

Planning for Incapacity: An Often Overlooked Aspect of Estate Planning

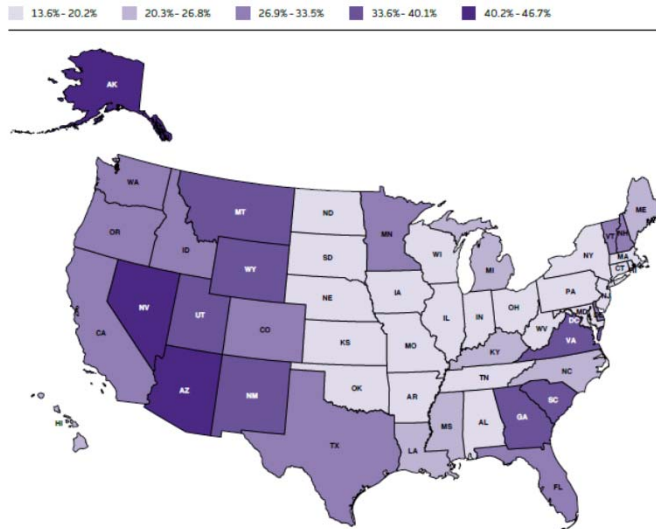
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BOK Financial RIA Trust Education Program

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Projected Increases Between 2018 and 2025 in Alzheimer's Dementia Prevalence by State



Source: Alzheimer's Association. 2018 Alzheimer's Disease Facts and Figures, pg. 20

Agenda

- Current State of the Law
 - Conservatorships and Guardianships
 - Agents under Powers of Attorney
 - Trusts
- Family Dynamics
- Planning Strategies
- Advice for Financial Advisors
- Hypotheticals
- Questions

Current State of the Law

- Incapacitated Person
 - Over the age of 18; and
 - Is unable to effectively:
 - receive or evaluate information or both; or
 - make or communicate decisions

to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.

Current State of the Law

- Managing an Incapacitated Person's Affairs
 - Financial
 - Conservatorship- Court appoints a Conservator to manage the estate of a "protected person".
 - Financial Power of Attorney- An individual names an Agent to manage the property of the individual.
 - Trust- Private relationship created by agreement between an individual and a Trustee, whereby the Trustee manages the property transferred to the trust pursuant to the terms of the agreement.
 - Medical
 - Guardianship- Court appoints a Guardian to make decisions regarding the "ward's" support, care, education, health and welfare.
 - Medical Power of Attorney- An individual names an Agent to make decisions regarding the individual's support, care, health and welfare.
 - Declaration for Surgical/Medical Treatment (a.k.a. "Living Will")- Individual makes declarations directing the continuation or removal of life-sustaining procedures and artificial nutrition and hydration in the event the individual, at some future time, has a terminal condition or is in a persistent vegetative state.

Current State of the Law

Managing an Incapacitated Person's Affairs

Requires Court Involvement	Financial Decisions	Medical Decisions
Yes	Conservatorship	Guardianship
No	Financial Power of Attorney	Medical Power of Attorney
No	Trust	Declaration for Surgical/Medical Treatment (a.k.a. "Living Will")

Current State of the Law- Conservatorship and Guardianship

	Pre Hearing Tasks	Priority of Appointment	Reporting Requirements
Guardianship	<ol style="list-style-type: none"> 1. Court sets hearing date. 2. Court appoints a Visitor to meet with respondent and other interested parties. 3. Court may appoint attorney to represent the respondent. 4. Court may order a professional evaluation. 	<ol style="list-style-type: none"> 1. Guardian currently acting. 2. Person nominated as Guardian. 3. Agent under Medical Durable Power of Attorney. 4. Agent under Financial Durable Power of Attorney. 5. Spouse. 6. Adult Child. 7. Parent. 8. Adult who has lived with respondent for more than six months before the filing of petition. 	<ol style="list-style-type: none"> 1. Guardian must submit initial report within 60 days after appointment. 2. Guardian must provide annual reports to the Court.
Conservatorship	<ol style="list-style-type: none"> 1. Court sets hearing date. 2. Court appoints a Visitor to meet with respondent and other interested parties. 3. Court may appoint attorney to represent the respondent. 4. Court may order a professional evaluation. 	<ol style="list-style-type: none"> 1. Conservator or Guardian currently acting. 2. Person nominated as conservator. 3. Agent under Financial Durable Power of Attorney. 4. Spouse. 5. Adult Child. 6. Parent. 7. Adult who has lived with respondent for more than six months before the filing of petition. 	<ol style="list-style-type: none"> 1. Conservator must submit a financial plan within 90 days after appointment. 2. Conservator must submit an inventory within 90 days after appointment. 3. Conservator must provide annual reports to the court.

