

Estate and Future Planning

*for Ohioans with Disabilities
and Their Families*

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Foreword

This booklet offers a brief, non-legalistic overview of estate planning options that exist at the time of this writing, and it provides a summary of other areas that might be called “future planning.” Readers should consult their own attorneys before attempting to implement information in this document, which is abbreviated and cannot begin to cover situations unique to each person. With that caution in mind, users are welcome to copy this document.

About the Author

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About ODDC

The Ohio Developmental Disabilities Council is a planning and advocacy group of 35 members appointed by the governor. ODDC receives and disseminates federal funds in the form of grant projects to create visions, influence public policy, pilot new approaches, empower individuals and families, and advocate for system change.



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Considerations

Many individuals with disabilities need to remain eligible for Medicaid and Supplemental Security Income (SSI), especially if they have significant medical needs. As a general rule, that means the individual cannot have assets greater than \$1,500 and still remain eligible. When a parent dies, care must be taken to determine what might be considered an asset to the individual, including but not limited to parents' joint bank accounts, payable on death (POD) accounts, life insurance policies, IRAs (individual retirement accounts), life estates, and trusts.

One of the most important purposes of this book is to give parents information about how—even after they die—they can continue to assist their children.

In Ohio, parents' legal obligation for support of their child generally ends when the child reaches age 18, the age of majority. There are exceptions, such as when a court extends the obligation as the result of a divorce.

Parents often continue to assist and support their children after the age of 18 whether or not they have a disability. If parents continue to provide full support for their child after he or she reaches age 18, the child will not be eligible for Medicaid and SSI. Even if they only provide supplemental items, they must do so carefully in order to retain their child's eligibility. [See Revised Code, Sections 2919.21 and 3103.03 and *Castle v. Castle*, 15 Ohio St. 3d 279 (1984.)]

If parents continue to provide full support for their child after he or she reaches age 18, the child will not be eligible for Medicaid and SSI.

If remaining eligible for public assistance benefits is important, then two principles must be kept in mind:

1. An asset does not affect eligibility unless it is accessible to the beneficiary of public assistance.
2. If an asset, such as a trust, provides basic necessities of life to an individual with a disability (that is, food, clothing, shelter, education), then the person responsible for the asset (for example, the trustee) can be forced to pay for all necessities for the person with the disability, and the person will not be eligible for Medicaid and SSI.

Not all attorneys are familiar with all of the options discussed in this booklet. In order to identify attorneys who do have some knowledge and interest about this type of estate planning, contact a local organization that serves individuals with disabilities. Examples are County Boards of Mental Retardation and Developmental Disabilities, Community Mental Health or ADAMH Boards, Arcs, and Easter Seals.



Last Will and Testament

At one time it was thought that parents had to disinherit their child with a disability in order to ensure that he or she would be eligible for various public assistance benefits. Although other options exist today, it is still not unusual for parents who are seeking a simple approach to estate planning to distribute their assets among other children with the unwritten understanding that the other children will use their increased share to provide for the child with the disability. Although this solution is simple, experiences such as death and divorce complicate it. Also, it is not enforceable.

If such an approach is taken, a clause might be added to the parents' Will that affirms their affection for the child with the disability and clarifies the parents' intent. An example of such a clause might be, "I am not leaving anything to my child X, not because of any lack of affection, but only because of his [or her] mental disability."

Parents may also consider dividing their assets evenly among their children. It may be an error to leave a greater share to the child with a disability without open communication and agreement with the other children. After all, parents don't want to risk alienating the siblings they hope will step in when they are gone.

The Will also can be used to state who the parents want to serve as guardian for the child, if that should ever become necessary. This will help ensure that someone is available to step forward to file an application for guardianship in probate court if a parent or current guardian dies, a support system disappears, or other circumstances change and make the guardianship necessary.

Because children often outlive their parents by 30–40 years, it is advisable to name guardians three deep:

- A primary;
- A first backup; and
- A second backup.

At least some of those named should be the same age or younger than the individual with the disability.

