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# PRACTICAL PLANNER

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## PLANNING POTPOURRI

o **What should your child be doing before heading off to college?** If your child is 18 he or she should sign a durable power of attorney to authorize a responsible adult to handle financial or legal matters if necessary. A simple standard form for your state is probably sufficient. Have him or her sign a health care proxy. Get your child a credit card and teach them how to use, not abuse it. Too often college students are bombarded with credit card offers that result in them racking up debts they can ill afford. Copy your child's wallet before they go and keep it in a secure place. If your child loses his or her wallet you'll have the information to help. Teach your child how to keep and reconcile a check book. Buy your child a computer software program like Quicken and encourage them to use it now. This will set a great foundation for future financial skills. Don't let your child forget to file an income tax return for

their summer job. Match your child's summer wages so they can painlessly contribute their earnings to a Roth IRA and begin a lifelong pattern of savings.

o **Track Passwords, Usernames, and More:** The proliferation of on line activities: banking, bill paying, purchases, organization memberships, professional societies, and more, makes it impossible to remember all passwords and usernames. How can you remember them all? How will anyone be able to find this information to help you if you are absent or ill? What if you're uncomfortable recording them on an Excel spreadsheet in case your laptop is lost? Here's an approach that meets the KISS principal (keep it simple stupid). Print each web page when you next use it. This will have the web address, the name prominently listed and other data. Note the password and user name on the copy. File them in a loose

-leaf binder with alphabetical index tabs organized by website, vendor or company name. Store them in a secure place your family knows about.

o **IC-DISC:** If your corporation has set up an IC-DISC to capture the differential between ordinary income and low dividend tax rate, and you've engaged in comprehensive estate planning, be sure to have your estate planner, as well as your corporate attorney, review the contract between your corporation and DISC. If you have to broad a right turn the commission payments to the DISC on and off there could be significant gift and estate tax implications if you try to gift DISC stock to heirs. **PP**



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## CHRONIC ILLNESS: SPECIAL PLANNING REQUIRED

A close friend was recently diagnosed with Multiple Sclerosis (MS). The course of MS is unpredictable; the effects range from mild to devastating. Such a diagnosis affects every aspect of your estate and financial planning. Some of the modifications are minor, some significant. Some steps should be implemented immediately; others can be viewed as more long term goals. Just as everyone's experience with any chronic disease is unique to them, your planning, while it should consider the potential impact of your illness, must be tailored to address your personal circumstances. While this article refers to MS, the planning is similar for many chronic illnesses.

**Living Will:** A living will is a statement of your health care wishes. Discuss yours with your neurologist, so that you can tailor the language to reflect nuances appropriate to your MS situation. Reconsider **organ or tissue donations**. Perhaps the reality of your situation will enable you to reconsider donating tissue for MS research. Be sure the language is specific enough as to what you want done so that your donations will be used for MS research. Include a guardian designation in your health care proxy.

**Fiduciaries:** Trustees, executors, agents under a power or health care proxy are generically referred to as "**fiduciaries**". When you disclose your diagnosis to close friends and family you might well be surprised by the reactions. Friends may be at your side and unbelievably supportive with a soft shoulder, or dinner by a lake, to cheer you up. An old high school friend may renew a valued friendship. Yet, a parent or sibling expected to be the most helpful, may prove conspicuously indifferent and absent. A teenager may show sensitivity and maturity beyond his years. Reevaluate who you designate as fiduciaries in light of how these people have acted since your diagnosis. You'll need to rely on your fiduciaries. Choose them carefully for what they can do, not out of obligation or guilt. Reconsider naming an **institutional co-trustee** to assure independence, and to lessen the burden on a friend who can't afford the time to handle all your affairs.

**Charitable Planning:** Creative charitable planning techniques provide income tax deductions, gift and estate tax benefit and the joy of contributing back to society. With your new diagnosis, perhaps major planned gifts you were toying with should be brought to fruition in a manner that can best help you financially and promote MS research. Example: You have a highly appreciated rental property and believe that the market will be soft for

years to come so you opt not to use a **1031 like kind exchange**. Donate the property to a charitable remainder trust. You'll get: a current income tax deduction, and an annuity payable for life (great security in light of your new uncertainties). You'll avoid capital gains taxes on the sale. This plan can help you financially, medically, and it will simplify your life reducing stress (instead of managing the property you collect a check from the trust). Call the National MS Society 800-923-7727.

