Legal Matters®

Estate Planning
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Estate planning when a spouse has dementia

Jay Leno recently filed for conservatorship of his wife, Mavis, who has been diagnosed with dementia. Meanwhile, Brian Wilson's family has also filed for conservatorship over the Beach Boys legend, following the death of his wife, Melinda.

These cases highlight a challenging situation faced by many families: estate planning when a loved one is diagnosed with Alzheimer's or another progressive cognitive decline.

A dementia diagnosis requires a series of important decisions concerning a person's future health care, finances and estate plans. In some cases, these choices are best made quickly, while the affected individual is still able to participate in decision-making.

Remember, just because your spouse has dementia doesn't mean he or she will necessarily die before you or that you'll remain healthy enough to care for them. Brian Wilson's wife, for example, passed away in January. His family filed for conservatorship soon after, reportedly "following family processes put in place by Brian and Melinda."

If you or your partner are facing a dementia diagnosis, talk to an estate planning attorney about important tools like these:

- Living trust: A revocable living trust can provide control over how assets are managed after you're gone. Assets placed in a trust are managed by a trustee according to your wishes, which could ensure your surviving spouse's needs are met even if they can no longer oversee their own finances.
- Will: If you don't have a trust, a will outlines how your assets will be distributed after your death. While valuable, a will can't address the ongoing challenges of caring for a surviving spouse who is incapable of managing their own finances and well-being.
- Power of attorney: A power of attorney, or POA, allows someone you

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New IRS advice raises concerns for irrevocable grantor trusts

A recent change by the IRS could impact irrevocable grantor trusts. In a late 2023 position, Chief Counsel Advice (CCA) 2023-52-018, the IRS reversed its prior stance on how these trusts handle income tax payments.

What are Irrevocable Grantor Trusts?

These trusts allow you to transfer assets to beneficiaries while still maintaining some control over them. They can be powerful tools for estate planning, helping to remove assets from your taxable estate and reducing the amount of estate taxes your heirs will owe. However, you may be responsible for the income taxes generated by the trust's holdings.

Previously, you could modify the trust, adding a provision allowing the trustee to reimburse you for those taxes. This wasn't seen as a taxable gift to you by the beneficiaries.

What changed?

The new IRS advice argues that by allowing the trustee to use trust funds for your tax bill, the beneficiary is giving up some of their potential inheritance. Since the beneficiary is consenting to a change as part of the modification, the IRS now considers it a taxable gift.

A previous IRS "Private Letter Ruling," or PLR, indicated that a tax reimbursement modification did not change the beneficial interests of the trust and that such a change was administrative in nature. The new CCA, however, expressly indicates that the PLR no longer reflects IRS views on the matter.

What remains unclear

At issue here is the question of consent. Some states allow trusts to be modified without beneficiary approval. What's unclear is whether in those situations, where the beneficiary remains silent and doesn't actively consent to using a portion of the trust funds for the grantor's tax reimbursement, the IRS will still consider the modification a taxable gift. In essence, will the IRS see a lack of active objection the same as consent, even if beneficiaries have no say in the decision?

The CCA specifically addresses situations in which the original trust is modified through court action. So, it's also unclear what would happen if the trustee recast or merged the trust into a new trust with the same assets and beneficiaries as the original, but some modifications to the terms.

Overall, the impact of this new interpretation is still unknown. For now, it may be wise to hold off on modifications to an existing trust until the IRS offers additional clarification. If you are in the process of drafting an irrevocable trust, talk to an estate planning attorney about the Chief Counsel Advice to ensure your trust implications are fully understood.

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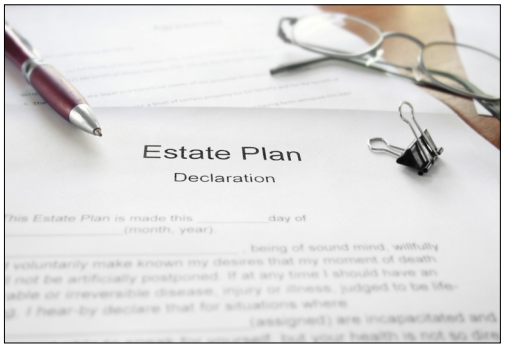


trust to make financial decisions on your behalf when you are no longer able to do so. That may help avoid the need for conservatorship, at least for financial matters.

- Advanced health care directive: A health care directive, such as a medical power of attorney or living will, designates someone you trust to make medical decisions for you if you become incapacitated.

Note that a conservatorship is a court-appointed legal guardianship for someone deemed incapable of making personal and/or financial decisions for themselves. While POA and health care directives can generally meet these needs, there are times conservatorship may still be required.

In court filings made by Jay Leno, the former "Tonight Show" host indicated that he was requesting conservatorship in order to set up a living trust for his wife. A trust requires the person setting it up to be mentally competent to understand the purpose and implications. If Mavis' dementia has progressed to the point where she lacks that capacity, she wouldn't be able to legally sign the couple's trust documents.

While it can be difficult to contemplate a loved one losing capacity, planning ahead ensures that they will be cared for and protected. Consult with an estate planning attorney to explore the right options for your family's situation.

Protecting your estate from undue influence claims

A recent lawsuit over the estate of New York City real estate billionaire Allan Goldman highlights the importance of safeguarding your will and estate plan against potential claims of undue influence.

Goldman's children allege that his longtime caretaker, Natalia Vostrikova, manipulated him in his final years in order to inherit $2 million from his estate.

