

An often-overlooked part of estate planning is planning for mental disability. Many of us have been in the uncomfortable position of having to take care of a relative or friend who can't handle his or her financial affairs anymore. It could happen to you one day.

Part of the definition of estate planning used by many members of the National Network of Estate Planning Attorneys is "I want to control my property while I am alive and well; [and] plan for me and my loved ones if I become disabled."

There are four basic planning choices:

1. No planning;
2. Power of Attorney;
3. Standard Trust; or
4. Counselling Oriented Trust.

As we examine these options, we'll consider these issues, and others:

1. Who decides when I lose control?
2. Who takes control?
3. Who gives instructions to the person who takes control?

In most states, if not all of them, if you haven't planned for when you are disabled, your loved ones will have to hire an attorney and go to court to ask the judge to declare you mentally incompetent. The judge may appoint a second attorney to make sure that you have a fair trial. After taking evidence in a public hearing, the judge will decide whether you are disabled; who will be your guardian; and what that guardian can do. Every state's system is a bit different, but they all have one thing in common: the judge, not you, is in control. I call this a "Living Probate."

People often use a General Durable Powers of Attorney (GDPOA) to prevent guardianship proceedings. A Power of Attorney appoints someone as your "Attorney in Fact", or agent. "General" means the powers granted are very broad. "Durable" means it remains in effect after you are mentally disabled. GDPOA's are usually effective immediately, have no reporting requirements, no personal instructions, and have extremely broad powers. If you look up "lack of control" in the dictionary, is this likely what you will see? The advantage of this approach is that you get to name the person who is in control.

A common problem with Powers of Attorney is that nobody has to accept them. If the bank won't take your Power of Attorney when it is needed, what do you have to do? Go back to a Guardianship proceeding.

## What about Me?

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Standard Living Trusts are often little more than word-processing. There is no attempt to prepare a personalized plan, so they often use a standard definition of disability, usually based on the opinion of any 2 doctors without any guidance on which doctors to use. These Trusts typically have few personal instructions, but they do provide for a private transfer of control to personally selected trustees.

Trusts prepared with a counseling-oriented approach, such as NNEPA's Three-step strategy, provide a personalized definition of disability through a disability panel. When your loved ones start to think that it's time for you to turn control over to somebody else, they can call the disability panel together and the panel will decide whether you are disabled. The panel operates by rules you set up. Who's on it? You decide. It will usually include a mix of medical professionals, family members, or trusted friends. Do they have to be unanimous, or will a majority do? You decide.

Whom do you pick? People you'll trust when they say, "I love you: it's time to let someone else take care of your affairs."

Then who does take care of you? The Successor Trustee you chose when you were well.

How do they care for you? They follow the instructions you've left behind. I often ask my clients "When you need somebody to take care of you, would you rather be cared for in your own home, in somebody else's home, or in a nursing home?" Everybody has their own opinion, but most estate plans don't answer that question. Many of my clients have opinions on things like whether they want visitors or whether they want music played in their room. I have clients who want to make sure somebody does their hair and makeup. That isn't trivial; it is part of your family's memory of you. When your family knows your wishes, they're more likely to be granted.

Finally, tax deferred retirement plans (such as IRA's and 401(k)'s) need to be addressed separately. They cannot be owned by trusts and still get the tax deferral that makes them so attractive. So, we will need to use a Limited Durable Power of Attorney (like a GDPOA, but with limited powers) to appoint someone to control those accounts. Because institutions don't have to accept these, it is a good idea to either get advance approval of your LDPOA, or use the institution's own Power of Attorney form.

Many Americans will go through a period of disability. Planning for your own care has become critically important, as families have become more mobile and fragmented. With proper planning, you can be well cared for in the way that you want, by the people you have chosen, for the rest of your life.