Marquette Elder's Advisor

Volume 2
Issue 1 *Summer*

Article 6

August 2012

Elder Law Incapacity Planning

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As part of any complete estate-planning practice, attorneys need to draft language that covers the ramifications of client's incapacity.

By Cynthia L. Barrett

As the U.S. population ages, the incidence of incapacity will rise. How can you prepare your practice for that unhappy fact? Most clients do not want to anticipate the tragedy of incapacity, so the good tools you develop in your practice may not be easily marketed to the end consumer. However, when the caregiver support entities (hospitals, support groups, community care centers) learn that you can help those already diagnosed with an illness, they will refer clients to you.

Should your now healthy, estate-planning client become incapacitated, you hope the documents you prepared can cover most eventualities. Will they? Or will the family be forced into expensive conservatorships, a complete spend-down of assets on one spouse's care, or family disputes about who the caregivers are, where care is provided, and how money is to be spent?

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The elder law practice brings practitioners into contact with the ill, the disabled, and those who care for them. As a result, elder law attorneys are developing sophisticated incapacity planning language. This article offers examples of that language.

Durable Power of Attorney

Everyone should do a durable financial power of attorney (POA)—the workhorse financial incapacity document. Below are samples of what I do in a typical POA and the situations in which the language would be used.

Financial Abuse

To protect the client from financial abuse, I put in mandatory accounting language. The agent must inform the client about anything he or she does in the client's name. My powers of attorney are immediately usable without need for proving documents (i.e., letters from doctors). I escrow powers of attorney for clients only in very unusual circumstances.

Fig. 1. Sample accounting language

> Within thirty days after my agent begins to act under this agency document, my agent shall notify me and any successor agent named in this power. Also, my agent shall account for his or her agency by providing a statement of account showing all receipts, disbursements, and asset changes or investment transactions since the prior statement of account and an inventory of my then-current assets known to the agent. The accounting shall be made at least once a year, and copies shall be sent to me and to any named successor agent. The statement of account shall be deemed to have been furnished to the person entitled thereto

when it has been placed in the United States mail addressed to that person at the person's last known address even if that person is under a legal disability. Copies of documents evidencing ownership of assets and a copy of my most recent personal tax return shall be attached to the accounting.

Home Care

To protect the client's home care choice, I routinely put in home care language and permit payment for care. I insist that the client understand something about home care costs in contrast to institutional costs. It is preferable for the family to be paid while the money lasts, keeping the elder in the home, so that all the money does not end up in the hands of the nursing home. I encourage long-term care insurance as a fund to pay for home care. I encourage payment to the care manager as well as to the care provider and payment to the financial manager.

Around the country, lawyers are structuring home care/life care contracts with big up-front payments to the family care providers as a for-value transfer, rather than a gift. I do not do that, but I do encourage paying the adult children for help. The agent can then continue the pattern when incapacity occurs and the POA kicks in.

Fig. 2. Sample "pay as you go" and home care language

Payments for care or assistance in home. I intend to remain in my own home despite any worsening medical condition. Should I need assistance with day-to-day tasks or direct care, I authorize my agent to use my income and savings to pay for home services or care, whether provided by family members, friends, or others in the business of providing such services. Should any agent, family member, or any other friend provide care or services for me in my, her, or his home when I am in need of help, then my agent shall compensate that agent, family member, or friend as follows:

1. If the family member or other person resigns from or takes a leave of absence from paid employment in order to care for me, that person shall be compensated at not less than the amount that he or she would have been paid at the job that he or she has left or from which he or she has taken a leave of absence. I intend that the employed caregiver be fully reimbursed for loss of income or benefits.
2. If the family member or other person is unemployed while providing care or is employed but spends free time helping me, he or she shall be compensated at the then current fair market rate for the in-home services being provided.

   The type of services that I understand can keep me in my home despite a deteriorating medical condition include home and yard maintenance, house cleaning, laundry, shopping, food preparation, security services, telephone call-in service, in-home personal care (such as bathing or medication management), taxi/transportation service, companion care, and nursing care. These services all have value to me, although I understand that certain services would cost more on the open market. I direct my agent to arrange for reasonable compensation to any person, including the agent, who provides these services to help me stay in my home.
3. Payment for care management. I consider the task of managing care and overseeing care/service providers to be very important to my quality of life, and direct that such services be compensated at the then current market value (now $25 to $75 per hour). Should any agent, family member, or friend personally undertake to arrange for and manage my care during any illness that I may suffer, whether that care is provided in a home or in a medical or nursing institution, then I authorize compensation to that personal care manager at the then current fair market rate for the services provided.
4. Payment for agent's financial management services. An agent serving under this instrument may charge my estate for the reasonable value of his or her services, at not less than the hourly wage rate received by him or her at his or her regular job or occupation if employed, and at a higher hourly rate if such a rate is reasonable considering all the circumstances including the market rate for bookkeeping services.

