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Planning for Incapacity



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What would happen if you were mentally or physically unable to take care of yourself or your day-to-day affairs? You might not be able to make sound decisions about your health or finances. You could lose the ability to pay bills, write checks, make deposits, sell assets, or otherwise conduct your affairs. Unless you're prepared, incapacity could devastate your family, exhaust your savings, and undermine your financial, tax, and estate planning strategies. Planning ahead can ensure that your health-care wishes will be carried out and that your finances will continue to be competently managed.

It could happen to you

Incapacity can strike anyone at any time. Advancing age can bring senility, Alzheimer's disease, or other ailments, and a serious illness or accident can happen suddenly at any age. Even with today's medical miracles, it's a real possibility that you or your spouse could become incapable of handling your own medical or financial affairs.

What if you're not prepared?

Should you become incapacitated without the proper plans and documentation in place, a relative or friend will have to ask the court to appoint a guardian for you. Petitioning the court for guardianship is a public procedure that can be emotionally draining, time consuming, and expensive. More importantly, without instructions from you, a guardian might not make the decisions you would have made.

Advance medical directives

Without legal documents that express your wishes, medical care providers must prolong your life using artificial means, if necessary. With today's modern technology, physicians can sustain you for days and weeks (if not months or even years). To avoid the possibility of this happening to you, you must have an advance medical directive.

There are three types of advance medical directives: (1) a living will, (2) a durable power of attorney for health care (or health-care proxy), and (3) a Do Not Resuscitate order (DNR). Each type has its own purpose, benefits, and drawbacks and may not be effective in some states. You may find that one, two, or all three types of advance medical directives are necessary to carry out all of your wishes for medical treatment. Be sure to have an attorney prepare your medical directives to make sure that you have the ones you'll need and that all documents are consistent.

Living will

A living will allows you to approve or decline certain types of medical care, even if you will die as a result of the choice. However, in most states, living wills take effect only under certain circumstances, such as terminal injury or illness. Generally, a living will can be used only to decline medical treatment that "serves only to postpone the moment of death." Even if your state does not allow living wills, you may still want to have one to serve as an expression of your wishes.

Durable power of attorney for health care

A durable power of attorney for health care (known as a health-care proxy in some states) allows you to appoint a representative to make medical decisions for you. You decide how much power your representative will have.

Do Not Resuscitate order (DNR)

A DNR is a doctor's order that tells all other medical personnel not to perform CPR if you go into cardiac arrest. There are two types of DNRs. One is effective only while you are hospitalized. The other is used while you are outside the hospital.



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Protecting your property

Without someone to look after your financial affairs when you can't, your property could be wasted, abused, or lost. To protect against these possibilities, consider putting in place a revocable living trust, durable power of attorney (DPOA), or joint ownership arrangement (or a combination of any or all options).

Revocable living trust

You can transfer ownership of your property to a revocable living trust. You name yourself as trustee and retain complete control over your affairs. If you become incapacitated, your successor trustee (the person you named to run the trust if you can't) automatically steps in and takes over the management of your property. A living trust can survive your death. There are, of course, costs associated with creating and maintaining a trust.

Durable power of attorney (DPOA)

A DPOA allows you to authorize someone else to act on your behalf. There are two types: an immediate DPOA, which is effective immediately, and a springing DPOA, which is not effective until you have become incapacitated. Both DPOA types end at your death.

A DPOA should be fairly simple and inexpensive to implement. However, a springing DPOA is not permitted in some states, so you'll want to check with an attorney.

Joint ownership

A joint ownership arrangement allows someone else to have immediate access to property and to use it to meet your needs. Joint ownership is simple and inexpensive to implement. However, there are some disadvantages to the joint ownership arrangement. Some examples include: (1) your co-owner has immediate access to your property regardless of incapacity, (2) you lack the ability to direct the co-owner to use the property for your benefit, (3) naming someone who is not your spouse as co-owner may trigger gift tax consequences, and (4) if you die before the other joint owner, your property interests will pass to the other owner without regard to your own intentions, which may be different.

How is incapacity determined?

Incapacity can be determined in one of two ways:

- **Physician certification** — You can include a provision in a durable power of attorney designating one or more physicians who will make the determination. Or, you can state that your incapacity will be determined by your attending physician at the relevant time, whomever that might be.
- **Judicial finding** — The court may be petitioned to determine incapacity. After a proceeding where medical and other testimony will be heard, a judge will decide whether you are incapacitated according to the legal standards in your state.

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