

Legal Planning for Incapacity

When a family member has been diagnosed with Alzheimer's disease or another disabling health condition, it's easy to feel overwhelmed by the many legal and financial questions that can arise as a result of the diagnosis. Determining how to pay for long-term care is often confusing for families. It is important to find an attorney with whom you feel comfortable and who has the expertise to advise you on these matters.

Q: What legal matters should be discussed when a family member has a health condition that affects his ability to function independently?

There are several legal issues to consider when a person is (or may become) incapacitated:

- The management of the person's financial affairs during his or her lifetime;
- The management of the person's personal care: medical decisions, residence, placement in a nursing facility, etc.;
- Arranging for payment of long-term health care: use of private insurance, Medicare, Medicaid (Medi-Cal in California) and Supplemental Security Income (SSI) when applicable;
- Preserving the family assets: ensuring that the patient's spouse and any disabled family members are adequately protected; and
- The distribution of the person's assets on his or her death. (If the person has a disabled spouse, child or other family member that they wish to provide for, special arrangements need to be made.)

In addition to issues that are clearly "legal," other important issues should be discussed in the course of legal planning. For example, a full discussion of

housing options is critical in making certain legal and financial decisions; i.e., is the person planning to stay

in his home? Is this feasible, both physically and financially? Is he thinking of moving to a retirement facility? What level of care is provided? Is it a rental or a "buy-in" arrangement? Is a move to a nursing home probable?

Q: When should an attorney be consulted?

Consult an attorney as early as possible. The maximum number of planning options will be available while the patient still has the legal capacity to make his or her own decisions. The question of capacity is a gray area, and must be determined on a case-by-case basis.

Q: What are the options for managing assets?

Options for managing assets include:

- Durable Powers of Attorney;
- Revocable living trusts;
- Designation of a representative payee; and
- Conservatorship (or Guardianship) of the estate and of the person.

Each of these has advantages and disadvantages, which should be discussed thoroughly with an attorney. Further, for making medical decisions, you should discuss the use of a *durable power of attorney for health care, directive to physicians, and conservatorship (or guardianship) of the person.*

Q: What are the options for paying for long-term care?

Investigate first the availability of private insurance to cover long-term care, whether at home or at an assisted living or skilled nursing facility. Also

examine the government benefit programs that may help pay for care:

- Medicare
- Medicaid or Medi-Cal
- Supplemental Security Income (SSI), and
- In-Home Supportive Services (IHSS).

If the person served in the United States Military, federal or state veteran assistance may be available.

Q: Can any assets be protected—for a well spouse, for example—if a patient needs long-term custodial care in a skilled nursing facility?

Various planning options may be available to finance long-term care. Much depends on the individual's circumstances; i.e., marital status, mental capacity, age and health of the care recipient, and, most importantly, the applicable law in the state where the individual resides. Medicaid, a federal program administered by the states, may pay for care in a facility. The rules regarding planning vary from state to state. Planning options can include:

- Converting non-exempt assets into exempt assets;
- Transfer of the family residence to a spouse;
- Transfer of the principal residence with the retention of a life estate;
- Use of court orders to increase the amount of resources and/or income the spouse of a nursing home resident can retain;
- Trusts; and
- Gifting of assets.

Each of these options has significant implications and should be thoroughly discussed with an attorney knowledgeable in Medicaid law.

Q: How can an individual provide for the distribution of his or her property upon death?

The options for distributing assets on death include:

- Will
- Revocable Living Trust
- Joint Tenancy Accounts
- Payable on Death Accounts

- Transfer with a Retained Life Estate

Each of these has significant legal ramifications and should be discussed with a knowledgeable advisor. Also, some financial products, such as life insurance, IRA's and annuities, provide for the distribution on death to a designated beneficiary.

Q: How do you find an attorney to assist with legal planning?

One of the best ways to find an attorney specializing in elder law is through a personal recommendation from a friend, relative or co-worker, or from another attorney whom you know and trust. Another way to get a personal recommendation is to attend a caregiver support group. Someone there may already have had experience with a knowledgeable attorney and be able to share his or her experience. Referrals, and advice for individuals aged 60 or over also may be obtained from senior legal services provided by your local Area Agency on Aging. Independent community legal aid agencies also may offer assistance to people of all ages.

