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How Can I Help My Family By Planning for Incapacity?

When it comes to estate planning, most people automatically think about taking legal steps to ensure the right people inherit their stuff when they die. That thought is not wrong, but it leaves out a very important piece of planning for life. This piece is perhaps the most critical part of planning.

Planning that's focused solely on who gets what when you die ignores the fact that death isn't the only thing you to plan for. Consider that at some point before your eventual death, you could be incapacitated by accident or illness.

Each of us is at constant risk of experiencing a devastating accident or disease that renders us incapable of caring for ourselves or our loved ones. Unlike death, however, which is by definition a final outcome, incapacity comes with an uncertain outcome and timeframe.

Incapacity can be a temporary event from which you eventually recover or it can be the start of a long and costly event that ultimately ends in your death. Incapacity can drag out over many years, leaving you and your family in agonizing limbo. This uncertainty is what makes incapacity planning so incredibly important.

In fact, incapacity can be a far greater burden for your loved ones than your death. This is true not only in terms of its potentially ruinous financial costs, but also for the emotional trauma, contentious court battles, and internal conflict your family may endure if you fail to address it in your plan.

The goal of effective estate planning is to keep your family out of court and out of conflict no matter what happens to you. Consider this: if you only plan for your death, you're leaving your family—and yourself—extremely vulnerable to potentially tragic consequences.

Where Do I Start?

Planning for incapacity requires a different mindset and different tools than planning for death. If you're incapacitated by illness or injury, you'll still be alive when these planning strategies take effect. In addition, the legal authority you grant others to manage your incapacity is only viable while you remain alive and unable to make decisions about your own welfare.

If you regain the cognitive ability to make your own decisions, for instance, the legal power you granted others is revoked. The same goes if you should eventually succumb to your condition—your death renders these powers null and void.

#189-133 West Market Street, Indianapolis, IN 46204

Phone: 317.721.9214 • Fax: 888.422.3151

www.saeedandlittle.com

Attorneys licensed in Arizona, California, Colorado, Illinois, Indiana, New York and Ontario, Canada



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To this end, the first thing you should ask yourself is: “If I’m ever incapacitated and unable to care for myself, who would I want to make decisions on my behalf?” Specifically, you’ll be selecting the people you want to make your healthcare, financial, and legal decisions for you until you either recover or pass away.

You Must Name Someone

The most important thing to remember is that you must choose *someone*. If you don’t legally name someone to make these decisions during your incapacity, the court will choose someone for you. This is where things can get extremely difficult for you and your loved ones.

Although laws differ by state, in the absence of proper estate planning, the court will typically appoint a guardian or conservator to make these decisions on your behalf. This person could be a family member you’d never want managing your affairs or a professional guardian who charges exorbitant fees and could potentially decimate your estate. Either way, the choice is out of your hands.

Furthermore, like most court proceedings, the process of naming a guardian is likely to be a time-consuming, costly, and emotionally draining task for your family. If you’re lying unconscious in a hospital bed, the last thing you’d want is to waste time or impose additional hardship on your loved ones. This is based on the assumption that your family members agree about what’s in your best interest. What happens if they disagree?

For example, if your family members disagree about the course of your medical treatment, this could lead to ugly court battles between your loved ones. Such conflicts can tear your family apart and drain your estate’s finances. What’s worse is that in the end, the individual the court eventually appoints may choose treatment options that are the exact opposite of what you’d actually want.

This potential turmoil and expense can be easily avoided through proper estate planning. An effective plan gives the individuals you’ve chosen immediate authority to make your medical, financial, and legal decisions without the need for court intervention. The plan can also provide clear guidance about your wishes so that there’s no mistake or conflict about how these vital decisions should be made.

How Do I Know What Works?

Determining which planning tools you should use to grant and guide this decision-making authority depends entirely on your personal circumstances. There are several options available,

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but choosing what's best is something you should ultimately decide on after consulting with an experienced lawyer like us.

That said, we can tell you one planning tool that's totally worthless when it comes to your incapacity: a will. A will only go into effect upon your death, and then it merely governs how your assets should be divided. In other words, having a will does nothing to keep your family out of court and out of conflict in the event of your incapacity.

What Are The Proper Tools For The Job?

There are multiple planning vehicles to choose from when creating an incapacity plan. Ideally, this shouldn't be just a single document; instead, it should include a comprehensive variety of planning tools that each serve a different purpose.

Though the planning strategies you ultimately put in place will be based on your particular circumstances, it's likely that your incapacity plan will include some or all of the following:

Healthcare power of attorney: An advanced directive that grants an individual of your choice the immediate legal authority to make decisions about your medical treatment in the event of your incapacity.

Living will: An advanced directive that provides specific guidance about how your medical decisions should be made during your incapacity.

Durable financial power of attorney: A planning document that grants an individual of your choice the immediate legal authority to make decisions related to the management of your finances, real estate, and business interests.

Revocable living trust: A planning document that immediately transfers control of all assets held by the trust to a person of your choosing to be used for your benefit in the event of your incapacity. The trust can include legally binding instructions for how your care should be managed and even spell out specific conditions that must be met for you to be deemed incapacitated.

While each of these documents is important, they are often of limited usefulness without the counsel and guidance of a personal lawyer who knows you, knows what's important to you, knows how to locate your assets, and who can guide your family when they don't know where to turn.

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Don't Let A Bad Situation Turn Worse

You may be powerless to prevent your potential incapacity, but estate planning -- which we prefer to call life and legacy planning because it's about so much more than just your "estate" -- can at least give you control over how your life and assets will be managed if it does occur. Moreover, such planning can prevent your family from enduring needless trauma, conflict, court intervention, and expense during an already trying time.

If you've yet to plan for incapacity, meet with us, your estate planning lawyer, right away. We can counsel you on the proper planning vehicles to put in place and help you select the individuals best suited to make such critical decisions on your behalf. If you already have planning strategies in place, we can review your plan to make sure it's been properly set up, maintained, and updated. Contact us today to get started.

This article is a service of Saeed & Little, LLP, estate planning lawyer. We do not just draft documents; we ensure you make informed and empowered decisions about life and death, for yourself and the people you love. That's why we offer a Family Wealth Planning Session™, during which you will get more financially organized than you've ever been before and make all the best choices for the people you love. You can begin by calling our office today to schedule a Family Wealth Planning Session and mention this article to find out how to get this \$750 session at no charge.

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