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# The Role of Fiduciaries

**You Want Me to Do What?**

**Understanding the Duties of Attorneys-in-Fact, Guardians, and Personal Representatives**

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\*This content is general information only and not legal advice. You should consult with an attorney for legal advice specific to your situation.

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# Defining Terms - Estate Planning

The term "estate planning" generally refers to the process of creating legal documents which: (1) designate someone to act on your behalf during your lifetime, and (2) designate someone to handle your estate when you die and state your wishes for what happens with your assets at death. Usually, these documents include:

- **General Durable Power of Attorney**
- **Health Care Advance Directive**
- **Last Will and Testament (and sometimes a Revocable Living Trust\*)**

\*We will not be discussing Trusts or the role of Trustees but a Trustee is also a fiduciary

# What is a fiduciary?

Person or entity designated to act on behalf of someone else or carry out the wishes of someone else.

Common law (case law) in Indiana and certain statutes explain the duties of a fiduciary. In general, those duties include:

- Act in the best interest of the person who designated you
- Always follow the actual terms of any legal document naming you
- Don't self-deal (unless the document says you may)
- Keep good records
- Report to the Court if needed or required

# Who May Serve as a Fiduciary?

- Individuals
- Professionals (banks, trust officers, attorneys)
- Other businesses
- Social Security Administration - Rep Payee
- Office of Personnel Management (federal employees) - Rep Payee
- Veterans Administration - Rep Payee

# Attorney-in-Fact - General Durable Power of Attorney

A **General Durable Power of Attorney (GDPOA)** is a document that names someone to handle your financial affairs during your lifetime. It can be effective immediately or when a doctor determines that you are incompetent.

The person/entity you name in the GDPOA is legally called the "***attorney-in-fact (AIF)***." Though, most people refer to the designated person as the "power of attorney."

The AIF does not need to be an actual attorney. It can be an individual (or multiple individuals) or an entity like a bank or professional fiduciary.

The GDPOA is only in effect while you are living and all legal authority to act stops at death.

# Typical Responsibilities of an AIF

The responsibilities of an AIF can vary greatly depending on the person's situation and needs, but common duties include:

- Paying Bills
- Handling various investment transactions (such as completing RMDs).
- Maintaining insurance and working with insurance companies
- Contracting with service providers, e.g., caregivers
- Protecting assets and maintaining real estate
- Can be asked to provide an accounting of all actions taken by the person who named you in their GDPOA or the family (during life and even after death)
- Need to keep records for 6 years after date of transaction

# Health Care Representative

A **Health Care Representative (HCR)** is the person designated in a **Health Care Advance Directive (HCAD)** to make health care decisions for the person who signed the HCAD.

Indiana recently updated its HCAD law effective 7/1/21 and now a HCAD can be a single document that includes:

- Naming a HCR
- Stating certain preferences for treatment at end of life
- Giving access to all health information to the HCR

\*If you have a health care POA/appointment of HCR document created before 7/1/21, those documents are still valid; but if you sign new documents after 1/1/23, you must sign a new HCAD under the new law.

# Typical Responsibilities of a Health Care Representative

The responsibilities of a HCR can vary greatly depending on the person's needs, but common duties include:

- Consenting to medical treatment
- Identifying ADL needs and working with the AIF for finances to maintain safety and independence
- Determine care needs for caregivers and/or facility living
- Monitoring the person's general health and care, and advocating for that person's needs
- Involve the person who designated you as HCR in their health care decisions if possible



# Guardian

Guardianship - legal process by which the Court appoints a Guardian for a person who is deemed incapacitated.

The person who needs a Guardian is called the "protected person."

The protected person has no ability to make legal decisions - the Guardian must make all decisions (unless the duties of the Guardian are limited by Court Order).

Guardian must ask permission from the Court to take certain actions.

Guardian of Person (health care decisions, where to live) vs. Guardian of Estate (financial decisions). There may be different/multiple Guardians for each.

A Guardian may be needed even if the protected person has signed a GDPOA and HCR.

# Common Duties of a Guardian

- Identify and gather all of the protected person's assets, create a Guardianship bank account and provide the Court with an Inventory of all assets
- Pay Bills
- Preserve the protected person's assets
- Make health care decisions, consent to medical procedures, determine level of assistance required and how to implement caregivers or move the protected person to a facility
- Provide reports and accountings to the Court (required every 2 years)

# Personal Representative - Last Will & Testament

The Last Will & Testament (LWT) states who will serve as **Personal Representative (PR)**. People also refer to the PR as Executor.

The PR should hire an attorney and obtain legal advice immediately.

The PR will need to file the LWT, along with other legal pleadings, with the Court, and the Court will formally appoint the PR.

The PR has no legal authority to act on behalf of the Estate until he/she is appointed by the Court. This process is known as "probate" and it may take 30 to 45 days from DOD to be appointed as PR and have authority to act.

# Typical Duties of a Personal Representative

- Work with the Attorney to identify, liquidate and/or distribute all assets titled in the decedent's name alone as directed by the Will
- Identify and pay creditors
- Provide an accounting to the heirs/beneficiaries
- Any assets that are titled jointly with someone else, name a beneficiary, have a transfer on death clause or are titled in a Trust are not controlled by the PR
- File all necessary tax returns
- Administering an estate typically takes a 12 -18 months depending on the assets

# What if a Person Dies Without a Will?

A person who dies without a Will (or without any Trust planning) dies "intestate."

Certain people are authorized to file a petition with the Court asking that a PR be appointed to administer the decedent's estate.

In an intestate estate, state law dictates who are the beneficiaries/heirs at law of the decedent.

The PR in an intestate estate has the same duties as a PR who was named in a LWT.

# Logistics - Things to Remember

- If a document indicates that someone must be incapacitated before the person/entity named in the document can step into the fiduciary role, someone must obtain this opinion from a primary care doctor. This can take time, especially depending on your health event.
- Person can be considered "temporarily" incapacitated (such as needing a rehab stay after a hospitalization).
- Person still has access to their funds and accounts even if the GDPOA is in effect and the designated AIF has access to your funds.
- As AIF, be prepared to spend significant time notifying financial institutions of your role and be prepared to "fight" and possibly fill out other forms to gain access to funds or accounts.
- Always have documents and important paperwork on hand (create folder for info like SSN, DOB, copy of DL)

# Logistics - Things to Remember

- If you require a Guardian, the Court has oversight and control. You are unable to access your funds or have credit/debit cards.
- It is possible to have someone out of town (even out of State) serve in these roles, if you have the means to pay for service providers to help be the "feet on the ground." (Caregivers, geriatric nurse case manager, handyman, etc). Medicaid does cover some of this.
- Professional fiduciaries are often a good option (if funds allow) if there are no family members locally to assist.

# Logistics - Things to Remember

Only in Effect While Living

Only in Effect upon Death

HCAD

Personal Rep - Last Will & Testament

GDPOA

In Effect While Living AND upon Death

Trust

Guardian (limited authority after death of the protected person)



# Resources

- Ask for referral from your financial advisor, tax preparer or trusted friends for an elder law attorney to start estate planning.
- Seek legal advice if you need to pursue a guardianship.
- Interview several attorneys to find someone to fit your needs.
- Your level of care and how it is handled will be significantly impacted by your financial situation. Work with your financial team and plan for your future. The more funds you have, the more flexibility you have.
- To inquire about starting services in the home, look to your local Area Agency on Aging.

# Questions?

THANK YOU FOR PARTICIPATING!

\*Please remember that this information is not intended to be legal advice and you should consult with an attorney to obtain advice on your specific situation. Also, all information on the slides is based upon Indiana law and not the law of any other state.