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Estate Planning to Protect Yourself and Your Assets in the Event of Incapacity as a Result of Dementia

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Introduction

People with dementia can be vulnerable as a result of their diminished capacity and therefore are more susceptible to becoming victims of unscrupulous predators. Because of their diminished capacity and inability to communicate effectively, people with dementia also may be neglected and not receive adequate care to meet their needs. For these reasons, our society should, and does, offer the ability of people that have, or will have, diminished capacity to control decisions with respect to their health and property after they are no longer able to make those decisions for themselves.

This article addresses some of the tools available under Delaware law that can be used by people to plan ahead for incapacity and safeguard their property and control their decisions and wishes with respect to health care and end-of-life situations. Some of those tools include a durable personal power of attorney, an advance health-care directive, a Delaware Medical Orders for Scope of Treatment form, and Last Will and Testaments and revocable trusts. This article also addresses the legal standards applied in determining whether and when a person has capacity to create these instruments and/or when such instruments become effective.

Planning Techniques

Durable Personal Power of Attorney

A critical document that an individual must execute prior to becoming incapacitated is a durable personal power of attorney ("DPOA"). The DPOA allows a person, as the principal, to select an agent or agents to manage his or her property and financial affairs during the principal's lifetime. In Delaware, DPOAs are governed by Title 12, Chapter 49A of the Delaware Code.

The DPOA can become effective immediately so that the agent can act on the principal's behalf upon execution of the document, or the DPOA can become effective only at a future date or upon the occurrence of a future event or contingency (e.g., incapacity) specified in the DPOA.[1]

For purposes of the DPOA, "incapacity" is defined in 12 *Del. C.* § 49A-102(6) as the "inability of an individual to manage his or her property or business affairs."[2] The statute allows the principal to authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.[3] It is not necessary for a physician to be designated the authorized person and, therefore, a person without a medical background can determine whether the principal is incapacitated for the DPOA to become effective. The statute does provide, however, that if a DPOA becomes effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated (or the authorized person is unable or unwilling to act), the DPOA becomes effective upon a determination in a writing or other record by a physician or by the Court of Chancery or other court of competent jurisdiction that the principal is incapacitated.[4] Needless to say, involving the Court would cause significant

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delays, so if the DPOA is drafted to become effective only upon the principal's incapacity, a mechanism for making this determination should be clearly set forth in the DPOA.

Similarly, to avoid uncertainty, the principal should specify in the DPOA whether the agent's authority will continue or terminate if the principal regains capacity. Pursuant to 12 *Del. C.* § 49A-110(c), unless the DPOA provides otherwise, an agent's authority is exercisable until the authority is terminated by, among other ways, revocation by the principal or termination of the DPOA.[5] The DPOA may be terminated if, among other things, the principal revokes the DPOA and provides notice of the revocation to the agent, a terminating event set forth in the DPOA occurs, or the purpose of the DPOA is accomplished.[6]

If the DPOA is effective immediately upon execution, the principal and the agent each have the ability to manage the principal's property and financial affairs as long as he or she is not incapacitated or the agent's power is not revoked. However, if the power of attorney does not contain language indicating that it is durable (meaning that it becomes or remains effective during the principal's incapacitation) or otherwise comply with the other statutory requirements, the agent's authority to act under the power of attorney will terminate upon the principal's incapacitation, potentially leaving the principal's property and financial matters in disarray and subject to adverse consequences.[7] In this situation, as discussed further below, an interested person may petition the Delaware Court of Chancery to appoint a guardian of the principal's property, who may not be the person the principal otherwise would have appointed, and will result in annual court filings and costs.

In a DPOA, the principal can grant the agent broad powers including, but not limited to, the ability to execute contracts, transfer assets, access communications, and initiate litigation on behalf of the principal with respect to the principal's real property, tangible personal property, stocks, bank accounts, business entities owned by the principal, estates, trusts, taxes, and gifts.[8] The principal can also limit the DPOA to a specific power, such as selling a particular parcel of real property.[9] The DPOA, however, does not grant the agent authority to make health care decisions on the principal's behalf, as that authority is granted only under an advance health-care directive.

