### **INCAPCITY PLANNING: WHAT ARE THE BEST LEGAL TOOLS**

Darlynn Morgan Morgan Law Group Estate Planning Lawyer

Focusing on Life Transition Planning . . . Planning for a Lifetime of Protection, Guidance and Love

### ATTORNEY DARLYNN MORGAN



- Practicing Law in Orange County for 17 years
- Office located in heart of Orange County
- Member, California State Bar
- Law firm Member of Wealth Counsel
- Morgan Law Group depth and breadth of experience



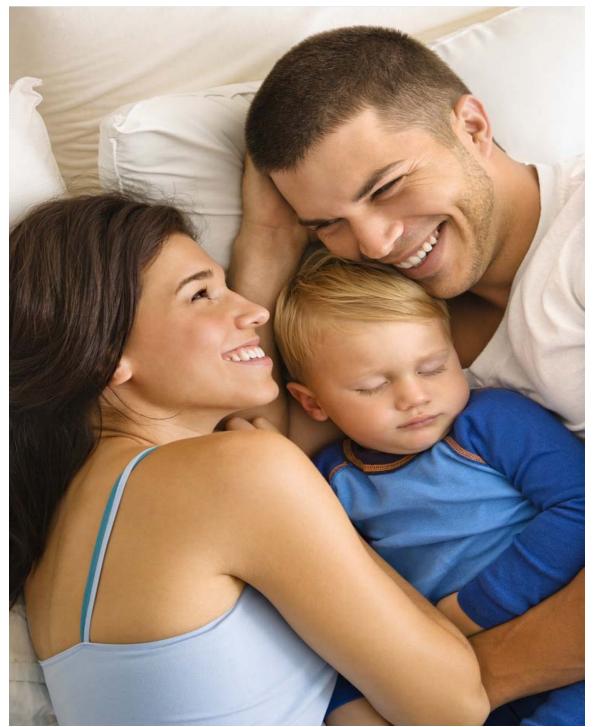
## **DEFINITION OF ESTATE PLANNING**

I want to: •Control my property while I'm still alive

> •Take care of my loved ones and myself if I become incapacitated

oGive what I have to whom I want, the way I want, and when I want to

Furthermore: •If I can, I want to save every last tax dollar, court cost, and professional fee that is legally possible



DEFINITION OF ESTATE PLANNING

Take care of my loved ones and myself if I become incapacitated



# EFINITION OF INCAPACITY LANNING

By "Incapacity Planning" we mean planning for the client's possible mental disability or total physical disability that is so severe that it leaves the client unable to sign anything.

Incompetent : When a medical determination has been made that an individual has lost the mental ability to function effectively.

<u>Incapacitated:</u> When a probate court declares the person legally disabled.



WHY INCAPACITY PLANNING IS **SO VERY IMPORTANT** 

It's Not Going to Happen to <u>Me!</u>

Should be the most **important** part of estate planning



WHY INCAPACITY PLANNING IS OS **VERY IMPORTANT** 

Most Attorneys do not counsel their clients

"Cheap" Plans Poor Listening Poor Communication

Estate Plan does not have adequate instructions for incapacity.



WHY INCAPACITY PLANNING IS SO VERY IMPORTANT

Medical science has done some wonderful things over the last sixty years to extend our life expectancy.

1776 = Age 35 1876 = Age 40 1946 = Age 62 1976 = Age 70



WHY INCAPACITY PLANNING  $\mathbf{SI}$ SO VERY IMPORTANT

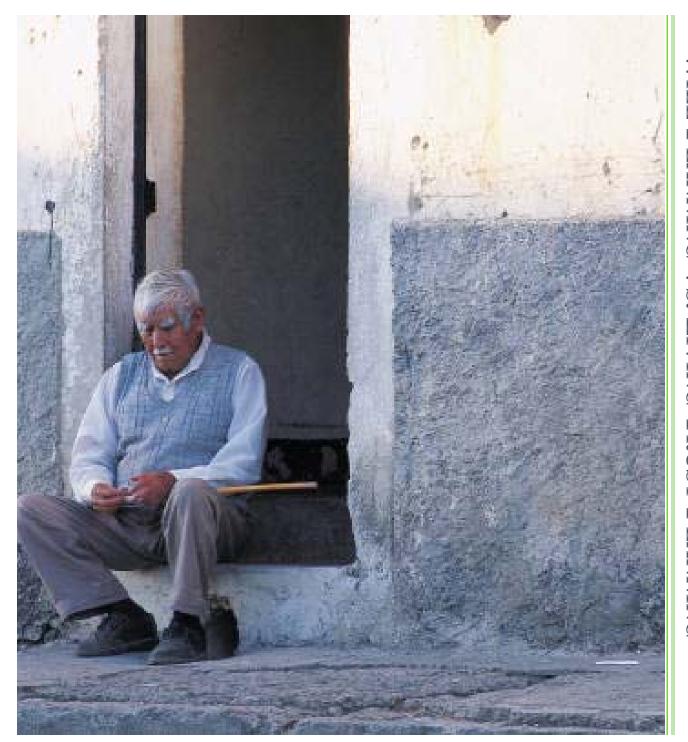
In the 21st century scientists say that a person born in this century will live to be well over 100.