A document that might be used to more fully explain the intent of a person making a Will is called a Letter of Instruction. It may make sense to more fully express one's wishes in such a Letter of Instruction than is really proper for a legal instrument such as a Will. An increasing number of attorneys and financial planners have forms, that when filled out, would provide very helpful information to future guardians or residential providers.

It is possible for people with mental retardation to make their own Will if they:

1. Know what they own;
2. Know who are “natural objects of their bounty” (legal language meaning family and friends); and
3. Decide to whom they want to leave their assets and possessions.



Trusts: General Considerations

Trusts are flexible legal documents by which one party leaves assets to another party (a trustee) to be used for the benefit of another person, charity, and so on. The trust instrument gives specific instructions as to how to pay out the assets. Trusts are not only for the wealthy. They represent a way to withhold assets from someone who may not be old enough, have enough experience, or have the ability to make wise decisions.

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There are several types of trusts, which fall into two broad categories: Testamentary Trusts and Living Trusts.

Testamentary Trusts are created in a person's Last Will and Testament, often from the proceeds of the deceased person's estate. Living Trusts are more of a contractual arrangement, possibly with a bank or professional person as the trustee, or possibly with a family member other than the beneficiary as trustee. Living Trusts are sometimes promoted as a means to avoid probate.

However, in some situations it may be wise to have the distribution of the estate supervised by a probate court.

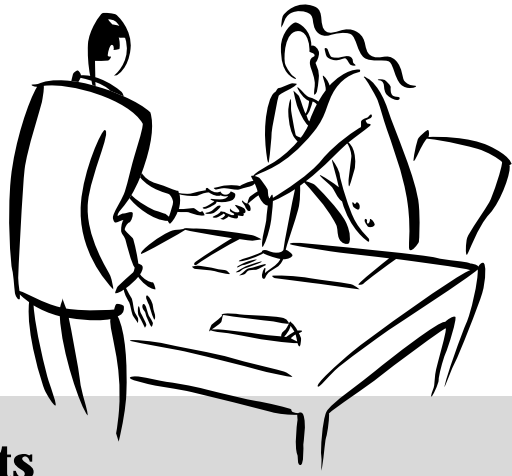
Selecting a trustee can present its own problems. For instance, trust departments of many banks in larger cities will not act as trustee for a trust with a balance of less than \$100,000 or even \$200,000. On the other hand, if a family member is going to be asked to serve as trustee, that person should have skill in handling financial matters. It may also make sense for the trustee to be someone other than the person's guardian. In some of the special arrangements set forth below, a trustee has already been selected. However, an advisor to the trust also may be needed.

Finding a qualified attorney with whom to explore options is probably more important than the actual choice of trust. A knowledgeable attorney will help clients accomplish their purpose with the trust, without affecting the beneficiary's eligibility for Medicaid, if that is the clients' wish.

Remember that the purpose of a trust for a person with a disability is not to hide assets so he or she can be eligible for Medicaid. The trust is often a means to continue providing "little extras" for the person with a disability and to make his or her life more enjoyable—to continue doing what parents did while they were alive.

If the purpose of the trust is to pay for supplemental items or luxuries only, it is worth remembering that it may not take a great deal of money to accomplish that purpose.

Several different trust options are now available that allow providing for people with disabilities without affecting their eligibility for Medicaid. A brief summary of each appears below.



Support Trusts

Before talking about trusts in which it is important to retain Medicaid eligibility, let's briefly consider a trust where the intent is to support the beneficiary as long as there are assets left in the trust. For example, if a mother has significant assets that she wants to use for support and care of her son with a disability, she may wish to create a Support Trust.

She also should consider creating one of the types of trusts mentioned below to pay for supplemental items to improve her son's enjoyment of life. Then, when the assets in the Support Trust are gone, the other trust will continue to provide extras in her son's life over and above what government will pay for—just as the mother did during her lifetime.

