BANCROFT

FOR ADVISORS AND THEIR CLIENTS

Incapacity Planning Guide

What happens when you cannot make decisions for yourself. The documents that protect you, the conversations that matter, and the plan that keeps your family out of court.

ABOUT THIS GUIDE

This guide is provided for informational and educational purposes only. It does not constitute legal, tax, medical, or financial advice. Incapacity planning involves state-specific laws and individual medical circumstances that require professional guidance. Consult with an attorney, financial advisor, and healthcare provider before making decisions about incapacity planning.

CONTENTS

In this guide

Why Incapacity Planning Matters More Than You Think

Most people think of estate planning as preparation for death. But for adults under 65, incapacity is statistically more likely than death. A car accident, a stroke, a traumatic brain injury, early-onset dementia, a surgical complication. Any of these can leave you unable to manage your finances, communicate your medical wishes, or make decisions for yourself.

When that happens, two questions need immediate answers: Who manages your money? And who talks to your doctors? If you have not designated someone in advance, the answers come from a judge, not from you.

1 in 3
ADULTS OVER 65 WILL EXPERIENCE COGNITIVE IMPAIRMENT

68%
OF ADULTS HAVE NOT DOCUMENTED THEIR END-OF-LIFE WISHES

$108K
AVERAGE ANNUAL COST OF NURSING HOME CARE IN THE UNITED STATES

Incapacity planning is the part of estate planning that protects you while you are alive. It ensures that someone you trust has the legal authority to act on your behalf, that your medical wishes are documented and respected, and that your family does not have to go to court to take care of you.

> **Incapacity is not just an aging issue.** A 35-year-old in an accident needs a power of attorney just as urgently as an 80-year-old with Alzheimer's. The difference is that the 80-year-old's family expects it. The 35-year-old's family is blindsided. The documents described in this guide protect adults of every age.

The Three Documents That Protect You

Incapacity planning rests on three legal documents. Each one addresses a different dimension of the problem: your money, your medical decisions, and your end-of-life wishes.

1. Durable Financial Power of Attorney

This document names an agent to manage your finances if you cannot. "Durable" means it remains effective during incapacity, which is precisely when you need it. Without it, no one can access your bank accounts, pay your bills, manage your investments, file your taxes, or sell property to fund

your care.

WHAT YOUR AGENT CAN DO

- Access and manage bank, brokerage, and retirement accounts
- Pay bills: mortgage, utilities, insurance, medical expenses, credit cards
- File income tax returns and communicate with the IRS
- Manage real estate: pay property taxes, maintain insurance, collect rent
- Apply for government benefits: Medicare, Medicaid, VA benefits, Social Security disability
- Operate or manage a business you own
- Hire professionals: attorneys, accountants, financial advisors

2. Healthcare Power of Attorney

This document names an agent to make medical decisions when you cannot communicate your own wishes. This person should understand your values, know your preferences, and be willing to advocate for what you would want, even under pressure from family members or physicians who may disagree.

WHAT YOUR AGENT CAN DO

- Consent to or refuse medical treatment, surgery, and procedures
- Choose or change physicians, hospitals, and care facilities
- Authorize or refuse diagnostic tests and medications
- Make decisions about pain management and palliative care
- Access your medical records and communicate with your healthcare team
- Arrange for home health care, assisted living, or nursing home placement
- Make end-of-life decisions consistent with your advance directive

3. Advance Directive (Living Will)

This document records your wishes about end-of-life care before you need it. It speaks for you when you cannot speak for yourself. It addresses specific scenarios: terminal illness, permanent unconsciousness, and conditions where recovery is not expected.

The advance directive does not replace the healthcare agent. It guides the agent. When a situation arises that the directive specifically addresses, the agent follows those instructions. When a situation arises that the directive does not cover, the agent uses their judgment based on your known values.

These documents must be signed while you are competent. A power of attorney can only be created by someone who has the legal capacity to sign it. If you wait until after a diagnosis of dementia, a serious accident, or a stroke, it may be too late. The court may determine that you lacked capacity when you signed, rendering the documents invalid. The time to plan is while you are healthy.

How Incapacity Is Legally Determined

The legal definition of incapacity varies by state, but the general standard is the inability to understand and manage one's own affairs. How incapacity is established depends on the type of document:

For a durable (immediate) power of attorney

A durable POA is effective immediately upon signing, so no formal determination of incapacity is required. The agent can act at any time, though the expectation is that they will not act unless the principal cannot manage their own affairs. The agent's judgment and good faith determine when to step in.

