

HIV

Wills
and
Powers
of
Attorney

YOUR LEGAL RIGHTS

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This is one in a series of booklets published by the AIDS LEGAL COUNCIL OF CHICAGO. All are designed to help you understand **YOUR LEGAL RIGHTS** in Illinois. The booklets in this series are:

HIV and Confidentiality

HIV and Discrimination

HIV and Insurance

HIV and Public Benefits

HIV and Undocumented Immigrants

HIV in the Workplace

HIV: Issues for Families with Children

HIV: Issues for Youth and Young Adults

HIV: Returning to Work

HIV: Wills and Powers of Attorney

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This guide is intended as an overview of HIV-related Illinois and federal law. As with any legal matter, it is always a good idea to consult an attorney concerning the particular circumstances of your case.

HIV: WILLS AND POWERS OF ATTORNEY

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INTRODUCTION

Thinking about making out a will or a power of attorney for yourself can be very scary. But it is a good idea for everyone to do these documents – not just people with HIV. If you were hit by a car tomorrow and went into a coma, your power of attorney would allow someone you trust to make medical decisions for you or to manage your money for you. If you did not survive the accident, your will would put someone in charge of all your possessions, and that person would distribute your possessions to the people you want.

Making out a will and powers of attorney is usually a simple process. This booklet will answer many common questions about these legal documents – documents which the AIDS Legal Council prepares for people every day. If you have more questions after you're done reading, you can call the AIDS LEGAL COUNCIL OF CHICAGO at (312) 427.8990. Someone there will be happy to speak with you.

Chapter One

WILLS: THE BASICS

1) What is a will?

A will is a legal document that lets you do at least three important things:

- ♦ Put someone in charge of your estate (all your possessions) after you die. This person is called your **executor**.
- ♦ Decide who inherits your money and possessions after your death.
- ♦ Nominate a guardian for your children.

It is important to know that **a will only goes into effect after death**. In other words, if you write in your will that all of your household furnishings should go to your sister, then she would not receive them until after you have passed away. *Writing a will doesn't mean that you have given up control of anything in your life.* It simply means that you are planning ahead for the day when you are no longer here.

2) Is a will the same thing as a living will?

No. A **living will** is a legal document that explains how you feel about artificial life support. It tells a doctor whether you want to be kept alive on a machine, for example. It does not pass your property after death like a will does.

3) What happens if I die without a will?

If you have no will when you die, Illinois law directs where your possessions go. For example, if you have a legal spouse but no children, then your spouse would inherit everything you own. If you have a spouse and children, then your spouse

would get half of everything you own, and your children would split the other half equally among them. If you have no spouse or children, then your parents, brothers and sisters would inherit everything.

If you die without a will, **the only people who have a right to inherit anything are your spouse or members of your biological family.** If you are gay, your lover would have no right to inherit anything, even if the two of you had lived together as a couple for many years.

4) I don't own much, just my household things, and they're not worth anything. I have very little money. Do I really need a will?

That's a good question. For a lot of people, making out a will gives them some peace of mind, knowing that they have put things in order for the future. Sometimes that peace of mind is worth the effort of preparing a will, no matter how little you own.

Even if you own almost nothing, you may have a few things that are extremely valuable *to you*. A will would allow you to give those valuable things to people you care about after you die.

If you have children, a will is an important way for you to plan for their future care. In the will, you can name someone to become the guardian of your children after your death. For more information on planning for your children's future, see our booklet *HIV: Issues for Families with Children*.

Also, a will lets you leave things to people who are not members of your family or your legal spouse. For example, if you have lived with someone in a loving relationship for years without getting married, and you would like that person to inherit all of your household things, then it would be a good idea to make out a will. Without that will, your household things would go to your family after you die. See question 3 in this chapter for more information on what happens if you die without a will.

Chapter Two

PREPARING A WILL

1) Can I prepare a will myself?

