*Know Your Legal Rights is a bi-monthly column distributed by the State Bar of Wisconsin. It is written by members of the State Bar of Wisconsin’s Lawyer Referral and Information Service (LRIS), which connects Wisconsinites with lawyers throughout the state. Learn more at*[*wislaw.org*](http://www.wislaw.org/)*.*

**Know Your Legal Rights: If I Become Incapacitated, Who Makes Healthcare Decisions For Me?**

By Attorney Pamela W. Flores, Flores Law Group LLC, Waukesha

Many people ask what would happen if they were in the hospital and unable to make their own medical decisions? The answer depends on whether you planned ahead.

If you did not plan ahead, then your loved ones would have to go to court to be granted the authority to make those decisions for you. When that happens, the court would appoint that person your guardian.

**What is a Guardian?**

A guardian is a person the court appoints to make your medical decisions for you when you can’t do so for yourself. Anyone can require a guardian to become appointed if they become mentally incapacitated through accident, injury, or otherwise.

In such cases, if there is no estate planning in place (or insufficient planning) to keep family or other loved ones out of court, a guardianship must be established in the county probate court.

Obtaining guardianship can be an extraordinarily challenging and expensive process. It begins with filing a petition in court for and requesting the court to declare the incapacitated person incompetent. In some cases, these types of filings are made “ex parte,” or in secret, and a guardianship can be established before family or close friends even know what’s happening.

In other cases, such a filing can result in a heated dispute between family members and/or friends, who may claim they’d be better suited for the role. Given this, things can get costly very quickly.

Of course, this assumes these matters haven’t already been decided through proper and up-to-date estate planning, including valid advance health care directives, which are the best methods for ensuring this important responsibility is handled as effectively as possible.

Sadly, most people don’t think of the costly possibility of incapacity and therefore leave their families at risk.

The most critical planning tools for this purpose are a Healthcare Power of Attorney and a Living Will. These advance healthcare directives work together to help describe your wishes for medical treatment and end-of-life care in the event you’re unable to express your own wishes.

In light of COVID-19, even those who have already created these documents should revisit them to ensure they are up-to-date and address specific scenarios related to the coronavirus.

**What is a Healthcare Power of Attorney?**

A Healthcare Power of Attorney is an advance directive that allows you to name a person, known as your “agent,” to make healthcare decisions for you if you’re incapacitated and unable to make those decisions yourself.

If you become incapacitated without a Healthcare Power of Attorney, physicians will generally look to someone in your family to make these decisions for you. If no family can be located, they may ask the court to appoint a legal guardian to be the decision-maker. In either case, the person given this responsibility could be someone you’d never want having such power.

**What is a Living Will?**

While a Healthcare Power of Attorney names WHO can make health-care decisions in the event of your incapacity, a Living Will explains HOW your care should be handled, particularly at the end of life. For example, if you should become seriously ill and unable to manage your own treatment, a Living Will can guide your agent to make these medical decisions on your behalf.

These decisions could include: if and when you would want life support removed, whether you would want hydration and nutrition, and even what kind of food you want or who can visit you.

To ensure your medical treatment is handled in exactly the way you want and prevent your family from undergoing needless stress and conflict during an already trying time, it’s vital that you document such wishes in a living will.

Even if you’ve already created advanced directives, now is the perfect time to review the documents to ensure they still match your wishes and circumstances. For instance, is the agent named in your Healthcare Power of Attorney still the individual you’d want making these decisions? Has your health changed in ways that might affect your Living Will’s instructions? Are your values and wishes regarding end-of-life still the same?

As you can see, by planning ahead with advanced directives the benefit is twofold. You protect yourself by directing your Healthcare agent as to how you would make your own medical decisions and you’re protecting your family by taking that burden off of them, not only for the decision making but also for not having to go to court at a very stressful time.

*Pamela W. Flores, Flores Legal Group LLC, is focused on helping individuals and families avoid collapse after the incapacity or death of a loved one by providing them with the peace of mind that comes with implementing a plan that works when they need it to.* *She is a member of the State Bar of Wisconsin’s Lawyer Referral and Information Service, which* connects Wisconsinites with lawyers throughout the state. Learn more at [wislaw.org](http://www.wislaw.org).