NAEPC Journal of Estate & Tax Planning
COLLABORATE • EDUCATE • CULTIVATE

Issue 43 – December, 2023

Basic Estate Planning Documents: Overview and Planning Considerations

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https://www.naepcjournal.org/issue/43/basic-estate-planning-documents-overview-and-planning-considerations/

Introduction.

Professional articles and webinars so often focus on new developments, complex or creative new planning ideas, as practitioners are always seeking to understand what is changing and new ideas that they can bring to clients. However, the "bread and butter" of many practitioners, and a focal point of discussions all practitioners in all disciplines have with clients concerns the clients will, revocable trust, financial powers of attorney and health care documents. These "basic" or "core" documents, so important to practitioners and clients, don't seem to get the limelight in the literature that they deserve. This article will seek to provide a practical discussion of these core documents. While many of the points are familiar to practitioners, the comments should be helpful to younger practitioners, and those not fully specialized in estate planning. Also, the discussions following will hopefully include many practical pointers some of which will hopefully be helpful to even experienced practitioners.

It's Not Just About Tax Planning

Tax planning is often incorporated into core estate planning documents created for a client. For example, a financial power of attorney may contain gift provisions, express rights for an agent to exercise swap powers the principal has over a trust (with comparable provisions in the trust authorizing the agent to act, change retirement plan beneficiaries, etc.). A will or revocable trust might include disclaimer provisions, a credit shelter type trust to address state estate tax, GST allocation provisions, etc. But these, and other documents, e.g. health care documents, often should also address human aspects of planning. These should include protecting the client, and their loved ones, from mental health, physical disabilities, family issues, respecting religious, philosophical and lifestyle decisions. Planning and documents should address practical aspects of planning such as ensuring bills are paid so the lights stay on in the event of a disability, death or other issue. Thus, the challenges facing practitioners when discussing and implementing core estate planning documents are as myriad as the human condition itself. The complexity of each document will vary by client based upon their needs and desires.

Some practitioners find these personal issues difficult or uncomfortable to address. First, no one can be expert in the myriad of religious, health, lifestyle and other nuances that various clients might wish addressed. School and professional training gives to little attention to personal "soft" topics. Many people, clients and advisers alike find some topics, e.g. mental health, addictions, and other challenges difficult to discuss. Part of the answer is more professional continuing education programs should address these considerations. But also, practitioners should never fear acknowledging when there is an issue that they either need to learn about, or reach out to another professional for assistance. As but one example, attorneys frequently reach out to CPAs for income tax guidance. Reaching out to another consultant with specific expertise in dealing with, for example, gambling addictions, should be no less comfortable. In the end, best serving the client should always be the objective.
The discussions below for documents can be considered a starting point, with thoughts practitioners can raise to a client, as well as several points regarding ancillary documents that a client may not realize could significantly affect their planning if not addressed in tandem with the preparation of documents.

Last Will and Testament and Revocable Trust.

Description. Oftentimes, the Last Will and Testament is the document that the client comes to a practitioner for (how often have practitioners received calls from prospects that begin the conversation with "I need a will"?). The common perception among lay people is that estate planning means a will. But this excessive emphasis on the need for a Will detracts from what for many clients is just as, or even more, important, having a plan. The best will is of limited benefit if the client has no financial plan as is spending themselves into oblivion. An array of high-quality estate planning legal documents with inadequate insurance protection may be equally dangerous. Most clients need a comprehensive plan, not just a will (or "loving trust" or any other magic bullet.

While the emphasis on a will is often overstated, the role a will serves in a client's plan is often significant. A Will, signed with all the formality required by the client's state's law, provides for the client's dispositive scheme and where assets held in the client's personal name should be distributed on their death. In addition, a will might address who should be guardian for a client's minor children. It may indicate who should be in charge of administering the client's estate (the "executor," "personal representative," etc.). It may provide for numerous other wishes of the client.

