do you want the signatures of both your son and daughter to convey your consent?

**What can my power of attorney representative do?** Your representative can do anything you give him or her the power to do in the language of your power of attorney document. You decide what powers you want to give your power of attorney. You can give the person you appoint very specific and narrow powers: for example, "the power to deposit my pension check in my bank account." Or you can give the person you appoint very broad authority: for example, "the power to do anything I could do if I were present."

**I want to make a Power of Attorney so that someone will be able to take care of my money and pay my bills if I cannot. Is there a way to accomplish this?** Yes, you need either a durable or a springing Power of Attorney. A Durable Power of Attorney remains in effect even after you lose the capacity to handle your own affairs. This power of attorney is said to "survive throughout your incapacity." Now instead of having to go the court to have the judge appoint someone to take care of your property, the person you have already appointed keeps this power. A Durable Power of Attorney gives your agent authority to transact things on your behalf as soon as you sign it, unless it contains language that makes it a "springing" power of attorney.

**What is a "Springing" Power of Attorney?** A "Springing" Power of Attorney is one that does not confer any power or authority on your representative until a certain condition specified in the document occurs. Typically this condition is that you become incapacitated or disabled. Instead of sharing the authority with your representative while you have capacity (as in Durable Power of Attorney), you have sole control over your affairs until you lose capacity, then your representative is authorized to act instead of you. The authority of the representative "springs" into effect upon your incapacity. A springing power of attorney contains words like this: "This power of attorney shall become effective upon the disability or incapacity of the principal."

**Are there any problems associated with springing powers of attorney?** Yes. There are two significant problems with springing powers of attorney. First, how will your bank, or any other institution or third party, know that you are incapacitated? Unlike a Durable Power of Attorney, you must be incapacitated before your "Springing" Power of Attorney representative can act. Your incapacity is the trigger that makes the springing power of attorney effective. West Virginia law does not provide specific standards for evaluating whether your capacity has reached the point where your representative may take over your financial decisions. Therefore, if you choose to use a springing Financial Power of Attorney you must make sure that the language of the document includes standards for determining financial decision-making capacity. One of the most common reasons for making out a power of attorney is to avoid going to court to determine if you are incapacitated. However, it is unlikely that banks and other institutions will recognize your springing power of attorney until they get some

official notification that you have been determined to be incapacitated. You may end up right in the middle of the court system you were trying to avoid. Meanwhile, no one has the ability to pay your bills and manage your property.

Second, some people choose a springing power of attorney instead of a Durable Power of Attorney because they want to put off the time that their representative will have access to their affairs for as long as possible. If you choose a springing rather than Durable Power of Attorney for this reason, you may need to reconsider your choice of representatives. If you do not trust your representative to act appropriately while you are able to look over his or her shoulder, this person is probably a bad choice for you. Once you lose the capacity to oversee his or her actions, the person you appoint will not suddenly become more trustworthy. To the contrary, he or she is even less likely to avoid self-dealing once you are not able to look out for yourself.

***I executed a Power of Attorney last year. How do I tell if it is a Durable Power of Attorney?*** Look for these words: "This Power of Attorney shall not be affected by subsequent disability or incapacity of the principal" or "This power of attorney shall become effective upon the disability or incapacity of the principal." The law requires the use of these words, or similar words that show your intent to have the power continue even after you are incapacitated, in every Durable Power of Attorney. If your power of attorney uses these words, it is a Durable Power of Attorney. If you are not sure if your Financial Power of Attorney is durable, you should have an attorney review and interpret it for you.

***What are the advantages to having a Durable Power of Attorney?*** There are two primary advantages to using a Durable Power of Attorney.

1. If you become mentally or physically incapacitated, a Durable Power of Attorney will make sure that the person handling your affairs will be someone you know and trust.
2. If you become mentally or physically incapacitated, a Durable Power of Attorney will make it much easier for your family and friends to handle your affairs. If you do not have Durable Power of Attorney and you become incapacitated, many difficult, time-consuming and expensive problems can arise. Who can authorize the medical care you need? Who will decide whether you should live in a nursing home? Who can use your money to pay your bills? Without a Durable Power of Attorney, someone will have to go to court to have a guardian/conservator appointed for you who can take care of all these problems. This process can be difficult, time-consuming, and traumatic for you and your family.

