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Human Aspects of Estate Planning

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Too often estate planning focuses on technical nuances of complex tax matters, or intricate legal issues, drafting finesse and almost anything other than the human aspects of estate planning. These latter matters in some instances can be more critical to the success of the plan then the tax, legal and other planning. The most brilliant estate planners cannot help planning for an issue they are not aware of. *Example*: A very wealthy client may be embarrassed to acknowledge that a family member has a gambling or theft issue. Not knowing there can be solutions, why raise the problem? *Example:* What should be done to protect, while not unduly disempower, a beneficiary living with bipolar disorder?

One approach is to enlarge the scope of the professional planning team. When useful involve a care manager, social worker, charitable gift officer, religious adviser (e.g., a priest, imam, or rabbi). Both the client and the team should work together towards identifying all material human or personal issues and make the estate plan, legal documents, and administration of the plan, as holistic as necessary to address client goals. This monograph will outline many of these human or personal points to illustrate how this can be done. The true scope of these matters, however, is as varied as is the human experience.

Health Considerations: Cancer Statistics

To drive home the point that human aspects of planning affect a tremendous number of clients, one health issue, cancer, can be considered. This single personal issue affects so many people that the point of addressing human considerations should become obvious. Consider the following statistics:

1 in 2 men will develop cancer in their lifetime and 1 in 4 men will die from cancer.

1 in 3 women will develop cancer in their lifetime and 1 in 5 women will die from cancer.

Around 1,688,780 new cancer cases were expected to be diagnosed in 2017.

Advisers should include in the estate planning organizers they give to clients, and ask at every initial and review meeting: “Are there any health issues that affect you,

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your family, or your loved ones, that might possibly have implications to your planning?" Only by asking can the adviser identify issues to help plan for them. If the advisor asking the question is an attorney, the client might be comforted by understanding that the information may be privileged and not disclosed.

Health Issues Affect Estate Planning: More Common than Realized

Consider:

- 5 million Americans are living with Alzheimer's disease.
- 24 million Americans are living with COPD.
- 400,000 are living with Multiple Sclerosis.
- Parkinson's disease affects 1% of those over age 65.
- 130 million Americans live with some type of chronic illness. 22% of the population is estimated to be living with two or more different chronic illnesses.

It is common for those living with chronic illness to have to expend considerable sums to make their home or apartment accessible. The home becomes altered to remain accessible, but it also takes on an even more significant emotional role as a haven as illness progresses. Powers of attorney with standard provisions authorizing sale of real estate, as well as trusts with similar provisions concerning residential property, may all need to be tailored.

How should practitioners determine when a fiduciary should take over the management of client matters? The mere transition to a successor fiduciary is not necessarily the appropriate paradigm for many chronic illnesses and may in fact not achieve the client's goals. Many disability provisions presume that once a client is disabled, they will remain disabled. This is not always true. Consider perhaps only removing the client/settlor as a co-trustee of her revocable trust only if she is disabled for at least 30 days.

Compensation could also provide an important motivator for the agents to act, even though they are close friends or family who would, presumably, act without compensation.

Assisted Suicide

A discussion of a client's objectives for end-of-life treatment might appropriately include consideration of assisted suicide. Several states (California, Colorado, Oregon, Vermont, Washington, and Montana) now permit legal suicide, either through statute or case law.

What steps should be taken to permit clients who wish to avail themselves of one of these laws?

Practitioners may for personal, religious, or other reasons choose not to counsel a client on pursuing assisted suicide, but knowledge of the topic may be important to that discussion and the referral to an appropriate other adviser.

Legal suicide is when, after complying with strict procedures, a dying and suffering client may obtain prescription medication to end his or her life in a less painful manner. Common requirements of these laws may include:

- Make the request personally.
- Be a resident of the state permitting this. This requirement is an important part of planning that those living in other states should address, and preferably as early as possible after obtaining a diagnosis of the terminal condition.
- Diagnosed to have a terminal illness with a prognosis of six months or less to live. The dire health status must be confirmed by two physicians, including the client's primary physician and a second, consulting physician.
- Confirmed as being mentally capable to make this decision by two physicians. They must specifically conclude that the client understands the consequences of the decision.
- Confirmation that the decision is deliberate.

