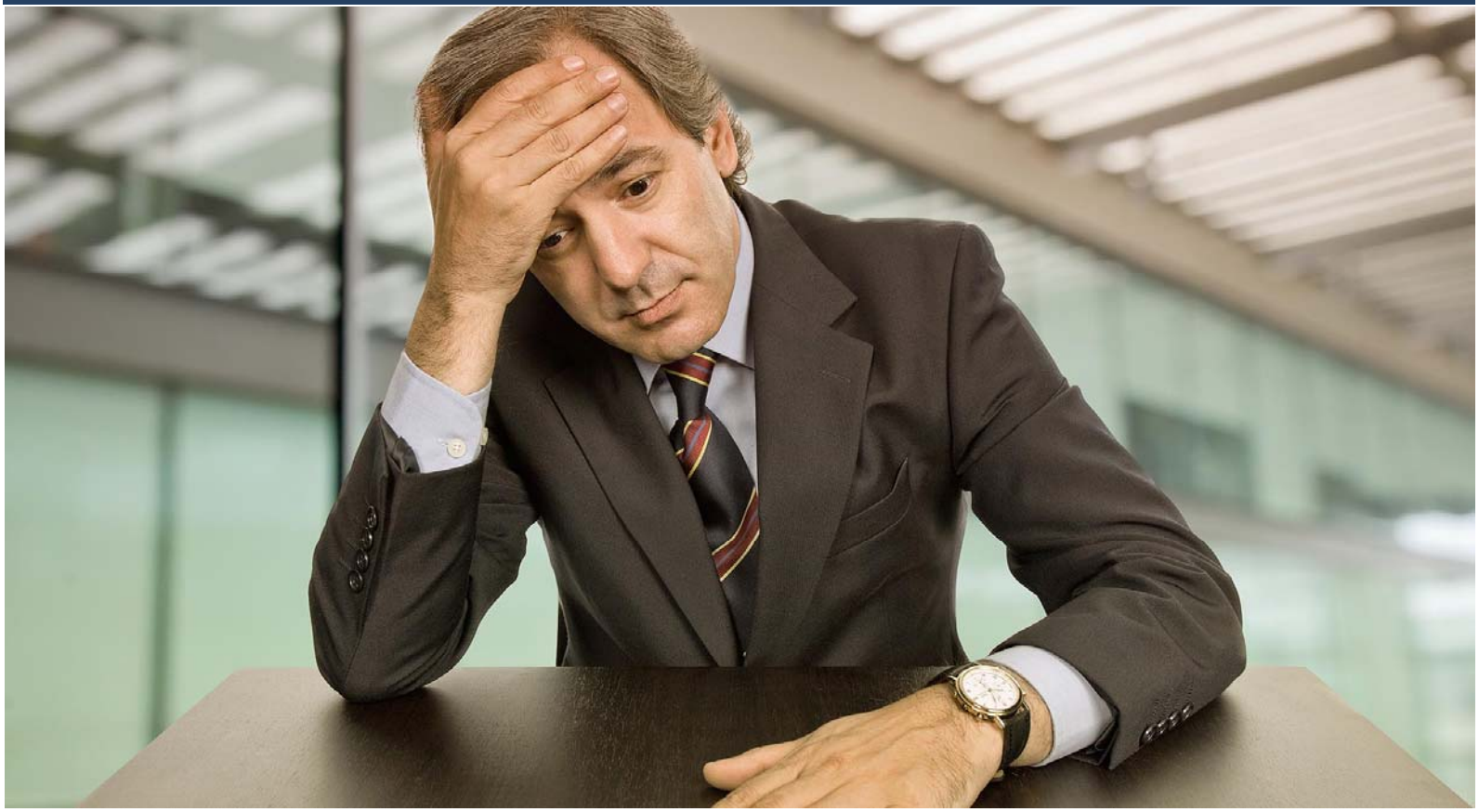
The Nightmare of Living Probate



WHY CREATE AN ESTATE PLAN?