***Do I lose control over my affairs if I give someone my Durable Power of Attorney?*** Not as long as you still have the capacity to manage your financial affairs. While you have capacity, you can have as little or as much control as you like. You can think of it as sharing control over your affairs with the person you appoint as your power of attorney representative. Later, if you become incapacitated, your representative can assume full control.

***This sounds like it could be dangerous. Shouldn't I be careful with a Durable Power of Attorney?*** Absolutely. You should never use a fill-in-the-blank form for Financial Power of Attorney, but instead should have an attorney draft a document especially to suit your needs and wishes. This is true for several reasons. First, most Durable Power of Attorney forms give extremely broad power to your representative. A wrongdoer can do a lot of damage in a short amount of time. Even with a specially tailored power of attorney document, the person you choose as your representative should be someone who will live up to their duty to act in your best interests and not waste or deplete your finances. Second, the legal meaning of a word may be quite different from the ordinary meaning of the word. Therefore it can be dangerous to use a form that was not drafted especially for you because it may legally authorize things you do not intend. Likewise, it may fail to give your representative all the authority you intend or need.

***Should I limit the Powers and Authority My Representative Will Have as a Way of Safeguarding My Affairs?*** Not necessarily. This is a difficult question to answer, because it is so hard to predict your future needs and the future actions of other people. A Durable Power of Attorney generally needs to give broad and general powers in order to adequately accommodate your needs if you become incapacitated. There is simply no way for you, or your attorney, to think of every specific situation that could arise and provide your representative with only the authority to deal with only those specific situations. On the other hand, if you do not have a lot of property or financial assets, or if you have engaged in other methods of financial planning, you may only need to give your representative a few, very specific, powers. The most important consideration is that you give someone you trust the power to see that your affairs will be taken care of in appropriate ways.

***Is there any other way to keep my representative in line?*** Yes. In the power of attorney document, you can appoint someone to monitor your representative. This person can look over the shoulder of your representative, just like you would, and keep him or her from doing something wrong.

## E. REVOCATION OF FINANCIAL POWER OF ATTORNEY

***What if I change my mind? Can I revoke a Durable Power of Attorney?*** Yes, as long as you still have capacity. Basically, all you need to do is to tell the person that you appointed that you are revoking the power of attorney and tear up the document. However, the law states that if another party relies on your power of attorney and takes an action, that action is binding unless that party knew that you revoked your power of attorney. For example, On December 1, you tell your power of attorney representative that you are revoking your power of attorney. You do not tell anyone else. On December 2, your old power of attorney representative goes to the bank, presents your old power of attorney document, and withdraws money from your checking account. When you discover this, you cannot make a claim against the bank to recover your money. The law says that the bank can rely on your power of attorney document unless they know you

have revoked it. Therefore, if you want to revoke your power of attorney, you should: Sign a written statement that you are revoking your Durable Power of Attorney. Your statement should refer to the date of your power of attorney and the name of the person you appointed as your representative. Give a copy of your written revocation to the person you appointed as your representative. Give copies of your written revocation to any institution or person that you know that also has copies of the Durable Power of Attorney you are revoking. If you recorded (filed in the courthouse or some other official place) your Durable Power of Attorney, you should also record your written revocation in the same place.

## F. WHEN DOES FINANCIAL POWER OF ATTORNEY BECOME INVALID?

When the principal breathes his or her last breath, any authority obtained through Financial Power of Attorney automatically ends.

Any Financial Power of Attorney is no longer valid upon the death of the principal. When the principal breathes his or her last breath, any authority obtained through Financial Power of Attorney automatically ends. Having Power of Attorney during the principal's life does not give any authority to the representative to handle the probate estate of the principal.

While the principal is still alive, the termination of the Power of Attorney depends on whether the power of attorney is durable, springing, or neither. Unless the power of attorney contains language that makes it "durable," the representative's authority is valid only as long as you have the capacity to handle your own affairs. As long as you have capacity, you can review the actions of your power of attorney at any time. You can tell him or her what you want and do not want. After you lose this ability, in other words, after you become incapacitated, a non-Durable Power of Attorney is no longer valid and the person you appointed loses the power to act for you. In that situation, if you need someone to have the authority to manage your affairs, someone will have to go through the court to have a guardian and/or conservator appointed for you.

