

Make Sure You Are Protected For Incapacity

I am still amazed at how many clients show up in my office without having any executed incapacity documents. Incapacity documents consist of a durable power of attorney, a designation of health care surrogate and a living will. The source of my amazement is that despite all the press coverage given to the Terry Schaivo case, people still haven't got the message.

The first incapacity planning document is the durable power of attorney. This is a document that allows a named agent to manage your financial affairs even if you are incapacitated. This is usually a broad grant of authority to manage assets of every kind and nature. Even if you are married and own everything jointly, you still need to have this document. Why? Because unless you have named an agent in a durable power of attorney, your spouse will not be able to sell a joint asset, access an IRA or 401(k) plan, sign tax returns, apply for public benefits, or a multitude of different tasks.

The next document needed is the designation of health care surrogate. This allows someone to make health care decisions in the event that you cannot give informed consent. This covers run-of-the-mill decisions as well as end-of-life decisions (if there are no instructions in a living will). A copy of your designation of health care surrogate should be given to your medical providers so they know who to contact in the event that you have an incapacity event. Thus, your designation of health care surrogate should include the addresses and phone numbers of your health care agent.

Finally, in light of the Schaivo case, everyone should now be aware of the need to have a living will. A living will is your end-of-life instructions on whether you want life sustaining treatment continued if you are incapacitated and either in a terminal condition, end stage condition or in a persistent vegetative state. A living will should also state whether or not the artificial administration of food and/or fluids should be continued in the event of any of the above situations. A copy of this document should be given to your medical providers as well.

If you are incapacitated and someone needs to act on your behalf with regard to your financial or health care affairs and you have not done executed a durable power of attorney a designation of health care surrogate or a living will, then there is no option but to have you legally declared incapacitated through a guardianship proceeding. A guardian can then be given the power to make those decisions sometimes needing court approval. Uncontested guardianship costs range in the \$5-7,000 range in Brevard County. Contested guardianship costs are much higher. This can all be avoided with some simple incapacity planning.

The moral of the story is that you need to get these documents done. If you have done these documents but they are over five years old, you probably need to have them reviewed. Much has changed in the last five years with regard to incapacity documents.