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How can I plan for possible incapacity in the future?

Defining Legal Capacity

When is a spouse, parent, or loved one no longer able to make decisions for himself or herself?

Legally, the issue is one of capacity. Oregon law defines 'incapacitated' as:

'a condition in which a person's ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirement for the person's physical health or safety or to manage that person's financial resources.'

Manage financial resources, means 'those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income.'

'Incapacitated' persons who are unable to make decisions about their health and safety may require a court-appointed guardian. An inability to manage financial resources may require the appointment of a conservator. In both instances, the rights and the decision-making abilities of the person are substantially reduced.

Are They Really Incapacitated?

A person does not necessarily lack capacity just because he or she is making bad decisions. We all have the right to make bad decisions. One US Supreme Court Justice called it the 'right to folly.' The legal issue, therefore, is not whether a person has made the wrong decision, but the capacity of the person making the decision.

For example, bouncing a few checks is not necessarily evidence of incapacity. On the other hand, overdrafts for the past few months, together with an increased history of unpaid bills, misplaced funds, unexplained gifts, a susceptibility to influence, and related problems may be evidence of an 'inability to manage financial resources.'

Whether a person has the capacity to perform a particular act is examined as of the time of the act. Even if several signs point to mental incompetence, it is possible for a person to have 'lucid intervals' during which he or she has the required capacity to enter into a contract or sign a Will or Trust.

Unfortunately, many people believe that a medical diagnosis of dementia (such as Alzheimer's Disease) is the same thing as a legal finding of incapacity. This is not true. Until a court legally determines that the individual is incapacitated, that person retains the right to make his or her own decisions, including the right to refuse assistance, placement, and medical treatment.



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Planning For Incapacity - What Legal Tools Are Available?

There are several tools used to plan for incapacity:

1. **General Durable Power of Attorney.** A Power of Attorney is a legal instrument used to delegate legal authority to another. The Power of Attorney gives legal authority to another person to make property, financial, and other legal decisions for you. You can give very broad or very limited legal authority. The Power of Attorney is frequently used to help in the event of a person's illness or disability, or in legal transactions where the person cannot be present to sign necessary legal documents.
2. **Revocable Living Trust.** The Revocable Living Trust is an excellent way to plan for decision-making if you become incapacitated. The trust appoints a decision-maker (successor trustee) to manage your assets in case of your incapacity. The trust document can incorporate specific instructions about how funds will be used if you become incapacitated.
3. **Representative Payee.** Representative Payee status can also be arranged to manage government benefits (such as Social Security). Follow this link for more information: <http://www.ssa.gov/pubs/10076.html>.
4. **Advance Directive.** Advance Directives are documents you can sign regarding your wishes about health care decisions and medical treatments given in advance of an incapacitating illness. An Advance Directive then gives direction to your family and physician about what decisions you would want made. Advance Directives are used when you cannot communicate your medical decisions for yourself.
5. **Declaration for Mental Health Treatment.** Another document utilized in Oregon is the Declaration for Mental Health Treatment. This document allows someone, in advance, to select a representative to make mental health treatment decisions, and/or to give specific directions regarding future mental health treatment.
6. **Physicians Order for Life Sustaining Treatment.** The Physicians Order For Life-Sustaining Treatment is an order signed by the doctor at the direction of the ill individual, or his or her health care representative or guardian. The POLST is a tool to implement the ill individual's desires regarding life-sustaining measures. www.oregonpolst.org

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