Holistic View of Special Needs Planning

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A KEY ESTATE PLANNING GUIDE

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Introduction

- Special needs and Medicaid planning is a specialized area of the law but one that non-special needs specialists encounter commonly.
- How and to what extent can non-specialists address this type of planning?
- What type of planning for these clients, drafting, ancillary work, etc. might practitioners whether specializing in this area of the law consider addressing?
- How can both the specialists and non-specialists interact and best help clients needing this type of planning?

When and How to Bring in a Specialist

Collaboration is Often Critical

Brining in Co-Counsel

- When a client's plan includes a special needs heir consider whether to bring in a specialist in supplemental needs or elder law planning to serve as co-counsel. The Rules of Professional Conduct 1.1 require that the attorney have competence to handle the matter. "*In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field…*"
- Practitioners should evaluate whether they have the competency to handle the matter at hand. If there is no known beneficiary with special needs and mere general planning is addressed, as discussed below, there would seem to be no need to bring in another attorney with specialized expertise. When there is a known beneficiary with special needs, that should be evaluated. In some instances, it may be essential in others perhaps not. One challenge practitioners face is the pressure to generate billing may weigh against bringing in a specialist even if the attorney or firm handling the matter does not have the expertise. Caution is certainly in order.

Co-Counsel versus Referral

- My practice as a small firm is to regularly co-counsel on most of such matters.
- I have seen in more than a few instances where new clients had prior counsel handling there planning, and I have brought in specialist in the field, prior counsel has missed significant planning considerations.
- When co-counsel is brought in a preliminary decision may be in some cases whether the referring counsel should remain involved or whether the special needs expert should simply handle the matter. For larger clients, where tax and complex estate planning has been involved, I have found that co-counsel arrangements can work well for the client. Special needs attorneys often do not have the expertise to handle the more complex tax and other planning. Thus, the co-counsel arrangement provides expertise to help the client on the full range of matters they require be addressed.

Co-Counsel versus Referral

- In smaller estates where the special needs attorney can handle the entirety of the matter, unless there is a special relationship with the referring attorney, perhaps the entire matter might simply be referred out.
- When a referral is made it is important for the special needs attorney to understand the scope of the referral. If the arrangement is a mere referral communication with the referring attorney may be unnecessary. If, however, the arrangement is a true co-counsel arrangement the special needs attorney must take special care to communicate all that they are doing, and the consequences of their planning recommendations to the referring attorney who is handling the overall client relationship.

Integrating Special Needs/Elder Law Planning into All Plans

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Every Plan Should Incorporate Special Needs Planning

- Every client should consider special needs planning on two levels. First, many trusts are created to last for as long as state law permits. The old-style trusts of paying out principal at specified ages is certainly not recommended by many if not most estate planning commentators. Thus, if a trust is to last for 100+ years, or perhaps forever where there is no rule against perpetuities, how can special needs planning be ignored.
- Statistics suggest that 4.3% of the under - 18 population) in the United States had a disability in 2019. Another study suggests a much higher incidence of disability amongst children. “Recent estimates in the United States show that about one in six, or about 17%, of children aged 3 through 17 years have a one or more developmental disabilities.” Over the duration of a modern trust the likelihood of a descendant having special needs is certainly material and should be factored into the planning by at minimum incorporating special needs provisions into every trust.
- Even if circumstances and laws change in unforeseeable ways, the instrument will contain reference to the topic so that if a reformation or other process is necessary to modify the irrevocable trust to better reflect the circumstances or then applicable law it will be clear from the governing instrument that this was a matter the settlor had intent to address.

Disability Planning is for Every Client

- Special needs planning might be viewed more broadly as planning for disability generally.
- The percentage of persons with a disability in all age groups between 6 and 64 hovers near 20%. Over the age of 65 that percentage increases to approximately 50%. “According to the 2010 Census report approximately 56.7 million non-institutionalized people with a disability reside in the United States. This number represents 20% or 1 in 5 adults living with a disability.”
- Thus, it should be assumed that every client will face challenges at some point in their lives. While it is routine for estate planners to include a durable power of attorney and health proxy in plans, more can and perhaps should be considered for clients, especially for clients of more advanced age.

