

AUGUST 8, 2018

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EMAIL: INFO@KLUGTAXLAW.COM
PHONE: 202-661-2179

FAX: 202-661-6119
WEBSITE: WWW.KLUGTAXLAW.COM



NEW TO INCAPACITY PLANNING FOR CLIENTS? GET UP TO SPEED WITH THIS QUICK OVERVIEW

Christopher Klug

Estate Planning Attorney, Washington DC

Incapacity planning keeps money under management, provides an opportunity for product sales, and protects your clients. It's a win/win because estate planning is not just having a plan in place to deal with a client's death; it's also about having a plan in place to deal with what happens if a client becomes incapacitated (a tragically common circumstance given the prevalence of Alzheimer's and other cognitive impairment ailments).



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There are many moving parts that need to be considered in incapacity planning.

Here are a few highlights:

- What happens without an incapacity plan
- The essential documents for managing finances during incapacity
- The essential documents for making healthcare decisions during incapacity
- How to choose the right person to manage finances and make healthcare decisions
- The importance of keeping an incapacity plan up to date

If you have any questions about incapacity planning or have a client who needs to create or update incapacity documents, [please call our office now. We'd love to collaborate with you.](#)

WHAT HAPPENS WITH NO INCAPACITY PLAN IN PLACE

Mental incapacity caused by injury or illness creates clients who are incapable of making informed decisions about their finances and well-being. Court-supervised guardianship or conservatorship and joint ownership problems are two ways things can go wrong without proper incapacity planning.

- **Guardianship and conservatorship:** Without a plan in place, a judge can appoint someone to take control of the client's assets and make all personal and medical decisions on their behalf under a court-supervised guardianship or

Without a plan in place, a judge can appoint someone to take control of the client's assets and make all personal and medical decisions on their behalf under a court-supervised guardianship or conservatorship.

conservatorship. This person may be a stranger or your client's most despised relative. The client and their loved ones often lose valuable time, money, and control.

- **Joint Ownership Issues:** Many clients may believe they are protected because they hold their assets in joint names with a spouse, a child, or another family member. While a joint account holder may be able to access a bank account to pay bills or a brokerage account to manage investments, a joint owner of real estate will not be able to mortgage or sell property without the consent of all other owners. If a joint owner is sued, the property could be seized as part of a judgment entered against them.

Planning tip: *Adding names to accounts or real estate titles may be deemed a gift for gift tax purposes. Using joint ownership is a risky proposition for everyone involved.*

Only a comprehensive incapacity plan will protect the client and the client's assets from these and other pitfalls.

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THE ESSENTIAL DOCUMENTS FOR FINANCIAL MANAGEMENT DURING INCAPACITY



There are two essential legal documents for managing finances that must be in place before a client becoming incapacitated:

1. Financial power of attorney:

This legal document gives an agent the authority to pay bills, make financial decisions, manage investments, file tax returns, mortgage and sell real estate, and address other financial matters that are described in the document. Financial Powers of Attorney come in two forms: “**durable**” and “**springing**.” A durable power of attorney goes into effect as soon as it is signed, while a springing power of attorney only goes into effect after the person who has made the document is determined to be mentally incapacitated.

Planning tip: Make sure your legal department is going to honor your clients’ powers of attorney; if not, notify the client (and us if possible) immediately so that we can get a plan in place that will work.

2. Revocable living trust: This legal document has three parties to it: the person who creates the trust (the “trustmaker” or “grantor” or “settlor” –they all mean the same thing); the person who manages the assets transferred into the trust (the “trustee”); and the person who benefits from the assets transferred into the trust (the “beneficiary”). In the typical revocable living trust situation, the trustmaker is also the trustee and beneficiary of their trust. But if the trustmaker/ trustee/ beneficiary becomes incapacitated, then someone else is named to step in as the successor trustee and manage the trust assets for the benefit of the incapacitated trustmaker/beneficiary.

To be part of an effective incapacity plan, a revocable living trust should contain provisions to determine the mental status of the trustmaker/trustee/beneficiary through a private process (i.e., a disability panel, an attending physician, the opinion of two physicians, or some other method) instead of a public court process. Also, the trust agreement should contain specific instructions about how to take care of an incapacitated Trustmaker/Beneficiary. Many older trusts or poorly-drafted new trusts omit these terms. If you aren’t sure whether a trust has these provisions, contact us so we can assist you in reviewing and updating the document.

THE 2 MUST-HAVE DOCUMENTS FOR HEALTHCARE DECISION-MAKING

There are two essential legal documents for making healthcare decisions that must be in place prior to becoming incapacitated:

1. Medical power of attorney: This legal document, also called a medical or health care proxy, gives an agent the authority to make healthcare decisions if the person signing the document becomes incapacitated.

2. HIPAA authorization: Federal and state laws dictate who can receive medical information without the written consent of the patient. This legal document gives a doctor or other health care provider authority to disclose medical information to the agent selected by the patient.

A client's loved ones may be denied access to medical information during a crisis and end up in court fighting over what medical treatment the client should, or should not, receive (like Terri Schiavo's husband and parents did, for 15 years). Without these documents, a judge may also appoint a guardian or conservator of the person to oversee the client's health care, thereby adding further expense and hassle. Clients should have these documents examined and frequently updated to ensure they accurately reflect their wishes.

HOW TO CHOOSE THE RIGHT AGENTS FOR AN INCAPACITY PLAN

There are two very important decisions clients must make when putting together their incapacity plan: who will be in charge of managing their finances during incapacity, and who will be in charge of making their medical decisions during incapacity. Factors clients should consider when deciding who to name as their agents include:

- **Where does the agent live?** With modern technology, the distance between the client and the agent matters far less than it once did. Nonetheless, someone who lives close by may be a better choice than someone who lives in another state or country.
- **How busy is the agent?** If the agent has a demanding job or frequently travels for work, then they may not have time to take care of the client's finances and medical needs.
- **Does the agent have relevant expertise?** An agent with work or life experience in finances or medicine may be a better choice than one without it.

Planning tip: Choosing the wrong person to serve as financial or health care agent will result in an ineffective incapacity plan because the plan requires a qualified agent to carry it out. Clients need to carefully consider who to choose as their agent and then discuss their decision with that person to confirm that they will, in fact, be willing and able to serve.

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ARE THE INCAPACITY PLANS OF YOUR CLIENTS UP TO DATE?

As time passes by and the lives of your clients change, their incapacity plans will become outdated. It is important for clients to have their incapacity plan reviewed every three to five years or after a major life event (such as a divorce or death) to best ensure that the plan will work the way they intend it to work if it is ever needed.

Please [contact our office to discuss incapacity planning opportunities](#) and to schedule plan reviews for your clients.



Christopher Klug



/KlugLawOfficePLLC



+KlugLawOfficePLLCWashington



info@klugtaxlaw.com



www.klugtaxlaw.com



202-661-2179