If a revocable trust (which is typically used to reduce probate involvement, to help manage assets as the client ages or if the client has a health challenge) is used in coordination with a will, then the will would generally be a "pour-over" will. That type of will distributes or "pours" assets the client owns at death into the revocable trust. While that is the norm, it should not automatically be used without consideration of the circumstances. In some instances, it might be helpful to achieve the client's plan to have one or more tailored revocable trusts that accomplish other specific planning goals. For example, a client that has separate assets may transfer them to a specially drafted revocable trust primarily to reduce the risk of those assets being commingled with marital assets. Occasionally a client might

find that having a tailored revocable trust to hold assets that will pass pursuant to a dispositive scheme different from their general estate dispositive scheme.

Many revocable trusts are created to avoid probate since assets in such trusts should not be subject to court supervision like assets that pass under the client's estate, and which are governed by their will. But that is only one of many benefits this powerful planning tool can provide. Revocable Trusts might provide other even more significant benefits. If a client is advanced years or has cognitive or other health challenges, the incorporation of a revocable trust into their planning can be a powerful tool to help the client manage their financial affairs. This may be preferable to relying on a power of attorney as in the revocable trust the successor trustee holds title to the assets and may therefore have an easier time operating on those assets then an agent under a durable power of attorney. If the revocable trust is given a tax identification number that might help safeguard trust assets if the client's Social Security Number is ever defrauded in an identity theft.

Decisions for a Client to Consider. One key decision for a client to consider in their will or revocable trust is choosing who will carry out their wishes and administer their estate, trust, or both.

1. Practitioners should counsel a client to choose someone who is trustworthy, responsible, and who has the time and ability to perform the actions required of them. Generally, trustees are either individuals or entities. Individual fiduciaries usually are either relatives, family friends, or trusted advisors of either the client or the beneficiaries.
2. If an institution is named, the fiduciary typically either is a bank with a trust department or an independent trust company. Fiduciaries have extensive powers, defined both under applicable law and the client's documents. All fiduciaries owe a fiduciary duty to the beneficiaries, and they also have liability for wrongdoing. Many clients bristle at the thought of using an institutional executor/trustee mistakenly believing that they are inflexible and difficult to deal with. The reality is that with the increasing use of trust protectors who can remove and replace a poorly performing trustee that may no longer be the same concern. Importantly, with the evolution of the family unit, in many cases the reliance on family might be misplaced. Further, the increasing complexity of modern trusts, in some cases makes the sophistication a professional or institutional trustee can bring to the plan a valuable advantage over what individuals might be able to handle.
3. The fiduciary will be responsible for marshalling assets, filing tax returns, paying debts and expenses, keeping beneficiaries informed, and managing the assets until their distribution. Too often family or individual non-professional fiduciaries do not respect the formalities of properly filing all advisable tax returns, creating thoughtful investment policy statements, communicating to beneficiaries, etc.
4. Practitioners should discuss with their clients whether an individual to be named is realistically up to the task of serving. Just because the client trusts "Uncle Bob" does not mean he may be the best fit for the position. Another consideration is the geographic location of the individuals named. If Uncle Bob lives in California, and the client is in New York, would Uncle Bob have the ability to serve effectively? What tax

implications might naming a particular individual have, e.g. on the state income taxation of a trust. If a client establishes a revocable trust, typically the client will serve as their own trustee while they are competent. Practitioners should consider discussing with a client whether they wish to name a co-trustee to serve with them, a trust company as a successor, a trust protector who can monitor all the trustees, and more. Implementing these checks and balances can create what might be important safeguards. Too often it is merely assumed that the client should be their own trustee. But if the client has cognitive or other challenges, it may be preferable to have a co-trustee from inception to assist the client or protect them.

5. Whom would the client feel comfortable naming as guardian of their minor children to take care of them until they are adults? Some clients suggest naming a couple as guardians, but then what should occur if there is a divorce? If the client names one person as guardian, are they assuming that person will be in a marital relationship if in the future they are to actually serve? If that is the intent, that should be drafted into the document. Generally, guardians are not named as beneficiaries. But if the guardian has to cut back or quit work to serve as a guardian, how will that economic impact be addressed? Too often the financial impact on the named guardian's is not considered.