**Good News=** We're all living longer

### Bad News=

We must plan for the possibility of an incapacity

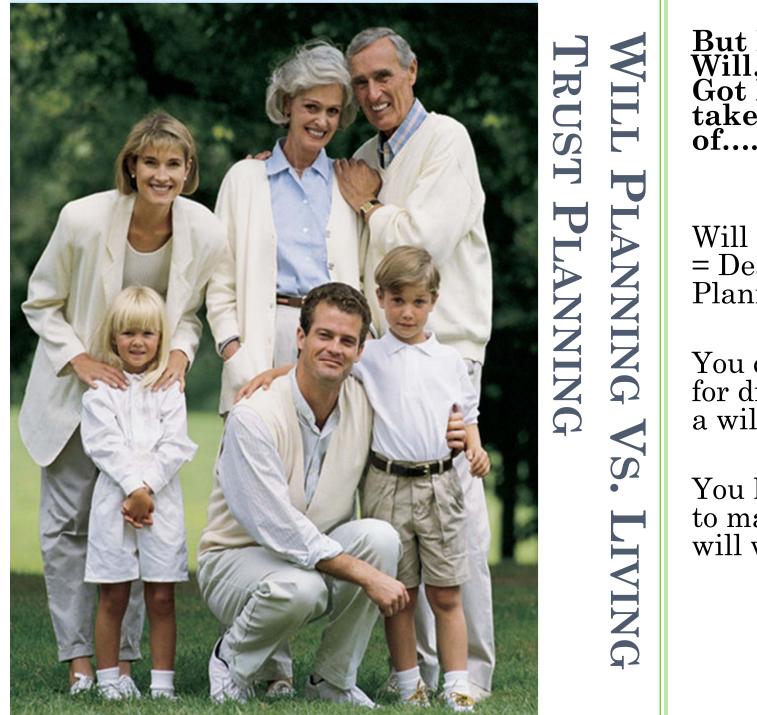
+ Modern day regulations & increased "red tape"



### WILL PLANNING VS. LIVING TRUST PLANNING

### Fear of Will Planning.

Most people spend more time planning for a family vacation then they spend on planning for their death.



But I've Got a Will... so I've Got It All taken Care of.... Right?

Will Planning = Death Planning.

You can't plan for disability in a will.

You have to die to make your will work!



WILL PLANNING VS. LIVING TRUST PLANNING

Living Trust planning is planning for the living.



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- Loss of Control!
- Unintended Beneficiaries
- Assets Available to JT Creditors
- Tax Issues
- No Incapacity Planning

