

Is Your Family Prepared If You Become Incapacitated?

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Incapacity, or the inability to make decisions on our own, is something we hope never happens to us. Unfortunately, we have all seen it happen to family members or loved ones. Aging can be difficult, or as my grandpa once said: "Getting old isn't for wimps!" So while we all hope we do not have to face incapacity issues for ourselves or loved ones, what can we do to prepare ourselves in the event we do face these issues? Executing estate planning documents ahead of time can address your concerns about what will happen in the event you face incapacity.

DURABLE POWER OF ATTORNEY

The first document you should consider signing to address incapacity issues is a Durable Power of Attorney. A Durable Power of Attorney appoints someone to act on your behalf to make business and financial decisions for you if you are unable to make decisions yourself. You can decide whether you want the Durable Power of Attorney to become effective upon your signing or at such time as you become disabled or incapacitated. Because it is a "Durable" Power of Attorney, it remains in effect even if you are incapacitated. Most people appoint their spouse or a trusted family member or friend for this role. Planning for this ahead of time will insure that your family does not have to petition the probate court to appoint a conservator for you to handle your business and financial affairs should you ever become incapacitated.

HEALTH CARE POWER OF ATTORNEY

You should also sign a Health Care Power of Attorney, which is sometimes referred to as a Patient Advocate Designation or Living Will. This document appoints someone to make health care decisions for you in the event you are incapacitated. You can state your wishes regarding life support and life sustaining treatment in this document. And this document should also be compliant with the Health Insurance Portability and Accountability Act (HIPAA), which insures that your medical records are kept private. Most people want their Patient Advocates to have access to their medical records so they can make informed decisions regarding their health care. A copy of your Health Care Power of Attorney can be kept in your medical file at your doctor's office. Your spouse does not automatically have the authority to make health care decisions for you. The only person who has authority to make health care decisions for you is the one you designate ahead of time by signing a Health Care Power of Attorney or the person the Probate Court appoints to you.

So by preparing and executing these two estate planning documents ahead of time, you have addressed incapacity issues you may face while you are living. But while incapacity is an event we may or may not face, ultimately, all of us will eventually face death. There are documents we can put in place that will help our families and loved ones through this difficult time.

INTESTATE SUCCESSION

If you die without an estate plan, the State of Michigan's plan for you is called "Intestate Succession." The probate court, pursuant to the Estate and Protected Individuals Code, will control who will receive your assets, who will be in charge of distributing your assets and who will care for your minor children. Many people are surprised to find out that their spouse will not automatically receive everything they own and that the probate court will have to be involved in appointing a guardian for their minor children. Fortunately, you can ensure that your goals and plans for your family are set down in writing as a part of your own estate plan and avoid the cost and confusion of intestacy.

LAST WILL AND TESTAMENT

You should consider signing a Last Will and Testament ("Will") to control the distribution of your property at your death. Your Will provides direction to the probate court for the distribution of your property. Probate is the process through which your assets are transferred to your heirs or named beneficiaries. Many people make the mistake of assuming that because they have a Will, their estate will not be subject to probate court jurisdiction and proceedings. The purpose of the Will is to tell the probate court who is your personal representative (the manager of your estate) and who is to receive your property.

REVOCABLE LIVING TRUST

Increasingly, more and more people are choosing to execute a Revocable Living Trust, rather than simply a Will. There are many reasons you may prefer to have a Revocable Living Trust. First, you can avoid probate court proceedings if the trust is properly funded (your assets are put into the trust, instead of your own name). This can save you money and time. The AARP reports that on average 5% of the value of your gross estate is lost in probate and the average amount of time for an estate to go through probate court is 12 to 24 months. In Michigan, that average time is probably closer to 12 to 18 months. Second, a trust provides privacy for your family. Wills are public documents and anyone can find out what you gave away at your death and to whom you gave it. In Michigan, there is no requirement that trusts be registered or filed at the probate court.

Your successor trustee handles the distribution and closing of your estate in accordance with your wishes as set forth in the trust. Third, a trust can be designed to allow your estate to be managed after your death. Perhaps you have minor children or you do not want your beneficiaries, regardless of age, to be given a lump sum distribution. You can direct how and when your beneficiaries will receive your assets. And finally, you may need a trust if you have a federal estate tax problem. Currently, the federal estate tax exemption is \$2 million, so if you and your spouse have assets in excess of that you should consult an attorney regarding the benefits of having separate trusts to take advantage of two federal estate tax exemptions.

CONSULT AN ESTATE PLANNING ATTORNEY

Without proper planning, your family is not protected in the event of your incapacity or death. And, proper planning can best be accomplished by consulting an estate planning attorney who can help you plan for incapacity (i.e., Durable Power of Attorney and a Health Care Power of Attorney) and achieve your estate planning goals. You, and not the State of Michigan, should be in control of your estate plan and determine what will happen if you face incapacity.

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