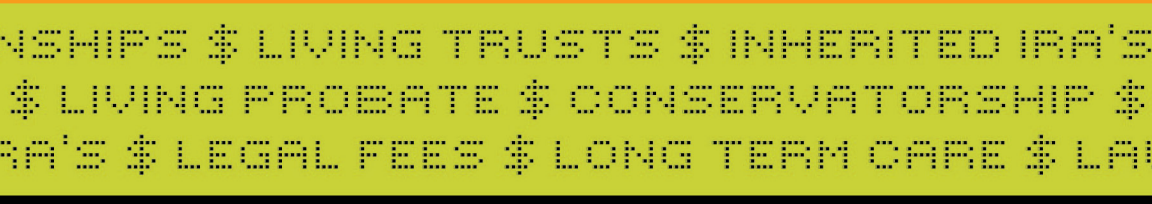
Die$mart

What Everyone Should Know About Death and Dying

Probate, Living Trusts, Power of Attorney, Inherited IRAs, Digital Assets, (And More)

Updated:
2010
Tax Relief Act



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Don't just die. Die$mart

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The information provided in this book does not offer, and should not be construed as providing legal, accounting or tax advice or professional services to any individual or group of individuals. This is not a do-it-yourself book but rather a handbook providing useful information about matters related to death or incapacity. It may serve as a reference guide when you speak with attorneys or other professionals who can give personalized advice tailored to your particular situation or answer your specific questions.

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PROLOGUE

Here are the facts: You are going to die. You don't know when. You don't where. You don't know how. But it's going to happen.

Another fact: You may not die fast. 40% of us will die from Alzheimer's or other forms of dementia; 20% of us will die from cancer; and 20% of us will die from chronic cardiac or respiratory failure. That means 80% of us will die a lingering –- and probably expensive -- death.

Here's another fact -- and this one is really important. If you don't take charge and understand what can happen to you and your money, the state will take over and your loved ones will have to fight for your rights and intentions.

We are writing this book for you because we have lived the nightmare of "dying dumb." We faced losses, personal and financial, that should have never happened.

We took care of our parents and watched our friends take care of their spouses, partners or parents as caregivers and, finally, as executors of their estates.

When our parents died, we paid $9,000 in probate fees to get the right to sell a van worth $25,000. In our conversations with friends over dinner, we kept hearing "If only I had known." We found it hard to believe that educated people like ourselves did not understand the paperwork or the legal and financial aspects associated with dying.

We realized that nobody teaches someone how to die smart in school. Not only is the business side of death and dying a scary subject, it is shrouded in the mystery of complex laws and legal jargon, and we are told is something best left to "professionals". These laws cross multiple subjects and disciplines, including probate law, medical and retirement benefits laws, insurance, tax, and laws relating to the funeral industry.

Few of us understand the laws that manage our lives in case of disability or death, or really understand why the lack of planning means someone pays later. However, public cases like Terri Schiavo and Anna Nicole Smith demonstrate all too well the courts' willingness and obligation to make decisions for us when we can't.

Our personal experience taught us there are eleven common mistakes that cost us dearly. We don't want you to make those same mistakes. That's why we wrote this book.

Don't Just Die. Die Smart.
www.diesmart.com

CONTENTS

GETTING STARTED:

Let's face it. This could be complicated. There will be terms, documents and ideas that are new to you and that can be confusing.

To help you, we have organized the chapters as follows:

Each chapter begins with a list of terms discussed in that chapter, referred to as Words To Know. If some of the terms are unfamiliar to you, you can find an explanation of those words in the glossary.

Next comes an overview -- "What You Will Learn In This Chapter".

Each chapter contains at least one Family Story. Many are real life stories from our families and our friends to illustrate real life experiences. Family Stories are identified with the  icon.

Facts provide interesting information particular to a specific topic and are identified by the 

icon.

If you see an 

ibutton, it identifies a subject where different states may have state or county specific rules, forms or fees. The state specific information can be found at **www.diesmart.com**/ibutton.

At the end of the chapter, we provide the Bottom Line, 

the consequences of making the mistakes. A checklist is also provided. By completing the action items listed in the checklist, you can truly die $mart.

Finally, since laws and legal processes change, we offer a companion web site, **www.diesmart.com**, to provide additional resources, sample forms and up to date information.

Mistake #1: You never even heard of Living Probate

Words to Know:

- Conservator
- Conservatorship
- DNR
- Durable Power of Attorney
- Funeral Agent
- Health Care Power of Attorney
- HIPPA
- In Case of Emergency ("ICE")
- Living Probate
- Living Will
- POLST
- Surety Bond
- Will

A Family Story: Living Probate.

Marsha waited in the intensive care unit where her husband was diagnosed with a life-threatening stroke. Roger, only 50 years old, no longer had the ability to speak, and will need physical therapy for the remaining years of his life.

Marsha decided to quit her job, sell the house she and Roger owned as joint tenants, and move to a smaller house with easier access for a wheelchair.

Marsha visited with the real estate agent. The real estate agent asked Marsha if Roger had completed a durable power of attorney form appointing Marsha as his financial agent.

Marsha said, "I don't understand. I don't know what a durable power of attorney is, and I am sure Roger has not completed one. I'm Roger's wife. Can't I just sign my name and Roger's name?"

Marsha discovered that in the eyes of the law, Roger was no longer authorized to make financial decisions for himself. Roger could not sell a house, sign a check, or even decide what type of health care he wanted. Marsha, his wife of 30 years, did not have the inherent right to make financial transactions on Roger's behalf.

