

**Florida Elder and Disability Law Forum  
Basic of Advance Directives  
and Guardianship**

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**Advance Directives**

Legal documents signed by a competent person to provide guidance and authority for medical and health-care decisions or financial decisions in the event the person becomes incompetent to make such decisions



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**Advance Directives**

Designation of Health Care Surrogate  
Health Care Power of Attorney  
Living Will  
Durable Power of Attorney  
Designation of Pre-Need Guardian



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### Advance Directives

Designation of Health Care Surrogate  
F.S.765.201 - 765.205  
Medical Decision (as defined by 765.101(6))  
making for an Incapacitated person, with the  
option of concurrent authority (as of Oct 2015)




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### Advance Directives

Health Care Power of Attorney  
F.S.709.2201 (2)(c)

If such authority is specifically granted in a  
durable power of attorney, (the agent may)  
make all health care decisions on behalf of  
the principal, including, but not limited to,  
those set forth in chapter 765




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### Advance Directives

Living Will  
F.S.765.301 – 765.304

Any competent adult may, at any time, make a living  
will or written declaration and direct the providing,  
withholding, or withdrawal of life-prolonging  
procedures in the event that such person has a  
terminal condition, has an end-stage condition, or is  
in a persistent vegetative state.




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**Advance Directives**  
**Health Care Surrogate/Living Will**  
**Signing requirements**

The document shall be signed by the principal in the presence of two subscribing adult witnesses. At least one person who acts as a witness shall be neither the principal's spouse nor a blood relative



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**Advance Directives**

**Durable Power of Attorney**  
**F.S. 709.2101 – 709.2402**

**General Durable Power of Attorney**  
Document allows agent to have nearly total access to financial world of principal. Certain authority requires Specific Enumeration (Super Powers) F.S.



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**Advance Directives**

**Durable Power of Attorney**  
**Specific Enumeration (Super Powers)**  
**F.S. 709.2202**

An agent may exercise the (Super Power) authority only if the principal signed or initialed next to each specific enumeration of the authority  
(Applicable to docs created after Oct. 1, 2011)



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**Advance Directives**  
**Durable Power of Attorney**  
**Specific Enumeration (Super Powers)**  
**F.S. 709.2202**

(a) Create an inter vivos trust;  
 (b) With respect to a trust created by or on behalf of the principal, amend, modify, revoke, or terminate the trust, but only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor's agent;  
 (c) Make a gift, (subject to limitations);




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**Advance Directives**  
**Durable Power of Attorney**  
**Specific Enumeration (Super Powers)**  
**F.S. 709.2202**

(d) Create or change rights of survivorship;  
 (e) Create or change a beneficiary designation;  
 (f) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or  
 (g) Disclaim property and powers of appointment.




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**Advance Directives**  
**Durable Power of Attorney**  
**Who Can Serve as Agent**  
**709.2105 (1)**

The agent must be a natural person who is 18 years of age or older or a financial institution that has trust powers, has a place of business in this state, and is authorized to conduct trust business in this state.




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**Advance Directives**  
**Durable Power of Attorney**  
**Execution of the Document**  
**709.2105(2)**

(2) A power of attorney must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public or as otherwise provided in s. 695.03.



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**Advance Directives**  
**Durable Power of Attorney**  
**Compensation for Services**  
**F.S.709.2112**

(1) Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal.

(2) Unless the power of attorney otherwise provides, a qualified agent is entitled to compensation that is reasonable under the circumstances.



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**Advance Directives**  
**Durable Power of Attorney**  
**Compensation for Services**  
**F.S.709.2112**

(3) Notwithstanding any provision in the power of attorney, an agent may not be paid compensation unless the agent is a qualified agent.



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**Advance Directives**  
**Durable Power of Attorney**  
**Compensation for Services**  
**F.S.709.2112**

(4) For purposes of this section, the term "qualified agent" means an agent who is the spouse of the principal, an heir of the principal within the meaning of s. 732.103, a financial institution that has trust powers and a place of business in this state, an attorney or certified public accountant who is licensed in this state, or a natural person who is a resident of this state and who has never been an agent for more than three principals at the same time.



