What's Your Plan C? Planning for Incapacity

By Monica Padineant

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I call it "Plan C" because it's outside the "if not this, then that" type of planning. Plan C is for what the investment world calls a "fat tail" event – low probability, high impact – at the level of personal health, usually due to an accident or medical condition. If the result is incapacity, or inability to make decisions for yourself, Plan C is figuring out in advance who will step in for you and what you want them to do. This is especially important for people with significant assets, and something we advise clients about as part of estate planning.

As wealth advisors who know our clients and their families well, we help put in place the essential documents and tools required to protect "health" and "wealth" (see box on next page), often acting as liaison between the family attorney, relatives and other key people such as business partners. In managing assets and finances, LNWM can work with people or entities assigned Power of Attorney and also as successor trustee for our clients' revocable trusts.

Why Have a Plan C

First, let's explore what happens with no plan for incapacity. Spouses and significant others can manage accounts and assets owned jointly but will not have access to accounts owned only by you. To act on your behalf, someone will have to petition a state court to appoint a legal representative for you, called a guardian or conservator. This can take months, can be contested, and the result may not be something you would want. All the while, close relatives may be asked to make critical medical decisions. Even if they know your wishes, they may not be legally permitted to implement them.

With a Plan C in place, you've already made it clear whom your chosen representatives are and the guidelines and choices they are to abide by. Your financial affairs remain protected, personal relationships are not overly burdened, and you can return to running your own affairs as you recover.

DEFINING INCAPACITY

State laws vary but mental incapacity is typically defined as an inability to make decisions or perform certain acts. Generally, capacity is assumed; the burden of proving otherwise is on the person seeking to have someone declared incapacitated.

Keep in mind that a mental or physical disorder is not enough to declare incapacity; a person may still be capable of making decisions, including contracting, marrying/divorcing, executing wills or trusts. Incapacity can only be legally declared by medical professionals or the finding of a court.

4 Key Issues & Concerns

Below are key considerations in incapacity planning that we spend time discussing with clients and their outside advisors (attorneys, CPAs, business partners) to come up with optimal solutions.

#1. Whom will you give Power of Attorney and for what? This is critical for carrying out mostly financial transactions of various types and can be quite general or very specific. You can assign Power of Attorney for different purposes:

- **Financial** - buying and selling of assets, bill paying, etc.
- **Business-related** – special or limited-purpose transactions
- **Heathcare** – known as Medical Power of Attorney (see box below)

The more complex the family finances, the more important it is that the people or entities you give Power of Attorney to have all three of these characteristics: trustworthy, capable, and dedicated (have the interest and time required to execute well). Giving sole Power of Attorney to a family member who lacks the ability or time to step into this role is usually not a good idea, no matter how willing or trustworthy they are.

PLAN C TOOLKIT

WEALTH

Power of Attorney. You give a person or entity legal authority to manage your finances, to the level specified, if and when you lose the ability to do so. This designation can be "durable" – in effect from the moment it is signed – or "springing" – goes into effect only if you are deemed to be incapacitated, which can take a while to officially be determined (see box "Defining Incapacity" on previous page).

Successor Trustee for Revocable Trust. Should you be deemed incapacitated according to terms you specify in the trust, the successor trustee you name will take over management of assets in the trust. In case of death, the trust becomes "irrevocable," meaning it cannot be altered. Assets in the trust remain private, avoid probate, and are distributed according to your wishes and timeline.

HEALTH

Medical Power of Attorney. You give someone you know well the legal right to make medical choices for you if you are unable. This designation take effect immediately ("durable"), or only after you lose capacity ("springing").

Living Will. You specify what kind of healthcare you wish to receive, or refuse to receive, should you lose consciousness or capacity. Can include a Do Not Resuscitate (DNR) order, which states conditions under which you refuse to accept further medical interventions.

HIPAA Release. Allows healthcare providers to talk to your relatives, friends, or other people you select about otherwise confidential medical details. Keeps loved ones informed about your health and treatment, instead of being kept in the dark.

Some people are loath to assign Power of Attorney because they fear loss of control, manipulation, fraud. Those are all valid concerns. This is why we advise designating a professional fiduciary (legally required to act in your best interest) who knows you and your family well and the scope of your finances and preferences. These requirements can be met by a trusted family attorney, CPA and/or LNWM.

