

My Doctor Said ... So My Attorney Said

The Legal Challenges for Recently Diagnosed Individuals

By Cora A. Alsante and Ellyn S. Kravitz

On a daily basis, regardless of our profession, each of us multitask. The proverbial “Where are my glasses?” when they are resting on your head to “What did I come into this room for?” does not discriminate by age.

Our memory changes as we get older. So how do we know if we are just aging or have signs of the onset of dementia?

The Alzheimer’s Association provides 10 warning signs of Alzheimer’s disease:

1. Memory loss that disrupts daily life;
2. Challenges in planning or solving problems;
3. Difficulty completing familiar tasks;
4. Confusion with time or place;
5. Trouble understanding visual images and spatial relationships;
6. New problems with words in speaking or writing;
7. Misplacing things and losing the ability to retrace steps;
8. Decreased or poor judgment;
9. Withdrawal from work or social activities; and
10. Changes in mood and personality.¹

People go to doctors on a frequent basis when any physical symptoms arise. Yet, when it comes to memory or cognitive issues, individuals are less willing to seek medical attention.

An individual with a diagnosis of the onset of dementia can camouflage his or her actions in a variety of ways. Betty, for example, is 72 years old. She has become a little forgetful. She can’t remember where she put her keys or what she ate for dinner last night. She plays bridge once a month with friends, and most recently she could not follow the game. She blames it on doing too many things at the same time. After her last card game, she became extremely frustrated and finally decided to see her primary-care physician. Betty explains to her doctor what she has been experiencing lately and her doctor recommends some neurological testing. At her follow-up appointment, her doctor gives her the diagnosis: the onset of dementia. Betty’s doctor suggests that she consider getting her legal affairs in order.

While the doctor’s suggestion is a good one, an elder law attorney knows that there is more involved than the execution of legal documents. An attorney must recognize and be sensitive to the emotional aspects of the diagnosis on the client, the family dynamics, and the challenges that result from such a devastating diagnosis.

After Betty has had some time to process the diagnosis, she decides that she should consult with an attorney to get her affairs in order for both personal decision-making and property management as she expects that her mental status will decline.

For some of our clients, like Betty, an initial meeting with an attorney to discuss long-term care issues is their first exposure to the legal world. These clients are apprehensive and untrusting. It takes a skilled elder law attorney to listen, understand and present options and recommendations in a clear and concise manner.

Rather than instill panic, an elder law attorney can assist with the creation of a plan to assure clients that their wishes will be met. Once the plan is in place, clients can concentrate on the activities that they enjoy most.

As elder law attorneys, we know that with a diagnosis of the onset of dementia, individuals will gradually lose the ability to think clearly. Their ability to participate meaningfully in the decisions regarding their finances and health care is likely to deteriorate. It is important for people in Betty's position to clearly state his or her wishes and make well-informed decisions *now* about his or her person and finances.

So what would an elder law attorney recommend to help Betty put her affairs in order? At the initial meeting, we can begin with a discussion of advance directives, such as a Health Care Proxy,² Living Will and Power of Attorney.³ These types of documents allow individuals to appoint another trusted individual to step into his or her shoes and act on his or her behalf if he or she becomes incapacitated. These documents afford a certain amount of peace of mind and security to the client, assuring the client that his or her wishes and desires are clear.

HEALTH CARE DECISION-MAKING

A Health Care Proxy allows an individual, the principal, to appoint another individual, the agent, to make health care decisions on his or her behalf in the event that he or she is unable to do so.⁴

New York State law provides that an adult is presumed competent to execute a Health Care Proxy and appoint an agent unless he or she is declared incompetent by a court and a guardian has been appointed pursuant to Article 78 of the Mental Hygiene Law or Article 17-A of the Surrogate's Court Procedure Act.⁵

The New York State Department of Health's website provides a sample form that is recognized by hospitals and physicians. Once the form is complete, it must be signed by the principal before two disinterested witnesses. The capacity threshold to appoint an agent under a Health Care Proxy is a low one. The statute, however, does not set forth a standard of capacity to execute such a document.

Even with a Health Care Proxy, Betty can continue to make her own health care decisions until a determination is made by her physician that she lacks the capacity to make decisions. The Health Care Proxy does not expire and continues to be valid even when she becomes incapacitated.

We will also recommend that Betty sign a Living Will, which is a written declaration of her wishes concerning medical treatment, such as life-sustaining treatment. The Living Will will be honored in any state, unlike the Health Care Proxy, which we can only guarantee will be recognized in New York State.

We also explain to Betty that she should consider completing a Medical Orders for Life-Sustaining Treatment (MOLST) form with her doctor, which will outline her wishes for treatment as her dementia progresses.

