

## **SPEAKER BIOGRAPHY**

### ***LINDSEY B. SAROWITZ***

Attorney at Law

Lindsey B. Sarowitz has been with Handler & Levine, LLC, since 2013. Ms. Sarowitz is an associate with the firm, and regularly represents individuals, including Federal government employees, in preparing their estate plans, consisting of wills, trusts, powers of attorney, health care directives and other estate planning documents. She also represents Estates and Trustees in regard to decedent's issues, helping guide families through probate and trust administration following the loss of a loved one.

Ms. Sarowitz graduated from American University in Washington, D.C. with a degree in Justice. She received her law degree from Thomas Jefferson School of Law, in San Diego, CA. Ms. Sarowitz is a member of the Bar in Maryland and the District of Columbia, and practices regularly in both jurisdictions. She is originally from New York, and currently lives in Bethesda, Maryland.

**Handler & Levine, LLC**  
4520 East West Highway, Suite 700  
Bethesda, Maryland 20814  
(301) 961-6464x3315  
[lindsey@handlerlevine.com](mailto:lindsey@handlerlevine.com)  
[www.handlerlevine.com](http://www.handlerlevine.com)



Bethesda Office Center  
4520 East West Highway  
Suite 700  
Bethesda, Maryland 20814

Ph 301/961-6464 x3315  
Fx 301/951-8631  
[lindsey@handlerlevine.com](mailto:lindsey@handlerlevine.com)  
[www.handlerlevine.com](http://www.handlerlevine.com)

## 1. **What is an Estate Plan?**

- a. The typical estate plan includes:
  - i. Powers of Attorney (both statutory and non-statutory; this is where you would name an agent to act for you with regard to your finances if you are unable to handle your finances on your own)
  - ii. An Advance Medical Directive (where you name an agent to act for you with regard to your healthcare, in case you are unable to make decisions on your own; you would also state your medical preferences if you are in a certain medical condition, and other important preferences such as pain relief, comfort care, organ donation, etc);
  - iii. A Will (simple or complex, depending on your situation; this is the document where you would direct where you want your assets to go if you pass away, name guardians for minor children, state your preferences regarding burial or cremation, create testamentary trusts for spouses and/or children, and more);
  - iv. A Revocable Living Trust (if applicable/appropriate; assets titled in the name of a Revocable Living Trust pass outside of probate, which is appealing to some people; there are additional factors that the attorney will look at in helping clients decide whether a Trust is right for them);
  - v. Proper completion of beneficiary designations; and
  - vi. Guidance with regard to jointly-owned assets.

## 2. **Why is Estate Planning Important for Me?**

- a. Many people think estate planning is only for wealthy people. However, even if you are not wealthy and even if you have no property to dispose of at all, everyone needs - at the very least - a Power of Attorney and Medical Directive from the time they turn 18 until the time they die. Without these documents, financial institutions will not, and doctors may not, listen to your loved one in the event that you become incapacitated. In that event, someone will have to go to Court and ask to be appointed as Guardian of your property (for finances) and of your person (to make medical and other day to day decisions for you). This can be a time-consuming and costly endeavor, which can be avoided with proper planning.
- b. Many factors other than wealth affect the need for estate planning, such as: (1) caring for a minor or disabled child, (2) incapacity planning, (3) care for a surviving spouse, (4) transferring ownership of property in accordance with your desires, (5) avoiding

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probate - sometimes in multiple states, and (6) charitable giving. (These are just a few of many reasons estate planning is important for everyone - not just the wealthy.)

### 3. **Estate Planning and Covid-19**

- a. It is not surprising that when a pandemic hits, people become more aware of their mortality and the potential for incapacity. At these times, a lot of people begin to realize the importance of estate planning.
- b. Now possibly more than ever, we are all afraid of falling ill. If someone becomes ill due to Covid-19, how will their estate plan come into play?

#### i. **Advance Health Care Directive**

(1) **General**. An Advance Health Care Directive (also referred to as a Living Will, Medical Directive, Power of Attorney for Health Care, and other names) is where you appoint someone to act as your agent with regard to your health care, and also to say what your specific wishes are if you are in a certain condition.<sup>1</sup>

(2) **Naming a Health Care Agent**. One part of the directive names a Health Care Agent and authorizes your agent to make all of your health care decisions for you if you are unable to do so yourself. This is very important even if you are married. Your spouse is not automatically your Health Care Agent just because you are married. As we learn from the *Terri Schiavo* case, while a spouse is often presumed to speak for their husband or wife (and a parent for an adult child or an adult child for their elderly parent) all it takes is any other credible person coming forward to say that the intended course of treatment is not what the person wanted, for the spouse's presumption to disappear and litigation ensue. In the absence of your clear instructions or other suitable alternatives to filing for guardianship, a court may have to step in to appoint a guardian of your person to direct your care. The person appointed by the Court may not be the person you would have chosen and may not be familiar with your wishes.