To avail themselves of this option some clients may need to relocate to, and become a resident of, the states permitting this with sufficient time and capacity to meet the strict statutory requirements.

Be certain that the client understands and considers that this option may violate religious beliefs of the faith the client has adhered to. It may also deeply offend and upset family and friends. Encourage the client to discuss the entire matter with any religious advisers, mental health professionals and

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others. It may be important to expressly corroborate the client's desire for assisted suicide in their living will, POLST or other documents.

Agent Confusion

There is a common issue that affects many people. It often falls between the "cracks" of the planning team but can wreak havoc with a client's finances.

The multitude of fiduciary and quasi-fiduciary appointments clients make, almost entirely without professional input, can create conflicts and inconsistencies in the administration of the client's affairs. Practitioners should expand the scope of their inquiry to determine all such appointments, be certain that they coordinate with the fiduciaries named under primary legal documents, and that they do not undermine the safeguards the planning team is endeavoring to create. Some of the many appointments might include:

- Authorized signer on safe deposit box.
- Brokers will be required, under FINRA Rule 45 12, "Customer Account Information," to make reasonable efforts to obtain the name of and contact information for a trusted contact.
- Social Security's Administration (SSA) Representative Payment Program.
- Long term care insurance "lapse designee."
- Successor Account Holders on 529 and 529A plans.
- Bank accounts POD, TOD, joint, etc.
- Funeral agent.
- Physician Order for Life sustaining Treatment (POLST) signed with the client's physician.

A client might give great thought to who to name as an agent under a durable power of attorney or successor trustee under a revocable trust, but the persons designated in the above appointments may be whomever the client thought of naming when asked to complete what they viewed as a "standard" form. These designations are likely not known by the professional advisers and may have been designated long ago and never updated. Nonetheless, these may have a significant impact on planning. Although not per se part of what an estate planning attorney, CPA or wealth adviser traditionally may address, someone should endeavor to identify these documents and assure rationale and coordinated designations.

Charitable Giving Is Not Only About Tax Savings

Charitable giving is often evaluated from the lens of maximizing tax benefits. But there are non-tax aspects of charitable giving that should also be factored into a plan. For clients who view charitable giving as a moral imperative that objective must be reflected in their estate planning documents, and often it is not. For example, many forms used for durable powers of attorney and revocable trusts do not permit charitable gifts. If not, the agent may be proscribed by applicable state law from making gifts. These documents should reflect the client's charitable giving goals by either expressly prohibiting donations if that is the wish, or if desired permitting or even mandating charitable gifts. A simple approach that might suffice is to permit the agent or successor trustee to make gifts consistent with the client's historic pattern of charitable giving. Others may prefer to be more precise in terms of permissible charities, and even amounts that can be given. *Example*: The client has donated substantial sums monthly to a favorite charitable cause. If the topic is discussed, after decades of consistent donations, the client may be upset to learn that those gifts cannot be continued.

Practitioners should recognize that most donations are made by older clients. See the discussions below concerning longevity. Before encouraging clients to donate be certain that the clients have had reasonable financial forecasts completed to an appropriate age (e.g., 95 or 100) so that the donations are in fact sustainable without adversely affecting the client's ability to sustain their lifestyle for an appropriate period. Incorporating a line item for gifts (whether charitable, to heirs or for additional luxury purchases) into the financial projections/Monte Carlo simulations it is suggested is a better threshold analysis for determining appropriate gifts from an economic perspective, e.g., what can be given in any year without undermining long

term financial objectives. This approach could free more wealth for transfer at earlier dates than the mere tax approach. Once the economic parameters are determined, then it can be evaluated how the gift transfer should be made from a tax perspective.

If clients want to pass on the legacy of philanthropy to their heirs, consideration should be given to incorporating charitable beneficiaries in irrevocable trust planning. Modern trust planning tends towards long term and perpetual trusts and passing most or all wealth in trust rather than outright. If those trusts don't permit, or even foster, charitable giving, the heirs may have most of their wealth tied up in trusts and insufficient financial resources to fund donations.

