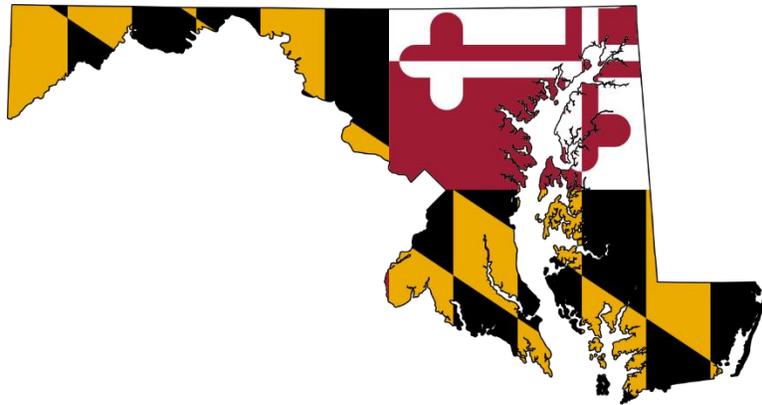


# **LIFE AND HEALTH PLANNING HANDBOOK**



June 2021





# Maryland Attorney General's **COVID-19 Access to Justice Task Force**

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# Life and Health Planning Committee Handbook

**The information in this Handbook is for informational purposes only. This Handbook is not and should not be considered legal advice. The legal information stated here may not apply to your individual situation. Therefore, please consult an attorney or legal advisor regarding your specific situation. For those who may need free or low-cost legal services, please refer to the *Directory of Legal Resources for Life, Health, and Estate Planning in Maryland*.<sup>i</sup>**

Life care and estate planning is important for every Marylander. Regardless of income, wealth or assets, you have the right to make decisions about how your health care and financial affairs will be handled if you lose the capacity to make your own decisions. In addition, you have every right to decide who should receive your personal belongings and property after you die. It may be uncomfortable planning for these things, but it is an important step to help your family and caretakers when you may be unable to do so. If you do not make these decisions ahead of time, they may be decided for you and may not reflect your wishes.

This handbook addresses:

- Advance Medical Directives, Living Wills, Health Care Powers of Attorney and the Medical Orders for Life-Sustaining Treatment (“MOLST”) form, which cover your health care decisions and treatment preferences;
- Financial Power of Attorney, which covers your property if you become incapacitated;
- The appointment of a standby guardian, which ensures that your children are cared for by someone of your choosing if you become incapacitated;
- Court appointed guardianship;
- Property ownership and titling;
- Wills and non-probate transfers, which cover your assets after your death; and
- Home ownership and deeds.

# Important Documents for Every Marylander

You should consider having at least the following three essential documents: An Advance Medical Directive, a Financial Power of Attorney, and a Last Will and Testament. You should also talk to your doctor about completing a MOLST form if you do not want CPR or other life support measures taken because of your current medical condition.

## Advance Medical Directive

You have the basic, legal right to make decisions about your own health care. An Advance Medical Directive (or “AMD”) puts into writing your general wishes for the medical care that you do – or do not – want sometime in the future, if you are not able to decide or to speak for yourself at that time. This is important: If you can communicate your health care decisions, your word will still take precedence over what you state in an AMD. However, if you are not able to decide or to speak for yourself, then your doctor and other care professionals will rely on what you wrote.

There are a few good reasons to have an AMD. Besides telling your doctors what you do and do not want, it also tells your family members or other decision-makers what is important to you. They might know anyway—but they might not—and talking to them about your wishes when you do decide to sign one is a good opportunity to tackle a difficult topic.

AMDs do not settle all issues when it comes to your future care. They are meant to cover basic information and are necessarily general. They may not address a specific problem that may arise in your future care, and even then, AMDs are not easily enforced without someone to speak on your behalf.

An AMD generally has two parts: a “living will” and a “health care power of attorney.” You can sign one or both. A related form, which a doctor signs, is called a Medical Orders for Life-Sustaining Treatment (“MOLST” – see below for more information).

## Living Will

A Living Will allows you to express your wishes regarding your medical treatment in various end-of-life circumstances. For example, it can tell your doctors how aggressively you want them to treat you and to what extent you would want to be kept alive. It can tell people at what point you would prefer a natural death instead of being kept alive by ventilators, feeding tubes, or

other mechanical means. Or, it can state you want all life-sustaining treatments even if they are unpleasant or you may not fully recover.

## **Health Care Power of Attorney**

Through a document called a Health Care Power of Attorney, Selection of Health Care Agent, or similar term, you can appoint one or more individuals as your “health care agent” to make health care decisions on your behalf if you are not capable of making these decisions on your own. Doctors and other health care professionals can ask your health care agent to make health care decisions on your behalf.

Without a Health Care Power of Attorney, family or even close friends may still be able to make certain health care decisions for you. But with a Health Care Power of Attorney you can decide *which* relative or friend you prefer to make those decisions for you when you cannot do so yourself. Whether or not you sign an Advance Medical Directive containing a Health Care Power of Attorney or Living Will, you should tell whomever might make those decisions what is important to you and what quality of life you value. However, if you choose to name a health care agent, you *must* let them know you have done so and discuss with them what you want. You may or may not allow your health care agent to make end-of-life decisions, but, if you do, they may use your Living Will as guidance in determining what actions to take, if any.

## **Medical Orders for Life-Sustaining Treatment (MOLST)**

A MOLST form is a written record of your medical orders – your specific decisions to receive (or not receive) certain treatments, signed by your doctor. A MOLST is used to give directions to all medical professionals about what types of treatment you should (or should not) receive, regardless of whether there are emergency circumstances. While similar to an Advance Medical Directive, there are some important differences. For example, a MOLST containing a Do Not Resuscitate Order (“DNR Order”) would most likely be obeyed by emergency responders; an AMD containing a DNR Order would likely NOT be obeyed.

