Recommended Legal Documents for Alzheimer's Patients and Their Families

THE KARPLAW FIRM, P.A.
Medicaid & V.A. Benefits Planning
Trusts, Wills, Probate & Estate Administration

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Introduction

If you or a loved one have been diagnosed with Alzheimer's Disease, you should take certain legal steps to protect yourself, your spouse and your assets. Putting in place the proper legal and financial framework place will smooth the road ahead for everyone. You will eliminate unnecessary worries, allowing your family to better enjoy this time and to concentrate your energies on the challenges ahead.

No one knows how Alzheimer's Disease will progress in any one individual. Therefore, it is always best to put plans in place as soon as possible. **There is no reason to panic, but no reason to delay, either.**

Even if you already have the legal documents you will read about here, you should revisit them now. Your new circumstances may make it necessary to modify your plans in order to ensure they protect you and your loved ones. Changes in state and federal laws have occurred of which you may be unaware, too. If your documents were drawn up in another state, they must also be reviewed at this time. An experienced law firm with a Florida Certified Elder Law Attorney should be consulted to examine your existing plans and inform you if revisions are necessary.

Because spouses' legal and financial plans are interrelated, the spouse of the affected individual should also create an appropriate plan, or re-examine his/her existing plan.

This booklet contains general information. Consider it a starting point for your important planning. Consult a law firm with a Florida Certified Elder Law Attorney who can help you decide on your best options.

Health Care Documents

Health Care documents are a vital element of your planning. Well-drafted, thoughtful and updated health care planning offers many benefits for you and your family:

- You enjoy the peace of mind that comes from knowing your wishes for treatment are understood and will be honored.
- You minimize potential conflict among family members.
- You reduce the chance that the courts will become involved – with all the trauma and expense that goes along with it - in the event you are no longer able to make your own informed medical decisions.

There are several types of health care documents:

1. Health Care Surrogate

A Health Care Surrogate allows you to authorize someone you know and trust (your "surrogate") to make medical decisions for you if you cannot make your own informed decisions. You should also designate successor health care surrogates in the event your original choice cannot serve.

Ideally, your surrogate should be someone who is familiar with your values and preferences. Before you designate someone, make sure that he/she is willing to serve and capable of serving. Discuss your wishes for medical treatment with your surrogate, both in writing and verbally. It will be far easier for your surrogate to make the appropriate decisions for you when he/she fully understands your preferences and moral and religious beliefs. Being clear and open about your preferences can also head off disagreements among family members and foster family harmony.

The spouse must also create a Health Care Surrogate that designates someone other than the affected spouse as surrogate. If the spouse's existing Health Care Surrogate designates the affected spouse as surrogate, this is the time to revise it.

A properly drafted Health Care Surrogate will also name any people you authorize to receive your privileged medical information under federal privacy laws, commonly known as HIPAA (Health Insurance Portability and Accountability Act). HIPAA prohibits health care providers from sharing your medical information with unauthorized persons.

A HIPAA waiver should be included in your Health Care Surrogate, or created as a separate free-standing instrument. This enables the person you've authorized to make your medical decisions to have access to your health providers and to discuss your situation with them. Even if you have signed a HIPAA waiver provided to you in your doctor's office, it may be unavailable or inadequate to meet your needs with other doctors, hospitals or health insurance companies.

If you have an existing Health Care Surrogate that does not include the HIPAA waiver, you should either have it modified, or execute a separate HIPAA waiver. It is generally best if the Alzheimer's patient is not included in the HIPAA waiver, as at some point he/she will not be able to communicate competently with physicians or reliably transmit your medical information to others.

Make sure your surrogates have copies of the documents so that they can provide them to medical providers and health insurance companies

Finally, many people think that if they become disabled, their Last Will and Testament allows someone else to make their health care decisions. This is false. As you will read in a moment, a Will has no legal power in the event of incapacity.

2. Living Will

A Living Will informs physicians that if you are in an end-stage, terminal condition or vegetative state, you do not wish to prolong your dying process, and desire only administration of medication or treatment that provides comfort care and relief from pain. A Living Will does not actually state that you are in such a condition; it merely indicates what kinds of treatments you prefer if you ever are in such a condition. Creating a Living Will can be a great kindness to your family members, relieving them of the often difficult decision of whether to commence, continue, or terminate life-sustaining treatments.

A Living Will must comply with Florida statutes and must be properly executed and witnessed. One of the witnesses may not be a blood relative or spouse of the maker. If you execute a Living Will, remember that it cannot do you or your family any good if it's squirreled away in a safe deposit box. You should let your physicians and family know it exists; provide them with copies; and keep the original accessible.

3. Pre-Need Guardian Designation

The Pre-Need Guardian Designation allows you to nominate your choice of guardian if in the future one must be appointed for you.

