

Planning After the Diagnosis



Imagine that you have just received a medical diagnosis that is likely to result in your incapacity or death in the near future. As your mind reels, you begin to worry about who will help you if you lose the ability to make your own decisions, as well as who will be there to wrap up your affairs when you die. It is time for you to establish (or update) your estate plan. So long as you remain competent, it is not too late to put your affairs in order.

To plan for your potential incapacity, your attorney will likely recommend that you establish a Health Care Proxy with either living will language or a separate Medical Order for Life-Sustaining Treatment (“MOLST”). In a Health Care Proxy, you name someone to make health care decisions for you if you cannot make them for yourself. Living will language addresses your end-of-life decisions and usually provides that you do not want extraordinary medical procedures used to keep you alive when there is no likelihood that you will recover. Your proxy will need to make decisions as you would, so it is especially important to choose someone who will be able to honor your decisions. Rather than including living will language in your proxy, you may establish with your physician a MOLST, which contains actionable medical orders that are effective immediately based upon your current medical condition.

To further plan for potential incapacity, your attorney will likely recommend that you establish a Durable Power of Attorney, in which you designate someone to make your financial decisions. The powers granted will usually be active once the document is signed, but it is expected that these powers will not be used unless you desire assistance with, or are unable to handle, your financial affairs. The Durable Power of Attorney is a very powerful document. In most cases, the person you name will be authorized to handle your real estate, life insurance, retirement accounts, other investment accounts, bank accounts, and any other matters involving your money. As such, you should choose someone that you trust without reservation.

As everyone will eventually pass away, every adult should have a Will, but an adult with a terminal diagnosis will likely find the need more pressing. A Will directs the distribution of your probate estate after your death. Your probate estate consists of assets held in your name alone that do not have a named beneficiary. If you should pass away without a Will, then your estate will pass as directed by the Commonwealth’s intestacy law, which could be to people you would not want to receive your estate.

A common misconception is that you do not need a Will if everything you own is held jointly or has a designated beneficiary. Sometimes, in a common accident with the primary owner, the joint owner passes away first. It is also common for beneficiaries to

predecease the account owner. In either case, there would be no surviving joint owner or beneficiary, and then all of the assets would need to be probated, which is when the Will would control.

A Will is also necessary to designate your Personal Representative, who will gather your probate assets, pay your valid debts, and make distributions to your beneficiaries as set forth in your Will or to your intestate heirs if you do not leave a Will. If need be, you can also designate a guardian in your Will for any minor children you may leave behind. By not making a Will, you forfeit your ability to make these designations and to direct the disposition of your property.

As you may be facing medical debt, if you are the owner of your primary residence, then your attorney would also want to ensure that you have a Declaration of Homestead properly recorded in the Registry of Deeds. Once recorded, this declaration declares your principal residence to be your homestead and will protect the equity in your home up to at least \$1,000,000 from attachment, seizure, execution on judgment, levy, or sale for the payment of debts. If you have not recorded a declaration, you will have only \$125,000 of automatic equity protection. Note well that, in addition to some other specific exceptions, a Declaration of Homestead will not protect your real estate from nursing home costs or tax liens.

By establishing an estate plan, you can help your loved ones avoid expensive legal hassles. Of course, individuals with more complicated estates may require different or additional documents to fully protect their interests and their beneficiaries. Thus, after the diagnosis, it is especially important to see your estate planning attorney.

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