### **Health Planning Documents FAQs**

#### **1. *Why should I sign an Advance Medical Directive?***

An Advance Medical Directive’s Health Care Power of Attorney allows you to appoint the person of your choice to make your medical decisions if you are unable to do so. The Living Will portion of the Advance Medical Directive is a written statement by you of what medical care you want in the future. Your doctor and others may use it when you are unable to say what you want. A Living Will is a good way to let your doctors and family know what you want if you cannot tell them.

**2. *Where can I get an Advance Medical Directive form?***

There are many different sources to obtain the forms needed to complete an Advance Medical Directive. One is available for free on the Maryland Attorney General's website.<sup>ii</sup> You may find others written by medical, religious, and other groups. Whatever form you use, you should discuss the medical treatment choices with your doctor and you may wish to speak with a lawyer about how to avoid any future confusion by making your choices clear and understandable.

**3. *How can I make sure my doctors and others will follow my Advance Medical Directive?***

To be followed, an Advance Medical Directive must be legally valid. There are only a few requirements for a legally valid Advance Medical Directive in Maryland, but it is important to meet them. An Advance Medical Directive must be (1) in writing, (2) signed by you, (3) dated, and (4) witnessed. There are specific rules about who can be a witness to the document. For example, you need two adults to witness your signing, but the person who witnesses cannot be a person you name to make decisions for you (your health care agent). One of your witnesses (but not both) may benefit financially from your death, such as a husband or child who will inherit your property after your death. You do not need a notary, but if you have a notary for signing another document, that person can be one of your two witnesses. You should consult a lawyer if you have any questions about meeting these legal requirements.

**4. *If I have completed an Advance Medical Directive in another state, is it also valid in Maryland?***

If you have completed an Advance Medical Directive in another state in accordance with that state's legal requirements, your out-of-state Advance Medical Directive is also valid in Maryland. However, it is always better to have a Maryland-specific document if you live in Maryland. Local doctors and hospital staff are familiar with Maryland-specific documents, and are more likely to follow them without having to take the additional steps of determining whether your out of state directive was a properly executed and valid document that can be applied in Maryland.

**5. *Is it possible to complete an Advance Medical Directive without witnesses?***

You may go online to complete an electronic Advance Medical Directive without the need for witnesses if you provide information requested by the website to prove your identity. To be certain the electronic Advance Medical Directive will be legally valid, use a website that has been approved by the Maryland Health Care Commission such as MyDirectives.com. An important advantage of an electronic Advance Medical Directive is that it can be stored and accessed online. You should consult a lawyer if you have any additional questions.

**6. *Where should I keep my completed paper Advance Medical Directive?***

You should keep your completed Advance Medical Directive in a place where it may easily be found. Give a copy to your health care agent or agents and to your physician. It is also a good idea to carry a wallet card saying you have completed an Advance Medical Directive

and that includes your health care agent's contact information. In some counties, the local hospital may accept a copy to be kept on file in case of an emergency.

**7. *Do I need to hire an attorney to complete an Advance Medical Directive?***

No, you do not need to hire an attorney to complete an Advance Medical Directive. However, an attorney can be helpful in answering any questions you may have and to ensure your Advance Medical Directive is legally valid.

**8. *What is a MOLST and how does it differ from a Living Will?***

A MOLST form contains medical orders issued by your physician, nurse practitioner, or physician assistant to carry out your wishes about life-sustaining treatments, such as CPR, ventilators, and feeding tubes. A MOLST form has medical orders that must be followed at all times; this means that a MOLST form will be followed even in unexpected emergency situations. In contrast, a Living Will contains your treatment preferences for end of life care. When the time comes for end of life care to be provided to you, your medical care providers would sign a MOLST form containing the actual medical orders needed to carry out the treatment preferences you stated in your Living Will. A free copy of the MOLST form can be found at the Maryland MOLST website.<sup>iii</sup>

**9. *If I do not want CPR, will a Living Will ensure that CPR is not performed on me?***

No. If you do not want CPR, you need to ask your health care provider to complete a MOLST form. A Living Will will not stop emergency medical personnel from performing CPR. When you or your loved ones call 911, emergency medical personnel will require a completed MOLST form, a Medic Alert bracelet, or other approved bracelet containing the MOLST form's DNR order to prevent them from starting CPR. If you do not have an approved bracelet, you or your loved ones are expected to retrieve the MOLST form before the ambulance arrives. Otherwise, emergency medical personnel may look for your MOLST form in a few places: on your refrigerator door, by your bedside, and behind your bedroom door.

**10. *I already completed a Living Will containing my treatment wishes. Do I also need a MOLST form?***

A Living Will and a MOLST form are used for two very different reasons, so you may choose to have both. A Living Will is a more general statement that you will either accept or decline life sustaining treatment in the event you become incapacitated and cannot speak for yourself. On the other hand, a MOLST form contains medical orders about specific life-sustaining treatments. You may choose to consent to a MOLST form if you have any current medical conditions that may require specific life-sustaining medical treatments. For example, a person who currently is unable to properly swallow solid food may have previously signed a living will stating generally that they do not wish to have future life sustaining treatment should they become terminally ill, but they may also consent to a MOLST form ordering that they now receive a feeding tube because they are not yet terminally ill. Each individual situation will vary and you should consult your medical care provider and an attorney to

make sure your wishes are properly documented so that they are carried out in accordance with your wishes.