Anyone can write a will for himself or herself. However, the will that you write for yourself may not hold up after you die. When it comes to wills, Illinois law is extensive and complicated, and it's easy to do the wrong thing. The AIDS Legal Council advises anyone who wants a will to seek out a competent attorney. For people who are financially eligible, the Council prepares wills free of charge. For those who are not financially eligible, the Council maintains a referral list of private attorneys who can help you prepare a will.

2) What information do I need to put into a will?

Here are the important things you should decide before preparing a will:

◆ Who do you want as your executor?

The **executor** is the person you are putting in charge of your belongings after you die. This person is responsible for giving your possessions to the people you name in your will, and for making sure that any debts you owe after you pass away are taken care of. *Your executor will not have to pay your debts with his or her own money.* Instead, the executor pays the debts with whatever money you have when you pass away.

Your executor should be someone you trust. The person should be responsible and organized. Your executor does not have to be a family member. It is best to make sure the person you choose is willing to be your executor before you name him or her in your will.

In order to be your executor, a person:

- ◆ Must be at least 18 years old
- ◆ Must be a resident of the United States
- ◆ Cannot have been convicted of a felony

It is also a very good idea to name someone as your **alternate executor**. Your alternate executor is the person who takes over if your executor is unable to carry out his or her duties as executor. For example, if your executor dies before you do, then your alternate executor would take over. You can name as many alternates as you like.

◆ **Who do you want to inherit your things?**

If you have valuable or treasured possessions, you can state in your will how you would like these things distributed after your death.

You can be as specific or general as you want. Some people list all of their possessions in the will (such as a television, a stereo, pieces of jewelry, etc.) and then say who should receive each thing. This approach is very thorough, but if you change your mind about one item, you have to do your whole will all over again.

Instead, many people leave everything they have to their executor, and then simply inform the executor who should get what. That way, if you change your mind later, you can just tell your executor, rather than make up an entirely new will.

◆ **Who should take care of your kids after your death?**

In your will, you can **nominate a guardian** for your children. It is important to know that *a person does not become a guardian through a will*. A will simply expresses your wishes about who you want that guardian to be. If, for example, you say in your will that you want your sister to be guardian of your children after your death, your sister would have to go to court to be appointed the legal guardian. She would use your will as evidence of your wish to make her the children's guardian.

For more information on guardianship and other future care plans for children, see the Council's booklet, *HIV: Issues For Families With Children*.

3) I don't want my mother or my brother to inherit anything of mine. Can I exclude them in my will?

Yes. In your will, you get to decide who inherits your things. You have a right to decide that certain people should get nothing of yours.

The only exception to this rule is your legal spouse. If you are legally married when you pass away, then your spouse is entitled to half of everything you own, even if your will says that your spouse should get nothing.

4) So once I decide what I want my will to say, how do I get it done?

The best way to get your will done is to contact an attorney who has experience in preparing wills. Many legal service agencies, like the AIDS Legal Council of Chicago, can prepare a will for you if you are financially eligible. The Council has prepared hundreds of wills for people with HIV.

5) I'm gay, and I want my lover to have my house after I die. How can I make sure the house goes to him?

One thing you can do is name your lover as the beneficiary of your house in your will. After you die, the house should pass to him. But there might be a problem if you owe a lot of money at the time of your death. Let's imagine you owe \$30,000 in credit cards and hospital bills when you die, but you only have \$5,000 in the bank. Your creditors might be able to sell your house to try to collect the rest of the money you owe them.

One way to be sure your lover will get your house free and clear after you die is to put the house into **joint tenancy**. If two people own a house in joint tenancy and one of those people dies, then the other person owns the entire house immediately. The house wouldn't pass through the deceased person's estate,

where creditors could try to go after it.

6) Should I set up a trust instead of writing a will?

Everyone should have a will, even people who have set up trusts. But you may want to do both. You may want to set up a trust if you will leave a house that is not in joint tenancy or if you have other property worth \$50,000 or more. A trust may also be harder to challenge than a will, so it might be a good idea if you expect arguments over how you are giving away your property. You should not try to set up a trust without advice from an attorney.

