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FACT SHEET

Incapacity: Plan for it now

Incapacity means the inability to make reasoned decisions regarding one's financial and personal affairs. It can befall anyone who suffers a traumatic brain injury or experiences a mentally debilitating illness. For many seniors, incapacity often accompanies a diagnosis of Alzheimer's, Parkinson's, or other diseases marked by dementia. Incapacity can have severe consequences for seniors and their loved ones, particularly if they have not planned for it in advance. Friends and family have a very difficult time paying bills, and handling health care and other personal matters when loved ones have not appointed anyone to make decisions on their behalf if they have lost capacity. The best way to deal with incapacity is to plan for it while one is still of sound mind.

If You Should Lose The Ability To Handle Your Affairs…

Think about the choices you would like control over The first step in planning for incapacity is to think about the issues that may arise. How do you want your assets managed? Would you ever want to be put on life–sustaining medical equipment? Whom do you trust to make decisions for you?

Learn your options This fact sheet will briefly explain the different ways you and your loved ones can set up a legal plan to ensure your wishes are followed.

See an attorney Once you know what kind of planning you want, you should see an attorney who specializes in estate planning. If you would like a referral to an attorney, contact CANHR. CANHR has a Lawyer Referral Service (LRS) that can refer you to an estate planning attorney in your area. If you are helping your loved one plan for incapacity, or your loved one is in need of long term care, you should see an attorney who is knowledgeable in the field of long term care.

Contact CANHR's Lawyer Referral Service (LRS) by visiting **http://www.canhr.org/LRS/index.html** or calling (800) 974–5171.

What Are My Options?

If a person still has mental capacity, he or she can use a *Durable Power of Attorney (DPA)* and/or a *living trust* to plan for the future management of their financial affairs. An *Advance Health Care Directive (AHCD)* enables a person with capacity to indicate what kind of medical treatment they prefer and who can speak for them. If a person is no longer has mental capacity, however, and they did not plan for incapacity earlier in life, these documents are no longer available. If that is the case, a *Petition for Conservatorship* may need to be approved by a judge in order to handle that person's financial affairs and personal care.

Powers of Attorney

A Financial Power of Attorney is a legal document that allows you (the principal) to give authority to another person (the agent) to make legal decisions and financial transactions on your behalf. The agent does not have to be an attorney; he or she can be any trusted adult, or even a nonprofit agency.

A *Durable* Power of Attorney (DPA) is a financial power or attorney that says the agent will retain legal authority even if the principal loses mental capacity. The standard DPA becomes effective immediately, giving the agent the ability to manage the principal's money even if the principal still has capacity.

A *Springing* DPA becomes effective only upon a designated time, such as when a physician certifies that the principal has lost capacity. Springing DPAs are considered safer, though perhaps more inconvenient, than standard DPAs.

Advantages and Disadvantages of a DPA

A DPA is a relatively easy, inexpensive way to give someone the ability to manage your financial affairs. Unlike a joint bank account, a DPA does not give the agent legal access to the principal's assets for the agent's own use, and DPAs terminate upon the principal's death. Thus, your assets will remain with your estate. DPAs are revocable, meaning the principal can amend or terminate the agent's powers at any time while he has capacity. A DPA can also help a caregiver plan for government benefits such as Medi–Cal by allowing the agent to transfer the principal's property.

The main disadvantage of the DPA is that it is subject to abuse. Agents do have access to the principal's money and there is no guarantee the agent will be honest with it. This is why it is extremely important to choose an agent you trust to capably handle your affairs. A couple of ways to limit the disadvantages of DPAs are:

- Execute a springing DPA instead of a standard DPA.
- Limit the powers that an agent has.
- Require an agent receive approval from a third party before handling large transactions.

How to Execute a DPA

To execute a valid DPA, *the principal must have mental capacity*. Once an adult has lost capacity, they can no longer give someone legal authority to be their agent. Most states, including California require only the presence of qualified witnesses or a notary to execute a DPA, but it is advisable to have it done by an attorney.

Advance Health Care Directive (AHCD)

An Advance Health Care Directive (also known as a "Living Will" or "Power of Attorney for Health Care") allows you to appoint a health care agent to make health care decisions for you (the principal). Your agent only makes decisions for you if you have lost capacity, unless you state otherwise in the document.

You can give an agent limited or broad powers in an AHCD, from the right to access medical records to the power to make anatomical gifts. You may also specify healthcare instructions you want to be followed. AHCD forms can be obtained at hospitals, senior service programs, or from the California Medical Association by calling (800) 882–1262. An attorney need not be present to execute an AHCD, but most states, including California, require adult witnesses or a notary public. If the principal lives in a nursing home when they sign the AHCD, it must be witnessed by a long-term care Ombudsman.

Physician Order for Life-Sustaining Treatment (POLST)

POLSTs are another form of advance health care planning where the principal or her legally authorized surrogate can express end-of-life care preferences. The form instructs providers about what to do regarding CPR, comfort care measures, artificial nutrition and hydration, and other important treatments. A POLST must be signed by a physician and is thus an actual medical order that nurses and nursing assistants must follow. The document is intended primarily for people who are terminally ill as a way to control their end-of-life care.