Divorce Planning

Planning for a potential future divorce, an ongoing divorce, or a past divorce is a common part of planning. Practitioners must begin the process by ascertaining the role they can play, if any. If an estate planning attorney is representing the couple, they may be precluded from giving either spouse matrimonial planning advice. Once the issue of representation is resolved, advisers must determine the client's status and wishes regarding such planning. All existing and new trusts and other planning instruments must be coordinated to meet the client's matrimonial objectives. It has grown more common for clients creating irrevocable trusts to name as a beneficiary "anyone whom I shall be married to" so that if there is a divorce that ex-spouse would lose rights as a beneficiary and a future spouse could obtain such rights.

In Ferri v. Powell-Ferri, 476 Mass. 651 (2017) the court permitted decanting to safeguard assets in a poorly crafted traditional style trust. The issue that arises in many states of the "veil of impropriety" from acting just prior to a divorce did not deter the Ferri court. In Ferri, the trustee had the discretion whether to pay trust assets to the child/beneficiary or to instead set them aside for the child/beneficiary. In addition, the child/beneficiary could demand increasing percentages of trust corpus at specified ages beginning with 25% of corpus at age 35 and increasing in increments to 100% of trust corpus after age 47.

The child/beneficiary's spouse filed for divorce in October 2010. At that time, the child/beneficiary had the right to demand 75% of the corpus of the trust. This made the trustees concerned that the child/beneficiary's ex-spouse might reach trust corpus. To endeavor to reduce this risk, the trustees decanted the trust assets into a newly created trust. While the decanting was in process the child/beneficiary's right to withdraw principal blossomed to 100% of corpus. The new trust, as would be anticipated, eliminated the child/beneficiary's right to demand trust corpus at specified ages. The new trust was formed in Massachusetts.

While the Court determined that there is no specific decanting power under Massachusetts law, the trustee's power to decant depends on the governing instrument and the facts. The rationale justifying decanting in the case was based on the fact that since the trustees had the discretion to distribute trust property to or for the benefit of the beneficiary, the power of the trustee to distribute the property to another trust for the benefit of the same beneficiary should be subsumed under the broader distribution power. The Connecticut Supreme Court held that the trust assets, while outside of the reach of divorcing spouse for property settlement purposes, would be considered for the determination of alimony.

Clients need to be educated that traditional or historic trust drafting commonly relied on techniques and provisions that are less than optimal, such as mandatory income distributions, mandatory principal distributions at specified ages, or as in the Ferri case permissible withdrawal rights of trust principal. Too many clients assume erroneously that an irrevocable trust is inviolate and that with tax laws in flux no planning is necessary. Modifying old inefficient trusts can be about much more than tax planning considerations as the Ferri case illustrates.

LLCs and FLPs Governing Entity Documents

The focus of reviewing many entity governing documents is to reduce the risk of estate inclusion.

For example, to avoid the ability of the taxpayer to control distributions or liquidation of the entity. However, the economics of the entity are as, or more, important than merely the estate tax implications. Just one aspect of these other considerations will be noted below.

While much attention has been given to tax reimbursement clauses in irrevocable trusts, practitioners should consider tax distribution clauses that might be included in the governing instruments of flow through entities. Review all family partnership, operating and S corporation shareholder's agreements. Depending on the circumstances, determine whether adding, or removing, a tax distribution clause should be addressed.

Clients, especially family members or close partners, often view the formalities of a written agreement as a waste of money, after all, they all "get along." Well, all partners get along, until they do not. A New York case highlights the dangers of clients ignoring the importance of a thought out written governing document. This case is a good reminder to clients that the formalities are well worthwhile. As the focus on estate planning for many client wanes, assuring that clients have requisite governing documents for entities should be given attention by practitioners.

Three members formed an LLC and initially operated without a written operating agreement, which meant state law default rules applied. Two of the three members, a majority, adopted a new written operating agreement that provided for capital calls. A capital call was made and the third member who did not sign the agreement, did not contribute additional capital as required, and his interests in the LLC was reduced.

That third non-contributing member argued that the operating agreement was invalid because it was adopted by less than all members. However, New York Limited Liability Company Law Sec. 402(c) provides that the operating agreement may be adopted by "the vote of a majority in interest of the members entitled to vote thereon."

