

WHO WILL MAKE MEDICAL AND FINANCIAL DECISIONS

Planning to Protect LGBTQ Families, Q Center Presentation

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America's older population is growing larger and more diverse. The estimated 3.5 to 4 million LGBTQ people age 65 or older in the United States often are not visible to the people and institutions that administer the health care, government benefits, financial, and legal systems. Oregon now gives the estimated 45% of gay men and 60% of lesbians who are in couples the option of registering as domestic partners but registration may not be recognized outside of the state. A number of issues need to be addressed at national and state policy levels.

On a personal level, advance planning that includes health care decisions, financial decisions, and estate planning can help you maintain more control over your care, your finances, your quality of life, and the people who will be responsible for carrying out your wishes. This outline contains general information only and is not legal advice about your individual situation.

I HEALTH CARE DECISIONS IN OREGON

A. **Capable Adult.** A capable adult has the legal right to make his or her own health care decisions. Those decisions may include consenting to treatment, refusing treatment, withholding or withdrawing consent to treatment, choosing health care providers, admission to or discharge from a hospital or care facility, and getting (and giving) access to medical records.

B. **Incapable Adult.** In the context of health care, "incapable" means that the treating physician has determined that the person is not able to make and communicate health care decisions. A person may be incapable for a short period (for example, temporarily unconscious following an accident) or on a more permanent basis (for example, due to a series of strokes, advanced Alzheimer's Disease, or severe developmental disabilities).

II SURROGATE DECISION MAKERS FOR HEALTH CARE

A. **Oregon's Advance Directive for Health Care.** The Advance Directive for Health Care form allows a capable adult to name his or her domestic partner, another trusted relative, or a friend as the health care representative to make decisions about health care if he or she becomes incapable. The health care representative named in the advance directive has legal priority to make those decisions over anyone else, including a court-appointed guardian. The advance directive can be used to inform doctors and other providers about the types of care that the person does or does not want, including choices about end-of-life decisions such as tube feeding. Advance directive forms are available at most hospitals and from many doctors. Oregon Health Decisions, (503) 692-0894, www.oregonhealthdecisions.org, publishes a helpful booklet that includes the form and instructions for completing it. There is a separate form, the Declaration for Mental Health Treatment, that allows a person who may need mental health treatment in the future to give instructions and state his or her preferences about that treatment.

B. **Guardianship.** A court can appoint a guardian to make health care decisions and other personal decisions for an adult who is incapacitated. An incapacitated person is defined as someone whose physical or mental condition makes him or her unable to provide for the health

care, food, shelter, clothing, personal hygiene and other care needed in order to avoid serious physical injury or illness. In deciding who should be the guardian, the court takes into account the wishes of the incapacitated person, the relationship to the proposed guardian by blood or marriage, and the specific circumstances of the case. A document that was signed by the person before becoming incapacitated can provide evidence of the person's preferences. The guardian is required to file an annual report form with the court.

C. End-of-Life Treatment Decisions. The Oregon statutes provide a default priority list to be followed if a decision regarding life-sustaining treatment has to be made for an incapable person who does not have a health care representative appointed under an advance directive for health care or a guardian with authority to make that decision. The person's spouse or registered domestic partner has first priority, followed by a majority of the adult children who can be located, either parent, a majority of the adult siblings, any adult relative or friend, and the attending physician. The people on the priority list are not authorized to make other types of health decisions. Some people have executed Living Wills or Directives to Physicians stating that they do not want life-sustaining treatment under certain conditions. A person who has a terminal illness or other serious medical condition may want to discuss completing a POLST (Physician Orders for Life-Sustaining Treatment) form with his or her doctor and adding the completed form to the Oregon POLST Registry.

D. Informal Surrogates. When no one has legal authority to make health care decisions for an incapable person, doctors and other providers often turn to the closest relatives who are available. This informal approach has caused problems for some LGBTQ people.

E. Disposition of Remains. Unless the decedent has a pre-paid funeral or burial plan or signed an Appointment of Person to Make Decisions about Disposition of Remains form, the decedent's spouse or registered domestic partner has legal priority to make decisions about the disposition of the person's remains, followed by the adult children, the parents, and the siblings.

III FINANCIAL DECISIONS IN OREGON

A. Financially Capable Adult. A financially capable adult has the legal right to manage and to make decisions about his or her financial resources, including real property, personal property, business interests, investments, government benefits, and income.

B. Financially Incapable Adult. Determining whether a person has the capacity needed to understand a particular transaction or to sign a specific document is specific to that transaction or document. For the purposes of conservatorship, a person is considered financially incapable if he or she cannot take the actions needed to obtain, administer, and dispose of his or her financial resources effectively. A person who has a conservator is not automatically incompetent and may have the capacity needed to make a will or to change the beneficiaries of a life insurance policy.

IV SURROGATE DECISION MAKERS FOR FINANCES

A. Durable Financial Power of Attorney. A power of attorney is a document in which a person (called the principal) names his or her domestic partner, another trusted relative, or a friend as the agent or attorney-in-fact and authorizes the agent to make certain decisions about money and property. Financial institutions have their own forms that they prefer to have signed when the owner of an account is authorizing another person to have access to that account. The

authority given to the agent is described in the power of attorney. The agent shares that authority with the principal. In Oregon, most financial powers of attorney are effective when they are signed. They are durable, which means that they remain in effect if the principal becomes financially incapable.

B. Revocable Living Trust. A revocable living trust is a written agreement in which the person creating the trust (called the settlor or grantor or trustor) appoints a person or a bank or a trust company as the trustee. The trustee agrees to follow the instructions in the trust agreement and to be responsible for managing and distributing the money and property that is transferred into the trust. The most common reason for creating a revocable living trust is to avoid the court-administered probate process after the settlor's death. A trust also provides a way for a successor trustee to manage money and property if the settlor becomes financially incapable.

C. Conservatorship. A court can appoint a conservator to manage money and property for an adult who is financially incapable and who has assets in need of protection. In deciding who should be the conservator, the court takes into account the wishes of the financially incapable person, the relationship to the proposed conservator by blood or marriage, and the specific circumstances of the case. The conservator is required to post a surety bond and file detailed annual accountings with the court.

D. Representative Payee. The Social Security Administration (SSA) has its own system for appointing a representative payee to manage the retirement benefits, disability benefits, and/or Supplemental Security Income (SSI) benefits for a recipient who is not able to manage his or her own benefits. The representative payee is required to complete an annual report for SSA. SSA does not recognize the authority of an agent named in a power of attorney or of a conservator or a guardian appointed by a state court.

E. Joint Accounts. Creating a joint account makes all of the people named on the account joint owners of the account, with the right of survivorship. Any owner can manage the funds and can withdraw funds from the account. A creditor with a judgment against one of the owners of a joint account can garnish all of the money in the account.

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