



WITH THE RISE OF ALZHEIMER'S AND OTHER COGNITIVE MENTAL HEALTH ISSUES, HOW DO YOU PLAN FOR A POTENTIAL LONG PERIOD OF INCAPACITY?

Every estate plan should provide for the management of assets in the event of incapacity. Depending on the jurisdiction, each family member should have a durable power of attorney, living will and health care proxy (or Advanced Medical Directive) and a Designation of Conservator or Guardian. In some states, these documents may be combined or each a separate document.

A durable power of attorney allows the named person to manage assets in the event the principal is no longer capable of doing so. This should be effective to avoid the expense and complications involved in having to petition a Court to appoint a Conservator or Guardian for that purpose. In some states, a Court will have continuing jurisdiction over the Conservator or Guardian which may require costly annual accountings.

A Living Will and Health Care Proxy or Advanced Medical Direction document contains two main parts. The "Living Will" expresses wishes regarding the removal or withholding of extraordinary life support measures in the event you are in a terminal medical condition or a permanent coma. The "Appointment of a Health Care Representative" appoints an individual to make medical decisions on the persona's behalf in the event he or she is incapacitated and authorizes that individual to communicate wishes relating to the withdrawal of life support under circumstances which are not expressly covered by the Living Will. It is important that this document contain an authorization to give the agent access to protected health information so as to make important decisions concerning care.

Finally, most states allow a person to execute a separate document or incorporate into a durable power of attorney or living will the appointment of a guardian or conservator in case one is needed. If the hospital or nursing home has concerns about relying on a durable power of attorney, a guardianship or conservatorship proceeding may be required. If the person has named a conservator or guardian in their documents, it is extremely difficult for a Court to name someone other than the named guardian or conservator.

We have found that a Revocable Trust that has been funded prior to incapacity is the best vehicle to manage incapacity. Without the practical complications of a durable power of attorney, the Trustees of a Revocable Trust can manage the family member's funds for a long period of incapacity.