Revocable Living Trusts

A Living Trust is a device allowing you (the settlor) to transfer ownership of your assets to another entity (the trust). The settlor assigns a trustee to manage the trust for the benefit of the beneficiary. A Living Trust is created during the settlor's lifetime (unlike a Testamentary Trust, which is created upon the settlor's death). You should consult a qualified attorney to set up a Living Trust.

Advantages of a Living Trust

A Revocable Living Trust can serve as a management device in the event of incapacity: The same person can be the settlor, the trustee, and the beneficiary of a trust, so you can set up a trust with your own assets and retain complete control over them. You must have mental capacity to establish a living trust, but you can name an alternate trustee to manage your assets in case you lose capacity.

A Revocable Living Trust can serve as a substitute for a Will: A Trust document provides for the distribution of the settlor's assets upon the settlor's death. Unlike with a Will, the trustee will distribute the assets directly to the beneficiaries, without complicated probate court supervision. This process is generally faster and cheaper than a Will.

There are often tax advantages to leaving property in a living trust, as well as the avoidance of probate fees. Because trusts are not subject to probate, property left in a living trust is also immune to Medi-Cal Recovery if you received Medi-Cal benefits before you die. If your property is left in a will, however, since wills are subject to probate (depending on the value of the estate), property left via a will could be subject to Medi-Cal Recovery. This is why, for Medi-Cal beneficiaries who own property, a living trust is generally a better alternative than just a simple will.

Disadvantages of Living Trusts

A Living Trust will help avoid the costs of probate, but it is more expensive to have drafted than a Will. In order for a Living Trust to function effectively, the settlor must ensure that the trust is fully funded, which can require effort by the settlor. Although Trustees have the duty to use trust assets only for the beneficiary's benefit, the Court does not supervise the management or distribution of funds.

Living Trusts and other Management Devices

Even if you get a Living Trust, you should still get a DPA and an AHCD, since a trustee has no power to make medical decisions and only limited power to make financial decisions on your behalf. You can also obtain a

"pour–over Will," which arranges for any assets not transferred into the trust during your life to be "poured over" into the trust upon your death.

Conservatorships

If a person no longer has mental capacity and has not appointed someone to handle his or her financial affairs and/or personal care, a court can appoint an individual or professional (the *conservator*) to act on that person's (the *conservatee*) behalf. In California, this proceeding is called a probate conservatorship (other states may call it a guardianship).

A conservator of *the person* is responsible for the personal care of the conservatee. A conservator of *the estate* is responsible for the financial affairs of the conservatee. The conservator must seek separate court approval for major transactions, such as the purchase or sale of real property.

How a Conservatorship Is Established

A conservatorship proceeding is initiated when a friend, relative, public official, or private professional fiduciary petitions a court for the appointment of a conservator. Once a petition is filed, a court investigator interviews the proposed conservatee and reports to the court whether the appointment of a conservator is justified. The conservatee has the right to an attorney. The conservatee will then attend a hearing, where the judge determines whether or not the conservatorship is required.

Advantages of a Conservatorship

A conservatorship offers more protection against abuse of the conservatee than other devices because the court supervises the conservator. The conservator must file with the court an inventory listing all the conservatee's property as well as accountings reflecting all transactions involving the conservatee's assets. A conservatorship can be helpful as a structured mechanism for managing an incapacitated person's affairs when no other mechanism is in place, especially when that person is reluctant to accept assistance.

Disadvantages of a Conservatorship

The court is heavily involved in the conservatorship process, and this can result in substantial costs in attorney's fees, filing fees, and investigator's fees. The proceeding is public, so the conservatee's assets become a matter of public record. The conservator must continually return to court for approval of certain transactions, which require hearings and additional fees and can create delays in completing the transactions. Finally, a conservatorship often results in a total loss of independence for the conservatee; thus, it is often opposed by the person it was intended to benefit.

Conservatorships and Nursing Homes

A conservatorship can be used to plan for Medi–Cal benefits for a person who is incapacitated and may need to enter a nursing home. For example, a conservator may petition the court for approval of appropriate Medi–Cal planning transactions, such as transferring a home or other assets. Conservatorships can also be used to place a conservatee in a nursing home, although special court approval is required if the conservatee objects or the

nursing home is locked.

Conservatorships and Mental Institutions

Under a probate conservatorship, the conservator may not place the conservatee into a locked mental institution against his or her will. However, under an LPS (Lanterman–Petris–Short Act) conservatorship, a person who has been found to be "gravely disabled" can be involuntarily committed to a mental institution. An LPS conservatorship must be initiated by the county government; it cannot be petitioned for by a spouse or relative.

Other Alternatives to Conservatorships

In addition to DPAs, Living Trusts, and AHCDs, other mechanisms may substitute for getting a conservatorship:

Joint Tenancy Property Joint tenancy allows another person access to your property. This can be risky, since your joint tenant can withdraw all joint tenancy funds. Joint tenancy property is also subject to the creditors of all owners. There can be adverse tax consequences with this option.

Management of Community Property by a Spouse A spouse who has mental capacity may manage the Community Property of a spouse who lacks capacity. Some transactions may require court approval.

Establishment of a Representative Payee Spouses or trusted friends may be appointed as representative payees for Social Security and Supplemental Security Income (SSI) beneficiaries who have lost capacity.

For more information on planning for incapacity, contact CANHR's Lawyer Referral Service (LRS). The LRS can answer questions and make referrals to qualified attorneys for legal advice.