**11. *Where can I get more information and copies of Advance Medical Directive forms and MOLST forms?***

Further information about Advance Medical Directives is available at the Maryland Attorney General’s website at [marylandattorneygeneral.gov](http://marylandattorneygeneral.gov). Further information about the MOLST form is available at the Maryland MOLST website, <https://marylandmolst.org>.

## **Financial Power of Attorney**

Whereas a Health Care Power of Attorney names an agent to make decisions related to your health and medical needs, a Financial Power of Attorney, hereafter referred to simply as “Power of Attorney”, is a document by which you enable someone else to act for you. You, the person giving the power, are the “principal” and the person you appoint is your “agent,” sometimes called “attorney-in-fact.”

A Power of Attorney may be a good way to help your family or others manage your legal and financial affairs if you become unable, because of illness or aging. There are many different ways to name a Power of Attorney. For example, you can name one or more people as your agent, acting together or independently of one another when one is not available. You can give your agent many powers, or just a few, and you can direct how they use those powers. It is an incredibly powerful document.

**CAUTION:** A Power of Attorney gives an agent the authority to make decisions about your property. A poorly chosen agent could cause great harm to your financial well-being. Therefore, great care should be given to selecting an agent and deciding how much power to give that person. And there are other possible problems, like giving someone too little power so that they cannot solve the problems that arise when you are no longer able to change the document.

While there are many sources for Power of Attorney forms, including online samples that can be completed and signed without a lawyer’s help, you may wish to discuss your particular situation with an attorney who can help you avoid potentially dangerous situations.

### **FAQs**

**1. *How long does a Power of Attorney last?***

A Power of Attorney can last for any amount of time that you agree to, including up until your death. You should be careful to state the specific duration of the agent’s power within the Power of Attorney document. In Maryland, a Power of Attorney is said to be “durable” – still effective even after you lose competence - unless the document itself says it is not.

**2. *What can the agent do?***

Almost anything you specify, but you have to be specific about what you want. A short document that says only “Everything I could have done if present” will not be honored by banks and other financial agents. There are some things the agent cannot do, for example, the agent may not create a Will for you or cast a vote in an election on your behalf.

**3. *Are all Financial Powers of Attorney the same?***

No. Maryland has by law created two “statutory form” documents - a “Limited Power of Attorney,”<sup>iv</sup> and a “Personal Financial Power of Attorney.”<sup>v</sup> A “statutory form” document is one that is created by state law and is, therefore, considered to be “state approved” form, which is readily recognized and accepted provided that it is properly executed. Lawyers usually have their own forms. The important difference is that banks and other financial institutions cannot dispute the scope of an agent’s power if either of the two “statutory form” Powers of Attorney is used. An agent’s power can be questioned or disputed if any other form is used. However, the statutory form may not contain all of the powers that may be appropriate for your needs. For example, if you are a business owner, there are no provisions in the statutory form that specifically give your agent powers that may be needed to continue to operate the business. A lawyer may assist in preparing a more complete power of attorney that addresses your specific needs.

**4. *Is it possible that the Power of Attorney might not be valid or honored?***

Yes. A Power of Attorney gives an agent extraordinary powers over your money and property. Any person or entity that is responsible for your money or property, such as your bank, may be hesitant to allow your agent to control it. Using a statutory form may help your agent perform his duty. Additionally, you may want to place a copy of your Power of Attorney on file with your bank or any other entity that might be affected.

**5. *Does that mean I should sign one of the Statutory Form Power of Attorney documents?***

It is recommended that all persons sign a power of attorney, but the statutory form powers of attorney may not include all of the powers you might want or need for your family to have in managing your affairs. You can alter the forms to add and delete powers, but of course you have to know what to add or delete to do it right. An attorney who specializes in this area of the law should know whether one of the statutory form powers of attorney is sufficient for your purposes, and if not, how to draft a power of attorney to get the results you want.

**6. *Do I really need to see an attorney to prepare a “Power of Attorney”?***

An attorney is not required but it is a good idea to consult one in this instance. Everyone’s situation is different so a statutory form or internet sample may not meet your needs. For example, using the wrong form may put your assets at risk or may disqualify you from receiving future Medicaid benefits without the need for litigation and additional costs. A knowledgeable lawyer can help you avoid such problems. Not having the right document can be a costly mistake.

**7. *Does it matter who I appoint?***

Yes – and it may even be the single important decision you will make. An unavoidable problem with a Power of Attorney is that it gives another person (your agent) access to your money and other property with little protection if they prove untrustworthy. They are required to be ethical and honest, and to use your money only for your benefit (or for someone else, if you said so), but no one stands over them making sure that they do it right. Choosing the wrong person as your agent can be expensive if you have to sue them to recover your money or property. Again, working with a lawyer, there are ways to make powers of attorney safer for you if that is your concern.

**8. *Can my agent use my Power of Attorney to handle my federal retiree benefits (that could be Social Security, Railroad Retirement Board, civil service, foreign or military service)?***

No, most federal agencies do not generally honor a Power of Attorney. However, they will generally allow you to appoint someone as your representative to receive your benefit payment (called “representative payees”). To name a representative payee you must contact the specific federal agency from which you receive benefits and request a representative payee form. The person you name as representative payee must of course use your money for you. One exception is the Internal Revenue Service, which does accept a Power of Attorney if the appropriate IRS forms accompany the submission of the Power of Attorney document.

**9. *Are there any other requirements for a Power of Attorney?***

Yes. The person signing – you, the principal – has to be legally competent, at least 18 years old, and able to understand the nature and purpose of the power of attorney. (Someone can sign for you if you cannot sign your name because of a physical disability.) It has to be signed in front of a notary public and two witnesses (the notary can be one of the two witnesses unless a remote notary is used). The agent also has to be at least 18 years old.