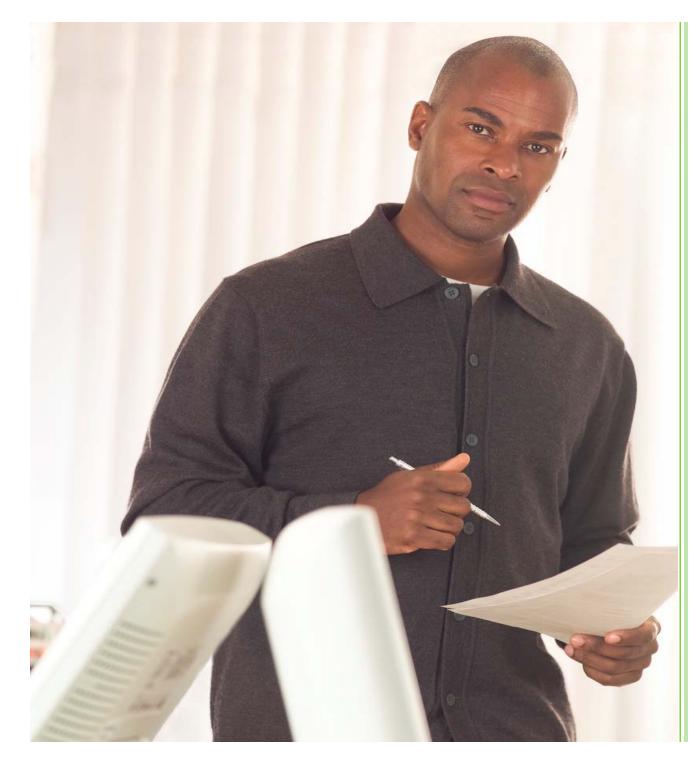


### VERY POOR ENA Ę $\mathbf{v}$ 3

Except for Joint Bank Accounts

Two Signatures are Required to Transfer Title to Joint Tenancy Assets

If One Joint Tenant is Disabled the Assets Go Through Living Probate



**REVOCABLE LIVING TRUSTS** 

Maintain Control While Alive, Well, Disabled or Deceased Can Contain Extensive "Take Care Of" Instructions!

Funded Assets Avoid Living and Death Probate



THE LIVING PROBATE SOLUTION

The Living Probate or Conservatorship is the results of a failure to plan for disability!

<u>Incompetent</u> = When an individual loses mental abilities.

<u>Incapacitated</u> = A probate court declares the person legally disabled.



THE LIVING PROBATE SOLUTION.

Living Probate is the solution for solving the Problem of:

How to <u>physically</u> take care of an incapacitated person **"Conservator of the Person"** 

and

How to <u>financially</u> take care of an incapacitated person **"Conservator of** 

"Conservator of the Estate"



THE LIVING PROBATE SOLUTION

Titled Assets = Probate Assets

THE PROBLEM: An incapacitated person cannot manage or transfer <u>"Titled</u> <u>Assets"</u>

<u>"Titled Assets"</u> are any assets that paper is needed to prove ownership and paper is needed to transfer ownership.

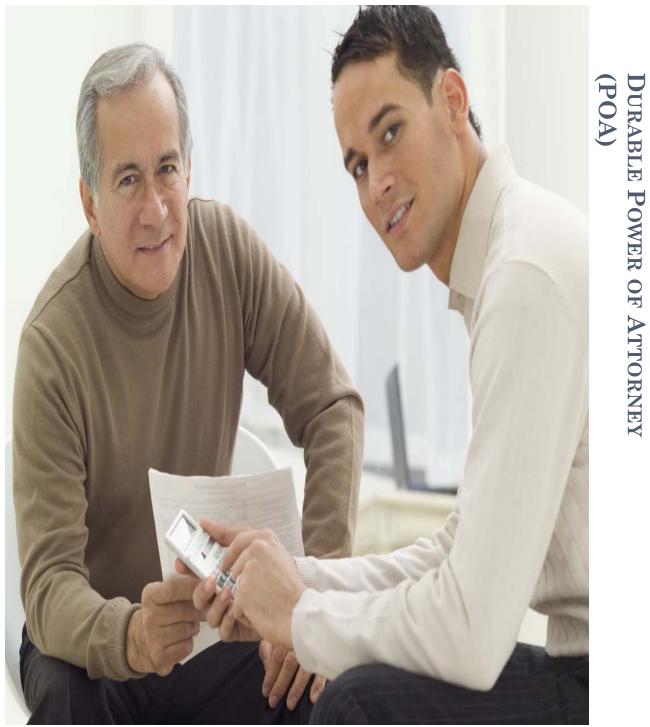


THE LIVING PROBATE SOLUTION

### You lose control!

The court will usually appoint whoever steps forward to be your conservator – usually a family member or could be a stranger.

This may not be <u>your</u> choice!



the

Governed by Principal - Agency Laws. One of the lowest fiduciary standards. Will endure Principal's Disability, but not the death of the Principal.



DURABLE POWER OF ATTORNEY (POA) Totally dependent on its acceptability by third parties – *Wishful Thinking Planning* 

The Catch 22 of the POA

Simple POAs may not be broad enough to be acceptable.

**Complex POAs** may be too broad to be acceptable until reviewed by legal counsel.



POA Vs. Living Trust

Durable POAs do not endure the disability or death of the Agent.