Discretionary Trusts

One of the most common estate planning tools for families with children with disabilities is the Discretionary Trust or the supplemental needs trust. With this sort of trust, the trustee is given "discretion" as to when, how much, and for whom the assets are distributed. How

useful this trust is depends on laws and court decisions of each state. Although both state law and court decisions establish policy in a general way, it is the Medicaid rule in effect at the time of application for Medicaid that will determine if the trust makes someone ineligible for Medicaid. The importance of the Medicaid Rule in effect is made even clearer in the next section.

Since 1968, the State of Ohio has been able to invade trusts or to declare a person ineligible for Medicaid if he or she is the beneficiary of a trust containing words like “for the benefit, support, education, maintenance and welfare” of the individual with the disability. A court could order the trustee of such a trust to pay support based on this enforceable standard. [See *Kretzer v. Bureau of Support*, 16 Ohio St. 2d147.] It is easy to determine the cost of items such as food, clothing, and shelter.

In 1996, use of a Discretionary Trust for a person with a disability again came before the Ohio Supreme Court. The court upheld Medicaid eligibility because the trust was not accessible to the beneficiary. [See *Young v. Department of Human Services*, 76 Ohio St. 3d 547.]

As a result of *Kretzer* and *Young*, the following drafting techniques are often recommended:

1. Avoid an enforceable standard and give complete discretion to the trustee;
2. Include a termination, “poison pill” or “booby trap” clause that causes the trust to “blow up” and trust assets to be distributed outright to alternative beneficiaries if the trust becomes subject to invasion or causes a loss of benefits;
3. Include a spendthrift clause clarifying that the beneficiary does not own the assets of the trust, cannot require the trustee to make distributions, and that creditors cannot reach the assets (that is, the bene-

ficiary does not have access to the assets);

4. Require that distributions be made only for supplemental items over and above necessities of life; and
5. List more than one possible beneficiary

The primary advantage of a Discretionary Trust is that there is no requirement that a portion of the trust be turned over to the state upon death of the beneficiary. It must be carefully drafted, or its purpose may be defeated—once again pointing out the need of seeking a qualified attorney.

Discretionary Trusts Since November 2002

In November 2002, the Ohio Department of Job and Family Services (ODJFS is the successor agency to the Ohio Department of Human Services) enacted a new rule on Medicaid Trusts (O.A. C. 5101:1-39-27.1). In March 2004, that rule was enacted into law as Ohio Revised Code Section 5111.151. The most striking provisions of that rule/law are the following:

- The trust is considered to be an available asset—and would make the beneficiary ineligible for Medicaid—if the trustee is permitted by the terms of the trust to pay for “medical care, care, comfort, maintenance, health, welfare, general well-being, or a combination of these purposes” for the beneficiary. Note the similarity to the approach taken with respect to such necessities in the 1968 Ohio Supreme Court decision in *Kreitzer*. [See subsection (G) (2) of the new Medicaid Trust Law.]
- The trust is not considered to be an available asset if it contains a “clear statement” that requires (that is, no discretion) the trustee to use the trust for a purpose other than medical care, care, comfort, and so on, as above (that is, for supplemental items, luxuries, and so on). [See subsection (G) (4) (b).]

- Most importantly, the trust is not considered to be an available resource if it contains a “clear statement” that requires (that is, no discretion) the trustee to terminate the trust if it is counted as an available resource. This section appears to give the grantor the ability to use the trust to pay for necessities as long as a “poison pill” clause is included in the trust. [See subsection (G) (4) (d).]

Thus, a Discretionary Trust may now be set up for a person with a disability in such a way that the trustee can pay for necessities, without having a negative impact on the beneficiary’s eligibility for Medicaid. The state has no incentive to go after such a trust when the only result will be that the trust will terminate and assets will be distributed to people other than the beneficiary. Careful drafting, including following the rule on Medicaid Trusts, remains important.

The real impact of Discretionary Trusts that are used to pay for necessities may not be on Medicaid eligibility, but on eligibility for Supplemental Security Income (SSI). Parents, as well as attorneys and financial planners advising them, will have to consider if it is worth setting up a trust that might reduce or eliminate SSI benefits, no matter which type of trust is used.

