

# Planning Matters

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## Managing Capacity: Planning for the Risk of Dementia

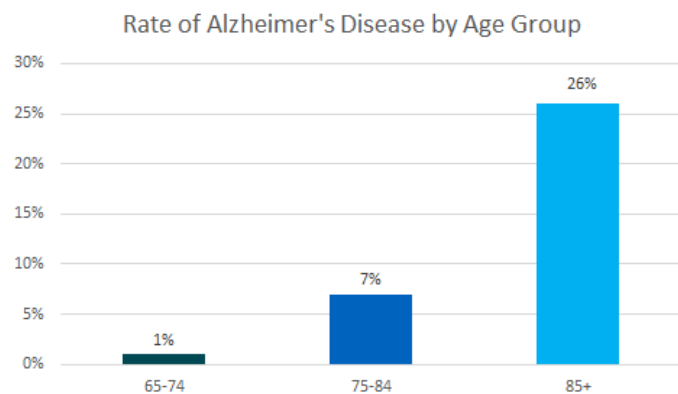
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It's human nature to avoid thinking about the fallibility of our bodies – that we might one day lose the use of our legs, or our eyes, or our minds. Perhaps it is in our DNA, an automatic suppression of the consequences of our natural decay, like the fading memory of a first heartbreak or the pains of child birth. And so, on the one hand we heal broken hearts and go on to build population-sustaining families. But on the other, we can develop dementias without the legal structures in place to allow our families to care for us, or we die without wills. These scenarios are complex and tragic in nature because dementia can descend on you with little warning, it can profoundly affect

the lives of both you and your loved ones, and the legal messes that can arise are totally avoidable.

Sadly, the risk of suffering an onset of dementia is all too real a risk, especially as we age. In presenting at a recent CFA Society Vancouver event focused on detecting and diagnosing dementia, Dr. Kenneth Shulman said the prevalence of the disease has been shown to jump from 1% of the population aged 65-74, to 26% of those age 85 and higher. Figure 1 shows this increasing trend as we age.

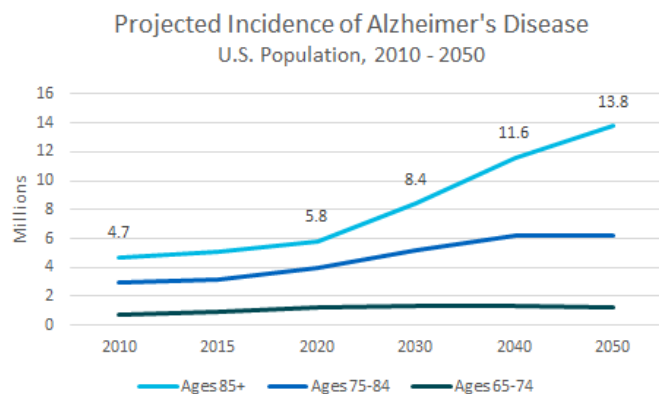
Figure 1: Prevalence of Alzheimer's Disease Increases with Age



Source: Canadian Study of Health and Aging, Canadian Medical Association Journal. 1994. Via Dr. Kenneth Shulman 2018.

Figure 2 shows the Alzheimer's Association's forecast for U.S. incidence of the disease over the next 30+ years, by age. The trend is both disturbing and clear: dementia is going to become more prevalent for both ourselves and our loved ones. We need to be prepared.

Figure 2: Growth Forecast of U.S. Alzheimer's Population



Sources: a) Alzheimer's Association 2015 Alzheimer's Disease Facts and Figures and b) Alzheimer's & Dementia 2015; 11(3)332+. Via Dr. Kenneth Shulman 2018.

## Managing Financial Affairs

It's a rare sunny spring day in Vancouver but the topic of discussion with trust and estate attorney Andrea Frisby of Legacy Tax + Trust Lawyers is decidedly dark. We are talking about planning for a scenario where you no longer possess the mental capacity to legally make decisions about your financial, health, or other personal matters.

"I think you should do it today. I think you cannot do it early enough... what happens if, today... you get hit on the head and you're in a coma, or you incur a catastrophic brain injury?"

Ms. Frisby is emphatic: a general Enduring Power of Attorney (EPA) is something that everyone – not just the elderly – needs to be thinking about today. While they are still well.

An EPA is a legal contract that grants a third party the ability to make financial and legal decisions for you. It can be as broad or as specific as you want or need, depending on your circumstances, and signing it over gives the other person the legal ability to do things like access your accounts, pay your bills, sell your real property, make investment decisions, and if you provide for the power in the EPA allocate gifts to charity, friends and family.