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<sup>1</sup>Maryland's form is an Advance Directive, the Virginia form is an Advance Medical Directive and the DC form is a Durable Power of Attorney for Health Care. Each state has its own form and variation, but all do essentially the same task. For more information on the Maryland Advance Directive form, go to:

[www.oag.state.md.us/healthpol/advancedirectives.htm](http://www.oag.state.md.us/healthpol/advancedirectives.htm) or [www.oag.state.md.us/Healthpol/adirective.pdf](http://www.oag.state.md.us/Healthpol/adirective.pdf).

The Maryland visually impaired version is located here:

[http://www.marylandattorneygeneral.gov/Health%20Policy%20Documents/adirective\\_Visually\\_Impaired.pdf](http://www.marylandattorneygeneral.gov/Health%20Policy%20Documents/adirective_Visually_Impaired.pdf)

For the Virginia form, go to: <https://www.inova.org/patient-and-visitor-information/making-healthcare--decisions/index.jsp>. Information for West Virginia can be found here: <http://wvendlife.org/for-patients/>.

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- (3) **What Does the Health Care Agent Do?** The Advance Directive provides for your Health Care Agent to become, in reality, your Health Care Advocate. The Agent makes not just end-of-life decisions, but also day to day decisions regarding your health care and living conditions. Your Agent determines who your doctor is, what hospital you are in, which (and what kind) of health care or assisted living facility you will live in, as well as making all decisions regarding your medication, therapy, surgery or other medical procedures. Although your Agent can change your doctor(s) or hospitals, that option can be delayed or forfeited if health prevents a change of facility.
- (4) **Health Care Instructions - What to do “If”.** The “Health Care Instructions” allows you to direct and/or provide preferences regarding the discontinuation of some stated and defined therapies or medical attention, including “life sustaining procedures,” feeding and hydration tubes, “heroic medical efforts” and to “pull the plug” if you are in terminal or vegetative condition *with no hope of return to a cognitive life*.
- (a) If someone is ill due to Covid-19 and needs a ventilator or other medical interventions, the direction not to provide those types of procedures would not come into play because the presumption is once provided, the person will return to normal life. Again, the direction to “pull the plug” is just if you are not going to return to the person you once were. With Covid-19, though, the expectation is that providing someone with the necessary treatment (i.e. a ventilator) will allow them to recover and live a perfectly normal life, just like before they were infected.
- (5) **Pain Relief and Comfort Care.** For many people, one of the most important issues deals with pain relief (pain killers) and comfort care. While the Maryland form explicitly allows you to indicate that no matter what your condition, you be given medicine or other treatment to relieve pain, other states often do not. No other form currently deals with treatment for comfort care apart from pain, including treatment intended to ease dryness or reduce congestion. A good estate planning attorney should be able to help you with choices in that regard, so you will not be denied pain relief or comfort care, even if such care would shorten (or extend) your life.
- (6) **“Do Not Resuscitate” Orders or Directives.** Emergency Medical Technicians and other first responders in Maryland, Virginia and DC cannot and do not follow your Advance Directive, and, in many circumstances, emergency room doctors will not be able to follow them due to practical considerations. In Maryland a Do Not Resuscitate order can *only* be issued by a physician. Unlike Advance Directives or other health care instructions, Do Not Resuscitate orders are followed by EMTs. This website [www.miemss.org/home](http://www.miemss.org/home), at the “Public” tab, has the Maryland form. Virginia

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uses a “Durable Do Not Resuscitate Order” for which you can get more information here: [www.vdh.virginia.gov/oems/ddnr/](http://www.vdh.virginia.gov/oems/ddnr/). D.C. has a “Comfort Care Order” for resuscitation issues, and information on that is online: <https://dchealth.dc.gov/service/ems-comfort-care-orderdo-not-resuscitate-program>.

