Planning for an Aging Population Update

Preparing for the Unexpected:

Designing and Drafting Estate Plans that Can Withstand the Heat!

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What should you do when your client comes to you with news of a medical diagnosis that will mean the client will lose intellectual capacity, and possibly physical abilities, in the near future? While the client is focusing on medical treatments and managing the progression of the diagnosed disease, what do you, the estate planning professional, need to be focused on to help your client? These materials will explore the answers to these questions.

I. First Understand, Then Design, Then Draft

When faced with the realistic possibility that your client may become intellectually incapacitated or physically disabled, or both, an estate planning professional must take the time to fully understand the client's situation, both financially and personally, and then design and draft an array of documents with appropriate powers and flexibility so the client's evolving needs and desires can be accomplished. Depending on the diagnosis the client has received, there may not be the ability or time for the client to amend and adapt the documents to changing circumstances in the future. It is important to get it right the first time.

To use a construction analogy, in this situation the attorney is both the architect and contractor. As the architect, the attorney must first understand the client's needs and desires, and then interpret them by designing a plan that satisfies the vision of the client and accomplishes the client's goals. As the contractor, the attorney must take the design plans and draft the required documents in a manner that is legally sound and fulfills the purposes of the plan. The goal is to construct a "building" that carries out the client's wishes and withstands whatever happens with the client, not one that collapses like a house of cards when put to the test.

II. Areas That Need To Be Addressed

In order to accomplish this, the estate planning professional must help the client focus on certain topics and make decisions that will allow the plan to be properly designed. These topics generally fall into the following areas.

1. Distribution of Assets Upon Death
2. Health Care Preferences
3. Long-Term Care Preferences
4. Substituted Decision Making

III. Tools Available to Accomplish the Client's Objectives

A. Primary Estate Planning Documents: The primary tools available to help carry out a client's estate planning wishes are: last will and testament, revocable living trust, financial durable power of attorney, health care durable power of attorney, and advance health care directive. These will be further discussed below.

B. Other Documents to Consider: In addition to the primary estate planning documents, other documents and concepts may be utilized to assist a client if the client's situation requires them. Among others, these include (i) questionnaires and other methods to help the client understand the implications and decide questions concerning when the client prefers that life support be stopped, (ii) irrevocable trusts, especially if there are public benefit or tax planning objectives to accomplish, (iii) buy sell agreements and other documents relating to the continuation or transfer of a

business the client owns or controls, (iv) methods for the client to gather, organize, and preserve needed information and documents, such as digital assets, original documents that will be needed, photographs, collections, and other items important to the client or family.

IV. Distribution of Assets Upon Death

Although estate planning professionals deal with this on a daily basis, when there is a diagnosis of impending incapacity, it is expected, as opposed to a mere possibility, that the client will not be able to make amendments that may be needed to adapt to future changes. This makes it imperative to not only clearly understand the client's wishes, but to design the estate planning documents so the plan can be adapted to changing situations.

Two of the primary goals for drafting wills and trusts should always be clarity and flexibility. Clarity meaning fully understanding the client's wishes and then drafting the document, so it accurately and completely states them in a way that is understandable and as complete as necessary. Flexibility meaning incorporating provisions in the document that allow it to be adapted to carry out the client's wishes when circumstances or laws change, and the client is unable to change the document.

A. Review and Clarify Distribution Provisions With The Client: The client should thoroughly review the provisions distributing assets upon the client's death. Depending on the diagnosis, this may be the last time the client will be able to do this. Not only should this include amending documents to take full advantage of all laws that have changed since the current version was created, but it should also include re-thinking who the beneficiaries are and how their share of the estate is to be distributed to them.

What, exactly, does the client want to happen with assets upon the death of the client? While the options are virtually endless and depend on the client's circumstances, a few overarching concerns are applicable.

If the client wants to leave assets in trust for a beneficiary, then there should be a thoughtful discussion of how the client wants the trust principal and income to be used for the beneficiary=s benefit.

1. Explain the Client's Intent in the Document: Whether using a will or revocable living trust as the client's primary estate planning document, it is important to explain what the client (the testator or settlor) was trying to accomplish in the written document. The courts are clear that testimony about the intentions of the testator are usually not allowed to explain what the testator intended. As stated in *Evans v. Volunteers of America*,[1]

> The general rule is that parol evidence as to the testator's declarations concerning his intention, whether made before, at the time of, or subsequent to, the execution of his will, are incompetent upon the question of the construction to be given the language employed in the instrument. This for the reason that the testator's intention is to be ascertained from the will itself, considered in the light of relevant, extrinsic circumstances where the language used is ambiguous; and were parol evidence of the testator's verbal declarations to be admitted, not only would the result be to subject the question of his intention to evidence of declarations which he, being dead, could not dispute, but it would also, in effect, be violative of the statute which requires all wills to be made in writing.[2]

The exception to this is when the will or trust is ambiguous.

> The rule is well settled that, 'where the will contains a latent ambiguity as to the person or thing intended by the testator, as where the instrument or a provision thereof applies equally as well to two or more objects or persons, evidence of statements or declarations made by the testator is admissible for the purpose of identifying the person, or property he intended,

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[1] Evans v. Volunteers of America, 280 S.W.2d 1 (Mo.Sup. 1955).

[2] *Id.* at 5.

> when it is necessary to do so, provided that the declarations are not inconsistent with the terms sought to be explained, and do not tend to show another intention, and provided also that there appears on the face of the will a sufficient indication of testator's intention to justify the application of the evidence.'[3] (citations omitted)

In the *Evans* case the will in question contained the following clause:

> Item Ten: Disposal of Residue of Estate. All the rest, residue and remainder of my property, real, personal and mixed, of whatsoever kind and nature, and wheresoever situated, which I may own or have the right to dispose of at the date of my death, I hereby give, devise and bequeath to the VOLUNTEERS OF AMERICA, commonly known as the Salvation Army, located in St. Louis, Missouri, to be held by it in perpetuity for the use and benefit of the poor.

The *Missouri* Supreme Court allowed oral testimony about the testatrix's intentions because the will named two different charities and it was unclear what the testatrix intended from the will itself.

Most issues with interpreting the meaning of a clause in a will or trust are not as blatantly ambiguous as in the *Evans* case. In those cases, explaining what the testator is trying to accomplish by including a clause in the will or trust will be very helpful when the trustee, or a court, is trying to decipher what the words actually mean.

2. What Does the Client Intend Health, Education, Maintenance, and Support to Mean? While attorneys should always strive to draft wills and trusts in a manner that accurately reflects the client's wishes, sometimes standard words and phrases are used and not fully explained to the client. If any of the traditional "health, education, maintenance, and support" words are used, there should be a discussion with the client to clarify what the client's intentions are, and the document should clearly reflect them.

For example, does the client want the beneficiary to be totally supported and lifestyle maintained by the trust regardless of other income and assets available to the beneficiary? Or does the client want the trustee to take into account other assets the beneficiary has when determining whether to distribute from the trust for the beneficiary's support and maintenance?

The difference may not seem important at first glance, but it has led to many lawsuits where remainder beneficiaries are challenging distributions made by a trustee. This was the issue in *Hoops v. Stephan.*[4] In this case, the Supreme Court of Connecticut framed the issue this way, quoting the New York Court of Appeals in *In re Martin=s Will*,[5]

> The primary question in this class of cases always is, Does the will constitute an absolute gift of support and maintenance which it makes a charge upon the income from the estate and upon principal? If so, then the private income of the beneficiary cannot be considered. If, however, the gift is of income coupled with a provision that the principal may be invaded in case of need, the private income of the beneficiary must be considered in determining whether such need exists.[6]

The clause in the will that was being questioned in *Hoops* was:

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[3] *Id.* at 4.

[4] Hoops v. Stephan, 131 Conn. 138, 38 A.2d 588 (1944).

[5] In re Martin's Will, 269 N.Y. 305, 199 N.E. 491, 494 (N.Y.App. 1936).

[6] *Hoops* at 591.

> If, in the discretion of my said Trustees, the income provided for in Paragraph Sixth of my said will shall be insufficient to provide for the comfortable support and maintenance of my said son Edwin and my said wife, Martha K. Hoops, I authorize and direct my said Trustees to sell and convey the whole or any portion of my estate and to pay to my said son and wife such sum or sums from the proceeds thereof as shall from time to time, in the discretion of my said Trustees, be necessary to secure to my said son and wife such comfortable support and maintenance.[7] (emphasis added)

Based on the first underlined phrase in the above quote, the court held that "the gift of maintenance and support in the present case is an absolute gift, the cost to be charged against income and if income is insufficient against principal. The right to support and maintenance came into existence from the beginning of the gift and is not contingent upon any necessities."[8]

A similar result was reached by the Supreme Court of Missouri in *Winkel v. Streicher*.[9] In this case, the language in question was,

> The trustee shall pay the net income and any part of the corpus of the estate, as he in his sole discretion deems necessary, to my niece, Lillie Streicher or her guardian or to any person or corporation caring for her, for the support and maintenance of my said niece.[10]

The court held that the distribution of income was mandatory, but the distribution of principal was discretionary. The question was whether the beneficiary was to receive full support from the trust, or whether the beneficiary's other income and assets were to be taken into account and, in effect, limit the trustee's discretion.

In the end, the court found that "this trust provision of the will should be construed as an absolute gift of support and maintenance for Lillie; that the discretion of the trustee is limited to the determination of the amount necessary for that purpose; and that the trustee is not authorized to withhold what is reasonably necessary for that purpose because of..." other assets available for Lillie's support.[11]

Both of these suits may have been unnecessary if the document had contained an express statement that the income and assets of the beneficiary are not to be taken into account by the trustee when determining how much to distribute for the beneficiary's support. Of, if the testator felt the opposite, then a clause to that effect would have clarified the testator's intent regarding this question.

3. Be Careful of Standard Provisions That May Not Be Appropriate: Once the intent of the client is understood, care should be taken to make sure other sections of the document do not contain provisions that conflict with or frustrate the client's intent. An example of what can go wrong can be found in the case of *Lanagan v. Rorke*.[12]

This case involved a traditional estate plan for a married couple wishing to minimize estate taxes. Each spouse had their separate revocable living trust that established a marital trust and non-marital trust for the

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[7] *Id.* at 589.