"Some people are going to stay capable, and that's fabulous," says Frisby. "But maybe when they're older, they're just going to want to have someone they can send to the bank to get money for them to pay the cleaner. These kind of things. So, the attorney can be a very, very important role."

The benefit of an EPA extends well beyond ensuring convenience for able-bodied seniors, however. If you suffer the less benign scenario of developing dementia, just like an insurance policy, if you wait to get it until you need it, it will be too late.

## Investment Considerations: Tailored vs Legislated Plans

An EPA can also help ensure that the existing investment policy statement (IPS) articulating your specific risk tolerances, asset mix ranges, and retirement targets, continues to be implemented on your behalf. If you lose capacity and no one has been given the authority to monitor and implement that IPS, someone will need to apply to the Court to have you declared incapable and to be appointed as your “committee” to make decisions on your behalf. In limited circumstances where no family members or friends can act, the Public Guardian and Trustee will then step in and apply the risk controls that govern fiduciaries in the *Trustee Act*.

What this can mean in practice is that your investment counselor may be forced to sell higher risk-higher reward securities like stocks and put the money into low returning but risk-free securities like government bonds. This can include forcing the sale of private company shares or non-revenue producing properties that you may hold for non-financial reasons like housing for a child in university or supporting a family member’s business.

From a planning perspective, while the broad law is written to avoid capital losses and ensure sufficient funds to live on, it can in practice force investment decisions that are overly conservative. That may translate into clients having to get by on less or missing investment goals like funding a grandchild’s first home down payment or endowing funds to a charitable cause.

Ensuring continuity of your investment plan therefore depends on properly allocating those powers in advance.

## Now or Then

For those nervous about granting full authority over their financial affairs *today*, Ms. Frisby takes it back to basics.

“If you cannot trust that the person you’re appointing today isn’t going to sell your house and run off with your money... when you are capable, how can you trust them when you’re starting to lose capacity?” she asks. “That’s a sign that that is not the person that you should be appointing.”

The “Springing Enduring Power of Attorney” is an alternative structure that delays the transfer of power of attorney until certain pre-defined events – like proof of a loss of capacity – occurs. The Springing EPA preserves independence for now, but introduces what Frisby describes as a “total lack of dignity” when the time comes to spring it.

“Who wants to have to take a loved one to a doctor to have someone say, ‘It’s nice that you came in today, but I think you’re not capable’? It’s distressing for the person and for the family,” Frisby says. “And everyone’s kind of watching like, ‘Should we spring it? Is this the year we need to spring?’ Unless the issue is that you don’t yet know who could or should act for you when the time comes, it’s just not ideal.”

## Providing for Your Health and Personal Care

The law splits legal and financial matters (EPA) from health and personal care ones. For the latter, you need to name a person in a separate legal document (called a “Representation Agreement” in British Columbia or “Personal Directive” in Alberta, as examples) who can make decisions on your behalf about things like your medical care, grooming, and even religion.

Health care decisions can be as simple as giving the go-ahead to have a tooth pulled that needs it, to determining whether to permit blood transfusions or extraordinary efforts to extend your life. In each case, it’s important that your wishes are carried out and that your day-to-day medical care can be attended to.

Personal care is a consideration Frisby finds is often under-appreciated. It encompasses things like what care home is appropriate for you, how many times per week you are bathed, how you want your hair done, what foods you like to eat, and the religion you may practice.

“Your personal care is really important as that determines the way you actually live,” she says. “The person acting under the power of attorney is going to pay the bills but they don’t decide where you live, who you associate with.”

## Choosing Your Agents

At the root of each decision of whom to appoint, of course, is trust: trust in their commitment to honouring your wishes, and trust in their ability to actually carry them out.

The question of skill is especially true in cases where the estate is complex – requiring tax planning around private company shares, for example, or needing someone who can actually engage in running an active business.

If you appoint separate people, your financial and health/personal care agents will also need to be able to work together effectively as conflicts will inevitably arise. A typical hot button issue can include decision making around your quality of life and the funding of what's required to support it.

From ensuring continued proper financial stewardship of your assets to having the confidence that your health and personal needs will be handled to your expectations – whomever you choose – you are best served by planning for it now and relying on it only if you need to. Because like it or not, change in some form will visit us all eventually. And given the choice, it's better to meet it on your own terms.

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*\*\* In a future edition of Planning Matters: Identifying Signs of Capacity Decline.*

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