Current State of the Law- Powers of Attorney Definitions

- “Durable Power” means the power of attorney is not terminated by the principal’s incapacity.
 - All powers of attorney created on or after January 1, 2010 are durable unless the power of attorney expressly provides that it is terminated by the incapacity of the principal.
 - All powers of attorney existing on December 31, 2009, is durable only if on that day the power of attorney specifically states that the intent of the principal is that the power of attorney not be affected by the principal’s incapacity.
- “Standing Power” means the power of attorney is effective when signed.
- “Springing Power” means the power of attorney will be effective upon the occurrence of a specified event, such as incapacity.

Current State of the Law- Powers of Attorney Definitions

- “Principal”- an individual who grants authority to an agent in a power of attorney.
- “Agent”- a person granted authority to act for a principal under a power of attorney.
- “Power of Attorney”- writing or other record granting authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.
- “Incapacity”- Inability of an individual to manage property or business affairs because the individual
 - Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or
 - Is
 - ❖ Missing
 - ❖ Detained, including incarcerated in a penal system; or
 - ❖ Outside the United States and unable to return.

Current State of the Law- Financial Powers of Attorney

- Agent’s Acceptance
 - Except as otherwise provided in the power of attorney, a person accepts appointment as an agent by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.

Current State of the Law- Financial Powers of Attorney

- **Mandatory Duties- Cannot be reduced or eliminated**
 - Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
 - Act in good faith;
 - Act only within the scope of authority granted in the power of attorney.

Current State of the Law- Financial Powers of Attorney

- **Agent's Default Duties- May be reduced or eliminated in power of attorney**
 - Act loyally for the principal's benefit;
 - Act so as not to create a conflict of interest between the principal and agent;
 - Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
 - Keep a record of all receipts, disbursements, and transactions made on behalf of the principal.

Current State of the Law- Financial Powers of Attorney

- Exoneration of Agent
 - Agent cannot be relieved of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interests of the principal.
 - Exoneration not effective if it was inserted as a result of abuse of a confidential or fiduciary relationship with the principal.

Current State of the Law- Financial Powers of Attorney

- Authority Granted to an Agent
 - General Grants- Power of attorney must list or must state that “the agent has authority to do all acts that a principal could do”.
 - Real Property
 - Tangible personal property
 - Stocks and Bonds
 - Commodities and options
 - Bank accounts
 - Business Interests
 - Insurance and annuities
 - Claims and litigation
 - Beneficial interests
 - Personal and family maintenance
 - Benefits from governmental programs or civil or military service
 - Retirement plans
 - Taxes

Current State of the Law- Financial Powers of Attorney

- Authority Granted to an Agent
 - Specific Grants- must be specifically listed in Power of Attorney
 - Create, amend, revoke, or terminate a trust;
 - Make a gift;
 - Create or change rights of survivorship;
 - Create or change a beneficiary designation;
 - Delegate authority granted under the power of attorney;
 - Exercise a power held by the principal in a fiduciary capacity;
 - Exercise a power held by the principal with respect to removal or appointment of a fiduciary.

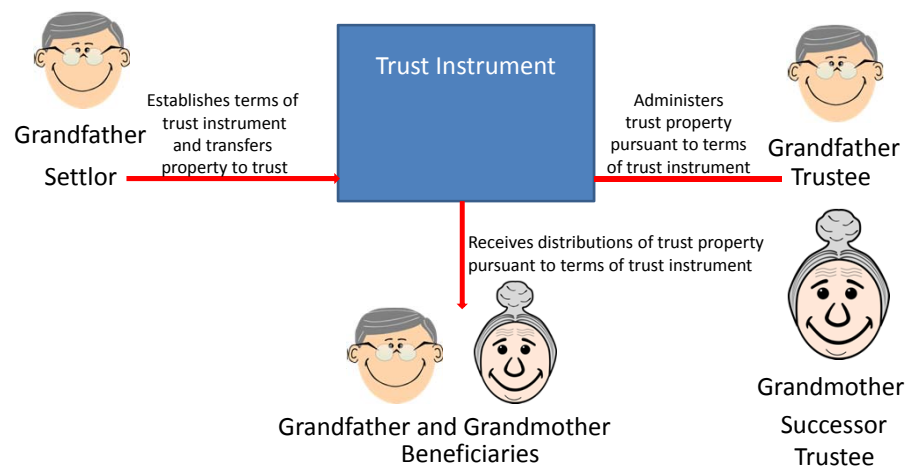
Current State of the Law- Financial Powers of Attorney