A validly executed Financial Power of Attorney does not expire merely because it is old, or was created many years ago. A durable or springing power of attorney may remain valid without ever expiring. It is a good idea, however, to review any power of attorney periodically to be sure that it still reflects your wishes and can satisfy your needs in possible incapacity.

Financial Powers of Attorney created in West Virginia before 1994 are not durable, because the law changed in that year to permit durability. Documents



created after that may also lack the durability clause. If you find that your Financial Power of Attorney document is not durable, you may wish to have a new one drafted for you to avoid the need for conservatorship proceedings in the event of your incapacity.

## 5. Guardianship and Conservatorship

West Virginia Code §44a-1-1, et seq.

*[Please note that guardianship and conservatorship are separate devices. We consider them together in this section because these two roles share many characteristics, and often the same person is appointed as both. We have been careful to use the terms individually when a concept applies to only one, but we frequently use the phrase guardian/conservator throughout this section where concepts apply to both roles.]*

### A. BRIEF DESCRIPTION OF GUARDIAN AND CONSERVATOR

**A guardian is a person who is responsible for your personal affairs. A conservator is a person who is responsible for managing your property and financial affairs. Guardians and conservators are appointed by a judge after he or she determines that you are unable to manage either your personal decisions, your finances, or both, without help.**

***What is the difference between a Guardian and a Conservator?*** A guardian only makes decisions about your person. For example, your guardian could decide where you live, what you eat or which doctor you see. A conservator makes decisions only about your money and property. For example, your conservator could pay your bills or invest your money for your benefit.

### B. WHO CHOOSES GUARDIAN AND CONSERVATOR AND HOW?

A circuit judge makes the final determination as to whether you need to have a guardian/conservator appointed. Sometimes a Mental Hygiene Commissioner actually handles the proceedings where the need for appointment of guardian/conservator is considered, but the appointment is not final and legal until it is ordered by a judge. The judge will only order the appointment of a guardian or conservator after a hearing. At the hearing, evidence is presented, and the person for whom guardianship or conservatorship is sought (the "alleged protected person") has the right to be present, to be represented, and to give evidence.

***How does the process get started?*** Someone makes an official request to the court to appoint a guardian/conservator for you. The act of making this official request is called "filing a petition."

### C. THE CAPACITY STANDARDS RELEVANT TO GUARDIANSHIP/CONSERVATORSHIP

***How does the judge decide that I need to have a Guardian/Conservator appointed?*** The judge must find that you are a "protected person." In order to categorize you as a "protected person", the court must find that because of mental impairment, you are unable to receive and evaluate information effectively

or to respond to people, events, and environments to such an extent that you do not have the capacity to:

1. To meet the essential requirements for your health, care, safety, habilitation, or therapeutic needs without the help of a guardian (you cannot take care of yourself physically), or
2. To manage your property or financial affairs or to provide for your support of your legal dependents without the help of a conservator (you cannot manage your money).

If the judge determines that you meet this test, he or she will find that you are "incompetent" and that you should be a "protected person." If the judge ONLY finds that you exercised poor judgment, that is not enough to qualify you as a "protected person." Once the judge issues a finding that you are a protected person, then he or she can appoint a guardian or conservator for you. Only the court can make a competency determination. Competence is a legal concept. When someone other than a judge; like a doctor, psychologist or advance nurse practitioner, evaluates your decision-making ability, they are making a determination about your capacity.

***What if the court simply disagrees with the way I take care of myself and my property? Is this enough to support the appointment of a guardian/conservator?*** No. If the judge ONLY finds that you exercised poor judgment, that is not enough to qualify you as a "protected person."

## D. THE SCOPE, LIMITS, AND OTHER SPECIFIC INFORMATION ABOUT GUARDIANSHIP/CONSERVATORSHIP

***Can the same person be both a Guardian and a Conservator?*** Yes. Frequently the same person is appointed as guardian and conservator. However, the court can appoint different people to fill these jobs if it determines that would be in your best interests.