A Common Gap in Special Needs Planning

- A common error I see in special needs planning is neglecting to address the risk of a parent caregiver becoming incapacitated.
- That is a heighted issue as not only will the adult (or minor) special needs child require continued assistance, but the parent caregiver will also need assistance. Thus, the risk of disability of the caregiver poses an enhanced risk in these circumstances.
- Too commonly I have not seen this addressed. One part of the plan can include a robust revocable trust plan for the parent (sometimes quite elderly) caregiver along with a guardianship for the adult special needs child with successor guardians named.

Robust Revocable Trust Plan

Planning for Client Disability and Continued Care of Special Child

Circumstances Affecting Clients For Whom A Robust Revocable Trust Might be Created

- **Isolation**: More clients are isolated. Traditional planning presumes that clients have a list of trusted family members to name in various fiduciary capacities. But this is increasingly not the case.
- **Family Not Available**: Clients should not cavalierly name a neighbor, nephew or second cousin to be in charge of their finances if they need help in later years, just because they have no one else to name. If a client does not have that presumed safety net of trusted people, there are better alternatives. For special needs trusts the testator's child or children who do not have special needs may not want to be the fiduciary for the child with special needs.
- **Divorce**: It is often suggested that approximately half of marriages end in divorce. For second and later unions, the failure rate is much higher. The segment of the population experiencing the fastest growth in divorce is those over age 65. Since 1990 the divorce rate for Americans over the age of 50 has doubled, and more than doubled for those over the age of 65.

Circumstances Affecting Clients For Whom A Robust Revocable Trust Might be Created

- **Identity Theft**: Identity theft has grown significantly in recent years.
- **Aging**: There are 75 million baby boomers (those born during the years from 1946 to 1964). Boomers are an integral component of the aging population. Those over age 65 comprised 12.4% of the population in 2000. Those over 65 will grow to 19% the population by 2030.
- **Longevity Planning**: Later life planning is the future of estate planning for the aging client. The phrase "later life" planning is much broader than merely estate or retirement planning. It will include all of the traditional planning steps of retirement planning (investment planning, budgeting, projections) and estate planning (creating powers of attorney, health proxies, etc.), but also much more.
- **Elder Financial Abuse**: Elder financial abuse is a significant problem for the aging client, and as more clients continue to age, the statistics will grow worse, absent proper planning. Major financial exploitation has occurred at a rate of 41 per 1,000. Practitioners need to proactively help clients build a planning team and address this risk.

Drafting Considerations for A Robust Revocable Trust

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Trustee Selection – Standing Issue

- **Trustee Selection**: The traditional revocable trust often names the client as sole initial trustee and a child or other individual as successor. Consider a broader perspective on the fiduciary positions in the revocable trust.
- **No Standing to Sue the Trustee**: There is a significant flaw in the laws governing the application of revocable trusts to protecting aging or infirm clients. This gap in the protection that a traditional revocable trust can provide is significant and must be addressed. The law treats a revocable trust as a will substitute. UTC Sec. 603. As a result, the remainder (successor) beneficiaries cannot obtain an accounting or other wise question the use of revocable trust assets. The UTC, and many cases, provide that while the settlor is alive, the trustee has no obligation to report to remainder beneficiaries. Tseng v. Tseng, 352 P.3d 74 (Or. Ct. App. 2015). The state of the law makes it difficult for interested parties to protect the grantor or the grantor's wishes. This is contrary to the application of revocable trusts to safeguard aging or infirm clients.

