



2601 Main Street, Irvine, CA 92614
(949) 501-4800 | Info@LSALawyers.com

Whom Do You Trust to Make Your Financial Decisions?

You wake up and check your investments over a cup of coffee. That tech stock you have been eyeing continues to trend upward, so you log in to your online brokerage account and buy some shares. Later in the day, you get a notice that your mortgage payment has been withdrawn. Sticking to your budget, you review your monthly spending and see that you have enough saved for an extra payment that month. That afternoon, you redeem some credit card cash back points to pay for a work lunch. That evening, you schedule an estimated payment to the IRS and update your spreadsheet to reflect recent client transactions. Before bed, while watching the news, you make a note to email your financial advisor about possibly changing investment strategies in response to an expected interest rate cut.

Although we may not always recognize it, financial decisions and tasks are a part of our everyday lives. They range from daily spending habits to more complex retirement planning. You may take for granted that you are able to manage your finances. However, what if you become incapacitated (meaning that you lack the ability to handle your own affairs due to illness, injury, cognitive decline, or some other cause)? Someone else will have to manage your finances for you if you cannot. If you have an updated estate plan that names a substitute decision-maker to act in your stead, you have control over who that someone is. Otherwise, the court will appoint a financial decision-maker, and it may not be who you would want—or who has your best interests in mind.

Guardianship or Conservatorship versus an Estate Plan

Two-thirds of US adults do not have an estate plan¹, which effectively means that they lack an incapacity plan (a plan for how their affairs will be managed if they cannot do it for themselves).

You may have created a will and completed other estate planning tasks, such as purchasing life insurance and making beneficiary designations. However, you still need a documented, legally enforceable process and plan for determining who will manage your affairs if you become incapacitated.

To proactively grant the necessary powers to a financial decision-maker, consider a revocable living trust and a financial power of attorney.

- **A revocable living trust** allows you to serve as trustee of the trust (in charge of managing the money and property owned by the trust) while you are still able. You can also name a successor trustee to take over trust management if you pass away or become incapacitated. The trust agreement can specify who determines whether you are incapacitated and can also contain detailed instructions about how the successor trustee should manage the trust. One of the main purposes and benefits of a revocable living trust is to avoid the court supervised probate process, but it can also be used to help avoid a different form of court intervention: the appointment of a legal guardian or conservator (the term may vary by state), which is the person appointed by the court to make financial and other decisions for you.
- **A financial power of attorney** is another estate planning tool that can help avoid court intervention if incapacity strikes you. It gives one person (the agent or attorney-in-fact) the authority to act on behalf of another person (the principal) regarding their financial matters. A financial power of attorney is highly flexible. It can include a statement describing how incapacity will be determined and who determines it; it can come into effect only when the principal's incapacitation is confirmed (in some states); it can specify the powers granted to the agent; and it can be limited or long-lasting in duration. Like a revocable living trust, a financial power of attorney helps eliminate the need for court-appointed guardianship or conservatorship.

Factors When Choosing a Financial Decision-Maker

When choosing a financial decision-maker, you should consider factors such as trustworthiness, financial knowledge, and the ability to handle responsibilities under pressure. The person selected should have a strong understanding of your values and priorities, be organized, and communicate effectively with other key parties, such as family members or advisors. Additionally, they should be available and willing to serve in this role, as it may require significant time and effort, particularly during complex situations.

If nobody in your immediate circle of friends and family seems like a good candidate, a professional, such as an attorney or financial advisor, can be chosen.

However, many professionals are hesitant about serving in the role of an agent under a durable power of attorney, so you may want to consider other professionals, such as professional caregivers or fiduciaries. A professional trustee or agent is different from a professional guardian or conservator because it is a person of your choosing rather than the court's.

The bottom line is that estate planning lets you manage incapacity in advance, in the manner that is best for you, your finances, and your family. You are free to name whomever you want to serve as a successor trustee or an agent under your financial power of attorney and to provide whatever instructions you want for them in your estate plan.

You may never need to rely on an incapacity plan. However, having the right people and provisions in place gives you added protection and peace of mind just in case something happens and you lose financial capacity. For guidance on this front, call us today to set up an appointment.

1) Rachel Lustbader, 2024 Wills and Estate Planning Study, Caring.com (July 30, 2024), <https://www.caring.com/caregivers/estate-planning/wills-survey>.