Because the DPOA grants the principal's agent with significant power to manage the principal's property, the person who the principal appoints should be someone the principal trusts and knows well. The principal should discuss the DPOA with the selected agent, preferably prior to executing the DPOA, to ensure that the agent understands his or her role and is willing to act on the principal's behalf. If and when the agent acts on the principal's behalf, the agent will be required to execute a certification appended to the DPOA, certifying, among other things, that the agent will act in good faith and within the scope of the powers granted under the DPOA.[10]

Advance Health-Care Directive and Health-Care Surrogates

An advance health-care directive ("AHCD") allows a person, as the "declarant", to accomplish two important tasks: (1) to provide instructions or directions concerning the declarant's health care decisions, including whether to provide or withhold artificial nutrition and hydration when the declarant has a "qualifying condition" (as defined in 16 *Del. C.* § 2501(r)) in certain end-of-life situations; and (2) to provide a power of attorney for health care by designating an agent to make health care decisions on behalf of the declarant.[11]

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Title 16, Chapter 25 of the Delaware Code governs AHCDs in Delaware. In contrast to the DPOA, the declarant's instructions and agent's authority under the AHCD only become effective upon the declarant's incapacitation and not before.[12] However, if a declarant regains capacity, the power to make medical decisions reverts to the declarant.[13]

The questions, then, are when does a person have capacity and who makes that determination? "Capacity" is defined in 16 *Del. C.* § 2501(d) as "an individual's ability to understand the significant benefits, risks and alternatives to proposed health care and to make and communicate a health-care decision."[14] Thus, if a person's dementia affects his or her ability to understand and communicate about health care options and decisions, the agent under the AHCD will have power to act, subject to any instructions provided by the declarant in the AHCD.

Pursuant to 16 *Del. C.* § 2503(e), the determination of whether an individual lacks or has recovered capacity must be made by the primary physician or other physician(s) as specified in the AHCD, provided, however, that an AHCD may include a provision accommodating an individual's religious or moral beliefs by designating a person other than a physician to certify in a notarized document that the individual lacks or has recovered capacity.[15]

An AHCD may provide instructions, or allow an agent to make decisions, regarding any health care decision that the declarant could make if he or she were not incapacitated.[16] For example, the AHCD could cover heath care decisions regarding: (i) the selection and discharge of healthcare providers and institutions; (ii) the acceptance or refusal of diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate; and (iii) directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care.[17] However, provisions directing or authorizing the use or refusal of medical care that are contrary to public health laws are unenforceable.[18] Like the DPOA, it is important for the declarant to discuss his or her wishes regarding heath care treatment with the selected agent and to select an agent who he or she trusts will follow the declarant's wishes and instructions, if not otherwise stated in the AHCD.

In the absence of an instruction or agent under an AHCD or an appointed guardian, a "surrogate" may be appointed to "make a health-care decision to treat, withdraw or withhold treatment for an adult patient if the patient has been determined by the attending physician to lack capacity."[19] Section 2507 of Title 16 of the Delaware Code provides an ordering rule to determine who may act as the patient's surrogate. First, any individual designated by a mentally competent patient to act as a surrogate by personally informing the supervising health-care provider in the presence of a witness, who may not be the designated surrogate.[20] Second, in the absence of a designation or if the designee is not reasonably available, any member of the following classes of the patient's family who is reasonably available, in the descending order of priority, may act as a surrogate: (a) the spouse, unless a petition for divorce has been filed; (b) an adult child; (c) a parent; (d) an adult sibling; (e) an adult grandchild; (f) an adult niece or nephew; and (g) an adult aunt or uncle.[21]

Delaware Medical Orders for Scope of Treatment

Another document through which persons can express their desires and control decisions about their own health care if and when they become incapacitated is a Delaware Medical Orders for Scope of Treatment ("DMOST") form published by the Delaware Department of Health and Social Services pursuant to the DMOST Act, 16 *Del. C.* § 2501A, *et seq*.

