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## Money Matters | What does it mean to be incapacitated?

By RANDY GARDNER

As we live longer, the likelihood that we will become disabled before we die increases. But what does it mean to be disabled or incapacitated?

"Disability" according to the Social Security Administration means the inability to do work that you did before and the inability to adjust to other work because of your medical condition.

Under the Americans with Disabilities Act (ADA), an individual is disabled if he or she has a physical or mental impairment that substantially limits one or more major life activities.

Insurance policies often define disability as either the inability to work at your regular occupation ("Own Occupation") or the inability to perform the duties of any occupation by which the individual is suited by training, education or experience ("Any Occupation").

Long-term care policies refer to the insured's inability to carry out certain "activities of daily living" (ADLs).

Estate planners assess disability/incapacity at two different times and in two different ways. On the one hand, the concern is, "Does the person have the capacity to understand and sign a document?" This determination is usually made by an attorney, witnesses, and a notary in the attorney's office. However, when a corporate trustee or individual is weighing whether to step in and manage the affairs of a loved one, the decision is usually made with the assistance of one or two physicians in a hospital, home, nursing home, or assisted living facility.

In deciding whether an individual was able to execute a will, one court, wrote: "...old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absentmindedness and mental confusion do not furnish grounds for holding that a testator lacked mental capacity" (Estate of Selb (CA Appellate Court 1948)).

Instead the California Probate code states that "a person with sufficient mental capacity is able to:

Understand the nature of the act he or she is doing,

Understand and recollect the nature and situation of his or her property, and

Remember, and understand his or her relations to, the persons who have claims upon his or her bounty and whose interests are affected by the provisions of the instrument."

This traditional language sets a very low standard.

Who Decides?

When it comes to the decision to take over the management of a loved one's affairs, the contractual standard applies, but most documents focus less on the standard and more on who will make the determination. It is important to define the disability "triggering event" consistently among the documents because the Grantor wants to provide for the continuity of trustee services and the payment of expenses, debts, and other obligations. Possible "triggering event" definitions look to the opinion of a (an): loved one, attending physician, a loved one and attending physician, two licensed physicians, disability panel, and court. There are pros and cons to each.

Some individuals who want to remain in control as long as possible or who are concerned about others making decisions for them prefer a conservative standard, while others who have been in long-term relationships and are confident in their decision makers are comfortable with an easier process. The goal is to strike the right balance between objectivity, convenience, and timeliness.

Avoiding Living Probate

Similar to probate at death, a probate while the incapacitated person is alive can be costly, complex, public, and time-consuming. Surprisingly, one of the most common causes of “living probate” is titled assets, such as joint tenants with rights of survivorship. This titling avoids probate when the person dies, but can require the involvement of a court if the person becomes incapacitated and needs to engage in a transaction, such as a sale, with regard to the property. The court costs are borne by the disabled person’s assets; all assets become part of the public record; and a living probate can last for the rest of the client’s life.

A durable power of attorney for financial matters (DPOA) may be effective, but it is totally dependent on its acceptability by third parties. If the DPOA fails to work when the principal is disabled, a living probate may be the only solution for taking care of the principal. If a court takes over in a living probate, the DPOA usually terminates.

It is important to prepare a plan for incapacity while you still have capacity.

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