CONTROLLING THE FUTURE:
PLANNING DOCUMENTS FOR HEALTH CARE, FINANCES, AND ESTATES
Gay and Grey Expo
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Penny L. Davis, The Elder Law Firm
111 SW Fifth Avenue, Suite 1890
Portland, Oregon 97204
503-452-5050

Advance planning which includes health care decision making, financial decision making, and estate planning can help you control your future. Advance planning can affect the care you receive, your quality of life, what happens to your money and property, and whether decisions will be made by people who know you and who will respect your wishes.

Many LGBTQ elders have families of choice which do not fit state laws based on families related by blood or through marriage. Quite a few live with a partner or - since same sex marriages are now recognized - a spouse. But LGBTQ elders are more likely than heterosexual elders to be single and less likely to have children. Those differences can affect what happens as we age. Around 80% of long term care is provided informally by spouses, adult children, and other relatives.

I MAKING HEALTH CARE DECISIONS IN OREGON

A. Making Health Care Decisions for Yourself.

1. A capable adult has the legal right to make health care decisions, including consenting to treatment, refusing treatment, withholding or withdrawing consent to treatment, choosing health care providers, authorizing admission to or discharge from a hospital or care facility, and getting access to medical records. A capable adult can sign documents to allow other people to have access to confidential medical information; to name a health care representative to make health care decisions if that becomes necessary; and to give instructions about the care and treatment that the person wants or does not want. Those documents are described below.

2. In the context of health care, "incapable" means that the treating physician or responsible health care provider 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 after an accident or during surgery) or on a more permanent basis (for example, due to a series of strokes, advanced Alzheimer's Disease, or severe developmental disabilities).

B. Authorizing Disclosure of Health Care Information

1. The federal Health Insurance Portability and Accountability Act (HIPAA) regulations govern how health care providers, health plans, insurers, and billing services use, disclose, share, and protect confidential health information of health care consumers. The regulations generally prohibit health care providers, etc., from disclosing or sharing information about you without your consent. There are some exceptions.

2. You can sign an authorization form giving your health care providers permission to share information about your condition and treatment to your spouse or domestic partner or other

person who is helping you. Health plans, hospitals, clinics, and other health care providers have authorization forms you can use. The forms may be available online.

a. You can give health care providers specific written instructions not to disclose information about you to particular people if that is a concern.

b. If you want to have someone with you during an appointment, you can give the health care provider verbal permission to share information during that appointment.

C. Giving Health Care Instructions

1. You can give instructions about types of treatment you do want, types of treatment you do not want, specific directions about treatment you would or would not want in end of life situations, and your other wishes about your care in an Oregon advance directive for health care, described on page 3. Some people sign a separate document (for example, a Living Will) with instructions about life-sustaining treatment.

2. If you are seriously ill or "old-old" (over age 85) and frail, your doctor may suggest completing a bright pink POLST form. The POLST (Physician Orders for Life-Sustaining Treatment) contains medical orders about treatments (for example, CPR) you do or do not want to receive in an emergency situation. After the doctor or practitioner signs the orders, the POLST will be added to the Oregon POLST Registry automatically and be accessible to EMTs and other authorized health care providers. The medical orders are limited to specific situations. A POLST does not take the place of an advance directive for health care.

II SURROGATE HEALTH CARE DECISION MAKERS

A. Who Makes Health Care Decisions if You Are Incapable

1. If you sign an advance directive for health care and then become incapable, the health care representative named in the advance directive has the legal authority to make health care decisions for you while you are incapable, even if a court later appoints a guardian.

2. If there is no advance directive, a family member or other concerned person can file a petition asking the court to appoint a guardian to make health care decisions for you.

3. Two state laws give other people authority to make health care decisions for you in specific situations:

a. There is a list of people who can make decisions about life-sustaining treatment for an incapable adult in an end of life situation when there is no advance directive naming a health care representative and no guardian. Oregon Revised Statutes (ORS) 127.635 gives first priority to the person's spouse or registered domestic partner, 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.

b. ORS 127.760 allows a hospital to appoint a specially trained health care provider to give consent to medically necessary health care services under certain circumstances if an incapable adult is admitted to the hospital and the hospital is unable to locate a health care representative named in an advance directive or a guardian or relevant health care instructions.

4. When no one has legal authority to make health care decisions for an incapable person, doctors, hospitals, and other providers often turn to the closest available relatives for decisions. This informal approach and the state laws cited above can create problems if the default decision

maker is someone who is not aware of or does not respect the person's sexual identity, gender identity, and important relationships.