For a springing power of attorney

A springing POA takes effect only when incapacity is formally established. The document defines what constitutes incapacity and who determines it. The most common trigger: a written certification from one or two physicians that the principal is unable to manage their financial or personal affairs. Some documents use a specific cognitive test or medical standard.

For a healthcare power of attorney

A healthcare POA typically activates when the principal's attending physician determines that the principal cannot make or communicate informed healthcare decisions. This is a clinical determination, not a legal one. It can change: if the principal regains the ability to communicate, their authority over their own medical decisions returns.

Intermittent capacity. Some conditions (delirium, medication effects, early-stage dementia) cause capacity to fluctuate. A person may be lucid in the morning and confused in the afternoon. During lucid periods, the principal retains the right to make their own decisions. The agent should defer to the principal's expressed wishes whenever the principal is capable of forming them.

What Happens Without a Plan

If you become incapacitated without a power of attorney, your family has no legal authority to manage your finances or make medical decisions on your behalf. The only option is to petition a court for guardianship (over your person) or conservatorship (over your finances). Some states use different terminology, but the process is fundamentally the same.

THE GUARDIANSHIP PROCESS

1. A family member or interested party files a petition with the probate court, alleging that you are incapacitated and need a guardian or conservator.
2. The court appoints an attorney to represent you (called a "guardian ad litem" in many states). You may also hire your own attorney to contest the petition.
3. A hearing is held. Medical evidence is presented. Family members may testify. The judge determines whether you are legally incapacitated.
4. If the court finds incapacity, it appoints a guardian and/or conservator. This may or may not be the person your family requested.
5. The guardian or conservator must report to the court regularly: annual accountings, care plans, and requests for approval of major decisions.
6. The arrangement continues until the court determines you have regained capacity, or until you die.

This process typically costs $5,000 to $15,000 in legal fees, takes weeks to months, is entirely public (anyone can attend the hearing and review the filings), and removes your autonomy. The court, not your family, has the final say over your care and your money.

> **Guardianship is a last resort, not a plan.** Courts themselves describe guardianship as "the most restrictive form of intervention" in a person's life. It strips legal rights. It requires ongoing court supervision. And it can be contested by family members who disagree about who should serve. A power of attorney, signed while you are competent, avoids all of this.

Guardianship vs. Power of Attorney

	POWER OF ATTORNEY	COURT-APPOINTED GUARDIANSHIP
Who decides?	You choose your agent while competent	A judge appoints someone after you are incapacitated
Cost to establish	$300 - $2,000 (part of estate plan)	$5,000 - $15,000+ in legal fees
Time to establish	Immediate (sign the document)	Weeks to months (court proceedings)
Privacy	Completely private	Public court proceeding and filings
Court supervision	None (unless abuse is alleged)	Ongoing: annual reports, accountings, court approval for major decisions
Flexibility	Tailored to your wishes in the document	Court determines scope of authority
Revocation	You can revoke it at any time while competent	Requires a court proceeding to modify or terminate
Family conflict	Reduced: you made the choice	Increased: family members may contest the appointment

HIPAA and Medical Privacy

The Health Insurance Portability and Accountability Act (HIPAA) protects your medical privacy. It also creates a barrier: without proper authorization, healthcare providers cannot share your medical information with anyone, including your spouse, your adult children, or your financial advisor.

This means that in a medical emergency, your family may not be able to get basic information about your condition, your treatment options, or your prognosis. They may be told: "We cannot discuss the patient's information with you."

HOW TO SOLVE IT

1. HIPAA Authorization. A standalone document that names specific people who are authorized to receive your medical information. Include your spouse, adult children, healthcare agent, and anyone else who may need to communicate with your providers.
2. Healthcare Power of Attorney. Most well-drafted healthcare POAs include HIPAA authorization language, giving the agent access to medical records. But the POA only activates when you are incapacitated. A standalone HIPAA authorization provides access even when you are conscious but unable to communicate (for example, while sedated after surgery).
3. Provider-specific forms. Some hospitals and physician offices have their own HIPAA release forms. Signing these in advance ensures that your designated contacts can access your information at that specific facility.