Supplemental Services Trusts

As of April 1993, Ohio authorized creation of Supplemental Services Trusts to benefit people who are being served or who are eligible to be served either by state or local Mental Health or Mental Retardation and Developmental Disability (MR/DD) systems. The primary advantage of a Supplemental Services Trust is that it provides a statutory safe harbor (safe from invasion by the state if the trust meets certain conditions set forth in the

law). [See O.R.C. Section 1339.51, O.A.C. MR/DD Sections 5123: 2-18-01, and O.A.C. Mental Health Section 5122-22-01.]

To meet requirements of the law, the trust cannot be created with more than \$220,000 as of 2005. The limit on the trust amount increases by \$2,000 each year. An earlier version of the law that limited Supplemental Services Trusts to Testamentary Trusts has been eliminated.

Assets used to create this trust must come from someone without a legal obligation of support and cannot belong to the beneficiary. Expenditures from the trust are limited to those things defined as “supplemental services,” that is, non-necessities such as recreational items, vacations, or items for which Medicaid or other third-party payers have denied payment. Expenditures may also include an amount up to \$4,500 for burial, but Social Security may question that expense.

The primary disadvantage of the Supplemental Services Trust is that at least 50 percent of whatever remains in the trust at the time of the beneficiary’s death goes to the State of Ohio. That amount must be deposited into a fund in the State Treasury to be used for the benefit of others who do not have such trust arrangements. People considering this type of trust should remember that it can be used for much smaller amounts (for example, \$25,000); and that by the time the 50 percent of the remainder goes to the state, the trust will have accomplished its primary purpose during the lifetime of the beneficiary.

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Medicaid Payback Trusts

Federal legislation passed in 1993 allows another type of trust called a Medicaid Payback Trust. The name comes from the fact that this type of trust must “pay back” Medicaid expenditures made on behalf of the beneficiary from whatever is left in the trust at the death of the beneficiary—even if repayment claims the entire amount left in the trust. In other words, the government allows us to set aside money now for people with disabilities if we agree to pay back Medicaid later.

There are two types of Medicaid Payback trusts:

- Special Needs Trust, and
- Pooled Trust.

Assets in both types of Medicaid Payback Trusts can be used only for supplemental needs or “supplemental services.” [See 42 USC 1396p(d)(4)(A) & (C) and O.R.C. Section 5111.151 (F) (1) & (3).]

Special Needs Trust

The Special Needs Trust (terminology from the ODJFS rule cited above) is the “regular” Medicaid Payback Trust that may appear to be much like a Discretionary Trust, except it must comply with federal law that created it and the regulations of the Ohio Department of Job and Family Services because it is another statutory safe harbor. This type of trust can be created for anyone with a disability by a parent, grandparent, legal guardian, or a court. The trust generally must be funded before the beneficiary reaches age 65.

Although a Special Needs Trust will normally be created with assets that belong to the individual with the disability, funds from other parties can be added. This type of trust may have its greatest use in situations where the individual with a disability sustains an injury (or

perhaps the disability was caused by an accident) and then recovers funds as a result of a lawsuit or insurance settlement. It may also be useful for substantial back payments from Social Security. Special Needs Trusts will normally be created as Living Trusts.

Pooled Trusts

Pooled Trusts are called “pooled” because the trust funds for several beneficiaries are pooled for purposes of investment. However, a separate account must be maintained for each beneficiary.

Pooled Medicaid Payback Trusts must be established and managed by nonprofit corporations. That does not mean that any nonprofit corporation can establish a Pooled Trust, because there are special requirements in Ohio law for a person or agency that holds itself out as doing business as a “trustee.” In Ohio, the trustee normally has to be a bank, savings and loan, or a charitable foundation. Otherwise the requirements for Pooled Trusts are very similar to those for Special Needs Trusts—specifically that funds remaining in the beneficiary’s account must be used to repay government for past Medicaid expenditures, and that expenditures must be limited to supplemental services.

