

Planning for Incapacity

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Trabuco Senior Center

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Estate Plan

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graph TD; EP(Estate Plan) --- LWT(Last Will and Testament); EP --- RLTR(Revocable Living Trust); EP --- DPAHC(Durable Power of Attorney for Health Care); EP --- AP(Appointment of Conservator); EP --- DPAF(Durable Power of Attorney for Finances);
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Last Will and Testament
-Effective after you pass away

Revocable Living Trust
-Effective during your lifetime and after you pass away

Durable Power of Attorney for Health Care
-Effective during your lifetime
-Court involvement not required

Appointment of Conservator
-Effective during lifetime if you are incapacitated
-Court involvement required

Durable Power of Attorney for Finances
-Effective during your lifetime
-Court involvement not required

What does Incapacity mean and how is it determined?

How is capacity defined by the Probate Code

“Capacity” means a person's ability to understand the nature and consequences of a decision and to make and communicate a decision, and includes in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives.

Probate Code Section 4609

Look at how the documents define “incapacity”

Example: For all purposes under this Power, I shall be deemed “incapacitated” if and so long as a court of competent jurisdiction has made a finding to that effect or a guardian or conservator of my person or estate duly appointed by a court of competent jurisdiction is serving, or in the opinion of one (1) licensed physician as stated on the physician’s professional letterhead or stationery that I am unable properly to care for myself or for my person or property. A certified copy of the decree declaring incapacity or appointing a guardian or conservator, or the physician’s written opinion shall be attached to the original of this document and recorded in the same county or counties as the original if the original is recorded.

Durable Power of Attorney for Finances or General Power of Attorney

- The Durable Power of Attorney for Finances gives a trusted person the power to make financial decisions if you become incapacitated.
- Non-Trust Assets managed by your agent, i.e., retirement accounts.
- Agent able to sign tax returns.
- Can be effective immediately or springing upon incapacity.
- Can include restrictive or broad powers.
- Can be a statutory form or one drafted by an Attorney as part of your Estate Plan or as a stand-alone document.

Durable Power of Attorney for Health Care or Advanced Health Care Directive

- The Durable Power of Attorney for Health Care gives a trusted person the power to make medical decisions if you become incapacitated.
- Gives your agent guidelines for your medical care, whether you wish to reside in a facility, end of life, organ donation, and wishes regarding burial, cremation, and memorial services.
- Can be immediate or springing.
- Can give specific or general directions.
- Can be a Statutory form (AHCD) or one drafted by an Attorney as part of your Estate Plan or as a stand alone document.
- Should include a HIPAA Authorization.

Conservatorship

- When Court supervision is necessary to manage the health or finances, or both, of an incapacitated person.
- Needed when there are no documents, there is disagreements among the family, and/or Court supervision is necessary.
- Conservator is appointed by the Court – may not be your choice.
- Conservator is required to be bonded – extra funds paid by your assets so that the Conservator can act.
- Court investigators must visit the Conservatee (you).
- Costly and time consuming
- *Nothing happens quickly with the Court*
- *Plan ahead and execute Powers of Attorney so that a Conservatorship can be avoided*

Who should you designate to act?

- Spouse?
- Adult children?
- Friends or Family Members?
- Professional Fiduciaries?
- Successors?
- Talk to your designated person

How will they know to act?

- Tell Family members
- Provide a copy to your agent
- Provide a copy to your doctor
- Tell trusted family members and your agent to contact your attorney as they may keep copies of documents
- Emergency Card – keep this information in your wallet
- Carry a copy in your glove box

Things to consider when designating an agent to act on your behalf:

- Does the person you are designating live nearby?
- Does the person handle finances well?
- Does the person handle emotional decisions well?
- What is the person's age?
- Bond?
- You can revise these documents at any time so long as you have capacity.



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