The non-contributing member argued that there was an oral agreement, but the law contemplated only a written agreement, and if that written agreement does not address a particular rule, state default rules apply. Limited Liability Company Law Sec. 417 requires a written operating agreement, and where there is no operating agreement, or the operating agreement fails to address issues in dispute, the default provisions under the Limited Liability Company Law govern. Since the written operating agreement specified that a member's interest may be reduced proportionally if the member fails to make a requested additional capital contribution, the non-contributing member's interests could be reduced.

Religious Beliefs/Feelings Affect Planning

There is perhaps no area of the law other than estate planning where religious considerations are so vital. 95+ percent of Americans believe in God or some type of higher power. For some, spirituality may be a vital part of their lives, but not include a belief in God. That too needs to be addressed. Yet many estate plans fail to address, in any manner, client religious beliefs (or lack thereof). That can be a mistake that can violate the client's wishes and leave the client and loved ones in a position of antagonism and even litigation.

Estate planning should not be just about the transmission of wealth. Estate planning should be about the transmission of values -- this encompasses the transmission of religious beliefs. With a modicum of effort, every legal document and transaction can be reconciled with religious views.

Even if the client is personally indifferent to the dictates of the faith they grew up in, ignoring religious issues can lead to family strife if other family members believe otherwise. If the client is not religious or has determined that she does not want the traditions of a particular faith adhered to, then make that point clear in a living will, health proxy and as appropriate in other legal documents, to avoid incorrect assumptions by family and others. The level of diversity of religious affiliation and observance among family members can be substantial. So, making assumptions without inquiry is often inappropriate.

Medical decision making concerning a mother and her fetus vary greatly among different religions. Thus, a living will should specify the client's wishes in this regard and address religious beliefs. This is important where the client is a member of a particular faith but wants a decision different then what that faith mandates pursued. *Example*: Some believe that Catholic doctrine disfavors choosing between the survival of a mother and her fetus. Some consider that Jewish doctrine favors choosing the life of the mother over that of the fetus if a choice must be made. What is the faith of the client and what decision does she want?

Many patients and health care providers view the alleviation of all pain to be an essential and ideal objective. *Example*: For an Orthodox Christian suffering can be an experience providing for purification, redemption, and salvation. While suffering is clearly not encouraged, pain relief to the point of making someone unconscious during their last days may prevent them from addressing profound and moving observances. *Example*: According to Buddhist tradition, the level of consciousness near death directly correlates to the level of rebirth. Most religions provide for post death rituals and law. *Example*: Under Jewish law autopsies and embalming are generally prohibited.

Agents and fiduciaries should be given guidance, and granted legal authority, to disburse funds for religious education (e.g., supplemental religious education or private school), religious travel (pilgrimages to holy sites), charitable giving (to inculcate a core religious value in heirs), and other purposes consistent with your religious goals.

Religious laws of inheritance differ from secular norms and from other faiths. *Example*: Eastern Orthodox faith suggests that if you do not provide for your family and relatives, it is as if you have disowned the faith, and you are worse than a non-believer. *Example*: For Catholics general guidelines of charity and justice are important. *Example*: Baha'is are expected to give a certain percentage of their income and assets to Baha'i charitable organizations.

Lifestyle Choices Impact the Estate Plan

Practitioners everywhere likely represent a significant number of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") clients, or clients who have family members or other potential beneficiaries in the LGBTQ community. The numbers will increase over time. One issue to address for an LGBTQ client is the careful definition of who should be included in a class defined as "children," "descendants," or "beneficiaries." *Example*: A child could be adopted or born through surrogacy, so that neither parent, or only one parent, is biologically related to the child. The result of this and other issues for LGBTQ clients, and others using assisted reproductive technology, may be that traditional drafting language may not include as a beneficiary the person that the client loves and raises as their own child. A simple approach is for that individual to be formally adopted and, hence, fall within the definition of "child" (so long as the governing document includes adopted children in the definition of "child" and "descendant"). However, that may not occur, or no one may realize that the issue exists. Another approach is to have the document reflect that child by name as being a beneficiary. The practical problem with that approach is that people too often defer updating estate planning documents and the child may be left out if death precedes the restatement. Another approach is to grant the trustee the right to add to the class of beneficiaries. However, that approach also may be inadequate in that the trustee has a fiduciary duty to the other beneficiaries and may be in an untenable position to add a beneficiary.

