

INCAPACITY PLANNING

*A Closer Look At Incapacity Planning –
What Is an Incapacity Plan and Why You Need
a Plan Long Before You Reach Your Golden Years*



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Studies tell us that as many as half of all Americans do not have a comprehensive estate plan in place. If you are one of them, there are reasons aside from the possibility of your death that should prompt you to finally create your plan. What happens, for example, if a tragic accident leaves you incapacitated tomorrow? Who will make decisions regarding your medical care and treatment? Who will manage your finances and assets? Without an incapacity plan within your overall estate plan the answers to these questions are unknown.

WHAT IS INCAPACITY?

The Texas Estates Code defines incapacity as follows:

“an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs”

WHAT IS AN INCAPACITY PLAN?

An incapacity plan is typically a plan within a plan, meaning that your incapacity planning strategies and documents coordinate with and complement your overall estate plan. Your incapacity plan should be as unique and individual as you are; however, the overall objective of any incapacity plan should be to make personal and legal decisions now that will take effect in the event you ever become incapacitated. Typically, an incapacity plan includes the legal framework necessary to grant one or

more people the authority to make decisions for you and/or to manage your property and finances in the event you are unable to do so yourself.

WHY WOULD I NEED AN INCAPACITY PLAN?

People often make the mistake of assuming they won't need an incapacity plan until they are well into retirement. While that could be the case, statistics tell us that there is a realistic chance you will need a plan long before you reach your golden years. Those statistics tell us that we all have a one in five chance of becoming disabled or incapacitated before reaching age 65. If you are fortunate enough to make it that far, your incapacity risk increases to about one in two, or a 50% chance. If you live to be over the age of 80 you have a 75% chance of becoming incapacitated. Alzheimer's, and other dementia related diseases, alone strike one in three seniors, most of whom will eventually become legally incapacitated. Incapacity is not just a concern for the elderly though as the previously mentioned statistics indicate. A tragic car crash or a serious illness could cause incapacity long before retirement age. Because there is no way to know if, or more likely when, incapacity will strike, it is imperative that you include incapacity planning in your overall estate plan.

WHAT HAPPENS WITHOUT AN INCAPACITY PLAN?

Often, the best way to explain the need for an incapacity plan is to explain what happens in the absence of one. Imagine that you are involved in a catastrophic car accident tomorrow. Although you survived the collision your injuries are severe enough that you are comatose. The doctors are not optimistic about your chances for survival, and if you do survive your chance of avoiding serious brain damage is low. There is, however, an

experimental surgery that could increase both your chance of survival and your chance of escaping serious brain damage. At this point, someone has to make healthcare decisions on your behalf. The question is who?

Because you do not have an incapacity plan in place the doctors look to the "next of kin." Legally, this would be your spouse; however, you and your spouse have been separated for close to a year. One of two results is likely under this scenario. Because you are still legally married your spouse may be allowed to make decisions for you regarding your medical care and treatment. If other family members object and/or your spouse declines to make the decisions, a court will have to decide who will be given the authority. Either way, you had no part in the decision-making process. The same results are likely with regard to control over your finances and assets during the time you are incapacitated. Again, you will have no input with regard to who is appointed to manage your finances and assets because you did not have an incapacity plan in place when you became incapacitated.

HOW CAN A TRUST BE USED IN MY INCAPACITY PLAN?

In the event of your sudden incapacity someone may need the legal right to manage your assets and your finances. If you have a family that you help support, your family may also need immediate access to money. A revocable trust is a great incapacity planning tool, and can accomplish all of these goals.

The way it works is that you establish a revocable trust and name yourself as the trustee and name the person whom you would want to control your assets and finances in the event of your incapacity as the successor trustee. You then transfer assets such as cash or real property into the trust. As long

as you are capable of doing so you will control the trust assets; however, in the event of your incapacity, control will immediately switch to the successor trustee without the need for any additional legal steps to be taken. Because the trust is revocable, you can modify or even terminate the trust at any time.

