

## Personal Independence and Incapacity Care

This is our third article about the importance of planning for physical or mental disability. In a [prior article](#), we focused on financial management planning alternatives for persons facing potential health crises and incapacity. In our [last article](#), we noted that planning for nonfinancial issues may have even greater personal impact and suggested how to effectively communicate your wishes about your future health care. In this article, we address how to make decisions about your future living arrangements and personal care while you are alive, how to make decisions about your remains after your death, and how such decisions can be legally and effectively communicated.

### **Your Personal Care is First and Foremost a Family Affair**

For centuries, personal care of the elderly has been love-based and family-centric. Just as we love and feel responsible for caring for our juveniles, part of our culture is that we reciprocate this affection and attention for those who cared for us when we were young and could not effectively do so. As family members age and face impending incapacity, where they will live when they can't maintain the normal routines of daily living is generally a personal or family decision. With that in mind, it makes sense to have these discussions early so that all family members are clear and on board as to how this will work when this time comes. Evidence these decisions by memorializing them in writing to make it clear what your wishes are if the time occurs when you can no longer voice your desires. This evidence need not be legalistic or formal. The evidence is better if it is clearly a communication of your personal desires and intent. Letters and email messages will suffice if they are maintained where they can be found and read in the future.

## **Court-Appointed Guardians of Your Person**

What happens if you are incapacitated and there is no family to rely on or if, in a diminished state, you clash with what others think is best for you. This may be where a court is called upon to step in to determine who or what decision-making is in your best interest. In Maryland, a court is authorized to appoint a “guardian of the person” for a person who is judged from clear and convincing evidence to lack “sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including provisions for health care, food, clothing, or shelter...”. In this regard, the court looks to determine whether the person before it is “unable to provide for the person’s daily needs sufficiently to protect the person’s health or safety” and who “as a result of this inability requires a guardian of the person.”

After appointment, this guardian of the person becomes an officer of the court who is designated to decide what is best for the ward. With this in mind, it is a good idea to designate in advance who you would prefer to be the guardian of your person were a court to find that you need one. Indeed, Maryland law provides a priority list for who is entitled to appointment as a guardian of a disabled person, and first on that list is “a person, agency, or corporation nominated by the disabled person if the disabled person was 16 years old or older when the disabled person signed the designation and, in the opinion of the court, the disabled person had sufficient mental capacity to make an intelligent choice at the time...” Such designations are often made a part of [power of attorney](#) documents because these documents are required to be carefully witnessed (and, in the case of financial powers of attorney, notarized).

In the absence of a designated person, the statutory order of priority entitles persons to be appointed in the following order: the disabled person’s health care agent; then his or her spouse; then parents; a person, agency or corporation nominated by the will of a deceased parent; children; heirs if the disabled person were deceased; a person, agency or corporation

nominated by a person caring for the disabled person; and, finally, any other person, agency or corporation considered appropriate by the court. Note, however, that for good cause, a court may pass over a person with priority and appoint a person with a lower priority.

Therefore, in case guardianship proceedings are commenced in the future, it is best to make your wishes in a written form that can be presented to the court for use in its determination.

## **Maintaining Your Independence**

How long you maintain your independence from family or guardian care will depend on a number of factors. First and foremost, if you are a citizen of the United States, you have a constitutional right to “liberty” guaranteed by the Fourteenth Amendment that cannot be taken from you without due process of law. Even family members cannot deprive you of that right without court action. Importantly, as noted above and assuming that you have not committed a crime, a Maryland court cannot take that liberty away from you without a determination based on clear and convincing evidence that you lack sufficient understanding or capacity to make or communicate responsible decisions concerning your person. Thus, as long as you can make or communicate responsible decisions, you have the right to do so and to live on your own.

Practically speaking, your ability to remain independent may depend on your personal finances. If you can make and communicate your desire that your resources be devoted to maintaining your independence and if your finances are such as to allow these expenditures, you remain in control even though you cannot provide for your daily needs yourself. In effect, your finances allow you to provide for your daily needs by employing others (such as hired caretakers) to do so or by entering an assisted living facility. While decreased mobility (e.g., an inability to drive a vehicle) is often a reason for moving in with a family caretaker, this need not be the case if you can offset this decreased mobility using your resources (e.g., by hiring drivers and/or shopping services, etc.) or if, because of assisted living circumstances, such mobility is no longer so necessary. For these reasons, planning to

maximize your financial resources (including providing for long-term care and other insurance) and for who will manage your finances as you direct (if you no longer manage them yourself) becomes a very important practical aspect of maintaining your personal independence.

### **Anatomical Gifts and the Disposition of Your Remains**

The capacity to make and communicate responsible decisions not only determines the extent of your independence while alive, it also allows you to plan and determine what happens to your body after your death.

First, under Maryland law, [“an advance directive”](#) may contain a statement by a declarant that the declarant consents to the gift of all or any part of the declarant’s body for the purposes of transplantation, therapy, research, or education. Typically, one evidences such a gift in one’s health care advance directive, in a separate anatomical gift form witnessed by two adult witnesses, or in the donor’s will. In any of these instances, it is best to also cause a statement or symbol indicating that the donor has made an anatomical gift to be imprinted on the donor’s driver’s license or identification card to make sure that health care providers are made aware of your wishes. After making an anatomical gift, a donor may by law amend or revoke the document in which the gift is reflected. You may wish to also note that any individual may instead explicitly refuse to make an anatomical gift of the individual’s body or part by signing or directing another to sign a record to this effect or by placing such refusal in his or her will.

In addition to planning for anatomical gifts of usable organs, “[a]ny individual who is 18 years of age or older may decide the disposition of the individual’s own body after that individual’s death without the predeath or post-death consent of another person by executing a document that expresses the individual’s wishes regarding disposition of the body or by entering into a pre-need contract” signed by the individual and a witness signing in his or her

presence. Such a document may provide for cremation as opposed to burial with embalment and may designate who can make post-death decisions about these and other matters concerning the disposition of the individual's remains. If a person has not signed such a document, the following persons, in the order of priority stated, have the right to arrange for the final disposition of a decedent's body: the decedent's spouse or domestic partner; an adult child of the decedent; a parent of the decedent; the decedent's adult brother or sister; a person acting as a representative of the decedent under a signed authorization of the decedent; the guardian of the person of the decedent (if any) at the time of the decedent's death; and then any other person (including the decedent's personal representative) willing to assume the responsibility. If a decedent has more than one survivor, the majority of the class may serve as the person in charge of the body disposition.

When I ask clients for their goals in undertaking [estate planning](#), I find that their primary concerns turn out to be maintaining control of their persons and property while alive and taking care of themselves and their loved ones if they become incapacitated. Even more important than the transfer of family wealth is using those resources to maintain independence and control while alive. I hope that this article has given you some food for thought about discussing with your family your decisions about your future living arrangements and personal care and about how to effectively memorialize those decisions so that they will be followed in the future. Please feel free to [contact us](#) if we can help you clarify your thoughts and assist you through this process.