It's Not Just Death and Taxes: Clients Need an Incapacity Plan that Works When It's Needed

Content provided by The Advisors Forum; Edited by James W. Garrett, Esq.

Estate planning is not only about having a plan in place to deal with what happens after a client's death, it is also about having a plan in place to deal with what happens if a client becomes mentally incapacitated.

In this issue you will learn:

- What happens without an incapacity plan.
- The essential documents for managing finances during incapacity.
- The essential documents for making health-care decisions during incapacity.
- How to choose the right person for managing finances and making health-care decisions during incapacity.
- The importance of keeping an incapacity plan up to date.

If you have any questions about incapacity planning or have a client who needs to make or update incapacity documents, please call contact us by calling one of our offices that is most convenient for you.

Court-Supervised Guardianship or Conservatorship: How to Lose Time, Money, and Control During Incapacity

Mental incapacity caused by an accident, injury, or illness results in clients being incapable of making informed decisions about their finances and well-being. Without a comprehensive incapacity plan in place, a judge can appoint someone to take control of an incapacitated client's assets and make all personal and medical decisions on the client's behalf under a court-supervised guardianship or conservatorship. The client and the client's loved ones often lose valuable time, money, and control until the client either regains capacity or dies.

Planning Tip: Many clients may believe they are protected if they become mentally incapacitated because they hold their assets in joint names with a spouse, a child, or another family member. While a joint account holder may be able to access a bank account to pay bills or access a brokerage account to manage investments, a joint owner of real estate will not be able to mortgage or sell the property without the consent of all other owners. Aside from this, adding names to accounts or real estate titles may be deemed a gift for gift tax purposes. In addition, if a joint owner is sued, the property could be seized as part of a judgment entered against the co-owner. Only a comprehensive incapacity plan will protect the client and the client's assets from a court-supervised guardianship or conservatorship and the misdeeds of a joint owner.

The Essential Documents for Financial Management During Incapacity

There are two essential legal documents for managing finances that must be in place prior to becoming incapacitated:

1. *Financial Power of Attorney.* This legal document gives an agent the authority to pay bills, make financial decisions, manage investments, file tax returns, mortgage and sell real estate, and address other financial matters that are described in the document. Financial Powers of Attorney come in two forms: "Durable" and "Springing." A Durable Power of Attorney goes into effect as soon as it is signed, while a Springing Power of Attorney only goes into effect after the person who has made the document is determined to be mentally incapacitated.

All Powers of Attorney are not "equal" and must be prepared to address the specific needs of the client. The benefits of a highly detailed, comprehensive power of attorney are numerous. Unfortunately, many Powers of Attorney are drafted with insufficiently broad authority, and cause more problems than they solve, especially for elderly adults. For example, some clients may desire to include certain highly discretionary powers allowing their agent to transfer and gift property for Medicaid qualification purposes. Given the nature of transfer and gifting powers, clients need to consider carefully whether or not to grant such powers to an agent. They must be specifically granted to the agent; a grant of "general" authority will not suffice.

2. *Revocable Living Trust.* This legal document has three parties to it: The person who creates the trust (the "Trustmaker" or "Grantor" or "Settlor" – they all mean the same thing); the person who manages the assets transferred into the trust (the "Trustee"); and the person who benefits from the assets transferred into the trust (the "Beneficiary"). With a typical revocable living trust the Trustmaker is also the Trustee and Beneficiary, but if the Trustmaker/Trustee/Beneficiary becomes incapacitated, then someone else is named to step in as the Successor Trustee to manage the trust assets for the benefit of the incapacitated Trustmaker/Beneficiary.

Planning Tip: To be part of an effective incapacity plan, a Revocable Living Trust should contain provisions to determine the mental status of the Trustmaker/Trustee/Beneficiary through a private process (i.e., a disability panel, an attending physician, the opinion of two physicians, or some other method) instead of through a public process, such a through a court. In addition, the trust agreement should contain specific instructions about how to take care of an incapacitated Trustmaker/Beneficiary.

The Three Must-Have Documents for Health-Care Decisions

There are three essential legal documents for making health-care decisions that must be in place prior to becoming incapacitated. In Virginia, these documents may be combined into a single document called an Advance Medical Directive (or sometimes simply an Advance Directive) and include the following:

1. Medical Power of Attorney. This legal document, also called an Medical or Health Care Proxy, gives an agent the authority to make health-care decisions if the person signing the document becomes incapacitated.
2. Living Will. This legal document gives an agent the authority to make life-sustaining or life-ending decisions if the person signing the document becomes incapacitated.
3. HIPAA Authorization. Federal and state laws dictate who can receive medical information without the written consent of the patient. This legal document gives a doctor or other health-care provider authority to disclose medical information to the agent selected by the patient.

Planning Tip: A client's loved ones may be denied access to medical information during a crisis situation and end up in court fighting over what medical treatment the client should, or should not, receive (like Terri Schiavo's husband and parents did, for 15 years). Without these three documents, a judge may also appoint a Guardian or Conservator of the Person to oversee the client's health care, thereby adding further expense and hassle to the court-supervised guardianship or conservatorship. Clients should have these three documents examined and updated frequently to ensure they accurately reflect their wishes.

How to Choose the Right Agents for an Incapacity Plan

There are two very important decisions clients must make when putting together an incapacity plan:

1. Who will be in charge of managing their finances during incapacity; and
2. Who will be in charge of making their medical decisions during incapacity.

Factors clients should consider when deciding who to name as their financial agent and health-care agent include:

- Where does the agent live? With modern technology, the distance between the client and the agent should not matter. Nonetheless, someone who lives close by may be a better choice than someone who lives in another state or country.
- How busy is the agent? If the agent has a demanding job or travels frequently for work, then the agent may not have time to take care of the client's finances and medical needs.
- Does the agent have expertise in managing finances or in the health-care field? An agent with work experience in finances or medicine may be a better choice than an agent without it.

Planning Tip: Choosing the wrong person to serve as financial or health care agent will result in an ineffective incapacity plan. In order to create an effective plan, clients need to carefully consider who to choose as agent and then discuss their choice with that individual to confirm a willingness and ability to serve.

Are the Incapacity Plans of Your Clients Up to Date?

As time passes by and the lives of your clients change, their incapacity plans will become stale and outdated. It is important for clients to have an incapacity plan reviewed every few years or after a major life event (such as a divorce or death) to insure that the plan will work the way intended it if ever needed. Moreover, Virginia overhauled its Health Care Decisions Act in 2009 and adopted its version of the Uniform Power of Attorney Act in 2010. This, if a client has not updated incapacity planning documents since 2010, please encourage the client to do so to take advantage of some of the new planning opportunities these laws allow.

Please contact one of our offices to discuss your questions about incapacity planning and to schedule plan reviews for your clients. Alternately, please encourage your clients to attend one of our Wills vs. Trusts workshops where we cover all of these topics. This workshop is offered several times a month in each of our office locations. For more information and to make a reservation, please use the link in this newsletter or give us a call.