FINANCIAL DECISION-MAKING

For property management, we will recommend a Power of Attorney under N.Y. General Obligations Law Article 5, Title 15, where Betty can appoint an agent to manage her business and financial affairs.⁶ Betty must be very careful in choosing her agent, as he or she can act on Betty's behalf even while she is able to act on her own. The attorney must remind Betty that in order for the Power of Attorney to be effective, her agent must acknowledge his or her appointment and sign the document as well.

While clients are typically apprehensive about signing documents and giving control to others, it is important to remind them that without such documents in place the alternative is a time-consuming and costly court proceeding as set forth in Article 81 of the Mental Hygiene Law. Most important, the client may not have the ability to select his or her guardian.

An individual with a diagnosis of dementia may still possess the capacity to execute a Power of Attorney. The determination of capacity should be on a case-by-case basis, taking into account a variety of factors, including the individual's familiarity with his or her assets and family members.

LAST WILL AND TESTAMENT

While advance directives work during the client's lifetime, we, as elder law attorneys, must impress upon our clients that they have the ability to control the disposition of their assets at the time of their passing.

The threshold for establishing testamentary capacity is extraordinarily low. It is less than what is required to sign a Power of Attorney or conduct any other legal transaction. The testator must:

1. Understand the nature and consequences of making a Will.
2. Know the nature and extent of his or her property.
3. Know the natural objects of his or her bounty and relations with them.⁷

In our example, Betty must be able to identify family members, demonstrate an understanding of her assets and be able to articulate how she wants these assets distributed at her death.

TRUSTS

Elder law attorneys often recommend Trusts to their clients, whether revocable or irrevocable. It is important for clients to understand the difference between these Trusts as a revocable trust will not provide the asset protection that an irrevocable Trust will provide after a period of time. The capacity standard for executing a Trust is higher than that of a Will, which is similar to that required to enter into a contract.⁸

LONG-TERM CARE COSTS

In addition to legal documents, clients with a diagnosis of the onset of dementia will be concerned about financing their long-term health care costs. Dementia is a chronic disease and individuals with dementia can live a long life. An individual with the onset of dementia may not require any assistance with his or her activities of daily living at the time of the diagnosis. However, as the disease progresses, medical needs will increase. Individuals will look to Medicare,⁹ Medicaid,¹⁰ veterans' benefits,¹¹ and long-term care insurance to pay these costs.¹²

Often clients believe that Medicare will cover the cost of all of their medical care. Who is eligible for Medicare? All U.S. citizens or permanent residents can enroll in Medicare when

1. they attain age 65.¹³
2. they are under age 65 and certified disabled or certified blind.¹⁴
3. they are any age with End Stage Renal Disease or ALS.¹⁵

Medicare is divided into four parts: Part A – Hospital and Skilled Nursing Benefits; Part B – Doctors and Durable Medical Equipment; Part C – Managed Care; and Part D – Prescription Plan.¹⁶ There are deductibles and co-insurances to the Medicare program.¹⁷ Those who are enrolled in the Medicare program should also purchase a Medigap policy which covers deductibles and co-insurances.¹⁸

The most important thing for clients to realize is that Medicare only provides benefits for skilled nursing care and for limited periods of time. Typically, a client with dementia requires assistance with their activities of daily living (ADLs),¹⁹ which is considered custodial care, not skilled nursing care. The only public-sponsored insurance program that provides caregiver benefits for someone who requires custodial care is Medicaid.

Medicaid is a federal program administered through state and county agencies. It is a means-tested program for clients who are elderly, blind or disabled. In New York State, there are various types of Medicaid programs. Clients can receive care at home or in a hospital/nursing home. The eligibility requirements vary for each program. Clients with dementia may be eligible to enroll in the Medicaid program to cover the cost of their home health aides provided that they are financially eligible to apply.

While long-term care insurance can offset the cost of care, a diagnosis of the onset of dementia prevents an individual from purchasing such a policy. As such, these policies need to be considered before any diagnosis. Long-term care insurance policies may provide benefits to someone living at home, in an assisted living setting and/or in a skilled nursing facility. They are beneficial in that they provide a source of payment to allow the individual to remain at home as long as possible.

PLANNING OPTIONS

At the initial meeting, the elder law attorney must also address asset preservation planning options. Often clients are uncomfortable with the idea of divesting their assets. Saving money for a rainy day did not take into account paying a home health aide and/or a nursing home.

We may suggest an irrevocable trust, a transfer of the client's home with a reservation of a life estate, outright gifting to family members, or simply adding a child to a bank account for convenience purposes. We must be careful, however, to counsel our clients about the legal consequences of these transfers to make sure they are in accordance with the client's life and testamentary plan.

For our clients with business or partnership interests, it is important to advise them that their interests will be considered resources for Medicaid eligibility and that transfers will need to be made now in order to protect those interests. We must also discuss transitioning any management role in these interests before capacity further diminishes. These are very difficult conversations to have but are critical to proper representation of our clients.