Transfers to Disabled Persons

When the client becomes incapacitated, he or she may want the agent to have discretion to make gifts to disabled children, disabled persons, or spouses to protect the assets from spend-down for care costs. Pre-Medicaid eligibility transfers to these

donee categories are blessed by OBRA '93 and do not cause Medicaid transfer penalty periods.

Fig. 3. Sample language permitting gifts or trust for disabled child

> To make gifts and transfers to or for the benefit of my disabled daughter and to create an irrevocable or revocable trust for full support or special needs only, for the benefit of my disabled daughter DAUGHTER's NAME, with due consideration to my then existing estate plan and to transfer my assets to any revocable or irrevocable trust for the benefit of my daughter which may be then created or which I have established prior to this date or may establish in the future as the agent may determine in the agent's sole and absolute discretion.

Whistleblowing Permission

When the agent seeks my advice as an attorney or I have some knowledge of some wrongdoing, I want permission to whistleblow—to tell someone. I have come up with language I now include in POAs permitting whistleblowing.

Fig. 4. Sample whistleblowing language

> *Consent to disclosure.* My attorney in fact, by accepting appointment as such, consents to the disclosure by any lawyer who is engaged to assist him in matters relating to this durable power of attorney, to me and members of my family or to the court, of any act or omission that might constitute a breach of fiduciary duties including information obtained through disclosures made to the lawyer by my attorney in fact.

Anticipating Guardianship

I have never petitioned for guardianship of a client. As a client's cognitive capacity has declined, I have refused to represent her to object to a guardianship in a few instances. I refused to represent the now incapacitated client and offered to be a witness about the intentions and incapacity plan she had in place. When I thought the client's plan was truly at risk from the proponent or that the court did not know the incapacity plan, I have told the declining client that I wanted permission to discuss the plan with the court so I could try to protect that client in that way. If there was no one else to act, that is, no plan had been done by someone I considered a client, and the client was declining and at risk, I could conceive of reporting his or her risk to the court.

In representing a person opposing guardianship, I have never had a client who was making bizarre choices. I have refused to undertake representation of some potential clients, telling them that I did not believe they had capacity and that the court would feel I was taking advantage of them in filing a frivolous opposition motion.

I tell clients that in some circumstances a guardianship may be necessary. I recommend the client nominate his or her choice for guardian. There are circumstances in which I can imagine I will need a guardian, although I have done a sound incapacity plan. I want my choice known to the court. My clients deserve the same service.

Nominating Guardian and Conservator

When I anticipate a big family fight for control when the client becomes ill, I like to nominate a guardian and conservator in the POA (written nomination is permitted in Oregon law and need not be in any particular format).

Fig. 5. Sample guardian/conservator nomination language for a man whose wife and child are both disabled

> 1. NOMINATION OF CONSERVATOR.
>
> I nominate _____ to act as conservator of my estate, with power to nominate a successor. If _____ shall be for any reason unable or unwilling to act in that capacity, I nominate _____ to serve as conservator of my estate, with power to nominate a successor.
>
> 2. NOMINATION OF GUARDIAN.
>
> I nominate _____ to act as guardian of my person, with power to nominate a successor. If _____ shall be for any reason unable or unwilling to act in that capacity, I nominate _____ to serve as guardian of my person, with the power to nominate a successor.
>
> 3. MOTIVATING FACTORS.
>
> I make these requests in order to comply with the preference statutes for appointment. The persons nominated above have been important in my life and persons with whom I have shared my values and thoughts. The persons nominated above are familiar with my personal and family history, have the proper temperament for dealing with my emotional needs, are trustworthy human beings, and share my values and

lifestyle. I trust the nominees to make decisions consistent with my plan to help my wife and child maintain their independence. Should I lose my cognitive capacity, I want my property, income, and resources used for their needs, and I want to be allowed to die naturally without extraordinary intervention.

Limiting the Guardian's Medical Decision-making Authority

I can control the decisions of a future guardian by giving specific directions such as where the client intends to live, specifying that money should be spent to do advocacy, and so on. See living trust language below.