[8] Hoops v. Stephan, 131 Conn. 138, 149, 38 A.2d 588, 592 (1944).

[9] Winkler v. Streicher, 365 Mo. 1170, 295 S.W.2d 56 (1956).

[10] *Id.* at 1172.

[11] *Id.* at 1178.

[12] Lanagan v. Rorke, 182 S.W.3d 596 (Mo.App.S.D. 2005).

lifetime benefit of the surviving spouse, named the surviving spouse as the sole trustee of both trusts, and left the remainder of both trusts to their children.

The marital trust contained the following clauses (the trustee was referred to as "Trustees" even though the surviving spouse was the sole trustee):

> (a) The Trustees shall pay, at convenient intervals, but not less frequently than annually, all of the net income from the Marital Trust to Settlor's spouse.
>
> (b) The Trustees may pay to Settlor's spouse so much of the principal of the Marital Trust as the Trustees in their discretion deem necessary to provide for the health, education, support or maintenance of Settlor's spouse (in accordance with the standard of living which was maintained during Settlor's lifetime).
>
> (c) The Trustees shall pay, upon the request of Settlor's spouse such additional amount from the principal of the Marital Trust as may be requested by Settlor's spouse, provided, however, that such additional distribution under this Paragraph (c) shall not exceed, in any one (1) year, the greater of five (5%) percent of the principal value of the Marital Trust; or Five Thousand ($5,000.00) dollars.[13]

Found later in the document was a conflict of interest clause that stated:

> No individual while serving as Trustee hereunder shall participate in any decision concerning any discretionary payment from any part of my estate or any Trust created therefrom in which such individual may then have any beneficiary interest.[14]

Mr. Rorke died and Mrs. Rorke became the sole trustee of the trusts established for her benefit. She distributed to herself, as beneficiary, principal from the marital trust for her health, education, support, and maintenance without taking into consideration other resources that were available for her use. One of the remainder beneficiaries, a daughter of Mr. and Mrs. Rorke, challenged those distributions, among other things.

One of the questions for the court was whether the provisions of the trust, taken as a whole, allowed Mrs. Rorke, as sole trustee and sole beneficiary of the marital trust, to distribute principal from the marital trust for her health, education, support, and maintenance.

The appeals court concluded the answer was no and overruled the trial court on this point. The court based this on the following: the conflict of interest clause prohibited an individual, while serving as trustee, from participating "in any decision concerning any discretionary payment from any part of my estate or any Trust created therefrom in which such individual may then have any beneficiary interest." (quoting from Mr. Rorke's trust); Mrs. Rorke had a beneficial interest in the marital trust; the payments to Mrs. Rorke for her health, education, support, and maintenance were discretionary; and the conflicts of interest clause prohibits Mrs. Rorke from making those discretionary distributions.

Ultimately, the court determined that, while Mrs. Rorke could serve as a trustee and make the mandatory distributions to herself, there must be another trustee who makes the decision concerning discretionary distributions.

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[13] *Id.* at 598.

[14] *Id.* at 600.

It is not known whether Mr. Rorke wanted Mrs. Rorke to be able to make discretionary distributions to herself, but that seems to be the case if only the distribution clause of the trust is read. However, this was prevented by the conflict of interest clause located later in the document.

The point is that every effort should be made to avoid this type of dispute. To phrase this in the context of the issue raised by the Lanagan case, the question of whether the surviving spouse should have complete discretion to make discretionary distributions to herself should be discussed with the clients. Whatever their decision is, the trust document should be drafted to clearly state that decision. Then the trust document should be carefully reviewed and provisions contained later in the document that contradict the clients' intent should be removed or modified. This should be done for every distribution decision made by the clients.

4. Determine Whether Any Potential Beneficiaries Have A Disability: If any potential beneficiaries are sufficiently disabled to receive SSI or Medicaid benefits, then their share of the trust estate should be left in a trust for their benefit that will not disqualify them from those programs. Typically, this means establishing a trust that contains a special needs distribution standard.

However, many states treat a trust that gives the trustee total discretion over distribution of trust assets as exempt for Medicaid eligibility purposes. These states do not require that the trust contain a special needs distribution standard. The rational used is that since a trustee of a trust with a true discretionary distribution standard has total discretion whether or not to distribute trust assets to or for the benefit of the beneficiary, the beneficiary cannot compel a distribution from the trust. As a result, neither can a creditor of a beneficiary. Because a creditor cannot compel a distribution from the trust, the trust assets are deemed to not be available to the beneficiary for the purposes of determining whether the beneficiary qualifies for means-tested public assistance programs, such as Medicaid and SSI. As stated by the Supreme Court of North Dakota in *Hecker v. Stark County Social Service Bd*.,[15]

> Because the ability to compel distributions from the trust is not available to the beneficiary of a discretionary trust, only those distributions of trust income or corpus actually made by the trustee may be taken into account by the Department.[16]

[15] Hecker v. Stark County Social Service Bd., 527 N.W.2d 226 (N.D. 1994).

[16] *Id.* at 230.

In addition, in many states leaving assets in a trust that gives the trustee discretion to distribute for the "support" of the beneficiary will be deemed to be a trust that disqualifies the beneficiary from Medicaid and SSI.[17] However, there are some exceptions derived from Medicaid agency policy[18] or case law.[19]

Then there are states that take a very strict approach to trusts established for the benefit of a person who has a disability. At least one state requires that a beneficiary receiving Medicaid will be disqualified unless the third-party settled trust contains a special needs distribution standard.[20]

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[17] In Leona Carlisle Trust Created Under Trust Agreement Dated Feb. 9, 1985, 498 N.W.2d 260 (Minn.App. 1993) ("Courts usually conclude a support trust is an available asset,*** This is because a beneficiary of a support trust can legally compel the trustee to distribute trust assets to him or her"); and

Bohac v. Graham, 424 N.W.2d 144 (N.D. 1988) ("The trust on its face includes elements of both a discretionary trust and a support trust." The actual trust language was, "The Trustee shall distribute all the net income annually unto my sister, Anne Bohac, and is further authorized to give my said sister any portion of the Trust Property as my said Trustee may deem necessary for her support, maintenance, medical expenses, care, comfort and general welfare." The court held that this trust was a support trust and therefore the trust estate was an available resource for the beneficiary's Medicaid eligibility purposes. The court declined to recognize the concept of a discretionary support trust.)

[18] For example, in Texas it is not necessary for a trust for a Medicaid recipient to contain a special needs distribution standard. Texas Medicaid for the Elderly and Persons with Disabilities Handbook (MEPD) § F-6100 clarifies that a trust for a Texas Medicaid recipient is countable for Medicaid eligibility purposes only if the beneficiary "is the trustee and has the legal right to revoke the trust and use the money for his on benefit. If he does not have access to the trust, the trust is not counted as a resource." As a result, even a trust that has a support distribution clause is an exempt trust for Texas Medicaid purposes, as long as the trust contains a spendthrift clause and limits the beneficiary's control over the trust assets.

[19] *See,* Pikula v. Department of Social Services, 138 A.3d 212, 321 Conn. 259 (Conn. 2016) (holding that a testamentary trust that directed the trustee to use the net income for maintenance and support of the beneficiary was a "supplemental needs trust" because the trustee was only required to use as much income as the trustee "may deem advisable", the trust provided that any unused income could be returned to the principal, the trustee was required to provide only supplemental support, and the testator had a relatively small estate and, therefore, could not reasonably have expected the beneficiary to be fully supported by the trust assets without assistance from the Medicaid program).

See also, Tidrow v. Director, Missouri State Div. of Family Services, 688 S.W.2d 9 (Mo.App. E.D. 1985) (holding that a testamentary trust established for a son was not an available resource for the son's Medicaid eligibility because that was what the testator intended, the trust was a spendthrift trust, and the trustee was given discretion concerning distributions to the son. The actual trust language was, "During the lifetime of my said son, [Bruce], the Trustee shall use and apply so much of the net income and principal of the trust estate as the Trustee may, in the Trustee's discretion, deem necessary for the health, maintenance and support in reasonable comfort of such child, any net income not so used shall be accumulated and, at least annually, added to income.").

[20] This is Kansas. K.S.A § 39-709(e)(3)(B) declares that all trusts established for the benefit of a person receiving Medicaid in Kansas will be deemed

> to be an available resource to the extent, using the full extent of discretion, the trustee may make any of the income or principal available to the [beneficiary of the trust]...unless
>
> (i) At the time of creation or amendment of the trust, the trust states a clear intent that the trust is supplemental to public assistance; and
>
> (ii) the trust:
>
> (a) Is funded from resources of a person who, at the time of such funding, owed no duty of support to the applicant or recipient of medical assistance; or
>
> (b) is funded not more than nominally from resources of a person while that person owed a duty of support to the applicant or recipient of medical assistance.
>
> (C) For the purposes of this paragraph, 'public assistance' includes, but is not limited to, medicaid, medical

If the client wants to leave assets to a person who may be eligible for Medicaid, then it is imperative that the trust established for that person comply with the laws of the state where the beneficiary resides, not the state where the client resides.

B. Special Concerns if Revocable Living Trust Used: If a client chooses to use a revocable living trust as the client's primary estate planning document, then a careful review of the client's current living trust document, or drafting a new living trust document, is necessary to make sure the client's wishes are properly carried out.

While the primary motivation to use a living trust for most clients is avoiding probate at the client's death, these documents are also very useful asset management tools while the client is living. This is especially true if the client loses intellectual capacity. Asset management authority of a trustee is often better defined in state statutes and case law than is the authority of an attorney-in-fact under a financial durable power of attorney. This can make trusts an overall better tool to manage the client's assets than a financial durable power of attorney. Typically, a trustee will have an easier time dealing with the client's broker or bank than an attorney-in-fact.

If a client is faced with impending incapacity, it is important to carefully review the provisions of the client's living trust that apply during the client's lifetime in addition to those that come into effect after the client's death.

For example, if the client is married or has living children or grandchildren, does the client want the trustee to be able to use trust assets for the benefit of anyone other than the client while the client is living? If so, the trust must authorize this action. If not, then the trust should expressly state that the client is to be the only recipient of trust income or principal during the client's lifetime.