Differences between Pooled and Special Needs Trusts include these:

1. A person with a disability may establish a Pooled Trust, in addition to the parent, grandparent, guardian, or the court.
2. The person creating a Pooled Trust can leave trust assets in the trust for use by other beneficiaries or to cover overhead expenses of the Pooled Trust instead of paying back Medicaid.

Pooled Trust arrangements are common in several other states. Ohio has two Pooled Trust arrangements:

1. The Community Fund Management Foundation (CFMF), was created by the Cleveland Federation for Community Planning and the Cuyahoga County Board of MR/DD. CFMF administers both a Pooled Trust and a Master Trust. (The Master Trust is a carefully drafted discretionary trust.)

Fifth Third Bank of Northeast Ohio serves as the trustee. Initial investments can be as low as \$5,000. The Community Fund Management Foundation accepts clients from anywhere in Ohio. Anyone with any type of permanent disability may be a beneficiary under the trust. [Please contact CFMF directly at (216) 736-4540 for more information and their fee structure.]

The latest Pooled Trust offering of CFMF is a new Roll-In Trust that allows individuals with a disability to send in small amounts each month until enough accumulates to activate a trust. This is the only option that I am aware of that allows people with disabilities to set aside some money for their retirement. Amounts remaining in the trust at the time of their death could also be used for burial purposes. This trust has specific terms and conditions. Please contact CFMF for specific information.

2. The Disability Foundation works closely with the Dayton Foundation and initially served people primarily in the Miami Valley area (Montgomery, Greene, and Miami Counties). The Disability Foundation uses annuities to create guaranteed income for supplemental services for the beneficiary. In addition, the creator of the trust may be able to deduct a portion as a charitable deduction. The minimum deposit is also \$5,000. Please call (937) 225-9940 for further information.

Trust Comparison Chart

If it is important that a person with a disability retains eligibility for Medicaid and SSI, there are several options other than disinheritance that might be considered, all of them trusts. Trust assets cannot be accessible to the person with a disability and must be used only to purchase supplemental items. The summary chart that follows should aid comparison.

	Discretionary Trust (private)
Set up by	Not beneficiary
Balance to	Anyone
Assets from	Anyone without duty of support
Size Limits	No limit
Type	Living (usual)
Purpose	See Medicaid Trust Rule
Trustee	Free choice
Privacy	Private
Risk	Drafting critical



Supplemental Services (state)	Medicaid Payback (federal)
Not beneficiary	Parent, grandparent, guardian, court (Beneficiary if Pooled)
Forfeit 50%	Forfeit 0-100% (Medicaid support)
Anyone without duty of support	Beneficiary and others
\$220,000 in 2005 + \$2,000 each year	No limit
Testamentary or Living	Living (usual)
Supplemental needs	See Medicaid Trust Rule
Free choice	Free choice (2 options if Pooled)
Public record or Private	Private
Minimal	Minimal



Leaving the Family Home

An individual can own a home and be eligible to receive public assistance benefits. The primary disadvantage of home ownership by someone with a mental disability is that someone else might attempt to move into the house or to gain ownership of the home. Therefore, a mechanism needs to be in place to prevent financial exploitation by others. Also, if the individual has to move out of the home for medical or other reasons, the home might need to be sold. As a result, the individual might lose his or her eligibility for Medicaid and SSI.

The primary disadvantage of home ownership by someone with a mental disability is that someone else might attempt to move into the house or to gain ownership of the home.

Another disadvantage of home ownership is that other resources may be needed for the individual to live in the home. It may be necessary to provide funds beyond those left in the trust—that is, if the trust funds can only be used for supplemental needs or services—for purposes such as supervision in the home, maintenance of the home, utilities, cleaning, and cooking. Sometimes other individuals with disabilities may move into the house to share living expenses. County Board funds may be available to support the home. Creative solutions may be needed, including allowing someone who works for a disability program live in the home rent-free in return for providing supervision.

