



AALU  GAMA
INTERNATIONAL

WRMarketplace

An AALU/GAMA Washington Report

Thursday, August 6, 2020

WRM 20-15

This WR Marketplace was created exclusively for Albert Gibbons by experts at Baker & Hostetler LLP and AALU/GAMA staff. WR Marketplace #20-15 was written by **Michael P. Vito, Counsel**, and **Lindsay R. DeMoss D'Andrea, Staff Attorney**, Baker & Hostetler LLP.

AALU/GAMA WR Newswire and WR Marketplace are published by AALU/GAMA as part of the Essential Wisdom Series, the trusted source of actionable technical and marketplace knowledge for AALU/GAMA members—the nation's most advanced life insurance professionals.

Planning for the Pandemic: Focus on Incapacity

MARKET TREND: The COVID-19 pandemic brings incapacity planning into focus in 2020.

SYNOPSIS: Now more than ever, a complete legacy plan should include comprehensive provisions addressing incapacity, which may include a revocable living trust, financial and health care powers of attorney, a living will, nomination of guardians of the person and property, a HIPAA authorization, and disability and long-term care insurance. Without this planning, court proceedings could be required in order to manage an individual's property and health care, potentially causing turmoil within the family, the loss of individual autonomy and privacy, and tremendous expense. Proper incapacity planning can help avoid these harsh results.

TAKE AWAYS: Planning for incapacity requires uncomfortable decisions that individuals often do not want to face. For that reason, many individuals put off the process for a later time. However, postponing these decisions can result in significant difficulty for the individual's family and lead to costly, time-consuming court proceedings. By taking a proactive approach, individuals who implement incapacity plans can avoid this delay and expense. Circumstances change constantly, and individuals should routinely monitor their plans to ensure their choices remain consistent with their values and objectives.

[Read full article here](#)

The COVID-19 pandemic is the most recent – and perhaps the most salient – reminder of the importance of disability planning in a comprehensive estate plan. While estate planning is often focused on the distribution of assets upon passing, planning for disability during life is an equally important component of the process. Mental or physical incapacity, whether temporary or permanent, can occur at any time, and, with longer life expectancies due to modern medical advances, individual incapacity may last for many years. Planning for incapacity now can help avoid later problems relating to family governance and control issues, particularly when complex assets such as private equity and closely held business interests are involved.

One benefit of incapacity planning is the reduced need for or avoidance of court

intervention. In the absence of a valid and effective plan, the courts would likely appoint someone (called a “guardian,” or sometimes a “conservator”) to handle an individual’s assets and make decisions on his or her behalf in the event he or she becomes incapacitated. The guardian makes all decisions for the incapacitated individual, ranging from financial decisions (such as asset investment and management, including voting control over a business) to health care and personal decisions (such as living arrangements, visitation, medical treatment, selection of physicians or caretakers, and whether life-prolonging treatments should be administered or withdrawn).

Court proceedings for the appointment of a guardian can be costly and time consuming, particularly if there is a dispute over who should serve as the individual’s guardian. The expense of such a proceeding will be paid from the individual’s own assets. In addition, the individual’s financial and other personal information could become part of the (public) court record. Finally, depending on the cause of the individual’s incapacity, the individual may have little to no input on the selection of the guardian or in the proceedings altogether. However, planning in advance gives an individual the ability to identify the persons who would manage his or her affairs in the event of incapacity and make certain determinations regarding care and treatment in the event they are unable to make those decisions in the future.

RECIPE FOR EFFECTIVE INCAPACITY PLAN

Individuals who include valid incapacity provisions in an overall legacy plan can generally avoid court guardianship proceedings. Depending on the jurisdiction and an individual’s specific needs, a complete plan may include the following interrelated components:

Document:*	Purpose:
Revocable Trust Agreement (“Revocable Trust”)	Names a successor trustee to manage revocable trust assets.
General Durable Power of Attorney for Property (“DPOA”)	Names an agent to manage the principal’s assets.
Health Care Power of Attorney (“HCPOA”)	Names a health care agent to make health care decisions for the principal.
Living Will	Serves as a statement of preferences for medical care and treatment in the event the principal cannot communicate their wishes.

Nomination for Guardians of the Person and Property	Allows the principal to select the individuals they would nominate to serve as guardian in the event a proceeding becomes necessary or desirable.
HIPAA Authorization	An authorization to disclose medical information to certain persons under the Health Insurance Portability and Accountability Act.
Disability and Long-Term Care Insurance	Supplements the cost of disability and long-term care.
*Note that the configuration of documents and the names of each may vary by jurisdiction.	