In addition, careful thought should be given to who should serve as trustee if the client becomes incapacitated and loses the ability to serve. Should this be the client's spouse or other family member? Often this is the choice because they know the client best and can continue to manage the client's assets in a manner similar to what the client was doing. Also, typically they will not charge a fee for these services.

Other times a corporate trustee is chosen to manage the client's assets during the client's incapacity. This brings in professional investment management experience, which the spouse or other family members may not have. This also allows the spouse and family members to be able to focus on the needs of the client rather than be responsible for managing the client's investment portfolio.

Obviously, each situation is different, and clients will choose whoever is appropriate for their situation. The point here is to make sure the client seriously addresses this question and makes the appointment that is best for the client's situation.

1. Removal of Trustee for Incapacity: When should a trustee, including the settlor if serving as trustee of a revocable trust, be able to be removed from serving as trustee because of incapacity? Should it require the opinion of a physician, two physicians, a physician and another person such as a family member, or other options? Should the trustee's "attending physician" or "primary physician" be one of the physicians whose opinion is required? If so, who is this person and how can he or she be contacted when needed?

What standard of incapacity should be used? A recent case concerning this issue involved the alleged incapacity of Donald Sterling by his wife, Rochelle Sterling, when she took steps to remove him from serving as trustee of the Sterling Family Trust, which at the time owned the Clippers National Basketball Association's (NBA) team, along with many other assets.[21]

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assistance or title XIX of the social security act.

[21] Sterling v. Sterling, 242 Cal. App. 4th 185 (2015).

Although the facts of the Sterling case are interesting and were covered closely by the press at the time, the focus for these materials is the incapacity clause in the trust agreement that was applied to remove Mr. Sterling from serving as trustee of his revocable trust. This clause[22] required,

- two licensed physicians
- who, as a regular part of their practice, are called upon to determine the capacity of others, and
- neither of whom is related by blood or marriage to any Trustee or beneficiary,
- examine the trustee, and
- certify in writing the trustee is incapacitated
- as defined in California Probate Code § 810, *et seq*.[23]

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[22] Mr. Sterling's trust contained two relevant clauses that are combined in the summary. These were, "Any individual who is deemed incapacitated, as defined in Paragraph 10.24., shall cease to serve as a Trustee of all trusts administered under this document." Paragraph 10.24 provided: "'Incapacity' and derivations thereof mean incapable of managing an individual's affairs under the criteria set forth in California Probate Code § 810 et seq. An individual shall be deemed to be incapacitated if ... two licensed physicians who, as a regular part of their practice are called upon to determine the capacity of others, and neither of whom is related by blood or marriage to any Trustee or beneficiary, examine the individual and certify in writing that the individual is incapacitated...." Sterling at 188 - 189.

[23] California Probate Code Section § 810. Findings and declarations; capabilities of persons with mental or physical disorders; judicial determination; evidence

The Legislature finds and declares the following:

(a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

(b) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.

(c) A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder.

§ 811. Deficits in mental functions

(a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:

(A) Level of arousal or consciousness.

(B) Orientation to time, place, person, and situation.

(C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

(A) Short- and long-term memory, including immediate recall.

(B) Ability to understand or communicate with others, either verbally or otherwise.

(C) Recognition of familiar objects and familiar persons.

(D) Ability to understand and appreciate quantities.

The court found that the testimony of the two physicians who examined Mr. Sterling, a neurologist and geriatric psychiatrist, "amply support the conclusion that Donald was incapable of managing his affairs under the criteria of section 811, the relevant criteria under the terms of the Sterling Family Trust."[24] These physicians had Mr. Sterling perform a battery of standard tests used to detect dementia and other brain diseases, and concluded both in written reports and testimony at trial that Mr. Sterling was no longer competent to act as trustee of his trust and no longer able to serve as trustee of the Sterling Family Trust.[25]

By utilizing the statutory definition of incapacity, the trust document brought in all of the case law and commentary that help define incapacity as defined in the statute. The court used that to determine whether Mr. Sterling was sufficiently incapacitated to be removed from serving as trustee by his wife, the co-trustee.

Many states do not have a statute like the California one quoted in the Sterling case. And even if a similar statute exists, the real question is what standard the client wants applied and what process the client wants to utilize when someone wants to remove the client as trustee of his revocable living trust. Whatever the client decides, the applicable standard and process should be set forth clearly in the trust document.

2. Authority to Amend the Trust: Consideration should be given to empowering someone other than the settlor to amend the trust if that becomes necessary or appropriate after the settlor no longer has intellectual capacity to take this action. This authority can be held by the trustee, a trust protector or trust advisor, the attorney-in-fact under the settlor's financial durable power of attorney, or a guardian or

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(E) Ability to reason using abstract concepts.

(F) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(G) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:

(A) Severely disorganized thinking.

(B) Hallucinations.

(C) Delusions.

(D) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.

[24] Sterling at 197.

[25] Sterling at 191.

conservator appointed by a court. There is not one correct solution; which option, if any, is chosen depends on the settlor's wishes.

If more than one person is granted authority amend the trust, then the trust document should contain a hierarchy of who has priority in the event multiple people attempt to amend or the amendments are conflicting. There should also be a process described in the trust document to resolve conflicts.

It is also important to consider including this authority in a will that establishes a trust for the benefit of another person after the testator's death.

3. Authority to Transfer Assets if Directed by Attorney-in-fact: If long-term care planning is a concern and it is appropriate for the trustee to be given authority to follow the direction of the client's financial attorney-in-fact and give trust assets away to other people, as discussed later in these materials, then there should be a clause in the living trust document that directs the trustee to comply with the instructions of the attorney-in-fact.

C. Review All Assets: A thorough review of the client's assets should be undertaken. This should include determining the current location of the asset and any documents that indicate ownership of the asset, value, owner or owners, and beneficiaries, if applicable.

1. Include Tax Planning Provisions, If Appropriate: If the value of the client's assets is high enough, then it may be necessary to incorporate provisions in the client's will or living trust that minimize any potential estate or inheritance taxes. These can be imposed by the federal government, the state where the client resides, or both. In addition, it may be appropriate to structure ownership or distribution of certain assets in a manner that minimizes capital gains taxes.

However, tax planning considerations should be taken into account after the client's distribution wishes are understood. Once this is completed, then the distribution plan should be viewed from an estate and income tax planning perspective. It may be that taxes can be reduced if the distribution plan the client wants is slightly altered. If so, this should be discussed with the client and, if appropriate, the documents altered to accommodate the client's decision.

2. Make Sure Assets Are Titled Correctly: Each asset owned by the client should be titled in a manner that accomplishes the client's objectives. Care should be taken to assure that beneficiary designations are correct.

a. If a Will is Primary Document: If the client is using a Will as the primary estate planning document, then assets that are to be controlled by the provisions of the Will need to be titled in a manner that will require them to be subject to the probate process. This means they should not pass to another person by joint ownership provisions or beneficiary designations. Instead, they should be owned solely by the client and/or made payable to the client's estate.

b. If a Revocable Living Trust is Primary Document: If the client is using a revocable living trust as the primary estate planning document, then there are two options concerning what should be done with the client's assets while the client is living. These options are: (i) transferring the asset to the trustee of the client's living trust now, while the client is living, or (ii) keeping the asset titled in the client's name while the client is living and using a beneficiary designation to transfer the asset into the client's living trust upon the client's death. Neither option is always the better choice; what is done depends on the client's circumstances and preferences.

For some assets, there is no choice. For example, the client's IRAs and other retirement assets must remain in the client's name while the client is living. However, most other assets can be titled either way.

Often this decision is based on who will be able to access the asset and is responsible for investing and spending it for the client=s benefit. If the asset remains titled in the client's name, then the attorney-in-fact appointed in the client's financial durable power of attorney has this authority. On the other hand, if the asset is transferred into the client's living trust, then the trustee of the trust has this authority.

Normally, while the client has intellectual capacity, the client can manage all assets whether titled in the client's name or the client's revocable living trust. This is because the client serves as trustee of his or her revocable living trust. However, when the client loses intellectual capacity, then the client=s attorney-in-fact appointed by the client's financial durable power of attorney takes control of assets titled in the client's name, and the successor trustee takes control of assets titled in the client=s living trust. If these are different, then who does the client prefer have access to or control of these assets - the attorney-in-fact or the trustee?

For example, if the attorney-in-fact is the spouse and the successor trustee is a corporate entity, the client may prefer that the spouse handle these items while the client is living. This may be because the client is more comfortable with spouse doing this, or because if the corporate trustee starts handling the assets it will begin charging fees for its services.

On the other hand, the client may not want people who are appointed in the financial durable power of attorney handling certain assets and, instead, may want the trustee to do so. For example, the person the client wants overseeing the client's financial affairs and paying bills from the client's checking account may not have the experience or ability to manage the client's investment portfolio, while the corporate successor trustee does.

D. If Charities Are Named Beneficiaries: If charities are named as beneficiaries of the trust, there should be a provision that describes what happens if a named charity no longer exists after the client's death. Unless the trust agreement describes what happens, there will often be litigation over the distribution.

As an example, consider the following language:

> Should any of the above-listed charitable organizations cease to exist or substantially change its charitable purposes and programs, then the Trustee is empowered, in its absolute discretion, to substitute in lieu of such organization, another charitable organization of the Trustee's choice that meets the qualifications of organizations discussed in Section 170(c) of the Internal Revenue Code of 1986, as amended from time to time, and which, in the Trustee's discretion, most closely resembles in purpose and program the charity that the Trustee is replacing.

V. Health Care Preferences

How aggressive does your client want medical treatment to be? What are the client's thoughts and preferences concerning stopping life support if medical treatment becomes futile? Does your client want to be an organ donor? Is your client ok with organs or other body parts being used for medical research? Who is the client comfortable with appointing to make health care decisions on behalf of the client if he or she is unable to make them on their own?

All of these topics should be discussed with the client. Once decisions are made, they need to be incorporated in appropriate legal documents so they are enforceable. In addition, the client should explain them to immediate family members and others who are empowered to make decisions on the client's behalf.

