

Helping Others Manage Their Finances Series  
**Formal Arrangements**

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This is the second in a two-part series about helping others manage their finances. In the first part, *FSHEC94, Helping Others Manage Their Finances Series: Informal Arrangements*, informal ways families can assist an adult relative with finances were discussed – helping with bill paying, managing checking accounts, record keeping and how to talk to fragile relatives about their finances.

Formal methods involve written legal agreements or following rules of certain agencies. Giving up control of your finances is a serious matter. All but two of the formal methods discussed here require taking steps in advance when you are in a position to make the best possible decision. You may want the guidance of an attorney.

### When You Plan Ahead

The formal arrangements – power of attorney, durable power of attorney, writing a living will and naming a health care proxy, setting up a trust – require advanced planning.

### Power of Attorney

A **power of attorney** is a written document in which a person (called the principal) gives another person (called the **attorney-in-fact**) legal authority to act on his or her behalf.



Why do you need a power of attorney? If you are unable to make personal or financial decisions, it will be necessary to have the legal system appoint individuals to handle both your personal and financial affairs.

A power of attorney spells out in a specific or general way those situations you want a specific person to act on. An extremely specific power of attorney authorizes the

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attorney-in-fact to do only one specific thing at one specific time. Your attorney can advise you on how general or specific you need to be.

### A **power of attorney**:

- Must be written, signed and notarized.
- Is not a permanent document. It can be revoked and a new power of attorney can then be written.
- Ceases to exist when a person becomes incapacitated (mentally unable to make decisions on his or her behalf).
- Terminates at death. It is not an estate planning tool.

A **springing power of attorney** spells out conditions that must take effect before the attorney-in-fact has the authority to act. For example, you can write a power of attorney which will not go into effect unless you are outside the United States.

### **Durable Power of Attorney**

A **durable power of attorney** does not terminate if a person granting the power becomes mentally incapacitated. In Arkansas, a durable power of attorney might state in writing the following words: "This power of attorney shall not be affected by subsequent disability or incapacity of the principal" or "This power of attorney shall become effective upon the disability or incapacity of the principal."

A durable power of attorney can avoid guardianship proceedings in event of incapacity because you already legally appointed someone to act on your behalf. State clearly in the durable power of attorney document the criteria for determining capacity and the person or persons you want to make that determination. For example, your criteria may be "upon written recommendation from two medical doctors and a minister."

A durable power of attorney is an alternative to putting another person's name (such as a child's) in joint ownership on a bank account. The assets in your accounts are under your control as long as you are not incapacitated.

The power of attorney can have provisions requiring the attorney-in-fact to account for transactions and be bonded. Sometimes a financial institution refuses to recognize that an attorney-in-fact has a power of attorney. A power of attorney is more likely to be accepted if it includes both a statement of the general powers that the agent may exercise and a list of the specific powers that the agent is more likely to need.

### **Living Trusts**

A **living trust** is one way a person can assure the management and protection of assets if he or she becomes incapacitated. A trust is a three-party arrangement where certain assets are transferred from one person (the **grantor**) to another person (the **trustee**) who holds and manages the assets for the benefit of the third (the **beneficiary**). Property and assets must be legally transferred to the trust to "fund" the trust.

The grantor, trustee and beneficiary may be the same person. In this example, a second person must be named as a contingent beneficiary. For example, Jane (the grantor) transferred her investments to her living trust and, as the trustee, manages the assets in the trust for her benefit because she is the beneficiary. Jane named her daughter to be the contingent beneficiary at time of death. Also Jane appointed a successor trustee, her Anytown Bank, to manage the funds in the event of her incompetency.

The grantor and beneficiary may be the same person and the trustee another "person," such as the trust department of a

bank. For example, Emma (the grantor) transferred her investments to her living trust managed by the Hometown Bank (the trustee) for the beneficiary (Emma) of her trust. Emma spelled out in her living trust how she wanted her assets managed and named her daughter as beneficiary of the trust at the time of death.

Trusts are sophisticated tools and require the guidance of an attorney experienced in elder law. A revocable living trust allows you to change the terms of the trust in case you change your mind. Irrevocable living trusts are similar to revocable living trusts, except you cannot change or end (revoke) the trust after you have established it.

A power of attorney becomes void on your death, but a trust need not. A trust provides you with an alternative to passing property. A living trust names the beneficiaries who will receive the assets at time of death, and as a result, the trust fund's balance avoids probate proceedings. However, the trust's beneficiaries may be liable for taxes and debts left by the decedent. Contact your county Extension office and ask for *FSHEC78, Revocable Living Trusts*.

## Living Will and Health Care Proxy

A living will is a written document that outlines what medical treatment you would not want if you became terminally ill or permanently unconscious. Arkansas law also permits you to name a health care proxy to make medical decisions for you. Contact your county Extension office for a copy of *FSHEL13, Living Wills*, for more information.

Keep in mind, a living will is not a financial agreement. However, there are financial implications when a person experiences a prolonged illness.

## When Plans Are Incomplete

Other formal arrangements, naming a representative payee and guardianship, arise because the individual is incapacitated and failed to plan. Someone you do not trust may be appointed to handle your personal and financial affairs.

### Representative Payee

A **representative payee** is a substitute person appointed by the Social Security Administration to receive the monthly federal benefit on a beneficiary's behalf. There must be medical evidence that the beneficiary is unable to handle his or her funds and that appointment of a substitute payee will be in her or his best interest.

A representative payee is used only for federal benefits. The payee need not be a relative. Reports are required, but monitoring is informal.

Contact the appropriate agency for an application form and instructions. Although the individual has a durable power of attorney or established joint bank accounts or arranged for "authorized signer," the Social Security Administration only recognizes a representative payee to handle monthly social security checks.

### Guardianship

In Arkansas, a court-appointed person to care for the property and economic assets or the physical well-being of an incapacitated person is called a **guardian**. The incapacitated person who has had a guardian appointed is legally referred to as a ward.

The guardianship may call for limited decision-making power for specific area(s) of a person's life or full decision-making power

to all areas. Guardianship isn't permanent, but it may only be changed or ended after appropriate court proceeding(s).

Guardianships are used when a durable power of attorney or an incapacity clause in a living trust is not in operation. If you don't have a durable power of attorney for finances, chances are your relatives or the State of Arkansas will have to go to court to get someone (even if it is your closest kin) appointed to manage your financial affairs.

The court can appoint whomever they see fit to manage your affairs. This is especially true if you never told anyone who you wanted to manage your finances in the event you were incapacitated.

Because guardianships are determined in court, your financial situation becomes a matter of public record. The procedure involves legal fees and court costs. A guardian will be asked to post a bond and is typically paid a fee from the ward's assets.

**A last resort, guardianship may leave the ward open to exploitation. There is no guarantee your funds will be spent the way you had intended.**

## A Final Thought

Instead of "putting off" making formal arrangements for someone to manage your finances, considered declaring a "legal day." Make an appointment with an attorney to update your will, write a durable power of attorney and discuss living wills.

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