B. Oregon's Advance Directive for Health Care.

1. There is a required form for an Advance Directive for Health Care in Oregon. It is in Oregon Revised Statutes (ORS) 127.531. The form has two main parts. One part allows a capable adult (called the principal) to name a trusted friend or relative as the health care representative to make health care decisions if the principal becomes incapable. The principal can name a second person as the alternate health care representative. The principal can complete the other part to give instructions about the types of care that he or she wants or does not want, including choices about end-of-life decisions such as tube feeding. The form has specific instructions for signing. Two witnesses are required. The health care representative also has to sign the form. A capable principal can revoke an advance directive and sign a new advance directive.

The Oregon advance directive form is available from most hospitals and health plans and from many doctors. It also is available on the Oregon Senior Health Insurance Benefits Assistance (SHIBA) website, https://healthcare.oregon.gov/shiba/Documents/advance_directive_form.pdf.

2. The advance directive form will change effective January 1, 2019. The new forms are in House Bill 4135 which was passed by the Oregon Legislature during the 2018 session. Valid advance directives signed before January 1, 2019, will continue to be effective.

3. If you try to appoint a health care representative by signing a different document in Oregon (for example, a power of attorney for health care or a Five Wishes form, or a form designed to be used in another state), the form may not be valid and may not be accepted by a health care provider.

4. Valid advance directives and powers of attorney for health care which were signed in other states are recognized under Oregon law.

5. Oregon has another planning document, the Declaration for Mental Health Treatment, which allows a person who may need mental health treatment in the future to give instructions and state preferences about that treatment. The Declaration for Mental Health Treatment Form is in ORS 127.736 and is available from mental health providers and on the Oregon Health Authority website, https://www.oregon.gov/oha/HSD/amh/forms/declaration.pdf.

6. It is important for the advance directive to be available when it is needed. You can keep the original advance directive in your home with your other important papers. You can take it to your health care providers and ask them to add an electronic copy or a photocopy to your medical records. You can give copies to your health care representative and your alternate health care representative. You can scan the advance directive and save it on your computer or in the cloud. You can email it to yourself and your companions before you go on a trip.

C. Guardianship.

1. 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.

2. 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 through marriage, and the specific circumstances of the case. A signed document nominating a guardian can provide evidence of the person's wishes. The nomination can be included in another planning document such as an advance directive for health care or a financial power of attorney.

3. The guardian has to file an annual report with the court describing the person's physical and mental condition and summarizing actions taken by the guardian during the past year. The form for the annual report is in the guardianship statutes.

D. Disposition of Remains.

1. Some people make advance arrangements by buying a prepaid funeral or burial plan from a funeral services provider. The prepaid plan specifies the arrangements for burial or cremation. There may be additional costs not covered by the plan.

2. A capable adult can complete and sign the Oregon Appointment of Person to Make Decisions Concerning Disposition of Remains to give one or more people authority to make decisions about burial or cremation arrangements. The form is in ORS 97.130(7).

The Appointment of Person to Make Decisions Concerning Disposition of Remains form is available on the Oregon Mortuary and Cemetery Board website, https://www.oregon.gov/MortCem/Consumer_Information/Appointment.pdf

3. If no advance arrangements were made and there is no form authorizing someone to make the arrangements, then the decedent's spouse or registered domestic partner has legal priority to make decisions about the disposition of the person's remains. If there is no surviving spouse or registered domestic partner, then Oregon law gives a son or a daughter, or else a parent, or else a brother or sister, the legal authority to make the arrangements.

III MAKING FINANCIAL DECISIONS IN OREGON

A. Making Financial Decisions for Yourself.

1. 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.

2. A determination of whether a person has the capacity needed to understand a particular transaction or to sign a document is specific to that transaction or document. For example, negotiating the sale of a business may be more complicated and require greater capacity than signing a basic will.

3. 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 revocable living trust agreement or other document may use the same standard for determining whether someone can act as trustee or take certain actions.

B. Authorizing Disclosure of Financial Information

1. A variety of laws prohibit banks, credit unions, and other businesses from disclosing or sharing information about a consumer's finances without that person's consent. There are some exceptions.

2. Some businesses, including NW Natural, PGE, and Pacific Power, offer customers a third party notification option. The option may be to send copies of all bills and notices to the third party or to notify the third party when payments have been missed due to illness, hardship, or other reasons.

3. If a financial or consumer account is being managed with online access, it may be possible to authorize a third party to have online access in order to monitor the account.

IV SURROGATE FINANCIAL DECISION MAKERS

A. Who Makes Financial Decisions if You Are Financially Incapable

1. If you have signed a financial power of attorney and then become financially incapable, the agent named in the financial power of attorney will have the legal authority described in the document to manage money and property.