If the client is elderly or has a known health issue, practitioners might discuss whether the client wishes to mandate in a revocable trust that an independent care manager (i.e., not a care manager giving the client services regularly) must evaluate the client annually, or perhaps quarterly, in their residence, and issue a written report to the trustees, trust protector, and even named family members. That can create another powerful safeguard to protect a client from elder abuse, etc. Incorporating a mandatory care manager provision, appointing a trust protector, using a separate Tax Identification Number, fully funding the revocable trust, and perhaps naming a successor institutional trustee, are steps that might make the revocable trust a powerful protective device for infirm or aging clients. Thus, a revocable trust can provide more significant benefits than just avoiding or reducing probate.

As the client's will and/or revocable trust is a dispositive document that provides for how some assets pass after the client's death, practitioners should engage in a discussion regarding the structure of any inheritance left to the client's beneficiaries. Several points to consider might include:

1. Outright bequests or gifts may be simpler from an administrative standpoint but provide no protection for beneficiaries. In contrast, trusts for beneficiaries can provide varying degrees of protection, both from creditors or ex-spouses during a divorce, as well as protecting the beneficiary from themselves if that is a concern. Practitioners should discuss with a client their unique needs to determine a structure that would help the client achieve their goals. Bequeathing assets into robust long term trusts can provide valuable tax benefits. Trust assets may remain outside the beneficiaries taxable estates, thus enabling the beneficiaries to avoid having to engage in the complex tax planning. Trusts can also provide income tax benefits if the complex non-grantor trust can avoid tax in the beneficiaries high tax home state.

2. Decisions regarding certain classes of assets should be discussed with a client depending on their unique personal and/or financial situation. Does the client have significant art, jewelry, automobiles, etc.? The tangible personal property provision may be a significant concern in such a situation. The client may wish to include reference to specific items in their will or revocable trust to assure their intended dispositive plan for that asset. Does the client have multiple residences that they may wish to bequeath to specific beneficiaries? In that situation the real property article would be of significant concern to the client. While retirement assets should not be transferred to a revocable trust, the trust might incorporate specific trust provisions to create a conduit or accumulation trust to serve as a receptacle for some or all retirement assets.
3. Practitioners should discuss with clients preparation of one or more letters of instruction. These could be used to outline any specific desires the client may for specific assets. For example, the client may wish for their gold watch to go to a specific child but not want to formally mandate that in their will. If a letter of instruction is used, some state law allows that letter to be incorporated into the will by reference as to the disposition of tangible personal property. Letters of instruction, perhaps separate ones from those indicating bequests, might provide information as to account information, passwords, crypto-currency keys, etc.
4. Practitioners may discuss and provide details of options for trusts which assets could be bequeathed to protect the client's heirs from their own irresponsibility, lawsuits, divorce, and possibly taxes. If the client's estate is large, the Will or Revocable Trust should include a number of estate and even income tax provisions.
5. Who should receive a client's assets if none of the beneficiaries named in the will or revocable trust survive the client? While it may be unlikely that such a provision is enacted, and a client hopes it is never needed, proactively addressing it may avoid a situation where assets escheat to the state the client lives in due to no named beneficiaries remaining.

Relationship to Other Documents. A client's will only governs assets in a client's estate that do not pass under contract or by operation of law. The structure of a client's finances and asset titles can have a significant effect on their will. For example, if the client's personal residence is owned with their spouse as tenants by the entirety, that asset will pass to the surviving spouse by operation of law. Beneficiary designation forms for retirement and life insurance accounts will determine who receives the proceeds of those accounts after a client passes, not their will. Any transfer on death (TOD) or joint tenant with right of survivorship accounts would pass to whomever is listed on the account. A client as they age may add a child or a trusted friend as a joint owner on a checking or savings account to allow that individual to assist them. The client may not realize that doing could potentially have that account pass directly to the individual named on the account, bypassing the dispositive scheme established in their will. While a client may believe they are passing their assets equally to all of their children as that is what their will states, these ancillary documents and title to assets could undermine that objective. In many cases well-meaning A client may not wish to have their attorney review the status of their ancillary documents, seeing it administrative personnel at financial institutions encouraging clients to use beneficiary designations for financial accounts (not only retirement accounts), joint accounts, and PODs,

to avoid probate, not realizing the negative results of those steps. Practitioners should consider educating a client about the impact of these steps. Some of these ancillary documents are discussed in more detail below.

