Helping Clients with Their Financial Decisions

Although we may not always recognize it, financial decisions and tasks are a part of our everyday lives. They range from daily spending habits to more complex financial planning and include everything from checking account balances and paying bills to updating insurance and signing contracts to making investments and retirement planning.

Most adults are capable of making their own financial decisions. However, what if they are alive but are no longer able to manage their own affairs (sometimes referred to as being *incapacitated*)? At that point, someone else will have to step in and act for them.

If a client has an updated estate plan that names a trusted financial decision-maker for periods of incapacity, they have control over who that someone is. Otherwise, the court will appoint someone, and it may not be the person the client would want—or who has their best interests in mind.

Guardianship or Conservatorship versus an Estate Plan

An estimated two-thirds of US adults do not have an estate plan.[1] This effectively means that they also lack an incapacity plan, leaving them without documented, legally enforceable instructions regarding who should manage their affairs if they are unable to do so themselves.

The two main estate planning documents that a client can use to name a financial decision-maker for themselves during a period of incapacity are a *revocable living trust* and a *financial power of attorney*.

- A **revocable living trust** allows the client (also known as the *trustmaker*) to serve as *trustee* of their trust as long as they are alive and have the capacity to manage it. The client also names a *successor trustee* who will take over trust management when the client passes away or is alive but incapacitated.

  One of the main purposes of a revocable living trust is to avoid probate, but it can also be used to avoid another type of court intervention: the appointment of a legal *guardian* (referred to as a *conservator* in some states) to manage an incapacitated person's legal and financial affairs. The trust document can also specify who determines whether the client is incapacitated and contain detailed instructions about how the successor trustee must manage the trust during periods of the trustmaker's incapacity.

- A **financial power of attorney** is another estate planning tool that can help avoid court intervention if incapacity strikes. It gives one or more people (the *agent* or *attorney-in-fact*) the authority to act on behalf of another person (the *principal*) regarding their financial matters.

  A financial power of attorney is highly flexible. It can include a statement describing how incapacity will be determined and who determines it; it can allow the agent to act only when the principal's incapacitation is confirmed (in some states), rather than allow the agent to act as soon as the client signs it; it can specify the powers granted to the agent; and it can be

[1] Rachel Lustbader, *2024 Wills and Estate Planning Study*, Caring.com (July 30, 2024), https://www.caring.com/caregivers/estate-planning/wills-survey.

limited or long-lasting in duration. Like a revocable living trust, a financial power of attorney eliminates the need for court-appointed guardianship or conservatorship.

Why should guardianship or conservatorship be avoided? Ultimately, it is about allowing the client to be in control. An estate plan lets a client choose who will handle their finances and property if they are unable to do so themselves. Leaving this choice up to the court makes it a matter of state law and judicial discretion. Another reason to try to avoid court-ordered guardianship or conservatorship is that the majority of the details of the case will be public, so details about someone's personal life, health, and finances could be shared openly. By planning ahead with legal documents such as a power of attorney or a trust, families can often keep these matters private and handle them without going through the court system. It is a way to protect both privacy and control over important decisions.

Factors When Choosing a Financial Decision-Maker

When choosing a financial decision-maker, clients should consider factors such as trustworthiness, financial knowledge, and the ability to handle responsibilities under pressure. The person they select should have a strong understanding of the client's values and priorities, be organized, and communicate effectively with other key parties, such as family members or advisors. Additionally, they should be available and willing to serve in the role, as it may require significant time and effort, particularly during complex situations.

Naming co-trustees and co-agents can grant joint fiduciary powers that may provide checks and balances. However, the benefits of these checks and balances should be weighed against the growing trend of banks not readily accepting documents authorizing co-decision-makers.

If nobody in the client's immediate circle of friends and family seems like a good candidate, a professional trustee or agent, such as an attorney or financial advisor, can be chosen. However, many professionals are hesitant about serving in the role of an agent under a durable power of attorney, so the client may want to consider other professionals, such as professional caregivers or fiduciaries.

The bottom line is that estate planning lets clients manage their incapacity in advance, in the manner that is best for them, their finances, and their family.

Having the ability to make their own financial decisions is something they may have taken for granted, and naming financial decision-makers is an area of their estate plan they may have overlooked. However, advisors can offer guidance that gives them peace of mind that the right people and provisions are in place—just in case they are needed.