

CONSIDERATIONS IN PLANNING FOR INCAPACITY
NBI Estate Planning Basics Seminar
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I. Estate Planning - What happens if I get sick or injured?

A. What happens if I make no plan for illness or injury?

1. Absence of financial administrator (bill payment; claimant for benefits)
2. Absence of health care manager, authorized representative to speak with health care professionals
3. Guardianship
4. Conservatorship

B. How do I plan for financial incapacity?

1. Living Trust
2. Power of Attorney
 - a. What is it?
 - b. Springing v. durable
 - c. Stevens-Ness v. Lawyer-drafted POA
 - d. Note Oregon law declaring that a power of attorney is not invalid simply due to its age (ORS 127.025)
 - e. Potential for fraud
 - f. Elder Financial Abuse - liability for "innocent bystander"
"An action may be brought under this section against a person for permitting another person to engage in physical or financial abuse if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical or financial abuse." ORS 124.100(4)
 - g. ORS 127.035. Liability limitation - Reasonable reliance
"Any person who reasonably relies in good faith on

the authority of an attorney-in-fact or agent under a power of attorney is not liable to any other person based on that reliance."

C. How do I plan for physical incapacity?

1. Advance Directive

- a. Purpose - appoint health care representative; give end-of-life instructions
- b. Execution - You sign before two qualifying witnesses
- c. Limitations - placement decisions; mental health treatment; ambiguity in the form)

2. POLST (Physician's Orders re Life Sustaining Treatment)

- a. Purpose - strictly to give end-of-life instructions
- b. Execution - Your physician signs the form
- c. Limitations - no representative appointed; typically executed only for the infirm
- d. Benefits - effective instructions for EMTs; Developed by health care providers; less ambiguity

3. Declaration for Mental Health Treatment

- a. Purpose - to authorize a representative to manage mental health issues that your health care representative is not authorized to manage.
- b. Targeted Mental Health Issues - Placement in mental health facility; Convulsive treatment; treatment with psychoactive medications.

4. HIPAA Release Form (Health Insurance Portability and Accountability Act)

5. Nomination of guardian and conservator

D. Can I preserve my assets if I am going to need long-term care?

1. Three ways to pay for long-term care

- a. Long-term care insurance. Standard policies don't pay for it
- b. Private pay: \$167-175 per day
- c. Medicaid

2. What is Medicaid? (It's not Medicare; Needs-based program)

3. Who needs/is eligible for Medicaid? (eligibility requirements: physical; income; assets (couple; single))

4. How do you become financially eligible for Medicaid?

- a. spend-down
- b. asset transfer rules / asset transfer penalties (\$5,360 is current divisor)

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