If a revocable trust is used it may overlap the client's other documents. If the revocable trust is funded during a client's lifetime, then the assets held in the revocable trust may be applied by a successor trustee to assist the client and the client's family or loved ones. If the revocable trust provides the trustee with the authority to make gifts on the client's behalf, any gifts made by the trustee should be coordinated with gifts made by any agent under the client's financial power of attorney. If the client has health-related challenges, the trustee may need to discuss any funding needed for the client's health care with the agent named under the client's health care proxy, also known as a medical power of attorney. While a client may name the same individual in each of these various financial positions, that is not always the case. Practitioners should discuss both the pros and cons of naming the same individual versus different people. If the same individual is named in the revocable trust, financial power of attorney and health care proxy (or any combination of the two) it would allow that individual to take action on behalf of the client with greater latitude, reducing the administrative burden for the individual named. However, there would not be any significant checks and balances on the individual named. If the individual is a bad actor, or makes questionable decisions, the client could suffer significant losses before the issue is identified. The client should consider naming an individual to monitor the actions taken by the trustee/agent in such a situation.

If an institution is named as a trustee or successor trustee of the revocable trust, they may refuse to act in a similar capacity as an agent in a Power of Attorney. Most institutions will not serve under a financial power of attorney. Thus, there would be an individual named as agent and that agent might have to coordinate with the institution named. That issue might be resolved if the agent merely transfers all assets feasible to the revocable trust, but that will not always occur.

Special Circumstances that May Affect the Document. A client, or their beneficiaries, may have lifestyle choices, addictions, religious preferences, heath challenges, special needs, etc. which may affect the provisions to include in their will or revocable trust. Practitioners may have to encourage clients to discuss some of these topics as the client might be embarrassed, uncomfortable or in denial. These may be tough topics for a client to discuss. If a client's beneficiaries are receiving governmental benefits, any trusts created may require special needs trust language. Regardless as to whether there are current special needs beneficiaries, with the long-term nature of modern trusts consideration should be given to including supplemental needs provisions in every trust, as over time, the likelihood of a beneficiary having special needs becomes more material. If a client, or their beneficiaries, are LGBTQ+ their unique needs should be considered in the drafting. See Trusts and Estates Magazine, LGBTQ Planning Issues, co-authored by Steven L. Kriz, Melisa Seyhun, Vanessa L. Kanaga and Martin M. Shenkman, pages 14-17, July 2020. For example, the definition of descendants might be expanded to assure that children conceived by a surrogate or through artificial reproductive technologies, etc. A special trust protector might be appointed and even

granted a limited power of appointment to address the costs of transition surgery and other unique issues that might arise.

Financial Power of Attorney.

Description. The financial Power of Attorney names individuals (the "agent") determined by the client and grants that individual with the authority to make financial decisions, take certain legal actions, file tax returns, perhaps make gifts, etc., on the client's behalf. This is a key document for every client who has attained the age of adulthood. In fact, a commonly overlooked step in many families is for children at the age of majority to sign a financial power of attorney and health proxy. Once a child reaches the age of majority the client can no longer make financial decisions for their child without a power of attorney.

Decisions for a Client to Consider. The key decisions for a financial Power of Attorney for practitioners to discuss with a client is whom they will appoint as agent, and the powers provided to that agent.