2. If you have created a revocable living trust and then become financially incapable, the trustee or successor trustee named in the trust agreement will have the legal authority to manage the money and property which has been transferred to the revocable living trust. The trustee will continue to manage the trust assets even if a court later appoints a conservator.

3. If you have a joint bank or credit union account, the other joint owner(s) can manage the money in that account.

4. If there are financial matters that cannot be handled under the financial power of attorney or through the revocable living trust or through the joint account, a family member or other concerned person can file a petition asking the court to appoint a conservator to manage money and property.

5. Unlike health care decisions, there are no state laws giving other people authority to make financial decisions for a financially incapable adult in a crisis situation.

B. Durable Financial Power of Attorney.

1. A financial power of attorney is a document in which a capable adult (called the principal) names his or her spouse, domestic partner, or other trusted relative or friend as the agent or attorney-in-fact and authorizes the agent to make certain decisions about money and property. No one monitors how a financial power of attorney is used, so choosing a trustworthy agent is important.

2. The principal can sign or revoke a financial power of attorney if he or she has the capacity needed to understand the document.

3. Some states have adopted forms for financial powers of attorney. Oregon has not. The financial power of attorney lists the types of authority being given to the agent. Both the principal and the agent will have the powers listed in the financial power of attorney.

4. A bank, credit union, or other company is not required to accept a financial power of attorney. Some have their own forms and prefer to have the principal sign that limited power of attorney form for an individual account. A bank or credit union representative may refer to the arrangement as adding an authorized signer. This is different from adding a joint owner. It is important to give clear directions to the bank or credit union representative and to check the name(s) on the account when adding an authorized signer.

5. The Social Security Administration, the U.S. Department of Veterans Affairs, and some other federal agencies do not accept financial powers of attorney.

6. In Oregon, most financial powers of attorney go into effect when they are signed. They are durable, which means that they remain in effect if the principal becomes financially incapable. The agent's authority ends when the principal dies.

7. Oregon allows a "springing" power of attorney, which is effective only during times when the principal is financially incapable. However, there are practical barriers to using a springing power of attorney. Examples include delay resulting from the need to get a doctor's or a court's determination about financial incapability; inability to get access to the principal's health care information; and uncertainty as to whether a particular company will accept the springing power of attorney.

C. Revocable Living Trust.

1. A revocable living trust is a written agreement in which a capable adult (called the settlor or grantor or trustor) appoints a person or a bank or a trust company as the trustee and agrees to put money and property in the trust. 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 in the trust.

2. The settlor can amend or revoke the trust if he or she has the capacity needed to understand the document.

3. The settlor often serves as the initial trustee. The settlor names one or more successor trustees to take over managing the trust when the initial trustee dies, resigns, or becomes financially incapable.

4. The most common reason for creating a revocable living trust is to avoid having an estate go through the court probate process after the settlor's death. Creating a revocable living trust may avoid the need to have a court appoint a conservator if the settlor becomes financially incapable in the future.

D. Conservatorship.

1. 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. 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.

2. 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. A signed document nominating a

conservator can provide evidence of the person's wishes. The nomination can be included in another planning document such as a financial power of attorney.

3. The conservator is required to post a surety bond and file detailed annual accountings with the court. A person who has a conservator is not necessarily incompetent and may have the capacity needed to make a will or to change the beneficiaries of a life insurance policy.

E. Representative Payee.

1. 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.

2. The representative payee is required to complete an annual report for SSA.

3. 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.

4. The U.S. Department of Veterans Affairs (VA) also 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. The VA has its own system for appointing a fiduciary to manage VA benefits for a recipient who is not able to manage his or her own benefits. The fiduciary is required to complete an annual report for the VA.

F. Joint Accounts.

1. Creating a joint account makes all of the people named on the account joint owners of the account. A joint account is owned with the right of survivorship. When one owner dies, there is a legal presumption that the proceeds of the account belong to the surviving owner(s).

2. 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.

3. Creating a joint account is different than adding an authorized signer to an account. It is important to give clear directions to the bank or credit union representative and to check the names on the account when adding a joint owner or an authorized signer to an account.

V. ESTATE PLANNING AND THE PROBATE PROCESS IN OREGON

A. Making a Will

1. An adult can sign a will directing how his or her money and property is to be distributed after he or she dies. A will can be used to name a guardian for minor children. The will also names a personal representative (sometimes called an executor) to manage the estate; pay claims, bills, and taxes; and distribute the estate according to the instructions in the will. The personal representative is usually a trusted family member or friend.

2. A person does not have to have a particular amount of money or property in order to make a will. The will is likely to be longer and more complex as the amount of money and property increases. There may be estate tax planning provisions or a testamentary trust for a

surviving spouse or for grandchildren.