***Who can file a petition to have a guardian/conservator appointed for me?*** Any of the following people can file a petition to have the court appoint a guardian/conservator for you:

1. You;
2. A person who is either responsible for your care or who has assumed responsibility for your care;
3. A representative from a facility providing your care, like a hospital or nursing home;
4. The person you have nominated as guardian or conservator, (more about this later); or
5. ANY other interested party, including, but not limited to, the Department of Health and Human Resources. The person or facility filing the petition is called the "petitioner" and will have to pay a filing fee (\$90 in the year 2002) when the petition is filed.

***Which court should the petition be filed in?*** The petition should either be filed with the clerk of the circuit court in the county where either the alleged protected person resides, or where the healthcare facility that the alleged protected person has been admitted to is located.

***What information does the petition contain?*** The petition must contain:

1. The petitioner's name and address and their relationship to you;
2. Your name and address;
3. The names and addresses of your nearest known living relatives;
4. The name and address of any person or facility who is responsible for your care or custody and a detailed list of all the things they do for you or your benefit;
5. The name and address of your Living Will or medical power attorney representative, or appointed healthcare surrogate, and a detailed list of all the things they do for you or your benefit, (Copies of these documents should be attached to the petition if they are available);
6. The name, address and phone number of the petitioner's attorney;
7. Whether you will be able to attend the hearing and the reasons why you cannot;
8. The extent of the guardianship/conservatorship requested, the reasons why and the specific areas of protection or assistance requested;
9. The name and address of the guardian/conservator the petitioner proposes;
10. If the proposed guardian/conservator is an individual, the petition should also include his or her age, occupation, criminal history, and relationship to you;
11. The name and address of the guardian/conservator you nominated, if different from that proposed by the petitioner;
12. If the guardian/conservator you nominated is an individual, the petition should also include his or her age, occupation, criminal history, and relationship to you; The name and address of any current guardian/conservator already acting on your behalf.

The petition should also include an evaluation by a licensed physician or psychologist documenting:

1. The nature, type and extent of your incapacity, including specific cognitive and functional limitations;
2. Your mental and physical condition and, if appropriate, your educational condition, adaptive behavior and social skill;
3. If the petition is requesting appointment of a guardian, a description of the services currently being provided for your health, care, safety or therapeutic needs;
4. A recommendation of the most suitable living arrangement and, if appropriate, treatment and habilitation plans;
5. An opinion as to whether the appointment of a guardian/conservator is necessary, the reasons why and the scope of the

guardianship/conservatorship needed;

6. An opinion as to whether your attendance at the hearing would be detrimental to your health, care or safety;
7. A statement as to whether you are on any medications that may affect your actions, demeanor or participation at the hearing;
8. The evaluating physician or psychologist's signature;
9. The signatures of any other individual who performed, supervised or reviewed the examinations on which the report was based or who made substantial contributions towards the report's preparation; and
10. The date(s) of examinations on which the report is based.

***How will I know if someone else petitions the court to have a guardian/conservator appointed for me?*** If someone petitions the court to have a guardian/conservator appointed for you, you will receive a notice from the court of the date, time and place of the hearing, a copy of the petition, and a copy of the doctor's evaluation not less than fourteen days before the hearing.

***Can I go to the hearing?*** Definitely. The law specifically says that you are entitled to attend the hearing. If you are not present at the hearing the judge will require a verified statement, known as an affidavit, from your doctor stating his professional opinion that it would be harmful to your health or impossible for you to be present, or evidence that you refused to be there.

***Who will represent my interests before the court?*** If someone petitions the court to have a guardian/conservator appointed for you, the court must appoint legal counsel for you. In making this appointment, the court will consider your preferences if they are known. For example, if you have had a longstanding relationship with an attorney and the court knows about this, the court should appoint this attorney as your legal counsel if possible.

***What is a "guardian ad litem"?*** A "guardian ad litem" is the old terminology for your appointed legal counsel.

***What are the duties of my appointed legal counsel?*** Your appointed legal counsel has the following essential duties:

1. To identify whether a guardian or conservator is needed for you;
2. If so, to tailor the guardian/conservator's role to your specific needs, for example, personal supervisor, business affairs, medical consent only;
3. To ensure that the person with the greatest interest in you is appointed guardian/conservator;
4. To ensure that the bond ordered is adequate; and
5. To ensure that proper living arrangements and placement are considered.