Basic medical decision making—the guardian's role—can be preempted by specific instructions in a well-drafted health care directive. The following health care directive is an example of the sort of additional instructions liked by clients.

Fig. 6. Sample health care directive

BARRETT LAW OFFICE
Addendum to Health Care Directive
of _____

Direction to stop treatment after physical/cognitive limits are permanent and have lasted three months:

I do not wish to receive medical care to keep me living if (1) I suffer cognitive losses which, alone or in combination with physical ability losses, cause me to need help with activities of daily living and instrumental activities of daily living indefinitely; (2) the losses are permanent in the judgment of my treating physician; and (3) the losses have lasted at least three months.

If my ability to receive and evaluate information becomes so impaired that I lack the ability to give informed consent to treatment and to cessation of treatment and particularly if I need day-to-day custodial and nursing care because of cognitive losses or combined physical and cognitive losses, then I do not want to be treated for life-threatening conditions such as pneumonia, heart problems, etc.

I want to let nature take its course should any infection, illness or progression of illness be life threatening.

I expect to receive basic care that provides for my comfort—oral and body hygiene, reasonable efforts to offer food and fluids by mouth, medications (for comfort—not to treat the life-threatening condition, that is, for example, no antibiotics for treatment of pneumonia), positioning, warmth, appropriate lighting, measures to relieve pain and suffering, and the personal, caring presence of others.

I hope my trained professional caregivers can help my loving family and friends understand that under these conditions I want my death to occur sooner rather than later and that the suffering that comes with death can be somewhat (but not wholly) relieved.

Testamentary Trust for Disabled Child: Trust Choice Deferred

I recommend testamentary trusts for disabled spouses and children. I dislike living trusts with special needs provisions, as I believe living trusts are more likely to attract state agency challenges than trusts set out in a will. I set up living trusts in disability situations primarily for irrevocable life insurance trusts, pre-Medicaid transfers by an ill parent for a disabled child, and under 65 42 U.S.C. 1396(d)(4)(A) trusts (which must include a provision that the state Medicaid claim be paid at termination before the remainder can pass to relatives).

I can draft instructions in the will to permit the personal representative to choose to fund either a full support or special needs trust or both. Parents of disabled children love the flexibility permitted by this approach when they are not certain how the child will be able to function. For example, I used a double trust format, with both full support and special needs, in a recent will for the mother of a six-year-old disabled daughter. The mother just did not know how the child's cognitive and coping abilities would develop and liked the flexibility of the double support/special needs trust.

Fig. 7. Sample personal representative "choice of funding" language

3.2 DISABLED YOUNG DAUGHTER TESTAMENTARY TRUSTS. I give the personal representative authority and discretion to distribute my residual estate between two trusts for the benefit of my daughter in such portions as the personal representative deems appropriate, in his or her sole and absolute discretion, considering the needs of my child and her abilities and the availability of public benefits for which she may be eligible and considering the public policy of Oregon as declared in ORS 412.700 to permit parents to plan for a disabled child without fear of loss of public benefits for the disabled trust beneficia-

ry. My daughter is young, the full extent of her abilities is not clear at this time, and the public benefit programs change from year to year.

3.2(a) One trust for the benefit of my disabled child, DISABLED YOUNG DAUGHTER, to be used and administered for her benefit, as described in ARTICLE 4.2 below, will be a full support trust without regard to public benefits and will be known as the DISABLED YOUNG DAUGHTER SUPPORT TRUST.

3.2(b) One trust for the benefit of my disabled child, DISABLED YOUNG DAUGHTER, to be used and administered for her benefit, as described in ARTICLE 6 below, will be a supplemental care trust, as a supplement to any public or private benefits that might be available to meet the basic needs of my disabled child, according to the purposes and plan set forth below in ARTICLE 6 and may be known as the DISABLED YOUNG DAUGHTER TESTAMENTARY SPECIAL PERSON TRUST.

Living Trust Incapacity Protection

I have developed living trust protection language (thanks to my clients and to my discussions over the year with Janet Kuhn of Langley, Virginia, about the perfect trust). My current version of the revocable trust contains a "freedom fund" and "choice of home care" section.

Fig. 8. Sample distribution language

TRUST DISTRIBUTIONS DURING MY LIFE

During my lifetime, the trust shall be administered and distributed as follows:

5.1 REQUESTED DISTRIBUTIONS. My trustee shall distribute to me or for my benefit those amounts of income or principal that I request in writing.

5.2 DISTRIBUTIONS UPON INCAPACITY. If I become incapacitated, my trustee shall distribute to me or for my benefit those amounts of income or principal that my trustee considers necessary or advisable for my health, education, support, maintenance, or reasonable comforts.