**Partner/Spouse's Planning:** If your partner/spouse is your

caregiver, that role can occupy time and emotional capital. Simplifying his or her financial life will help them help you. Your partner/spouse should also revise their estate planning documents to assure that any assets left to you are left in trust to provide a management structure in case you need it. Ask an estate planner if a **special needs trust** is advisable. If you've been named as agent, executor or trustee, it's probably fine that you remain in that capacity so long as possible, but consider naming a co-fiduciary, per-

*(Continued on page 2)*

## CHECKLIST: SERVING AS AGENT

No, were not talking about your being Tom Cruise's agent to negotiate a contract for Mission Impossible IV, we're talking about your Aunt Nellie was just admitted to a nursing home, and although sometimes lucid, needs help managing her affairs and you were named the agent under her durable power of attorney to do just that. While your family is a regular Brady Bunch, you are worried that your sibs, Anastasia & Drizella, may just not feel comfy with your controlling money they view as their future inheritance. What can you do to help Aunt Nellie and protect yourself? Meet a lawyer to review your responsibilities under Aunt Nellie's power

of attorney. The cost is probably a legitimate expense to pay from Aunt Nellie's funds. Set up a file system and diligently record and document everything. The following is a list of the tabs you should set up in a binder to keep everything organized, and what should go in each:

¶ **Power:** Copies of the power of attorney you're operating under (you'll need copies for every bank or other person you deal with. Safeguard the original. Include a copy of the power on which you made annotations explaining your role based on your meeting with an attorney.

¶ **Effective Date:** Some pow-

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## ...CHRONIC ILLNESS: SPECIAL PLANNING REQUIRED

(Continued from page 1)

haps a bank. This will enable you to serve in those important roles but with the help and support you might need in the future.

**Power of Attorney:** You may have permitted your agents to make gifts. The economic reality of your diagnosis may have you reconsider and actually prohibit gifts to preserve resources for your now uncertain future. Most powers of attorney don't address compensation for an agent. With the possibility of someone having to help you manage your affairs on a long term basis, reconsider authorizing your agent to take compensation for what might be a more significant task. Include an express power of your agent to fund a revocable trust. Reconsider not using a "springing power". A springing power only takes effect if you're disabled. But with MS you might have periods when you can handle financial matters interrupted by brief periods when an

agent's assistance might be necessary. If the appointment of your agent is effective immediately the agent will be able to help during an exacerbation or relapse, and then can cede control back to you as soon as you are able. With a springing power, by the time the agent can legally demonstrate your disability, the need for help may have passed.

**Revocable Living Trust:** While these trusts are almost always hawked to avoid probate, their most powerful and beneficial use is in helping you manage assets through illness and disability. With some creative tailoring a living trust can assure you the maximum control of your financial life and provide the most comprehensive protection if your abilities fail. Be certain that your trust provides for a clear mechanism to determine when your position as trustee should cease and successor trustees take over. With a disease such as MS you could need someone to step in during an exacerbation of the disease, but then you might resume control of all your affairs when it subsides. Your trust needs a practical and readily implemented "switch". The mechanism by which a successor trustee can demonstrate your inability to serve as trustee so that she can take over could be tailored to reflect the cognitive impairment or spasticity that you have experienced. You might also consider naming an initial co-trustee to serve with you so that during periods of exacerbation the co-trustee can handle business and financial affairs for you without having to surmount a mechanism to become appointed. This is quite different than the manner in which most living trusts are drafted. Also, use the living trust to provide some level of detail as to your care in the future: where and how you would like to live, etc. Few living trusts address these details. A comprehensive trust will guide your chosen trustees as to how to help you. The trust, a living will, health care proxy and power of

attorney may avoid your ever having to face a court guardianship proceeding in which a judge may designate someone to be in charge of your affairs (and not always who you want). **Investments:** The fatigue which commonly accompanies MS, exacerbations, and possibly significant disabili-

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ties, can make it difficult to manage assets. Consolidate and simplify your assets. Select a bank or wealth manager that can hold all of your investments and provide comprehensive planning services. Even if you continue to pick your own stocks for now, consolidate assets into an institution that can provide the full array of services. As you need additional services you will be situated to obtain them. This will simplify recordkeeping which at some point you may not be able to handle. Complete a comprehensive budget and investment plan. Consider what the impact of your illness might have on near and long term earnings of yourself and a caretaker spouse. Consider the impact of costly medications if insurance now or in the future may not cover them, modifications to make your home more accessible, etc. Re-evaluate your risk tolerance. New uncertainties may warrant reducing investment risk. On the other hand, budget projections might demonstrate that you require greater investment risks to meet your goals. **Conclusion:** Chronic illness changes aspect of your planning. Be proactive and begin creating the safety net you might need, while hoping that you won't. **PP**

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## ...CHECKLIST: AGENT UNDER POWER OF ATTORNEY

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ers of attorney are effective when signed. Other's require you to have two doctors letters stating that Aunt Nellie cannot take care of her affairs. Banks or others may have you sign a statement (affidavit) attesting to the validity of the power. Save copies in this file. It might even be helpful for you to have Aunt Nellie's lawyer prepare an affidavit for you to sign to give to people to encourage their acceptance of the power. Whatever the requirements, document that you can serve and save the proof.

