

Practical Estate Planning: Mental Disability Planning

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Your Guide to Wills & Estate Planning

How to Properly Plan for Mental Disability

Planning for mental disability should be an integral part of every estate plan. There are two important aspects of this type of planning: deciding who will take care of your personal well being and deciding who will take care of your finances.

What Can Happen if you Fail to Make a Disability Plan?

Before you can understand how to properly plan for mental disability, you will need to understand what will happen to you and your property if you fail to make a plan.

All states have a legal process in place for dealing with their residents who become mentally incompetent through what are referred to as guardianship or conservatorship laws. We all recently became aware of California's conservatorship laws when Britney Spears family used these laws to have Ms. Spears involuntarily committed to a mental institution and her father designated to serve as her conservator in order to manage her and her finances.

What is Guardianship or Conservatorship?

Guardianship, or conservatorship as it is referred to in some states, is a court-imposed and court supervised process for dealing with a person's mental disability.

What will happen if you become mentally incapacitated and a court imposes a guardianship over you and your property? This means that it will be a judge, not your loved ones, who will decide how you will be taken care of and how your assets will be invested, managed and spent. It will also most likely cause family disharmony since the judge will need to select one family member to be your guardian and often times either more than one member will want to serve or no one will want to serve.

How to Avoid Guardianship or Conservatorship

In order to avoid guardianship or conservatorship, you will need to have two important legal documents in place; a medical power of attorney, called a designation of health care surrogate in some states, and a financial power of attorney.

A medical power of attorney or designation of health care surrogate allows you to choose someone to make your medical and other personal decisions if for any reason you cannot do so for yourself. It is very important to select someone who will be readily available to make these choices for you since it is quite possible that they will be life or death ones. In addition, you should choose someone who will be comfortable making these decisions for you, otherwise they may simply choose not to serve.

A financial power of attorney allows you to choose someone, called your “attorney in fact,” to manage your finances for you. There are two types of financial power of attorney: one that will allow your attorney in fact to have immediate access to your assets, called a “durable” power of attorney, and one that will allow your attorney in fact to access your assets only after you have been determined to be mentally incompetent, called a “springing” power of attorney. While the choice is up to you whether your attorney in fact should or should not have immediate access to your property, in my experience a durable power of attorney works better since there are no hurdles to jump over before it can be used.

Using a Revocable Living Trust to Plan for Disability

Aside from using medical and financial powers of attorney to keep you and your assets out of court if you become mentally incapacitated, a revocable living trust can also be used for disability planning.

How can a revocable living trust be used to avoid guardianship? Because assets that are owned by the trust can be readily accessed and managed by the person you name as your disability trustee without the need for a court to get involved.

Be aware, however, that not all revocable living trusts are created equally, since some either do not mention disability planning at all or provide for limited planning. If you already have a revocable living trust in place, you should check with your attorney to insure that it contains the proper language to take care of you in the event you become mentally incapacitated. If you are in the process of setting up a revocable living trust, you should ask your attorney to include a comprehensive disability plan in your trust.