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The DMOST form contains medical orders that are intended to travel with the patient and pertain to the patient's goals for care regarding the use of life-sustaining medical interventions when the patient is incapacitated and living with a serious illness or frailty, such that the patient's health-care practitioner would not be surprised if the patient died within the next year.[22] The DMOST form is separate from an AHCD and, unlike an AHCD, it must be signed by a health-care practitioner after discussion with the patient or the patient's authorized representative regarding the DMOST form and its implications.[23]

According to the statute, the reason for the DMOST and the DMOST form is because "[d]ata reveal[s] that many individuals may reside or be situated in multiple locations such as home, acute care, and post-acute care settings near the end of life," and that "[c]hanges in such settings require that an easily understood, standardized, portable document be available to communicate the individual's care preferences."[24] The DMOST form is intended to accompany the patient, and to be honored by all personnel attending the patient in all health-care settings, including the patient's home, a health-care institution, at the scene of a medical emergency, or during transport.[25]

Guardians of the Person and Property

If no agent has been appointed under a DPOA and/or AHCD, or an agent or surrogate is unavailable, it may be necessary for an interested person to file a petition in the Delaware Court of Chancery for the appointment of a guardian of the person and/or property of a disabled person.[26]

Pursuant to Court of Chancery Rule 175, the petition for appointment must include a lengthy list of information regarding the disabled person and it must be accompanied by, among other things, a physician's affidavit, which must be executed by a medical or osteopathic doctor authorized to practice medicine and (i) give particulars as to the alleged disabilities, (ii) state the date of the doctor's last examination of the person with an alleged disability, and (iii) state the doctor's opinion as to whether the person has a disability that interferes with the ability to make responsible decisions, and whether the person has sufficient mental capacity to understand the nature of guardianship in order to consent to the appointment of a guardian.[27]

Upon the filing of the petition, the Court will then appoint an "attorney ad litem" to represent the disabled person and to investigate the allegations of the petition, the fitness of the proposed guardian, and all other pertinent facts.[28] Upon concluding the investigation, the attorney ad litem will report its findings and conclusions to the Court, including whether the wishes of the disabled person diverge from his or her best interests.[29] After notice is provided to all potentially interested persons, the Court will hold a hearing to determine whether to appoint the guardian and whether to apply any restrictions on the guardianship.[30] Within thirty days after appointment, the guardian is required to file a verified inventory of the disabled person's property and, one year after appointment, the guardian must file an accounting with the Court and every two years thereafter unless ordered otherwise by the Court.[31] Similar requirements are not imposed upon agents under DPOAs and AHCDs and, therefore, it is advisable to create those instruments to avoid the cumbersome, but necessary, guardianship process.

Last Will and Testaments and Revocable Trusts

Regardless of your age, health, and financial situation, everyone should have an estate plan to provide for the orderly management and disposition of assets upon death. The most common

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estate planning tool is a Last Will and Testament, which dictates how the testator's assets will be distributed at death and who will serve as the personal representative to administer the estate.

Another common estate planning tool in Delaware is a revocable trust. With a typical revocable trust, the trustor will retitle individually owned assets into the name of the trust and will also serve as trustee so that he or she may continue to manage and access the assets during his or her lifetime. Revocable trusts can be great tools for incapacity planning, too, because the trust instrument creating the trust will name a successor trustee that will be appointed to serve if the trustor becomes incapacitated or dies. If a person has established a revocable trust, his or her Last Will and Testament typically will include a "pour over" provision, whereby the testator's individually owned assets will be distributed to his or her trust upon death to be distributed in accordance with the provisions of the trust instrument.

