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"Out of All The Things I've Lost, I Miss My Mind The Most"
– Mark Twain

Recently *I Care A Lot* was released on Netflix and it scared many of our family members and friends. The basic premise of the movie is that an individual becomes the court-appointed guardian for a succession of elderly wealthy people who have been declared incapacitated by the court. The guardian then uses the money of her incapacitated clients in nefarious ways and bars family members and friends from seeing them. After the movie's release, we received questions from clients voicing concerns raised in this film: Could this actually happen? How do I avoid this happening to me? What does it mean to be incapacitated? With those concerns in mind, we decided to dedicate this Bove & Langa Report to incapacity and how to plan for it.

SPOILER: Although *I Care A Lot* is disturbing, it is unlikely that you need to be concerned about it happening to you if you take the right precautions!

What We Mean When We Talk About Capacity: In estate planning, we have to review capacity in several situations; for example, there is the question of whether a person has the capacity to sign estate plan documents, whether a person has the capacity to serve in a fiduciary role, and whether a person has the capacity to have autonomy over their own day-to-day life and finances. The law presumes a person has capacity unless there is evidence to the contrary.

For the purposes of signing a last will, trust, and accompanying estate plan documents, a person has to have what is referred to as "testamentary capacity", which is really a determination of whether the individual knows the purpose of the document, the consequences of signing the document, the assets that make up the person's estate, the person's family members, who the person wants to benefit under their estate plan, and who the person wants to appoint as fiduciaries. Importantly, for purposes of testamentary capacity, the person needs only to have the requisite capacity at the time the person is actually signing the documents. The standard for testamentary capacity is reasonably low because public policy supports the idea that a person has the right to make decisions about where their property passes at death so long as the person understands what they are doing when they do it.

In contrast to the capacity needed to sign estate plan documents, the capacity needed to serve in a fiduciary role requires a higher level of cognitive understanding. This is because a person serving as a fiduciary has an obligation to act in the best interest of the principal or beneficiary, as the case may be. The discussion of when a fiduciary may be deemed to no longer have the requisite capacity is discussed in its own section of this Report.

A final area of capacity that comes into play with regard to estate planning is the capacity determination that a court must make before appointing a guardian (an individual with power

over the person's daily life) or a conservator (an individual with power over a person's property and finances). It is important to remember that having a durable power of attorney and a health care proxy (both of which are discussed later in this Report) in place will normally avoid the need for a court appointment of a guardian or a conservator.

For the determination of whether to appoint a *guardian*, the court will look to whether the person has a diagnosed condition that makes it hard or impossible for the individual to understand, make and communicate decisions to the extent that the person cannot provide for their own physical heath, safety, or self-care, even with technological assistance.

For the determination of whether to appoint a *conservator*, the court will look to whether or not the person has the ability to comprehend and evaluate financial information and make decisions and, if without a conservator, there is a danger that the person's property will be wasted or the person's financial needs will not be met.

A Lawyer's Duty: As lawyers, we often make assessments of our clients' capacity. Here are two examples:

If a client comes in and wants to change their estate plan and there is a question in the lawyer's mind as to capacity, a lawyer might request that the client's primary physician sign a statement as to the capacity of the client. Although it might seem like an affront, such a statement could be helpful down the road when an estate plan is being administered. If a physician's statement of capacity is in a client's file, a disgruntled beneficiary would be hard-pressed to find a judge who would find that the client was incapacitated when the estate plan was created.

What happens if, in the course of the representation, a client becomes incapacitated? This is not unheard of, as many relationships between estate planning lawyers and their clients last for decades. The good news is that a lawyer may continue to represent a client who is incapacitated. (Note, however, that this does not mean that a lawyer can prepare an estate plan for a client who is incapacitated without court permission or a durable power of attorney allowing the attorney-in-fact to do so on the client's behalf.) If a lawyer reasonably believes that their client is incapacitated and the client is at risk of harm, the lawyer may take reasonable action to protect the client. Attorney-client confidentiality is still preserved, except to the extent necessary for the lawyer to protect the client's interests. So, for example, a lawyer could call a client's family members to inform them that the client has been acting strange in a way that leads the lawyer to conclude that the client may be incapacitated. This will allow the family to take steps to care for the incapacitated love one.