A. Durable Power of Attorney for Health Care Decisions: Empowering someone to make health care decisions requires the execution of a health care durable power of attorney. As with the financial durable power of

attorney described below, this document must comply with applicable statutes and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[26]

Health care powers can be included in a durable power of attorney document that also contains financial and legal authority unless the applicable state law requires separate documents. Despite this, many attorneys use two separate documents, one for only health care powers (referred to in these materials as a "health care durable power of attorney") and the other for legal and financial powers (referred to in these materials as a "financial durable power of attorney"). Two reasons to use separate documents may be because the principal is naming different attorney-in-facts or changing the order of attorney-in-facts in the two documents, or because including the financial and legal powers along with the health care powers makes the document too long and challenging to use.

If the client wants to participate in an organ donation program, then authority to consent to this should be included in the client's health care durable power of attorney. It may also be possible to make this election on the client's motor vehicle driver's license and by joining a local organ bank program. However, failure to make an organ donation election on the driver's license should not lead to an inference that the client did not want to be an organ donor. It is very important that the client discuss this with immediate family members since they will most likely be required to authorize such donations.

B. Advance Medical Directive: Stopping life support when a person does not have the mental capacity to make or communicate such a decision usually requires that the person have an advance medical directive (sometimes referred to as an "advance health care directive" or just "advance directive"). This is a statement in writing by which a person directs what medical treatment to allow or prevent, or delegates these decisions to another person, in the event that the maker of the statement is incapacitated at the time a decision is needed. Although these are partially based on certain rights contained in the United States Constitution, there is no overriding federal law authorizing advance medical directives. It is therefore necessary to look to the laws of the state where a person resides to determine what requirements the person must comply with in order to execute a valid advance medical directive.

Whether the client wants life support to be stopped under certain circumstances or wants to be kept alive by artificial means as long as possible, it is important that the client convey these wishes as clearly as possible. This means that these wishes should be in writing and verbally explained to immediate family members and anyone authorized to make these decisions on the client's behalf. Many of the high-profile cases concerning this issue came about because the person had not clearly expressed her wishes in a manner that was enforceable.[27]

Although there are many sources for helpful information relating to this topic, a few items that may assist the client to work through these issues or better express his or her wishes are the Caring Conversations toolkit offered by the Center for Practical Bioethics,[28] the American Bar Association Commission on Law and Aging Toolkit for Health Care Advance Planning,[29] and materials produced by the U.S. Department of Health & Human Services, National Institute on Aging.[30]

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[26] Pub. L. 104-191. The HIPAA Standards for Privacy of Individually Identifiable Health Information ("Privacy Rule") is located at 45 C.F.R. Part 160 and Part 164, Subparts A and E.

[27] *See,* Cruzan, *ex rel.* Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990); and the various cases regarding Theresa Marie Schiavo, including In re Guardianship of Schiavo, 916 So.2d 814 (Fla.App. 2005).

[28] *See* https://www.practicalbioethics.org/resources/caring-conversations.html.

[29] *See* https://www.americanbar.org/groups/law_aging/resources/health_care_decision_making/.

[30] *See* https://www.nia.nih.gov/health/advance-care-planning-healthcare-directives.

VI. If Long-Term Care May Be Needed

If the client's diagnosis makes it a possibility that the client may require long-term care assistance in the future, then two topics need to be explored and decisions made. These are (i) whether the client's current living arrangements will be appropriate, and if not, what should be done to prepare for the future, and (ii) whether the client's income is enough to cover the possible cost of long-term care in addition to all other reasonable living expenses of the client, along with the spouse or other dependents, if any. If the income is not sufficient, then an analysis of the client's assets should be undertaken since it will most likely become necessary to liquidate some or all of them to pay these expenses.

A. Housing Analysis: Most people who need long-term care prefer to stay in their own home. Whether this is a realistic option for very long depends on the design and physical aspects of the home, whether there are people who can provide long-term care assistance (and if so, at what cost), and, most importantly, what happens to the client, both intellectually and physically. The more assistance the client needs, the harder it is to remain in the home.

1. Design and Physical Aspects of the Home: If the client does not develop physical disabilities, then almost any house design will allow the client to reside in the house while receiving long-term care assistance. However, if the client has difficulty with stairs, or requires the assistance of a walker or wheelchair, then many houses will not suffice.

If all the bedrooms or full bathrooms are on one floor, while living and kitchen space is on another floor, then the client will become isolated on one of the floors without access to the amenities on the other floors. While it is possible to remodel a house to accommodate these needs, that may not be feasible or affordable. On the other hand, if the house has kitchen, living, sleeping, and bathroom space on one floor and doors wide enough to allow a wheelchair to pass through, or incorporates Universal Design[31] options, then the client will have a better chance of remaining in the home.

2. People to Provide Long-Term Care: Most long-term care is provided for no charge by family members, such as a spouse or adult children. As a client's health or intellectual abilities deteriorate, however, the care required may exceed what family can provide.

The next option is to hire people to provide care in the client's home. This can be accomplished by hiring someone directly or contracting with a home health agency or business. In either event, the care provider is paid for the time and services provided to the client. Also, services such as Meals on Wheels, or more tech savvy options such as UberEATS or Grubhub, can be utilized to deliver prepared meals to the home so the client does not have to cook food.

If it is not possible for the client to remain in the client's home, then it may be possible to move into a family member's home. This most likely would be the home of an adult child or a sibling. However, all of the potential issues that impact whether a client can remain in the client's home also apply to being able to live in a relative's home.

Other alternatives for housing are an assisted living facility or a continuing care retirement community.[32]

B. Income Analysis: The client's expected income should be reviewed in order to know what may be available to pay for the client's long-term care.

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[31] "Universal Design is the design and composition of an environment so that it can be accessed, understood and used to the greatest extent possible by all people regardless of their age, size, ability or disability." This is from the website of the Centre for Excellence in Universal Design, http://universaldesign.ie/What-is-Universal-Design/.

[32] An informative article from Kiplinger concerning shopping for a continuing care retirement community is https://www.kiplinger.com/article/retirement/T010-C000-S002-how-to-shop-continuing-care-retirement-community.html.

1. Social Security, Pensions, and Royalties: The first income to take into account should be that which is expected to be received without the client or spouse working and is not dependent on the client's investments. These include sources such as Social Security, pensions, royalties and other similar income, and any other similar cash flow the client is expected to receive. If the client is married, any similar income the spouse may receive should be part of the analysis.

2. Long-Term Care Insurance: The second source of income to help pay for the client's long-term care is long-term care insurance, if the client owns it. This is why long-term care insurance is purchased - to help pay the expenses of long-term care. While the many variations in coverage offered by long-term care insurance policies are beyond the scope of these materials, a short explanation of two aspects of how benefits are determined is appropriate.

a. Total Amount of Money Available: Typically a long-term care insurance policy will pay a maximum amount of money per day, such as $200 per day (which may increase annually if the policy has an inflation factor), for a maximum period of time measured in days, such as 365 days (one year), 1,095 days (three years), or longer. Some older policies may pay for lifetime. This amount is normally aggregated or "pooled" into a total amount of benefits that may be available.

> For example, if the long-term care policy pays a maximum of $200/day for 1,825 days (5 years), this equals $365,000. This is the total amount of money that could be received from this policy. This is available at a rate of no more than $200/day. This means for a 30-day month, the policy will pay a maximum of $6,000.

A minority of long-term care insurance policies are "indemnity" policies and will pay the full maximum amount each month the client is eligible to receive benefits, no matter what the client=s actual cost of long-term care. However, most policies are "reimbursement" policies and will pay the lesser of the client's actual cost of long-term care for the month, or the maximum available for that month.

> Continuing the above example, if the client is in an assisted living facility and cost of long-term care for the 30-day period was $3,000, then a reimbursement long-term care insurance policy would pay $3,000, not the potential maximum of $6,000. If the client's cost of long-term care never increased, then this policy will actually pay for a ten-year period. The policy will continue to pay as long as the client qualifies to receive benefits from the policy and there is money remaining from the maximum potential benefit.

b. When the Policy Pays: This actually raises two aspects of long-term care insurance policies:

> (1) What is the waiting or elimination period? Or in other words, how long must the client private pay for long-term care services before the policy will begin paying claims? The typical waiting or elimination period ranges from thirty to ninety days. Only if the client remains eligible for benefits from the policy and private pays for long-term care during this time will the policy begin paying benefits. This requires that the client have sufficient money to pay for care during this time.
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> (2) Is the policy a "reimbursement" or "indemnity" policy? As mentioned above, while some long-term care policies are indemnity polices and automatically pay the appropriate benefit if the client remains eligible, most policies are reimbursement policies and require the client to first pay for the cost of the long-term care and then submit a paid receipt to the insurance company. The company will then review the claim and reimburse the client for what was paid. This means the client must have sufficient income from some other source to pay for the client's long-term care for the month or two the insurance company takes to review and reimburse the claim.

Once the maximum daily benefit, maximum pooled amount available, waiting period, and whether the long-term care insurance policy is an indemnity or reimbursement policy are known, it is possible to know how much money the client will need to spend before the long-term care insurance policy begins to pay and whether the client's fixed income and long-term insurance benefits are sufficient to pay the expected cost of the client's long-term care.

3. Investment Income: The third source of income that will help pay for the client's long-term care is investment income. This includes dividends and interest, rents, and other income that can be generated from the assets owned by the client or the client's spouse.

If total potential income is not sufficient to cover the realistic expenses, then the client's investment advisors should be consulted to see if it is possible to alter the client's investments to increase the income to a sufficient amount.

C. Asset Analysis: If it is not possible to increase the client's income enough to fully pay for the client's long-term care and other living expenses of the spouse and any dependents, then the need to slowly liquidate the client's assets becomes likely. In this situation, an analysis of two items becomes necessary: (i) how long the client may realistically be able to cover these expenses without having to spend beyond the client's income, and (ii) how long the client's assets will last if they must be liquidated to help pay for these expenses.

If the client has plenty of assets and is not concerned with liquidating some of them to pay for long-term care, then no further analysis for these purposes may be necessary.

However, if there are not sufficient assets, or the client does not want to liquidate a sufficient amount of assets that may be necessary to pay for the client's long-term care, then begin an analysis of how to tap into the Medicaid or Veterans Administration programs to help pay for the client's long-term care.