Although it is possible to leave a home in trust for an individual with a disability without affecting eligibility for Medicaid, those arrangements are often complex and require careful planning. For example, it might be necessary for the individual with a disability to pay rent to the trust so that the value of being able to live in the home is not attributed to him or her as income.

A person might also be given the right to live in a home during his or her life (that is, a life estate in the home). But even a restricted life estate could affect a person's eligibility, especially for SSI, since the monthly rental value of living in the home might be seen as income.

It might also be possible for a family to leave a home to a nonprofit housing corporation associated with a County Board of MR/DD, a residential provider, or to other siblings with the understanding that the individual with the disability will be able to continue to live there.



Guardianship

A discussion of futures planning would not be complete without considering guardianship. The natural guardianship of parents ends when their children reach the age of 18 in Ohio. Many parents struggle to decide if they need to remain guardians after that. If they decide to retain guardianship, they must complete an application for guardianship and submit it to their local probate court. In some counties it is necessary to have an attorney file for guardianship.

Two prerequisites must exist before a guardianship becomes needed:

1. The individual must be incompetent in at least one important area of his or her life. That decision is often easy to make as a result of real-life experiences; and
2. There must be a present need for the guardianship. A person may have significant deficits in his or her life, but the support network may be so strong that guardianship is not necessary. The expression, "If it ain't broke, don't fix it" may be applicable.

There are several types of guardianship.

- Full or Plenary Guardianship gives the guardian authority over all aspects of a person's life.
- Guardianship of the Estate involves only financial matters.
- Guardianship of the Person involves all matters other than financial.
- Emergency Guardianship allows a court to intervene to appoint someone on short notice. Probate courts are reluctant to appoint emergency guardians.
- Interim Guardianship allows a court to appoint someone on a temporary, interim basis because the former guardian is no longer available.
- Limited Guardianship allows a probate court to appoint someone as guardian only over the portion of a person's life in which he or she is both incompetent and has a need. Thus, you might have a Limited Guardian for medical purposes only (that is, to provide consent for medical procedures), or for placement purposes only, or for the limited purpose of approving behavior plans and/or psychotropic medications. This is the least restrictive form of guardianship. [See O.R.C. Section 2111.02.]

It may not be necessary for a person to have either Full or Plenary Guardianship, or to be Guardian of the Ward's Estate. If the only significant income a person receives is SSI, a Representative Payee may be able to handle all relevant financial matters. A Guardian of the Person, or a Limited Guardian, could handle other matters.

Guardians are not required to live in the same state to be appointed as guardian for minor children pursuant to a parent's will. However, in order for a person to serve

as guardian for an adult, he or she must live in the same state. A reason for that requirement is that it is difficult for a guardian to perform if the guardian does not have frequent face-to-face contact with his or her ward (the subject of the guardianship). [See O.R.C. Section 2109.21(C).]

In order for a person to serve as guardian for an adult, he or she must live in the same state.

Ohio law also provides personal immunity for a person who becomes guardian while he or she is acting as guardian. To have protection under this section of the law, it is necessary only that the person make it clear that he or she is acting in official capacity as guardian. [See O.R.C. 2111.151.]

The Ohio Department of MR/DD also provides the services of an agency that can act as guardian for those who need it and have no one else available. For more information, contact Advocacy and Protective Services, Inc., (APSI) at (800) 282-9363.

There are alternatives to guardianship, especially for financial purposes. As mentioned above, if a person's only assets are payments from Social Security, then a Representative Payeeship may be the simple solution. Another alternative is one of the trusts discussed earlier, or a Durable Power of Attorney for financial purposes. See the later discussion on powers of attorney (POA), and note that the makers must be competent when they give/execute the POA."

Finally, for those who are competent mentally but who have a physical disability, Conservatorship may be an option. An individual selects his own Conservator who is appointed by the probate court. An individual can terminate the Conservatorship at any time.



Advanced Directives

A few years ago, Ohio passed legislation authorizing use of advanced directives (that is Living Wills and Durable Powers of Attorney for Health Care). Since passage of the legislation, the Ohio State Bar Association and the Ohio State Medical Association jointly prepared standard forms for both types of directives. These forms are the ones most commonly used in Ohio. [See O.R.C. Chapters 1337 and 2133.]

