

Handling Incapacity through a Living Trust

My last column addressed the usefulness of a Power of Attorney for dealing with incapacity. A Power of Attorney allows you to designate another person (an “agent”) to handle your financial transactions for you should you become incapable of handling your affairs. Without a Power of Attorney, relatives or friends of an incapacitated person may have to go to court to obtain the power to act on behalf of the incapacitated person. The court proceeding, called a “conservatorship”, is time consuming and costly.

Another way you can make provision for the handling of your affairs should you become incapacitated is through a living trust. People usually think of the living trust only in connection with death and the passing of property to a person's heirs without probate. However, a well written living trust should also provide important provisions which give the successor trustee the power to deal with the trust property should the person who created the trust become incapacitated. If the trust has appropriate provisions for dealing with incapacity, a conservatorship proceeding can be avoided even if there is no Power of Attorney.

A complete estate plan will have both a Power of Attorney and provisions for incapacity in the living trust. Both documents are usually written so that the agent takes over only when certain persons (either one or two doctors, the designated agent and/or a council of interested persons such as family members and friends) sign a notarized statement giving the opinion that the person is incapacitated. Generally, provision is also made for the incapacitated person to resume handling of his or her own affairs if their capacity is restored. For practical purposes, the same person should be designated to act as agent in both the Power of Attorney and the living trust and there should be no contradiction in the powers given.

You might wonder why a person would need a separate Power of Attorney if they have a living trust which provides for incapacity. The reason is that the living trust only covers property that has been put in the name of the trust. It has absolutely no effect on property that is not in the trust. Property may be left outside of the trust on occasion through inadvertence. Sometimes property is left out of the trust intentionally because of the nature of the property. Whatever the reason, it is wise to have both a Power of Attorney and provisions in a living trust to handle your affairs should you become incapacitated.