

TRUST CONNECTION

A Monthly Report on
Trust News and Information

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Planning for Incapacity

Baby Boomers are turning 65 at the rate of 10,000 people per day and Alzheimer’s disease affects one in nine people older than 65. Stroke is one of the top five causes of death in the United States and forty-nine percent of Americans have at least one risk factor for stroke. About one third of those hospitalized for stroke are under age 65, and stroke is the number one cause of long-term disability. While these aren’t fun stats to read, they are a reminder that estate planning isn’t just about passing assets at death. It should also help with the management of assets during life and address the management of one’s affairs as well as carrying out one’s wishes when one is no longer able to manage one’s own affairs.

Many draft a living will along with their estate plans and put a durable power of attorney in place, but are they really thinking through the implications and best tools for the job? There are many tools, both financial and medical, that should be considered. Several of these tools will be discussed as they relate to the difficult topic of defining incapacity.

Generally speaking, incapacity means not having the ability to make effective decisions or to manage oneself or one’s affairs. In some cases this is obvious, such as when someone is diagnosed with Alzheimer’s, but what about the gray areas, such as when to take the car keys away from Dad or tell Mom she should move to assisted living? It is the period between completely lucid and clearly incompetent that gets sticky. Because of this, it is important to identify trusted individuals well in advance who will make financial and medical decisions on one’s behalf and to put the right documents in place to empower these individuals.

Some of the signs of diminished capacity include the following: memory loss, impaired

or poor judgement, difficulty understanding simple concepts, mood swings, trouble communicating, confusion with time and place, difficulty with familiar tasks, trouble understanding visual images and spatial relationships, withdrawal from work or social activities, misplacing things, and losing the ability to retrace steps. Everyone will experience some form of diminished capacity with age. The point where this crosses the line into incapacity is a legal issue that varies by state and the facts and circumstances of the individual.

There are many tools to help manage the financial needs of clients with incapacity:

Account Title

An account can be titled in various ways, but how are the affairs being managed? In an account titled solely in one’s own name, no other person has advanced authorization to access the account. An outside power like a power of attorney would be needed, which will be discussed later. Joint tenancy gives each tenant access but can cause other problems because it involves the legal ownership of the property. If a joint tenant is someone other than a spouse, consider the problems that can arise if one tenant’s son is divorcing or daughter causes damage in a DUI crash. Instead, think about granting signature authority, which gives right to sign without ownership issues. In addition, titling in the name of a trust, when one is being used in the plan, will allow a trustee to access the assets.

Guardianship

In cases where people do not plan, every state has the ability for the court to appoint a guardian or conservator to make decisions for the ward (the incompetent person).

Guardianships are generally to be avoided as they can be expensive, time-consuming,

continued ...



POLST - Physicians Orders for Life Sustaining Treatment

POLST does not replace an advanced directive or living will, nor a durable healthcare power of attorney; they are designed to work together. These are, in essence, a portable medical order for the specific medical treatments one desires during a medical emergency. Since they are a doctor's orders, they must be complied with the provider. POLST replaces the Do Not Resuscitate (DNR) instructions and is used mostly for the seriously ill and end-of-life care. As a state law instrument, the name can vary in different states.

Durable Power of Attorney for Healthcare

These are like a financial power of attorney, but for medical decisions allowing the attorney-in-fact to make decisions and sign on behalf of the principal.

Long Term Care Insurance

It is harder to find standalone policies because of low interest rates, changing demographics, and the fact that not many firms offer pure long-term care insurance. The American Association for Long Term Care Insurance (AALTCI) states that sales are down from 750,000 policies in 2000 to 105,000 in 2015.

One option is to look to life insurance policies that build cash value quickly and allow lifetime distributions for long-term care: a 'hybrid' approach, which usually requires lump-sum funding.

Conclusion

With the Baby Boom generation reaching age 65 at such a high rate and medical advances keeping clients alive more effectively than ever, we need to be concerned with whether our clients may live on as their brains develop symptoms of diminished capacity. In these cases, we need to ensure that our clients' wishes will continue to be followed and that they have family or friends who can make the decisions on their behalf in accordance with their wishes. Advanced planning can make a huge difference in quality of life, care, family harmony, and finances.

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and public, but at least there is a backup plan for those who do not have one.

Power of Attorney

In a power of attorney, the person appoints an attorney in fact to sign on his/her behalf. This can be a broad set of powers (general power) or quite restricted and specific to certain issues (limited power). Most important is that the power is "durable," meaning it is valid even during incapacity. This has become such a problem that some states have begun deeming a power to be "durable" in order to avoid guardianship proceedings. Be aware that many firms prefer to have these signed on their own forms or have troublesome policies meant to protect the account holder but that can be tough to navigate, especially when time is of the essence.

Revocable Trust

Assets in a trust are managed by the trustee on behalf of the beneficiary. Keep in mind that the trustee manages only funds owned by the trust, so retitling of assets is important. Likewise, seamless transition should take place from trustee to trustee, but when the client is his/her own trustee paranoia can set in upon anyone suggesting removal. A well-drafted incapacity clause should identify how incapacity is determined. It is generally better to turn over power sooner rather than later.

There are also many tools available for making medical decisions. Following is a brief review:

Living Will

These go by other names such as healthcare directive or advanced directive and state one's wishes for end-of-life medical care. These are legal in every state, just make sure a physician is aware and willing to comply.

HIPAA Authorization

HIPAA (Health Insurance Portability and Accountability Act of 1996) provides data privacy and security provision for safeguarding medical information, certainly a worthy goal; however, the 2003 privacy rule can cause trouble with getting information if not properly authorized. Check planning documents and with physicians and hospitals for authorization.