The probate court is the "default person" with the right and obligation to oversee and appoint a conservator for someone like Roger, who could not make financial decisions on his own and who had not appointed someone to make financial decisions for him. Without such a conservator being appointed, no decisions could be made or contracts entered into regarding Roger.

The probate courts became involved in Marsha and Roger's lives while they were living, referred to by the legal profession as Living Probate.

Marsha had to first file documents with the probate court requesting a court hearing to determine Roger's ability to make decisions on his

own. At this initial hearing, the probate judge considered declarations from physicians and other witnesses about Roger's physical and mental conditions.

Once the judge ruled that Roger was unable to make decisions on his own, Marsha was appointed as the conservator for Roger. The probate court issued documents known as Letters, empowering Marsha to act. Once Marsha obtained these Letters, Marsha had the legal authority to manage financial transactions on behalf of Roger and was able to put the house up for sale.

Before Marsha was appointed as the conservator, Marsha had to purchase a surety bond. The surety bond is a form of insurance guaranteeing the payment of money should Marsha wrongfully deprive Roger of his property.

As the court appointed conservator, Marsha had to file documents with the probate court listing all the assets owned by Roger. Marsha may need approval of the court before she can sell assets jointly owned with or owned by Roger.

Although the capacity declaration is confidential, all other documents filed with the probate court are public records. Anyone can see the documents describing Roger's and Marsha's financial assets.

Marsha spent almost $8,000 in legal fees to declare Roger incompetent and an additional $4,000 to be appointed the conservator for Roger. Marsha will have ongoing legal costs preparing and filing annual reports explaining how she managed Roger's financial assets. In addition, Marsha must pay a fee to renew the surety bond each year. This is living probate and it won't end until Roger dies.

WHAT YOU WILL LEARN IN THIS CHAPTER

As we age, we may need someone to help manage our money or make medical choices for us. The law gives each of us the right to document who we want to make these choices for us and what choices we want made. These documents are referred to as advance directives.

This chapter explains what types of advance directive forms are available and the consequences of not completing the forms.

WHY IS DYING DIFFERENT TODAY?

In 1900, the usual place of death was at home; in 2000, it was the hospital. In 1900, most people died in accidents or as a result of acute infections, and they rarely endured long periods of disability. In 2000, people spent, on average, two years severely disabled on the way to death. Acute causes of death (such as pneumonia and influenza) are in decline, whereas deaths from age-related, chronic, degenerative diseases (such as Alzheimer's, Parkinson's and emphysema) are on the rise.

A 2006 Rand study tried to envision the future needs of elderly people who are terminally ill, and classified the elderly into four groups:

- The first group will die after a short period of sharp decline. This is the typical course of death from cancer. Roughly 20 percent of all deaths are of this type.
- The second group will die following several years of increasing physical limitations, punctuated by intermittent acute life-threatening episodes. This is the typical course of death from chronic cardiac or respiratory failure. Roughly 20 percent of all deaths are of this type.
- The third—and the largest—group will only die after prolonged dwindling, usually lasting many years. This is the typical course of death from dementia (including Alzheimer's disease) and disabling stroke. The trajectory towards death is gradual but unrelenting, with steady decline, enfeeblement and growing dependency, often lasting a decade or longer. Roughly 40 percent of all deaths are projected to be of this type.
- The other 20 percent will die as a result of some sudden and acute event, like an accident.

Source: Federal Government Study: "The Dilemma of an Aging Society"

These facts are astonishing. Eighty percent of us need to make planning for incapacity just as important as planning for death.

WHAT ARE ADVANCE DIRECTIVES?

If your mental capacity becomes compromised as you age, or if you suffer an unexpected accident or illness, your spouse or your children may need to help manage your finances or your health care. Sounds simple? It's not. The fact is incapacity, like dying, is an event in your life where laws decide who has the authority to manage your affairs for you when you can't. These are the laws your family and friends will be required to follow if you become unable to make decisions on your own behalf.

As an example, when your children talk with your doctor, they will find the doctor requires a health care power of attorney signed by you giving one of your children the legal authority to make health care choices for you. Your spouse will discover he or she does not have the authority to sell a house you jointly own unless you have completed a durable power of attorney form appointing him or her as your attorney-in-fact.

The law recognizes the legal rights of a competent adult to leave instructions on what choices you want made regarding your health care and your finances and to appoint someone you trust to carry out those wishes.

- You can complete a health care power of attorney form appointing someone you trust to make health care choices for you.

- You can complete a living will form documenting your end of life wishes.

- You can complete a durable power of attorney form appointing someone you trust with the power to act as your financial agent.

If you become physically incapacitated or are considered mentally incompetent, the law considers you unable to make decisions for yourself.

- If you have not completed forms appointing someone to make choices for you when you can't, your family

may need to involve the probate court to request and get authority to act on your behalf. For a fee.

- If you have failed to make appropriate advance instructions or your instructions are incomplete, the court appointed agent will follow whatever instructions are provided for in your state laws.

Your family will find they need multiple documents to act on your behalf, each one serving a different purpose. The following group of questions and answers can help you understand what documents are needed and what purpose they serve.

Fact: Incapacity can happen to anyone.

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Although planning for death is important, planning for mental or physical incapacity is just as important. A recent government study stated "eighty percent of people over the age of 65 will spend one to ten years under the care of a caregiver". In less than two decades it is expected that some 30 million people will suffer from some form of dementia. If this happens to you, someone must manage your health care and your money.

