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## Preparing for Incapacity: The Documents You Need and Traps to Avoid

*By Diane B. Weinberg and Loraine M. DiSalvo*

In the last edition of *The Passionate Estate Planner*, we discussed the different levels of incapacity an individual can face and how incapacity impacts that person's ability to sign legal documents. Today, we want to address those documents that can help protect individuals from the results of their own incapacity. We also want to highlight those planning decisions that can sink an incapacity plan.

When attorneys think about planning for incapacity, they primarily think about three different types of planning documents: advance directives for health care, financial powers of attorney, and revocable living trusts. Each of these documents could be the topic of its own newsletter, so we are only going to highlight them here. They also have been addressed in more detail on the Morgan & DiSalvo, P.C. website and in past editions of this newsletter.

### 1. Planning Documents

- A. **Advance Directive for Health Care.** The Advance Directive for Health Care ("Advance Directive") allows an individual (the "principal") to select another individual (the "agent") to make medical decisions on the principal's behalf in the event he cannot make or communicate these decisions. The document consists essentially of three substantive parts. In the first part of the document, the principal designates his agent. The second part of the Advance Directive incorporates what used to be known as a "Living Will." Here, the principal provides guidance as to whether he would like to receive life-sustaining treatment, such as hydration or nutrition, if he is at the end stage of a terminal illness or in a permanent coma or vegetative state. In the third part of the document, the principal names the person he would like to serve as his guardian in the event he requires one. Typically, that person is the same as the agent.

The Advance Directive becomes effective when signed or as otherwise provided. It is important to remember that, as long as the principal is able to make and communicate his own decisions, the agent does not have the power to override those decisions. The agent's authority ends at the death of the principal. That having been said, the Advance Directive does allow the agent to agree to certain post-mortem activities, such as authorizing an autopsy. The Georgia Code provides a statutory form for the Advance Directive, but other "substantially complying" forms may be used.

- B. **Durable Financial Power of Attorney.** This document, also called a DPOA, appoints someone to serve as an agent (officially called an "attorney-in-fact") with respect to the principal's financial affairs. Typically, the DPOA is broadly drafted to allow the agent to perform a wide variety of tasks on behalf of the principal – check writing, making and selling investments, applying for public benefits (e.g., Medicaid or VA Pension), and even creating or revoking a Revocable Living Trust. The principal can also propose that the agent or another person serve as the principal's conservator in



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the event he requires one. Although the Georgia code provides a statutory form DPOA, the statutory form is not required, and broader or narrower forms may also be used to add to or reduce the powers given to the agent.

As suggested by the title, the financial power of attorney is durable, meaning that it survives an individual's incapacity. However, the agent's power under a DPOA ends immediately at the principal's death, and no post-death acts of any kind are allowed.

- C. **Revocable Living Trust.**<sup>1</sup> This type of trust is created during the principal's lifetime, and generally allows the principal to modify or terminate the trust at will. The trust may be used to hold the principal's assets and can make it easier for a third party to manage and use those assets on behalf of the principal if needed. In a revocable living trust, the trustee is the legal owner of the assets held by the trust; by contrast, the agent under a DPOA is simply a third party authorized to handle assets which are legally owned by the principal. Thus, banks, brokerages, and other third parties are far more likely to question the authority of an agent under a DPOA than they are to question the authority of a trustee. In addition, in a situation where the principal is susceptible to gift or loan requests from family members or "friends," the Trustee can help protect the principal's assets against predators, such as Uncle John who would like a loan to fund his latest invention or the care giver who requests help with personal expenses.

## 2. Common Myths and Pitfalls to Avoid When Creating Incapacity Planning Documents.

Deciding to have incapacity documents prepared is only part of the planning process. Deciding how to structure the documents is also critical. Without the right provisions in the planning document, the document is simply an expensive piece of paper.

- A. **The Problem with Co-Agents and Co-Trustees.** One common mistake involves naming co-agents and co-trustees. A parent/principal with more than one adult child often wants to avoid hurting anyone's feelings, and so she decides to name two or more children as co-agents under a DPOA or Advance Directive, or to name two or more children as co-trustees of a revocable living trust.

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<sup>1</sup> A revocable living trust also usually contains Will-type provisions that spell out how the principal's remaining assets will be distributed after his death. Since a revocable living trust can be much more difficult to challenge than a Will, having a fully funded revocable trust can be helpful where a blended family exists, or where would-be inheritors may not be happy with the desired asset distribution.



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As a parent of three boys, I understand the desire to treat children equally and to make sure that no one feels either slighted or favored. As an elder law attorney, however, I have come to recognize a “co-something” in a contentious family situation as shorthand for “Mom Isn’t Going to Get the Care She Needs” or “Siblings Go to Court.”

We would all like to hope that our families will be brought together by hard times, and that teamwork and cooperation will result. Unfortunately, a parent’s illness usually does not bring families together. Rather, it exacerbates any tension that already exists between siblings. Instead of working together, the co-agents or co-trustees end up arguing about who is supposed to do what under the document, and the parent ends up suffering as a result. If two siblings who are co-agents under an Advance Directive begin arguing about the type of treatment Mom is supposed to receive, the treating physician will likely just walk away. Likewise, a financial institution will not honor a DPOA if the siblings/co-agents argue about how to spend Mom’s money. Corporate trust companies have refused to manage trusts where the siblings/co-trustees fight about the management of the trust. To ensure proper planning, pick one adult child (or even a trusted third party) as the agent or trustee, and let the other children know who was selected. Other children may be named as successors, but it can be critical for one person to hold the decision-making authority.