1. This individual appointed as agent may manage the client's finances (other than the client's assets held in either a revocable trust or an irrevocable trust), filing tax returns, and taking routine financial actions such as paying bills and investing funds. Practitioners should counsel client's that they want to choose someone not only trustworthy, but capable and responsible, and someone who has the necessary time to attend to the client's affairs.
2. If the client has a professional practice, their profession may require that an individual with appropriate qualifications be named as the agent to handle professional matters (e.g., for a solo law practice an attorney must need to be named as agent as to practice matters). The client may wish to name an individual to handle their professional practice, while having a different agent handle their personal affairs. That may be done in a separate special professional practice power of attorney. It may be preferable to create an entity for the practice and have the person designated to handle matters in the event of disability or death to be provided a formal position in that entity. For example, if the professional practice is placed into a limited liability company ("LLC") the LLC could be structured as a manager managed LLC and the designated successor could be named in the operating agreement as a successor manager.
3. The powers that can be given to an agent can be narrow or broad. The broader the powers, the more flexibility the agent will have to assist a client should that be necessary. However, practitioners should consider cautioning a client that the broader the powers provided, the greater risk that an agent might abuse the powers granted.
4. For example, practitioners should carefully review with the client any gift and other tax provisions as while they can be used by the agent to provide the client with a potentially better tax result, they also provide the agent with a broad grant of authority that could significantly alter the dispositive scheme the client has established. Consideration should be given to discussing with the clients gift

provisions and support provisions to assure that family members or other the client supports financially can be assisted, in addition to any gift tax considerations. In too many situations only the tax consequences of gifts are considered.

5. Practitioners could discuss with the clients whether the agent named should be given the immediate power to carry out tasks for them, or if the agent should have to wait for a triggering event, such as the client's incapacity (called a "springing power"). If a client indicates they are uncomfortable with giving their agent immediate authority, practitioners should consider cautioning a client that requiring a triggering event for the agent to act can raise practical issues (e.g., will the agent be able to get two physicians to write letters confirming your incapacity). Also, in some states, springing powers are not permissible.
6. Should the agent have the authority to move the client's domicile to a different state? If the client's current domicile is a high tax state, and there are no remaining ties to the state, giving the agent the authority to move the client's domicile may provide an avenue to save tax on the client's behalf. However, if the move is successful, it will have significant repercussions for a client from legal and perhaps other perspectives. Consideration should also be given as to whether this is a right that should be given to the health care agent or the financial agent as it may affect both spheres. In the context of health care documents changing domicile may be critical to carrying out end of life decisions. For example, if the client's home state will not permit assisted suicide it may be possible to move the client to another state that does.
7. If the client has life insurance policies and retirement policies, should the agent be given the authority to make decisions regarding those policies? Should the agent be able to liquidate policies, or rollover IRAs, perform Roth IRA conversions on behalf of the client, determine benefits the client will receive under a pension plan, etc.? Further, should the agent be granted the authority to change beneficiary designation forms for the client's plans? If the client has significant retirement plan assets, the ability to change beneficiary designations may potentially provide the agent with the ability to significantly change the client's dispositive scheme.
8. If a client is charitably inclined, they may wish to include specific provisions allowing for the agent to make donations to charities. Does the client wish to limit the agent's authority to only make donations to charities the client has previously donated to? Perhaps the agent's authority may be limited to both the charities and annual amounts the principal typically donated. It may be inadvisable to mandate the agent make those gifts and perhaps the power should only be permissible. In that way if the principal's resources dwindle the agent may choose not to make such charitable gifts. For some clients, which may not be an option and they may opt for religious or other reasons to have the agent in all events continue or make donations. Does the client wish to allow the agent to make tax-advantaged planning gifts, such as establishing a charitable remainder trust?
9. Should the agent receive compensation for the work being performed? If the client has a significant disability or chronic illness the agent could serve for many years and spend significant time assisting the client. Even if the agent is family, is that fair for the client to ask the agent to take that time without being paid for the effort? Practitioners could discuss the pros and cons of compensation with the client, as many clients will automatically assume family members or close individuals would

not want compensation, but after realizing the depth of responsibility they are asking their agent, choose to allow compensation to be taken. The agent could be allowed to waive compensation if they wish but providing them with the option to receive compensation may be the client's wish after considering carefully.