Trustee Selection - Safeguards

- **Build in Safeguards for the Settlor/Client**: Integrate protection while a settlor/beneficiary is alive but "fading".
- Consider perhaps an institutional trustee or co-trustee,
- a CPA in a formal role as monitor,
- naming a trust protector to serve in a fiduciary capacity.
- If a trust protector is appointed, consider expressly designating that person to serve in a fiduciary capacity. Although many commentators believe protectors always act in a fiduciary capacity, the law is not fully clear, so specifying this can avoid any issue as to status. The protector, as a fiduciary, should have standing to sue and protect the grantor from improper acts of a successor trustee. Caution – some commentators routinely recommend that trust protectors serve in a non-fiduciary capacity. That may be in the context of a complex irrevocable trust so that the status as a non-fiduciary may create broader decision-making options and perhaps reduce the liability the person serving as trust protector faces. But the analysis in the context of a revocable trust to protect an aging an infirm settlor may be different and suggest a different status and structure for the protector.

Trustee Selection - Institution

- **Consider an Institutional Trustee**: The typical default approach of simply naming the client as sole initial trustee often will be inadequate to protect an isolated or vulnerable client. With growing fractionalization or disintegration of family units, longevity, silver divorce, and other dynamics, for many clients the safest approach for trustee may be to name the client as co-trustee with an institutional trustee, or at minimum to name an institutional successor trustee. An institutional or corporate trustee can provide independence, internal processes, controls and safeguards, and an array of ancillary services that can be useful to aging clients.
- One of the problems to be wary of is naming an institution as a successor rather than current trustee for an aging client. If the institution is named as co-trustee from inception, the potential problems of "passing the baton" from the client as trustee to the institution can be obviated. It is often those transition points, e.g., when a client's capacity has waned sufficiently to affect investment decisions but not sufficiently to have the client fully manage his or her own affairs, that are most difficult.

Client as Trustee – Specific Health Considerations as Examples

- If a client is living with **Alzheimer's** incompetency is assured. Depending on the client's current age and health status, there may be only a limited duration of time during which it may be feasible for the client to serve as his or her own trustee. Thus, prudence might suggest a co-trustee at minimum. Perhaps the client should not serve as a co-trustee and instead opt to appoint other trustees from inception.
- If the client has **bi-polar disorder**, the safest course of action for the client might for the client not to serve even as a co-trustee. Someone living with bipolar disorder may experience severe mood swings which could continue for weeks or months. These include feelings of intense depression, manic periods of intense elation, and possibly mixed emotions combining aspects of both. During a manic period, the client might embark on a sudden, extreme and impulsive spending spree, gambling, gift buying, etc. The risk of a client having financial controls as a trustee or co-trustee may be too great. In fact, for many such clients prudence might not only suggest another serve as trustee, but that the trustee named be able to resist demands that may be made during these periods.
- Clients facing the challenges of **Amyotrophic lateral sclerosis (ALS)** have generally been assumed not to have any cognitive impact. ALS is viewed as a pure motor disease. However, there is indication that ALS may be accompanied by some cognitive impairment. Thus, for clients with ALS it may be reasonable for the client to serve as a co-trustee so that they retain decision making authority, but with a co-trustee to assist in the routine and physical aspects of trustee functions (e.g., bill paying and deposits).

Care Manager

- **Care Manager**: Integrating a care manager provision into a revocable trust can provide important safeguards for aging or infirm clients. They can comprehensively evaluate an individual's physical health and wellness, memory and mental health status, functional abilities, informal and formal social support networks, financial resources and living environment. They can make recommendations for care based on the information gathered from the assessment, coupled with an under standing of the client's wishes. Care managers can establish a comprehensive plan of care for the client.
- This input can be valuable to the estate planner in crafting a plan or guiding a family on implementing a plan, because it provides professional expertise to tackle issues that financial and legal service professionals do not have the expertise to address. A revocable trust might include a mandate that the trustee must provide, perhaps once per year but more frequently if called for, that an independent care manager evaluate the client/settlor and issue a written report to the trustee, trust protector and perhaps even one or more family members. This can provide independent verification of the status of the grantor/client and detect a range of problems that otherwise might not be noted.