Two key things people often do not realize about Power of Attorney: (1) It does not apply to assets held in a trust; and (2) it ends when you die. Therefore, revocable trusts are often used in combination with Power of Attorney designations.

#2. Should you set up a revocable trust? As a trust company, LNWM has long administered revocable trusts for our clients to accomplish a variety of goals. Typically, assets placed in a revocable trust are controlled by the client at all times. But as successor trustee or co-trustee, LNWM can step in if a client is deemed incapacitated. How incapacity is determined can be specified in the trust terms. It is not unusual to see requirements such as three key people – family attorney, family doctor and spouse/partner – must all agree on incapacity before the successor trustee can take over management of assets.

Regarding Children, Young Adults

#3. If there are soon-to-be young adults in the family, what's their Plan C? The age of 18 or 21 (depending on the state) is when children legally become adults. At that time, parents are no longer considered decision-makers in their child's life, and critical medical and financial information may not be shared with them.

Therefore, as children of clients leave for college or to start their own lives, we often work with them to put in place their own Medical Power to Attorney, HIPPA release, and even a financial Power of Attorney if warranted. Young adults tend to name parents as their representatives but not always. As they gain independence, it may even be advisable for young people to name non-parents (a significant other, a sibling, etc.) to act on their behalf.

WHEN TO UPDATE PLAN C

Incapacity plans can and should change with life circumstances. Some of the major reasons we recommend updates:

New Relationship Status. Marriage, divorce, or new significant other often mean changes to designated representatives.

Starting a Business. You'll need to be prepared to transfer your duties to someone who can manage them effectively.

Birth of a Child. Choosing and naming a temporary guardian; designating Power of Attorney to ensure children are cared for and educated in a way you specify.

Primary Residence in New State. Each state has its own laws related to incapacity planning.

New Diagnosis or Injury. If you learn that your cognitive abilities are likely to decrease rapidly at some point in time, you may want to reconsider whether your financial and medical power of attorney designations are "durable" vs. "springing." You may also want to make different choices about what kind of health care you wish to accept or refuse, especially if you have a terminal illness.

Aging and Frailty. As people get older, medical and personal circumstances can change without warning. It's a good idea every six months to review capacity-related documents to make sure they are both valid and enforceable.

Change in Needs, Desires, Choices. It's natural for people to change their minds about what works for them over time. A sibling or a spouse, for example, may themselves loose capacity or ability to be your medical representative.

A key consideration is children with special needs. When they become adults in the eyes of the law, assets in their name (including money in 529 Plans and custocdial accounts) can disqualify them from various types of government assistance. To provide lifetime financial support for children facing physical or intellectual challenges, we often help clients establish Special Needs Trusts and serve as trustee (assets in the trust are not considered as being owned by the child), as well as 529 ABLE accounts.

#4. Who will be guardian for young children? If clients have young children (under the age of 18 or 21 depending on the state), we strongly advise they name a guardian for their children in their wills as well as naming them as beneficiaries of trusts they put in place. Note that the designations of a will apply only at death. In the rare event that both parents become incapacitated, we work with the family attorney to make sure the state court is petitioned to name the guardian both parents have chosen in their wills.

"Incapacity planning is just as much about designations as documents"

Putting Your Plan in Place

As you can see, incapacity planning is just as much about designations – the people and entities you name to manage your affairs if you cannot – as the documents that allow that to happen. We are here to strategize with you about how to put the most effective plan in place and update it as needed so that your assets and loved ones are protected should the unexpected happen.

ABOUT THE AUTHOR

Monica Padineant, CFP® is a director, client services at Laird Norton Wealth Management. To her work she brings nearly 20 years of exprience in financial services, including the creation of customized and integrated wealth strategies, that include legacy, philanthropic planning and impact investing. As head of LNWM's NextGen Money Group, Monica leads workshops and presentations that help the younger generations in client families assume financial responsibility. She is a CERTIFIED FINANCIAL PLANNER™ professional and holds a bachelor's degree in business administration from the University of Washington.

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