Additional Support. In addition, my trustee may distribute to or for the benefit of SUPPORT PERSON those amounts of income or principal that my trustee considers necessary for SUPPORT PERSON's health, education, support, and maintenance to enable SUPPORT PERSON to maintain the standard of living that SUPPORT PERSON maintained before my incapacity.

5.2 (a) *Freedom Fund Incapacity Distribution of $FREEDOM/month.* In addition to the above distribution, the trustee shall distribute the sum of $FREEDOM per month to the incapacitated trustor as discretionary funds, not for support needs, and the trustee shall neither attempt to control nor monitor the use of those funds, nor shall beneficiary or trustee account for use of those funds to any person, as the incapacitated trustor may use those funds to implement whatever personal spending goals or donative choices the incapacitated trustor may have.

5.2(b) *Home Choice.* I intend to create a trust that will upon my incapacity allow me to maintain the highest level of personal independence and comfort in the manner in which I have lived throughout my life. The authorized expenditures from the trust include all expenditures necessary for food, shelter, and maintenance of an independent lifestyle in my own home or apartment. The authorized expenditures include services, equipment, or personal care necessary to allow me to remain in my home or apartment and to have a lifestyle that allows the highest degree of dignity and independence. It is my intent that I remain in my current home in HOME LOCATION, Oregon, for as long as possible, unless medical exigencies that may not be handled by purchase of additional home care make it necessary for me to move to another location.

I understand that with the assistance of family, friends, and medical professionals, I can remain in my home despite serious medical problems and I direct my trustee to make expenditures for such assistance (whether care is provided by licensed personnel or by family and friends) to allow me to remain where I prefer, in my home.

If my physician and I differ about what home care assistance is useful or desirable, I request that the trustee consult with my PERSONAL ADVOCATE about the disagreement and then determine in the trustee's sole discretion whether or not the assistance should be provided despite my objection and if the assistance is provided, how it can be made least onerous for me.

5.3 PREFERENTIAL RIGHTS OF PRIMARY BENEFICIARY. The distribution rights of the primary beneficiary, NAME OF CLIENT, are preferred to the rights of any remainder beneficiary. The trustee is authorized to exercise the trustee's discretion to spend all income and/or principal of the trust in order to accomplish the trust purposes described above, so that there is nothing left for any remainder beneficiary.

Incapacity Determination

I developed language describing how the incapacity of the trustor/trustee (and successor trustees) is to be determined. The client names the decision makers and controls how he or she is to be judged.

Fig. 9. Sample incapacity determination language

5.4 DETERMINATION OF INCAPACITY. For purposes of this instrument, an original Trustee or any successor trustee shall be considered incapacitated if the Trustee becomes unable to manage his or her business affairs due to illness or for any other cause, and that incapacity is likely to continue. The fact of incapacity of NAME OF CLIENT shall be determined by majority decision of any one specialist providing medical services, INCAPACITY 1 and INCAPACITY 2. I authorize and permit INCAPACITY 1 and INCAPACITY 2 to consult with any treating physician to determine capacity. Any individual who accepts the office of successor trustee hereby grants to the next nominated successor the authority to determine his or her legal capacity. Legal capacity shall be determined as follows:

(1) The named successor is given authority by this document, which shall serve as a form of medical authorization, to consult with medical providers for the trustee.
(2) Any named Trustee waives the confidentiality privilege between medical providers and patient and authorizes those providers to disclose a trustee's medical condition, and mental and/or physical capacity to manage and participate in decisions about business affairs or asset management.
(3) When medical information has been obtained by the persons entitled thereto, then in the case of the original trustor the named committee members shall determine NAME OF CLIENT's capacity by majority vote and for other successor trustees the next nominated successor trustee as the sole authority, upon consultation with a treating physician, shall determine whether a serving trustee lacks capacity. The determination of incapacity shall be made in writing, shall be given to the incapacitated trustee by personal service or by mail directed to that trustee's last known address, shall be signed by the successor trustee, and shall serve as a resignation by the incapacitated trustee.
(4) If the named successor trustee and members of any capacity committee act in good faith, they shall not be liable for any acts or omissions taken in connection with or in reliance upon the determination of incapacity.
(5) Should a court enter an order finding a trustee incapacitated and unable to manage the trust property or the trustee's own property and affairs, then the determination by the court shall serve as a trustee's resignation as trustee. The effect of the court order as a resignation shall not be stayed during an appeal of that order.