Source: Federal government report: "The Dilemma of an Aging Society"

Planning is not just for the elderly. Terri Schiavo was 26 years old when she had a heart attack and slipped into a "permanent vegetative" condition. She then lived for fourteen years until she was allowed to die following enormous expenses to her family while incapacitated.

WHO WILL MAKE HEALTH CARE CHOICES FOR YOU IF YOU CANNOT?

Health Care Power of Attorney (HCPOA) or Health Care Directive

You can complete a health care power of attorney form and name a health care agent to make health care choices for you if and when you can't. This person will make sure your previously written wishes relating to your health care are carried out. This agent may also request other treatments for you consistent with your broad directives regarding your health care.

Some states call this document a health care proxy. Some states call your health care agent a health care surrogate. Some states combine the health care power of attorney form with the living will form in a single document referred to as an advanced health care directive.

Fact: Advanced Health Care Directive.

These states have adopted the use of an advanced health care directive, a single form documenting your end of life choices and your designation of a health care agent: Alabama, Arizona, California, Connecticut, Delaware, District of Columbia, Hawaii, Kentucky, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania and Virginia.

The person you identify as your agent when you complete your health care power of attorney will be empowered to give informed consent on your behalf, and may make decisions about whether you should undergo medical procedures or elect hospice care.

The more specific you make your instructions regarding your health care choices, the better. These instructions should address whether your agent has the authority to withhold artificial resuscitation, hydration and nutrition, depending on your circumstance. In many states, the Health Care Power of Attorney is a "statutory form," meaning the authority granted to your health care agent and the signature requirements are specifically described in state law. **ibutton:** Health Care Power of Attorney diesmart.com/ibutton

Q. *Who should you appoint as your health care agent?*

A. There is no limitation on who you may name as your health care agent. It could be your spouse, an adult child, another relative or a friend. We have found that your agent should, ideally, be a fighter: a person willing to make sure your wishes are carried out.

While you can only have one health care agent at a time, you may name a contingent agent in the event that the first person is unable or unwilling to serve.

Don't appoint someone without first asking if they are willing to serve as your health care agent and unless you trust them to carry out your health care wishes.

Q. *How long is a health care power of attorney effective?*

A. With one exception, the authority of the health care agent ends at your death when a personal representative, executor or a trustee takes over. The exception is that a person acting under a Health Care Power of Attorney could have been given authority to handle the final arrangements regarding your remains and funeral.

You can create a revocation form terminating the appointment of your health care agent at any time while you are living. **ibutton:** Health Care Power of Attorney Revocation Form www.diesmart.com/ibutton

Q. *What if you have not completed a health care power of attorney?*

A. If you are married or have a registered domestic partner, generally your spouse or registered domestic partner has the inherent legal right to make health care choices for you if you are unable to do so, even if you have not completed a health care power of attorney form.

If you have no spouse or registered domestic partner and become unable to manage your own personal health care decisions, someone will request the probate court to appoint a conservator who will be in charge of making health care decisions for you.

Your medical choices can be delayed unless you have legally identified a health care agent to make choices for you.

fyi

Fact: A single adult child also needs a health care power of attorney.

Parents of injured Virginia Tech students rushed to be at the side of their children. If their child was over 18 and had not signed a health care power of attorney, they found they did not have the legal authority to make health care choices for their child.

If your adult child is attending college, or is not married, your adult child should complete a health care power of attorney designating a parent or another adult as their health care agent.

WHAT ARE YOUR END OF LIFE WISHES?

Living Will

A living will is a document that sets out, in writing, your wishes in the event that you become terminally ill and there is no reasonable expectation of recovery. Some people ask to be kept alive as long as it is possible. Other people prefer that if there is no reasonable expectation of recovery, they no longer want to live. You can even elect not to make a choice regarding whether or not you want to receive life-sustaining medical treatment, and delegate this decision to your appointed health care agent.

If you are well enough, you can tell your doctors what types of medical treatment you want or don't want. If you can't speak, a living will describes what you want done or not done if you are terminally ill with no likelihood of recovery.

Almost all states have specific living will statutes. Most states without living will statutes recognize living wills, but may rely on the court decisions on the intent of the instructions contained in your living will.

Fact: States without living will statutes.

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Currently, these states do not have living will statutes: Massachusetts, Missouri and New York. This does not mean if you live in one of these states that you should not have a living will. Your living will continues to provide evidence of your intentions.

Q. *Why do you need to complete both a durable health care power of attorney and a living will?*

A. A living will answers the question: What do you want done if you are being kept alive through an artificial life support system? Do you want to be kept alive at all costs or would you prefer to be allowed to die if there is no reasonable likelihood that you will ever get better? No matter which choice you make, state laws assure that you will continue to receive medical or other treatment available to alleviate pain.

A durable health care power of attorney (DHCPOA) answers the question: Who do you want to make decisions about your health care if you can't? If you have chosen to be allowed to die, a DHCPA empowers your health care agent to decide to withhold treatment.

Both documents are important parts of pre-death planning. A living will is a document relatively narrow in scope—it only applies to those circumstances described in the document. In contrast, a durable health care power of attorney vests a person with types of authority to make various decisions, and thus applies to a wider range of potential health care circumstances and decisions.

Q. *What if you have not completed a living will and you are facing a lingering death attached to machinery that is only keeping your vital organs alive?*

A. In the absence of a health care power of attorney or a living will, sometimes a physician will work with the spouse or family to carry out your wishes if the spouse and/or all members of the family agree on what to do.

