

# INCAPACITY PLANNING: WHAT ARE THE BEST LEGAL TOOLS



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

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- 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
- Give 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





# PLANNING DEFINITION OF INCAPACITY

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.

Incapacitated: When a probate court declares the person legally disabled.





WHY INCAPACITY PLANNING IS SO VERY IMPORTANT

**It's Not**  
**Going to**  
**Happen to**  
**Me!**

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





WHY INCAPACITY PLANNING IS SO 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 IS 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 than they spend on planning for their death.





# TRUST PLANNING VS. LIVING WILL PLANNING

**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.





## JOINT TENANCY IS VERY POOR ESTATE PLANNING

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





## JOINT TENANCY IS VERY POOR ESTATE

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!

Incompetent = When an individual loses mental abilities.

Incapacitated = A probate court declares the person legally disabled.







THE LIVING PROBATE SOLUTION.

Living Probate is the solution for solving the Problem of:

How to physically take care of an incapacitated person

**“Conservator of the Person”**

and

How to financially take care of an incapacitated person

**“Conservator of the Estate”**





## THE LIVING PROBATE SOLUTION

Titled Assets =  
Probate Assets

### THE PROBLEM:

An incapacitated person cannot manage or transfer “Titled Assets”

“Titled Assets” 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 your choice!





**DURABLE POWER OF ATTORNEY  
(POA)**

Governed  
by Principal  
– Agency  
Laws.

One of the  
lowest  
fiduciary  
standards.

Will endure  
the  
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!**





**DEFINING DISABILITY IN THE  
LIVING TRUST**

It is important to **define disability** because the trust-maker 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.





**DEFINING DISABILITY IN THE  
LIVING TRUST**

**DEFINITION  
NUMBER ONE**

A determination by two physicians that Certifies that the trust-maker is Disabled.

A HIPAA Release will be necessary.





## DEFINING DISABILITY IN THE LIVING TRUST

### **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?

## DESIGNING “TAKE CARE OF” INSTRUCTIONS





# RUNNING A BUSINESS DURING A DISABILITY

Who will run the  
business?





## UNMARRIED COUPLES

### Opposite & Same Sex

#### **Co-Habitation Agreement**

- Spells out property rights & occupancy rights

#### **Living Trust**

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

#### **Health Care Documents**

- Each Party needs to have Health Care Documents.





## **BLENDDED FAMILIES**

### **Second Marriages or Later-in-Life Marriages, Children from Different Parents**

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





**IN CONCLUSION!**

**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

