DISABILITY PLANNING FOR THE OLDER GENERATION

By Attorney Danielle Redmond Streed
Law Office of Redmond, Redmond & Yokom

As we look at the make-up of society, we realize that the baby boomers are just settling into their 60's with the hope that they will live as long as those in the depression era generation. As the depression era generation finds themselves moving into their 90's, the possibility of dealing with a disability has become an important issue for all families.

Disability can mean a variety of conditions. It can involve physical disability, mental disability, developmental disability, advanced aging, disability due to a serious accident or disability due to the abuse of drugs and alcohol. For purposes of this article, we will focus primarily on mental disability due to advanced aging.

Although it is hard to think about losing our mental functions and/or competency, everyone needs to plan ahead while they are of sound mind and execute a Durable Power of Attorney. A Durable Power of Attorney is a legal document that allows an individual to name an agent to handle day to day financial matters. The "agent" named in a Durable Power of Attorney can have both limited and general power to act, depending on the language of the document. Such powers may include the authority to sell the disabled individual's home, write checks and file income tax returns.

When an individual takes the time to execute a Durable Power of Attorney, it eliminates the confusion of who should be in charge should a disability occur. If the individual did not plan ahead and did not execute a Durable Power of Attorney, it may be necessary for a family member to seek the Probate Court's assistance. If the family cannot locate a Durable Power of Attorney, it may be necessary for a family member to seek the Probate Court's assistance for appointment of a conservator.

A conservator proceeding involves the Probate Court determining that the individual is unable to manage his or her property effectively; that without the appointment of a conservator the assets will be lost or wasted without proper management; or that money is needed for the disabled individual's care and support.

A conservator is usually appointed until the death of the disabled individual. Once the conservator is appointed, the conservator must account to the Probate Court for all funds under management and in some cases the conservator must obtain the courts approval before funds are spent or before assets are sold. When the conservator is appointed, the terms or limitations of the conservator's authority will be defined by the Probate Court. Because most conservator proceedings require the involvement of an attorney, the disabled person's doctor and a court appointed guardian ad litem (independent evaluator), conservatorship proceedings can be costly and time consuming. If the individual had merely taken the time to execute a simple Durable Power of Attorney at a very nominal cost, the Probate Court's involvement could have been avoided.

In addition to making sure your financial documents and affairs are in order, it is also important to make sure that your medical affairs and medical documentation is in order by setting up a

Designation of Patient Advocate. With the enactment of HIPAA (Health Insurance Portability and Accountability Act), the government has also made it even more difficult to handle medical decisions or provide medical assistance for a disabled individual. Unless an individual has executed a Designation of Patient Advocate with HIPPA authority, the family may also find themselves seeking the Probate Court's assistance regarding medical decision making authority as well. This process is referred to as the appointment of a guardian and is many times handled at the same time as the conservator appointment.

Even if the court does appoint a guardian for the disabled individual, the family may still run into problems when the times comes to remove that person from life support. A court appointed guardian can be given the power to make decisions regarding care and placement of the disabled individual, but the court appointed guardian cannot make life support decisions if they are not already in writing.

As you can see, if you do not have your medical and financial affairs in order, you may be leaving your family with a legal mess. With a simple Durable Power of Attorney and a Designation of Patient Advocate, you could avoid many future problems should you become "disabled".