Defining Disability of Settlor

- **Disabled is not Just "Disabled"**: Another aspect of disability is the effect of an attack or flare up of the client's disease. If the client has COPD and is hospitalized for several weeks, during that period of hospitalization the client may well meet the definition of disability and technically be terminated from serving as a co-trustee of his or her revocable trust.
- However, when the client is released from the hospital, he or she may be perfectly capable, and desirous of resuming management of his or her own revocable trust. T
- his could result in an on-again, off-again, pattern of removal and reinstatement. Apart from the sheer awkwardness of such a provision, there could be signify cant issues if a third party has to determine whether the trustees appropriately took a particular action. Who was the trustee on the date of the action?
- An alternative might be to provide a trigger mechanism that requires perhaps 30-days of consecutive disability before the grantor/client is removed as a co-trustee. The period should be selected in consultation with the client's medical advisers or care manager to coordinate with the anticipated periods of flare ups or hospitalizations. In this way, a short-term attack will not trigger any complications to the trustee position.

Should you Create a Monitor and Trust Protector?

- **Monitor**: A monitor relationship can be created. For example, an independent Certified Public Accountant, can be designated to receive and review monthly brokerage and bank statements to provide a check and balance on the trustees.

Get the Trust a EIN

- Don’t use the client’s Social Security Number, instead assign an EIN to the trust.

Financial and Related Planning Considerations for Aging Clients and Special Needs Children

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Financial Aspects of Disability Planning for Wealthier Clients - LTC

- Some might view Elder law planning as safeguarding assets from the costs of long-term care, but a broader view is necessary. Even clients who may be too wealthy to engage in traditional elder law planning may require planning to address the financial implications of future health challenges or challenges of aging.
- Broadening the planning and client discussion over the potential for future disability might entail viewing the planning from different perspectives. While attorneys typically begin that process from a document perspective, the financial perspective should be considered in many cases as well. Does the client have long term care coverage? Should they?
- **Long Term Care Coverage**: My practice is to routinely recommend that clients evaluate long term care coverage, whether or not they actually purchase such insurance. Regardless of the wealth level of the client, even if the client can readily self-insure, the process of evaluating long-term care coverage, being informed, generally for the first time of the magnitude of such costs and what issues may be involved, can be help inform the client on later life planning generally.

Financial Aspects of Disability Planning for Wealthier Clients - SLATs

- **Planning for Clients Who Created SLATs**: This might be particularly important for clients who have made substantial transfers to irrevocable trusts to secure exemption before the scheduled reduction in the exemption amount by half in 2026 (which may depend on election results prior to that). It is common to find clients who have transferred large portions of their wealth to various types of irrevocable trusts to use exemption. For example, a couple worth $30 million may have transferred $10 million each of their wealth to non-reciprocal spousal lifetime access trusts ("SLATs"), etc. In such instances reconsidering long-term care coverage may be quite important to their peace of mind. The degree to which such coverage is needed may depend in part on what access the client or clients have to the assets in the trusts the transfers were made to. For example, if the trust was structured as a self-settled domestic asset protection trust ("DAPT") in which the client has access as well as the spouse as discretionary beneficiaries of the trust, there may be less need for long-term care coverage even if large asset transfers were made. The only way to ascertain the need is to evaluate the access to each specific trust by carefully reviewing the instrument and having an insurance or financial specialist review insurance options.

Financial Aspects of Disability Planning for Wealthier Clients – Budgets/Forecasts

- **Budget and Forecasts**: The clients wealth adviser should review the budget, forecasts and modelling to confirm that the client has sufficient financial resources for the duration of their lives and with reasonable consideration to the challenges of aging and potential for chronic illness. Counsel and/or the client's CPA should review those forecast assumptions to be certain that they are reasonable and realistic. Often they are not.
- **Costs of Aging and Long-Term Care**: About 85% of older adults have one chronic disease. 60% of older adults have 2 or more chronic conditions. Chronic diseases are the leading drivers of increasing the nation's health care costs to $3.8 trillion each year. Chronic pain and diabetes are the most expensive chronic conditions with annual spending totaling $635 billion and $327 billion, respectively. More than two-thirds of all health care costs are for treating chronic diseases. 95% of health care costs for older Americans can be attributed to chronic diseases.
- **Get Involved**: Practitioners should be proactively involved in the financial and insurance planning for their aging clients at some level, even if it is to only ask questions. Unfortunately, few clients permit this.