At the minimum, your appointed legal counsel should meet with you and conduct an interview to determine your needs and wishes, conduct an investigation to determine if a guardian is needed, make a recommendation as to who would be the best guardian for you, and make sure that your living arrangements suit your needs.

***How can my appointed legal counsel carry out these duties?*** The law provides that your appointed legal counsel can perform any or all of the following in carrying out his or her duties:

1. Promptly notify you, and any caretaker, of his or her appointment;
2. Contact any caretaker, review your file and all other relevant information;
3. Maintain contact with you throughout the case and assure that you are receiving services appropriate to your needs;
4. Contact persons who may have knowledge about you;
5. Interview all possible witnesses;
6. Pursue discovery of formal and informal evidence;
7. File appropriate motions;
8. Obtain independent psychological and medical examinations as needed;
9. Advise you about the consequences of the proceeding and find out what your specific interests and desires are;
10. Subpoena witnesses to the hearing;
11. Cross-examine witnesses;
12. Review all medical reports;
13. Tell the judge what you want;
14. Produce evidence on all relevant issues;
15. Zealously represent your interests and desires, including objecting to inadmissible testimony;
16. Raise appropriate questions to all nominations for guardian and the adequacy of the bond;
17. Take all steps to limit the scope of the guardianship to your actual needs and make all arguments to limit the scope of intervention;
18. Ensure that the court considers all issues concerning your current or intended placement. Simply put, your appointed legal counsel is empowered to use any of the standard legal tools and methods to assure that your interests are protected.

***Do I have any say over who will be my guardian/conservator?*** Yes. There are several ways in which your preference will be considered.

1. If you already have written down your preference in a Durable Power of Attorney, Medical Power of Attorney or Living Will, this person shall be the first preferred nominee for guardian or conservator;
2. So long as you have capacity to do so, you may at any time nominate an individual to serve as your conservator/guardian;
3. If you have already named a surrogate decision maker in a Medical Power of Attorney or Living Will that person will be treated as your nomination for your guardian. If you have already named a power of attorney representative under a Durable Power of Attorney, that person will be treated as your nomination for your conservator.
4. Additionally, anyone who has the capacity to form a preference may nominate his or her own guardian or conservator. The nomination may be made in writing, by an oral request to the court, or may be proved by other evidence.

***You've been talking about nominees or nominations, doesn't the court have to follow my instructions if I've already expressed who I want to serve as my guardian/conservator?*** Not necessarily. The final decision as to who will serve as your guardian/conservator rests with the court. The court will appoint your nominee if it determines that he or she is eligible to act and would serve in your best interests. Who is eligible to serve as a guardian/conservator? Any adult individual can serve as a guardian/conservator so long as he or she can show that he or she has the necessary education, and the ability and background to perform the duties of guardian/conservator. The court determines if he or she is capable of providing an active and suitable program of guardianship/conservatorship. The following persons ARE NOT ELIGIBLE to serve as guardian/conservator: People employed by or affiliated with any public agency, entity or facility which is providing substantial services or financial assistance to you (this category includes nursing home employees).

***My son had some trouble with the law when he was a teenager, does this mean he cannot serve as my guardian?*** Not necessarily. Any person being considered for appointment as a guardian/conservator must provide information regarding any crime, other than traffic offenses, of which he or she was convicted. The court must then consider this information as one factor in the individual's fitness as guardian/conservator.

***Are there times when the state will become my guardian/conservator?*** The state itself is not appointed guardian/conservator. However, if there is no one else that is eligible to serve, a representative of the Adult Services Department of the West Virginia Department of Health and Human Resources may be appointed to serve as guardian. Similarly, when there is no one else equally or better qualified to serve as conservator, the sheriff of the county where the petition was filed may be appointed to serve as conservator.

***Are there any particular educational requirements to be a guardian/conservator?*** There are no specific educational requirements in order to be considered for appointment as a guardian/conservator. It is only necessary that the person being considered show that he or she is capable of performing the duties of guardianship/conservatorship. However, after the individual is appointed to serve as guardian /conservator he or she must complete educational training. This educational program is developed by the Secretary of the state Department of Health and Human Resources and may consist of written materials and/or audio- or videotapes. The only reason that a newly appointed guardian/conservator would not have to complete this training would be if the court agreed that the individual did not require training because he or she completed it in the last three years.