Relationship to Other Documents. A client may have signed powers of attorney in addition to the document provided by the practitioner.

1. A limited power of attorney for specific tasks (i.e., a power of attorney to real estate counsel during a closing, a power of attorney regarding a specific bank account that a financial institution provided, a professional power of attorney that was created specifically for a business, an international power of attorney if the client has property in another country, etc.) may have been signed by the client. Practitioners should discuss with the client whether they have any of these powers of attorney in place, and whether the client wishes to continue to keep that power of attorney in place, or whether they should be formally terminated. It may be advisable to notify the agent and successor agents of the revocation of a no longer needed power than to merely rely on a provision in a new power stating that it supersedes older powers, although both might be done.
2. If a practitioner creates their own form power of attorney for the client to sign, the practitioner should consider whether the client should also sign a statutory power of attorney, if the applicable state law provides for one. While a customized power of attorney prepared by the practitioner may be more tailored or robust than a statutory power of attorney, some might view it as a practical step to have a state mandated statutory form that perhaps financial institutions might be less likely to question. However, having both might raise issues of inconsistency.
3. The power of attorney should then address those ancillary powers, affirmatively stating whether the new Power of Attorney revokes those powers of attorney or not.

As the agent under the power of attorney will control the "purse-strings" for the client, the agent will need to coordinate with any trustee serving under a revocable trust, or agent serving under a health care proxy, to assure coordinated action.

For an agent serving under a power of attorney where the client operates a business, the governing documents for the client's business will be integral to the actions taken by the agent. The agent's powers may be overridden by an operating agreement, buy-sell agreement, or other contractual arrangements. Clients often do not appreciate the nuances of the relationship of their estate planning documents and governance versus the provisions and governance in entity related documents.

If the agent has the authority to gift under the power of attorney, documentation reflecting gifts made previously by the client will assist the agent in decisions regarding gifting. Does the client have a pledge agreement in place with a particular charity that will need to be honored? Providing the agent with copies of all key documents and agreements, e.g., a copy of a pledge agreement with a charity, is advisable.

If the power of attorney provides the agent with the authority to manage life insurance policies and retirement policies, copies of any policies the client may have, and their corresponding beneficiary designation forms are key for the agent to have.

If the client has significant assets and a complex estate plan in place including complex trusts and corresponding ancillary documents, the power of attorney may include significant tax planning powers that would need to be coordinated with the governing documents for those trusts. On the other end of the spectrum, if the power of attorney includes provisions that provide for Medicaid planning, documentation regarding the benefits the client is receiving could be key to the agent performing their duties.

Special Circumstances that May Affect the Documents. The circumstances under which a power of attorney is employed may affect the advice and guidance practitioners should provide.

1. Has an acute event occurred that prevents the client from making their own financial and legal decisions? Being certain that the agent is informed about their responsibilities as agent, recommended recordkeeping procedures, identifying appropriate expenditures to make on behalf of the client, and similar points, are key in such a situation to assure that the client and their loved ones are provided for, and to reduce the possibility of financial abuse. This could become an emotionally charged, stressful situation, and an individual serving as agent is typically someone trusted and close to a client. That exacerbates the stress the agent would already be under with their concern for the client. Practitioners should consider engaging a client in discussions in advance of an "event" regarding the nature of their finances, and encourage a client to simplify their financial lives, to facilitate passing the baton to an agent if and when that might be necessary. Providing a cohesive financial picture for an agent will allow that agent to understand the situation and marshal the client's finances to assist in a more methodical manner.
2. Is the client traveling overseas for a significant period of time? In such a situation a client should inform their agent of their absence and provide the agent with a list of anything that may be required of them during the period of time the client will be traveling. A list of ways the agent can contact the client in an emergency would be prudent, as well as a list of actions an agent can take if the client has an emergency while traveling.
3. Is the client an agent under a Power of Attorney for their child who is away in college? Practitioners should discuss with a client actions they could take to both help their children while they are away at college, as well as begin instructing the child about financial literacy. A parent/client who has the ability to help their child in an emergency will also have a greater peace of mind when this may be the first time the child is away from home for a significant period of time.

