

PLANNING FOR INCAPACITY

Estate Planning is not only about what happens if you die. It's also about planning for what happens if you are incapacitated. That is, what happens if due to a stroke, serious injury or illness you are unable to make decisions for yourself?

Decisions might have to be made regarding your medical care and treatment. Someone will need to pay your bills, manage investments, sell property you own, access funds in your retirement accounts, file for government or insurance benefits, file your tax returns, access your safe deposit box, take legal action on your behalf, etc.

Without the proper documents in place, you and your family members could find yourselves confronted with any number of roadblocks that would leave no alternative other than the necessity of pursuing guardianship proceedings. A guardianship is actually a form of lawsuit that is filed in the Circuit Court. The lawsuit is filed by an attorney hired by the Petitioner, and must be supported by statements from two doctors who may have to testify in court. When the petition is filed, the Court must appoint a second attorney to represent the incapacitated person and file a report after investigating all the facts. So, with two doctors and two lawyers involved, you can imagine that the costs of a guardianship are significant, not to mention the time it will take to get through the court process. Plus, it will be up to the judge to determine who will make these important decisions, which may cause family members to fight over the who should serve in this capacity.

That is why any "estate plan" must include the documents that can ensure that you can name the person or persons that you would want to be in the position to carry out your wishes. These include the following:

1. **Maryland Statutory Form Personal Power of Attorney.** Everyone should have this Power of Attorney document. It allows you to appoint and authorize an agent (or "attorney-in-fact") to act on your behalf for financial purposes, such as dealings with real property, bank accounts, digital assets, retirement account, and life insurance policies. Under a 2010 Maryland law, a Maryland resident can execute the statutory version of a Power of Attorney that, if wrongfully refused by a bank or other financial institution, can allow a Court to assess attorney's fees. This law was passed as a result of the tendency among banks and financial institutions to be reluctant, or in many cases unwilling to accept powers of attorney. As a result, many banks and financial institutions now may only be willing to accept the statutory form, so we want all our clients to have such a form ready in case it is needed. However, we cannot solely rely on the statutory form because it does not include some provisions that we feel all clients should have. And since the statute seems to say that the statutory form cannot be expanded to include these powers, we feel our clients should also have a Durable General Power of Attorney.

2. **Durable General Power of Attorney.** The Durable General Power of Attorney is a document that also appoints someone you trust as your agent (or “attorney-in-fact”) and empowers them to take action on your behalf if you were unable to do so because of an incapacity caused by illness or injury. It is important that you trust the person you name as your agent because their authority is granted immediately. It is also beneficial to name at least one backup agent in case the first named person cannot serve. Most Powers of Attorney are broad, giving the agent the power to do anything you, yourself, could do. This would include exercising authority over your bank accounts, investments, insurance policies, retirement accounts, real estate, etc. A good Power of Attorney will also authorize your agent to access safe deposit boxes, file income tax returns, deal with your employer with respect to employment benefits and take legal action on your behalf. Some durable Powers of Attorney will also include the power to gift assets to reduce your estate as necessary to qualify for Medicaid or other government benefits, or to avoid your beneficiaries having to pay estate tax upon your death.
3. **Health Care Power of Attorney.** If you become ill or injured and you are unable to make decisions concerning your health and medical care and treatment, there are probably people close to you who you would trust to make those decisions for you. If so, it is essential that you have a legal document that empowers them to act on your behalf. The Health Care Power of Attorney authorizes your agent to communicate with your doctors and other health care providers and to make decisions regarding your care and treatment. This would include the power to consent to surgeries or other medical procedures, the administration of medications, arranging for your hospitalization, convalescent care, hospice or long-term care. It would also empower the agent to make the ultimate decisions regarding the withholding or withdrawal of life sustaining procedures if your condition met one of the following criteria: (1) you suffered from a terminal condition where death was imminent; (2) you were in a persistent vegetative state or coma; or (3) you were in an “end stage” condition.
4. **Advance Directive or “Living Will.”** If, in addition to appointing someone as your agent to make medical decisions for you, you wish to leave written instructions as to what you would want in those end-of-life situations, you should execute an Advance Directive or so-called “Living Will.” We recommend our clients use the standard Maryland Living Will form, since it is the document that is the most widely recognized among doctors, nurses and hospital personnel. The document enables a person to choose among several prescribed options that are the most common in reflecting people’s wishes as to being removed from life support. The Living Will can be useful for several reasons. First, it can serve as guidance to your health care agent. Secondly, it can provide evidence of your intentions in the event that others question your agent’s decisions.

Planning for incapacity is an essential part of any Estate Plan. Having these important documents in place can make it so much easier on your family if they are unexpectedly forced to care for you.



© 2020 The Law Office of James A. Hyatt
13220 Executive Park Terrace, Germantown, MD 20874
(301) 540-3300
www.estateplanningmatters.com