Often, legal problems occur when family members do not agree on what was your intent and what should be done to carry out that intent.

Some state statutes specify who has the right to make health care choices for you if you have not identified a health care agent, usually a spouse, adult children or parents. Some states only require the consent of one person; some states require unanimous consent from adult children or parents. Without consensus, doctors have no choice but to provide life sustaining treatment.

A Family Story: Terri Schiavo.

Terri Schiavo suffered severe brain damage in 1990 after her heart stopped because of a chemical imbalance that was believed to have been brought on by an eating disorder. Terri was 26 years old. Court-appointed doctors ruled she was in a persistent vegetative state, with no real consciousness or chance of recovery.

The case focused national attention on living wills, since Terri Schiavo left no written instructions in case she became disabled. Michael, Terri's husband, wanted to remove her feeding tube and let Terri die. Michael argued that his wife would not have wanted to live in her condition. Terri's parents wanted to keep Terry alive and argued she would want to be kept alive.

The courts became involved. The case spiraled through the court system for seven years, eventually being heard by the Supreme Court. The Supreme Court ruled that the husband had the right to decide and he subsequently had his wife taken off life support.

Do Not Resuscitate (DNR)

A Do Not Resuscitate (DNR) order is another kind of advance directive. A DNR is a request not to have cardiopulmonary resuscitation (CPR) if your heart stops or if you stop breathing. Unless paramedics or other emergency staff are given other instructions, paramedics and hospital staff will try to resuscitate any patient whose heart has stopped or who has stopped breathing.

The exact rules for obtaining a DNR and for proving its validity vary widely from state to state. **ibutton:** State DNR Rules www.diesmart.com/ibutton

Once you complete a DNR, make sure your physician and others are aware of your wishes. Give a copy of your DNR to your primary physician and request this information be added as part of your medial records. If you are in a hospital, make sure a copy of your DNR is included with your medical chart. Keep a copy of the original in your estate planning files.

Generally, doctors and hospitals in all states respect DNR orders.

Q. *If you have a heart attack or other medical condition that would appear to compromise your mental abilities, how do you tell someone you don't want to be resuscitated?*

A. Once your mental capacity has been substantially compromised, it is possible for a physician to determine that you lack sufficient mental capacity to provide informed medical consent.

If the physician considers that your mental capacity is diminished, it will be too late for you to instruct the medical staff not to resuscitate you. These orders must be made when you are healthy.

Q. *Why do you need to complete a living will and a DNR?*

A. The directions in your living will are only followed when your doctor believes you are in a terminal state and will not recover from your illness or injury. The directions in your DNR are effective the moment you sign them and do not require any type of medical condition to be present for the DNR to be effective.

Elderly people sometimes want a DNR if they suffer from chronic illnesses and are concerned that their quality of life will suffer if they require resuscitation.

Q. *What happens if the paramedics do not know y you have completed a DNR?*

A. If the paramedics or other medical personnel cannot locate your DNR, they will make an effort to save your life.

You can help the paramedics make the right treatment choices in several ways:

- Participate in the Vial of Life program. The Vial of Life program is a nationwide effort to assist emergency personnel to administer proper medical treatment for you when you can't speak for yourself.

  A Vial of Life sticker is placed on your door. This sticker tells the paramedic to look for your DNR and other medical information in a vial placed in your refrigerator. **ibutton:** Vial of Life www.diesmart.com/ibutton

- Some people recommend storing the DNR in the freezer in a blue freezer bag, as paramedics are trained to look in the freezer for DNR documents stored in a blue bag.

- Some states authorize the use of identification bracelets or tags as a way for you to notify medical personnel that you have signed a DNR. Although all states authorize the use of a DNR, some states require special paper to be used when printing as a means of authentication.

The exact rules for obtaining a DNR and for proving its validity vary widely from state to state. **ibutton:** Do Not Resuscitate www.diesmart.com/ibutton.

A Family Story: No DNR present.

Kathy's 92-year old mother was at her house watching TV when her mother suddenly said she could not breathe. Kathy called an ambulance.

As the paramedic prepared to take her mother to the hospital, Kathy explained to the paramedic that she and her mother had decided not to resuscitate if the situation was such that her mother's quality of life could be impaired.

The paramedic asked to see the DNR form. Kathy replied the form was at her mother's house in another state and was not able to provide a copy to the paramedic. The paramedic said they were allowed to wait sixty seconds for someone to provide the DNR. After that, they are required by law to administer all available life saving techniques.

Kathy now keeps a copy of the DNR in her freezer and in her purse. Her mother wears a DNR bracelet.

Physician Order for Life Sustaining Treatment (POLST)

Q. *What is POLST?*

A. POLST is a new program designed to improve the quality of care people receive at the end of their life and ensure a patient's wishes are fulfilled.. In some states it is called a Medical Orders for Life Sustaining treatment (MOLST).

The physician, after talking with the patient and the family, documents what type of end of life care is desired. It includes the patient's desire to have or refuse CPR, comfort measures, and whether to receive artificial nutrition. The document is valid in a nursing home, at home, in a long-term care facility, and in the hospital.

Currently, California, Hawaii, New York, Oregon, North Carolina, Tennessee, Washington and West Virginia have adopted state wide forms and procedures. Numerous other states are developing similar programs.

Q. *How does POLST different from other advance directives?*

A. A living will covers your wishes regarding all future medical situations. A POLST is specific to a certain time and specific medical situation.