Health Care Documents.

The health care documents a client may need will vary depending on the state law where the client is located, legal customs in the client's area, and the specific needs of that client. For example, in some states and areas the Health Care Proxy and Living Will documents described below may be consolidated into a single document. The HIPAA Authorization and Release may not typically be signed in particular areas of the country. These documents are intensely personal for each client and include numerous tough questions for a practitioner to ask a client. However, by assisting a client with tackling these tough decisions now the practitioner helps the client's family avoid the heartbreaking issue of trying to discern the client's wishes when that client is incapacitated and may prevent family discord in the process.

Health Care Proxy.

Description. The Health Care Proxy, or medical Power of Attorney, names the individual the client wants to make healthcare decisions for them if they are unable to do so. The document will also provide the authority and decisions that the agent is granted. The decisions below should be considered in the points the practitioner discusses with the client, and the practitioners should encourage the client to discuss relevant points with their medical provider, and if applicable religious adviser. Which adviser will have these discussions might vary. Certainly, the attorney drafting the documents must have these discussions. However, in some instances the wealth adviser or CPA may have a closer relationship with the client and may be in a position to support the discussions on some of these points with the client.

Decisions for a Client to Consider. There are numerous points for practitioners to discuss with a client, which might include the following:

1. The client will need to determine who they wish to serve as their agent, and ideally one or more successor agents. While a client may initially want to name a close family member, such as a child, the practitioner should consider engaging the client in a discussion as to whether the individual under consideration is really a good fit for the responsibilities that serving as a health care agent entails. Is the individual in a geographic location that facilitates them assisting the client? Does the individual have a job that will give them the flexibility to tend to matters if a health care emergency occurs? Will the person under consideration have the emotional ability to address potentially dire health care issues with the client's medical team? Is the individual someone who can make what are potentially hard personal decisions? The client should carefully consider who to name as their agent, and appoint someone who has sound judgment, can make quick decisions without jumping to conclusions, and will also be accessible in the event of an emergency.
2. Some clients wish to name joint agents. That is not permissible in all states, but even if permissible raises potentially problematic issues. What if the agents do not all agree on a course of action when urgent and immediate decisions are required? What if one agent is not reachable?

3. The client should carefully review the powers that are given to the agent. Are the powers sufficient to meet the client's wishes? Should the powers be constrained or limited to reflect any religious or philosophical views the client may have?
4. Does the client want the agent to be able to make decisions on their behalf for mental health and psychiatric issues? Is the client even willing to discuss what issues they might currently face with their advisers so that these provisions can be tailored?
5. Does the client want to authorize the agent to change their domicile to another state in case that facilitates a better result for the client's health care? If this is under consideration see the similar point discussed above under the financial power of attorney. This power perhaps should be limited to only one document, and more likely given the dramatic personal implications such a decision might have as to medical and end of life decisions, it should be placed in the realm of the health care agent.
6. If the client has a partner, or other close non-blood related individuals, do they want to proactively address that partner's ability to visit them in a hospital or other health care facility? Providing directly that an individual can see the client in these situations may help avoid headaches for an individual during a stressful time while trying to see a loved one.
7. Does the client wish for the agent named to discuss decisions with any successor agents named? While it is unadvisable to name joint agents for healthcare decisions, and in some states statutorily restricted from doing so, the practitioner could incorporate language for the client indicating the client's wish to have agents discuss decisions with successor agents.
8. Should the agent be given the authority to hire consultants to assist and advise the family regarding health care decisions? For example, the client could authorize the agent to hire a professional geriatric care manager to discuss tough decisions that the agent may need to make. If the agent needs to place the client in a rehabilitation center, allowing the agent to procure professional help both takes stress off of the agent, and can provide the client with a more thoroughly researched option.
9. Does the client wish to be an organ donor? Are there specific situations in which they wish to donate their organs (i.e., only to save another family member, or person's life, specific organs they wish to donate but not others, donate their organs or body to science for research, etc.).
10. Should the agent be provided the option for compensation for serving? Similar considerations to those above for the agent in the financial power of attorney apply here. However, the client may view taking actions of a personal nature like health care decisions as different than taking actions financially, so even if the client desires the financial Power of Attorney agent to receive compensation, they may not wish to allow compensation under the health care proxy.