May the Power be With You: It doesn't seem that long ago that an estate plan consisted of just a last will, but as estates grew, so did the need for more sophisticated estate plans. Today, the typical family estate plan consists of not only a last will, but one or more trusts, a health care proxy, a HIPAA authorization and release, and a durable power of attorney. The durable power of attorney (DPA) is a document where a person (the "principal") will authorize one or more others (the "attorney(s)-in-fact") to deal with the principal's property while they are alive, even if they (the principal) have become legally incapacitated (hence the term "durable"). Prior to the adoption of the DPA statute, a power of attorney would lapse if the principal became

incapacitated, and the only person that could legally deal with the property of the incapacitated person would be a conservator appointed by the court. It was in the late 70's and early 80's that states (Massachusetts in 1978) saw the importance of a durable power, and the DPA began to be a standard document in estate plans. With a DPA, the attorney-in-fact could be authorized, for example, to make transfers to a trust or to make gifts that the incapacitated person intended to make, without the need for court permission.

Another benefit of the DPA is that you can name your own guardian or conservator, which the court will recognize, barring some reason the person is considered unsuitable. This could bypass a dispute among family members who wanted the position.

Contrary to popular belief, the DPA does not give your attorney-in-fact authority over your personal care. That is reserved to the health care agent or guardian, if and when one is appointed by the court. Although, the attorney-in-fact is the person who will pay the health care bills!

Some people may have the concern that giving someone authority over their finances is risky, for obvious reasons. Although the typical DPA takes effect immediately, if the principal is overly concerned, they could instead have a "springing" power, where the transfer of power does not take effect unless and until the principal is determined (typically by their physician) to be incapacitated. That way, when they do steal your money, you won't know about it. Kidding aside, the selection of the attorney-in-fact should be carefully thought out, and as noted, two persons could be named to be on the safe side. And equally important, remember that the attorney(s)-in-fact have a legal duty to act only in your best interests.

Of course, as with any power, the powers given to the attorney-in-fact could be abused, so it is important to choose a trustworthy person, or two for a cross-check. Furthermore, most DPA's are written in very broad terms, giving the attorney-in-fact the power to make gifts, so think about this carefully before you sign the document.

Incapacity and Health Care: It is important for any incapacity planning to involve the preparation of a health care proxy and a HIPAA authorization and release (herein a "HIPAA"), both of which are discussed below. Being "incapacitated" in the health care context, means that a person is unable to make health care decisions. As we like to say, if you can blink once for yes and twice for no, you are still in the driver's seat with regards to your care. A health care proxy is the document in your estate plan in which you give someone the power to make health care decisions for you in the event of your incapacity. It can be used when you are temporarily incapacitated because you are unconscious and cannot make a decision in a timely manner, or more permanently incapacitated, because your mental faculties have declined to such a state at which you are unable to make medical decisions for yourself. If you are incapacitated, do not have a health care proxy, and need health care decisions made, someone will need to go to court and be appointed your guardian (which most people want to avoid). In addition, in Massachusetts, a person needs to explicitly give their health care agent the power to authorize the administration of anti-psychotic medications (which includes some dementia medications); if this power is not set forth in the health care proxy, the decision whether or not to authorize these drugs must be made in a court proceeding. It is important to be aware that the standard health care proxy that you might fill out at a hospital does not contain this provision. In your health

care proxy, you may also include a non-binding "living will", which can inform your health care agent as to whether at the end of your life you want heroic measures used to keep you alive, when you are unable to make those decisions yourself.

A HIPAA is the companion document to the health care proxy and gives your medical providers the permission to speak with and release your confidential medical information to the people named in the HIPAA. We call it a "companion document" because a health care agent should not make medical decisions without all the medical information available and that information can only be released to the health care agent if a HIPAA has been executed. The HIPAA is required by federal law for medical providers to release such information. Although the law requires that the HIPAA be separate from a health care proxy, some hospitals require a HIPAA to be imbedded within a health care proxy (no matter what your medical providers require, we have you covered as we place a HIPAA within your health care proxy and we prepare a separate HIPAA for you). Unlike the health care proxy, the HIPAA may be used to request confidential medical information regardless of the principal's competency.

