

# Estate planning and cognitive aging



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The 2020 United States Census showed that 1 in 6 Americans was age 65 or older.<sup>1</sup> The size of the 65 and older population has grown by over a third since 2010.<sup>2</sup> As we age we may become more susceptible to financial abuse, such as identity theft, fake investments and offers, threats, and intimidation. In the United States, it's estimated that individuals over the age of 60 lose \$28.3 billion each year.<sup>3</sup> This vulnerability can be further exacerbated for people with a cognitive decline, such as dementia. In 2020, approximately 5.8 million Americans were living with Alzheimer's disease, the most common type of dementia.<sup>4</sup> The Centers for Disease Control estimates that this number will

triple to 14 million by the year 2060.<sup>5</sup> Common signs of dementia include memory problems such as confusion, misplacing things, and repeating questions or tasks. It's critical to have legal documents in place that speak to your wishes when you no longer can speak for yourself.

### Financial planning

A Power of Attorney for Property allows you to name an agent to make financial decisions on your behalf. Powers of Attorney for Property can be durable, meaning the agent is granted the powers right away and these powers will last until you either pass away or revoke the agent's powers.

Alternatively, Powers of Attorney for Property can be more limited, such that the agent's powers only exist upon the existence of certain circumstances, such as your incapacity. This is sometimes referred to as a *springing* power of attorney. As we grow older, Powers of Attorney for Property become increasingly important as someone will need the ability to pay bills and purchase and sell property if we are unable to do so for ourselves. While still useful, a springing Power of Attorney for Property may prove problematic for individuals that later suffer a cognitive decline if they refuse to admit to being unable to manage their financial affairs. It is important to

<sup>1</sup> "2020 Census: 1 in 6 People in the United States Were 65 and Over," United States Census Bureau, May 25, 2023, <https://www.census.gov/library/stories/2023/05/2020-census-united-states-older-population-grew.html#:~:text=In%202010%2C%20the%20baby%20boom,is%20projected%20to%20start%20slowing.>

<sup>2</sup> Id.

<sup>3</sup> "AARP Report: \$28.3 Billion a Year Stolen from Adults 60+," AARP, <https://states.aarp.org/colorado/aarp-report-28-3-billion-a-year-stolen-from-adults-60.>

<sup>4</sup> "Alzheimer's Disease and Related Dementias," Centers for Disease Control, October 26, 2020, <https://www.cdc.gov/aging/aginginfo/alzheimers.htm>.

<sup>5</sup> Id.

remember that a Power of Attorney governs assets that are outside of a trust and only works during your lifetime; the agent's powers over the your assets stop at death.

After your death, your assets will be governed by your Last Will and Testament and your Revocable Trust (sometimes referred to as a Living Trust). A Last Will and Testament allows you to appoint an individual to administer your estate upon your death. In addition to outlining how the assets of your estate will be distributed, your Last Will and Testament can also designate a guardian for minor children. A Revocable Trust allows you to name someone to act as a trustee to make investment and distribution decisions with regard to assets owned by the trust. You may act as the initial trustee of your Revocable Trust, but you will want to name a successor trustee to act in the event of your incapacity or at your passing. The Revocable Trust becomes irrevocable at your passing, meaning the terms of the trust cannot be changed (or, at a minimum, are difficult to change). The remaining assets in the trust at your death will be invested, administered, and distributed pursuant to the terms of the trust. A Power of Attorney for Property, a Last Will and Testament, and a Revocable Trust can work in conjunction to efficiently carry out your wishes if you become incapacitated or upon your death.

## Health care planning

Everyone should have a Power of Attorney for Health Care (sometimes referred to as an Advanced Health Care Directive), regardless of their cognitive state. This document allows you to name an agent to make health care decisions on your behalf. Most often, an agent's powers will take effect if you become incapacitated and can no longer make decisions for yourself. Since these documents detail your wishes ahead of time, they are especially important for individuals facing a cognitive decline. In some states, a Power of Attorney for Health Care will include a HIPAA (Health Insurance Portability and Accountability Act) release, a Living Will, and instructions on resuscitation. A HIPAA release allows an agent access to your medical records. A Living Will provides an agent with instructions regarding life-sustaining measures (for example, whether mechanical ventilation or a feeding tube is acceptable if a physician deems you to be in a persistent vegetative state). Do not resuscitate orders provide an agent with instructions as to your wishes on resuscitation. You may also want to consider having documentation providing instructions regarding burial wishes and organ donation.

