

Not Just Death and Taxes: Five Essential Legal Documents You Need BEFORE You Become Incapacitated

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Comprehensive estate planning is more than your legacy after death, avoiding probate, and saving on taxes. Good estate planning includes a plan in place to manage your affairs if you become incapacitated during your life and can no longer make decisions for yourself.

What happens without an incapacity plan?

Without a comprehensive incapacity plan in place, your family will have to go to court to get a judge to appoint a guardian or conservator to take control of your assets and health care decisions. This guardian or conservator will make all personal and medical decisions on your behalf as part of a court-supervised guardianship or conservatorship. Until you regain capacity or die, you and your loved ones will be faced with an expensive and time-consuming guardianship or conservatorship proceeding. There are two dimensions to decision making that need to be considered: financial decisions and healthcare decisions.

- **Finances during incapacity**

If you are incapacitated, you are legally unable to make financial, investment, or tax decisions for yourself. Of course, bills still need to be paid, tax returns still need to be filed, and investments still need to be managed.

- **Healthcare during incapacity**

If you become legally incapacitated, you won't be able to make healthcare decisions for yourself. Because of patient privacy laws, your loved ones may even be denied access to medical information during a crisis 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).

You must have these five essential legal documents in place **before** becoming incapacitated so that your family is empowered to make decisions for you:

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 declared mentally incapacitated. There are advantages and disadvantages to each type, and we can help you decide which is best for your situation.

Revocable Living Trust

This legal document has three parties to it: the person who creates the trust (you might see this written as “trustmaker,” “grantor,” or “settlor” — they all mean the same thing); the person who legally owns and 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 situation, you will be the trustmaker, the trustee, and the beneficiary of your own revocable living trust. But if you ever become incapacitated, your designated successor trustee will step in to manage the trust assets for your benefit. Since the trust controls how your property is used, you can specify how your assets are to be used if you become incapacitated (for example, you can authorize the trustee to continue to make gifts or pay tuition for your grandchildren).

Medical Power of Attorney

This legal document, also called a medical or health care proxy, gives your agent the authority to make healthcare decisions if you become incapacitated.

Living Will

This legal document shares your wishes regarding end of life care if you become incapacitated. Although a living will isn’t necessarily enforceable in all states, it can provide meaningful information about your desires even if it isn’t strictly enforceable.

HIPAA Authorization

This legal document gives your doctor authority to disclose medical information to an agent selected by you. This is important because health privacy laws may make it very difficult for your agents or family to learn about your condition without this release.

Is your incapacity plan up to date?

Once you get all of these legal documents for your incapacity plan in place, you cannot simply stick them in a drawer and forget about them. Instead, your incapacity plan must be reviewed and updated periodically and when certain life events occur such as moving to a new state or going through a divorce. If you keep your incapacity plan up to date and make the documents available to your loved ones and trusted helpers, it should work the way you expect it to if needed.