While the legal battle is ongoing, the case provides valuable lessons for anyone looking to ensure their final wishes are respected.

In the context of estate planning, undue influence occurs when someone exerts improper pressure or manipulation to coerce a person into making changes to their will or trust that they would not have made of their own volition. This can involve a caretaker, family member or other trusted person taking advantage of the individual's vulnerability due to age, illness or cognitive decline.

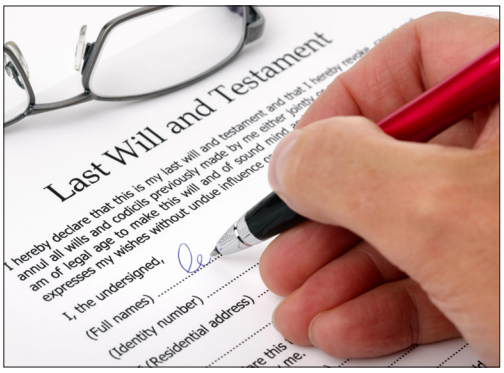
Warning signs of potential undue influence include:

- A caretaker or family member isolating the individual and controlling access to them;
- Sudden, unexpected changes to estate planning documents, especially changes that benefit the supposed-influencer;
- The influencer making false statements about the individual's condition or care needs;
- Unusual spending or gifting of the individual's assets to benefit the influencer.

To protect against undue influence claims, consider these steps:

1. Have your estate planning documents prepared and reviewed by a qualified attorney.

2. Discuss your wishes with multiple trusted family members so they understand your true intentions. Consider informing them of key provisions.



3. Obtain a written assessment from a physician attesting to your mental competency at the time documents are signed.

4. Establish a revocable living trust to exempt assets from probate and make it less likely the provisions will be challenged.

5. Distance your estate planning activities from the person who might be accused of undue influence. For instance, do not ask them to drive you to or attend meetings with your lawyer, and do not have them witness the signing of your estate planning documents.

Claims of undue influence can arise when family members are blindsided after you're gone. While there is no foolproof way to prevent such claims, taking proactive measures with your estate planning, involving multiple trusted people, and maintaining open communication can significantly reduce the risks.

Meanwhile, if you suspect a loved one is being unduly influenced, consult an experienced attorney to discuss your options. Significant wealth can attract bad actors. But undue influence can happen to estates of any size.

New law set to reform health care directives

The Uniform Health Care Decisions Act, or UHCDA is a model law that was revised in 2023 by the Uniform Law Commission to address health care decision-making for individuals. Because it is a model law, individual states will need to adopt it for it to have effect in their jurisdiction.

The UHCDA focuses on advance directives, which are legal documents that allow you to plan for your medical care in case you become incapacitated and can't make decisions yourself. These directives typically include a health care power of attorney and outline your wishes for treatment.

The new UHCDA aims to improve these functionalities by:

- Enabling power of attorney documents to be created with remote witnessing (i.e., videoconference);
- Expanding the list of health care professionals authorized to make a capacity determination;
- Recognizing that incapacity may occur along a continuum, allowing the patient to maintain some autonomous decision making, when feasible;
- Setting out a process for people who object to a determination of incapacity;
- Authorizing the use of advance directives for mental health care and enabling individuals to provide specific instructions or designated agents for this type of care; and
- Expanding the list of people who may serve as a "default surrogate" when no power of attorney exists, reflecting a wider array of family relationships and structures.

Clear health care directives can avoid confusion and conflict among family members during a medical crisis. A well-defined health care power of attorney may also lessen the need for a court-appointed guardian to make decisions about your care.

If you have a health care proxy, review it periodically with your estate planning attorney to ensure it still meets your needs and follows state law.

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Remote witnessing now permissible for health care proxies in New York

In a move that could signal a shift in national trends, New York has become the first state to permanently allow remote witnessing of health care proxies.

This change, enacted in November 2023, offers greater flexibility for residents seeking to appoint a trusted decisionmaker for their medical care.

Traditionally, health care proxies, which grant someone else the authority to make medical decisions on your behalf if you become incapacitated, require in-person witnessing by two individuals. That can pose challenges, particularly for those with limited mobility, patients in health care isolation, or during times of social distancing, as seen during the COVID-19 pandemic.

While some states implemented temporary allowances for remote witnessing during the pandemic, these measures have largely expired. New York's new law, however, establishes a permanent framework for utilizing audio-video technology to witness the signing of health care proxies.

What remote witnessing looks like in New York

New Yorkers can now appoint a health care agent and have the document witnessed remotely, using platforms like Zoom or FaceTime, provided specific requirements are met. These include:

- Valid ID verification: If the remote witness doesn't already know the principal (the person signing the proxy), a valid photo ID must be displayed during the video call.
- Direct interaction: The technology used must facilitate clear two-way communication between the principal and the remote witness.
- Document transmission: A copy of the signed health care proxy needs to be sent to the remote witness electronically within 24 hours.
- Remote witness signature: The remote witness must then sign the document and return it to the principal.

Aligning with the UHCDA

It's worth noting that New York's new law aligns with the recently revised Uniform Health Care Decisions Act, or UHCDA, put forth by the Uniform Law Commission in 2023.

The UHCDA is a model law that many states reference when drafting their own health care proxy legislation, and its inclusion of remote witnessing provisions could signal a trend toward wider adoption of this practice.

Remote witnessing for wills — not there yet

It's important to distinguish this development from remote witnessing for wills. While discussions are ongoing about expanding remote witnessing to wills, most states, including New York, still necessitate in-person witnesses for wills.