D. Public Assistance Analysis:

1. Medicaid: If tapping into the Medicaid program for assistance is a possibility, then there are various items that should be reviewed with the client and possibly changed in preparation for this event.

a. Titling Exempt Assets in Spouse's Name: All assets of the client and spouse should be reviewed and consideration should be given to titling them as they should be owned after the client becomes eligible for Medicaid. For example, if the client is married, then often assets that are exempt for Medicaid eligibility purposes, such as the home, income producing real property, personal property, and motor vehicles, should be transferred into the name of the spouse who is living at home (the "community spouse") before the client enters an institution (a hospital or nursing home) and is expected to not return to the community within thirty days (*i.e.,* becomes "institutionalized").

The advantages of doing this are many. The primary ones are:

(1) The state Medicaid agency will not be able to claim that there were disqualifying transfers made to the community spouse that exceeded the amount he or she is entitled to (the "community spouse resource allowance").

(2) Although some states may have different rules, in most states any income earned on these assets will belong to the community spouse and will not have to be shared with the institutionalized spouse (which would be required if the asset was jointly owned by both spouses). For example, if the asset is an income producing farm, all of the income will be paid to the owner (the community spouse) and not to the institutionalized spouse.

(3) If the community spouse sells the asset, the entire net sale proceeds will be allocated to the community spouse and will not have to be given to the institutionalized spouse and cause disqualification from Medicaid until spent down.

b. Changing the Spouse's Will and Trust Documents: Usually a married couple's estate plan leaves all assets to the surviving spouse. However, this is not the best plan if one of them is going to need long-term care in a nursing home and may need Medicaid assistance to help pay for it. Instead, if the client is the one who may need long-term care, then consideration should be given to altering the spouse's Will and other estate planning documents so most, if not all, of the assets held in the spouse's name go someplace other than directly to the client. If the assets end up in the client's name and the client needs to tap into the Medicaid program to help pay for long-term care, then everything will need to be spent before the client qualifies for Medicaid assistance. This not only leaves the client totally dependent on the Medicaid program, but it eliminates any of the assets getting to children or grandchildren.

(1) Leave Assets to Special Needs Trust for Client: With proper planning, the spouse can leave some or all of the spouse's assets to a special needs trust for the benefit of the client if the spouse dies first. Doing this allows these assets to be used for the care of the client and pay for items the Medicaid will not cover. Instead of spending everything and then qualifying for Medicaid, the client will be able to utilize the Medicaid program to pay the base care, and the assets in the special needs trust can be used to pay for additional care or other items that will enhance the life of the client. And when the client dies, any assets remaining in the trust can be passed on to children or other beneficiaries of the spouse's choice.

However, if this is not done properly, money in the trust will be deemed "available" to the client. This will cause the client to be disqualified from Medicaid until the money in the trust is spent.

Although a full discussion of how to accomplish this is beyond the scope of these materials, it is important to understand that the only way this can be accomplished is by establishing the special needs trust for the client via the spouse's last will and testament. This will not work if the spouse's living trust is used.

The federal law is clear that a person can only establish a valid third-party settled special needs trust for their spouse by utilizing the person's last will and testament.[33] The applicable statute is:

> 42 U.S.C. § 1396p(d)(2)(A) - For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust **other than by will**: . . .
>
> (ii) The individual's spouse. . .. (emphasis added)

(2) Improper Design May Result in Legal Malpractice Claim: Failure to properly design the spouse's estate plan can result in a legal malpractice claim against the drafting attorney.

For a recent case where this happened, see *Doyle v. Hood*,[34] an Illinois Appeals Court decision issued on September 28, 2018. In this case Harry Doyle retained attorney Hood to prepare a special needs trust to be funded upon Harry's death for the benefit of his wife, Patricia, who suffered from Alzheimer's disease. Instead of using Harry's last will and

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[33] 42 U.S.C. § 1396p(d)(2)(A); 42 C.F.R. § 435.121(a)(3)(i).

[34] Doyle v. Hood, ---N.E.3d---, No. 2-17-1041; IL. App.2d 171041 (September 28, 2018).

testament, attorney Hood used Harry's revocable living trust to establish the Supplemental Trust for the benefit of Patricia. After Harry's death the Supplemental Trust was funded. Later, when Patricia entered a long-term care facility and applied for Medicaid assistance, the assets in the Supplemental Trust were determined to be "available" to Patricia and caused her to be disqualified from Medicaid.

After losing all Medicaid appeals, the trustee of the Supplemental Trust, who was also named executor of Harry's estate and was a son of both Harry and Patricia, filed a legal malpractice claim against attorney Hood. Fortunately for attorney Hood, the appeals court agreed with the lower court that the statute of limitations for this claim had expired prior to the time the lawsuit was filed. This allowed attorney Hood to dodge a bullet because he clearly did not properly design the special needs trust Harry established for the benefit of his surviving spouse.

(3) State May Enforce Spousal Election: Normally, state law does not allow one spouse to disinherit another spouse. Instead, the surviving spouse has the ability to file a claim against the deceased spouse's estate or the people who received assets upon the deceased spouse's death and receive what the surviving spouse would have received if the deceased spouse's assets had passed through intestacy. For ease of reference, these materials will refer to this as "spousal election."

Some Medicaid agencies take the position that when a community spouse dies, the institutionalized spouse must enforce the spousal election.[35] This will allocate a portion of the deceased spouse's assets to the institutionalized spouse, which will cause disqualification from Medicaid until the assets are spent. If the institutionalized spouse, or anyone who has authority to act on their behalf, does not file the spousal election, then some states take the position the amount that could have been received via the spousal election is deemed to be an available resource to the institutionalized spouse, while other states treat this amount as a transfer for less than fair market value. In either event, the institutionalized spouse will be disqualified from Medicaid for a period of time.[36]

If the right to spousal election is waived by the institutionalized spouse, in many states the effective date of the waiver is the date of the community spouse's death, not the date the waiver is signed.[37]

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[35] *See,* In re Estate of Shipman, 832 N.W.2d 335 (S.D. Sup. Ct. 2013) (Decedent, the community spouse husband, executed a will disinheriting institutionalized spouse wife because he "ha[d] given her sufficient consideration during [his] lifetime." On same day, son, as attorney-in-fact for his mother, executed a disclaimer of any inheritance she would be entitled to from husband's estate. Upon death of husband, state Medicaid agency required wife to pursue her elective share or Medicaid long-term care benefits would be terminated. A guardian ad litem was appointed. The GAL petitioned for elective share and moved to set aside the disclaimer. Trial court denied, but Supreme Court reversed on basis that what husband spent during life did not satisfy elective share and disclaimer was being used as an estate planning tool to allow wife to receive Medicaid benefits).

[36] For example, in Kansas, the state Medicaid manual describes this as follows: "**Disclaimer of Inheritance and Spousal Elective Share** (*see* Policy Memo, PM2002-12-03 Spousal Elective Share - If the individual or spouse disclaims or gives up his or her rights to an inheritance, the fair market value of the assets which would have been available to the individual are considered transferred without adequate compensation. The date of the decedent=s death is the date of transfer. In addition, failure to take the full spousal elective share available following a spouse=s death shall also be considered an uncompensated transfer. The transfer disqualification is applicable following a confirmation that no further action can be taken to pursue the asset. Current recipients must pursue the full share as a potential resource per 2124.1(4)." Kansas Department of Health and Environment Medical KEESM § 5722.3, located at http://www.kdheks.gov/hcf/kancare/Apr_2018_Output/keesm5722.htm (emphasis added).

[37] This is what occurred in Estate of Dionisio v. Westchester County Dep't of Social Services, 665 N.Y.S.2d 904 (N.Y. App.

If the client lives in a state that requires enforcement of the spousal election, then the community spouse's estate plan must take this into account. Some states require the amount to be received because of the spousal election to be distributed outright to the surviving spouse.[38] This will cause the surviving spouse to be disqualified from Medicaid for a period of time. Other states allow the spousal election amount to be held in the third-party settled special needs trust established by the will of the deceased community spouse.[39] In these states, the estate plan of the community spouse can leave an amount equal to the spousal election amount to or for the benefit if the institutionalized spouse and transfer the remaining assets elsewhere. Other times the institutionalized spouse is intentionally disinherited, and the plan is to force the filing of the spousal election action.

c. Changing the Spouse's Durable Power of Attorney Documents: In addition to considering changing the distribution of assets if the spouse dies first, the spouse may also want to change durable power of attorney documents and name a person other than the client as the primary person to make decisions on the spouse's behalf if the spouse loses intellectual capacity.

d. Establish Self-Settled Special Needs Trust if Client is Under Age 65: If the client is under the age of 65 and already sufficiently disabled to satisfy the definition of disability for SSI purposes, then consider transferring assets into self-settled special needs trust authorized by 42 U.S.C. § 1396p(d)(4)(A) prior to the client attaining age 65. Doing this will allow those assets to be retained for the client's benefit even if the client applies for long-term care assistance from the Medicaid program. However, keep in mind that upon the client's death, the assets remaining in this trust must first be used to reimburse the Medicaid program for what it spent on the client's behalf. Any assets remaining after that payment can be distributed however the client directs.

e. Gift Assets to Irrevocable Trust: If incapacity is likely to happen, but the client should not need to tap into the Medicaid program for at least five years, consider whether some of the client=s assets should be transferred to an irrevocable Medicaid compliant asset protection trust for the benefit of people other than the client or the client's spouse, or outright to such people. Doing this will generate a transfer penalty for Medicaid eligibility purposes if the client applies for Medicaid within five years following the transfer.

If such a transfer is made, then the client should either (i) retain sufficient assets to pay all expenses for the five year period, or (ii) utilize other methods, such as a Medicaid compliant immediate annuity or promissory note to generate sufficient income so, when combined with the client's other income there is enough to cover the costs of long-term care for the five year period, or if shorter, the transfer penalty period.

Assets transferred by the client to other people should not be placed in a trust that benefits the client or spouse unless careful planning is done to avoid the application of 42 U.S.C. § 1396p(d)(2)(iv).

Div. 1997). Mrs. Dionisio executed a waiver of her spousal election two weeks before she entered a nursing facility and twenty months before applying for Medicaid. Testimony was that the waiver was executed for estate planning purposes, not for the purpose of becoming eligible for Medicaid. When her husband died four months after she entered the facility, he did not leave any of his estate to her. The Medicaid agency imposed a transfer penalty disqualifying Mrs. Dionisio from Medicaid on the theory that by waiving her marital rights to a portion of her husband's estate, she had transferred resources for the purpose of qualifying for Medicaid assistance. The court agreed and let the disqualification stand.