## **Standby Guardian**

A standby guardian is a person appointed by a parent of a child to take care of the child in the event that the parent becomes:

- a. Mentally incapacitated;
- b. Debilitated by an illness or injury; or
- c. Subject to an adverse immigration action.

Standby Guardianship is not the same as custody. If both parents are living, then both parents must consent to the appointment of a standby guardian. If a parent is unavailable for certain specific reasons, only one parent’s consent is required. A parent may revoke his or her consent to the standby guardianship at any time. Parents do not lose their parental rights at any time under a standby guardianship.

## FAQs

### **1. *Why designate a standby guardian before it is needed?***

It is not always possible to anticipate when a standby guardian is needed, for instance in the event of an accident or sudden illness. Designating a standby guardian allows you to make provisions for your child to be in the care of someone you trust if you are unable to care for your child yourself. Otherwise, if no suitable guardian is found, your child may be at risk of being placed in the Maryland child welfare and foster care system.

### **2. *How do I designate a standby guardian?***

You can designate a standby guardian by using the Parental Designation and Consent to Beginning the Standby Guardianship form (the “Designation Form”) which is posted on the Maryland Courts website.<sup>vi</sup> You must sign the Designation Form in the presence of two witnesses. The designated standby guardian must also sign the Designation Form.

The Designation Form must include:

- a. The identity of the parents, the child and the standby guardian;
- b. The duties and powers of the standby guardian. The Designation Form lists the duties and powers you may give to the standby guardian, such as providing for the child’s physical and emotional well-being and making educational and medical decisions for the child, and you indicate on the form the ones you want the standby guardian to have; and
- c. Consent by the parents to the designation of the Standby Guardian. Each parent (if available) must affirmatively state that he or she intends the standby guardian named to become the minor’s guardian if necessary.

### **3. *When does the standby guardianship go into effect?***

The standby guardianship goes into effect when you are unable to care for your child because of a physical or mental incapacity or start of deportation proceedings, and it continues for 180 days unless you revoke it. At the end of the 180 days, the standby guardianship automatically terminates. If you need the standby guardian to serve more than 180 days, prior to the end of the 180 days, the standby guardian must file a Petition by Standby Guardian (Judicial Appointment) with the Circuit or Orphans Court in the county in which the child is living. The filing of the Petition automatically extends the standby guardianship until the court rules on the Petition. The Petition is available on the Maryland Courts website.<sup>vii</sup>

### **4. *Where can I find more information about standby guardianships?***

More information about a standby guardian may be found at The Peoples Law Library of Maryland<sup>viii</sup> and at [www.standbyguardian.org](http://www.standbyguardian.org).

# Court Appointed Guardianship

Court Appointed Guardianship is the last resort when you are unable to manage your property (e.g., bank accounts, business interests, land and buildings, etc.) or make healthcare decisions on your behalf. It is a court proceeding in which someone – the guardian – is appointed to act in your best interest, manage your property and/or make healthcare decisions on your behalf because a court has found you to be disabled. Once appointed, the guardian must complete a training program and has ongoing reporting and recordkeeping requirements, including the filing of annual accountings. The Court Appointed Guardianship process is cumbersome, time-consuming and expensive, so all other alternatives must be explored before pursuing court appointed guardianship.

## FAQs

### 1. *What alternatives should be considered before pursuing court appointed guardianship?*

Under Maryland law, a guardian will only be appointed if there is no less restrictive form of intervention available that is consistent with your welfare and safety. Guardianship is a very serious process, which, if initiated, will have the effect of restricting your right to make personal and financial decisions. Therefore, all alternatives must be exhausted before the court will approve a guardianship. The alternatives to guardianship include, but are not limited to:

- a. Financial powers of attorney and representative payee;
- b. Advance Medical Directives and surrogate decision making; and
- c. Maryland state agency programs and private services aimed to assist adults who wish to remain self-supporting.

A complete list of alternatives that should be pursued prior to initiating guardianship can be found at the website for The People's Law Library of Maryland.<sup>ix</sup>

### 2. *Are there different types of guardians?*

There are two different types of guardians: (1) Guardian of the Person and (2) Guardian of the Property.

- a. *What is a Guardian of the Person?* The court can appoint a person to take care of your personal and physical needs. This includes, but is not limited to, providing everyday needs, such as food, clothing and housing, and can also include arranging for health services and for your care. The guardian of the person will need to file reports with the court describing your health and care needs.
- b. *What is a Guardian of the Property?* The court can appoint a person to manage your financial affairs and to make financial decisions on your behalf. This includes, but is not limited to, managing day-to-day finances, collecting income, applying for benefits, managing property and paying expenses. The guardian of the property must file with the court annual accountings of your property. Also, to protect your

property, the court may require the guardian of the property to be bonded and may appoint someone else if the person seeking appointment as guardian does not have the financial qualifications to qualify for a bond.

Note that the court can appoint one person to manage both your personal and financial affairs who would be both the Guardian of the Person and the Guardian of Property. Or, the court can appoint one person to manage your personal affairs and appoint another person to oversee your financial affairs.

**3. *When is guardianship necessary?***

A guardianship proceeding is necessary when: (1) a physician, psychologist or certified clinical social worker determines that you are unable to make decisions related to your personal care and financial decisions, and (2) there are no alternatives to guardianship.