- Third-Party Reliance on Power of Attorney
 - A person that in good faith accepts a purportedly acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid, and still in effect, the agent's authority were genuine, valid, and still in effect, and the agent had not exceeded and had properly exercised the authority.
- A person that is asked to accept an acknowledged power of attorney may request and rely upon, without further investigation, one or more of the following:
 1. An agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney;
 2. An English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; or
 3. An opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.
 - Such requested documentation must be provided at the principal's expense.
 - Requests must be made no later than seven business days after presentation of the power of attorney for acceptance and must accept the power of attorney no later than five business days after receipt of the requested documentation.

Current State of the Law

Pros/Cons of Powers of Attorney	
Pros	Cons
May avoid the need for conservatorship or guardianship.	Does not wholly replace a conservatorship or guardianship.
Simple to establish.	Simple to establish- principals do not always understand the legal implications of a form they pull from the internet.
Principal will have a say in who will make decisions.	Named agent is under no duty to accept.
No mandatory reporting.	Limited oversight. If principal is incapacitated and agent does not volunteer information, then only a Court may force agent to report to interested parties.

Current State of the Law- Revocable Trusts



Family Dynamics

- There is no such thing as the “perfect family”
 - The Prodigal Son
 - The Black Sheep
 - Blended Families

Family Dynamics Example

- Husband and wife have three adult children.
 - The eldest child is a successful neurosurgeon with two young children of her own. Her husband is a successful litigation attorney at a large firm in L.A.
 - The middle child is a college professor at CU Boulder with one young child and a “pushy” husband, who recently quit his job at a large brokerage firm to begin a private equity fund.
 - The youngest child, who is fifteen years younger than the middle child, graduated from law school in 2015. He is working at a law firm specializing in collections work and still lives with his parents.

Planning Strategies

- Ensure the client is protected in the event of incapacity.
- Minimize family conflict and, at the very least, remove the client (and his financial advisors) from the family conflict.

Planning Strategies

- Selecting who should serve
 - Family
 - Friends
 - Professional Advisors
 - Independent Third-Parties
 - Hybrid
- In what role?
 - Guardian
 - Conservator
 - Agent
 - Trustee
 - Overseer

Planning Strategies- Minimizing Family Conflict

- Checks and Balances
 - Financial Decisions
 - Medical and Personal Care Decisions
- Oversight
 - Who is responsible for monitoring the actions of the agent?
 - Remember that conservators and guardians report to the Court and a trustee reports to the beneficiaries of the trust.

Advice for Financial Advisors

- Do not give legal advice
 - “My son helps me with all my finances, is there an easy way to give him access to my accounts?”
- Do not rely on your own interpretation of a power of attorney or other legal document
 - Remember, you may request an opinion of counsel as to any matter of law concerning the power of attorney if you state the reason for the request in writing.

Advice for Financial Advisors

- Elder Abuse and Mandatory Duty to Report

DISCLAIMER- This presentation only discusses mandatory reporting requirements in the context of financial exploitations of at-risk adults in Colorado. Colorado contains other mandatory reporting requirements which are beyond the scope of this presentation. Please consult with your local attorney to fully understand all mandatory reporting requirements which may be applicable to you.

Advice for Financial Advisors

- Elder Abuse and Mandatory Duty to Report
 - “At-risk elder” means any person who is seventy years of age or older.
 - “Exploitation” includes the following:
 - Uses deception, harassment, intimidation, or undue influence to permanently or temporarily deprive an at-risk elder of the use, benefit, or possession of any thing of value;
 - Misuse of property of an at-risk elder that adversely affects the at-risk elder’s ability to receive health care or health care benefits or to pay bills for basic needs or obligations.

Advice for Financial Advisors

- **Mandatory Duty to Report**
 - All personnel of banks, savings and loan associations, credit unions, and other lending or financial institutions, whether paid or unpaid, who observe exploitation of an at-risk elder or who have reasonable cause to believe that an at-risk elder is being exploited or is at imminent risk of being exploited shall report such fact to a law enforcement agency not more than 24 hours after making the observation or discovery.