4. Do Not Resuscitate Order (optional)

A Do Not Resuscitate Order (DNRO) must be signed by the patient or the patient's surrogate, and by the patient's doctor, indicating that life-sustaining measures like CPR are not to be administered in the event of the patient's cardiac or respiratory arrest.

Durable Power of Attorney

Just as a Health Care Surrogate authorizes someone to make your medical decisions, a Durable Power of Attorney (also known as a Durable Power of Attorney for Property) allows you to authorize someone you know and trust to handle your financial decisions, from paying the rent, to accessing your brokerage account, to turning utilities on and off in your home, to buying and selling property, etc. The person you empower to handle these tasks is called your "agent." If you are incapacitated and do not have a Durable Power of Attorney, a court guardianship may have to be instituted so that the court can appoint someone to handle your affairs. That person may not be the person you would have chosen for the job.

Contrary to popular belief, your spouse does not have the automatic right to handle your affairs. He or she cannot sign your name, handle your IRA, etc., without your authorization in your Durable Power of Attorney.

Again, as with your Health Care Surrogate, you should be certain the person you want to designate as your agent is willing and able to serve. You should also appoint back-up agents in the event the original agent is not able to serve. You may also designate co-agents, but if you do, you should be reasonably confident those individuals can work together amicably.

The spouse should also create a Durable Power of Attorney, or revisit his/her existing one. Obviously, designating a spouse who has been diagnosed with Alzheimer's Disease as one's agent is impractical and can create negative financial and other ramifications.

The language in the Durable Power of Attorney must be consistent with Florida law. The Durable Power of Attorney is not as broad-based as most believe. The powers the person wishes to give the agent must be specifically mentioned in the document. Powers not specifically mentioned may be deemed not to exist, even if the document includes a blanket statement such as, "Any and all powers which I may have I hereby give my agent." For example, if you want the person to be able to sell or buy your homestead property, the document must specifically say so.

In addition, there are certain special powers that must be initialed within the document by the principal appointing the agent. One example is the power to make gifts. This power is particularly relevant as it relates to Medicaid planning. If the Durable Power of Attorney does not have gifting powers or has restrictive gifting powers, it can hamper the agent's ability to do Medicaid planning. Medicaid planning may also be hampered if the document does not authorize the agent to create a Qualified Income Trust (Miller Trust), which may become necessary for a Medicaid applicant. Any Durable Power of Attorney executed after October 1, 2011 that includes these special powers must specifically list them and be initialed by the maker.

It is important to note that under Florida law, any Florida Durable Power of Attorney created after Oct. 1, 2011 must be immediate, not "springing." In other words, it gives the agent the power to act immediately.

Naming an agent in your Durable Power of Attorney does not mean you cannot handle your own affairs. It means that both you and/or your agent may do so.

Estate Planning

Regardless of your health status or the extent of your assets, you probably want to be sure that whatever you leave behind goes to the people you love, and not end up in the wrong hands. You can achieve this goal with sound estate planning. If you fail to create an estate plan, the State of Florida decides who gets what. The people who end up inheriting your assets may not be the people you would choose.

Do not assume that the person who has been diagnosed with Alzheimer's Disease will predecease his/her spouse. In fact, studies show that caregivers frequently pass away first. Therefore, effective estate planning must take into consideration the possibility that the affected individual will outlive the healthy spouse.

The topic of estate planning is highly complex. Your plans must be built around your specific goals, and your health, financial and family circumstances. The information below provides a general overview of various Florida estate planning documents and the issues that should be considered by Alzheimer's patients and their families.

There are several types of estate planning documents and methods:

1. Florida Living Trust

The Living Trust, usually a Revocable Trust, is a popular estate planning tool among Floridians, with substantial benefits. Among these benefits are:

- It may be modified or revoked by you at any time during your lifetime.
- You retain full control over the monies in the Trust.
- If a Living Trust is properly drafted and funded, it will keep your estate out of Probate. Probate is the court-supervised process by which creditors are notified and paid, distributions are made to beneficiaries, etc. The Probate process can be time-consuming, expensive, and a hardship for family members.
- If you have real property in your name in more than one state, putting all your real property into your Living Trust will allow you to avoid probate in each of those states.

- Unlike a Will, the Living Trust is a private document. That means anyone you suspect might challenge your dispositions – for example, a former spouse or someone who's disgruntled because you have "cut them out" – is less likely to mount a legal challenge.

- You have more control over distributions. For example, if you have an adult child who is not financially responsible, you may include a provision in your Living Trust so that he/she receives only a certain amount periodically.

- Through your Living Trust, you can designate whom you wish to handle the financial assets in your Trust should you become incapacitated. Thus, the Living Trust "beefs up" your Durable Power of Attorney, providing extra protection against possible guardianship.