We will also need to advise clients with spouses that for Medicaid eligibility purposes, Medicaid will consider clients and their spouses as "units" and will allow the spouse to retain non-retirement resources of somewhere between \$74,820 and \$119,220, a vehicle, an irrevocable burial account, life insurance with a face value not to exceed \$1,500, and retirement accounts in payout status. They can also keep \$2,980.50 of combined monthly income. In addition, clients can keep \$14,850 in his or her own name and \$50 in monthly income for incidentals and any excess monthly income will need to be paid to the nursing home.

We must also advise that clients with children who are certified disabled may transfer assets to that child without adversely affecting their eligibility for certain government benefits. They must, however, be mindful of any government benefits the child may be receiving so as not to jeopardize the child's benefits.

THE AMBIVALENT CLIENT

Often clients are overwhelmed with all the information and recommendations made by the attorney. The client may become paralyzed and unable to focus and prioritize the action needed to be taken. In certain situations, the attorney may require the input of other professionals, including but not limited to, accountants, financial planners and care managers. Care managers, in particular, can provide guidance regarding the diagnosis, access to required services and counseling. The care manager can also help clients identify and navigate their current needs and help them to see what their future care needs will be.

If clients are uncomfortable proceeding with any of the above, we advise that there are crisis planning options available if they decide to wait until a nursing placement is imminent.

As one can see, there is no cookie-cutter plan for a client with a diagnosis of the onset of dementia. The uniqueness of an elder law practice is that each client comes to the meeting with different needs, other illnesses and family issues. The totality of the circumstances must be taken into consideration by the attorney in order to make the appropriate recommendations.

Elder law attorneys must identify who their client is and determine if there are any conflicts of interest, especially a spouse or other family members who attend the meeting. The National Academy of Elder Law Attorneys (NAELA), in November 2005, adopted the Aspirational Standards for the Practice of Elder Law with Commentaries that was published in the *NAELA Journal*, Volume II.²⁰ These standards can serve as a guide for the elder law attorney.

It is important for clients to realize that a diagnosis of dementia may not prevent one from properly planning for the future. While these decisions may be overwhelming for our clients and they may initially resist, we, as elder law attorneys, must recognize the importance of putting our clients at ease with both their new diagnosis and the options available to them to put their “legal house” in order so that they can navigate the long road ahead. One of the goals of the elder law attorney is to become the trusted advisor to both the client with the diagnosis and those family members and/or friends that the client wants involved in the planning process. The ultimate goal of the elder law attorney is to promote dignity and quality of life for the clients that we represent.

ENDNOTES

1. The Alzheimer’s Association, Know the Ten Signs, https://www.alz.org/national/documents/checklist_10signs.pdf (2009).
2. N.Y. Pub. Health Law § 2981 (McKinney 2005) (PHL).
3. N.Y. Gen. Oblig. Law § 5-1501 (McKinney 2009) (GOL).
4. PHL art. 29-c.
5. PHL §§ 2981 (1), (2); (McKinney 2012).
6. GOL § 5-1501.
7. *In re Slade*, 106 A.D.2d 914 (4th Dep’t 1984); *In re Estate of Kumstar*, 66 N.Y.2d 691 (1985).
8. *In re ACN*, 133 Misc. 2d 1043 (Sur. Ct., N.Y. Co. 1986).
9. 42 U.S.C. § 1395 (1935).
10. 42 U.S.C. § 1396 (2014).
11. U.S. Dep’t of Veterans Affairs, Paying for Long Term Care, www.va.gov/geriatrics/guide/longtermcare/Paying_for_Long_Term_Care.asp.

12. U.S. Dep't of Health & Human Services, Long-Term Care Insurance Costs, <http://longtermcare.gov/costs-how-to-pay/what-is-long-term-care-insurance/long-term-care-insurance-costs/>.
13. 42 C.F.R. § 406.12 (2012).
14. *Id.*
15. 42 C.F.R. § 406.12(b) (2012).
16. U.S. Centers for Medicare & Medicaid Services, What's Medicare?, <https://www.medicare.gov/sign-up-change-plans/decide-how-to-get-medicare/whats-medicare/what-is-medicare.html>.
17. *Id.*
18. Patricia Barry, *Medigap or Medicare Advantage?*, AARP Bulletin, www.aarp.org/health/medicare-insurance/info-09-2010/ask_ms_medicare__question_87.html (April 2014).
19. Dementia Care Notes, <http://dementiacarenotes.in/caregivers/toolkit/adl/>.
20. Gregory S. French, et al., *Aspirational Standards for the Practice of Elder Law with Commentaries*, 2 Nat'l Acad. of Elder L. Attorneys 5 (2005), www.naela.org/App_Themes/Public/PDF/Media/AspirationalStandards.pdf.