Advice for Financial Advisors

- **Failure to Report**
 - A person who willfully fails to report commits a class 3 misdemeanor.
- **Resources**
 - Colorado Department of Health and Human Services
 - <https://www.colorado.gov/pacific/cdhs/report-abuse-older-adult>
 - <https://www.coloradoaps.com/about-mandatory-reporting.html>
 - Cdhs_aps_questions@state.co.us (questions only, reports should be directed to the local police department).

Hypothetical 1

- Mom, an 82 year-old widow, executed a financial power of attorney appointing her eldest son and only daughter as co-agents.
- Mom learns that she must have an operation that likely will leave her incapacitated for a few weeks. She contacts agent son and asks that he take over her bill paying and looking after her home while she recovers. Mom says nothing about any other financial matters nor does Mom mention anything to agent daughter.
- Agent son presents power of attorney to Mom's financial advisor so that he can access Mom's money market account to pay bills. All of Mom's accounts are managed by the financial advisor on a non-discretionary basis.
- Mom ends up having a difficult recovery and is marginally coherent for the next year. Unfortunately, during this time a major recession hits and Mom's brokerage account lost 50% of its value.
- Mom's youngest son rides into town with legal counsel and threatens to sue his brother and sister for breach of fiduciary duty, contending that if mom's brokerage account had been managed correctly, the losses would not have occurred.

Hypothetical 1- Who is Responsible

- Is agent son and/or agent daughter liable for the loss that occurred in the brokerage account?
 - In general, merely naming an agent does not impose a duty on the agent to accept or reject appointment.
 - Substituted Judgment vs. Best Interests

Hypothetical 2

- You have been Hank and Wanda's financial advisor for over 20 years. Hank and Wanda have always been diligent with their finances and they would meet with you at your office at least twice a year to review their finances and their financial plan.
- Two years ago, Hank and Wanda sold their home and moved into an assisted living facility. Since that time Hank and Wanda have had their daughter, Donna, attend all financial planning meetings. Hank and Wanda also have a son, Sam. You have never met Sam and Hank and Wanda do not talk much about him.
- Wanda died last July and all accounts held in Wanda's name have been properly transferred to Hank.
- Last week, Hank called you and requested a meeting to discuss his financial plan and some changes he wanted to make. Hank wasn't as talkative as usual and was confused as to the date and time of the meeting. He also asked for directions to your office, even though you have been at the same office for 20 years.
- The meeting with Hank occurred yesterday. You were surprised to see that Hank brought Sam to the meeting as well as Gina, Hank's new girlfriend. During the meeting Sam and Gina did most of the talking.

Hypothetical 2

- Sam and Gina both direct you to take the following actions:
 - Add Gina to Hank's Money Market account and related debit card so that she can help pay Hank's bills and incidentals.
 - Add Sam to Hank's Brokerage account so that Sam can monitor Hank's investments and participate in on-line trades.
 - Withdraw all of the cash value (approximately \$200,000) on Hank's life insurance policy so that Hank will have a down payment on a new home that he and Gina are purchasing.
- Hank's only contributions to the meeting was to inform you that he agrees with whatever Sam and Gina think is best.
- What do you do?

Hypothetical 3

- Same Hank and Wanda scenario. Except that after Wanda's death, Hank and Donna meet with you to provide you with new estate planning documents that Hank's lawyer prepared. Hank hands you the following three documents: (i) a revocable Trust naming Donna as Trustee; (ii) a standing, durable financial power of attorney naming Donna as his agent; and (iii) a springing, durable medical power of attorney naming Donna as his agent. Hank instructs you to change title to all of his accounts to his revocable trust. Hank also informs you that his memory is not what it used to be and that he would prefer that in the future all communications regarding his finances go through Donna. Finally, Hank pulls you aside and mentions that Donna and Sam do not get along and that Sam has been questioning Donna's motivations. Hank does not believe Donna's motivations are improper but doesn't want to get in the middle of disputes between Donna and Sam and authorizes you to share information regarding his finances with Sam should Sam contact you.
- Six months later, Sam contacts you to request account statements for the past two years. You provide those to Sam and the next week you receive a long letter with a list of concerns and a demand that you not allow Donna access to any of Hank's accounts.
- What do you do?

Questions

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