

## Incapacity-Planning

Life happens. Sometimes wonderful things happen; sometimes terrible things do. We all know that we will die, although we might not want to think about it. Many of us never think that something can happen to us that might even be more dangerous. Incapacity to manage your financial affairs can truly be more dangerous than death. The majority of Americans have no estate plan, but in the majority of instances this has not caused great problems. In Michigan, the default is for property to go to next of kin—spouse and children in some mixture. That is what most people want anyway. If something happens to affect our capacity to manage our lives the default is not nearly so good. Unless there are good plans, our families may be forced to file protective proceedings (guardianships, conservatorships, and so forth) in a probate court. This can be very expensive; it is very invasive of privacy; and often rips families apart. Incapacity can happen in an instant. We may think of Alzheimer’s and other dementias, which are much more common as we age, but closed head injuries in automobile accidents and various diseases and brain insults can happen at any age.

Even when people plan, they often don’t do so in a very sophisticated way. I have read several documents that define incapacity as triggered by one of two factors:

- ❖ A court judges them to be incapacitated.
- ❖ One or two doctors sign a statement that they are incapacitated.

Neither trigger is very good. We want to avoid those probate hearings. Our current state of medical knowledge is not very good at predicting actual behavioral abilities from medical diagnoses. For example, recent research has indicated that persons may become very susceptible to financial exploitation, undue influence, and other scams before anything shows up on standard medical tests. On the other hand, a person may be able to cope quite well and make certain important decisions after doctors would predict that she should not be able to.

What makes the most sense is for you to work with an expert to come up with a plan that makes sense for you and your situation. For example, some people believe that financial advisors are much more likely to see early problems than doctors are. You may wish to set certain rules in case you have lost some capacity. For example, even if you cannot manage all of your property, you may wish to keep some reasonable allowance you can spend any way you want to.

It is also critically important to have some good controls in case you are unable to manage your property. Some well-meaning family members fall victim to temptation if they believe that no one is overseeing their actions. This possibility can be largely avoided through proper planning.

You certainly might want to deal with incapacity to make medical decisions, also. Often disputes about end of life treatment leave a bitter taste in families. You can set the rules yourself while you are

capable. Remember that this is not only for end of life. It is for any situation where you are temporarily unable to participate in medical decision-making.

## Incapacity–Defending your Rights

Sometimes families and friends judge us more much less capable than we are. Events that might not raise an eyebrow that happen when are middle-aged might be viewed rather differently when we are older. This is not a new phenomenon. Cicero discussed the trial of the Greek playwright Sophocles, who wrote almost 2400 years ago. When he was 90 his children claimed he was incompetent, because he was neglecting his property to continue to write plays. For his defense Sophocles presented the text of a play he had just finished, Oedipus at Colonus, one of the most outstanding tragedies in history. The court agreed that no one with diminished capacity could have written that.

It is unfortunate that some of us will have to defend our rights to continue to make decisions about our bodies and our properties. Even if the purpose is supposed to “protect us,” the consequences can be severe. The late Congressman Claude Pepper pointed out that criminals have rights than the average person who has a guardian and conservator. Prisoners even get to keep control of more of their money and property. Rep. Pepper said:

*"The typical ward has fewer rights than the typical convicted felon--they can no longer receive money or pay their bills. They cannot marry or divorce. By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty."*

Ideally, your family may be convinced that there are better means to protect you than taking away your fundamental rights. Generally, if you are able to vigorously object to a petition, you probably have the ability to consent to consensual arrangement such as powers of attorneys or trust that would provide protection, freedom, and dignity. Litigation over your capacity invades your privacy, assaults your dignity and autonomy, and can tear families apart. It is best to avoid.

If it cannot be avoided, you are entitled to a vigorous defense. The petitioner actually has a hard burden to bear—if the judge applies the law correctly. The protect your rights you need an experienced counsel with knowledge in depth about legal matters and familiarity with specialized knowledge in current research on geriatric assessments, neuro-cognitive science, and potentially other matters, such as the nature of elder abuse and exploitation. I have both a J.D. (legal degree) and a Ph.D. I will offer you the vigorous defense you need.