It is important to have copies of these documents on file with your medical professionals and bring them with you if you ever require a stay in the hospital. That way, if you do become incapacitated, your health care agent may swiftly take over your care.

Will You Know It When You See It? We've discussed how incapacity is defined, and how you can direct what happens to you and your assets should you become incapacitated. We've also seen that at some point you might be so incapacitated that you can no longer execute estate plan documents yourself, although you may have empowered others to do so on your behalf. Now we turn the focus off of you, and turn the spotlight on the people you name within your estate plan to carry out important functions.

Everyone can agree that a person who has become mentally incapacitated should not serve in positions of financial authority within an estate plan – personal representative in a Last Will, attorney-in-fact in a durable power of attorney, and a trustee of a trust. But we may not all agree on when that point in time has occurred. And, importantly, the fiduciary may not recognize that it is time to step down. What to do? Every lawyer has their own approach to this issue.

Some lawyers use a mandatory retirement age, such as stating that no trustee can serve as such beyond the age of seventy. That's harsh, as age often brings wisdom. For example, Trustee Aunt Victoria may be doing a fine job knowing when to make discretionary trust distributions to her nieces and nephew, to kick her out at seventy harms everyone. Her long experience and knowledge of the family is a plus, not a minus. That is why her sister decided to name her as trustee. An alternative to a mandatory "aging out" provision is to provide for a co-trustee at a certain point in time. The trust might provide that when a sole trustee reaches age seventy a co-trustee must be appointed to handle management of the trust assets, file trust income tax returns, provide trust accountings to the beneficiaries, and other administrative tasks.

Some lawyers require the fiduciary, upon assumption of the fiduciary position, to waive medical privacy rights and agree in advance to submit to a medical determination of mental capacity upon some triggering event, such as a complaint by a beneficiary. This is not a bad idea, but care

must be taken in defining the trigger and limiting how often the trigger can be pulled. A very competent fiduciary can be harassed into resignation if repeated and unlimited medical tests are authorized under the terms of the trust.

Some lawyers, like us, use a trusted person to determine the capacity issue, with such determination to be conclusive. Someone the fiduciary trusts. So it might be the fiduciary's attorney-in-fact or health care agent. If Aunt Victoria's health care agent attested to her mental incapacity and inability to handle the trust's affairs, Aunt Victoria might listen and be less likely to put up a fuss. As a fall back, many estate plan documents, such as a trust, have general fiduciary removal provisions that permit a trustee change regardless of capacity issues, but for many reasons it can be awkward or impossible to use the trustee removal provisions when the shadow of mental incapacity falls upon the fiduciary. Having specific provisions which touch upon mental incapacity is the best practice.

Don't Keep Your Wishes to Yourself: When a person becomes incapacitated and cannot make decisions, questions invariably arise as to details of their intention regarding the use and disposition of their property, whether they are incapacitated or deceased, and this happens even though the person has a well-designed estate plan. For example, although parents frequently establish trusts allowing their children to become additional beneficiaries when they themselves (the parents) are incapacitated, they seldom detail their wishes with regard to how the trust should be used for themselves if incapacitated, as well as their children at that time, so the result is often that a non-parent trustee decides how to use the trust.

For this reason, in recent years, estate planners encourage their clients to add a "letter of wishes" to their estate plan. It is important to understand at the outset that the letter of wishes is not and should not be a binding legal document. It is merely a personal statement in your own words expressing your wishes as to potential situations the trustee may encounter with respect to the beneficiaries and how you might decide in those cases. For example, do you want to stay in your home if you are incapacitated? How far should the trust be depleted to keep you at home? Do you want the trust to provide for your descendants' education if you are incapacitated? What does education mean to you? Does it include schooling in another country? Or the purchase of expensive equipment to start a trade? Without some indication of your intentions, the trustee would go by their own best judgement, which may or may not be the same as yours.

Planning For Future Incapacity: Incapacity can be sudden and unexpected, such as due to an injury, or it can be more easily anticipated, such as due to aging or to an unfavorable medical diagnosis. While we all like to think that we will never experience a time when we cannot be totally autonomous, there is always the chance that one will become incapacitated in the future. It is important to plan for this possibility to make things easier for your fiduciaries and to also ensure that things are done in the manner that you would prefer. As we discussed above, one option is to prepare a letter of wishes for your fiduciaries providing them with guidance. Some additional steps that can be taken are discussed here.