> **Sign a HIPAA authorization today.** Of all the documents in estate planning, the HIPAA authorization is the simplest, the fastest to execute, and the one most likely to be needed first. It takes five minutes. It requires no attorney. And it prevents the agonizing scenario of your family standing in a hospital hallway, unable to learn what is happening to you.

Medical Decisions Your Agent May Face

If you name a healthcare agent, they may be asked to make decisions about the following. Understanding these in advance helps you communicate your wishes clearly.

Life-sustaining treatment

Mechanical ventilation (breathing machines), artificial nutrition and hydration (feeding tubes and IV fluids), dialysis, and cardiopulmonary resuscitation (CPR). Your advance directive should state whether you want these measures continued, and under what circumstances you would want them withdrawn.

Do Not Resuscitate (DNR) orders

A DNR instructs medical personnel not to perform CPR if your heart stops or you stop breathing. This is a medical order, not an estate planning document. But your advance directive can express your wish for a DNR, and your healthcare agent can request one from your physician.

Palliative care and hospice

Palliative care focuses on comfort and quality of life rather than curative treatment. Hospice is palliative care for patients with a terminal prognosis (typically six months or less). Your agent may need to decide when to transition from aggressive treatment to comfort care. This is often the most difficult decision a healthcare agent faces.

Organ and tissue donation

If you wish to be an organ donor, register through your state's donor registry and note your wishes in your advance directive. Your healthcare agent can also authorize donation if you have not registered, unless you specifically prohibited it.

Mental health treatment

Some states allow a separate psychiatric advance directive that governs mental health treatment, including hospitalization, medication, and electroconvulsive therapy. If mental health is a concern, discuss this with your attorney.

> **Your values matter more than specific instructions.** No document can anticipate every medical scenario. What matters most is that your healthcare agent understands your values: What does quality of life mean to you? At what point would you not want to be kept alive? How do you feel about pain versus consciousness? These values guide your agent through situations your advance directive does not specifically address.

How to Have the Conversation

Naming someone as your agent is not enough. They need to understand your wishes before the crisis arrives. This conversation is uncomfortable, but it is far less painful than forcing your agent to guess while you lie in a hospital bed.

QUESTIONS TO DISCUSS WITH YOUR HEALTHCARE AGENT

1. What does quality of life mean to you? Can you describe a condition under which you would not want to continue living?
2. How do you feel about being on a ventilator? For how long would you want to remain on one if recovery was uncertain?
3. If you could not feed yourself and had no reasonable prospect of recovery, would you want a feeding tube?

4. If your heart stopped, would you want CPR? Under what circumstances?
5. Do you want to die at home, in a hospital, or in a hospice facility?
6. Are there specific religious, spiritual, or cultural beliefs that should guide medical decisions?
7. Is there anyone whose opinion should be considered? Anyone whose opinion should not override yours?
8. Would you want aggressive treatment if it extended your life but significantly reduced its quality?

QUESTIONS TO DISCUSS WITH YOUR FINANCIAL AGENT

1. Where are your accounts? Bank, brokerage, retirement, insurance. Give your agent a list or access to your password manager.
2. What bills need to be paid, and how? Mortgage, utilities, insurance. Are they on autopay?
3. Do you have long-term care insurance? Where is the policy?
4. What is your threshold for spending on care? Would you want to spend down all assets to remain at home, or would you prefer a facility to preserve assets for your family?
5. Do you own a business that needs management if you are incapacitated?

> **Write it down.** After having these conversations, write a summary of what you discussed and give a copy to your agent. This is not a legal document. It is a reference that helps your agent remember what you said when the moment arrives and emotions are high. Keep it with your advance directive.

Long-Term Care Planning

Incapacity often leads to a need for long-term care: assistance with daily activities such as bathing, dressing, eating, and moving. This care is expensive, and the financial burden is the most common reason families are forced to liquidate assets or go to court.

THE COST OF CARE

TYPE OF CARE	NATIONAL MEDIAN ANNUAL COST (2024)	NOTES
Home health aide	$75,500	Based on 44 hours/week. Part-time is proportionally less.

TYPE OF CARE	NATIONAL MEDIAN ANNUAL COST (2024)	NOTES
Adult day care	$22,100	Daytime supervision and activities. Does not include overnight care.
Assisted living facility	$64,200	Room, board, and personal care. Does not include memory care.
Nursing home (semi-private)	$104,000	Full medical and personal care. Memory care units cost more.
Nursing home (private room)	$120,400	Same as above with a private room.