Federal law requires health care facilities to provide certain information to all people prior to admission, including the opportunity to sign advanced directives. The health care facility cannot refuse to admit someone on the basis of whether they complete an advanced directive. This is simply a notice provision. ICF/MRs (intermediate care facilities for people with mental retardation) are not required to give such notice.

Powers of Attorney for Health Care

To understand Powers of Attorney for Health Care, it is important to understand Powers of Attorney generally. A Power of Attorney is a legal document by which one person gives another (that is, the Attorney in Fact, who need not be a lawyer) power to do certain legal acts in his or her absence. People must be competent when executing a Power of Attorney, and they cannot give someone else more legal authority than they themselves have. For example, a daughter with profound mental retardation cannot give her mother more authority than she herself could exercise.

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Examples of Powers of Attorney include the power to renew one's automobile registration, to sell a specific piece of property, and so on. Nondurable powers of attorney expire when the maker becomes incompetent. A "Durable" Power of Attorney (one that states an intent to make it durable) has the added feature that it will continue to be valid even if the maker of the power becomes incompetent.

All Powers of Attorney expire when the maker dies.

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A Power of Attorney for Health Care allows a person to make medical decisions on another person's behalf if something happens that restricts the person from making decisions on his or her own.

The Power of Attorney may provide guidelines as to how those decisions are to be made. The Attorney in Fact is to make decisions as the creator of the Power would have. At the very least, some discussions should take place as to the creator's wishes.

Living Wills

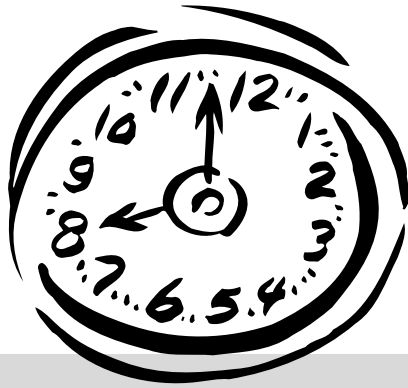
A Living Will is a legal document in which a person states what medical care he or she would like to receive or not receive in given situations. Probably the most difficult decision to make in completing this document is whether a person wants nutrition and hydration (that is, food and water by artificial means such as feeding tubes and IVs) in the event he or she becomes permanently unconscious.

Ohio law requires the maker of these documents to be "of sound mind" at the time the documents are executed. It is recommended that, if there is some doubt about the competency of the maker, the maker be required to summarize what he or she is signing in his or her own words in the presence of witnesses. It is this writer's opinion that it takes a much greater level of competence to understand the complexities of a Living Will as opposed to the comparatively minimal level of competence required to sign a Durable Power of Attorney for Health Care.

Just like a Will, a Living Will and Durable Power of Attorney require that the person himself or herself signs the document. No one has the authority to sign advanced directives for someone else, not even a parent, a court-appointed legal guardian, or the court itself.

No one has the authority to sign advanced directives for someone else, not even a parent, a court-appointed legal guardian, or the court itself.

The General Assembly has now recognized an Advanced Directive for Mental Health Care. This new Advance Directive allows people to indicate what medications or treatments they consent to, which physicians they want to see, and whom they want to act on their behalf if certain conditions occur. It would seem wise for people with mental illness to use such a document to state how they want to be treated, based on past personal experience. A standard form is available on the websites of the Ohio State Bar Association, Ohio Legal Rights Services, and Ohio Advocates for Mental Health. [See O.R.C. Sections 2135.01 through 2135.14, as well as references in Sections 1337.11 and 1337.14.]



