



Family Legacy Protection Planner

IT'S NOT JUST DEATH AND TAXES: YOU NEED AN INCAPACITY PLAN THAT WORKS WHEN IT'S NEEDED

Estate planning is not only about having a plan in place to deal with what happens at your death, it is also about having a plan in place to deal with what happens if you become 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 your incapacity plan up to date.

If you have any questions about incapacity planning or whether you need to make updates to your incapacity documents, please call our office now.

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

Mental incapacity caused by an accident, injury, or illness means you will be incapable of making informed decisions about your finances and well-being. Without a comprehensive incapacity plan in place, a judge can appoint someone to take control of your assets and make all personal and medical decisions for you through a court-supervised guardianship or conservatorship. You and your loved ones could lose valuable time, money, and control until you either regain capacity or die.

Planning Tip: You may believe you are protected if you become mentally incapacitated because you hold your assets in joint names with your spouse, a child, or another family member. While a joint account holder may be able to access your bank account to pay bills or access your 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 your accounts or real estate titles may be deemed a gift for gift tax purposes. In addition, if a joint owner is sued, your property could be seized as part of a judgment entered

against them. Only a comprehensive incapacity plan will protect you and your assets from a court-supervised guardianship or conservatorship and the misdeeds of your joint owners.

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 your 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 you have been determined to be mentally incapacitated.
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”). In the typical revocable living trust situation you will be the Trustmaker, the Trustee, and the Beneficiary of your own trust. However, if you become incapacitated, then your Successor Trustee will step in and manage the trust assets for your benefit.

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

The Three Must-Have Documents for Health Care Decision-Making

There are three essential legal documents for making health care decisions that must be in place prior to becoming incapacitated:

1. Medical Power of Attorney. This legal document, also called an Advance Directive or Medical or Health Care Proxy, gives your agent the authority to make health care decisions for you if you cannot do so because you have become incapacitated.
2. Living Will. This legal document gives your agent the authority to make life-sustaining or life-ending decisions if you become 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 your doctor or other health care provider the authority to disclose your medical information to the agent selected by you.

Planning Tip: Your loved ones may be denied access to medical information during a crisis situation and end up in court fighting over what medical treatment you 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 your health care, thereby adding further expense and hassle to your court-supervised guardianship or conservatorship. You should have these three documents examined and updated frequently to ensure they accurately reflect their wishes.

How to Choose the Right Agents for Your Incapacity Plan

There are two very important decisions you must make when putting together your incapacity plan:

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

Factors you should consider when deciding who to name as your financial agent and health care agent include:

- Where does the agent live? With modern technology, the distance between you and your 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 your agent has a demanding job or travels frequently for work, then they may not have time to take care of your finances and medical needs.
- Does the agent have expertise in managing finances or 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. You can pick different people to fill each role, that is, one person in charge of health care decisions and someone else in charge of financial matters. In order to create an effective plan, you need to carefully consider who to choose as your agent and then discuss your decision with that person to confirm that they will in fact be willing and able to serve.

Is Your Incapacity Plan Up to Date?

As time passes by and your life changes, your incapacity plan will become stale and outdated. It is important for you to have your incapacity plan reviewed every few years or after a major life event (such as a divorce or a death) to insure that the plan will work the way you intend it to work if it is ever needed.

Please contact our office to discuss your questions about incapacity planning and to schedule your plan review.

ENSURE YOUR FAMILY IS PROTECTED

If you want to ensure that your family is protected, please schedule your complimentary Estate Planning Strategy Call with San Francisco's premier estate planning attorney, Matthew J. Tuller.

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With an emphasis on developing and maintaining relationships with our clients and allied professionals, our firm collaboratively provides comprehensive estate planning and administration solutions to every client. Our firm provides the full spectrum of estate planning solutions. This includes creating and implementing a comprehensive estate plan, maintaining that plan through life, and administering the plan in the most effective and efficient manner.



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