HOW CARE IS PAID FOR

Personal savings and investments

Most people pay out of pocket initially. A well-structured financial plan, coordinated with your financial advisor, can help determine how long your assets can sustain care at different levels.

Long-term care insurance

Policies pay a daily or monthly benefit for qualifying care. Premiums are most affordable when purchased in your 50s or early 60s. Policies vary significantly in coverage, benefit period, elimination period, and inflation protection. Your financial advisor and insurance agent can help evaluate options.

Medicare

Medicare covers short-term skilled nursing care (up to 100 days) following a qualifying hospital stay. It does not cover custodial care (help with daily activities), which is what most long-term care actually involves. Medicare is not a long-term care solution.

Medicaid

Medicaid covers long-term care for individuals who meet strict income and asset limits. Qualifying typically requires spending down assets to near-zero (the exact threshold varies by state). Medicaid planning is a specialized area that involves asset protection strategies, look-back periods (typically five years), and state-specific rules. An elder law attorney should be consulted.

> **The five-year look-back.** Medicaid reviews all financial transactions from the five years preceding the application. Gifts, transfers to family members, and certain trust transactions during this period can result in a penalty period during which Medicaid will not pay for care. This is why Medicaid planning must begin well in advance of the need. Last-minute asset transfers are penalized.

Veterans Affairs benefits

Veterans and their surviving spouses may qualify for Aid and Attendance, a VA pension supplement that helps pay for long-term care. Eligibility depends on military service, disability rating, and financial need. The application process can take months. Start early if the veteran may need care.

Action Steps

Incapacity planning is not a single task. It is a set of actions that should be completed now and reviewed periodically.

DO NOW

- [ ] Sign a Durable Financial Power of Attorney naming a trusted agent and a backup.
- [ ] Sign a Healthcare Power of Attorney naming a trusted agent and a backup.
- [ ] Sign an Advance Directive documenting your wishes about life-sustaining treatment, resuscitation, and end-of-life care.
- [ ] Sign a HIPAA Authorization naming every person who should be able to access your medical information.
- [ ] Have the conversation with your healthcare agent. Discuss your values, your fears, and the specific decisions described in this guide.
- [ ] Have the conversation with your financial agent. Share account information, bill-payment routines, and your preferences for spending on care.
- [ ] Register your POA with financial institutions. Submit copies to your bank, brokerage, and insurance companies in advance.
- [ ] Give copies of healthcare documents to your physicians. Your primary care doctor and any specialists should have your Healthcare POA, Advance Directive, and HIPAA Authorization on file.

REVIEW ANNUALLY

- [ ] Confirm your named agents are still willing and able to serve.
- [ ] Review your advance directive. Have your wishes changed?
- [ ] Update your HIPAA authorization if family circumstances have changed.
- [ ] Review long-term care insurance coverage and premiums.
- [ ] Discuss long-term care preferences with your financial advisor.

Glossary

Advance Directive (Living Will)

A document that records your wishes about end-of-life medical treatment, including life support, resuscitation, and pain management.

Capacity

The legal ability to understand the nature and consequences of your decisions. Required to sign a power of attorney or other legal document.

Conservatorship

A court-appointed arrangement in which a conservator manages the finances of someone who has been found incapacitated. Some states use "guardianship" for both personal and financial matters.

DNR (Do Not Resuscitate)

A medical order instructing healthcare providers not to perform CPR if the patient's heart stops or they stop breathing.

Durable Power of Attorney

A power of attorney that remains effective even after the principal becomes incapacitated. "Durable" is the critical word.

Guardianship

A court-appointed arrangement in which a guardian makes personal and medical decisions for someone who has been found incapacitated.

HIPAA

Health Insurance Portability and Accountability Act. Federal law that protects medical privacy and restricts who can access your health information.

Hospice

Palliative care for patients with a terminal prognosis, focused on comfort rather than cure. Typically covered by Medicare when life expectancy is six months or less.

Incapacity

The inability to manage one's own affairs due to illness, injury, cognitive decline, or disability.

Medicaid

A joint federal-state program that covers long-term care for individuals who meet strict income and asset limits. Requires a separate eligibility determination from Medicare.

Palliative Care

Medical care focused on relieving symptoms and improving quality of life, rather than curing the underlying condition. Available at any stage of illness.

Springing Power of Attorney

A power of attorney that takes effect only when a specific triggering event occurs, typically physician-certified incapacity.