**4. *Where can I learn more about guardianship in Maryland?***

More information and resources related to guardianship of adults and minors in Maryland can be found at the Maryland Courts website<sup>x</sup> and The Peoples Law Library of Maryland.<sup>xi</sup>

## **Property Ownership and Titling**

The titling of your property is an important concept to understand in order to determine who has access to your property and what will happen with that property in the event of your death. “Titling” is a word used to refer to who (one or more persons) owns the property, and what rights they have to the property (in other words, whose names are on the title of the property). “Property” means something that you own, such as a bank account, car, or home.

In order to understand how your financial and estate planning documents will operate it is important to understand how property titling works. The decision of how to title your property is a significant one, which can completely change who can access your property, what rights they have, and who inherits from you. Adding co-owners to your property can also give the creditors of the co-owners certain rights to your property! These decisions can have enormous consequences, and you should be very careful before adding owners to your property; you may wish to consult with an attorney and tax professional before doing so. In particular, if you believe you may need to qualify for Medicaid assistance, you should consult with an elder law or disability rights attorney before making any changes to the title of any property. More information about titling for bank accounts can be found at the Maryland Department of Labor’s website<sup>xii</sup> and more information about titling for real property can be found at The People’s Law Library of Maryland.<sup>xiii</sup>

## FAQs

### 1. *How can property be owned/titled?*

Property can be owned/titled in a number of ways and the form of ownership/titling will determine an owner's rights to the property during the owner's lifetime and also how the property will be disposed of at the death of an owner. Generally, there are three main categories of property ownership/titling: (1) Individual Ownership; (2) Joint Ownership (i.e., Joint Ownership with Rights of Survivorship, Tenants by the Entirety, and Tenants in Common); and (3) Direct Transfer Ownership (i.e., Beneficiary Designation, Payable on Death, Transfer on Death, and Revocable Trusts). All three categories of property ownership are discussed in detail below.

### 2. *What does it mean to own property in your individual name (alone as the sole owner)?*

If you own property in your individual name (alone and as the ONLY owner), then you are the only person who can access and manage the property. In the event of your disability, in order for someone else to access and manage the individually owned property for you, such person would need a financial Power of Attorney or would need to pursue guardianship. Upon your death, individually owned property will be controlled by your Will, if you have one. Otherwise, such individually owned property will be controlled by Maryland's laws of intestacy, which is a set of laws that provides how your property will be distributed in the event that you die without a Will. Lastly, it is important to note that upon your death, all of your individually owned property is subject to probate, which is the process by which the court oversees the transfer of your property at death. More information about the probate process is found below under the topic "Wills and Other Property Transfer Documents."

### 3. *What are the types of joint ownership available to me?*

It is possible to co-own property together with one or more other people – this is known as "joint ownership". There are three forms of joint ownership, which are: (1) "tenants by the entirety," (2) "joint ownership with rights of survivorship," and (3) "tenants in common." Typically, when you own a bank account or real property with one or more other people, the title to the account or the deed to the real property will reflect which form of joint ownership the property is titled as. To make things more complicated, these forms of ownership can sometimes be combined. For example, the ownership in a home might be divided equally as tenants in common, but with 50% owned by a married couple as tenants by the entirety, and the other 50% owned by their daughter. Decisions regarding property titling can be quite complex, and you may wish to consult with an attorney prior to making any changes.

#### a. *What does Tenants by the Entirety mean?*

"Tenants by the Entirety" is a form of joint ownership reserved only for married couples. This form of ownership can sometimes be used to protect property from the creditors of only one spouse. This is because the property that is owned as tenants by the entireties is considered to be entirely by both spouses, and not owned by each of them as to a separate and divisible 50% separate. Accordingly, the creditor of only one spouse may not force the sale of the property that is also considered to be owned

by the other non-debtor spouse. When it comes to bank or brokerage accounts, if one spouse becomes disabled, the other spouse will still have access to the property in the account; for real estate, both spouses can use the property, but if one becomes disabled and the real property needs to be sold, the other spouse would need a financial Power of Attorney or guardianship to do so. This kind of ownership means that if one spouse dies, the surviving spouse automatically inherits the property (and as a result, the property will not be subject to probate as part of the deceased spouse's estate).

b. ***What does Joint Ownership with Rights of Survivorship mean?***

The second form of ownership, "Joint Ownership with Rights of Survivorship," can be used by any two or more people for the ownership of any kind of property. Whereas, tenants by the entirety is a form of ownership available only to a married couple, joint ownership with rights of survivorship is a form of ownership available to two or more people, including married people. When it comes to bank or brokerage accounts, if one owner becomes disabled, the other owner(s) will still have access to the property in the account; for real estate, all owners can use the property, but if one owner becomes disabled and the property needs to be sold, someone else would need a financial Power of Attorney or guardianship to do so on behalf of the disabled owner. In the event of one owner's death, the deceased owner's ownership in the property automatically transfers to the surviving owner or owners (and as a result, the property will not be subject to probate as part of the deceased owner's estate).

c. ***What does Tenants in Common mean?***

The last form of ownership, "Tenants in Common," can also be used by two or more people for the ownership of any kind of asset, although it is most common with real estate. With this type of ownership, a significant difference from the other types of ownership is that each owner will own a specific fraction of the property, and he or she will usually own that fractional interest as a sole owner. The ownership interests can be equal, but they do not need to be – for example, one owner may own 80% of the property, and another owner may own 20% of the property. If one owner dies, his or her share of the property will not automatically transfer to the other owners, but would typically be subject to probate as part of the deceased owner's estate, to be transferred by his or her Will or to heirs decided by state law.

