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# Generations

FOLEY, FOLEY & PEARSON NEWSLETTER

## Welcome New Staff Members!

**Jenna Sutton** joined Foley, Foley & Pearson this spring as a receptionist. Jenna was born in Virginia and lived in Nebraska and New Mexico before moving to Anchorage, where she has lived since 2002. Jenna graduated from Texas A&M University with a Bachelor's Degree in International Studies, and is hoping to attend Law School in Texas in the fall of 2019.

Outside of work, Jenna enjoys road trips, reading, traveling, and spending time outdoors.



**Zachary "Zac" Field, Esq.**, joined Foley, Foley & Pearson in June as an associate attorney. In announcing the hiring of Mr. Field, firm President William M. Pearson said, "We are excited to have the energy and business experience that Zac brings to the firm. We are committed to serving our clients now and into the future. Zac will be a vital member of the team."

Born and raised in Spokane, Washington, Zac has called Alaska home since 2011. Zac received his undergraduate degree in Government from Eastern Washington University and his Juris Doctor from the University of Illinois College of Law, where he was an editor of the Elder Law Journal. He has been a member of the Alaska Bar Association since 2015. Zac and his wife Jackie have three young children and own two pizza franchises in Anchorage.



*You are cordially invited...*



*Please join us in welcoming our new attorney,*

*Zachary Field,*

*for a meet-and-greet open house*

*on Friday, November 9, 2018*

*from 4:00 to 7:00 p.m.*

*at the Law Offices of Foley, Foley & Pearson.*

*Food and drinks will be provided.*

*We look forward to seeing you there!*



## What is a Living Probate?

By Richard H. Foley, Jr.

Most people believe that an estate plan consists of one legal document, the Will, which is more completely known as a Last Will and Testament. However, your Will doesn't become effective until you pass away. In fact, a Will doesn't have any legal effect whatsoever while you are alive. This causes some estate planning lawyers to tell clients, "The problem isn't what if you die, the problem is what happens if you don't."

Statistics tell us that most people will suffer some period of incapacity before they die. That period of incapacity might last two days, two weeks, two months, or two years. When a person becomes incapacitated and can no longer manage their own affairs, loved ones may not be able to take control of financial affairs without extra legal hassles and red tape. So what are the options?

### Guardianship/Conservatorship

If the incapacitated person has not made any arrangement for transferring control of themselves or their assets,

the closest next of kin will be required to file a legal action in court called a guardianship or conservatorship. Sometimes this process is called a "living probate" because it is intended



to transfer control over the incapacitated person and their estate through the state court system. Generally, "guardianship" refers to the person appointed to care for the incapacitated person, and "conservatorship" refers to the person assigned to taking care of the finances of the incapacitated person. "Full guardianship" generally means that one person is named as both the guardian over the person and conservator over the money.

CONTINUED ON PAGE TWO

## LIVING PROBATE

CONTINUED FROM PAGE ONE

Guardianship/Conservatorship proceedings can be expensive, time consuming, and stressful, because the family is required to “prove” incapacity and the court is likely to appoint a lawyer for the incapacitated person and perhaps a “court visitor” to make sure that the rights of the incapacitated person are not violated prior to the final decision of incapacity. After the court appoints a guardian or conservator, that individual must provide an annual report or accounting to the court. The proceeding for guardianship remains pending in the court until the incapacitated person passes away, which sometimes is a number of years.

### Power of Attorney

A power of attorney is the legal document that empowers another person to act on your behalf during your lifetime. A power of attorney that is effective now and upon disability is called a “durable power of attorney,” which is the document that we generally recommend as part of an estate plan.

The person who creates the power of attorney is called the principle. The person named in the power of attorney is called the agent. You can name more than one person to serve as

agent and include successor agents if your first choice is unable or unwilling to serve.

In Alaska, a power of attorney allows the agent to handle the financial affairs of the principal while the principal is still alive. A valid power of attorney avoids having to apply to a court to name a conservator.

### Health Care Directive

A Health Care Directive, sometimes called the Health Care Power of Attorney, gives your agent the ability to make decisions about your medical care during your lifetime. The document may also include “end of life” decisions that you select. The Health Care Directive avoids

We recommend that all of our clients have a current durable power of attorney and health care directive.

having to apply to a court to name a guardian.

We recommend that all of our clients have a current durable power of attorney and health

care directive to provide legal authority to family or loved ones if you become incapacitated for any reason.



### Living Trust

A living trust is a contract between a Trustmaker and a Trustee to hold and manage property and financial affairs for the benefit of the beneficiaries. While you are alive and well, you are the Trustmaker, Trustee, and Beneficiary of your own Trust.

In your Trust you can name “Successor Trustees” to take over management of the financial assets in the trust at your death or disability. Typically a trust has a clear definition of “incapacity” that indicates when the Successor Trustees can take charge of the finances.

If you feel you would like to create or review the legal documents necessary for a smooth transition of your affairs upon incapacity, call our office to set an appointment and we will be happy to help.



# The Real Problem of Incapacity

By Richard H. Foley, Jr.

*Having the proper legal documents in place can avoid the time and expense of guardianship proceedings. (See article “What is a Living Probate” in this issue.) But the reality of aging creates challenges that legal documents alone cannot easily solve.*

Here is the problem.

Alaska law and your estate planning documents typically have a definition of “incapacity.” The definition might say something like, “I will be deemed incapacitated when two independent licensed physicians determine that I can no longer manage my own financial affairs.” That seems simple enough. But in most cases “incapacity” does not happen overnight. As we age, capacity gradually diminishes and it is sometimes difficult to determine when a person can no longer manage their own affairs. Moreover, we all have our good days and bad days, which means that we might lack capacity on one day, but have legal capacity on the next.

How should family and loved ones handle the decision of when to “take over” the estate or trust? What action should family

members take if they think a parent or grandparent is at risk for elder fraud or elder abuse?

We often recommend a “sharing of control” arrangement between

As we age, capacity gradually diminishes and it is sometimes difficult to determine when a person can no longer manage their own affairs.

the senior generation and the junior generation. By sharing control of financial assets through a Power of Attorney or Co-Trustee relationships, the senior generation can remain in control of the things they can handle, while the junior generation can monitor financial decisions and take over duties and responsibilities gradually as necessary.

This is not a perfect solution,

and any sharing of control arrangement requires the parties to work together with patience, care, and respect.

In most cases, the senior generation wants to maintain dignity and control of financial resources that they are capable of handling. The junior generation hopes to protect finances from fraud, neglect, or mistakes. By working together in a shared control arrangement, families can navigate the aging process and limit the conflict that is often caused by ignorance and fear.



Save the Date  
December 27, 2018  
~  
Successor Trustee Workshop