

Who Will Make Your Health Care Decisions if You Cannot? The Illinois Health Care Surrogate Act vs. the Illinois Power of Attorney Act

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Have you considered who will be making health care decisions for you if you cannot make them yourself? Under the Health Care Surrogate Act, 755 ILCS 40/1, the State of Illinois has established a plan for your decision-making authority, even if you have not established a plan on your own. The Act clarifies the rights and responsibilities of those involved in making often critical decisions on behalf of patients.

As part of the estate planning process, clients are urged to consider what will happen once they no longer have the ability to make important decisions about their own health and well-being. A properly-executed Health Care Power of Attorney, or a Living Will answer many of these important questions.

What happens if a person fails to execute one of these planning documents? The good news is that you still have a remedy if you have not prepared them. If no health care power of attorney is made, and no direction is given through a Living Will, the State of Illinois offers some potential relief... albeit with certain drawbacks. Authority to transfer decision-making is permitted under the Health Care Surrogate Act. That legislative act creates an order of priority to certain individuals to obtain the ability to make decisions on your behalf.

The surrogate process will be utilized if (a) a physician has determined and recorded that you cannot make decisions yourself, and (b) you do not have an applicable living will, declaration for mental-health treatment, or a Power of Attorney. Your surrogate may even have the right to forego life-sustaining treatment if you have one of a few qualifying conditions, such as a terminal condition. Your surrogate may also petition the Court to make decisions regarding your mental health treatment.

Having a Health Care Power of Attorney (or even a Living Will), however, is superior to relying upon the Health Care Surrogate Act. First, there will be no confusion or disagreement regarding who may make the decisions. Secondly, your Power of Attorney must follow your specific, written directions, rather than rely on their own opinion. The maker of the Power of Attorney can directly address life-sustaining treatment questions or decisions regarding mental health. Finally, and perhaps most persuasive, is the notion that all of these benefits can be accomplished without an expensive, time-consuming court process that is required with the Health Care Surrogate Act. So plan ahead!

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