For most of our lives the greatest risk to our well-being isn't death. It's the ever-growing likelihood of becoming seriously ill or injured.

> *As Carolyn Henderson* anxiously watched her husband's flickering vital signs on the Intensive Care Unit monitor, she considered the irony of their circumstances. When she and Kirk planned how they might spend their thirtieth wedding anniversary, this sickbed vigil was the farthest thing from their minds. But then on the very day they planned to celebrate 30 years of marriage, Kirk Henderson, a robust, health-conscious, ex-pro football player in his mid-fifties, unexpectedly suffered a stroke. As the hours ticked by with no sign that Kirk would regain consciousness, Carolyn considered for the first time that he might not pull through.*
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> *Although Kirk didn't die, he hasn't fully recovered either. Today, two years after his stroke, the aftermath of his illness has rendered him barely able to walk or use his right arm. His speech is slurred, his thinking processes are still muddled, and he will probably need physical therapy for the rest of his life. Carolyn tries not to dwell on the remnants of her husband's illness, emphasizing instead on the miraculous progress he has made in so many areas. But just when she starts to think things are returning to normal, she's reminded that in the eyes of the law, her husband is as good as dead.*
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> *Declared mentally incompetent in a court of law, Kirk Henderson no longer has the right to make any decisions for himself. He can't sign a check, conduct a financial transaction, or even decide how he wishes to be cared for.*

When they least expected it, the Hendersons discovered what insurance companies have been trying to tell us for years. For most of our lives, the greatest risk to our well-being isn't death. It's the ever-growing likelihood of becoming seriously ill or injured. And when illness or injury make us unable to manage our affairs for ourselves, we may face an ordeal nearly as debilitating as our disability itself. It's a legal process commonly called Living probate, and for those who must endure it, it is often a living nightmare.

WHAT IS LIVING PROBATE?

Many people know that probate occurs when someone dies with a will in force, or intestate—without a will. This legal process is so-called death probate, and it establishes the validity of the deceased's will (or when there is no will, determines the deceased's heirs). Probate also identifies and values the assets of the deceased; ensures that creditors are paid off; sees to it that the courts and attorneys get their fees for handling the probate; and lastly, distributes to the heirs whatever remains of the estate after all debts and expenses have been paid. As you may have guessed, probate is often a very costly, time-consuming, bureaucratic and public process.

What most Americans don't know, however, is that they may find themselves in the midst of probate while they're still alive. This living probate ensnares many of those who suddenly find themselves unable to make personal or financial decisions as a result of a serious injury or debilitating illness.

Few can argue with the idea behind living probate. Its goal is to protect an individual who can no longer protect himself or herself, and it seeks to identify the person or persons best suited to take over the individual's financial affairs and personal care. That's the theory. But in practice, living probate can be a costly, time-consuming, bureaucratic and public process that often achieves an outcome vastly different from what the individual would have wanted—just like death probate.

Although it varies from state to state, living probate usually involves these steps:

- Someone—usually a spouse, child or parent—must file court papers to have an individual declared legally incompetent.
- Interested parties—such as family and creditors—will usually be notified.
- Notice of the hearing will be published in a local newspaper.
- If the individual's competency is contested, an investigation will ensue.
- Finally, a hearing will take place, at which the individual may have to be present if his mental or physical health will allow it; otherwise, medical evidence or testimony will be introduced.

If the evidence justifies the conclusion, the individual will be declared mentally incapacitated or incompetent, and the court will appoint others to act on his or her behalf. In general, this responsibility includes medical care and long-term care issues. A financial guardian or conservator is the person the court designates to be responsible for the individual's financial affairs.

Often both roles are assigned to the same individual. That's the usual outcome when the person declared mentally incompetent has a spouse ready, willing and able to assume responsibility.