## **E. HOW CAN GUARDIANSHIP/CONSERVATORSHIP BE REVOKED OR CHANGED?**

Only the court can order changes in a Guardianship/Conservatorship. This includes removing or changing a Guardian/Conservator, as well as changes in the duties and responsibilities of a particular Guardian/Conservator. Any interested person, including the protected person, the Guardian/Conservator, or others, may petition the court for changes in a Guardianship/Conservatorship.

#### F. WHEN DOES GUARDIANSHIP/CONSERVATORSHIP BECOME INVALID?

There is no general time limit for a Guardianship/Conservatorship. When either the protected person or the Guardian/Conservator dies the Guardianship/Conservatorship ends. The court may appoint a new Guardian/Conservator if the Guardian/Conservator dies. The court's initial Guardianship/Conservatorship order may indicate conditions under which the Guardianship/Conservatorship would terminate, but that is unusual.

The court may also end the Guardianship/Conservatorship if it is determined, after a hearing, that the protected person no longer needs the protection of a Guardian/Conservator.



## **Section IV: Miscellaneous Considerations**

**What is a committee?** A committee is the old designation for someone who was appointed by the court to assist a protected person. Committees were replaced with guardians/conservators by the West Virginia Guardianship and Conservator Act, W. Va. Code § 44A-1-4, which became effective on June 12, 1994. All people who were appointed to serve as committees prior to that date were included under the following conditions: If the original order provided that the committee had responsibility only for the personal affairs of a mentally incompetent, mentally retarded or mentally handicapped person; then the committee is deemed to be a guardian as defined by the West Virginia Guardianship and Conservator Act. W. Va. Code § 44A-1-2(b)(1).

If the original order provided that the committee had responsibility only for the estate and financial affairs of a mentally incompetent, mentally retarded or mentally handicapped person; then the committee is deemed to be a conservator as defined by the West Virginia Guardianship and Conservator Act. W. Va. Code §44A-1-2(b)(2). If the original order does not place any limitations on the responsibilities that the committee had for a mentally incompetent, mentally retarded or mentally handicapped person; then the committee is deemed to be both a guardian and a conservator as defined by the West Virginia Guardianship and Conservator Act. W. Va. Code §44A-1-2(b)(3).

Finally, the committee retains the authority, powers, and duties specified in the original order, EXCEPT where the West Virginia Guardianship and Conservator Act enumerates the authority, powers, and duties more specifically. In that case, the committee shall have only those duties enumerated in the West Virginia Guardianship and Conservator Act. W.Va. Code § 44A-1-2(d). If the committee is unwilling or unable to serve as guardian and/or conservator, then a new guardian and/or conservator must be appointed in accordance with Article 4 of the West Virginia Guardianship and Conservator Act. W.Va. Code §44A-4-1, et seq.

### ***Effect of Divorce on Decisionmaking Devices***

**Financial Power of Attorney:** If you named your former spouse as your Financial Power of Attorney representative or successor representative, you need to decide as soon as possible, whether you still want your spouse to do this. If the divorce was a messy one or if the reason for divorce was financial matters, you may be better off choosing someone else. Or you might want someone else to serve as your representative and name your former spouse as successor representative. **IF YOU DO NOTHING, YOUR FORMER SPOUSE REMAINS YOUR CHOICE FOR REPRESENTATIVE.**

**Medical Power of Attorney:** If you named your former spouse as your Medical Power of Attorney representative or successor representative, your final divorce decree automatically revokes this designation. As soon as possible after your divorce is finalized, you need to execute another Medical Power of Attorney and

appoint a new representative or successor representative. You can appoint your former spouse, so long as your Medical Power of Attorney is executed after the date your divorce is finalized. IF YOU DO NOTHING, YOUR DESIGNATION OF YOUR FORMER SPOUSE AS MEDICAL POWER OF ATTORNEY REPRESENTATIVE OR SUCCESSOR REPRESENTATIVE IS AUTOMATICALLY REVOKED. IF YOU DO NOT EXECUTE A NEW MEDICAL POWER OF ATTORNEY, IT COULD BE NECESSARY TO APPOINT A HEALTHCARE SURROGATE IF YOU BECOME INCAPACITATED.

