

DISABILITY

Statistically it is more likely at almost any time in our lives that we will become disabled than that we will die. However, since we all die but we do not all become disabled, frequently we do not consider planning for disability. Disability also covers a large range of conditions. We may be unable to work, but still able to handle our personal affairs. But if we cannot handle our personal affairs, who would? Who would care for you? Who would manage your property? Pay your bills? Who would make health care decisions for you? Who would... ? All of this depends on whether you have a plan in effect.

Let's consider legal guardianships, joint tenant accounts, powers of attorney, revocable living trusts, health care powers of attorney, and living wills. Planning now can set up a framework to handle your property decisions and your health care decisions in a manner that you desire and by the persons you trust.

If You Can't, Who Will? Don't let the Court Decide.

Suppose you become disabled and unable to manage your affairs. If you have not authorized someone to act for you, third parties like a bank will refuse to allow your relatives to handle any financial matters for you. If action must be taken and no plan is in effect, the court will take over. When your disability becomes a court case, it turns into a lengthy and frustrating process, especially for your spouse, friend, or relative. The court must determine that you are incompetent and appoint a legal guardian.

Guardians and Community Managers: Nice but Limited.

Typically, your spouse or your closest relative is the preferred guardian, but the guardian application and appointment process is demeaning, tedious, and tiring, regardless. If your spouse wants to manage only your community property,

he/she can be appointed "community manager."

"Community administration" of property is simpler than a legal guardianship arrangement. However, as community manager, your spouse does not have power over any portion of your estate that is not community property. If your spouse needs access to your separate property to provide for your care, he/she would have to be appointed as your guardian.

Suppose you become disabled and unable to manage your affairs. Without a plan in effect, the courts will take over.

Anyone else attempting to manage your affairs would be restricted in his/her actions on your behalf. The court must authorize all the non-spouse guardian's actions and expenditures. Your guardian must file annual accountings of his/her actions with the court. As if you haven't guessed, this process is very time-

consuming, expensive, and a burden on the guardian. The process is intended to protect you and protect you it does - at a cost. The court must review all actions of your guardian to ensure that your interests are being properly protected. However, with proper advance planning you can name the persons you trust to act on your behalf. You can select someone to act for you whom you feel does not need the extensive review of the courts.

So, what are your options? Should you give someone the right to sign on your accounts?

Yes, this could minimize your problems in the event of a short-term disability. For example, if you put your daughter as a permissible signatory on your accounts, your daughter would be able to handle your affairs with little hassle. However, consider this action carefully.

First, you must be careful in the manner in which you open a joint account. Determine if the account is held in "joint tenants with rights of survivorship." This type of account would automatically pass its entire balance, outside of your Will, to the joint account holder. Frequently, this results in an unintended bequest to the joint account holder.

Second, giving someone the power to sign on your account limits their power to the account on which they can sign. Also, as with powers of attorney discussed below, you must be careful in selecting a person to whom to give this power. Not only is abuse possible, but also other members of the family may become resentful (and suspicious) of this individual's position.

"Not only do you want someone you trust to be able to pay your bills, you also might want them to have the flexibility to handle other financial matters."

Trustees and Attorneys: Expanded Powers and More Flexibility.

Before you start thinking of all your lawyer jokes, here, I am referring to an attorney-in-fact. An attorney-in-fact is the agent you designate, not a lawyer.

Not only do you want someone you trust to be able to pay your bills, you also might want them to have the flexibility to handle other financial matters. Any other financial matter such as selling real estate or stock or investing cash or other assets would have to be handled by someone specifically authorized by you. One way to authorize someone to do this for you is to give him/her a durable general power of attorney. Another option is to designate someone as trustee of a trust specifically set up to handle your property in the event of your disability.

In powers of attorney, you, as the "designator," are called the principal. The person of your choice, the "designate," is called the attorney-in-fact or agent or both. A general power of attorney gives the attorney-in-fact authority to handle any matter which you could have handled. The attorney can transfer title, collect money, sue, spend money, reinvest money, etc. . . . However, the attorney can only spend the money for your benefit.

What is a "Durable Power of Attorney?"

A "durable" power of attorney is a power of attorney that continues to be effective even when the principal is disabled. Although, this seems logical, it is not

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necessarily the case. In fact, unless your power of attorney specifically states that it does not terminate upon your disability, it *will* terminate in the event of your disability.

What if I'm Alive and Well in Dallas? Can My Attorney-in-Fact Clear Out My Accounts?

Basically, yes. The power is effective from the time it is executed. "But wait," you say, "I want it to be effective *only if* I am disabled." That is a "springing" power of attorney. We did not have this type of power until 1993. If you want to have a power only be effective upon your disability, you should decide how you want your disability determined. Without a method set forth in your power, a third party may require a legal determination of disability. A common method of determining disability is to provide that your disability may be evidenced by a letter from two physicians.

Does a Springing Power of Attorney Help me Avoid all Risks?

No, it does not. You may have problems with a third party's [e.g. a bank's] acceptance of the power. As mentioned above, the third party may not accept the letters from the doctors as evidence of your disability. Individuals have historically encountered problems in the acceptance of a power of attorney by third parties. A third party may question whether the power had been revoked. To address these problems, a series of changes have been made to the power of attorney statute to protect third parties from liability in accepting the power. For

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example, the statute allows the third party to accept the attorney's statement that the power has not been revoked.

Most importantly, there is the possibility of an attorney abusing the power. One fear you might have is that the attorney might "borrow" some of your property, intending to pay it back. Or he/she might decide a fee or a bonus is necessary for his/her services. If he/she transfers property into his/her name, as time passes, it would become increasingly difficult to trace which property belongs to him/her and which property is yours.