It's another story when there is no spouse or the spouse, due to age, illness or some other factor, isn't able to manage the affairs of the individual. You'll also find the roles are frequently separated in contested cases—such as the notorious Groucho Marx competency trial. At the conclusion of the first trial—a sordid invasion of Groucho Marx's personal life—his live-in girlfriend was declared his personal guardian while his bank was declared his conservator.

Finally, when the court determines that there is no suitable relative or family friend who can fill the role, a professional guardian or conservator—who is usually a total stranger to the individual—will be appointed.

Clearly, it's hard to imagine a more humiliating process. Adding insult to injury, it is the individual whose competency is in question who must pay all the court fees, publication fees, and other expenses incurred during the living probate. That's true, even if the living probate has been instigated against the individual's will!

Stan Baker was on his way home from work when his car was struck head-on by a drunk driver. Stan was brought to the hospital in a coma, and the doctors could provide his wife, Maggie, with little reassurance that he would ever regain consciousness.

Still reeling from the shock, Maggie was forced to confront yet another emergency: their financial affairs.

Stan had never considered the possibility that he would be unable to make decisions—either personal or financial—on his own behalf. So, at the time of the accident, Stan had left no legal documents authorizing Maggie to act for him. That omission, Maggie was dismayed to discover, had almost immediate implications.

When Maggie needed to raise funds to cover expenses, she found she couldn't sell any of their joint property, nor could she sell the assets in Stan's name alone. In desperation, Maggie sought out a finance company that agreed to loan her enough money to get by for a little while—at an exorbitant interest rate.

As is became apparent that Stan might linger in a coma indefinitely, Maggie was forced to do the seemingly unthinkable: she asked her attorney to initiate a living probate to have her husband declared mentally incompetent and give her authorization to act on his behalf.

The hearing itself was far from the formality Maggie thought it would be. In fact, it was a complicated, public, and embarrassing invasion of their private lives.

Making matters worse, Maggie faced a challenge from Stan's adult daughter from a previous marriage. Stan, a successful entrepreneur, had built a thriving business and accumulated a sizable investment portfolio. His daughter feared that if Maggie were placed in charge of Stan's financial affairs, Maggie would raid all his assets, take over his business, and effectively eliminate any opportunity the daughter might have to inherit from her father. To underscore her concerns, she filed an action that she—not Maggie—be appointed her father's conservator.

To Maggie's dismay, she learned that judges have tremendous discretion to decide who will be appointed guardians and conservators. Although she won a partial victory—the judge named her Stan's personal guardian—he responded to the concerns of Stan's daughter by appointing a professional conservator to manage Stan's financial affairs. Maggie suddenly found herself unable to dispose of any of their joint property—or even

write a check on their joint account—without obtaining the approval of this professional conservator—a total stranger.

PUTTING YOUR FATE IN THE HANDS OF STRANGERS

Today you don't have to be King Lear, Groucho Marx or Martha Raye to run the risk that a younger generation will decide you're too old and addled to manage your own affairs. And no one is immune to catastrophic illness or injury.

In the face of these challenges to our dignity and desire to control our destinies, we have but two choices. We can trust in the kindness of strangers and hope the outcome they effect resembles what we would have chosen for ourselves. Or we can plan ahead so that our wishes are carried out as we would want them to be by the person we choose. As we pursue this goal, here are the choices available to us.

POWER OF ATTORNEY: PROVIDING A FALSE SENSE OF SECURITY

Recognizing that sickness or injury may affect their ability to control their lives, a growing number of Americans have looked for a tool that will let them direct how their financial and personal affairs should be managed if they're unable to do so for themselves. Many consumers think they've found the solution in the Power of Attorney for Property.

With a Power of Attorney for Property, you empower someone else to act on your behalf. Technically, this person becomes your "Attorney in Fact," but is more commonly referred to as your "Agent." When and how that person may do so depends on the kind of Power of Attorney you draft. For example, a Power of Attorney provides your Agent with the broadest authority possible. It says that at any time – and in just about any capacity – your Agent can conduct business in your name. By legal definition, the Agent has great discretion and few restraints governing his actions.