Another way to locate an attorney is through an attorney referral service. The local bar association in your community may have a panel which refers callers to lawyers in various specializations. After describing your needs, you will be referred to the most appropriate specialist. Initial consultations generally include a nominal fee.

Caution should be exercised if such a referral service is used. Panel-referred attorneys need meet only minimum requirements and may have little experience. It is important to check the qualifications of an attorney and to make calls to compare fees and experience. Keep in mind that laws vary from state to state. The National Academy of Elder Law Attorneys may also be able to help you.

Q: What kind of attorney should be consulted?

Most attorneys concentrate on one or two areas of law. It is especially important for caregivers to find an attorney who has the appropriate expertise. Attorneys advising caregivers on planning for long-term care should have knowledge of the following areas of law:

- Medicaid (Medi-Cal) laws and regulations
- Social Security

- Trusts (special needs trusts)
- Conservatorships
- Durable power of attorney for health care and asset management
- Tax (income, estate and gift) planning
- Housing and health care contracts

5. Existing wills or Durable Powers of Attorney; and
6. Bank statements, passbooks, CDs—again showing who the owners are and how title is held.

Some attorneys are certified specialists. For example, an attorney can be a certified specialist in elder law, taxation, or estate planning. In the case of an accident, a personal injury attorney is needed. In that case, it is advisable to select someone who has had jury trial experience.

Attorneys often do not know about all of the above-mentioned areas. In the case of a personal injury, two attorneys may be needed—one to litigate an accident settlement and another to help plan for long-term financial or health care needs.

Q: What should you do to prepare for a legal consultation?

It's helpful to have a clear idea of what you would like as the outcome of a legal consultation—that is, what you would like to gain from the appointment. Learning as much as possible ahead of time will help ensure a productive consultation.

More specifically, individuals who are interested in a health care directive may wish to think about the type of life-sustaining procedures they would want used in the case of a serious illness. In addition, it may be helpful to identify a first, second and third choice of family member or trusted friend to make personal health care and financial decisions in the event you are unable to do this for yourself. (See the FCA Fact Sheet [End-of-Life Decision Making](#).)

Items to Bring to the Consultation

1. List of major assets (real estate, stocks, cash, jewelry, insurance, etc.);
2. Any documents of title (e.g., copies of deeds, stock certificates, loan papers, etc.) which show who the asset owners are and how title is held;
3. Contracts or other legally binding documents;
4. Lists of all major debts;

Glossary

Advance Health Care Directive. An Advance Health Care Directive is a document in which you can: 1) instruct your physician as to the kinds of medical treatment you might want or not want in the future (in many states, this is called a *Living Will*); and 2) choose someone to make medical decisions for you in the event you are unable to make those decisions yourself (in many states, this is called a *Durable Power of Attorney for Health Care*, or just a *Power of Attorney for Health Care*). For additional information on advance directives, see the FCA Fact Sheet, [End-of-Life Decision Making](#).

Attorney-in-Fact. The person named in a Durable Power of Attorney to act as an agent. This person need not be an attorney.

Beneficiary. An individual who receives the benefit of a transaction, for example, a beneficiary of a life insurance policy, a beneficiary of a trust, beneficiary under a Will.

Conservatee or Ward. The incapacitated person for whom a conservatorship or guardianship has been established.

Conservator or Guardian. An individual who is appointed by the court to act on behalf of an incapacitated person.

Conservatorship or Guardianship. A court proceeding in which the court supervises the management of an incapacitated person's affairs and/or personal care.

Directive to Physicians. A written document in which an individual states his or her desire to have life-sustaining procedures withheld or withdrawn under certain circumstances. This document must meet certain requirements under the law to be valid.

Durable Power of Attorney for Health Care. A type of Advance Health Care Directive, this is a document in which an individual nominates a person as his or her agent to make health care decisions for him or her if he or she is not able to give medical consent. This document can give the agent the power to withdraw or continue life-sustaining procedures.