To create a valid Last Will and Testament in Delaware, the testator must be of sound and disposing mind and memory,[32] meaning that, at the time the Last Will and Testament is executed, the testator must: (i) be capable of exercising thought, reflection, and judgment; (ii) know what he or she is doing and how he or she is disposing of his or her property; and (iii) have sufficient memory and understanding to comprehend the nature and character of his or her act.[33]

Ideally, a Last Will and Testament and revocable trust should be created when the testator is competent and there is no concern of dementia. For various reasons, that may not always be possible. Diminished capacity alone is not enough to invalidate a Last Will and Testament or trust, as long as the testator is deemed to have testamentary capacity in accordance with the standard set forth above.

Delaware courts have recognized that only a modest level of competence is required and "[c]ourts have long held there is a low standard for testamentary capacity."[34] For example, Delaware courts have declined to invalidate a challenged Last Will and Testament and/or trust for lack of capacity when the testator had a history of memory problems and suffered from delusions and Alzheimer's disease[35]; a reduced mental capacity, a sudden change in living habits, and engaged in irrational behavior following a stroke[36]; and a personality change and periods of confusion in the months prior to the execution of the Last Will and Testament.[37]

In addition to challenges for lack of testamentary capacity, a potential beneficiary can allege that a Last Will and Testament or trust should be invalidated because the testator or trustor was unduly influenced by another person who benefitted from the alleged exertion of undue influence. To demonstrate undue influence, the challenger must demonstrate that the alleged influencer exerted "excessive or inordinate influence" on the testator or trustor so as to "subjugate his mind to the will of another, to overcome his free agency and independent volition, and to impel him to make a will that speaks the mind of another and not his own."[38]

Assuming a person suffering from dementia has the requisite capacity to create a Last Will and Testament or trust, he or she is free to dispose of property as he or she wishes (subject to certain limitations regarding disinheriting a spouse). However, if a person with diminished capacity desires to create or alter a Last Will and Testament or trust, the validity of those instruments may be more susceptible to challenges from potential beneficiaries, particularly if those beneficiaries received less than they otherwise would have received under a prior version of the Last Will and Testament or trust or under the intestacy laws, which would apply if no Last Will and Testament or trust were executed. Even if a challenge is defeated, the cost to litigate such an action can be significant and substantially diminish or completely wipe out the assets of the estate or trust.

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Fortunately, Delaware law provides a couple of mechanisms to preclude challenges based on a person's capacity.

First, Delaware permits the use of no-contest clauses in Last Will and Testaments and trusts.[39] Such clauses attempt to prevent beneficiaries from initiating an action to contest the validity, or set aside or vary the terms, of a Last Will and Testament or trust.[39] The no-contest provision typically provides that a potential beneficiary who unsuccessfully challenges the validity or terms of a Last Will and Testament or trust will be treated as if he or she predeceased the testator or trustor, and therefore will preclude the beneficiary (and usually his or her descendants) from taking any assets under the Last Will and Testament or trust. It should be noted, however, that the deterrent effect of a no-contest clause is negated if the testator or trustor completely disinherits a person in their Last Will and Testament or trust because the disinherited person stands to lose nothing if his or her challenge to the validity of the estate planning instruments fails.

Second, Delaware has enacted "pre-mortem validation" statutes, which provide a process whereby testators and trustors can, during their lifetime, notify potential beneficiaries (or individuals who are excluded as beneficiaries) of the existence of a Last Will and Testament or trust and require that any challenges to the validity of the Last Will and Testament or trust be brought within 120 days of receipt of the notification. The pre-mortem validation statutes that govern Last Will and Testaments and trusts are set forth in Sections 1311 and 3546 of Title 12 of the Delaware Code, respectively. If an action challenging the validity of the Last Will and Testament or trust is not initiated within the 120-day notice period, the beneficiaries that received (or were deemed to have received) the notice are generally precluded from later challenging the validity of the Last Will and Testament or trust.[40]

These options can be potent tools to thwart challenges to a person's legitimate estate plan after death, and they should be given special consideration by testators and trustors that have a diminished capacity and particularly if they desire to create or amend estate planning documents to disinherit or provide for disparate distributions to similarly situated heirs.