The POLST form is a medical order and is completed and signed by a health care professional, usually a doctor or a nurse

An advance health care directive is not a medical order and is completed and signed by an individual.

WHO DO YOU WANT TO ACCESS YOUR MEDICAL RECORDS?

Health Information Privacy and Portability Act (HIPPA)

Q. *What is HIPPA?*

A. HIPPA is the acronym for the Health Insurance Portability and Accountability Act passed in 2003. In an effort to protect your privacy, HIPPA restricts the freedom of medical care providers to share medical information about you with anyone, even family members, without your consent.

The provisions of HIPPA give you the right to view information contained in your medical records and to designate other persons with whom your medical information may be shared.

Q. *Do you need to complete a HIPPA form in order for your spouse or family to see copies of your medical records?*

A. If you want your medical information shared with someone, you must complete a HIPPA Authorization to Release Information form naming and authorizing the people you wish to see the records maintained by your physician or hospital. Access to these records will be important for whoever is in charge of making medical decisions for you.

The list should certainly include your health care agent. Whether you want your medical information shared with your family is up to you. If you have old and trusted friends to whom you frequently turn for advice, you may want to name them as well.

Once you sign a HIPPA Authorization to Release Information form, you should give a copy to your family physician.

Although you can add a clause to your health care power of attorney form giving your health care agent and family access to your personal medical records, it is also wise to sign a separate HIPPA form identifying the people whom you want to have access to your records.

Q. *What if you have not completed a HIPPA form giving someone the legal right to view your medical records?*

A. Without a written authorization from you to share your medical records, medical professionals and medical facilities face stiff penalties for violating HIPPA.

Without advanced authorization by you, your health care agent, spouse, family and others will not be able to access the information about you to make an informed decision about the best plan of care for you.

Fact: HIPPA and adult children.

fyi

If an adult has a child attending college, they should consider having the child sign a HIPPA form giving their parent the right to access their medical records. Otherwise, if the student is in an accident, the parent may not have the right to view the child's medical records to make decisions about their care.

WHO WOULD YOU WANT CALLED IN CASE OF EMERGENCY (ICE)?

Q. *What is ICE?*

A. If you are in a car accident or some other event requiring unexpected medical care, the physicians and emergency personnel must find a way to contact someone regarding your medical emergency. Time is important. Some medical procedures require authorization from a spouse or a health care agent before treatment can begin. A shorthand process has been developed to facilitate this communication process, referred to as ICE. ICE stands for In Case of Emergency.

Q. *How Does ICE Work?*

A. ICE reflects the list of persons who you want contacted in case of an emergency. This list of persons and their telephone numbers (and other information) is stored on your cell phone. The steps are as follows:

- Decide whom you want contacted in case of emergency.

- Enter ICE as the contact name in your cell phone contact list.
- Add the phone number of the person you want called in case of emergency.
- If you want to name more than one person, make an ICE1 and ICE2 entry in your contact list.

Paramedics and other emergency responders are trained to examine your cell phone and look under "ICE" to see who ought to be contacted to give your location and condition.

WHO WILL MANAGE YOUR MONEY AND PROPERTY IF YOU CANNOT?

Durable power of Attorney

A durable power of attorney is a legal document you complete in which you appoint and delegate to an agent the power to make financial decisions and transactions on your behalf if you are unable to do so yourself.

The person you appoint in this document to act on your behalf is referred to as your attorney-in-fact.

A durable power of attorney gives the attorney-in-fact you name the power to make decisions other than health care choices for you if you can't. The term "durable" means the power of attorney form remains effective if you become incapacitated.

Some states call this document a "financial power of attorney" or "financial proxy." Some states call the attorney-in-fact an agent.

Just as important as naming someone to act as your agent is defining what powers you want to give to your agent.

Like your health care power of attorney, the more specific you are regarding the duties you want your agent to

perform for you, the better. For example, your durable power of attorney should address whether your agent has the authority to write and deposit checks, buy or sell real estate, invest your money, manage your taxes and retirement accounts, borrow money, make gifts on your behalf, sign contracts that buy or sell things for you, change beneficiaries, hire counsel and engage in litigation on your behalf.

In many states, the durable power of attorney is a "statutory form," meaning the authority granted to your attorney-in-fact and the signature requirements are specifically described in state laws. When completing your power of attorney, understand what authority your state automatically grants your attorney-in-fact. It may be necessary for you to add language giving your agent certain powers or your agent will not have them.

- In New York, Florida and North Carolina, you must file a copy of your signed durable power of attorney with the county recorder where you own real estate if the power of attorney authorizes the attorney-in-fact to conduct real estate transactions. The document becomes a public record.

- Many states require that for an agent acting under a durable power of attorney to amend, modify or terminate a trust, both the durable power of attorney and the trust agreement must specifically provide this authority to the agent.

Q. *Who should you appoint as your attorney-in-fact?*

A. You can appoint an adult person or a financial institution to act as your attorney-in-fact.

You may name back-up agents in the event that the first person is unable or unwilling to serve. This is highly advisable. If you only name one agent and for some reason they can't act as your financial agent, your family will need to request the probate courts to appoint a financial agent to act on your behalf.

Q. *How long is a durable power of attorney effective?*

A. The authority of the attorney-in-fact generally ends at your death at which point a personal representative, executor or a trustee takes over.