- (7) **Resources for Health Care Directives.** Bare statutory versions of health care directives are required to be available at every hospital under the *Federal Patient Self-Determination Act* and are sometimes available at various DMV/MVA branches. You can get versions from many other sources, Compassion and Choices ([www.compassionandchoices.org](http://www.compassionandchoices.org)) (formerly known as the Hemlock Society) and the National Hospice and Palliative Care Organization ([www.caringinfo.org](http://www.caringinfo.org) and/or [www.nhpco.org](http://www.nhpco.org)). Another good site is New York Online Access to Health ([www.noah-health.org/en/rights/endoflife/adforms.html](http://www.noah-health.org/en/rights/endoflife/adforms.html)). The versions available at the NHPCO and NOAH websites, in addition to being free, contain explanations and signing instructions. More detailed and individually tailored documents can be provided by an attorney. Remember that your decisions regarding your care are your own, and do not have to conform to the categories or options provided in the various state forms.
- (8) **The “Five Wishes” Document.** A more detailed review and consideration of health care decision making can be found at [www.agingwithdignity.org](http://www.agingwithdignity.org), which provides the “Five Wishes” document. Although this is not a “legal” document, according to their website it meets the legal requirements in Maryland, DC and Virginia, as well as about 38 other states. As they point out, regardless of its legal merits (and it should not be relied upon alone), this document is very useful as an attachment to a state's required forms, as it expresses your preferences in detail and provides a helpful guide to families, caregivers and doctors. Another good website is the American Bar Association Commission on Law & Aging at <http://www.abanet.org/aging/toolkit/home.html>, providing *Consumer’s Tool Kit for Health Care Advance Planning*.

ii. **Power of Attorney (“POA”) For Financial and Legal Matters**

- (1) **General.** This document allows you to designate someone (an “Agent” or “Attorney-in-Fact”) to have access to your assets for your benefit, and make your legal decisions for you, if you should become incompetent (temporarily or permanently).
- (2) **Why have a Power of Attorney?** Without a POA there are many issues which cannot be handled for an incompetent person, even by their spouse, as a

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spouse is not your agent for legal and financial matters simply because you are married.

- (a) A spouse can usually unilaterally access most joint bank or brokerage accounts, but cannot legally deal with separately owned assets, such as individually titled bank accounts, brokerage accounts, real property, etc. A spouse cannot usually unilaterally close or transfer a joint bank or brokerage account.
  - (b) Your spouse, without a valid power of attorney, cannot change any of your beneficiary designations for life insurance or retirement accounts.
  - (c) Your spouse cannot refinance, encumber (for a line of credit) or sell real estate owned “joint with rights of survivorship” or “tenants by the entirety,” or deal with stock certificates owned as tenants by the entirety.
- (3) **What Happens When There is No POA?** Without a POA someone - your spouse, child, sibling, parent, friend or even the nursing home where you are living - will have to file with the Court for **Guardianship** of your property to deal with those issues. That Petition will usually require **you** to pay for an attorney to prepare and file it, for an attorney “appointed” by the Court to represent “you” and, sometimes, for an “investigator” to determine whether you need a guardianship at all. Although there are emergency and temporary guardianship procedures, most guardianships will take months, and contested guardianships can take far longer. In addition, contested guardianships take a tremendous personal and financial toll on families. Additionally, without a POA, the Court may designate someone you may not have wanted to be in charge of your finances as your Guardian/Conservator for your property (such as an attorney).
- (4) **What Types of Powers Should Be in Your Power of Attorney?** You cannot just write on a piece of paper that you want your agent to have “all powers” or do “all things” that you can do for yourself. Rather, you must list out the exact powers you want your agent to have. It is especially important to consider whether you want your agent to have the power to (1) give gifts (to your spouse, children, issue, charities, and/or the agent him or herself); (2) transfer, sell, mortgage, or otherwise deal with your real estate; (3) make changes to your retirement assets and/or change your beneficiary designations; (4) engage in estate planning for you; (5) access your email and digital assets; (6) provide support for anyone other than you; (7) take care of your pets; and perhaps most importantly (8) access your financial accounts.