Most frequently however, problems are caused not by abuse but by poor communication between the attorney and the principal's other family members. The attorney may be handling all of your affairs very efficiently, but his/her failure to communicate with other family

members may breed suspicion. Moral: If you use a power of attorney, only give it to someone you trust absolutely and who will communicate openly and effectively with your family.

Revocable Living Trusts: Built-in Checks and Balances, Basically.

Is there an alternative to a guardianship or a power of attorney? Another way to appoint someone to manage your property is to create a trust which can be used to manage your property during your lifetime. You can create a management trust specifically for this purpose.

A management trust is simply a trust in which one person acts as Grantor, Trustee, *and* Beneficiary. You could set up such a trust with yourself as all three participants. If you became unable to handle the trust due to a disability,

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another person (named by you) will serve as Trustee. The successor Trustee would gain control over the trust and all of your assets held in the trust.

Someone you name as attorney-in-fact would transfer all your property to the trust. The attorney-in-fact's power to transfer the property is low-risk because it is the *only* power he/she has. If the attorney-in-fact uses this power even when you are not disabled, he/she can only transfer your property into the trust,

making it accessible only to you (at the time).

So, the attorney-in-fact transfers the property into the trust, allowing the Trustee to hold and manage it on your behalf. You can require the Trustee to report to other people, give others the power to remove him/her, or put any other checks and balances in the trust that you choose. These trusts can be very simple and standardized or customized to fit any particular situation. If you want to provide a trust to manage your property during your lifetime, a better alternative is to structure your estate plan using a revocable living trust. The revocable living trust function like a management trust during your lifetime, but includes provisions for the distribution of your property upon your death. By including the provisions for the distribution of your property on your death, you avoid extra steps and the cost of probate. See the discussion in the section on Revocable Living Trusts.

I particularly favor the use of a trust, usually a Revocable Living Trust for an elderly individual who does not have close reliable family members. In those situations a corporate trustee can be named with individuals as co-trustees. Alternatively, the corporate trustee can serve as sole trustee and individuals can be included on a trust committee to oversee the trustee's actions, advise the trustee (if the trust so provides) and/or have the power to remove and replace the corporate trustee. In these situations frequently it is helpful to set up a team to make decisions and handle matters during disability. This team can serve as members of the trust committee or in

some other more informal advisory capacity.

What About Health Care?

In the event of a disability, you may not be able to make decisions concerning your own health care. Primarily, two concerns warrant decisions made prior to the disability. First, you want to appoint someone to make decisions on your behalf concerning the type of medical or surgical procedures to be done. Second, if you are diagnosed with a terminal illness, you need to stipulate what extraordinary procedures you would authorize to be performed.

Medical Power of Attorney.

Generally, if you are married, the doctors and hospital would consult your spouse. If you are single, they would turn to your next of kin. The "Medical Power of Attorney" allows you to designate which of your "next of kin" you want to make health care decisions. It also allows you to state that you want someone to whom you are not related to make those decisions. In fact, if you do not want a relative to have this power, you *must* have the Medical Power of Attorney. Unlike the durable power of attorney for property, the medical power of attorney is *only* effective if you are unable to make these decisions yourself.

In addition, this Medical Power of Attorney allows you to state your desires regarding the use of artificial life support. If you *do not* want artificial life support to be used, you should say so in this statement and/or sign a Directive setting forth your desires.

...it is important, not only to make your wishes known to another person, but also to execute a Directive stating those desires..

The agent you appoint in the Medical Power of Attorney has the power to make decisions concerning artificial life support. You can sign a Directive (discussed below) but in any event I strongly recommend that you discuss your feelings with your agent. Making this decision is always a difficult one and having had the discussion with you will be important to the agent (and your family) should it ever be necessary to make this decision.

Directive to Physicians and Family or Surrogates.

Advanced medical technology has enabled doctors to extend patients' lives even when the patients seem to be, essentially "dead." This progress in science has increased the interest in an individual's "right to die."

The Karen Quinlin case touched off the debate on this issue. In the aftermath of that dispute, many states (including Texas) passed laws allowing people to create what has come to be known as "Living Wills." These documents state the individual's wishes that life support not be used in certain situations. In the state of Texas, the statute passed is the Natural Death Act and a "living will" is called a "Directive to Physicians and Family or Surrogates."

Although doctors and hospitals have become more open to the idea of allowing a person to be taken off artificial life support, they still need sufficient evidence of a person's desires concerning the use of artificial life support. In the Nancy Cruzan case in Missouri, the state refused to allow the parents to take their adult daughter off of artificial life support since the daughter had not executed a Directive.

As stated above, the agent you appoint under a Medical Power of Attorney has the power to make all health care decisions for you, including the decision regarding artificial life support. It is important to make your wishes known either to your agent under a Medical Power of Attorney or by the execution of a Directive stating those desires.

Prior to September 1999, the form used for the Directive was a simple one-page document; however, the form has been expanded and now allows for the following specific choices:

(1) If you have a **terminal condition** and are expected to die within 6 months, do you wish to have available life-sustaining treatment or not?

(2) If you have an **irreversible condition** so that you cannot care for yourself or make decisions for yourself, do you wish to have available life-sustaining treatment or not?

The new Directive form provides definitions for "terminal condition," "irreversible condition," and "artificial nutrition and hydration." These definitions are very important in understanding the nature of the choices

being made. The new Directive goes much further than the Directive which was in effect prior to 1999. For example, an irrevocable conditions includes Alzheimer's. In addition artificial nutrition and hydration includes the use a a feeding tube.

With a little planning and a few documents, you could avoid major problems in this area.

More importantly, you can plan for the handling of these matters. Planning gives you peace of mind. Planning provides your family with guidance during a difficult time.