Revocable Trust. A revocable trust can serve an important role in an individual's incapacity planning. The incapacity provisions in a revocable trust are operative only *to the extent the trust is funded*, because the trustee's authority is limited to assets held in the trust and not assets titled in the individual's name. Typically, the individual (here, the "**grantor**" of the revocable trust) serves as his or her own trustee until incapacitated, at which time the successor trustee automatically steps in to manage the trust's assets. The successor trustee will use the revocable trust funds for the benefit of the grantor without the need for court intervention. A carefully drafted revocable trust can include provisions specifically dealing with the grantor's incapacity, such as:

- The procedures for determining whether the grantor is incapacitated (for example, obtaining certifications from two attending physicians).
- Authorization for expenditures that allow the grantor to continue living at home, including remodeling the grantor's home, payment of in-home nursing care for the grantor, and the purchase of specialized medical equipment.
- Authorization to distribute trust funds to support the grantor's family, such as a spouse, minor or incapacitated children, and extended family, like elderly parents.
- Authorization to engage in advanced estate planning using gifts, sophisticated trusts and other transactions, and charitable giving. This authority can be particularly important if the grantor has created an irrevocable life insurance trust ("**ILIT**") that requires a continuation of gifts for the payment of insurance premiums.

If the grantor owns an interest in a closely held business, the revocable trust can provide a plan for the management and voting of such interest in the event of the grantor's incapacity. This is especially important if the business interest is a controlling interest. For example, the grantor can appoint special trustees or advisors who are familiar with the business to handle narrow aspects of the business (e.g. voting shares and managing the company), without giving them control over the grantor's other assets or the distribution of trust funds. Or, the grantor may wish to create a separate revocable trust to hold only the business interests. Where business interests are involved, the grantor should ensure the revocable trust is consistent and compatible with company documents, like buy-sell agreements and changes to the management structure that may be triggered if the individual is permanently incapacitated.

As noted above, sufficiently funding the revocable trust is an important step towards implementing the incapacity planning laid out within the trust instrument. For some, this will require retitling assets held in joint tenancy with another. While joint tenancy may work for some estate planning purposes, it is not helpful for purposes of incapacity planning. Although the other joint tenant would be able to access financial accounts to pay bills and manage investments, the other joint tenant is under no duty to use the joint assets for the incapacitated owner's benefit. As a mere joint owner, they have no fiduciary duties. Furthermore, in many instances, the joint tenant would be unable to sell or mortgage real property without the incapacitated individual's consent, potentially requiring a court-appointed guardian. Joint tenancy also exposes the individual's assets to seizure by the other tenant's creditors (with certain exceptions for property held by spouses as "tenants by the entirety"). Care should be taken when changing the title of an asset to or from joint tenancy, as the transfer into or out of joint tenancy may have gift tax consequences and may present issues as to insurance coverage.

General Durable Power of Attorney. Similar to a revocable trust is a DPOA. A DPOA will authorize an agent, selected by the individual (here, the "**principal**"), to manage and invest **assets titled in the principal's name and not assets that are titled in a revocable trust**. The DPOA can also authorize the agent to file tax returns, pay bills and expenses, borrow money on behalf of the principal, sell or mortgage real property, apply for government benefits and manage the principal's health, property and life insurance policies. Other key provisions for a DPOA include:

- Ensuring the DPOA is, in fact, "durable," meaning the power will not terminate if the principal becomes incapacitated. Generally, to be "durable" the DPOA

must include specific language. DPOAs also can be “springing,” meaning that the agent does not have the authority stated in the document unless and until the principal is incapacitated.

- Authorizing the agent to move the principal’s assets into a revocable trust. Even if the principal did not previously fund the trust, this power allows for later the consolidation of assets into the revocable trust, which is typically a more robust instrument.
- Specifying the procedures for determining if the principal is incapacitated.
- As in a revocable trust, authorizing sophisticated estate planning approaches.
- Authorizing the agent to make intra-family loans and gifts.
- Authorizing the agent to change beneficiary designations for life insurance and retirement plans, consistent with the principal’s overall legacy plan.
- Authorizing the agent to vote interests in a closely held business and to enter into buy-sell and other agreements with respect to a business interest.

Selection of Trustees and Agents. Individuals must carefully consider who should serve as successor trustees under a revocable trust and as agents under a DPOA. The instinct may be to appoint a spouse, child, other family member, or friend. However, depending upon the sophistication required to manage the individual’s assets, family and friends may not be the best choices. Further, while a bank or trust company can be appointed as successor trustee of a revocable trust, it often cannot or will not serve as an agent under a DPOA.

Health Care Power of Attorney. A HCPOA, also referred to as an advance medical directive or health care proxy, allows an individual (here, the “**principal**”) to appoint an agent to make health care decisions in the event of incapacity. The powers granted to the agent generally include the authority to determine and consent to medical treatments, select and dismiss physicians and other health care providers, and admit the principal into a hospital, nursing home, or assisted living facility. The document can be tailored to meet the principal’s specific wishes, including wishes regarding organ donation. As in the revocable trust and DPOA, the HCPOA also should set out guidelines to determine when the principal is incapacitated.

