

WILLMS, S.C.

LAW FIRM

MEMORANDUM

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**TO:** Clients and Friends of Willms, S.C.

**FROM:** Jessica A. Bourke

**DATE:** January 6, 2011

**RE:** How Your Estate Plan Protects Against Incapacity

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**Introduction**

According to the U.S. Census Bureau's 2010 Statistical Abstract, a baby born in 2010 can expect to live beyond 78 years of age. With advances in medical technology, cures and treatments are allowing many of us to live very long lives. Our clients have a good understanding that planning for death needs to happen well before death is expected. Wills and trusts are great tools for ensuring that your affairs are taken care of in the manner you direct after you pass away.

In addition, our estate plans are designed to protect your personal and financial affairs in the event that you become incapacitated before death. As we live longer, we are more likely to experience dementia and other types of ailments that may leave us unable to manage our affairs independently. Some of these conditions develop with age, but other types of incapacity result from simple accidents or unexpected illnesses. Even if you have not considered these possibilities, your estate plan does.

**What An Estate Plan Does to Plan for Incapacity**

Our standard estate plans contain several documents essential to your personal and financial welfare, regardless of your age or net worth. These documents include a Durable Power of Attorney, a Power of Attorney for Health Care, and a Medical Records Release and Authorization. For some clients, this also includes a Declaration to Physicians.

Consider the possibility that you are in an accident tomorrow, and you are in the hospital unable to communicate. In addition, perhaps your spouse (if you have one) is in the same situation, or has previously passed away. How are your mortgage and other monthly bills going to get paid? Who will have the power to talk to your doctors and make medical decisions? If the person who steps in to make these decisions needs assistance or advice from an attorney, how will he or she pay for legal fees? What if more than one person attempts to act on your behalf, and they disagree on what to do?

### Durable Power of Attorney

Your Durable Power of Attorney appoints a person to conduct business on your behalf in the event that you are alive but unable to manage your own financial affairs. A quick look at this document will indicate an extensive list of financial powers given to an agent of your choosing (and an alternate agent, if selected).

Generally there are two main types of durable powers of attorney. A “springing power” means that the power only becomes effective upon disability or incompetency. A “non-springing power” means that the document becomes effective immediately upon valid execution. Under the new Wisconsin Statutes Chapter 244, a power of attorney executed in Wisconsin will be immediately effective unless otherwise stated in that document.<sup>1</sup>

### Power of Attorney for Health Care

Your Power of Attorney for Health Care nominates who you would like to have in charge of your medical decisions, as well as numerous other decisions listed in your particular document. These may include deciding what types of treatment to use, or deciding what type of facility in which you would like to reside. Some of our clients also have a Declaration to Physicians, which states your intentions regarding artificially prolonging your life. Other clients prefer to delegate this decision to their health care agent.

### Medical Records Release and Authorization (HIPAA Release)

Your HIPAA Release and Authorization allows the person you choose as your health care agent to have access to your medical records before making a medical decision on your behalf. Due to federal law protecting the privacy of patient records, even a well-meaning relative seeking your records in order to make an informed medical decision may not be granted access.

Additionally, many of our clients set up revocable trusts and transfer their assets to it during their lifetimes. In the case that you become incapacitated, the trustee of your trust is able to manage the assets in the trust. Clients who have these documents in place are well-prepared for the possibility of incapacity.

### **Establishing a Guardianship for an Incapacitated Individual**

For individuals who experience incapacity without having the proper legal documents in place, a guardianship may become necessary. In Wisconsin, a guardianship means a guardian is appointed by a court to serve as a decision maker for a person (“ward”) who is found to be incompetent. A “guardian of the person” makes personal decisions such as health decisions and living arrangement decisions, while a “guardian of the estate” makes financial and other property decisions.

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<sup>1</sup> Wis. Stat. § 244.09.

A guardian will be able to do many of the same things that an agent would be able to do under a Durable Power of Attorney, Health Care Power of Attorney, and HIPAA Release. However, we do not recommend this approach for several reasons:

#### Privacy

Powers of attorney documents can be established without anyone except your attorney and your nominated agents knowing what you are doing. A guardianship, on the other hand, is a court-supervised appointment. A court will have to make the initial determination that you are sufficiently incapacitated. This means providing notice to all “interested persons,” including your family members and the county in which you reside. A doctor will have to examine you and report to the court. After the guardianship is established, the guardian will have to file inventories to inform the court of your financial status, and will also have to update the court on your physical condition.

Major decisions that a guardian may make, like selling real estate, will require additional permission from the court. In contrast, an agent under a Durable Power of Attorney would be able to perform this task simply by showing the documents you signed appointing him or her as your agent.

#### Expense

Establishing and maintaining a guardianship requires substantial financial and time expenditures. During the petition stage, a guardian-ad litem is appointed to determine whether it is in your best interest to have a guardian, and attorneys generally need to be consulted to represent the petitioner. Both of these people are paid out of your assets. Additionally, it costs money to go to court or file anything with the court. The expense of all of those annual filings and accountings will accumulate over time.

#### Timeliness

The proper documents prepared ahead of time are available for use by your appointed agents as soon as they are needed. In contrast, it can take as long as 90 days for a guardian to be appointed after the initial petition is filed. In the meantime, your bills may have to go unpaid, and doctors are legally able to refuse to share your medical records with someone trying to make a decision on your behalf.

#### Self-Determination

Most importantly, having your intentions in writing before incapacity allows you to determine who you want making your decisions and what decisions you want them to be able to make. When appointing a guardian, a court uses a “best interest” standard that cannot take into account which family member you trust the most, or the fact that you might want one person making financial decisions and another person making medical decisions. Having your documents in place prevents the

dilemma of your family members trying to determine your wishes without your input.

**Summary**

Many people still view estate planning as only necessary for someone with children, or someone elderly, or someone with vast financial assets. However, incapacity can set in at any time. We certainly assist individuals who need to petition for guardianship, but it is like a doctor assisting a patient only after a serious illness has set in. We prefer to help clients take preventative measures that will be more cost effective and painless in the long run.

Please let us know if you have any questions about powers of attorney or establishing a guardianship for a loved one. If you know that your estate plan is lacking one or more of the documents described above, you may want to schedule an appointment to review and update your estate plan.

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