[38] New York is one of these states. EPTL § 5-1.1A.

[39] Florida does not require the elective share to be distributed outright to the surviving spouse. Instead, it can be held in an "elective share trust". Fla. Stat. § 732.2025(2)(2018). In addition, Florida allows a "qualifying special needs trust" to be established for the benefit of an "ill or disabled" surviving spouse by court order upon the death of the deceased spouse. This trust can receive the elective share portion and not disqualify the surviving spouse from Medicaid. Fla. Stat. § 732.2025(8)(2018).

This statute deems the assets in such a trust to be an available resource to the client for Medicaid eligibility purposes because the trust was established by people "acting at the direction or upon the request of the" client or spouse.[40]

2. Veterans Benefits: If the client is a Veteran of the United States Armed Forces, or in some cases, a spouse of a veteran, then it may be possible to receive financial assistance from the Department of Veterans Affairs (VA). This may include the ability for the veteran to live in a veteran's nursing home or for the veteran or spouse to receive money monthly from the VA that can be used to pay for long-term care. If potentially eligible, this should be explored as a possible source of assistance for long-term care.

Although the details of applying for VA assistance are beyond the scope of these materials, it is important to point out that the VA has recently issued final regulations imposing transfer penalties on veterans who give away assets within a 36-month look-back period, similar to the Medicaid program (although Medicaid imposes a 60-month look-back period).[41]

VII. Substituted Decision Making - Durable Powers of Attorney

When it is possible that a client may lose intellectual capacity in the near future, it is important to decide how decisions affecting the client and the client's assets should be made when this happens. Hopefully, there are people in the client=s life who the client is comfortable relying on for this assistance. If not, then perhaps it is possible to hire someone to do this for the client.

Generally, the types of decisions that may need to be made on the client's behalf fall into the following categories: financial, legal, personal care, and health care. The legal documents typically employed to empower others to make these types of decisions are durable powers of attorney and advance health care directives. Although revocable living trusts can be used to manage a client's assets during the client's lifetime, they were discussed in a previous section of these materials since these trusts also are utilized to distribute a client's assets after death.

A. Types of Durable Powers of Attorney: Generally speaking, there are two types of durable powers of attorney - financial/legal and health care. Each of these is a written instrument that authorizes someone designated in the document (the "attorney-in-fact" or "agent") to act on behalf of the person granting the power (the "principal"). For ease of reference, these materials will refer to this person as an "attorney-in-fact." Once performed, the acts of the attorney-in-fact bind the principal. They can grant broad powers (a "general" durable of attorney) or limited and focused authority ("special" or "limited" durable power of attorney).

B. The Law Concerning Durable Powers of Attorney: Although the concept of a power of attorney was established under common law as contract of agency, the agent lost the ability to act on behalf of the principal if the principal became incapacitated. This was because the common law power of attorney was solely based on the concept that the principal had to have the authority to do something before it could be delegated to an agent. Thus, if the principal lost intellectual capacity and could not make decisions anymore, the agent also lost such authority.

A "durable" power of attorney is a creature of statute. It was not until 1954 that Virginia enacted the first durable power of attorney law in the United States. Currently, all the states have laws authorizing their residents to execute

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[40] 42 U.S.C. § 1396p(d)(2)(iv). *See also*, Hedlund v. Wisconsin Department of Health Services, 807 N.W.2d 672 (Wis. Ct. App. 2011) (seventeen years prior to applying for Medicaid assistance, Medicaid applicant transferred assets to children. Later on the same day children transferred the same assets to an irrevocable trust for applicant's benefit. The court held the trust was not a third-party settled trust by the children, but was self-settled by the applicant. Therefore, assets were available to the applicant for Medicaid eligibility purposes. There was a reasonable inference that the children created trust at applicant's direction).

[41] Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits, Final Rule, 38 C.F.R. Part 3, 83 Fed. Reg. 47246 (September 18, 2018).

durable powers of attorney. However, these laws are not identical and, in some instances, may contain significant differences.

For example, in Virginia,[42] Missouri,[43] and Kansas,[44] along with many other states, the principal's signature must be notarized and witnesses are not required. In contrast, in Florida the principal's signature must be witnessed by two subscribing witnesses and notarized[45] and in Arizona the principal's signature must be witnessed by one subscribing witness and both signatures must be notarized.[46]

Because durable powers of attorney are state specific, it is important that any durable power prepared for a client be effective not only in the state where the client resides, but also in any state where the client has property, bank accounts, or is planning to reside.

When discussing the future care of a client who is expecting to become incapacitated, one of the items the drafting attorney must know is whether the client is anticipating moving to another state to be near family or other care providers. If so, the attorney should coordinate with an attorney authorized to practice law in that state to assure that the durable power of attorney drafted will also be effective in that state.

If it is not possible to draft one document that will work in all potential states, then consideration should be given to preparing multiple durable power of attorney documents, one for each state. If this is done, then care must be taken that they do not conflict with each other or revoke the other durable power of attorney. It is normal for a durable power of attorney document to contain a clause that revokes all prior durable powers of attorney. This should be modified so the concurrent durable powers of attorney are not inadvertently revoked.

C. Durable Power of Attorney Granting Financial and Legal Powers: Typically, one durable power of attorney document grants the attorney-in-fact both (i) the authority to make financial decisions on behalf of the principal ("financial powers") and (ii) the authority to make decisions affecting the legal aspects of a principal's life ("legal powers"). For ease of reference, these materials will refer to this document as a "financial" durable power of attorney.

When designing and drafting a financial durable power of attorney there are many clauses that are important to include and are often standard in the documents. These materials will not list those. Instead, some additional items to consider will be covered.

1. Make the Durable Power of Attorney Effective Immediately: In most states, the principal can choose to make the durable power of attorney effective at one of the following times:

a. When the principal signs it; or

b. After a physician (or two) certifies the principal is intellectually incapacitated. This is referred to as a "springing" durable power of attorney.

If it is likely the principal will become incapacitated in the future, it is suggested that the financial durable power of attorney be drafted so it is effective immediately after the principal executes it. This will eliminate the necessity of obtaining physician's letters prior to the attorney-in-fact being able to use the document. Not

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[42] Va. Code Ann. § 64.2-1603.

[43] R.S.Mo. § 404.705.1(3).

[44] K.S.A. § 58-652(a)(3)

[45] Fla. Stat. § 709.2105(2) ("A power of attorney must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public or as otherwise provided in s. 695.03.").

[46] A.R.S. § 14.5501(D).

only does this simplify the attorney-in-fact's initial use of the document, it also eliminates the possible necessity of periodically needing updated physician's letters to confirm the principal is still incapacitated.

If the principal insists that the financial durable power of attorney be springing, and the state law allows it,[47] then confirm whether the opinions of one or two physicians is necessary; this may be a state law requirement or something the principal requests. Then have the principal provide the names and contact information for the physician (or two) that the principal prefers to provide this certification when it becomes needed. The principal should also communicate with these physicians about this and sign the necessary HIPAA documents the physician may require in order to release this medical information about the principal. It is also recommended that the principal sign a standard HIPAA authorization form appointing the people appointed as attorney-in-fact as "Personal Representatives" for the principal, allowing them to access the principal's protected health information. This should be kept with the durable power of attorney document so it can be easily located by the attorney-in-fact when needed.

2. Visit Financial Advisors and Institutions Before It Is Needed: After the financial durable power of attorney document is executed, if the principal is able, the principal and attorney-in-fact, or the first attorney-in-fact appointed in the document if there are more than one, should visit each financial institution and financial advisor that the attorney-in-fact may be required to work with in the future. A copy of the financial durable power of attorney should be provided to the institution. Typically, the document will be reviewed by the institution's legal counsel before the institution will honor it. By making this contact while the principal has capacity, any concerns of the institution can be handled by the principal and, if necessary, the document can be altered to accommodate the institution's concerns.

During this visit, the attorney-in-fact should be introduced to the financial advisor or institution and any documentation they may need from the attorney-in-fact should be obtained. This may include copies of identification and signatures on documents. The objective of this contact is for the financial advisor and institution to feel comfortable that the principal is knowingly empowering the attorney-in-fact with the authority to work on the principal's behalf with the advisor and institution, and that they are ready, willing, and able to work with the attorney-in-fact when it becomes appropriate.

These visits should be made with all banks, financial advisors, accountants and other tax return preparers, brokerages, and similar people and institutions with whom the principal does business. If out of town, these contacts may need to be made by telephone and the documentation delivered to the appropriate people with the financial institution.

Often financial institutions have their own durable power of attorney forms specific to their institution that they also want the principal to sign. These should be reviewed by the principal's lawyer prior to executing, but if there are no issues, then this institution-specific document should also be executed.

If a financial institution's durable power of attorney form is executed, then the client's lawyer must carefully review that document and make sure that it does not limit or alter any of the authority contained in the principal's primary financial durable power of attorney. In addition, if necessary, the institution's document should expressly reference the principal's primary financial durable power of attorney and incorporate the various powers granted by it into it, or if that is not acceptable, at least confirm that it will be honored by the financial institution.

3. Consider Including Gifting Powers: Consideration should be given to granting the attorney-in-fact authority to spend the principal's money for the benefit of other people or give away the principal's assets to other people or trusts. Obviously, allowing this could lead to financial exploitation and abuse, so the principal needs to trust the people appointed as attorney-in-fact and be certain they would not take advantage of this authority.

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[47] Florida does not allow the use of a springing durable power of attorney. Fla. Stat. § 709.2108.

If gifting is allowed, there are two major categories of decisions to be made: (i) how broad should the gifting power be, and (ii) to whom or what can gifts be made.

a. Broad v. Limited Authority to Gift: The financial durable power of attorney can grant the attorney-in-fact broad authority to transfer and give away any or all of the assets and income of the principal. Doing so gives the attorney-in-fact the most flexibility to adapt to what may occur in the future. This is especially important if there is any possibility the principal may need to apply for Medicaid or VA assistance in order to help pay for the principal's long-term care.

