Estate Planning

Planning for incapacity or disability.

By David Toups, JD, MBA, CFA®, CFP®, CTFA

As people grow older and, hopefully, wiser, their mortality becomes a more frequent consideration, and estate planning takes on an ever-increasing importance. Modern medicine and healthier lifestyles have greatly contributed to Americans living longer than ever before. Diseases and infirmities that previously ended lives in prior generations are now remedied or treated; however, those remedies and treatments that prevent a fatality are increasingly resulting in incapacity or disability instead.

In our fast-paced life in the United States, younger adults rarely consider their own mortality, much less the possibility of disability or incapacity. Unfortunately, for younger adults, the likelihood of being disabled or incapacitated greatly exceeds their chance of dying. Individuals in their 30s are three to four times more likely to be disabled than to die, and those in their 40s are over twice as likely to be disabled than die. Failing to plan for incapacity or disability can prove costly without the provisions and structures designed to handle such a contingency.

As a legal foundation for capacity planning, the law in the United States presumes the capacity of an individual upon their 18th birthday and all of the rights recognized in the Constitution spring into effect at that time. Restricting or limiting any of those rights requires affirmative legal action to do so. A guardianship or conservatorship proceeding is such an action, and it seeks to restrict or limit those rights for the good or benefit of an individual alleged to be incapacitated.

Similarly, just as the law presumes capacity at 18, the law presumes incapacity for minors. Even though a teenager may demonstrate a maturity exceeding most 30-year-olds, the law draws a bright-line rule and until the age of majority, without an emancipation proceeding, minors may not represent themselves in court, have contractual agreements enforced against them, or receive medical treatment without parental consent.

Whether it's for mental incapacity, physical disability, or legal agency, capacity planning comprises an import part of a solid estate plan.

The following documents can help to address certain needs that arise when incapacity or disability strikes.

Power of Attorney

A power of attorney is a legal document which permits a person to designate or name another person to act on his or her behalf as an agent. The powers granted to the agent can be broad or very narrow, for as long as the principal indicates, up until the principal's death. The power of attorney can be made durable, which means that the named agent(s) may continue to act for the principal even if the principal has become incapacitated.

For capacity planning purposes, a durable power of attorney permits the agent to act for the principal, but the document does not remove the principal's ability to act. It is a great tool to help avoid costly guardianship proceedings since someone can conduct the personal and business affairs of the principal without having a guardian appointed. However, if the principal is suffering with an impairment that waxes and wanes, such as mild Alzheimer's disease, and third parties would not be aware that the person is incapacitated when doing business with them, a guardianship may be needed to remove the principal's ability to act.

At the time of execution, the principal must have capacity to execute and name agents to act on his or her behalf. A person without capacity may be able to physically sign his name on a document but, without capacity, legally the document is invalid. Also, if the persons assisting or inducing the power of attorney to be signed know that the person is incapacitated, they may be liable for their actions. Additionally, for entrepreneurs and executives who have built companies and established business holdings, a business succession plan should contain a specific power of attorney for business decisions naming agents capable of managing those holdings if the other business succession plan documents do not specifically address such an event or contingency.

Medical Powers of Attorney

A medical power of attorney is a power of attorney that is specifically structured to address health care decisions. The principal names agents to act on his or her behalf regarding medical treatment and services to be provided in the event the principal is unable to provide the direction.

From a legal perspective, patients provide consent to physicians to perform medical examinations and procedures; otherwise, the procedure would constitute a battery for which the doctor could be liable. Assumed in the interactions performed in hospitals and doctors' offices daily is the capacity of the patient to consent. Absent capacity, a patient cannot provide the necessary consent for the doctor or provider to perform the medical procedure or service.

Without a durable medical power of attorney, upon incapacity, a guardianship may need to commence in order to designate someone who may consent to medical services and treatments for that person.

Revocable Trusts

Trusts often prove to be a useful tool for capacity planning, especially when the grantor's holdings and properties are plentiful, diverse, or exist in more than one state. For single entrepreneurs, if your next drive on the highway results in an accident, leaving you incapacitated, the likelihood that your friends or family know all of the places you have businesses, accounts, policies, properties, or holdings is rather remote and exceptionally unusual.

A trust is the separation of legal and equitable title to property recognized under the law. A revocable trust permits the creator or grantor the ability to amend or revoke the trust after its creation. When properly funded with the grantor's assets, it functions as a convenient treasure house for his or her holdings. A

grantor typically names himself or herself as trustee, who manages and administers the assets in the trust. Additionally, the grantor typically appoints successor trustees to act. Upon the grantor's disability, the successor trustee can immediately step in with authority to act, provide direction, and care for the incapacitated grantor. Property located out of state, if properly transferred to the trust, would not require legal proceedings to transfer or administer the assets. Additionally, the nature and extent of the assets and holdings would not be subject to public disclosure, which may occur if guardianship or conservatorship proceedings related to the estate had to commence.

Designation of Guardians or Conservators

Certain states provide statutory legal forms that may be used to designate a guardian or conservator in the event one is necessary. These documents should be executed as part of an overall estate plan. If the document proves unnecessary, the cost of its preparation should be negligible; however, if the need arises for a guardian, it prevents a problematic child or greedy relative from serving as guardian or conservator or subjecting the estate to litigation to become guardian or conservator over others more deserving. Some estate planning attorneys include language in their client's powers of attorney indicating that certain named agents should serve as guardian or conservator if such proceedings were to commence. In some states, the filing of a guardianship or conservatorship proceeding suspends the powers of designated agents under a durable power of attorney, which may lead to gamesmanship as attorneys jockey to have their client appointed as guardian or conservator of the estate.

Guardianship or Conservatorship

If no planning exists or circumstances require it, a guardianship or conservatorship proceeding may commence for the incapacitated person. A court of law must determine if the person is incapacitated and, if so, what powers the guardian or conservator may exercise in his or her best interest. The court provides oversight of the guardian or conservator, often with periodic reporting back to the court regarding the health and status of the incapacitated person or his or her estate. Without capacity planning documents, strangers determine who will serve as guardian or conservator of the incapacitated person and his or her estate. Since legal proceedings and oversight exist, the cost associated with guardianship or conservatorship proceedings rise quickly. Also, entrepreneurs serve as the foremost experts on how to operate, manage, and profitably conduct their businesses and properties, but if the entrepreneur fails to designate anyone to serve in his or her place, a judge without the benefit of such knowledge and experience does so—often with far less favorable results to the estate.

The necessity of an effective capacity plan is directly proportional to the uniqueness and size of a person's estate and holdings. As the number of persons able to effectively manage and administer a person's assets decrease, the importance of creating a succession plan in the event of the principal's incapacity becomes critical; otherwise, the losses resulting from delay, indecision, or mismanagement may prove devastating, leaving the incapacitated person and their loved ones in an economic state far below that previously enjoyed.

Discussing capacity planning and other available planning alternatives with a trusted financial advisor may prove to be the wisest action you take this year.

David R. Toups, JD, MBA, CFA®, CFP®, CTFA, joined The Nautilus Group in 2016 after more than 14 years in the private practice of law focused in estate, trust, guardianship, and business planning and litigation. Prior to practicing law, he managed money professionally as an investment portfolio manager for several national corporate fiduciaries. He earned his BBA in marketing from Texas A&M; his MBA, with a finance emphasis, from Sam Houston State; and his JD, with honors, from South Texas College of Law. David is a former U.S. Marine Corps artillery and infantry officer.