Financial Aspects of Disability Planning for Wealthier Clients – Case Study

- **Case Study in Financial Planning**: A client consulted an elder law attorney who felt that they had adequate resources to pay for care, but the numbers were close. I inquired why they continued to maintain life insurance policies. It turned most were not necessary. We terminated an inheritance trust the husband had to put the assets in his estate so they could be bequeathed to the wife. Finally, their investment performance was tepid, and they were paying more than 1% in wealth management fees. They moved their portfolio to a lower cost provider. The combination of these savings not suggested (obviously) by the financial adviser or elder law attorney, created financial comfort for the client.

Financial Aspects of Disability Planning for Wealthier Clients – Case Study

- **Case Study in Financial Forecasts for Health Care Cost**: Here is a real case study. Several years ago, we had our wealth adviser, one of the best known and most well-respected private trust companies in the country prepare forecasts to assess whether we were on track for a future retirement. When reviewing their report, I noticed that while they reflected investment returns at historic rates, expenses were reflected with no adjustment for inflation. When I inquired why they explained that their experience was that expenses tended not to increase as clients aged. That was in my view a broad generalization that certainly for us, and no doubt for many people, just would not make sense. I had the forecasts revised using a 3% inflation adjustment for expenses. Moral of that story is that many advisers use assumptions that may not make sense for the client. But is that 3% figure sufficient in light of current inflation rates? Now let us make this case study more real and concerning. My wife was diagnosed 16 years ago with multiple sclerosis. The out-of-pocket cost on Medicare for the drug insurance plan and for her injectable drug is prohibitive about $25,000. That is the good news. All other Part D Medicare plans would result in an out-of-pocket cost in excess of $130,000 per year. If the one plan is discontinued, how can anyone, at almost any wealth level, sustain an additional $130,000 per year of out-of-pocket medical costs. How realistic or useful are any financial forecasts that are not tailored to a client's specific needs and updated as circumstances develop.

Automate the Client's Financial Affairs

- Clients who have not automated their checkbook and other financial records should be guided into doing so. This will create a detailed and accessible record of charitable giving, lifestyle and gifts to family and others that will be invaluable as the client ages. If an institutional trustee is named this information could be invaluable in ensuring that the client's lifestyle is maintained and wishes carried out. If an institution or CPA will have to take over bill paying and other administrative functions at some point, as the client's health fades or simply as the client becomes frail, automated financial records will be important. Tackling these issues before it becomes necessary can help keep the client in control of his or her finances and affairs for a longer period and minimize the potential risks of "passing the baton" to a successor trustee.

Protecting Residential Real Estate

- For a client owning their own home or apartment steps to protect it might be advisable.
- For a vulnerable isolated client having his or her home held in the trust may facilitate the institution al trustee in protecting the client. Include express language permitting the trust to hold personal use assets and indemnify the corporate trustee for doing so. If the institutional trustee is based in a different state from the state where the home is located, consider a single member limited liability company (LLC) to own the home. The residential property might then be deemed an intangible asset and not be subject to the laws of a state other than where the corporate trustee is based. Because a single member LLC is disregarded for tax purposes, this will have no negative income tax impact (although it might adversely affect a senior citizen's property tax discount).
- Another approach for the charitably inclined might be to donate a remainder interest in the residence to a charity while retaining a life estate. That may prevent someone from stealing the interest in the home.

Conclusion and Additional Information

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Conclusion

- There are many elder law and special needs planning implications which all practitioner should consider.
- Many of the steps that can be taken to help clients address special needs children and their own aging are outside the scope of what estate planning or elder law attorneys might consider their swim lane but making certain someone on the advisory team addresses them may be vital to clients.

Additional information

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