Another issue that may arise is if a beneficiary transitions. What becomes of a bequest to Samuel who is now Samantha? Does the bequest lapse? A simple solution, like that noted above, is to modify the document (e.g., sign a new will) that expressly names the child.

There are many other issues that can arise in planning for LGBTQ clients that may require specific planning and drafting to address. A somewhat generic approach that might address many of these issues could be to appoint in a trust instrument a

Special Trust Director, specified to act in a non-fiduciary capacity. That Special Trust Director could be given the authority to add beneficiaries. In that way if a child is inadvertently left out as a beneficiary because of the definition used, the Special Trust Protector can add them back. Other powers can be granted as well. The person named should be independent. Perhaps the attorney for the client who is familiar with the client's wishes. Or perhaps an organization or member of the LGBTQ community who is understanding of the challenges involved.

Tangible Personal and Intangible Property

There are few areas in estate planning more fraught with the risk of disputes and interpersonal strife than the distribution of assets with significant sentimental or personal value. Traditionally, these issues focused on tangible personal property. Distribution of tangible personal property (e.g., coin collections, family heirlooms, grandmother's china, and similar property) should be a positive step of the client passing on a legacy and memories to the next generation. But how that property is distributed could make the difference between a positive experience for heirs or a disastrous result. Some factors to consider:

- What are the client's specific wishes as to tangible personal property? Are there specific assets the client wants to pass to specific heirs? Are those bequests sufficiently specific to avoid ambiguity?
- Which entity or trust owns a particular item of tangible personal property? Some clients have business entities purchase tangible property in an inappropriate effort to secure a tax deduction for personal property. However, how might that affect how that property will be bequeathed? Will a shareholders' agreement rather than the clients will govern disposition of those assets?
- How will the distribution of tangible property be determined? Will heirs be awarded points and directed to expend those points in their discretion in bidding on property? Might a lottery mechanism be used? Instead, might a rotational selection process be mandated where heir 1 chooses a property, then heir 2 followed by 3, then the order is reversed. Instead, might a binding list specifying which property to which heir be incorporated into the will? Another common approach is to defer to Executor discretion. But who will be named in that role and what happens when they are also a beneficiary?
- Equalization by value may or may not be mandated. For personal tangible property, equalization of value is difficult because these assets are rarely fungible, or divisible, and are often unique and have non-quantifiable emotional value.
- Are beneficiaries motivated by monetary gain or personal wishes for property?
- Multiple marriages raise a host of emotional and practical issues concerning the disposition of personal property.

With an increasingly digital society, intangible property is growing in importance. Who will be able to access online photographs and other assets? Will the third-party providers respect the directives in the will or revocable trust? Have those will provisions been crafted with sufficient specificity to clarify the client's intent? The landscape of intangible digital assets is evolving rapidly. Will the current provisions suffice to address new types of digital assets?

Practitioners Role

While this article has only briefly touched upon a few of the myriad of personal or human issues that may be relevant to a client's estate plan, the implication is that appropriate issues must be addressed as applicable. This requires that practitioners inquire of the client to identify issues. The starting point for this inquiry may be the questionnaire that the practitioner has clients complete to begin the planning process. The questionnaire should include several open-ended questions to serve as a catalyst for communications from the client. *Example*: "Do you or any of your family or loved ones have a substance abuse, emotional, or other challenge that might need to be addressed in your planning?" "Do you or

any of your family or loved ones have any religious or lifestyle choices that might need to be addressed in your planning?" Open ended questions about tough issues may trigger a response that is informative. It also serves the purpose of communicating to a prospective client that you are sensitive to, and willing to help address, a broader array of issues.

When at an initial client meeting, actively, sincerely, and intently listen to clients. Too often professional advisers of all professions are focused on explaining complex tax, legal, financial, or other planning concepts. But, the most important communication may not be the professional's explanations, but for the professional to listen to what the client says, and especially what the client does not say, as those communications and silences may provide vital information to better assisting the client achieve their goals. Also, listen to the "background music" between attendees at meetings: what is being said, what is not being said, body language, even who does and does not attend.

Advisers should not fear the unknown or the uncomfortable. There are many other experts who can be involved in the planning process in order to address matters that any one practitioner lacks the expertise in. But merely listening and raising issues will be a tremendous help to clients and pinpoint the specialists that might beneficially be involved.