SHOULD I EXECUTE A POWER OF ATTORNEY?

A power of attorney is an estate planning tool that can work well as part of your incapacity plan. A power of attorney can be limited or general. If you execute a general power of attorney this gives your agent (the person to whom you grant power) a broad range of power and authority to act on your behalf in almost all legal transactions. Therefore, you should be very careful to whom you grant a general power of attorney. To survive the incapacity of the principal, a power of attorney must be “**durable.**”

CO-OWNERSHIP OPTIONS

A strategy that works with a limited number of assets is to create a joint ownership of the asset. For example, if you create the right type of joint tenancy for your home, your co-owner will have all the same rights that you do to the property. The same strategy may work for vehicles, bank accounts, and investment accounts. This way, if you become incapacitated your co-owner has immediate access to the asset. Be careful though, joint ownership can supersede the terms of your Will or Trust.

WHERE DO ADVANCED DIRECTIVES FIT IN?

A trust, a power of attorney, or co-owning property are all viable options for determining ahead of time who will control your assets and/or finances in

the event you become incapacitated. None of those options, however, address the issue of who will make healthcare and personal decisions on your behalf in the event you are unable to make them. For those issues we turn to advance directives. The State of Texas recognizes four different types of advanced directives, each serving a specific purpose.

- **Medical Power of Attorney** – this type of advanced directive, formerly known as Durable Power of Attorney for Health Care, is what allows you to appoint an agent to make healthcare decisions for you in the event of your incapacity. Your agent may agree to or refuse medical treatment, decide not to continue medical treatment, or make decisions to stop or not start life-sustaining treatment.
- **Directive to Physicians and Family or Surrogates** - this is what people commonly referred to as a Living Will and allows you to decide ahead of time whether you want a doctor to administer, withdraw, or withhold life-sustaining treatment if you have an “irreversible or terminal condition.”
- **Out-of-Hospital Do-Not Resuscitate Order** – lets you refuse life-sustaining treatment outside of a hospital setting. If included, the order should be left in plain sight for rescue personnel in the event they are ever called for you.
- **Declaration for Mental Health Treatment** – allows you to direct what type of mental health treatment you will receive if it is ever ordered and you are unable to express your wishes.

By now you should realize the need for an incapacity plan. While there is no way to prevent the possibility of incapacity, there are ways to control who

will have authority over you and your estate in the event you do become incapacitated at any point in the future. The only way to ensure that your wishes are honored, however, is to create the legal framework, in the form of an incapacity plan, to ensure that the law is required to honor those wishes.

Family Caregiver Alliance, [Legal Issues in Planning for Incapacity](#)

Texas Health, [Living Will](#)

Alzheimer's Association, [Alzheimer's Facts and Figures](#)

Texas Department of Aging and Disability Services, [A Texas Guide to Adult Guardianship](#)

About the Author

Stephen A. Mendel



Stephen A. Mendel is a member of the American Academy of Estate Planning Attorneys, a national organization that serves the needs of legal professionals whose practices focus on estate planning and asset protection. The Academy fosters excellence among its members and helps them deliver the highest possible service to their clients. Stephen A. Mendel provides a broad spectrum of strategies and planning tools that can accomplish very diverse goals.

Mr. Mendel is an attorney who focuses a substantial part of his practice on estate planning. Mr. Mendel's guiding principle is to provide his clients with quality legal services tailored to each client's specific needs and goals.

Mr. Mendel has been providing quality estate planning for Houston and surrounding area clients for many years. His firm helps numerous people who are concerned about protecting their families from the devastating legal effects of disability and death. The aim of the firm is to help you accomplish your estate planning goals and to take the mystery out of the planning process.

Specific services include, but are not necessarily limited to, design and preparation of wills & trusts, asset protection, use of family limited partnerships as part of the planning process, buy-sell agreements, business counseling, and succession of closely held, family owned businesses.

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