You can create a revocation form terminating the appointment of your financial agent at any time while you are living. **ibutton:** Durable Power of Attorney Revocation Form www.diesmart.com/ibutton

Q. *Must your attorney-in-fact be an attorney?*

A. No. Your attorney-in-fact can be any adult person or financial institution, including your attorney. Financial institutions and attorneys-at-law usually charge a fee for serving as your attorney-in-fact. Some states require the person you appoint as your agent to also sign the durable power of attorney form, acknowledging their appointment.

Your attorney-in-fact should be someone you trust to manage your money when no one is watching them.

Fact: Your wife now is your ex-wife.

Some states provide that, upon divorce, the ex-spouse identified in a durable power of attorney as your attorney-in-fact is presumed to no longer be a valid selection as an attorney-in-fact. If you re-marry, be sure to amend your power of attorney form to identify your new spouse as your agent, assuming you believe the new spouse is the correct attorney-in-fact for you.

Q. *Can you appoint more than one attorney-in-fact ?*

A. Generally, you may appoint more than one agent under a durable power of attorney. However, if you appoint two or more persons to simultaneously serve as your attorneys-in-fact, you should specify whether they must act jointly or whether each can act separately.

You may specify that for some types of decisions they must act together, and that for other types of decisions they may act separately. You might, for example, want both attorneys-in-fact to make the decision to sell your house, but allow either to manage your living expenses. If you own a business, you may consider creating a separate power of attorney to designate someone to make financial decisions about your business.

Q. *What is a "springing" power of attorney?*

A. A signed durable power of attorney is effective immediately, and stays effective until you revoke it or you die. You may add language to a durable power of attorney turning it into a "springing" power of attorney.

A "springing" power of attorney is not immediately effective. It "springs" into effect upon the happening of a specific event, such as illness or injury.

You can include language requiring your physician or a third party to confirm your mental incompetence to activate the power. This will give you some protection against a greedy or impatient attorney-in-fact. It will, unfortunately, delay the moment when somebody will be authorized to manage your affairs. You may add language to a durable power of attorney turning it into a "springing" power of attorney.

Not all states permit a springing power of attorney.
ibutton: Springing Power of Attorney www.diesmart.com/ibutton

Q. *If you have a living trust, do you need to complete a durable power of attorney form?*

A. Yes, you probably do. Your trust should include language granting the successor trustee or the co-trustee the right to make financial decisions regarding trust assets if you become legally incapacitated. When this language is part of the trust, the trustee has the right to manage trust property without any other legal procedures.

Even if you have a living trust where the language gives the trustee the right to manage trust assets on your behalf if you become incapacitated, it is almost certain that you will have some assets that are not owned by the trust, such as Individual Retirement Accounts (IRAs) or Roth retirement accounts.

Or you may own property whose title has not yet been transferred into the trust. Since these assets are not owned by the trust, the trustee of your trust and any instructions regarding incapacity in your living trust do not govern them.

Your durable power of attorney will give the attorney-in-fact the authority to manage property not owned by your trust. Your attorney-in-fact can be given authority, or instructed, to transfer all of your property to your living trust.

Q. *What is the difference between a durable power of attorney and a power of attorney?*

A. There is one key difference between the two. A power of attorney is effective if, at the time it is used, you are living and of sound mind. It ceases to be effective if you are dead or not of sound mind.

A durable power of attorney continues to be effective whatever your legal capacity, or incapacity, may be. A durable power of attorney includes words such as

"This power of attorney shall not be impacted by any subsequent incapacity or disability".

Q. *How does your attorney-in-fact perform business on your behalf?*

A. Your agent would provide a copy of your signed, witnessed, and in some instances, notarized power of attorney form to your bank or brokerage firm. He or she would then sign documents on your behalf as "John Doe, attorney-in-fact for John Smith."

Some banks or financial institutions are reluctant to accept a power of attorney form. Ask your bank or financial institution the method in which someone can perform business on your behalf. If they ask you to complete a power of attorney form supplied by the bank, make sure the word "durable" is on the form.

A Family Story: Durable Power of Attorney.

Tom executed a durable power of attorney document, designating Katie, his wife, as his attorney-in-fact. As the named attorney-in-fact, Katie had the legal authority to make decisions for and on behalf of Tom.

Tom had a stroke six months later and was unable to communicate.

Katie decided to sell the house she and Tom owned as joint tenants. The Contract of Sale listed Katie and Tom as owners of the property. Signature lines were provided for both Katie and Tom to sign.

Katie signed as Katie. She then provided a copy of the power of attorney appointing Katie as the attorney-in-fact for Tom. Katie then signed on the line requiring Tom's signature as "Katie Smith, attorney-in-fact for Tom."

Q. *Does the agent you named in a durable power of attorney have the right to manage your health care decisions?*

A. In most states, the answer is no. State statutes governing financial power of attorneys do not permit the inclusion of language giving your agent the right to also manage your health care. You must create a separate health care power of attorney form identifying the person you want to make health care choices for you when you can't.

fyi

Fact: Power of attorney statutes.

If you live in Alaska or Pennsylvania, statutes allow you to add instructions to your financial power of attorney covering your health care decisions.

Q. *What happens if you have not completed a durable power of attorney?*

A. If you become incapacitated and have not properly created a durable power of attorney, it is likely that no one has the legal authority to make financial transactions on your behalf without court intervention.

- It surprises many married couples to learn that a spouse does not have the legal authority to buy or sell property without their spouse appointing them as their financial agent.
- If your children need to act as caregivers, your children may not be able to manage your money without you designating them as your attorney-in-fact.

