

# Planning for incapacity: The key word is trust

Incapacity can befall anyone at any time. For the healthy, it may be the result of a sudden illness or injury. For older people, the onset of incapacity may be slower, the progression of an illness such as Alzheimer's disease or just part of the normal aging process.

The best way to protect your family and assets in the event that disability strikes is to take the necessary steps when there is no doubt that you are fully capable of acting on your own behalf.

## **The durable power of attorney option**

A *durable power of attorney* is a legal document that allows you to give someone the authority to act for you. Unlike a *general power of attorney*, a durable is not revoked automatically if you become mentally incapacitated. It will survive until your death.

The authority that you grant the individual named in the durable power can as broad or as narrow as you wish. And the power may be revoked for any reason prior to your incapacity, or in the event that your incapacity proves to be temporary. Regular updating of the power is recommended. Some third parties may reject it if it is more than a few years old.

There are two types of durable powers. Each has its own pros and cons.

The power holder in a "springing power" can act for you only when you become incapacitated. Therefore, the document must spell out in detail exactly how your incapacity will be determined and by whom. If there is any dispute, the power may not become effective. In addition, in a transaction, anyone who is asked to rely on the power may want proof that you have, in fact, become incapacitated.

On the other hand, a "nonspringing" power becomes effective upon its creation. It avoids the problem of having to prove incapacity. It does, however, grant the power holder the authority to act for you even when you are not incapacitated, raising the possibility for unauthorized use of the power.

## **The revocable living trust option**

A *revocable living trust* can accomplish everything that a durable power of attorney does,

and offers its own unique advantages.

A trust agreement delineates what assets are to be placed in the trust and who serves as the trustee and invests the trust's assets. You also name the beneficiaries of the trust, specifically, who is to receive the income from the trust now and who is to receive the trust's assets when the trust ends.

You may serve initially as trustee of the trust as long as you name either a successor trustee to serve should you become incapacitated or a cotrustee who will be authorized to act alone upon your incapacity. Or, if you choose, you can name someone other than yourself to serve as trustee from the outset. Here are some of the key benefits of a living trust:

- Unlike a durable power of attorney, a third party cannot challenge the trustee's authority to act for you.
- If you choose a corporate trustee, your investment assets will be managed by professionals.
- The trust agreement is a flexible document. It's relatively easy to alter, amend or revoke it at any time.
- The trust can be integrated into your estate plan so that, after your death, the assets will avoid the probate process and be shielded from public scrutiny.

Perhaps the most comprehensive strategy is to create both a durable power and a revocable living trust. The durable power can control assets that may have been left out of the trust inadvertently and may be used for financial decisions unrelated to the trust.

### **The essential element of trust**

The individual that you authorize to act for you in the durable power and the trustee of your trust will have absolute control over your finances. In turn, you must have absolute trust in them.

In a late 2007 article ("How to Ensure Relatives Don't Rip You Off"), Rachel Emma Silverman and Ashby Jones examined some of the risks inherent in durable powers. They interviewed several attorneys who specialize in elder law about what safeguards might be put in place to avoid potentially calamitous results. Among their recommendations:

- *Financial reporting*. Put a provision in the durable power that family members, an attorney or accountant be provided with regular accounting statements.

- *Name multiple power holders.* Create a system of checks and balances by giving authority to two people instead of one. (There's some inconvenience attached to this protection: In most transactions, signatures of both power holders will be required.)

- *Limit the power to make gifts.* Making questionable or fraudulent gifts is a common form of abuse. The durable power should spell out clearly when the power holder has the authority to make gifts.

- *Create a revocable living trust.* When a trustworthy individual is unavailable, establishing a trust and naming a corporate trustee provides a good solution.

### **Medical care directives**

The individual that you have designated in your power of attorney and the trustee of a living trust have the authority to make financial decisions only. There is another side of the coin.

For medical care decisions you will need to execute either a *living will* or a *durable power of attorney for health care*. (The general term is *medical care directives*.) A living will is limited in its scope. It lets you express your wishes regarding your care should you be in a terminal condition and, generally, deals with questions as to whether and what life-sustaining treatments should be undertaken. A power of attorney for health care is much like a durable power of attorney: You delegate someone to make the decisions for you based upon guidance that you have set down in the document.

Whatever your wishes are with regard to what treatments and procedures should (or should not) be withheld, it's important to make your wishes known to your family members and your physician(s) and to put your wishes in writing.

### **Rely upon your advisors**

Your failure to plan for possible incapacity can exact an emotional toll on family members. It may lead also to the need for formal court proceedings in order to appoint a guardian for decisions best made in private (with the attendant expenses and potential delays).

When you seek legal guidance, consider consulting someone who is knowledgeable and experienced about the laws of the state in which the documents are executed. You may want to include your tax and financial advisors as well.

If you are considering a trust, we would be glad to serve on your team. Please feel free to call on us at any time. We would be glad to explain the advantages of choosing us to

serve as the cotrustee or successor trustee of your revocable living trust.

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Any developments occurring after January 1, 2009, are not reflected in this article.