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**Advance Directives**  
**Incapacity of Principal Required?**

Health Care Surrogate:  
 Docs Before Oct 2015:      Yes  
 Docs After Oct 2015:      Depends on  
    Principal's choices

Physician or health care provider determines incapacity

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**Advance Directives**  
**Incapacity of Principal Required?**

Health Care Power of Attorney:  
 Not Specified: Principal's decisions control  
 Physician or health care provider determines incapacity



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**Advance Directives**  
 Incapacity of Principal Required?

Living Will:  
 Principal's incapacity required  
 Two Physicians or determine incapacity

  
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**Advance Directives**  
 Incapacity of Principal Required?  
 Durable Power of Attorney:

Before Oct 1, 2011: Springing Power is allowed, even if  
 springs after that date.  
 After Oct. 1, 2011: Doc must be effective upon signing.

Incapacity standard determined by terms of document

  
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**Advance Directives**  
 Designation of Pre Need Guardian  
 744.312(3)(a)

The Court shall "Consider the wishes  
 expressed by an incapacitated person as to  
 who shall be appointed guardian.

  
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**Advance Directives**  
**Designation of Pre Need Guardian**

This designation can be contained in a Health Care Surrogate, Durable Power of Attorney or in a stand alone document. Individuals may nominate a guardian for themselves and Parents may nominate guardian for minor children.



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**Advance Directives**  
**Designation of Pre-Need Guardian**

This designation does NOT empower or appoint a guardian, it only informs the court whom the Principle wishes the Court to appoint.



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**Advance Directives**

Advance Directives are considered a less restrictive alternative to a Guardianship for an incapacitated person, unless they are found by the Court to be insufficient.



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### Guardianship

A petition to determine incapacity is the beginning step in a guardianship proceeding. The filing affects the authority granted of certain Advance Directives as does the final adjudication.




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### Guardianship

Filing of petition:  
HCS : Not suspended  
DPOA: Suspended, unless agent is parent, spouse, child, or grandchild  
LW: No Effect  
PNG: Must be presented to Court for review




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### Guardianship

DPOA to parent, spouse, child, or grandchild:  
May be suspended upon filing motion and showing :  
a) The agent's decisions are not in accord with the alleged incapacitated person's known desires.  
(b) The power of attorney is invalid.  
(c) The agent has failed to discharge his or her duties or incapacity or illness renders the agent incapable of discharging duties.  
(d) The agent has abused powers.  
(e) There is a danger that the property of the alleged incapacitated person may be wasted, misappropriated, or lost unless the authority under the power of attorney is suspended. 744.3203(1)




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### Guardianship

DPOA to parent, spouse, child, or grandchild:

Grounds for suspending a power of attorney  
do not include the existence of a dispute  
between the agent and the  
petitioner 744.3203(1)




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### Guardianship

Adjudication of incapacity:

At the Adjudication hearing the Judge will address  
whether less restrictive alternative to guardianship  
exist that meet the needs of the Principal (i.e.  
Advance Directives) and where there needs to be a  
guardian.




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### Guardianship

Adjudication of incapacity:

If the Advance Directives are shown to be  
valid and meet the needs of the Principal, the  
court will not appoint a guardian, but if not...




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## Guardianship

### Adjudication of incapacity:

If the Court determines that there will be a guardian appointed, the Court will then determine if any authority under an advance directive will continue (F.S. 744.331 and 744.345)




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## Guardianship

### Court Orders:

The Court's Order Determining Incapacity and Appointment of a Guardian and the Letters of Guardianship, identify the exact authority and powers of the Guardian, and will identify whether agents under advance directives (HCS and DPOA) will continue to have authority. (F.S. 744.331 and 744.345)




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THANK YOU !!!!!!!




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