*Living Will:* A divorce does not have a direct impact on your Living Will. However, if you have not discussed your choices and personal values and beliefs with anyone besides your former spouse, be sure to do so now. This will decrease the likelihood that someone could challenge your directives at a later date.

This might be one of the most important decisions you make in your life, so choose wisely, not politely.

***Can my former spouse be appointed my guardian/conservator?*** Any adult individual thoth court determines to be qualified and capable of meeting your best interest may be appointed as your guardian/conservator. This includes your former spouse. If you feel strongly about this one way or another, you need to execute an advance directive, such as medical or Financial Power of Attorney, with instructions about your preference for a guardian/conservator should one become necessary.

***Can my former spouse be appointed my a health care surrogate?*** If you do not execute a Medical Power of Attorney and you are incapacitated, your doctor may appoint a health care surrogate. Your current spouse is first in priority of those to be considered. However, after you are divorced your former spouse moves down the list and will be considered at either position number six, close friends, or at position number seven, any other person. If you feel strongly about your former spouse having the authority to make healthcare decisions for you, you should execute a Medical Power of Attorney. You can designate your former spouse or name someone else to make those decisions. Keep in mind that a final divorce decree automatically revokes the designation of your former spouse as your Medical Power of Attorney representative. If you want your former spouse to serve as your representative, you need to execute a new Medical Power of Attorney after your divorce is final.

***Selecting an agent or representative*** Selecting an agent to act as medical or Financial Power of Attorney is an important decision. You are placing a sacred trust with that person. Your agent will be the one responsible for making critical medical and/or financial decisions if you become incapacitated. It is important to select someone you know well, who knows you and understands your beliefs, and in whom you trust to act in your best interests at all times.

This is not a time for politeness. Don't choose an individual merely because you think his or her feelings will be hurt if you select the person you really want. This might be one of the most important decisions you make in your life, so choose wisely, not politely. The considerations to make in selecting a Medical Power of Attorney are different from those in selecting a Financial Power of Attorney. Of course, in each case, your agent should be someone you trust completely.

*Selecting a Medical Power of Attorney* Remember that your Medical Power of Attorney may be asked to make difficult decisions regarding your health care. For this reason, you may not want to appoint a family member. If the time comes to make life and death decisions, your family may not be able to put aside their personal feelings in deference to yours. Surveys show that people are more hesitant to terminate care for a relative than for themselves. In the end, choose someone who knows you, your values, and your wishes for end-of-life care. That person may in fact be a family member. With whomever you choose, be sure to discuss the responsibilities associated with Medical Power of Attorney and how you want them to exercise those duties. These are not always easy conversations to have, but the more your representative understands about your wishes, the more effective he or she can be.

*Selecting a Durable Power of Attorney* Your Durable Power of Attorney will be responsible for your finances and property if and when you become unable to manage them yourself. Some considerations in selecting your Durable Power of Attorney include: If you appoint your spouse, consider the risk of divorce or separation. Your former spouse's power of attorney will not automatically end upon divorce. Consider whether there may be family tension as a result of appointing one child and not another.

You may appoint more than one power of attorney and assign to them different tasks.

***If you have been asked to be a representative*** You will be taking on a very important responsibility if you decide to act as a medical or Financial Power of Attorney. The principal has put great trust in you to complete a service that can be very important. For these reasons, it is important to know what you have agreed to do. The power of attorney document will outline your expected duties.

Your powers may be very broad or they may be limited in some ways. Go over the document with the principal to be sure you both understand what your responsibilities will be. Also, make a point to understand the principal's personal values and beliefs as much as possible. If you are acting as a Medical Power of Attorney, you may be called to make difficult, unforeseen decisions. These decisions will be easier for you to make if you have a sense of what the principal would decide for him or herself if given the chance. Even if you agree to be an agent, you retain the right to refuse service when the time comes. In that case, the power of attorney would go to the successor representative, or, if a successor was not named, to a health care surrogate, or a court-appointed

guardian/conservator.