For example, if the principal must move to a nursing home while the principal's spouse is living at home, and it becomes necessary to apply for Medicaid assistance in order to help pay for the principal's long-term care, then assets the principal owns in the principal's sole name or jointly with others may need to be transferred out of the principal's name and into the name of the principal's spouse. In order to accomplish this, it is usually necessary for the principal's financial durable power of attorney to authorize unlimited gifting of assets to the principal's spouse.

If the principal is not willing to authorize unlimited gifting powers, then they can be limited in many possible ways, depending on the principal's circumstances. For example, there can be dollar amount limitations, such as no more than the current present interest gift tax exclusion amount (currently $15,000 per person per calendar year), amounts previously given away to charities or family members for birthdays or holidays, or only what is necessary to pay for certain items, such as a child's or grandchild's education.

However, if acceptable to the principal, it is recommended that any gifting authority not be limited so the attorney-in-fact has sufficient flexibility to adapt to changes in circumstances or laws.

b. Unlimited v. Limited Class of Recipients: In addition to the amount of the principal's assets that can be given away, it is also possible to limit to whom the principal's assets can be transferred. For example, transfers can be limited to only the principal's spouse, or children, or other descendants. Specific friends or people can be named, as can charitable institutions. Or charitable gifts can be limited to charities the principal has donated to within the past few years or over the principal's lifetime.

Whether the potential recipients of a gift are limited or not, specific authority should be granted to gift assets to a trust established for the benefit of the principal and any of the other potential recipients of a gift. In addition, specific authority should be granted to gift to an ABLE account, 529 plan, or Uniform Transfer to Minors Act account for the benefit of an eligible recipient.

c. Coordinate With Principal's Revocable Living Trust: If the attorney-in-fact is given gifting authority, the financial durable power of attorney should authorize the attorney-in-fact to direct the trustee of any revocable living trust established by the principal to also make gifts of property held in the name of the trust. This requires that the trust document contain instructions to the trustee to comply with any reasonable request to make a gift of trust property that is made by the attorney-in-fact under the principal's financial durable power of attorney. Typically, the attorney-in-fact would be the primary initiator of any gifting of trust assets, and the trustee is exonerated from any liability that may be incurred by complying with any such direction made by the attorney-in-fact. Also, the trustee should be given authority to refuse to follow the attorney-in-fact's direction if the trustee reasonably believes it is inappropriate.

d. Waive Self-Dealing Restrictions: If the attorney-in-fact is a potential recipient of a transfer of the principal's assets that is initiated by the attorney-in-fact, then any such gifts should be explicitly authorized and all self-dealing prohibitions and restrictions should be expressly waived, whether located elsewhere in the financial durable power of attorney or in state statutes.

As an example, consider the following language:

Transfers to Attorney-in-Fact: Subject to the above restrictions, I specifically authorize any transfers made according to the provisions of this Section to or for the benefit of my attorney-in-fact or anyone related to or associated with my attorney-in-fact. Any such transfers that are to or for the benefit of my attorney-in-fact or my attorney-in-fact's relatives or associates that are made by my attorney-in-fact in good faith shall not constitute self-dealing or a breach of fiduciary duty if my attorney-in-fact in good faith deems such actions to be what I would do if fully informed of my options, and so long as my attorney-in-fact is not acting in bad faith, fraudulently, or otherwise dishonestly.

Not Self-Dealing: Any action taken by my attorney-in-fact that benefits my attorney-in-fact shall not constitute self-dealing or a breach of fiduciary duty so long as my attorney-in-fact in good faith deems such action to be in my best interest and/or what I would do if fully informed of my options and my attorney-in-fact is not acting in bad faith, fraudulently or otherwise dishonestly.

4. Powers Relating to Trusts: Some of the authority to consider granting to the attorney-in-fact regarding trusts are listed below:

a. Power to Transfer Assets to Trust: Even if the principal does not want to authorize any gifting, as discussed above, if the principal has a revocable living trust as a part of the principal's estate plan, the attorney-in-fact should be authorized to transfer the principal's assets into the name of the trust.

In addition, the attorney-in-fact should be given authority to name the principal's living trust as the beneficiary of any asset the principal owns. This can include utilizing (i) change of beneficiary forms for assets such as life insurance, retirement accounts, and annuities; (ii) pay on death designations for bank accounts; and (iii) transfer on death designations for any tangible property, such as financial investments (stocks, bonds, mutual funds, savings bonds, and so on), automobiles, and real property.

b. Power to Establish Trusts: Consider giving the attorney-in-fact authority to establish trusts on behalf of the principal. This can include (i) establishing revocable or irrevocable trusts that benefit the principal, while living, and others after the principal's death, and (ii) establishing a trust for the benefit of the principal, or the principal's spouse, child, or anyone under the age of 65 years who is sufficiently disabled, that complies with the provisions of 42 U.S.C. § 1396p(d)(4)(A) (a custom drafted self-settled Medicaid payback special needs trust) or 42 U.S.C. § 1396p(d)(4)(C) (a pooled special needs trust), or complies with 42 U.S.C. §§ 1396p(c)(2)(B)(iii) and (iv) (sole benefit trust).

5. Other Provisions: Without any attempt to make this a complete checklist of other provisions that should be in a financial durable power of attorney, a few provisions that should be considered are listed below.

a. HIPAA Compliance: The Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulates who can access health related information, and what can be disclosed and/or discussed by health care providers. While HIPAA compliant provisions are very important in health care durable powers of attorney, they are equally important in financial durable powers of attorney.

Often an attorney-in-fact may need to deal with an insurance company, hospital, or health care provider about financial or contractual matters. If the durable power of attorney is not compliant with HIPAA, the company may be unwilling to discuss the situation.

All new durable powers of attorney should be drafted to comply with HIPAA. At the least, this includes appointing the attorney-in-fact as the principal's Personal Representative under HIPAA

and granting the attorney-in-fact authority to execute all forms required to access and release protected health related information.

b. Nominating Attorney-in-fact as Guardian and Conservator: Durable power of attorneys are utilized so someone will have the authority to make decisions on behalf of the principal without having to go to court and being appointed as the principal's guardian and conservator. Despite this, occasionally the appointment of a guardian and/or conservator becomes necessary.

Durable powers of attorney merely delegate authority to the attorney-in-fact to act on the principal's behalf; they do not prohibit the principal from also acting. In fact, the principal's decisions will override the attorney-in-fact's. For example, an attorney-in-fact may sign a form admitting the principal to a long-term care facility. However, the principal can leave the facility and terminate the contract. Or the attorney-in-fact may be authorized to write checks on the principal's bank account, but so can the principal.

Sometimes, a principal may be making decisions that are harmful to the principal, despite the attorney-in-fact's best efforts to protect the principal. For example, the principal may continue to respond to solicitations to buy useless items, give money away to non-profit organizations or people, or fall for fraudulent schemes. Or the principal may be acting out uncontrollably and placing himself in danger.

If it ever becomes necessary to remove the principal's ability to make his or her own decisions or manage property, the only way that can be accomplished is to petition a court to be appointed as the principal's guardian and/or conservator. If that occurs, it is helpful if the principal's financial durable power of attorney states that the attorney-in-fact is to be the person appointed to this position. This is especially true if the attorney-in-fact is not an immediate family member of the principal.

As an example, consider the following language:

> **Acting as My Guardian:** If I am found to be incapacitated by a court of law, then I request that my attorney-in-fact have priority to be appointed as my guardian and/or conservator, or to nominate a guardian and/or conservator for; and I hereby waive any requirement of bond for any such person so appointed. This shall apply to each of the people I have appointed as my attorney-in-fact under this instrument, in the order of priority within which they are listed at the beginning of this instrument.

c. Granting the Attorney-in-fact Authority to Handle Tax Matters: It is likely the attorney-in-fact will be required to deal with taxing authorities on behalf of the principal. As a result, the attorney-in-fact should be granted express authority in the durable power of attorney to do this. The Internal Revenue Service (IRS) has its own form for the appointment of a power of attorney and someone to represent the principal before the IRS. This is form 2848. The principal's durable power of attorney should expressly authorize the attorney-in-fact to represent the principal before any taxing authority and sign any necessary forms and authorizations, including, but not limited to, Form 2848.

d. Nominating Attorney-in-fact as Representative Payee for Social Security: Even with a valid financial durable power of attorney, the attorney-in-fact will not be able to communicate with the Social Security Administration (SSA) on behalf of the principal unless the attorney-in-fact is appointed by SSA as the principal's Representative Payee.[48] This is a person who is appointed

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[48] 42 U.S.C. § 405(j); 20 C.F.R. § 404.2001, et seq. *See also,* https://www.ssa.gov/payee/index.htm, and the SSA's Program Operations Manual System (POMS) GN 0390.000. The POMS can be found online at

by SSA to manage the Social Security payments made to the principal. SSA does not recognize financial durable power of attorneys or court appointed guardians and conservators. Instead, SSA requires one person to apply to SSA to be appointed as the principal's Representative Payee.

In selecting a Representative Payee, SSA takes into consideration the following items: (a) the relationship of the person to the beneficiary; (b) the amount of interest that the person shows in the beneficiary; (c) any legal authority the person, agency, organization or institution has to act on behalf of the beneficiary; (d) whether the potential payee has custody of the beneficiary; and (e) whether the potential payee is in a position to know of and look after the needs of the beneficiary.[49]

For adults who do not have a drug or alcohol addiction, the SSA prefers to appoint the following as Representative Payee: (1) a legal guardian, spouse (or other relative) who has custody of the beneficiary or who demonstrates strong concern for the personal welfare of the beneficiary; (2) a friend who has custody of the beneficiary or demonstrates strong concern for the personal welfare of the beneficiary; (3) a public or nonprofit agency or institution having custody of the beneficiary; (4) a private institution operated for profit and licensed under State law, which has custody of the beneficiary; and (5) persons other than above who are qualified to carry out the responsibilities of a payee and who are able and willing to serve as a payee for a beneficiary; *e.g.*, members of community groups or organizations who volunteer to serve as payee for a beneficiary.[50]

A financial durable power of attorney should specifically state that the principal requests that the Social Security Administration appoint the people named in the financial durable power of attorney, in the order they are listed, to act as the principal's Representative Payee, if it becomes necessary to appoint one.