- If you are not married, your partner will generally not have the legal right to manage your financial affairs unless you have completed a power of attorney naming your partner as your attorney-in-fact.

In the absence of any such advance directive from you giving someone the power to manage your money and property for you, a spouse, child, attorney, or other relative or must begin a legal process known as a Conservatorship with the probate court.

Q. *What happens when a conservatorship case is filed?*

A. Conservatorship is a judicial process whereby the probate court appoints a person, referred to as a conservator, to hold and protect your personal and financial rights.

The purpose of the conservatorship process is to have the probate court appoint someone and give them legal authority to make financial decisions and/or personal care decisions on your behalf. Some states call this process a Guardianship, as the person appointed to take care of a mentally incompetent adult has duties similar to those of a guardian for a minor or disabled child.

Attorneys often refer to the conservatorship process as living probate, because the probate courts become involved in managing your affairs while you are living.

The conservatorship process is a two-part procedure.

Step 1: Someone, usually a spouse or an adult child, must file documents with the courts requesting you be declared incapable of managing your personal or business affairs.

When a conservatorship action is filed, it must be served on all interested parties. The court will set a time for an evidentiary hearing. At the hearing, testimony will be given by friends and medical professionals regarding your physical and mental health. You may be present

at the hearing and the judge may ask you questions to establish your incompetence.

After hearing the evidence, the court may deem you mentally incompetent and/or unable to care for your own basic personal and financial protection.

Step 2: After the court agrees you are incapable of managing your own affairs, your spouse or some other third party will request they be appointed as conservator.

More than one party may apply to serve as your conservator. If there is more than one person who seeks to be appointed conservator, state preference laws give higher priority to the appointment based on their relation to you. For example, if you are married, the preference is for your spouse. If you are not married, the next priority is usually your parents. Other interested parties, including members of your family, have the right to contest a request to act as your conservator.

The person appointed to act on your behalf, referred to as the conservator, is required by law to provide to the court an accounting of how they manage and spend your money. The conservator can charge a fee for performing these duties. All legal, accounting and court fees are paid for from assets owned by you, the conservatee.

A Family Story: Living Probate: Contested Conservatorship.

Matt and Emma, a married couple, owned a restaurant together. Matt had been married before; he had one daughter from that marriage, Jessica, age 28.

Matt, at the age of 57, suffered a stroke, from which he suffered major brain damage rendering him incapable to walk, talk or think rationally. Matt's doctors concluded his condition was permanent. Emma decided to sell the business and take care of Matt.

Matt had not prepared a durable power of attorney. No one had the legal authority to sign any documents authorizing the sale of the business.

Emma met with her lawyer. The lawyer explained the need to file for a conservatorship over Matt.

Emma filed documents requesting the court declare Matt incompetent and for her to be appointed as the conservator. The court scheduled a time to hear testimony from Matt's doctors. Emma and Jessica attended the hearings. The judge agreed Matt was incompetent and needed someone to make decisions on his behalf.

Jessica contested the appointment of Emma as the conservator and filed documents alleging such a choice would put Jessica's inheritance at risk.

After a lengthy, expensive, public legal procedure, the court appointed a financial institution as the "conservator of the estate" for Matt. This financial institution will receive a fee for managing Matt's affairs, money which will come from Matt's income. The court appointed Emma the "conservator of the person" for Matt.

All of the documents filed with the courts regarding Matt's physical condition and his finances are public information.

Just when Matt needs the support of both Emma and Jessica, they are not talking to each other.

Matt could have executed a power of attorney naming Jessica and Emma as co-attorneys-in-fact, requiring both signatures on financial decisions. This simple document would have likely eliminated costly legal proceedings and the management of Matt's financial affairs by someone Jessica and Emma have never met.

Q. *Can you prevent your financial or health care information filed with the courts from being public?*

A. Documents filed with the courts as part of a Conservatorship procedure are generally public records. Anyone can visit a probate court or go on line and review most of these documents.

WHO WOULD YOU LIKE TO NAME AS YOUR CONSERVATOR?

Pre-Need Guardian

Sometimes, whether you like it or not, someone may file documents with the probate court requesting the courts appoint a conservator to act on your behalf. Anyone is entitled to seek to have you conserved or to have a guardian appointed for you.

In such a case, if you have previously completed a pre-need guardian form and designated a person who you trust to serve as your conservator or guardian, the court will give first priority to that person in its appointment. If you have not prepared a pre-need guardian form, the court may appoint someone you would not want making financial and health care choices for you.

Some states allow you to file this form with the Clerk of the Court. **ibutton:** Pre-Need Guardian Forms by State www.diesmart.com/ibutton.

Fact: Pre-Need Guardian for minor children.

If you have minor children, you should also complete a Pre-Need Guardian form designating someone you want to become your children's guardian, in case you ever become incapacitated. This document may not deny a natural parent their right to be a custodian, but single parents should complete this form. See Mistake #10 for more information regarding minor children and guardians.

WHAT OTHER SIGNATURE FORMS ARE NEEDED TO MANAGE YOUR FINANCIAL AFFAIRS?

Certain assets have special rules regarding the appointment of a financial agent to manage your money and property.

Social Security

Q. *How would you give someone the right to manage your social security payments?*

A. Treasury department regulations do not permit a power of attorney or a durable power of attorney to be used to manage your social security benefits. A family member or other person must complete a Social Security Representative Payee form designating a "representative payee" to act on your behalf regarding social security benefits.