Conclusion

There are several tools available in Delaware to plan ahead for incapacity and allow people to control decisions with respect to their property and health care at a time when they can no longer make those decisions for themselves. Without these instruments, the disposition of a person's property and decisions regarding health care are governed by Delaware's default guardianship and surrogate statutes. These default options, however, may not be consistent with a person's wishes and can be more costly and administratively burdensome. Thus, it is advisable for all Delawareans to consider their options and implement a comprehensive estate plan.

As discussed, it is prudent to execute these instruments in advance of any concerns of dementia. It is important to note, however, that experiencing some symptoms of dementia will not disqualify or prevent a person from executing valid planning documents. The law generally recognizes that a person, even with diminished capacity, can create valid planning documents as long as they appreciate and comprehend the significance of their decisions and understand the documents they are executing. People that have experienced symptoms of dementia should especially be encouraged to seek assistance in creating their estate plan as soon as practicable to

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ensure that their decisions and goals with respect to their finances and health care treatment are respected.

References

1. 12 *Del. C.* § 49A-109(a).
2. 12 *Del. C.* § 49A-102(6).
3. 12 *Del. C.* § 49A-109(b)
4. 12 *Del. C.* § 49A-109(c).
5. 12 *Del. C.* § 49A-110(b), (c).
6. 12 *Del. C.* § 49A-110(a).
7. 12 *Del. C.* § 49A-104.
8. 12 *Del. C.* § 49A-203.
9. 12 *Del. C.* §§ 49A-201, 49A-204.
10. 12 *Del. C.* § 49A-105(c).
11. *See generally* 16 *Del. C.* § 2503.
12. 16 *Del. C.* § 2503(c).
13. 16 *Del. C.* § 2503(d).
14. 16 *Del. C.* § 2501(d).
15. 16 *Del. C.* § 2503(e).
16. 16 *Del. C.* § 2503(a)
17. 16 *Del. C.* § 2501(h).
18. 16 *Del. C.* § 2502.
19. 16 *Del. C.* § 2507(a).
20. 16 *Del. C.* § 2507(b)(1).
21. 16 *Del. C.* § 2507(b)(2).
22. 16 *Del. C.* § 2503A(c).
23. 16 *Del. C.* § 2502A(d).
24. 16 *Del. C.* § 2502A(e).
25. 16 *Del. C.* § 2503A(e)(5).
26. 12 *Del. C.* § 3901(a)
27. Del. Ct. Ch. R. 175(a), (c)(4).
28. Del. Ct. Ch. R. 176(a).
29. Del. Ct. Ch. R. 176(a), (c).

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30. Del. Ct. Ch. R. 176(e), 177.
31. 12 *Del. C.* §§ 3921(b), 3943.
32. 12 *Del. C.* § 201.
33. *In re Langmeier*, 466 A.2d 386, 402-03 (Del. Ch. 1983).
34. *In re Purported Last Will & Testament of Wiltbank*, 2005 WL 2810725, at *7 (Del. Ch. Oct. 18, 2005).
35. *Matter of Kittila*, 2015 WL 688868, at *11-12 (Del. Ch. Feb. 18, 2015); *Sloan v. Segal*, 2009 WL 1204494, at *15 (Del. Ch. Apr. 24, 2009).
36. *In re Purported Last Will & Testament of Wiltbank*, 2005 WL 2810725, at *7 (Del. Ch. Oct. 18, 2005).
37. *In re Estate of West*, 522 A.2d 1256, 1262-63 (Del. 1987).
38. *In re Will of Cauffiel*, 2009 WL 5247495, at *7 (Del. Ch. Dec. 31, 2009).
39. 12 *Del. C.* § 3329(a)
40. 12 *Del. C.* §§ 1311, 3546.

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