3. The will is not effective until the person who signed it (the testator) dies. Naming someone as the personal representative does not give that person any power to manage money and property while the testator is alive. The testator can revoke the will, sign a new will, or change the will by signing a codicil if he or she has the capacity needed to understand the document.

4. The will controls money and property owned by the testator in his or her sole name at death. A joint bank account or other asset owned with right of survivorship will go to the surviving owner(s). Life insurance, an IRA, or other asset with a beneficiary designation will go to the beneficiary(ies) named on the contract or beneficiary designation paperwork filed with the company. Property for which there is a transfer on death deed will go to the beneficiary(ies) named in the deed.

5. Getting married generally revokes a will signed before the marriage if the spouse survives. However, the will is not revoked if the will states a different intent or was written with the marriage in mind, or if the will was signed after the couple registered as domestic partners in Oregon or elsewhere and the couple later married. Getting divorced revokes the provisions of a will in favor of the former spouse unless the will states a different intent.

B. When There Is No Will

1. Under Oregon law, if a person dies without a valid will, the person's money and property will be distributed as follows after paying claims, bills, and taxes:

- If the person is survived by a spouse or a registered domestic partner and does not have children from a different relationship, then all to the surviving spouse or registered domestic partner; or
- If the person is survived by a spouse or a registered domestic partner and has children from a different relationship, then half to the surviving spouse or registered domestic partner and half in equal shares to the children who are not also the children of the surviving spouse or registered domestic partner; or
- If the person does not have a surviving spouse or registered domestic partner, then in equal shares to his or her children; or
- If the person does not have a surviving spouse or registered domestic partner or any descendants, then in equal shares to his or her surviving parents, or else in equal shares to his or her siblings; or
- If the person has none of the above relatives, then to his or her surviving grandparent(s) or to the descendants of his or her grandparents.

2. Adopted children are treated the same way as biological children. A person of half blood, like a half sister or half brother, is treated the same way as a full sister or full brother.

3. If a child or a sibling who would have inherited from the person's estate dies before the person, then his or her share will go to his or her descendants by right of representation.

C. Probate in Oregon

1. Probate is the court-supervised process used to distribute the money and property owned by a person who has died. The probate process also determines whether claims by creditors will be paid and settles arguments between people who disagree about a will or an

inheritance. Anything owned by the deceased person in his or her own name (and not in the name of a trust or with right of survivorship) goes through probate.

2. An estate goes through the probate process whether the person had a will or did not have a will.

3. In Oregon, the minimum time to complete the probate process is six months to a year. It can take longer if there is property to be sold, or taxes to be paid, or disputes with creditors or among the heirs.

4. The expenses for probate include the personal representative's fee, which is a fixed percentage of the value of the estate; the attorney fees, which will vary according to the time that the attorney and the attorney's staff spent on the probate; the court filing fee; and the cost to publish the legal notice in a local newspaper.

D. Small Estate Affidavit

1. A small estate proceeding is handled less formally, takes less time, and costs less. The claiming successor, who may be the personal representative named in the will or a close relative if there is no will, files an affidavit with the court that includes certain information and mails copies to people who are named in the will or who would inherit if there were no will.

2. To qualify as a small estate, the estate's total assets must be worth $275,000 or less; any real property must be valued at no more than $200,000; and any bank accounts and personal property must be valued at no more than $75,000.

E. Revocable Living Trust

1. The most common reason for creating a revocable living trust is to avoid having an estate go through the court probate process after the settlor's death. There is more information on revocable living trusts on page 6.

2. A probate will not be necessary if all of the settlor's assets either have been transferred to the revocable living trust or were owned with right of survivorship or had beneficiary designations. A probate or small estate affidavit will be necessary if there are assets which are not in the trust, which are not owned with right of survivorship, and which do not have a beneficiary designation.

3. Creating a revocable living trust does not avoid federal and state estate taxes.

F. Federal and State Estate Taxes

1. For a person who dies in 2018, there will be no federal estate and gift tax owing if the total of the value of the person's estate (plus the value of lifetime gifts in excess of the annual exclusion amount, which is now $15,000 per donee per year) is $11,180,000 or less. For estate tax purposes, "estate" includes assets in a trust and assets that pass by right of survivorship or by beneficiary designation.

2. The threshold is much lower for the Oregon estate transfer tax. If a person dies in 2018, owning property taxable in Oregon, there will be no Oregon estate transfer tax owing if the total value of the person's estate is $1,000,000 or less. Oregon does not have a gift tax.

3. People who inherit money or property generally do not have to pay income taxes on the inheritance.