*The Duties of a Guardian* State law requires mandatory education within thirty days of appointment for both guardians and conservators. Once you have completed the training, you must provide the court with an affidavit of completion of training. The guardian must consider the individual's desires and personal values, and the protected person is to participate in the decisions to the degree possible. If the desires and values are not known, the guardian is responsible for acting in the best interests of the protected person. The best interests approach to decision making requires an objective evaluation of the situation and a decision based upon a cost/benefit analysis for the individual in the present time. Prior court authorization is required prior to relocation to another state, to initiate a change in the individual's marital status, to revoke or amend a Durable Power of Attorney, or to deviate from a Living Will or Medical Power of Attorney. The guardian is to make periodic reports to the court regarding the protected person, the person's current status, as well as reporting on visits with the protected person and activities for the individual. The court may also add case specific information to be reported.

***The Conservator's Duties:*** A conservator is responsible for applying the income and principal of the protected person's estate towards their housing, care, health, education, support or therapeutic needs. In addition to the protected person's desires and values (or best interests if these are not possible to know) the conservator is to consider the size of the estate, the protected person's accustomed style of living, other available resources and the recommendation of the guardian in decision-making. A conservator is to manage the estate of the protected person in their best interests. The conservator has the ability to manage the estate without the prior authorization of the court in a number of ways. These include, but are not limited to, prudently investing funds, the purchase of land, sale of personal property, borrow against property, sell stocks, employ others such as attorneys or accountants, to manage the estate following termination of the conservatorship until delivery to successor in interest or the protected person. Real estate cannot be sold or mortgaged until the individuals entitled to notice in the initial petition are notified and are given thirty days to object. The court then must consider the objections and determine if additional bond for the conservator is required. Activities of estate planning such as making gifts, providing for those who are not legal dependants, or changing beneficiaries require prior court approval. The court, in authorizing these activities considers the decisions that the protected person would have made as well as other factors. Action of estate planning cannot occur until notice of hearing is given to the protected person, beneficiaries of the estate plan, and individuals who would succeed to the estate.

## **Section V: WV Law, Aging, & Mental Health & Capacity Resources**

### **West Virginia Senior Legal Aid, Inc.**

Providing free legal services to needy WV seniors

1.800.229.5068

[www.seniorlegalaid.org](http://www.seniorlegalaid.org)

### **The West Virginia Long-term Care Regional Ombudsman Program**

Advocating for residents of long-term care

facilities in WV

1.800.834.0598

[www.wvlegalservices.org](http://www.wvlegalservices.org)

### **WV Initiative to Improve End-of-Life Care**

Making life's end better for patients and families in WV

[www.hsc.wvu.edu/chel/wvi/](http://www.hsc.wvu.edu/chel/wvi/)

### **WV Network of Ethic Committees**

Promoting ethical decision making in patient care and quality end-of-life care

304.293.7618

[www.hsc.wvu.edu/chel/wvnec/index.htm](http://www.hsc.wvu.edu/chel/wvnec/index.htm)

### **WVU Center on Aging**

Development of excellence in service, education, research and policy

304.293.2968

[www.hsc.wvu.edu/coa](http://www.hsc.wvu.edu/coa)

### **West Virginia State Bar**

Organization of licensed lawyers in WV

304.558.2456

[www.wvbar.org](http://www.wvbar.org)

### **WV Advocates**

Advocacy for people with disabilities

1-800-950-5250

[www.wvadvocates.org](http://www.wvadvocates.org)

### **NAMI WV (Nat'l Alliance for the Mentally Ill)**

Support & advocacy for people with mental illness

1-800-598-5653

[www.nami.org](http://www.nami.org)

### **Behavioral Health Advocacy Project**

Advocacy for behavioral health consumers in WV

1.800.834.0598

[www.vacmov.org/iris/HTML/n70r4qn5.htm](http://www.vacmov.org/iris/HTML/n70r4qn5.htm)

### **WV Mental Health Consumers Association**

Promoting the rights, representation, respect and responsibility for consumers of mental health services

1-800-598-8847

[www.contac.org/WVMHCA/](http://www.contac.org/WVMHCA/)

### **Aging With Dignity**

5 Wishes online advance medical directives forms and info

1.888.5WISHES

[www.agingwithdignity.org](http://www.agingwithdignity.org)

### **The Living Will Center**

Info and articles on living will concepts

[www.rights.org/deathnet/LWC.html~](http://www.rights.org/deathnet/LWC.html~)