Additionally, individuals must carefully consider who will serve as the agent under an HCPOA. Unlike financial and business decisions that can be handled objectively, a health care agent will carry out decisions and handle issues that are deeply personal for the principal. Additionally, the time and attention required of an agent serving under an HCPOA can be immense. The agent is under a duty to observe and meet with the

principal on a regular basis and oversee medical care. These factors dictate appointing someone who lives nearby, when possible, and someone who is familiar with the principal's values and objectives. Further, if the principal has decided for or against life-sustaining treatments, the principal will need to select an agent who will honor these wishes.

Living Will. A living will is an opportunity for an individual to relay his or her wishes regarding end-of-life care and the provision or withholding of life-sustaining treatment. Often incorporated into an HCPOA, a living will is designed to allow an individual to participate in future health care decisions by stating them in advance of incapacity. For some, a living will is a final opportunity to express a desire to continue or terminate extraordinary measures. Additionally, the individual should discuss these wishes with his or her health care agents and family members to avoid surprises or potential family disagreements over treatment options.

Nomination of Guardian of the Person and Property. Unfortunately, plans do not always work as intended, and the appointment of a guardian of the person and/or property may nonetheless be required. For instance, a designated agent may be unable or unwilling to serve, a financial institution may not recognize a DPOA, or additional protection may be needed from persons attempting to take advantage of the individual. Under these circumstances, it may be necessary or advisable to have a guardian appointed by the court. Incorporating a nomination of a guardian of the person and property (a "**Guardian Nomination**") into a legacy plan gives the individual some control over who may be appointed, if permitted in the respective jurisdiction. In some states, a Guardian Nomination can be included in the DPOA and HCPOA. Additionally, because an individual's first choice (whether for successor trustee or agent under a general DPOA or HCPOA) may become unable to serve, the document should always name a series of successor fiduciaries.

HIPAA Authorization. Federal and state legislation protects an individual's medical records from disclosure without the individual's consent. These laws can make it difficult for successor trustees and agents to obtain medical information that may be needed to implement the incapacity plan, like diagnoses, medication information, and other health records. A HIPAA Authorization allows the individual's physicians and other medical care providers to disclose otherwise private medical information to the individual's designated agents and successor trustees. A HIPAA Authorization may also appear directly in the DPOA or HCPOA.

Disability and Long-Term Care Insurance. The long-term health effects of COVID-19 are still unknown. Even pre-pandemic, increased life expectancies combined with rising health care costs could deplete many individuals' assets, particularly if the individual requires nursing care, leaving little for the individual's surviving spouse or children. Disability and long-term care insurance can help cover the expenses of a nursing home, assisted living facility, or in-home care should the individual become incapacitated – costs that are not covered by Medicare or conventional health insurance. For many individuals, disability and long-term care insurance should be a key component of an incapacity plan as a tool to help preserve the individual's assets. See *WRMarketplace No. 15-29* for a discussion of long-term care insurance in more detail.

Priorities. Creating a legacy plan may seem like a daunting task. Aside from the serious subject matter, putting one's affairs in order requires time for deliberation and, for some, self-reflection. It is important not to let the scope of creating a plan get in the way of moving forward with the most critical elements.

In the current environment, the highest priority will be documents addressing health care concerns and avoiding or easing a guardianship proceeding to the extent possible. To address immediate concerns, a client may be well advised to break the process in to two stages.

The first stage can implement a HCPOA, a Living Will, a HIPAA Authorization, a DPOA, and, if permitted in the respective jurisdiction, a Guardian Nomination (the "**Priority Documents**"). The Priority Documents often reflect shorter decision trees as they do not govern the disposition of assets upon passing. In many cases, these can be put in place relatively quickly.

The second stage would include a revocable trust and last will and testament. While using a funded revocable trust is the gold standard for incapacity planning, doing so requires a client to make a myriad of decisions as well as to re-title his or her assets. Thus, getting the Priority Documents together first allows the client to be prepared for incapacity at a basic level while contemplating larger issues in the second stage, which can take longer for many to consider.

As noted above, different jurisdictions handle these subjects in varying ways. For

example, the configuration of documents and the names of each may differ depending on each client's domicile. The client should consult with his or her attorney to determine the best course of action for his or her specific situation.

TAKE AWAYS: Planning for incapacity requires uncomfortable decisions that individuals often do not want to face. For that reason, many individuals put off the process for a later time. However, postponing these decisions can result in significant difficulty for the individual's family and lead to costly, time-consuming court proceedings. By taking a proactive approach, individuals who implement incapacity plans can avoid this delay and expense. Circumstances change constantly, and individuals should routinely monitor their plans to ensure their choices remain consistent with their values and objectives.

Copyright © 2020, All rights reserved.

Our mailing address is:

AALU/GAMA
101 Constitution Avenue
Suite 703 East
Washington, D.C. 20001