If the Principal is disabled, a Living Probate may be needed if there are no successors Agents named.

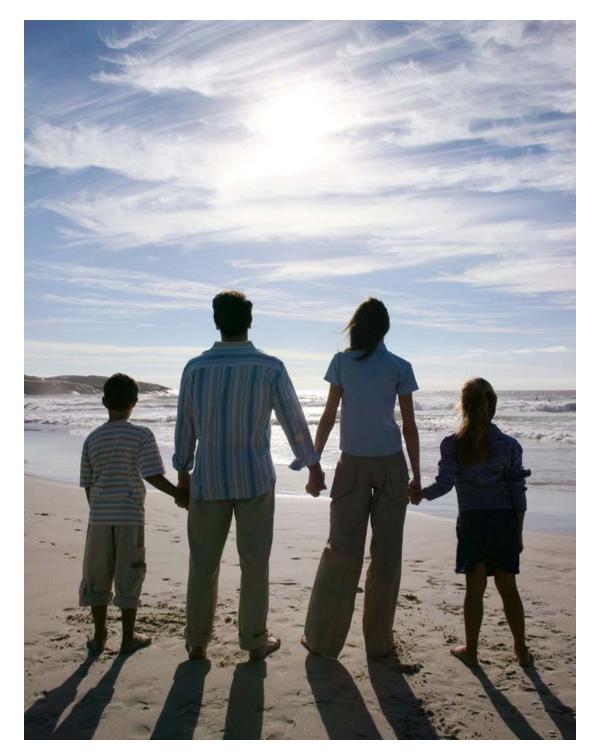
A Trust will not fail for lack of a Trustee.

A well-drafted Living Trust will contain Trustee succession provisions.



# POA VS. LIVING TRUST

### POAs become stale



POA VS. LIVING TRUST

A Living Probate will cause a POA to terminate.

A fully-funded Living Trust will avoid living probate and can eliminate the need for a Conservator of the Estate Probate.

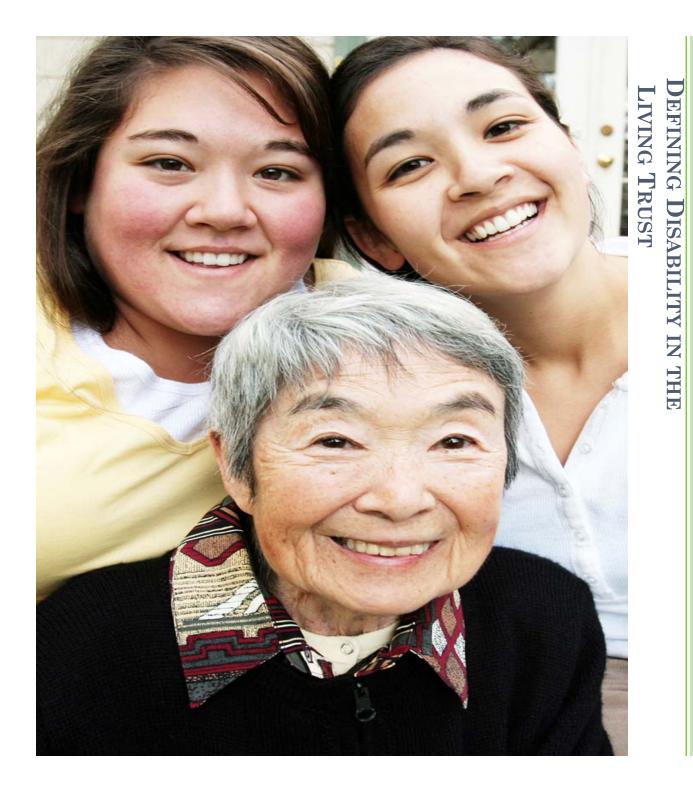


POA VS. LIVING TRUST

If the Power of Attorney fails to work when the principal is disabled:

A Living Probate may be the only solution for taking care of the principal.