2. Florida Will

A Will is an essential part of everyone's estate plan. Your Will is a written legal document that specifies how you want your assets to be distributed after you are gone. It must be filed with the Florida Probate Court upon death. The court then supervises the distribution of your assets.

Many people incorrectly believe that if their estate is modest and not subject to estate taxes, there will be no need for Probate. This is a misconception. Any estate where assets must be distributed through the provisions of a Will is subject to Probate, regardless of whether the estate is taxable.

When you create a Will, you designate a Personal Representative who will administer your estate. Factors to consider when designating a Personal Representative include that person's level of responsibility, time constraints, etc. If you are thinking of appointing several co-Personal Representatives -- all your adult children, for example -- you must assess whether they can work together amicably. You must also consider Florida restrictions on who may serve. For example, Florida allows you to choose a Personal Representative who resides out of state, but only if that person is a relative.

Obviously, someone diagnosed with Alzheimer's Disease is not a prudent choice to serve as a Personal Representative.

Elective Share as It Relates to Medicaid: In a Medicaid case, it is essential to review the Will of the non-institutionalized spouse ("community spouse"), as more than likely it will need revision. This is because Florida law requires the surviving spouse to receive an elective share of the deceased spouse's estate (about 30% of the decedent's augmented estate, which consists of both probatable and non-probatable assets). If the community spouse dies first and the surviving spouse does not receive his or her elective share, Medicaid may consider that a failure to receive assets to which the Medicaid recipient is entitled, and Medicaid benefits may be lost as a result.

On the other hand, Medicaid benefits may also be jeopardized if the community spouse leaves funds outright to the institutionalized spouse. This is because a Medicaid recipient may not have available non-exempt assets in excess of $2,000. If the recipient receives an inheritance that puts his/her assets over the cap, Medicaid benefits will terminate and can be reinstated only when the person's assets are again below the cap of $2,000.

Fortunately, there is a solution to the elective share issue. Under Florida law, the community spouse may leave the elective share in a Testamentary Special Needs Trust for the benefit of the institutionalized spouse. The monies in the Testamentary Special Needs Trust can be used to enhance the quality of life for the spouse by supplementing services provided by Medicaid. For example, the trust funds may be used to pay for private-duty care.

The Will of the well spouse should contain a provision that establishes a Testamentary Special Needs Trust upon the well spouse's passing. At that time, the elective share will flow into the Trust, which will protect the institutionalized spouse's Medicaid benefits.

Although creating a Testamentary Special Needs Trust will require the community spouse's estate to go through Probate, the associated inconvenience and expense are far outweighed by the benefit of preserving the surviving spouse's Medicaid benefits.

This elective share issue is a very important issue to address. Anyone who has an institutionalized spouse on Medicaid, or believes that his/her spouse will become a Medicaid beneficiary in a nursing home in the future, should be sure to have his/her Will reviewed and revised accordingly.

3. Assets That Are Co-Owned, or Payable on Death

Many people try to keep their estates out of Probate by co-owning assets with a spouse or with one or more adult children, or by making an asset payable on death to them. It is true that assets that are co-owned with someone else, or which are titled payable on death to a designated beneficiary, are not governed by the terms of the Will. These assets pass by operation of law, i.e., outside of the Will, and thus need not go through Probate. However, depending on your specific circumstances, there are several reasons that co-owning assets or making them payable on death may not be prudent:

- Obviously, if a married couple co-owns assets and a spouse has been diagnosed with Alzheimer's Disease, co-ownership arrangements and payable on death designations should be revisited and modified as necessary.

- Co-owning an asset with an adult child will make that asset vulnerable to the creditors of the child, whether it is a claim arising from an auto accident, a spouse in a divorce, etc.

- Co-ownership may not be advisable in second marriage situations, even if you trust your spouse implicitly and expect he/she will distribute what he gets to your children from your prior marriage(s). The legal reality is that the surviving spouse can do whatever he/she wants with those assets. That includes sharing them with his/her own children, or with a new spouse.

- While co-owning assets may avoid Probate upon the first death, the survivor's estate will still go through Probate, unless the right legal strategy is put in place.

A note of caution about outright inheritance: If your spouse has been diagnosed with Alzheimer's Disease and ends up inheriting a lump sum from you – either through a Will as mentioned above, a Trust, a payable on death Account, or as the surviving co-owner of an asset – the inheritance may disqualify your spouse from receiving certain types of government assistance such as Medicaid, V.A. benefits, etc. Moreover, it is highly unlikely that anyone who is cognitively impaired will be able to prudently manage a large sum of money.

In Conclusion

Do not delay in taking the steps outlined in this guide. No one can accurately predict the course that Alzheimer's Disease will take in any individual. One fall or other trauma can exponentially impact the course of the disease. Take these steps, while you can, to prevent legal problems in the future, and to eliminate unnecessary worry today and tomorrow.

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