

March General Meeting

Attorney Judith Copeland Speaks on Powers of Attorney, Conservatorships, Trusts, and Other Legal Issues Affecting Brain-Injury Survivors and Their Families

by Arlette C. Ballew, Interim Executive Director

At the March 4 2000 general meeting of the SDBIF, attorney Judith Copeland discussed various legal issues pertinent to brain-injury survivors and their families. These included estate planning, powers of attorney, probate, and conservatorships. Her message was that we should be “planning” for, rather than “reacting” to, events such as disability, death, and so on. This protects our assets and families and allows us to express our wishes legally.



Judith stated that there are a lot of things that family members can't do legally unless you give them the rights. She said that most people should have two powers of attorney, although the power does not have to be given to the same person for each. A Durable Power of Attorney (financial) gives another person the right to manage your business and financial assets if you cannot. This is especially important if you are not married and want a partner to have the rights to take care of you, visit you, and manage your affairs. It cannot be used after your death.

A Health Care Power of Attorney lets someone else make health-care decisions for you, such as consent or refusal for specific treatment, review of medical records, placement in a nursing home, home care, and artificial life support. It can say that your agent is to be treated as a family member, for purposes of visitation. It also can spell out your wishes regarding burial/cremation. Since a will often is in a safety-deposit box and is not opened until after the funeral, this is a good idea.

An agent under a Power of Attorney has no “duty” to start to act for you, so it is important to choose a person who will act responsibly should the occasion arise. However, once your agent starts to act for you, he/she has a duty to do it right and a duty to finish.

If a person is incapacitated and does not have a Power of Attorney, you have to go to court and be appointed conservator in order to act for that person. This is much more expensive and time consuming. A Power of Attorney can cost as little as \$80.00. A conservatorship can cost thousands of dollars. Standardized forms are available for Powers of Attorney; you can fill in the blank lines and add attachments.

There are two types of Conservatorships: probate (re. the person and/or the estate) and LPS (usually the person only). A personal conservator can do things such as determine appropriate precedent and consent to medical treatment. An estate conservator can take possession of assets, pay bills and debts, sell property, settle claims, invest, and (with court approval) make gifts, create a trust, and write a will.

There are standards for appointment of a conservator. For a person, the individual must be unable to properly provide for his/her own physical health, food, clothing, and shelter. (This is

not for a developmentally disabled person.) For an estate conservatorship, the person must be unable to manage his/her financial resources or resist fraud or undue influence. The conservatorship procedure involves a petition and other documentation, the service of a notice and citation, a visit by a court investigator, and a court hearing. Priorities for conservators are spouse first, then, child, grandchild, and any interested person in the “best interests” of the conservatee.

Establishing a Trust for estate planning is a good idea if you own a home or have over \$100,000 in assets. A Trust protects your estate (money and property) from probate, but not from taxes or creditors. In most cases, all assets (except retirement accounts, 401Ks, life insurance, and personal belongings) are added to the trust and distributed according to the trust. No probate is required if the total estate is less than \$100,000 and/or all assets have a beneficiary designation or are in joint tenancy.

A Living Trust allows another person to manage your assets while you are alive, for example, during a period of disability. You are your own trustee (you manage the trust) and state that if you can no longer manage your assets, a specific person is to do it. If this person agrees to do so, he/she must do it and do a good job. You also have the option of resigning as your trustee and having your agent manage your assets. You can name a second agent in case the first one dies. (Judith mentioned that in some cases, it may not be a good idea to name family members as trustees; they may not have financial and investment expertise, may tend to forget that it is not their money, etc. In such cases, a friend, professional fiduciary, bank, CPA, investment professional, trust company, or attorney may be named. Co-trustees must agree on what to do. Professionals are better at compromising than siblings tend to be.) You also can state a preference for asset management (e.g., investments, CDs). A trust’s assets include real property, investments, and bank accounts.

Disabled people are entitled to Social Security Disability payments (SSD). Social Security Income (SSI) is different; it is for people with no money of their own. Inheriting money (for example, from a parent) can eliminate SSI and Medi-Cal benefits. If the inherited amount is not sufficient to provide well for the disabled person for the rest of her/his life, you may want to avoid this by stating that on your death, for example, you leave everything to your spouse and, if he/she is not living, you leave it to your three children equally, but the share of your brain-injured child shall stay in the trust, and the trustee is to take care of this child and maintain him/her comfortably for the rest of their life.

Of particular interest to families of brain-injury survivors is the Special Needs Trust. Such a trust allows the trustee to disburse money “for her special needs,” such as dental care, transportation to therapy, vacations and other travel, and things that public benefits do not pay for.

Judith Copeland is a principal of Copeland & Tierman, LLP, Attorneys. She can be reached at 619-231-0456 for consultation on estate planning, wills, trusts, powers of attorney, elder law, probate, and conservatorships.