As you might expect, that unchecked degree of power over your affairs can be about as dangerous as handing someone a blank check. And that's just the most obvious of the disadvantages with a Power of Attorney for Property. Ironically, next on the list of disadvantages is the fact that the more powers your Power of Attorney gives your Agent, the less likely it is to be honored.

A Limited Power of Attorney carves out a specific realm of responsibility that your Agent is empowered to pursue. Although it offers you greater protection against abuse by reducing the activities your Agent can conduct on your behalf, like the General Power of Attorney, it offers precious little direction or supervision of the Agent's activities.

No matter whether your Power of Attorney is broad or limited, it may be next to worthless as a tool for avoiding living probate. That's because many Powers of Attorney will very likely become invalid the moment you become incapacitated – and that's just when they're needed most.

DURABLE POWER OF ATTORNEY: BETTER, BUT STILL NOT BEST

In contrast, the Durable Power of Attorney remains in force even if you become incapacitated. (In some states, a "springing" Durable Power of Attorney goes into effect only if you become legally disabled.) Because someone now has your authorization to step in and manage your personal and financial affairs on your behalf, you may be able to avoid living probate.
While it offers many advantages—such as its flexibility, low cost, and simple language—it's still not a perfect solution. It shares with all Powers of Attorney these drawbacks:

- Because there is no legal requirement compelling your financial institutions, such as your bank, brokerage house, insurance company, etc., to honor your Power of Attorney, many will not do so. Others will accept it only if drafted on their forms or if it uses the specific language they require.
- The older and more complex your Power of Attorney, the more likely it is that third parties will not honor it.
- In some states, if the Agent you've named under your Power of Attorney resigns, dies, or becomes disabled, it is revoked. That's true even if you've named more than one Agent under your Power of Attorney, and only one of the Agents can no longer serve.
- Sometimes the Power of Attorney works too well. With few guidelines or restraints to govern the performance of your Agent, he can act at will. If you've chosen your Agent well, you may have nothing to worry about. But the inability to carefully control an Agent's performance makes many people uncomfortable with the Power of Attorney.
- While a Power of Attorney is easy to revoke in theory, in practice, revoking it can be difficult. Without any way of knowing with whom your Agent has conducted business—and what kind of business he has conducted—it can be nearly impossible to effectively end your Agent's role in your personal and financial affairs.

Of course, there are times when a Power of Attorney is still a necessary tool. But in general, relying on it as your sole recourse to living probate can pose as many risks as living probate itself.

HOW THE HEALTH CARE POWER OF ATTORNEY SOLVES HALF THE PROBLEM

If you're reluctant to hand someone the keys to your financial kingdom—as you effectively do, with a Power of Attorney—you may have considered the Health Care Power of Attorney. *The Health Care Power of Attorney* is *durable*, so it remains in effect when you become legally disabled. And, as its name suggests, it is a *Limited*, restricting your Agent's sphere of authority to

health care decisions only. You can use the Health Care Power of Attorney to express your wishes on such important topics as life-support intervention and long-term care. Because its authorization is very narrow, it is more likely to be honored than a Limited Power of Attorney or even more broadly-drafted Powers of Attorney for Property.

But that leaves the question of how your financial affairs will be managed. Fortunately, there's an excellent solution within reach of nearly everyone.

A REVOCABLE LIVING TRUST GIVES YOU CONTROL OVER ALL ASPECTS OF YOUR LIFE

Today a growing number of savvy consumers are using the *Revocable Living Trust* as an estate planning tool that helps them avoid *death probate*. But this versatile document can also help you dramatically eliminate the risk that you'll ever have to endure the nightmare of l*iving probate*.

As you sit down with your estate planning attorney to draw up your Revocable Living Trust, one of the first issues you will decide is who will serve as your Successor Trustee. This individual will carry out your wishes and manage your affairs should you become legally incapacitated or die. Upon either event, your Successor Trustee follows to the letter the detailed directions you've provided in your Trust documents.