Taking Stock of Your Personal and Financial Affairs: The Swedes have a tradition known as "death cleaning" where towards the end of one's life an individual will start divesting themselves of some of their possessions so that their family members are not saddled with the task of doing

this after the person's death. This is often a combination of giving away meaningful items to friends and family members, donating no longer used items that are not sentimental, but would be useful to someone else, and getting rid of things that might be best termed the clutter that collects during life. While we do not suggest anything this in depth with regard to incapacity, it is still important to take stock and make sure that someone could step into your shoes if necessary. Are your files in order? Could someone easily determine what bills have been paid and which are outstanding? Is there anything in your home requiring special treatment or maintenance that you would need to provide specific instructions for? If you maintain an on-line secure list of your passwords, can your fiduciary access this information if it is needed?

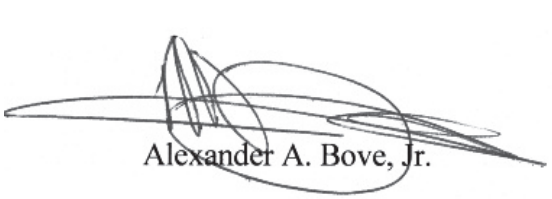
Personal Inventory: It is important to keep current information about your medical providers, financial advisors, assets, liability, and password information (such as that Netflix password that your adult children still rely upon) in a central place that is accessible to your fiduciary in the event of your incapacity. We regularly provide our clients with a form titled "personal inventory" to complete to consolidate this information, but any format can work. The one thing to keep in mind is that while you want this information to be available to your trusted fiduciaries, you do not want it simply accessible to anyone who happens to drop by for a visit. If you do decide to complete a personal inventory, please make sure that it is kept in a secure location that it accessible to your fiduciaries and that your fiduciaries know where to locate it, if it is ever needed. As with all things in life, this information will change over time, so we also recommend that you review the personal inventory on a periodic basis and update as needed.

Safe Deposit Box: To avoid your fiduciary from having to potentially go to court to gain access to a safe deposit box, it is always a good idea to authorize at least one other person to have access to the box and to let that person know where the safe deposit key is kept. This is particularly critical if you keep your legal documents in the box, which may be needed by your fiduciary when you become incompetent.

Prevention of Financial Exploitation of the Elderly: It is an unfortunate fact that the elderly or those with diminished capacity are often the targets of financial exploitation and other forms of abuse. In Massachusetts, medical providers, social workers, home health aids, assisted living residence, first responders, and a variety of other professionals are all classified as mandated reporters for elder abuse, including financial exploitation and self neglect. A mandated reporter is required to report any suspected abuse of a person over age sixty to the Elder Protective Services Program. If instead the reporter is concerned about a person under the age of sixty then the report is made to the Disabled Persons Protection Commission. Additionally, in Massachusetts an initiative by the Division of Banks, the Office of Consumer Affairs & Business Regulation, and the Executive Office of Elder Affairs has put into effect a training manual for employees of financial institutions in the Commonwealth to learn how to spot signs of financial exploitation and how to report it. If you are interested in learning more, www.mass.gov website has sections on both elder abuse and neglect and on elder financial abuse and fraud (https://www.mass.gov/reporting-elder-abuse-neglect, https://www.mass.gov/reporting-elder-financial-abuse-fraud).

Conclusion: Although the looming threat of incapacity can be scary, there is not much one can do if it comes, but be prepared. Making sure you and your loved ones have done incapacity

planning will help to put your mind at ease about the future. A proper plan will leave you and your care in the hands of people who care about you and your welfare.



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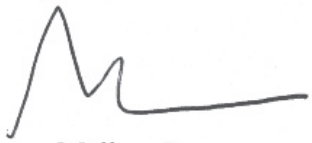

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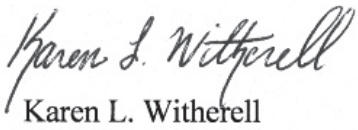

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