

A Comprehensive Guide to Legal Planning for Dementia and Alzheimer's Patients and Their Families



When you or someone you love is diagnosed with a progressive disease like Alzheimer's or dementia, you face a number of serious considerations, and many of those considerations need to be made quickly before the disease has a chance to progress. In addition to decisions about care, doctors, medical treatments and therapies, this is the time to make some legal decisions to plan for the future. The sooner you create an estate plan, the greater the likelihood that the patient will be able to express his or her full wishes,

ensuring that the estate plan is exactly what he or she would want. Here are some tips and guidelines to help you through this process.

Understanding the Basics of Legal Planning

Legal planning is important for all people to consider, but for those who have been diagnosed with a disease such as dementia, it's even more important, and the timing of the planning is vital as well. The individual with dementia needs to act quickly in order to ensure that he or she can participate fully and clearly express wishes in the planning.

Legal planning involves three basic factors. These are:

- Planning for health care including long-term care needs.
- Planning for overseeing of finances and property.
- Choosing someone to make decisions on behalf of the individual.

Within each of these broad categories, a number of decisions and documents apply, but the end goal of any legal planning is the same – to ensure that the individual with the diagnosis is cared for well and with what he or she wants when the disease makes it impossible for the individual to live independently, and to ensure that he individual's estate distribution is properly planned for to avoid complications and disagreements among family after death.

Who Should Be Involved in the Process?

Because dementia and Alzheimer's affect an individual's cognitive function and memories, the individual with the disease may not be able to handle these legal considerations completely independently. Often, legal planning for dementia and Alzheimer's patients needs to be a family affair, because children or siblings of the affected individual are going to have to step up and provide help with the disease progresses. Here are some of the individuals who should be consulted in this process:

- The Individual – The first person who should be involved in the process is the individual with dementia. Even if the disease has progressed to the point that the individual's ability to make decisions is in question, they should be consulted when appropriate to ensure the planning is in line with their goals and desires.

- The Individual's Spouse – For married individuals who still have a spouse that is living, the spouse should be part of the legal planning process. This is vital, because most of the estate that will be discussed in the plan will be owned by both parties.
- Adult Children – If an unmarried or widowed individual is not capable of handling these legal matters, or wishes to have some help, any children of the individual can be included in the decision making process, provided they have a good and loving relationship with the individual and are of an adult age. Children often will have the best interests of their parents in mind, and will know their parents' goals and desires.
- The Individual's Lawyer – If the individual has a lawyer, the lawyer should be involved in the process. Often, lawyers are privy to information that others may not be, and can bring a legal perspective to the table.
- Other Relatives or Close Friends – Finally, any other close relatives or friends who may have unique insight into the individual's wishes should be consulted, especially if they will be named as trustees, agents or executors.

With all of that said, too many people can make the process confusing. While some others may be consulted, ultimately the decision should be left to the individual, if possible, or the individual's closest friends or family members.

What Is Legal Capacity?

An important term to consider when making decisions about someone with an Alzheimer's or dementia diagnosis is the term "legal capacity." Legal capacity refers to an individual's ability to understand the consequences of his or her actions, appreciate what those consequences really mean and execute his or her will by signing documents.

When dealing with mental health concerns, you must first determine if the individual has legal capacity. With diseases like Alzheimer's and dementia, legal capacity can be a shifting thing. Sometimes, the individual has the necessary faculties to make and understand decisions, while other times the disease will take over and create confusion. Several professionals can help with this determination, including:

- A lawyer with experience dealing with dementia patients.
- A medical professional who understands the nature of the disease.
- Loved ones who understand the individual's personality.

Before asking someone with dementia to sign any legally binding documents, take the time to:

- Ask a medical professional about the legal capacity of the individual.
- Talk with the individual, outlining the consequences of the document and ensuring that the individual understands the consequences of signing.
- Check to see if any documents similar to the one you are about to create exist. If they were created before the individual was diagnosed, they should be reviewed to ensure that they are still valid and are in line with the individual's new goals and desires. The nature of this disease means that the individual may not remember creating some of these documents.

What Documents Are Needed?

When planning for the future with someone who has dementia, you will need a number of legal documents. Some will be focused on medical and medical care, while others will be the typical estate planning documents. Documents to consider include:

- Power of Attorney – Power of attorney documents give someone the right to make decisions in the place of someone who is no longer able to make them. Power of attorney documents are available for both financial and estate planning needs and for healthcare needs.
- Last Will and Testament – A will outlines how the individual's estate will be dispersed after his or her death, and also names the executor of the estate and the beneficiaries.
- Living Trust – A living trust provides an alternative way to divide an individual's estate upon his or her death, with the hopes of avoiding probate courts and providing tax advantages.
- Physician Orders for Life Sustaining Treatment/Living Will/Advance Directive – These are different documents that do the same basic function, providing guidance to medical professionals as to the types of life-sustaining treatment an individual does or does not want during a serious illness.

These are the basic parts of a estate plan, but other documents may also be used. It's important for a legal professional to provide guidance to the family to ensure the proper considerations and documents are included in the planning process.

A Closer Look at Power of Attorney Documents

Because of the likelihood that an individual with dementia or Alzheimer's may not be able to make decisions at some point, a power of attorney document is vital. There are two types of power of attorney documents, one focused on finances and the other focused on health care.