Do Not Resuscitate Orders (DNRs) or No Codes

It is common for parents or next of kin to make medical decisions for their family member in certain situations, such as when the person is comatose in the hospital after a serious accident or stroke. One such decision is a Do Not Resuscitate Order, or No Code, generally understood to mean a physician's order for the non-application of cardiopulmonary resuscitation (CPR). In the normal course of events, a DNR is authorized by the individual or his or her guardian, and is signed by a physician. A DNR is not a request not to treat, although in some cases the treatment provided may be limited to comfort care. Medical personnel are still required to provide care and treatment according to acceptable medical standards as long as it does not conflict with the DNR.

Ohio law authorizes a guardian of the person to approve health care and treatment. Ohio law also specifically authorizes the guardian or next of kin in a descending order of priority to withhold or withdraw life-sustaining treatment for an individual who does not have a Living Will, if the individual has a terminal condition or has been in a permanently unconscious state and unable to make an informed decision for at least 12 months. Ohio

law does not specifically allow physicians to make those decisions. [See O.R.C. Sections 2111.13(C) and 2133.08.]

A DNR becomes much more appropriate when the individual is in the final stages of a terminal condition, or when to treat aggressively would be simply prolonging the process of dying rather than providing a realistic hope of recovery. A DNR may also become appropriate when the person is suffering from a very serious medical condition that makes the application of CPR painfully invasive, ineffective, or both.

It is not appropriate for a nursing facility to require that every resident have a DNR on his or her medical chart. Nor does it seem appropriate for a guardian to authorize a DNR when the ward is in relatively good health or has a long life expectancy.

Ohio law specifically recognizes two types of DNRs:

1. DNR Comfort Care. The trigger for DNR Comfort Care is the completion of a DNR Order or a Living Will with that provision in it. In other words, only comfort care will be provided once the document has been signed.
2. DNR Comfort Care Arrest. The trigger for DNR Comfort Care Arrest is a cardiac or respiratory arrest. In other words, all normal care and treatment is provided up until cardiac/respiratory arrest occurs.

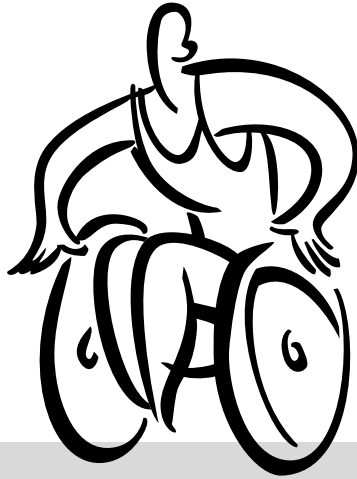
Ohio law provides immunity for health care workers (including physicians and emergency squad personnel) who follow the patient's directions, but they are still held to a reasonable standard of care. Standard forms of identification can be used including bracelets, necklaces, and wallet cards. [See O.R.C. Chapter 2133 and O.A.C. Sections 3701-62-01 *et seq.* See also the Department of Health's web site at www.odh.state.oh.us.]

PLAN in Ohio

Many parents, especially those whose only child has a disability, look for someone to monitor and support their children after they are gone. The Planned Lifetime Assistance Network, also known as PLAN, provides such services. Originally established on the East Coast, many different PLAN organizations have been created around the country. There are five in Ohio. The oldest and most established is in Cleveland and serves more than 110 clients, many of them with mental illness.

PLAN of Northeast Ohio provides case management-type services including therapeutic recreation and counseling. There are also PLAN units at various stages of development in Southwest Ohio, Northwest Ohio, Southeast Ohio, and Central Ohio. Although each PLAN organization looks a little different, they price out services over the projected lives of their clients. Parents can “buy” those services by using one of the estate planning mechanisms discussed above. For further information about PLAN in your area, contact your local public and private MR/DD or mental health agencies.

Although each PLAN organization looks a little different, they price out services over the projected lives of their clients.



OSBA Disability Law Committee

The Disability Law Committee of the State Bar Association tries to stay abreast of the most recent developments in disability law in Ohio. The committee meets three times a year—two times in Columbus, and once in conjunction with the State Bar Association's Annual Convention, wherever in the state it is held. The committee is in the process of developing a handbook with sample forms for prospective attorneys. Attorneys interested in joining this committee should contact the Ohio State Bar Association.

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