Although as these materials are being written this may not be persuasive with the SSA, Section 201 of the Strengthening Protections for Social Security Beneficiaries Act of 2018,[51] which became law on April 13, 2018, authorizes a person to designate one or more individuals to serve as the person's Representative Payee in the event one needs to be appointed.[52]

The actual text of the Act is,

> SEC. 201. ADVANCE DESIGNATION OF REPRESENTATIVE PAYEES.
>
> (a) In General.CSection 205(j)(1) of the Social Security Act (42 U.S.C. 405(j)(1)) is amended by adding at the end the following:
>
> (C) (i) An individual who is entitled to or is an applicant for a benefit under this title, title VIII, or title XVI, who has attained 18 years of age or is an emancipated minor, may, at any time, designate one or more other individuals to serve as a representative payee for such individual in the event that the Commissioner of Social Security determines under subparagraph (A) that the interest of such individual would be served by certification for payment of such benefits to which the individual is entitled to a representative payee. If the Commissioner of Social

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https://secure.ssa.gov/apps10/poms.nsf/Home?readform.

[49] 20 C.F.R. § 404.2020.

[50] 20 C.F.R. § 404.2021.

[51] Pub. L. 115-165.

[52] This amends Section 205(j)(1) of the Social Security Act (42 U.S.C. § 405(j)(1)).

> Security makes such a determination with respect to such individual at any time after such designation has been made, the Commissioner shallC
>
> > (I) certify payment of such benefits to the designated individual, subject to the requirements of paragraph (2); or
> >
> > (II) if the Commissioner determines that certification for payment of such benefits to the designated individual would not satisfy the requirements of paragraph (2), that the designated individual is unwilling or unable to serve as representative payee, or that other good cause exists, certify payment of such benefits to another individual or organization, in accordance with paragraph (1).
>
> (ii) An organization may not be designated to serve as a representative payee under this subparagraph.

This law becomes effective on April 13, 2020, and the Commissioner of Social Security is directed to come up with a procedure to accomplish this no later than six months prior to that date.

It is not known if the SSA will accept the nomination of a Representative Payee that is contained in a financial durable power of attorney, but until the SSA develops the procedure to accomplish this, there will not be any harm in including it in a financial durable power of attorney.

As an example, consider the following language:

> **Acting as My Representative Payee:** I specifically authorize my attorney-in-fact to act as my Representative Payee for Social Security benefits purposes, as authorized by Section 201 of the Strengthening Protections for Social Security Act of 2018, adding new section 42 U.S.C. § 405(j)(1)(C). This shall apply to each of the people I have appointed as my attorney-in-fact under this instrument, in the order of priority by which they are listed at the beginning of this instrument.

e. Nominating Attorney-in-fact as VA Fiduciary: Similar to SSA's Representative Payee program, the United States Department of Veterans Affairs (VA) has a program entitled the "VA Fiduciary Program".[53] If the principal is a veteran of the United States Armed Forces, or is related to a veteran and may someday become eligible for monetary benefits from the VA, then the principal's financial durable power of attorney should also appoint the attorney-in-fact as the principal's "VA Fiduciary" or "legal custodian" if it ever becomes necessary for someone to help manage and protect any monetary veteran's benefits the principal may receive.

Department of Veterans Affairs payments are to be made to the veteran or other person entitled to such payments, if the veteran (or person) is able to manage the money.[54] However, if the veteran is incapacitated, then, after the veteran's spouse, the payments can be made to the veteran's "legal custodian" who is appointed by the Veterans Service Care Manager.[55] "In the absence of special circumstances, the person or legal entity to be appointed legal custodian will be the person or legal entity caring for and/or having custody of the beneficiary or the beneficiary's estate."[56]

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[53] 38 U.S.C. § 5502; 38 C.F.R. Part 13. *See,* https://www.benefits.va.gov/fiduciary/index.asp.

[54] 38 C.F.R. § 13.56.

[55] 38 C.F.R. § 13.57 - .58.

[56] 38 C.F.R. § 13.58(a).

A financial durable power of attorney should specifically state that the principal requests that the Department of Veteran's Affairs Veteran's Service Center Manager appoint the people named in the financial durable power of attorney, in the order they are listed, to act as the principal's "legal custodian," if it becomes necessary to appoint one.

As an example, consider the following language:

> **Acting as My VA Fiduciary and Legal Custodian:** If I become eligible to receive monetary benefits from the Department of Veterans Affairs (VA), then I specifically authorize my attorney-in-fact to act as my "VA Fiduciary" and, if needed, as my "legal custodian", for purposes of receiving monetary benefits from the VA, and I request the Veterans Service Center Manager to appoint my attorney-in-fact as my legal custodian, if one is needed, as authorized by 38 C.F.R. § 13.58(a). This shall apply to each of the people I have appointed as my attorney-in-fact under this instrument, in the order of priority by which they are listed at the beginning of this instrument.

f. Digital Assets: The attorney-in-fact should be authorized to access the principal's digital assets and electronic communications. This is an evolving area of the law, but currently the Revised Uniform Fiduciary Access to Digital Assets Act (2015) (RUFADAA),[57] developed by the National Conference of Commissioners on Uniform State Laws (NCCUSL), also known as the Uniform Law Commission, has been adopted by most states.

The RUFADAA requires that the durable power of attorney expressly grant the attorney-in-fact authority over the content of electronic communications[58] of the principal (Section 9). In addition, Section 10 authorizes access to all of the principal's other digital assets[59] if the durable power of attorney "gives the attorney-in-fact specific authority over digital assets or general authority to act on behalf of the principal."

g. Right of Sepulcher: Some states have statutes or case law that address who has priority over what happens to the principal=s body after death. This is referred to as the "right of sepulcher." If the principal resides in a state that has addressed this, then the principal should be asked if the principal has concerns about this or preferences for who should have this authority. If so, then the appropriate action should be taken to ensure the principal's preferences are enforceable.

For example, in Missouri this authority is granted in the principal's durable power of attorney. Missouri has a statute that lists a hierarchy of who can control what happens to the principal's body

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[57] *See,* http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf.

[58] "Electronic communication" as used in RUFADAA is identical to the definition found in 18 U.S.C. § 2510(12),

> "'electronic communication' means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include
>
> (A) any wire or oral communication;
>
> (B) any communication made through a tone-only paging device; (C) any communication from a tracking device (as defined in section 3117 of this title); or (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds". RUFADAA, Section 2(12).

[59] "Digital asset" is defined in RUFADAA as, "an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record." RUFADAA, Section 2(10).

after the principal's death.[60] First on this list is "[a]n attorney in fact designated in a durable power of attorney wherein the deceased specifically granted the right of sepulcher over his or her body to such attorney in fact." This is followed by the person designated on form 93 if the principal is on active duty in the United States military, the principal's surviving spouse, any surviving child, any surviving parent, any surviving sibling, the next nearest surviving relative by consanguinity or affinity, any person or friend who assumes financial responsibility for the disposition of the deceased remains if no next-of-kin assume such responsibility, and the county coroner or medical examiner. durable power of attorney should contain this authority.

In New York, the applicable statute does not recognize an attorney-in-fact under a durable power of attorney, but gives first priority to "the person designated in a written instrument executed pursuant to the provisions of this section".[61] A sample form to appoint an agent to control the disposition of a person's remains is provided.[62]

VIII. Ethical Considerations

Although details of ethical considerations are beyond the scope of these materials, the client's attorney has an ethical responsibility to continue to represent the client as the client's capacity diminishes and after it is gone. This can quickly become an ethical quagmire if the attorney is not aware of all the potential pitfalls and prepared to navigate them.

There are many sources available to help guide the attorney through the ethical minefield that will result when the client loses intellectual capacity. Some of these are described below.

All the states (except California) and the District of Columbia have adopted the American Bar Association's Model Rules of Professional Conduct[63], in whole or part. Those rules that are applicable if a client is expected to lose intellectual capacity are Rules 1.4 Communications, 1.6 Confidentiality, 1.7 and 1.8 Conflict of Interest, 1.9 Duties to Former Clients, 1.14 Client with Diminished Capacity, and 2.2 Advisor. Similar provisions can be found in the California Rules of Professional Conduct[64] at 3-500 Communication, and 3-300 and 3-310 Avoiding Conflicts of Interest. The particular rules applicable in the jurisdiction where the attorney practices should be consulted.

Although all of these rules are important to follow, it is Rule 1.14 that stands out when an attorney is representing a client who is expecting to have diminished capacity in the future. This rule requires the lawyer to "as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[65]

Both the National Academy of Elder Law Attorneys (NAELA) and the American College of Trust and Estate Counsel (ACTEC) have published materials that provide guidance and commentary to attorneys. These are *NAELA=s Aspirational Standards for the Practice of Elder Law and Special Needs Law with Commentaries*, Second Edition, April 24, 2017[66] and *ACTEC*

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[60] *See,* Mo. Rev. Stat. § 194.119.

[61] N.Y. Public Health Law § 4201.2(a)(i).

[62] *See,* https://www.health.ny.gov/forms/doh-5211.pdf.

[63] *See,* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

[64] *See,* http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules.

[65] Model Rules of Professional Conduct (MRPC) 1.14(a).

[66] *See,* https://www.naela.org/Web/Members_Tab/Aspirational_Standards/Aspirational_Standards_Member_Page.aspx.

Commentaries on the Model Rules of Professional Conduct, revised Fifth Edition 2016).[67] In addition, the Restatement (Third) of the Law Governing Lawyers[68] provides guidance for these situations.

These sources should be consulted by the attorney and reviewed with the client while the client has sufficient intellectual capacity. The client should decide what confidential information may be disclosed to whom, and what should remain confidential between the attorney and the client. A process should be established so the attorney knows who the client prefers to be contacted on the client's behalf. If possible, the client should sign appropriate forms authorizing the attorney to discuss matters that would otherwise be confidential with other advisors and appropriate family members.

This outline was prepared by Bernard A. Krooks and Craig C. Reaves for their presentations at the 53rd Annual Heckerling Institute on Estate Planning.

[67] *See,* https://www.actec.org/publications/commentaries/.

[68] Restatement (Third) of the Law Governing Lawyers (Am. Law Inst. 2000). Among other sources, this is available for purchase from The American Law Institute, or online in Westlaw, Lexis, and HeinOnline.