**4. *What are the types of direct transfer ownership available to me?***

There are three main categories of direct transfer ownership: (1) Beneficiary Designations, (2) Payable on Death/Transfer on Death Accounts, and (3) Trusts. All three categories allow the property owner to transfer their interest in such property directly to the designated beneficiaries upon the death of the property owner and as such, such property is not subject to probate. Each category of direct transfer ownership is discussed in detail below.

a. ***What is a Beneficiary Designation?***

Beneficiary Designations allow you to transfer assets directly to individuals, regardless of the terms of your Will. (See Section below on "Wills and Other Property Transfer Documents.") Generally, a Beneficiary Designation is a form in

- which you designate beneficiaries to receive the balance of property upon your death. Beneficiary designations are most often associated with life insurance policies and retirement accounts, but can also be used with annuities and mutual funds. During the property owner's lifetime, the persons designated as beneficiaries have no right to access or manage the property. However, upon the death of the property owner, the property passes directly to the designated beneficiaries by operation of law, and as such, the property controlled by beneficiary designations are not subject to probate.
- b. ***What is a Payable on Death/Transfer on Death Account?***  
Payable on Death Accounts (generally associated with bank accounts such as checking and savings accounts) and Transfer on Death accounts (generally associated with stock and brokerage accounts) allow an owner of such accounts to designate beneficiaries to receive the balance of such account directly by operation of law upon the account owner's death. During the lifetime of the account owner, the persons designated as the payable on death or transfer on death beneficiaries have no right to access or manage the account. However, upon the death of the account owner, the account passes directly to the designated beneficiaries by operation of law, and as such, the property controlled by a Payable on Death and/or Transfer on Death account are not subject to probate.
- c. ***What is a Trust and what happens if I transfer my property into a Trust?***  
A Trust is a relationship in which one party, known as the "Grantor", gives another party, known as the "Trustee", the right to hold property or assets for the benefit of a third party who is the beneficiary of the Trust. There are two types of Trusts: Revocable Trusts and Irrevocable Trusts. There are many reasons that individuals may set up some sort of Trust. Typically, it may be done to avoid probate, or it may be done for certain asset protection reasons. Regardless of what type of Trust you may establish, it can have serious consequences in many different respects, such as asset protection, divorce, bankruptcy, and your ability to make changes to your plan in the future. ***Trusts should always be created under the advice of an attorney with knowledge in the area of estates and trusts law.***
- i. ***What is a Revocable Trust?***  
A "Revocable Trust" (sometimes calling a "Living Trust" or "Revocable Living Trust") is a type of Trust you may set up for yourself while you are living. You may transfer your property to a Revocable Trust in which you would be the trustee (i.e. the person responsible for managing property) and sole beneficiary (i.e. the person who receives the financial benefit of the Trust property) while you are living. The Trust could be changed or revoked by you. You could transfer the property in and out of the Trust as needed, although if you have a mortgage on a home that you wish to transfer into your trust it is best to notify the mortgage company of the transfer and obtain their consent. The home (or its proceeds, if it is sold) can be transferred to the trust's beneficiaries when you die. One advantage to having your property held in a Revocable Trust is that it avoids the cost of probate upon your death and affords some privacy. The disadvantage

can be the additional cost of setting up the trust and the deed to transfer the property.

ii. ***What is an Irrevocable Trust?***

An “Irrevocable Trust” is a Trust that may not be changed or revoked by you. In some specific situations, it may be beneficial for you to transfer your property to an Irrevocable Trust in which you name another person to serve as trustee, and in which you, your family, or others are named as beneficiaries. The advantage to Irrevocable Trust ownership is the preservation of value of the home for your loved ones. The disadvantage is the loss of control and the cost of setting up the trust and new deed.

## **Wills and Other Property Transfer Documents**

There are different ways that your loved ones can receive your personal belongings and property after you die. A Will can help make sure that when you die, any of your property that is in your name alone, and which does not have a beneficiary, will be distributed according to the instructions that you have included in your Will. This means that a Will often can only control what happens to some of a deceased person’s property, but *not* all of their property. For example, if you die, anything that you own which is jointly owned with another person will automatically belong to that surviving person. Anything that you own which has a designated beneficiary will immediately be transferred to those beneficiaries when you die (this is most common for retirement accounts and life insurance policies). As you can see, there are a number of ways that a person can own property, and have only a portion of their property pass under their Will when they die. (See section on Property Ownership and Titling above.)

### **FAQs**

**1. *What else can a Will do?***

Although a Will is typically known as a document that determines how property is distributed upon death, there are other important parts of Wills. For instance, a Will can be used to name a guardian to care for your minor children in the event of your death. A Will is also a place where you designate who you want as your Personal Representative (often referred to as an “executor”) who will be responsible for administering your estate through the Court process. In Maryland, a Will is also permitted to waive the bond requirement for the individual serving as your Personal Representative, which allows your Personal Representative to manage the process without requiring them to be insured for the value of all property of the estate. In most cases, waiving the bond requirement is a way to minimize the expense associated with administering estates.