**Legal Actions:** If you sign a contract for Aunt Nellie (e.g. with the cable television company so she doesn't miss an episode of Survivor) copy the contract as you signed it for the binder. Make notations as to why you signed the contract (e.g., to keep Aunt Nellie entertained), and the provision in her power of attorney that gave you the authority to do so.

**Checks:** Copy every check you write (or get carbonless copies called safety checks) and staple the bill you paid with to the copy of the check. File them in check number order.

**Reimbursements:** Sometimes you can't avoid paying for something yourself. Aunt Nellie needed her Twinkie fix and the corner newsstand wouldn't take a check. You can reimburse yourself for appropriate expenditures, but keep detailed contemporaneous records and copies of receipts to support each reimbursement. Bear in mind that anytime you reimburse yourself for a cash expenditure, the sibs' lawyer will accuse you of having used the money for yourself.

**Gifts Made:** Many but not all powers permit gifts to be made. Be sure you have the authority to do so, and that you understand any limitations or restrictions. Document all gifts, why they were made, and to whom. Be very careful if you make gifts to yourself or your heirs. Verify that you can with an attorney. Document everything. Carefully consider any

gifts that aren't equal to all heirs.

**Cash:** If you withdraw cash using Aunt Nellie's bank card, be sure to have receipts and contemporaneous records as to what it was spent on. While you should avoid cash, sometimes there is no choice. Many caretakers and others will be tipped in cash. Be prepared for the potential challenges later (yes, even from loving sibs). If possible, have a witness to the payments who will also sign off on the documentation you have.

**Deposits:** Keep a copy of every deposit in chronological order. Identify the source of any deposits. You should review prior bank statements and tax returns with Aunt Nellie's accountant to see what cash receipts you should expect. Make up a checklist so you can monitor them and

verify that they have been deposited. You don't want the gardener keeping the rental payments for the tenant in Aunt Nellie's vacation home because you didn't know to pick it up.

**Accountings:** Consult with an accountant periodically and have a summary of cash flows completed along with bank statements reconciled. Having an independent accountant do this, at Aunt Nellie's expense, will give more independence and credibility to your actions and have you prepared to complete a formal accounting if a court ever requires it (it may!).

Good luck serving. You'll get Brownie points, but remember "no good deed goes unpunished" so be prepared. **PP**

## RECENT DEVELOPMENTS

**LLC's:** It doesn't always pay to be a pig (or boar!). A New York Court recently held that a member of a NY LLC has standing to sue derivatively on behalf of the company. The case addressed alleged diversions of funds by the controlling members of the LLC to another entity in which they had greater ownership interests, and hence would benefit from the earnings so diverted. This is another example of how LLC law continues to develop, and how corporate law concepts have and are applied to LLCs. *Bischoff v. Boar's Head Provisions Co. Inc.* 06 Civ. 106 NYLJ 7/11/06, page 1.

**Valuation:** Score one for the taxpayers. The Tax Court upheld the taxpayer's valuation of stock in a manufacturing company on an estate tax return. This case is instructive for everyone using a valuation for tax purposes. The Court noted the importance of a valuation report conforming to Uniform Standards of Professional Appraisal Practice (USPAP)...Read – you want this in any report you hire a business appraiser for. The appraiser must understand the business involved and demonstrate this in the report. The IRS expert ignored the company's dividend history which was the primary return shareholders realized. Reasonable explanations must be provided for methods used or rejected. *Kohler v. Commr.* T.C. Memo. 2006-152, 7/25/06.

**Conservation Easements:** The Tax Court disallowed a deduction a developer sought for a conservation easement that would limit development to 30 houses on the tract instead of the 60 he planned. Applicable zoning restrictions limited development to 30 houses without the purported easement. To qualify for the Code Section 170(h) tax benefit the contribution of the interest in the land had to be exclusively for conservation purposes. The transaction couldn't meet this requirement. With land prices so high many are pushing the envelope on conservation easements and other techniques to make the numbers work. This plan cost the taxpayer a 20% penalty tax under Code Section 6662! *Turner Est. v. Commr.* 126 TC No. 16; No. 5165-04. **PP**