Chapter Three

AFTER YOU SIGN YOUR WILL

1) Where should I keep my will?

It is best to keep your will in a safe, dry place. Make sure your executor knows where it is.

2) Who should get copies of my will?

It's a good idea to give your executor a copy of your will. If you have named an alternate executor, then that person should get a copy too.

3) Can I change my will in the future?

Yes. If you change your mind about some of the things in your will, you can create a new will whenever you want. Sometimes people need a new will because the person they named as executor has passed away, or because they have moved to a different state.

4) Can anyone challenge my will after I die?

People can try to challenge your will after you die. They would have to file a lawsuit to challenge it. There are two ways that people commonly challenge wills:

- ♦ **They will say you were not in your right mind when you signed your will.** For example, someone might say you had HIV-related dementia when you signed your will, and therefore you didn't know what you were signing. If you have any history of cognitive or mental impairments, it might be a good idea to meet with your doctor before signing your will so that he can note in your medical records that you are competent to complete a will.
- ♦ **They will say someone forced you to make out the will.** Your will is not valid if someone forced you or coerced you to sign it, or if someone influenced your decisions in the will. For example, if your sister said that you had to give her your house or she would tell your parents about your HIV status, then she has used "undue influence" over you, and your will could be made invalid.

Chapter Four

POWERS OF ATTORNEY: THE BASICS

1) What is a power of attorney?

A power of attorney is a legal document that lets you name someone you trust to take care of your affairs if you are ever unable to do so yourself. If, for example, you are in a coma, then the person you name in your power of attorney will be in charge.

There are two different powers of attorney in Illinois:

- ♦ **Power of Attorney For Health Care.** The person you name in this document has the power to make all health care decisions for you if you cannot make them yourself. That person, called your **agent**, can check you into a hospital, consent to medications or surgery, take you to a nursing home, or make any of the health care decisions you normally would make. Also, your agent can make your final arrangements, like a funeral or cremation.
- ♦ **Power of Attorney For Property.** You don't have to own real estate to need a power of attorney for property. "Property" refers to anything you own – your money, your car, your household things, etc. The **agent** you name on this document can manage all of your financial and property matters if you are unable to do so. Your agent can sign your checks, buy and sell things for you, pay your bills, etc.

2) Why do I need a power of attorney?

- ♦ What if you are hit by a bus and you go into a coma? Who is going to tell the doctor what you want done?

- ♦ What if you get too sick to endorse your Social Security check? How will that check get cashed?

A power of attorney lets you decide ahead of time who will make important decisions for you *just in case* you ever need it. It is a good idea for everyone to make out powers of attorney, whether they are HIV positive or not.

3) Who should I name as my agent?

Your agent should be someone you trust. Your agent will have a lot of responsibility, and will be able to sign your checks, get into your bank accounts, and make critical decisions about your health care.

You can also name an **alternate agent**. This person would take over only if the first person you name is unavailable or cannot act on your behalf. Obviously your alternate agent should be someone you trust, too.

It is a good idea to pick someone who lives close by, or at least in the same city. If you are in an accident, your agent may have to work quickly; if that person lives in another state or country, he or she may not be available fast enough.

But there is no law that says you have to name someone who lives nearby. You should name the person that you think will be best for you.

Also, you don't have to name the same person on both powers of attorney. For example, you could name your sister as the person in charge of your health care decisions, and your father as the person in charge of your financial matters.

4) How much authority does my agent have?

That is up to you. In a standard power of attorney, you can give your agent the authority to make almost every health care or financial decision you could make yourself.

However, you can also limit your agent's powers. You can say that your agent is

never allowed to do certain things. Here are some examples:

- ◆ For some people, it is against their religious beliefs to have a blood transfusion. So they might write in their power of attorney for health care, "Under no circumstance do I authorize my agent to consent to a blood transfusion for me."
- ◆ Let's imagine you inherited your grandfather's watch. It's not worth much money, but it's very important to you. You might write in your power of attorney for property, "Under no circumstance is my agent authorized to sell the watch I inherited from my grandfather."