- B. **Selecting the Wrong Adult Child as an Agent.** When deciding who should serve as an agent or trustee under an incapacity document, it is important to consider each adult child’s skills and capacity to serve. Typically, a parent will select the oldest child or the child who lives nearest to serve to serve as a trustee or as an agent under both the DPOA and the Advance Directive. What we recommend, however, is that the parent focus instead on selecting the child whose skills are most appropriate for the tasks that trustee or agent will need to perform. If a child is an accountant or skilled investor, that child may be appropriate to serve as the agent under the DPOA or as a trustee of a revocable living trust. If a drop of blood sends an adult child into a fetal position in the corner of the room, this is probably not the child to serve as agent under an Advance Directive. A child who travels extensively for a living may be a poor choice for an agent or trustee, no matter how stellar that child’s other qualities may be.

In situations of extreme sibling conflict, we often recommend using a friend or a third party as the agent or trustee, instead of having any of the children serve in that role. With the aging Baby Boomer population, companies are increasingly offering to serve as agents under Advance Directives as well as providing financial management services. Having a third party serve in an agent or trustee role can actually help improve the children’s relationship by removing some of the pressure on them, while allowing the parent to receive the care she needs.

- C. **Delaying the Effective Date of the DPOA or Advance Directive.** In some cases, a DPOA or Advance Directive is structured so that it only becomes usable by the appointed agent at a certain date, or on



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the happening of a certain event, such as the principal's incapacity. These are often called "springing" powers of attorney. Usually, the principal's incapacity is established through a doctor's note or a vote of family members.

Many attorneys, like me, do not like springing powers of attorney because it can be difficult to bring them to life. Families end up chasing busy doctors down hospital corridors to get them to sign a letter stating that Mom is incapacitated. I remember one situation in which the siblings/co-agents could not agree that their parent was incapacitated. Because the siblings did not agree, the DPOA never became effective, and no one had authority to pay bills on their parent's behalf. In a separate matter, it took six weeks and repeated phone calls by both the client's daughter and the attorney, to convince the doctor to put the necessary statement in writing, even though he would state verbally that yes, the client was clearly incapacitated.

So what is someone to do if she wants to create a power of attorney but is not quite comfortable giving up that that level of control over her life? In these circumstances, we usually advise the client to create the power of attorney and to hold it in a safe place for the agent. Simply tell the agent where it can be found if it is needed. "Jim, I want you to know that you are my agent under a power of attorney. If there comes a time where you need to pay bills on my behalf, you can find it in the top drawer of my office filing cabinet."

Sometimes people are reluctant to create a DPOA or Advance Directive because they believe that they are relinquishing their right to act to the agent. These documents give the ability for someone to act concurrently with the principal; they do not take away the principal's ability to act on her own. Thus, both my husband, as my agent under my DPOA, and I have the ability to write checks on my checking account; I have not given up that right simply by naming him as my agent. Moreover, the agent is supposed to use "substituted judgment"; he is supposed to make the same decisions that you would make if you were standing there. Thus, since I am an alumna of the University of Pennsylvania, I would give my husband funny looks if he, as my agent, began making regular donations to Princeton University. (Go Quakers!) Ultimately, if the principal doesn't like the actions taken by her agent, she can revoke the power of attorney.

Sometimes, the parent/principal doesn't want the power of attorney to become effective for a different reason - he doesn't quite trust his child and don't want him to have any unnecessary powers. The child may be a spendthrift or have a problem with a drug or gambling addiction. Here, we will have a discussion as to whether the child is an appropriate agent and suggest alternatives to that person, such as a family friend or third party.

- D. **Keeping Planning Documents Current.** Another common problem with incapacity planning documents is that people do not regularly update them and keep them current. Georgia does not require banks and other financial institutions to honor financial powers of attorney. In our



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experience, the older a power of attorney is, the less likely the bank is to honor it. Also, financial institutions and government agencies increasingly require specific language in the DPOAs. As we learn of these new requirements, we update our forms. However, if the client does not come in and make periodic updates, he will be unable to take advantage of these form improvements. Keeping your documents current is the best way to ensure that your agent will be able to use them when needed.

- E. Ensuring All the Bases Have Been Covered.** Once people have completed their Advance Directive and DPOA, and possibly created a revocable living trust, they may feel that they have completed the incapacity planning puzzle. Unfortunately, nothing is that easy. Once the documents have been completed, we want our clients to be sure they can properly fund their care in the event of an extended period of disability. Here, we recommend consulting with a financial advisor to help determine whether the client needs insurance or whether the client can self-insure part or all of the costs of a period of incapacity. We also recommend talking to an insurance advisor about short or long term disability insurance to replace lost income, as well as long-term care insurance to subsidize the cost of home care or care in an assisted living facility or nursing home. We encourage our many business-owning clients to develop a plan for the continued operation of the business in the event of the client's incapacity. This type of planning may include investing in business continuation insurance, preparing buy-sell agreements, and planning to ensure that there is an employee, fellow business-owner, or family member who knows how to take over the client's role in the business at short notice.

Most people don't like to think about their own incapacity or their own death. However, the probability of disability increases with age, and death is inevitable. Planning for the possibility that you will become incapacitated can help protect your living standards during such an event. This planning can also help you ensure that the person making your decisions is the person who you would really want making those decisions. It can avoid the need for expensive litigation and ongoing court supervision which often results where no planning has been undertaken. At Morgan & DiSalvo, P.C., we have years of experience in helping people plan for possible incapacity, select appropriate agents, and implement important documents. To schedule an appointment to discuss this important planning for yourself or a loved one, please call us at (678) 720-0750 or e-mail [info@morgandisalvo.com](mailto:info@morgandisalvo.com) for a consultation.