

## PLANNING FOR INCAPACITY

By: James L. Melchers

As Americans we are living longer. As we age most of us are going to suffer some form of mental or physical disability, which may be short lived or continue for many years. In the United States one in twelve over the age of 65 and one in three over the age of 80 will suffer with Alzheimer disease. Today, approximately five million Americans have the disease. Therefore, it is important that we look at the different options available to us when addressing this issue of one's incapacity.

We can do nothing and one day find ourselves the object of an interdiction proceeding. This is a court proceeding whereby the court decrees you an interdict (one who is unable to take care of his person or estate or both). The court appoints a curator to handle your affairs, and the curator is required to seek court approval for his actions. This is the least desirable way to handle one's incapacity.

A partial solution to the issue of incapacity might be for the individual to have accounts registered in the names of others as the sole or joint owners, be it a family member or a friend. Another partial solution would be to have accounts payable on death to another, setup by the person establishing the account (depositor). These accounts can be in favor of the depositor's spouse, child, children or grandchildren inclusive of stepchildren and stepgrandchildren.

As a partial solution to the issue of incapacity, Social Security, the Veterans Administration, Civil Service, other government agencies and some retirement programs provide for the designation of a representative payee to take receipt of those funds.

Another way to deal with this issue would be to establish a revocable or living trust. A revocable trust created during the person's lifetime allow the person who created it (the Settlor) to manage his or her property until incapacity at which time the trust becomes irrevocable and a Successor Trustee (person administering the Trust) assumes control. The revocable trust should define a procedure for determining the Settlor's incapacity and should provide the mechanism for removal and replacement of the Settlor Trustee.

The least expensive and probably best way is to execute a General Procuracy and a Special Limited Medical Power of Attorney (medical and health issues). The Procuracy is a written instrument by which one person (the Principal) appoints another as his or her representative and confers upon the representative the authority to act for the Principal for the purposes stated in the document. It can be made effective immediately or conditioned upon the happening of some event (which is usually incapacity).

Another way of dealing with this issue of incapacity is to utilize the Uniform Custodial Trust Act La. Revised Statutes 9:2260.1-2260.21 which was adopted by Louisiana in 1999. This act allows any kind of property to be transferred by a person to a custodial trustee and is created by a written transfer of property, either to another person as custodial trustee and naming a person (who can be the Transferor) other than the trustee as beneficiary or by written declaration naming as a beneficiary a person other than the declarant (transferor) and naming the declarant

as the trustee.

The trust can be terminated by a beneficiary who is not incapacitated. The beneficiary who is not incapacitated has complete control over the trust. The trust terminates at the beneficiary's death. Upon the beneficiary becoming incapacitated the custodian trustee has all the rights and powers over the custodial trust property which an adult owner has over individually owned property but must exercise these rights in a fiduciary capacity.

In conclusion, failure to plan for incapacity can give rise to an interdiction proceeding which is the most intrusive, most expensive and least desirable method for dealing with one's incapacity. Partial solutions give you partial answers to the incapacity issue. The Procuration, the Revocable Trust, or the Uniform Custodial Trust Act are appropriate vehicles or methods to be utilized by an individual dealing with the issue of one's incapacity.

This article is limited to the use of living trust and accounts of joint ownership and their utilization in dealing with the issue of one's incapacity and does not attempt to assess the advantages or disadvantages of each.

**Disclaimer:**

The information on this website is for general informational purposes only. It is not intended to, and does not, constitute legal advice. Use of this information does not establish an attorney-client relationship with Melchers Law Firm, APC.