

Planning for Periods of Disability



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I drafted many estate plans in the years when I practiced law, almost all of them geared toward dictating who was to get what upon the death of a loved one. The plans that stand out in my mind, however, are the ones that answered a question that was more likely to come up each year and for which there were fewer guardrails and/or customs to follow: what happens when a person becomes disabled?

Disability: as important to plan for as death

Planning for disability is important because, at every age, you are more likely to become disabled than you are to pass away. It is also true that the majority of disabilities come from illnesses like heart disease and cancer, not from workplace accidents. This means that a person with a desk job is just as likely to be disabled as a person doing physical labor.

The financial impact of disability

Some individuals with disabilities are able to go on with their lives largely unaffected (I injured a nerve that prevents my foot from working properly over five years ago and have never missed work due to the condition), while others may become totally incapacitated. The Social Security system has a disability program that pays benefits only to those whose disability dramatically affects their lives. The definition from the program is a helpful one in defining the parameters as we seek to plan for periods of disability:



"A person is disabled under the Act if they can't work due to a severe medical condition that has lasted, or is expected to last, at least one year or result in death. The person's medical condition(s) must prevent them from doing work that they did in the past, and it must prevent them from adjusting to other work."

The Social Security definition is at one end of the spectrum, representing near total disability (that one must have for a year before applying for benefits), but the spectrum extends in the other direction also. Temporary disabilities, which may range from minor to severe, are far more common in younger individuals — and these must be planned for as well. Short-term disabilities may be something as brief as being unable to make decisions on the day of a surgery due to the effects of anesthesia; or being out of the country and unable to access a means of communication. Most disability insurance

policies will require a temporary disability to persist for at least 30 days prior to paying benefits, so remember that just because you are disabled does not mean you are immediately eligible for benefits.



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Legal strategies for disability planning

The legal world deals with disability with two primary documents: trusts and powers of attorney. A power of attorney is the document in which an individual names another party to make decisions on his or her behalf in the event he or she is disabled or unable to communicate. Powers of attorney come in two main types:

- A **springing power** becomes effective upon the occurrence of some event (usually a doctor declaring an individual is disabled).
- A **durable power** is effective as soon as it is signed.

Your attorney can advise you on which type is appropriate for your situation. Many financial institutions have their own powers of attorney, so it is always good to check in with Schwab, Fidelity, E-Trade or whomever has custody of your accounts to see if there is a separate power of attorney for you to sign.



Trusts are a more comprehensive strategy than powers of attorney to plan for disabilities, as the grantor of a trust is able to outline what they would like their care to look like upon the occurrence of a disability. Once the trust is funded, the Trustee (not the power of attorney) controls distribution of assets during a disability period. This is one of the primary reasons that individuals (and couples) put together trusts during their lifetime — so that, when a disability occurs, the administration of the affairs is handled privately and quickly.

To put this in a little perspective, I once had a client indicate in her trust that — were she to be disabled — she was to be cared for at a facility that would feed her a vegan diet. This kind of specificity cannot generally be drafted into a power of attorney, while it is fairly common for trusts to have provisions that outline spending during a disability. Without a trust, this individual's family likely would have needed to get a letter from doctors and/or decrees from judges to prove the disability, and then they would have to hope that the agent appointed under the power of attorney knew about her dietary restrictions.

Advance directives

There are two other legal documents that often come into the disability conversation. The first is a medical power of attorney and the second is the advance directive (also sometimes called a Living Will). Some states (like Oregon) have combined this into a single form. The medical power of attorney dictates who can make medical decisions on your behalf in the event you cannot communicate, while the advance directive lays out your wishes for end-of-life care related to tube feeding and the use of ventilators.

Our planning team can run scenarios for you showing how your financial life would be impacted by a disability; please reach out to our team if you would like to have that dialogue.

We generally make referrals out to two specific areas when questions arise about disability — insurance agents can help you understand how disability policies work, and estate planning attorneys can help you build the right structure so that things go as you want them to in the event you are disabled. Please contact our team if you have questions about disability planning or if you would like the names of some qualified agents or attorneys.

(Full disclosure: Arnerich Massena sells neither legal advice nor insurance products; however, we are happy to share the names of some of the professionals that our clients have utilized to address these areas).