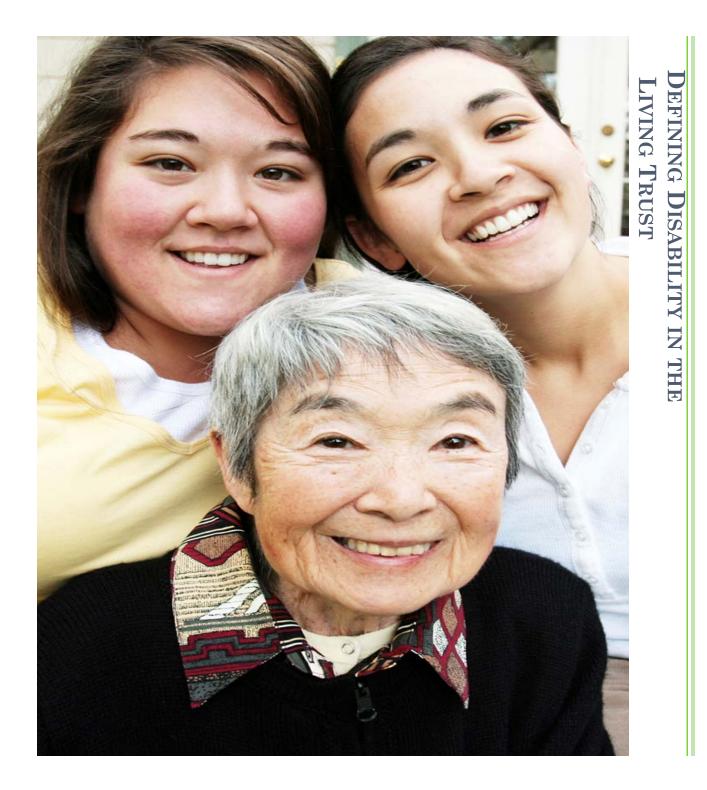
We cannot rely upon "wishful thinking" estate planning!



It is important to **define disability** because the trustmaker wants to provide for the continuity of Trustee services.

The trust-maker and loved ones will be taken care of during a disability.

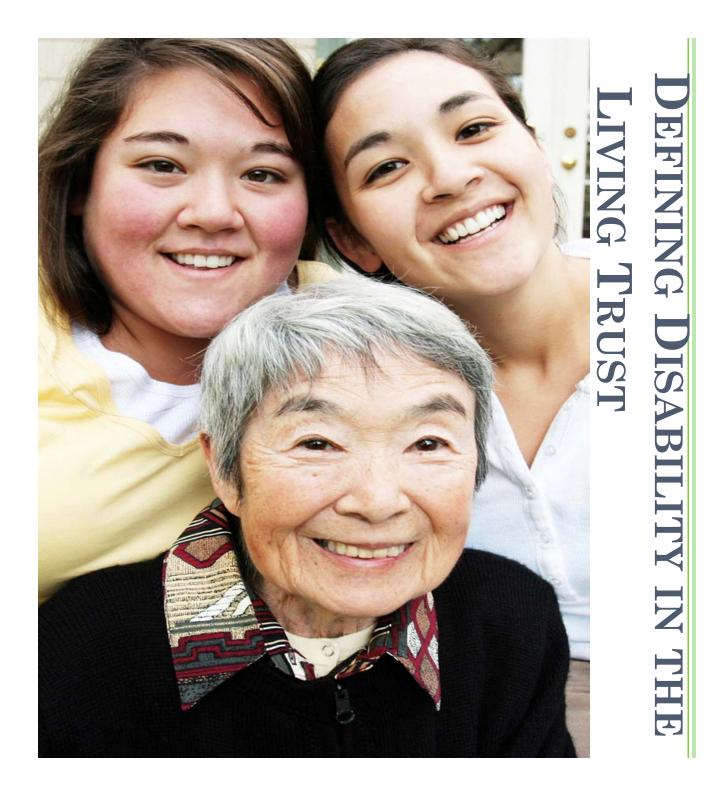
Debts, liabilities, and obligations will continue to be paid.



### DEFINITION NUMBER ONE

A determination by two physicians that Certifies that the trustmaker is Disabled.

A <u>HIPAA Release</u> will be necessary.