While it's important to have these legal documents in place, it's just as important to communicate your wishes to your loved ones. The role of a health care agent can be emotionally taxing and the agent may have to make very difficult decisions.

Communicating your wishes while you are of sound mind can ease this emotional burden for your agent in the future. You should inform the individual that you have named them to this very important role and discuss the responsibilities the role entails, along with your wishes. Additionally, you should provide a copy of your document(s) to your agent in order to make any future hospital visit more efficient.

It's important to organize all of your important information while you are able to do so. Consider creating a list of your important contacts (e.g., executor, trustee, attorney, accountant, financial advisor, corporate benefits and insurance benefits), online accounts and passwords (e.g., bank and brokerage), income and expense information (e.g., pensions, annuities, bills to pay and debts to settle) and letting your loved ones know the location of these items. Parents are sometimes reluctant to share their private information with their adult children. For example, parents may not want to share a balance sheet that discloses their entire net worth, or they may not wish for their children to see a will or trust document that discloses the ultimate beneficiaries of the parents' estates. However, organizing important information and providing your fiduciaries and beneficiaries with its location will ease the burden on your loved ones should they need that information. For a discussion on estate planning documents, see Joanna Morrison, *Estate Planning: An Overview* (a publication of the Advanced Planning Group).



## In the event of incapacity

If those around you believe that you are no longer able to meet your own needs, then they may petition a court to declare you incapacitated. Each state has its own process by which a court declares one to lack capacity. However, there is typically no bright line rule as to when someone is incapacitated, rather a judge will evaluate evidence such as interviews with the individual, physical and mental health evaluations, and interviews with doctors and close family and friends. If the court finds you to be incapacitated, it will grant someone the ability to make decisions for you. The nomenclature for these decision-makers varies from jurisdiction to jurisdiction. For the purposes of this whitepaper, a *guardian* refers to a person appointed by a court to make personal decisions for an incapacitated person and a *conservator* refers to a person appointed by a court to make

financial decisions for an incapacitated person. However, some states simply refer to these two roles as a “Guardianship over the Person” and a “Guardianship over the Estate.” Many states will allow you to nominate the individual that you would like to serve as your guardian and conservator while you have capacity, by putting it in writing in your Powers of Attorney for Property and Healthcare. If you have a Power of Attorney for Healthcare and a court has also appointed a guardian, medical decisions will be reserved for the agent you selected. If you have a Power of Attorney for Property and have given your agent broad powers to manage your financial affairs, then it’s unlikely there would be a need for a court to appoint a conservator.

In addition to ensuring that estate planning documents are up to date, it’s also important to think about everyday tasks that become more

difficult with age, even absent a cognitive decline. For example, driving a vehicle can become more challenging as we grow older as our senses, such as hearing, vision, and perception can decline over time. If the time comes where you are no longer able to safely operate a vehicle, a loved one may have to intervene. Some states have laws that allow the anonymous reporting of an unsafe driver. The state will then conduct a review and may require the individual to provide medical information and/or perform a driving test. It is important to think about how such tasks can become more difficult as we age.

Conversations concerning cognitive decline are often difficult. However, by planning ahead, you can protect yourself and your loved ones should you ever find yourself unable to make personal or financial decisions.

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The Advanced Planning Group consists of former practicing estate planning and tax attorneys with extensive private practice experience and diverse areas of specialization, including estate planning strategies, income and transfer tax planning, family office structuring, business succession planning, charitable planning and family governance.

The Advanced Planning Group provides comprehensive planning and sophisticated advice and education to ultra high net worth (UHNW) clients of the firm. The Advanced Planning Group also serves as a think tank for the firm, providing thought leadership and creating a robust intellectual capital library on estate planning, tax and related topics of interest to UHNW families.



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