**2. *What is the process for following a Will at a person’s death?***

The process of distributing property under your Will is accomplished with a court proceeding referred to as “probate.” The probate process involves the Court appointing an executor (the

“Personal Representative”), who is a person responsible for locating property, paying final debts and taxes, and distributing property according to the terms of your Will, if you have one, or if you do not, then to your closest living relatives based on Maryland law. This process typically takes at least 9 to 12 months, and the Personal Representative is responsible for filing information about the probate property with the Court at regular intervals. The Maryland Registers of Wills has a website with answers to frequently asked questions about probate.<sup>xiv</sup>

### **3. *Can I avoid using a Will and going through probate?***

In some cases, people may try to set up their property in a way to try to avoid probate, in order to make it easier for their family to wind up their affairs and make sure that property is distributed to the recipients most quickly. In many cases, this can be accomplished by designating beneficiaries on accounts, or by adding co-owners; one common example of this is making sure that your bank accounts are “Payable on Death” (or “POD”) to an individual at the time of your death. Another common example is making sure that your vehicles are set up to “Transfer on Death” (or “TOD”) to an individual at the time of your death. In Maryland, you can set up a beneficiary on vehicles through the MVA EStore Website.<sup>xv</sup> This can also be done through the use of “life estate” deeds for real estate, or the use of “revocable trusts” or “living trusts” for many other types of property. The National Academy of Elder Law Attorneys has a website containing information about the use of “revocable trusts” or “living trusts”.<sup>xvi</sup> When making changes to your accounts to accomplish certain goals after your death, it is important to make sure that you are not making changes that will accidentally impact how you manage your property during your life. The Maryland Department of Labor has more information about how to title your financial accounts.<sup>xvii</sup>

### **4. *How can I be sure my Will is valid?***

- a. It is *critical* to make sure that a Will meets all the technical requirements of a legally valid will, including that it is properly signed by you and witnessed, in order to ensure that your Will is accepted by the Court at the time that you die. A Will in Maryland must have two witnesses, both of whom are over the age of 18, and have watched you sign your Will.
- b. A Will does not need to be prepared by a lawyer to be effective, but a lawyer may be able to provide you with guidance about how to navigate complicated situations, such as planning for family members with disabilities or planning for blended families.
- c. A Will cannot override all legal requirements, such as what your spouse may be entitled to inherit from you, but a Will can be used to make sure that you have addressed those concerns in the most effective way possible.

### **5. *Where should I keep my Will?***

There are a number of different places that you may choose to store your Will. In Maryland, you are able to store your original Will with the Register of Wills for the county in which you live for a fee (\$5, as of 2020).<sup>xviii</sup> Many people also choose to keep their Will at home, with their attorney, or in a safe deposit box. The most important part of storing your Will is

making sure that you and your loved ones know where the original copy of your Will is, and are able to access it at your death. For those who store their Will in a safe deposit box, they should make sure that they have designated a trusted co-signer who will be able to access the box after their death.

It is extremely important to ensure that your original Will (in other words, not a copy) can be located and is able to be submitted to the probate Court at the time of your death. In cases where your original Will cannot be found after your death, it is possible that your wishes will not be followed.

## Home Ownership and Deeds

For many Marylanders, their home is the single largest and most important asset in their family. The family home is not just a major economic resource that can be used to build wealth, it is often the emotional cornerstone of the family. If a homeowner raises a family in the home, there is a lifetime of cherished memories and it becomes extremely important that the home – and the memories – stay in the family for future generations. The best way to ensure this is through proper estate planning.

**CAUTION:** This handbook cannot go into all of the potential issues related to the transfer of home ownership. Consultation with an attorney is advised before taking any action related to changing the deed, so that your attorney can review your specific circumstances and planning needs. A Directory of Legal Resources for Life, Health, and Estate Planning in Maryland provides a list of legal service organizations that offer free and reduced-cost services, as well as other associations that can direct you to an attorney for assistance with a fee.<sup>xix</sup>

### FAQs

#### 1. *What is the best estate planning option if you own a home?*

The best approach for a homeowner is to take the proper estate planning steps to ensure that the property is left to an heir. This can be done through changing the ownership of the property, leaving the property to your loved ones in your Will, establishing a Revocable Trust, establishing an Irrevocable Trust, or through a life estate deed, as outlined below. (See section on Property Ownership and Titling above.) ***One should not assume that adding a family member to the deed to the home is the best thing to do.*** As discussed more below, there are several options to consider and the best choice depends on each person's unique situation. Therefore, it is best to seek legal advice before making any change to the ownership of your home.

#### 2. *What happens if no estate planning is done before the homeowner dies?*

If a homeowner dies without taking any of the estate planning steps that are discussed here, title to the home will remain in the deceased's name and will be subject to the rules of

probate. (See Wills and Other Property Transfer Documents above.) If the home does not pass through probate, then title and ownership of the home may not be transferred to heirs. This may be true even where an heir remains in the house and continues paying a mortgage and other expenses. This means that without proper estate planning the child who may be incurring the expense of keeping the home may never receive ownership of it following the death of the parent. Also, as a result of the child not being the legal owner, there are several extremely beneficial programs out there – homeowners tax credits, utility assistance programs, and repair assistance grants – that are inaccessible to the child. This could cause severe financial hardship which may make it even harder to keep the property in the family and avoid foreclosure.

**3. *How is a deed different from a life estate deed?***

A “deed” is the document that conveys ownership of real property – land and buildings. A “life estate deed” is one that reflects ownership of your home, but which limits your ownership to your lifetime. In other words, a life estate deed allows you to own a property while you are living, and gives it to the people you name (legally called “remainderman”) after you die. It is a way to own your home during your lifetime while allowing ownership to pass to the people you have named in the deed without **probate**. (See section on Wills and Other Property Transfer Documents above.) Both individuals and married couples can use life estate deeds.

**4. *Do I give up control of my home with a life estate deed?***

You can, but you do not have to. There are two kinds of life estate deeds, “life estate without powers” and “life estate with full powers.” In one you give up control over what happens after you die, and in the other you don’t.