5) I don't want to be kept alive on a machine. Can my power of attorney help prevent this from happening?

Yes. The decision to put someone on artificial life support is a health care decision, so your agent on your power of attorney for health care would have the authority to tell the doctor not to put you on a machine. It is a good idea to state your wishes concerning artificial life support clearly in your power of attorney for health care.

6) I want to be cremated after I die. Can my power of attorney help make that happen?

Yes. The person you name as agent in your power of attorney for health care has the legal right to arrange a cremation or funeral for you.

Chapter Five

PREPARING POWERS OF ATTORNEY

1) Can I prepare a power of attorney myself?

Yes. Most stationary stores carry blank power of attorney forms that you can fill out.

But it's a good idea to let someone who has experience help you fill out your power of attorney. Attorneys who specialize in estate planning can be of assistance. The AIDS Legal Council has prepared hundreds of powers of attorney for people with HIV.

2) What information should I know before filling out a power of attorney?

Here are the decisions you should make before completing a power of attorney:

- ♦ **Who do you want as your agent?** Your agent is the person you appoint to make decisions for you and act on your behalf if you can't. If you are filling out a power of attorney for health care and also a power of attorney for property, you need to name an agent on each. You can name the same person for both, or a different person for each. It's up to you.

Make sure you know the full address of your agent or agents. And make sure they are willing to act as your agent if you ever need them to.

- ♦ **Who do you want as your alternate agent?** In case the person you name as your agent cannot or will not act on your behalf, you can name a second person to take that agent's place. You can name the same alternate on both powers of attorney, or a different one on each. Make sure you have the alternate's full address.

- ♦ **What are your feelings about artificial life support?** Do you want to be kept alive on a machine? Do you want to give your agent the authority to turn off your artificial life support? In your power of attorney for health care, you can make clear your wishes concerning such issues.

- ♦ **Are there any medical procedures that you never want performed on you?** Many people have religious objections to certain medical procedures, such as receiving blood transfusions. If you have any objections to specific medical procedures, you can list them in your power of attorney for health care.

- ♦ **Who would you want as your legal guardian if you ever needed one?**
Imagine that some day you are so incapacitated that you need a legal guardian to look after you. It's very unlikely this would ever happen, but *just in case* the power of attorney lets you nominate someone to be your legal guardian.
It's important for you to know that nominating someone as your guardian is not the same thing as legally appointing that person as your guardian. Only a court can appoint someone as your guardian. In other words, if you nominate your sister as your guardian in your power of attorney, that does *not* mean that she immediately becomes your guardian. It means that *if* some day in the future you need a guardian, you would like the court to appoint your sister.

Chapter Six

AFTER YOU'VE SIGNED YOUR POWERS OF ATTORNEY

1) Where should I keep my powers of attorney?

Keep your powers of attorney in a safe, dry place. No matter where you keep them, make sure your agent knows where they are.

2) Who should get copies of my powers of attorney?

It's a good idea to give your agent copies of your powers of attorney. You can also give copies to your alternate agent. It's a very good idea to give a copy of your power of attorney for health care to your regular doctor. That way your doctor will know who is in charge if you ever can't make health care decisions for yourself.

3) How long are my powers of attorney good for?

Your powers of attorney can be effective for as long as you want them to be. When most people fill out their powers of attorney, they make them effective until after their death.

4) If I change my mind about my agent, can I make out a new power of attorney?

Yes. If you decide that the person you named as agent is not right for you anymore, you can change your power of attorney anytime you want.

In addition, you can make any other changes to the power of attorney as well.

5) If I owe money, can my agent be sued for my debts?

No. Your agent is not liable for your debts. Your agent would be responsible to try to pay those debts *out of your money*. But your agent is not required to pay for your debts with his or her own money.

6) What if my agent and my parents disagree on an important decision?

Legally, your agent has the right to make final decisions. What your agent says, goes.

