



ESTATE PLANNING & PLANNING FOR INCAPACITY

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OVERVIEW

Wills v. Trust

What is Incapacity?

Planning for Incapacity
through a Living Trust

Planning for Incapacity
through a DPA

Planning for Incapacity
through an AHCD

Amending/
Terminating
Documents

What happens if you
fail to plan?

Questions



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WHAT IS A LIVING TRUST

A living trust is a legal document, or trust, created during an individual's lifetime where a designated person, the trustee, is given responsibility for managing that individual's assets for the benefit of the eventual beneficiary.



Living Trust

Avoids Probate

Private

Incapacity Management

VS

Wills

Probate Required

Public

Effective at Death Only





TESTAMENTARY CAPACITY

An individual is not mentally competent to make a will if, at the time of making the will, the individual does not have sufficient mental capacity to be able to do any of the following:

- Understand the nature of the testamentary act.
- Understand and recollect the nature and situation of the individual's property.
- Remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.

(Probate Code section 6100.5)





LEGAL MENTAL CAPACITY

A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act shall be supported by evidence of a deficit in at least one of the following mental functions:

- (1) Alertness and attention (arousal, orientation, attention, concentration)
- (2) Information processing (memory, recall, communication, recognition, reasoning and logic)
- (3) Thought processes (disorganized thinking, hallucinations, delusions)
- (4) Ability to modulate mood and affect. (mood that is inappropriate in degree to the individual's circumstances).

Probate Code section 811



DEMENTIA

An infographic featuring a large purple umbrella at the top with the word 'DEMENTIA' in white. Below the umbrella is a definition of dementia. Underneath the definition, five teal teardrop shapes represent different types of dementia, and a teal oval at the bottom represents mixed dementia. A vertical purple line connects the umbrella's handle to the oval.

Umbrella term for loss of memory and other thinking abilities severe enough to interfere with daily life.

Alzheimer's:
60-80%

**Lewy Body
Dementia:**
5-10%

**Vascular
Dementia:**
5-10%

**Frontotemporal
Dementia:**
5-10%

**Others:
Parkinson's,
Huntington's**

Mixed dementia:
Dementia from more than one cause

THE MERE DIAGNOSIS OF A
MENTAL OR PHYSICAL
DISORDER SHALL NOT BE
SUFFICIENT IN AND OF
ITSELF TO SUPPORT A
DETERMINATION THAT A
PERSON IS OF UNSOUND
MIND OR LACKS THE
CAPACITY TO DO A CERTAIN
ACT

PROBATE CODE SECTION 811(D)



INCAPACITY MANAGEMENT WITH A TRUST

Names a Co-Trustee or Successor Trustee

Dictates how incapacity is determined

Provides for an easy transition of authority

Allows for management of a wide array of assets

WHAT DECISIONS/ACTS ARE NOT COVERED UNDER A TRUST?

- Health care decisions
- Certain financial decisions
- Managing non-trust assets
- Authority to deal with governmental agencies
- Authority to transfer assets to a Trust
- To make arrangements for personal care



POWER OF ATTORNEY (POA)

A legal document in which you (the Principal) designate an individual (the Agent) to act as your attorney-in-fact with broad powers manage your financial, business and legal affairs. The Agent owes a fiduciary duty to act in the Principal's best interests.



POWERS OF AN AGENT UNDER A POA

- Sell, encumber or lease real property
- Control partnership interests
- Purchase or sell stocks/securities
- Collect debts, pursue litigation
- Pay debts
- Sell or transfer personal property
- Prepare and file income tax returns
- Manage checking and savings accounts
- Invest the Principal's funds
- Deal with governmental agencies
- Use credit cards
- Hire health care providers
- Provide for food, clothing and shelter for principal
- Other acts as needed



TYPES OF POAS

- Immediately (Durable Power of Attorney)
- Upon the incapacity of Principal (Springing Power of Attorney)

ADVANCE HEALTHCARE DIRECTIVE (AHCD)



What is an AHCD? It is a tool to make healthcare wishes known when a patient is unable to communicate. It allows a person to appoint a healthcare agent or give specific instructions for future healthcare decisions.

In some AHCDs, there is room to provide more general quality of life information, and some have spaces for indicating choices on treatment. This information is intended to guide the medical team, and more importantly, to support the surrogate decision-maker in making choices for the document's owner. The healthcare agent has power to interpret the document for the medical team according that person's understanding of the situation.

AMENDING/TERMINATING DOCUMENTS

- Revocable Living Trust: follow procedures in the instrument for amending/terminating the Trust
- Durable/Springing Power of Attorney: execute revocation/amendment in a writing signed by the Principal.
 - If revoking the power of the agent and appointing a new agent, distribute to financial institutions if concerned about fraud
- AHCD: execute revocation/amendment in a writing signed by the Principal.
 - Distribute to health care providers

WHAT HAPPENS IF YOU FAIL TO PLAN?

Conservatorship

A conservatorship is a court proceeding that is meant to protect a person who cannot care for their own person or property. In a petition for conservatorship, the petitioner asks the court to appoint a conservator to make decisions for the conservatee and in the conservatee's best interest.



A court may establish a conservatorship of the *person*, the *estate*, or *both*. In establishing a conservatorship of both the person and the estate, the court may appoint separate conservators (one for the estate and one for the person) or one person to serve in both roles.

DRAWBACKS TO A CONSERVATORSHIP

- Loss of control over key decisions
- Time and expense of court proceedings
- Additional stress upon family members and friends
- Many decisions require court approval

RECOMMENDED NEXT STEPS

- Discuss incapacity planning with your family and friends
- Assess which individuals are best suited to serve as trustees/agents
- Meet with legal counsel to formulate a plan that best suits your needs
- Keep your plan up to date

THANK YOU FOR ATTENDING!

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