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- (5) **Who Should You Name as Your Agent?** If married, most clients name their spouse as the primary agent, so for those people the real question is who they should name as successor (in case the spouse is unable to act due to death, incapacity, or unwillingness). Issues to consider when naming your agent(s):
- (a) **What Are the Most Important Characteristics of the Agent.** **Trust and common sense** are the two most important characteristics of any fiduciary, including the agent under your power of attorney, the trustees under trusts and personal representatives and executors under your Last Will and Testament. The best agents can sometimes be family members, friends and colleagues you trust, who have common sense.
  - (b) **Transparency and Checks & Balances.** Because of how much power you are giving someone, developing proper checks and balances can be vital, sometimes including requiring approval from a third person, such as a sibling, friend, attorney or CPA for some actions, to provide for accountings to go to other people, or even providing for more than one agent if appropriate.
  - (c) **Children Acting As Agent(s) for Parents.** One of the hardest issues is how to deal with children as agents, where there are multiple children, but only one or some of them are acting as the agent under the power of attorney document. Using checks and balances discussed above, or “transparency” by allowing all children to receive monthly bank statements and brokerage statements and/or calling for an annual accounting, are some possibilities.
  - (d) **Multiple Agents.** You can name more than one person as your agent, but if there are multiple agents they serve either “jointly,” meaning they must agree on everything or nothing happens and no decisions are made, or they are “joint and several,” meaning they can each make unilateral decisions, including decisions that conflict with each other. Consider carefully how the agents will work together, not just for a day or a week, but possibly for years.
  - (e) **Agents Must Disclose.** An Agent has to be aware that they are responsible to let other people they are dealing with know they are an Agent. This is a some time complicated issue, with some Agents becoming personally liable for debts where they fail to disclose their agency.
  - (f) **Third Party Agents.** Naming a “third” party may be appropriate under some circumstances, but the choice of a bank, a trust company, accountant or attorney should be considered carefully, and made only when other options do not fit your particular circumstances. Sometimes
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it is useful to have a third party to take on the complaints from beneficiaries, or keep people in line. But remember that naming an attorney, accountant, or financial institution will typically be more expensive than naming a family member or close friend. It is important to keep in mind that your agent can hire these types of people to help them fulfill their duties as well.

### iii. **Last Will and Testament**

(1) **General**. Your Will is where you appoint the person that will be in charge of administering your estate (“Personal Representative”/ “Executor”) and state how you want your assets (real estate, tangible personal property, and any other non-beneficiary designated assets in your name alone) to be distributed at your death. This is also where you will name guardians of minor children, and you can create testamentary trusts (i.e. a Marital Trust for your surviving spouse and/or a Trust for children).

(2) **What Happens When There is No Will?** When someone dies without a valid Will, they are deemed to have died “intestate,” so the intestacy laws of the jurisdiction where they were domiciled at their death will control.

(a) **Personal Representative**. The statutory order of precedence will control who is appointed as Personal Representative of your Estate.<sup>2</sup>

(b) **Guardians**. The Court will determine who will be the guardian for your minor children. This will typically be a relative, but may not be the one you would have chosen. This may also result in litigation among family members as to who should be the guardian. If minor children receive assets (rather than setting up a trust for them in your Will or in your Revocable Living Trust), the Court must appoint a guardian to manage the assets for them in addition to appointing a guardian of their person.

(c) **Distribution of Assets**. Assets are not distributed according to your wishes, but according to your state’s laws. For example, in Maryland, a married person who does not have a Will will have his/her probate assets divided between the surviving spouse and his/her children.<sup>3</sup> Additionally, all children will be treated equally even if they have

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<sup>2</sup>For the Maryland order of precedence, see the Annotated Code of Maryland, Estates and Trusts, Section 5-104.

<sup>3</sup>For the Order of distribution of an intestate estate in Maryland, see the Annotated Code of Maryland, Estates and Trusts, Section 3-101.

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different or special needs, and step-children will be excluded completely, even if you raised them from a very young age.

iv. **Revocable Living Trust**

- (1) **General**. A Revocable Living Trust may or may not be appropriate for you, depending on your situation. Creating a Revocable Living Trust (“RLT”) is a popular way of avoiding probate.
- (2) **Lifetime Creation and Funding**. The RLT must be created and executed. A properly worded and executed Durable Power of Attorney may allow the person that you have appointed as your agent create a RLT if you are incapacitated. To be effective, the RLT must be funded by retitling assets that would otherwise be considered probate assets into your RLT (i.e. real estate, financial accounts, etc.).
- (3) **Benefits of Revocable Living Trusts**.
  - (a) **Real Estate In Multiple Jurisdictions**. Since probate, or some similar process, occurs in each state where you have real estate, an RLT can be used to avoid multiple probates where real property is owned in different states.
  - (b) **Avoids Delays and Costs of Probate**. In Estates that will not have to file a federal or state estate tax return, an RLT may avoid many of the delays and costs associated with probate in some states;
  - (c) **Privacy**. Unlike Wills, RLTs are not public information;
  - (d) **Incapacity Planning**. A RLT can be very effective where you desire to have someone else manage your assets now or in the near future. A good alternative to joint ownership used to allow a child to help with asset management and bill paying.
  - (e) **Difficult to Value Assets**. Assets that pass through probate must be valued. While cash, equities and even real estate can usually be easy to value and transfer through probate, other assets create more obstacles, create delays and increase costs. Limited partnerships, businesses and business interests (including small LLCs and sole proprietorships), collections (coins, antiques, stamps, comic books, antique farm equipment) and other unusual probate assets can require specialists to value the assets for probate. In a revocable trust this may not be required.

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