A durable power of attorney gives the principal (the individual making the estate plan) the right to name an agent, which is an individual who will make decisions about the principal's finances and property when he or she no longer is deemed capable of doing so. Types of decisions an agent can make include:

- Sale and purchase of real estate
- Spending money to pay for large expenses
- Best use of income
- Investment decisions
- Decisions about assets
- Maintaining financial records
- Paying and filing taxes

In addition, you can choose a power of attorney for health care. This individual will be able to make decisions about which doctors to choose, what types of treatments to choose and what care facilities to use when the patient with dementia is no longer able to make these decisions. This power can include the power to make end-of-life decisions for someone in the late stages of the disease. This is a separate type of power of attorney, and does not have the same powers as the durable power of attorney.

The agent for an individual with Alzheimer's or dementia is a vital part of the estate plan. It's crucial that the agent is available when the need arises. Because of this importance, many plans will include a backup agent who will step in if the original agent is unable to fulfill the duties outlined in the estate plan.

When choosing an agent for a power of attorney document, choose one that you feel you can trust to look out for the principal's best interest. Also, choose someone you feel would handle money well or who understands medical terminology clearly. While the agent can be held legally liable for any intentional misconduct, someone would have to challenge the action for this to

take place. Finally, remember that the medical and financial power of attorney documents do not have to have the same agent. You can choose different people for these two tasks.

A Last Will and Testament

A last will and testament is the most common form of end-of-life planning. This document outlines the individual's desires for how his or her estate will be divided at death. It will outline an executor, which is the person responsible for managing the estate, and will name beneficiaries, which are the people who will get the assets the individual leaves behind.

When creating a will, remember that you cannot communicate healthcare preferences in one. That requires a separate set of documents. The will can only dictate the individual's wishes for his or her belongings, assets and any dependents who will need a new caretaker.

Having a signed will in place soon after diagnosis, if one is not already present, is vital. It's possible for the will of someone with dementia to be challenged if the disease has progressed, so the earlier a will is created, the better for all involved.

A Closer Look at a Living Will/Advanced Directive

A living will, which can also be called an advance directive or physician orders of life sustaining treatment (POLST), outlines the way an individual wishes to be treated for end-of-life medical care. This is quite helpful for a patient with a progressive disease, like Alzheimer's, who may eventually need life-sustaining treatment. Because medical science has become so advanced, allowing the sustaining of life long past the point it would have been impossible in years before, individuals need to actively state how much intervention they wish to have before a medical event occurs.

A living will or advance directive shows exactly how much intervention the individual wants, so families are not left to make painful decisions when someone is seriously ill. With this particular document, the individual can make specific requests for what should and should not be done, rather than relying on family members to remember their wishes in an emotionally charged situation.

The requirements for creating this document varies tremendously from one state to the next. Checking with an attorney is the best way to ensure that yours is in line with the laws of your state. However, you can find these forms online as well. Just make sure that they are in line with the laws of the state where the individual with dementia lives.

A Closer Look at a Living Trust

A will outlines how an individual's assets should be divided, but a living trust provides protection and direction. A trust gives the opportunity to pool an individual's assets and financial resources into a trust, and a trustee named by the individual will manage the assets. In many states, this allows the estate to skip the probate courts, so the individual's assets are not tied up in court or eaten up by taxes after death.

Typically, the estate's owner is named as the trustee of a living trust. However, in the case of someone with a disease like dementia, the trust will also have a successor trustee and a removal clause that is invoked when the estate's owner is no longer able to serve as the trustee and manage the estate and its funds. For people with dementia or Alzheimer's, the successor trustee and this removal clause provide a measure of protection when the disease makes it impossible for the individual to properly care for his or her assets.

A living trust is created in such a way that the individual continues to have access to his or her assets, when needed. When the individual is no longer able to manage money, the agent named in the power of attorney document will be able to access the funds through the trustee. The trustee and agent can also be the same individual, to make matters less complicated. This means that the living trust provides asset protection without actually locking assets away from the individual while still living.

When Guardianship Proceedings Are Needed

On occasion, an individual with Alzheimer's or dementia will not have the necessary documents in place to name agents and trustees, or the family will be in disagreement on how to handle the decisions necessary as the disease progresses. If no power of attorney exists, the courts may have to appoint a guardian or conservator to make these decisions.

This is a difficult process for everyone in the case. It can lead to someone being appointed to handle the affairs of the individual who does not have his or her best interests in mind. The process can also create drama in the family, as different individuals may have differing ideas as to who would serve as the best guardian. Finding the right guardian also takes time, and that time can lead to serious problems for the patient. Avoiding this through proper estate planning including a power of attorney, will and living trust is the best option.

Where to Get Additional Help

Dealing with a diagnosis of dementia or Alzheimer's can leave you shaken and wondering what the future holds. The future will hold many changes, but it can also hold many joys. To make certain you can focus on those joys in the days ahead, take the time now to take care of your legal planning for the future. As you do, you may need to get additional help to ensure that you are fully prepared legally for the days ahead. Here are some resources that may help.

- Call the Alzheimer's Association 24/7 Hotline to get attorney recommendations. The number is 800-272-3900.
- Visit the Alzheimer's Association Website.
- Search for help on Eldercare.gov.
- Learn more about estate planning for dementia patients at EstatePlanning.com.
- Read FAQs on Estate Planning from the American Bar Association.
- Learn more about dementia at Mayo Clinic.