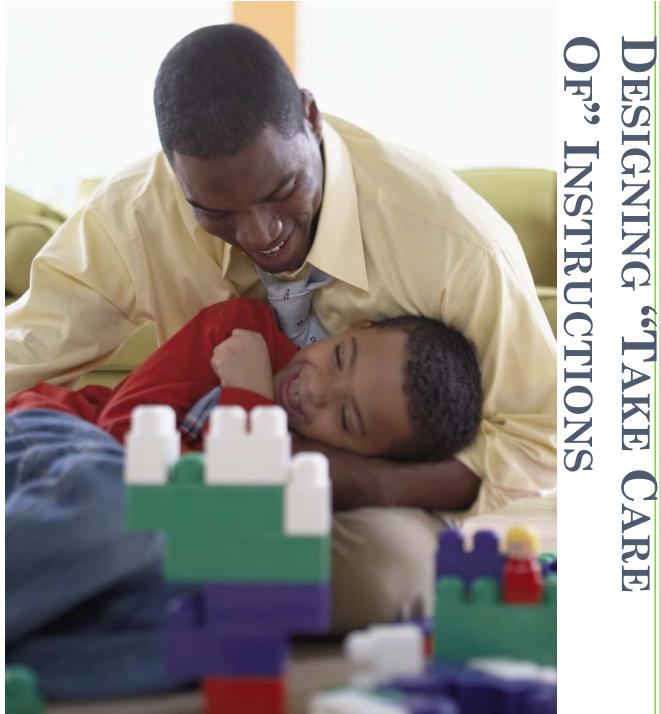


### DEFINITION NUMBER TWO:

A determination of incapacity by a Living Probate Court.

### DEFINITION NUMBER THREE:

A determination of incapacity by an Incapacity Panel named in the trust.



Who are the beneficiaries that are taken care of when the trust-maker is Disabled?



Who will run the business?



### **Opposite & Same** Sex **Co-Habitation** Agreement •

Living Trust Each Party • needs to have a Living Trust with Instructions that Take Care Of each other

Spells out

rights

property rights

& occupancy

#### **Health Care Documents**

Each Party • needs to have Health Care Documents.



# **BLENDED FAMILIES**

Second Marriages or Later-in-Life <u>Marriages</u>, <u>Children from</u> <u>Different Parents</u>

Can be even more stressful, on all involved, if proper planning is not taken care of in advance of incapacity.



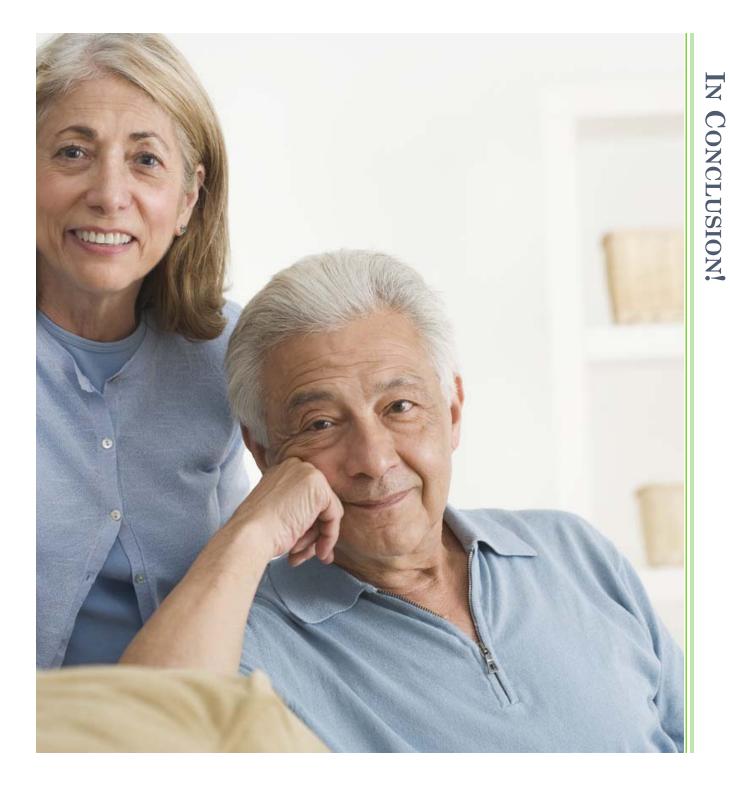


HEALTHCARE DOCUMENTS

The Advance Health Care Directive (or Health Care Proxy or Medical Powers of Attorney)

Living Wills or Directives to Physicians

HIPAA Release



Not All Living Trusts or Estate Plans are the Same!

Improper or Inadequate Counseling

Most Plans do NOT Adequately Plan for Incapacity

### **Next Steps**

Complete your blue evaluation worksheet & turn it in to receive Certificate for Estate Plan Review

**Schedule** your Consultation