Social Security will then send your social security benefits to the representative payee. The representative payee is required to prepare and file an annual report describing how they spent the money on your behalf.

The representative payee is also obligated to report any change in circumstances impacting your eligibility to receive social security benefits. **ibutton:** Representative Payee reporting form www.diesmart.com/ibutton

Brokerage Accounts

Q. *How will your attorney-in-fact be able to manage your brokerage accounts?*

A. Brokerage accounts have special rules for your attorney-in-fact.

If your attorney-in-fact needs to buy or sell stocks held in physical form or held in a brokerage account, your attorney-in-fact will need to add a medallion signature "guarantee" to their power of attorney form.

The medallion signature is a stamp provided by a

financial institution guaranteeing to a transfer agent that the signature of your attorney-in-fact is actually their signature.

Requests to buy or sell stocks are reviewed by someone referred to as a Transfer Agent. The Transfer Agent cannot authorize transactions requested by your attorney-in-fact without the medallion signature guarantee evident on the power of attorney form.

Your attorney-in-fact may need to locate a bank participating in the medallion signature program. The bank should be one the attorney-in-fact does business with that is willing to guarantee its signature. The bank puts the medallion stamp on the power of attorney form.

Safe Deposit Box

Q. *How will your attorney-in-fact get access to your safe deposit box?*

A. If you open a safe deposit box in the name of your trust, the trustee or successor trustee has the legal right to access the safe deposit box.

When you open a safe deposit box in your name, or as a joint tenant, ask whether your bank will accept your power of attorney as authorization for your attorney-in-fact to access your safe deposit box.

Some banks will not. These banks may require you to complete a separate form they provide designating a safe deposit box agent. The box renters will complete the form naming a safe deposit box agent in the presence of a bank employee, which gives the bank greater assurance about the validity of the authorization.

Banks and other financial institutions struggle with accepting your power of attorney. Currently, there is no way for banks to know if you have revoked your power of attorney or changed the name of your attorney-in-fact.

WHO DO YOU WANT TO MANAGE YOUR FUNERAL ARRANGEMENTS?

Nominating A Funeral Agent

Before you die, you have the legal right to appoint a funeral agent who will become responsible for carrying out and/or planning your funeral wishes.

This person has the right to decide: (a) whether you will be cremated or buried with your body intact and (b) where to bury your body or your ashes.

Q. *How do you appoint a funeral agent?*

A. The document you use to appoint a funeral agent is dependent upon the state you live in.

- Some states require that you appoint a funeral agent in your will.
- Some states provide that the attorney-in-fact named on your power of attorney may act as your funeral agent.
- Some states have created a new form entitled, "Disposition of Remains" giving you the right to name a funeral agent and specify whether you want your body cremated, buried intact, or donated to medical research. **ibutton:** Funeral Agent Rules By State www.diesmart.com/ibutton

Q. *What happens if you don't appoint a funeral agent?*

A. State preference laws entitle a surviving family member to act as your funeral agent and give that family member the right to make choices regarding the disposition of your body.

A Family Story: Domestic partners.

Susan and Linda had lived together as partners for many years in the state of Kansas. Linda named Susan as the executor in her will, but did not include instructions giving Susan the right to make funeral arrangements.

When Linda was diagnosed with cancer, Susan assumed the caregiver role. In talking with Susan, Linda expressed her desire to be cremated and have her ashes buried at sea.

Linda died. Linda's mother wanted Linda to be buried with her body intact and next to her father. State preference laws in Kansas gave Linda's mother the right to make choices regarding the disposition of Linda's body.

Susan expressed Linda's desires to Linda's mother, to no avail. Linda was buried in Kansas.

Q. *What information should you provide your agent regarding your funeral wishes*?

A. At a minimum, you should leave instructions specifying:

- Whether you want to be buried with your body intact, cremated, or have your body donated for medical research. If you want your body donated for medical research, you should sign an agreement with a medical research institution before you die. Your family or funeral agent may not have the legal authority to donate your body for medical research after you die.
- Where you want your body to be buried, or have your ashes scattered.

- How you would like your life celebrated, if at all.
- Whether or not you have prepaid for your funeral or a cemetery plot.
- Whether or not you want to participate in the organ and tissue donation program. If you don't document your wishes, your family has the right to make this choice for you.
- Whether you have already taken and stored a sample of your DNA, or want a DNA sample taken before disposing of your body.

You can find more information and resources for planning your funeral at **ibutton:** Funerals diesmart.com/ibutton

Bottom Line:

Planning for incapacity is as important as planning for death.

It's Your Choice.

- You can either document your wishes or your health care agent must follow the instructions of the state where you live regarding life support.
- You can name someone you trust to manage your finances and make health care choices for you, or the state can appoint someone you don't even know to make choices for you. For a fee.

Action Checklist: Avoid Living Probate.

- ❑ Complete a durable power of attorney or living trust. Avoid the costs and emotional trauma involved with Living Probate.
- ❑ Complete a living will and a durable health care power of attorney.
- ❑ Designate a funeral agent to carry out your funeral wishes.
- ❑ Complete and carry a DNR with you.
- ❑ Store your emergency contact information on your cell phone under ICE.
- ❑ Place the Vial of Life sticker on your door. Place your medical information in a vial in your refrigerator.
- ❑ Prepare a Pre-Need Guardian Form or otherwise name and identify a person who you wish to serve as your guardian or conservator and/or your minor child's guardian in case of incapacity.
- ❑ Document whether or not you want to participate in the organ or tissue donation program.