Since this Academy Report focuses exclusively on living probate and how to avoid it, let's look only at how the Revocable Living Trust might work upon your disability. (To learn more about how the Revocable Living Trust works as an estate planning strategy for avoiding death probate, see the Academy Report, *Where There's a Will, There's Probate*.)

When properly drafted, your Revocable Living Trust will empower your Successor Trustee to assume the duties you've defined should you become disabled. Depending on your Trust's provisions, all that may be required is a physician's statement indicating you are mentally or physically incapacitated. That's it. No court filings or humiliating public displays. And in just days—or even hours—your financial affairs will be placed under the diligent management of your handpicked caretaker.

(If the thought of being declared mentally incompetent without justification is a source of great concern to you, take heart. You can always contest these proceedings and the findings of your physician. And if greater assurance would make you feel more secure, you can direct your estate planning attorney to require more than one physician's statement before your successor trustee may take charge.)

Next and equally important, however, is management of your personal needs.

Although a successor trustee can't make health care decisions for you, a properly drafted Revocable Living Trust Estate Plan will include a Health Care Power of Attorney. This Power of Attorney will authorize the person you've designated to act as your Agent to execute your preferences for medical treatment and long-term care. So now your personal care will be assured.

Remember our earlier discussion of living probate and its intent? Living probate seeks to protect the incapacitated individual and provide for his care—both financially and physically. That's precisely what the Revocable Trust what the Revocable Living Trust does. Only it accomplishes these goals without going to court, and without the expense, delay and harrowing publicity that the living probate entails.

Best of all, it assures that the end result is precisely what you want and that the individual overseeing your affairs is the person you want to charge. That's something a living probate can't guarantee.

Among the Revocable Living Trust's many advantages are these benefits:

- The Revocable Living Trust provides you with complete control over the management and disposition of the property you've placed under its authority.
- The Revocable Living Trust provides you with a vehicle for leaving extensive instructions to your successor trustee without fear of jeopardizing the trust's implementation. That's in marked contrast to the Power of Attorney, which is less likely to be honored when it contains lengthy directions.
- A trustee will have much greater success carrying out your wishes, because, unlike an Agent or guardian, a trustee wields an authority that is readily and widely accepted.
- In general, you have more opportunities to direct and supervise the activities of a trustee than an Agent. So, with a trust, you have somewhat greater protection against abuse and financial mismanagement.
- When you die, your Revocable Living Trust will survive you, and it will guide your successor trustee in the final disposition of your assets, providing you with important continuity in the management of your estate.

The Revocable Living Trust provides enormous peace of mind and control over your affairs. Even so, be aware that nothing provides bulletproof protection against a disgruntled family member's attempt to force you through living probate. A well-designed Revocable Living Trust provides you with the greatest possible assurance that your financial and personal care will be conducted as you (and no one else but you) wish.

GETTING STARTED

Most of us find it hard to admit we're mortal. Death and dying are touchy subjects we tend to avoid. That helps explain why so few Americans do their estate planning. Now, consider this: even fewer Americans plan for the possibility that injury or illness will make them unable to care for themselves. Yet, as we've seen in the Report, our chances of becoming seriously hurt or sick are even greater than dying for much of our lives. So, it's imperative that we plan for every contingency—disability as well as death.

Fortunately, you can accomplish both tasks in one fell swoop when you work with a knowledgeable estate planning attorney. Your estate planning attorney will draft for you a Revocable Living Trust estate plan that accomplishes both goals. Your Revocable Living Trust will ensure that when you die, your life's work passes to whom you want, when you want and how you want, without the interference of death probate. At the same time, your estate planning attorney can ensure that your Revocable Living Trust estate plan also helps you avoid the indignity of living probate.

Sure, it requires admitting you're mortal. But you knew that anyway. And once you've planned for all eventualities, you'll gain incomparable peace of mind knowing that, come what may, you've remained master of your fate.