Durable Power of Attorney for Asset Management. A document in which an individual (the “principal”) nominates a person as his or her agent (attorney-in-fact) to conduct financial transactions on his or her behalf. This document can be either “springing,” which means that it is effective only upon the principal’s incapacity, or “fixed,” which means that the document becomes effective when it is signed.

Executor. The individual named in a Will who is responsible for administering an estate during probate. The Executor is the person responsible for making sure all taxes and other expenses are paid and distributing the property of the deceased person in accordance with the Will.

Federal Estate Taxes. A 55% tax is due at death if the estate exceeds \$1,000,000 (as of 2011), and is calculated on the value of the deceased person’s estate at the time of death.

Health Insurance Portability and Accountability Act of 1996 (aka HIPAA). Federal legislation which limits the informal communication of information from doctors and other health care providers

In-Home Supportive Services (IHSS). A program in California that pays for non-medical services for persons who meet certain financial criteria and who could not remain safely at home without such services.

Irrevocable Trust. A trust that has terms and provisions which cannot be changed.

Joint Tenancy. A form of property ownership by two or more persons designated as “joint tenants.” When a joint tenant dies, his or her interest in the property automatically passes to the surviving joint tenant and is not controlled by the Will of the deceased joint tenant and is not subject to probate.

Life Estate. An interest in property that lasts for the life of the person retaining the life estate. When a person who has a life estate interest dies, the property passes to the person holding the remainder interest, without the need for probate.

Living Will. A written document in which an individual conveys his or her desire to die a natural death and not be kept alive by artificial means. Unlike a Durable Power of Attorney for Health Care, the wishes in this document are not legally enforceable in California.

Long-Term Care Insurance. Private insurance which, depending on the terms of the policy, can pay for home care, or care in an assisted living facility or skilled nursing facility.

Medicaid. A state and federally financed program that provides medical care to low income persons. In California it’s called Medi-Cal.

Medicare. A federal medical coverage program for persons who are over 65 years old or who are disabled. It is funded by Social Security deductions and has no income or resource restrictions. It does *not* pay for long-term custodial care.

Probate. The court proceeding which oversees the administration of a deceased person’s estate. Wills are subject to probate; living trusts (if properly funded) are not.

Revocable Living Trust. A device that describes certain property, names a trustee (who manages the property) and names a beneficiary who receives benefit from the trust. A living trust is an effective means of avoiding probate and providing for management of assets. It can be revoked by the person who created it during that person’s lifetime.

Social Security Retirement Benefits. Benefits, which eligible workers and their families receive when the worker retires. The worker must work for a specified period at a job that is covered by Social Security in order to be eligible for benefits. A worker must be at least 62 years old to receive retirement benefits.

Social Security Disability Benefits. Social Security benefits payable to disabled workers and their families.

Special Needs Trust. A specially drafted trust that provides a fund to supplement the governmental benefits of a beneficiary while not affecting that beneficiary's eligibility for public benefits.

Supplemental Security Income (SSI). A federal program which provides cash assistance to the aged, blind and disabled who have limited income and resources.

Testator. The person who executes a Will.

Trustor (Settlor). A person who creates a trust.

Trustee. The individual who is responsible for managing the property in the trust for the benefit of the beneficiary.

Will. The document a person signs which tells how he or she wants his or her estate administered and distributed upon death. It must conform to certain legal requirements in order to be valid. The terms of a Will become operational only upon the testator's death.

Resources

Family Caregiver Alliance

180 Montgomery Street, Suite 1100
San Francisco, CA 94104
(415) 434-3388
(800) 445-8106
Web Site: www.caregiver.org
E-mail: info@caregiver.org

Family Caregiver Alliance (FCA) seeks to improve the quality of life for caregivers through education, services, research and advocacy. FCA's National Center on Caregiving offers information on current social, public policy and caregiving issues and provides assistance in the development of public and private programs for caregivers. For residents of the greater San Francisco Bay Area, FCA provides direct family support services for caregivers of those with Alzheimer's disease, stroke, ALS, head injury, Parkinson's disease and other debilitating health conditions that strike adults. For the FCA Fact Sheet on [End-of-Life Decision-Making](#),

American Bar Association (ABA)

Commission on Legal Problems of the Elderly
740 15th Street, N.W.
Washington, DC 20005-1019
(202) 662-1000 <http://www.abanet.org/>

The general public may contact the ABA to obtain information on county bar associations. County bar associations provide attorney referrals through local attorney referral offices throughout the U.S.

