Incapacity Planning

Many focus on asset transfer when they think about estate planning. While leaving one's legacy may be very important, an often overlooked aspect of estate planning is planning for incapacity. Many feel their incapacity is unlikely, but that's just not true. One study states, "By the time you reach the age of 65, your chances of becoming incapacitated rise to over 50 percent. If you live to be over 80 years of age, this statistic reaches nearly 75 percent. Although age is often a disability factor, even those under retirement age have a 20 percent chance of becoming incapacitated."[1] Review these statistics and you realize incapacity is a reality for most.

Incapacity is generally defined as the inability to make financial or medical decisions. This could be for a short period of time, say due to a car accident or an extended hospital stay, or on a more permanent scale, like dementia. In either event, legal, financial and health care decisions will continue to arise, and if you're unable to make those decisions, someone will make them for you. The question is who?

Unfortunately, many fail to name a "who" in planning for incapacity. Should you fail to create your own plan, your state has default provisions to handle your affairs. In most states, this is referred to as a custodianship.

Custodianships typically require someone to petition the local court on behalf of an incapacitated person so that the person's affairs can be handled. If approved, the court assumes oversight of the personal affairs and appoints a custodian to manage day-to-day activates on behalf of the incapacitated person. This is often a slow and expensive process, is a matter of public record, and the court controls allowable spending and possible investment strategies. This isn't what most people want, and while the court action is pending, bills and decisions will continue to pile up.

Taking a proactive stance on incapacity protection can be much simpler and more efficient. Here are a few common planning techniques:

Financial power of attorney: A legal document granting enumerated financial powers to another person, known as the "agent" or "attorney-in-fact". The powers granted can be very narrow or extremely broad depending on the need. Powers of attorney are usually either *"durable"* (meaning the power is

[1] Stephen M. Waltar, *Smart Estate Planning in Washington*

granted to the agent immediately and the agent's authority survives any eventual incapacity of the grantor) or *"springing"* (meaning some action, typically a doctor declaring the grantor to be incapacitated, must occur before the agent has authority to act). Most planners use durable powers of attorney to allow swift transitions of responsibilities when necessary. Reliance on a springing power can slow or stop the process depending on the ability to secure a doctor for a diagnosis to cause a springing power to take effect.

Living trusts: A trust created during one's lifetime, also known as a revocable trust or grantor trust, typically has provisions for the care of the grantor should the grantor become incapacitated. The assets held by the trust would then fall to the control of the successor trustee who could use those assets to care for the incapacitated grantor per the trust's terms. This is typically a much quicker transition than other incapacity planning techniques.

Health care/medical power of attorney: Simply, these are similar to a financial power of attorney, only for health care decisions. These legal documents grant enumerated health care decision making powers to the agent. Again, these powers can be broad or narrow and may be durable or springing, though durable powers are more common.

Living will/health care directive: For end-of-life decisions, a living will/health care directive may be utilized. Typically, these documents stipulate one's wishes for the use or denial of certain medical treatments if they are terminally ill or permanently unconscious. These documents typically only become controlling after mental incapacity. Usually, an agent isn't named, rather your desires are documented for the medical professionals to follow.

Incapacity can be a scary thing. The inability of your loved ones to care for you, without going through a lengthy court procedure, can be even scarier. Consider implementing an incapacity plan for yourself. If you have these documents in place already, review them again. You should make sure your documents still represent whom you would like to care for you should the time come, and that you have properly documented your wishes. Doing so can eliminate the hassle of courts making decisions for you and allow your affairs to be handled in the manner you've chosen.