- a. In a “life estate without powers” deed, you do give away all rights to your home after you die as well as many present-day rights associated with your home. It is a gift *now* of the right to your home *in the future*, which means you do not have the power to sell or mortgage the property without the consent of the remainderman. ***Because you cannot undo the life estate deed without the consent of the remainderman, you should not sign a life estate “without powers” deed unless you are absolutely convinced that you want to make a permanent gift of your home that you cannot change.***
- b. A life estate “with full powers” deed lets you change your mind. It is like a gift that happens automatically in the future at the time of your death. You *have* given away the house after your death, but you have kept the power to change your mind and take it back, sell it, borrow against it, give it to someone else, or do anything else the owner of a house can do. But if you do not do any of those things, then the deed will take effect when you die.

**5. *How is a life estate deed different from a Will?***

- a. A Will is your present statement of how all of your property should be distributed after you die, but it does not operate automatically. It tells the person responsible for

- your estate – the property you owned at death – who gets what. (That person is called the personal representative.) However, creditor and tax agency claims get paid first. All of this goes through the process known as probate, where a court supervises the personal representative’s conduct in administration of the estate. (See section on Wills and Other Property Transfer Documents above.)
- b. A life estate with full powers deed is a little like a Will in the sense that you can change your mind. But unlike a Will, in the case of a life estate with full powers, the gifting of your home takes effect automatically on your death; probate courts are not involved, nor is the house exposed to your creditors.
  - c. On the other hand, a life estate deed without powers actually gives away the property to your named “remainderman,” but the gifting of the property does not actually happen until the moment of your death. You can’t take it back and you cannot undo it by yourself. No further action is required – or allowed. Creditors do not have a claim on it (except for the mortgage holder and some others).

**6. *What happens if I own my home with a life estate deed and need long term care from Medicaid?***

Life estate deeds present unique and specific problems for persons applying for Medicaid, which is a “means tested” program intended to provide benefits for only poor and lower income individuals. To determine eligibility for Medicaid, a person’s assets are identified, valued, and calculated to determine the amount of financial resources, if any, that should be used to pay for your medical care before Medicaid pays the rest. In calculating your available assets to determine the amount that you should be responsible to pay for your own care, Medicaid will include in that figure the value of any real property (house) that is not determined by Medicaid to be an “exempt home.” Reasons to designate real estate as an “exempt home” include yourself, spouse, or disabled child currently residing in the home. In the case of a life estate with full powers deed, Medicaid will deny “exempt home” status in some situations (neither you nor a spouse or disabled child is living there), meaning that, to become eligible for Medicaid benefits, you will be forced to either sell the house and “spend down” the proceeds or put the house back in your name, undoing the benefit of a life estate deed. A “spend down” is a financial strategy in which you work with an attorney qualified in Medicaid planning to qualify for benefits.

In the case of a life estate without powers, your eligibility for Medicaid will be delayed if you seek benefits within five years of signing the deed. The reason for this being that Medicaid will likely view this transfer of your home to another person as deliberately impoverishing yourself to qualify for benefits because you gave away the remainder without getting anything in return. If you apply for Medicaid more than five years after you signed the deed, Medicaid benefits would not be delayed because of the transfer. That is not to say you can’t or shouldn’t use a life estate if you anticipate needing long term care, only that you need to understand what does and does not work to achieve your goals. You should seek competent legal assistance before transferring any home or other assets, especially if you have concerns about current or future Medicaid eligibility.

**7. Are there other ways to avoid probate of your home?**

Yes, but they may be more expensive and may create other problems. For example, you could hire a lawyer to prepare a **revocable trust** to hold your home until your death and then pass it on to those you chose. Or you could put your home into **joint ownership** with the person (or people) you want to take the house after you die. (See section on Property Ownership and Titling above.) These options can be costly and complicated. Please consult a lawyer before considering these or other options.

**8. Should I add my child's (or other person's) name to the deed of my home?**

It depends. However, you should always be mindful that adding a person as an owner of your home may have unintended consequences.

- a. Adding another person as a joint owner of your home can be risky because you may not be able to change your mind about your home's ownership without the consent of the joint owner once you have given that person an ownership interest in the house.
- b. You may lose certain property tax exemptions that are available only to you and be disqualified from certain public benefits you would otherwise be entitled to if you had not added another person to the deed.
- c. There may be certain transfer or recordation taxes which need to be paid for this transfer depending on your relationship to the person you are adding to the deed.
- d. If the person you add to the deed owes money to a creditor, and the creditor has obtained a judgment against that person, the creditor may force the sale of your home to satisfy that person's debt.
- e. Adding someone to your deed may cause that person to pay additional taxes that may have otherwise been avoided if the home had been inherited by them upon your death.

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i [https://www.marylandattorneygeneral.gov/A2JC%20documents1/DIRECTORY\\_OF\\_RESOURCES.pdf](https://www.marylandattorneygeneral.gov/A2JC%20documents1/DIRECTORY_OF_RESOURCES.pdf)

ii <https://www.marylandattorneygeneral.gov/health%20policy%20documents/adirective.pdf>

iii <https://marylandmolst.org>

iv <https://www.marylandattorneygeneral.gov/Courts%20Documents/17-203.pdf>

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vi <https://mdcourts.gov/sites/default/files/court-forms/ccgn041.pdf>

vii <https://standbyguardian.org/wp-content/uploads/2020/04/SBG-Petition-by-Standby-Guardian-Judicial-Appointment-3-25-20.pdf>

viii <https://www.peoples-law.org/standby-guardianship>

ix <https://www.peoples-law.org/adult-guardianship-process-1-alternatives-to-guardianship>

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xi <https://www.peoples-law.org/cat/family-law/guardianship>

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xiii <https://www.peoples-law.org/joint-ownership-real-property>

xiv <http://registers.maryland.gov/main/faq.html>

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