National Academy of Elder Law Attorneys

1604 N. Country Club Rd.
Tucson, AZ 85716
(520) 881-4005
www.naela.com Provides information on how to choose an elder law attorney and referrals to elder law attorneys.

National Association of Area Agencies on Aging

1112 - 16th Street, NW, Suite 100
Washington, DC 20036
(202) 296-8130
www.n4a.org Provides information on local Area Agencies on Aging which coordinate a variety of community-based services for senior citizens, including legal services.

National Senior Citizens Law Center

3435 Wilshire Boulevard
Los Angeles, CA 90010-2029
(213) 639-0930 www.nsclc.org
NSCLC closely monitors court rulings, legislation and regulatory changes which affect older persons. They also publish a weekly newsletter and have many fact sheets.

California Resources

State Bar of California - Los Angeles

1149 South Hill Street
Los Angeles, CA 90015
(213) 765-1000 www.calbar.ca.gov
(The State Bar of California is a regulatory agency and does not provide attorney referrals. However, complaints about lawyers can be sent to the State Bar.)

California Advocates for Nursing Home Reform (CANHR)

650 Harrison Street, 2nd Floor
San Francisco, CA 94107
(800) 474-1116 www.canhr.org

CANHR provides advocacy, consumer education, and legal information to residents of California.

Orange County Bar Association Lawyer Referral

P.O. Box 17777

Irvine, CA 92713

(949) 440-6747 www.ocbar.org

The only referral service sponsored by the Orange County Bar Association. A representative will refer to appropriate attorney, who may provide an initial brief consultation for free.

Legal Aid Society Of O. C.

902 N Main Street

Santa Ana, CA 92701

(714) 571-5200 www.legal-aid.com

Provides free legal service in certain areas of civil law to residents of O.C. whose income is at or below 125% of the federal poverty level. Services include family law, landlord-tenant, consumer protection, child custody, government benefits, employment issues, etc. There may be a waitlist. Legal services free to eligible clients.

Senior Legal Advocacy Program

902 North Main Street

Santa Ana, CA 92701

(714) 571-5245

Must be 60+ and an Orange County resident. If under 60, may be eligible for Legal Aid.

Public Guardian / Administrator

1300 S Grand Ave, #C

Santa Ana, CA 92705

(714) 567-7660

The public administrator is, by state law charged with administering the estates of persons who have died when there is no executor or administrator willing or able to act and the decedent has no heirs. The public guardian, when appointed by court, acts as conservator or guardian for persons legally incapable of administering their affairs and assets and therefore vulnerable to exploitation. The On-call person can provide information about particular court procedures.

Written by Harriet P. Prensky. Ms. Prensky is a certified elder law attorney and partner in the law firm of Prensky & Tobin in Mill Valley, California. She focuses on legal problems of the elderly and disabled, estate planning and probate, and is a Fellow on the National Academy of Elder Law Attorneys. Prepared by Family Caregiver Alliance in cooperation with California's Caregiver Resource Centers. Funded by the California Department of Mental Health. © 2004 Family Caregiver Alliance. All rights reserved. Updated OCCC 11-2010

Family Caregiver Resource Center

St. Jude Community Services

130 West Bastanchury Road

Fullerton, CA 92835

(714) 446-5030

(800) 543-8312

fax (714) 446-5996

www.caregiveroc.org

Providing support and assistance to family caregivers in Orange County. Services include information and referral, family consultations, support groups, legal clinics, educational seminars and respite planning.

The CAREGIVER RESOURCE CENTER, sponsored by St. Jude Medical Center, is part of a statewide system of Caregiver Resource Centers contracted through the California Department of Health Care Services. Additional funding comes from the California Department of Aging funds from the federal Older Americans Act, as allocated by the Orange County Board of Supervisors. Rev. 10-15