Relationship to Other Documents. The powers provided to the agent under the health care proxy should take into consideration the directions the client has given under their living will, if they have created one. For example, if the client wishes to have life-sustaining "heroic measures" removed and has stated such in the living will, the health care proxy should clearly state that the agent has the authority to determine when such life-sustaining efforts should be ceased.

The Health Care Proxy should address the possibility of the client having a Physician's Order for Life Sustaining Treatment (POLST), which is discussed in more detail below, and either provide which document would take precedence if there were a conflict between the Health Care Proxy and the POLST, and whether the agent under the Health Care Proxy has the authority to change the client's POLST. For example, language could be incorporated into a health care proxy regarding POLSTs "If I have not signed a Physician's Order for Life Sustaining Treatment (POLST) my Agent is authorized to sign on my behalf a POLST that comports with my wishes as expressed in this document and my Living Will. If I have signed a POLST my Agent is authorized to amend and modify a POLST that predates this health care proxy and/or my living will to conform that POLST to my wishes as expressed in this document and my Living Will if dated after such POLST. The provisions of this health care proxy and any POLST shall, in the event of a conflict between the two, be interpreted in favor of the later signed document." Note that a POLST is referred to by other names in some states, such as a "Portable Medical Order Form."

The agent under the health care proxy may need to coordinate with the client's financial power of attorney agent, as the options available to the agent regarding the client's healthcare will depend on the financial resources of the client. The health care proxy agent will need to determine the best care the client can be provided based upon the client's wishes, their available resources, and that information will be determined in conjunction with the financial power of attorney agent. If the client has a revocable trust, the successor trustee of such revocable trust should also be involved in the discussions, as the assets held within the revocable trust can be deployed for the client's benefit. If the client has a budget and financial plan in place, that can facilitate decision making by agents without their having to scramble and gather data while addressing their new roles.

Special Circumstances that May Affect the Document. The client may wish to provide specific powers to the agent based upon their health conditions. If the client has unique health care needs, those needs should be proactively addressed by providing the agent with the authority to make decisions regarding those needs. If the client does not have any individual they feel comfortable naming to make medical decisions on their behalf, they may need to address their needs in a more creative manner. See Probate & Property, Estate Planning for the Chronically Ill, Aging, or Otherwise Vulnerable or Isolated Client, by Martin M. Shenkman, pages 23-29, May/June 2016. If a client does not wish for their agent to make mental health or psychiatric decisions on their behalf, in what manner do they wish to have those issues addressed?

Living Will.

Description. The living will states the client's general wishes for how their health care decisions should be handled if they are unable to make the decisions themselves. In certain states, the living will may not be legally binding, but the document provides guidance for the client's health care agent to use when making decisions. Practitioners should consider asking the client whether there are any special requests or issues they wish to address in the document. If a client is struggling with making decisions in the living will, the practitioner should consider advising the client that having sometime in place, even if it does not include

every question or permutation possible, will provide a starting point for the client's family and health care agent to base decisions off of. Encouraging the client to discuss some of the decisions required with their health care provider so the client understands what their decisions actually entail in terms of surgical procedures, etc., which may help crystallize a decision for the client.

Decisions for a Client to Consider. The following is a small sample of the many decisions a client may wish to address in their living will. Certain topics may be insignificant to a certain client, while other topics may be a key point for that client to make.

1. Health care related decisions.
    a. If a client has a significant known health issue, the client may want to discuss that health issue in the document and reflect specifically whether or not they might wish experimental or other treatments. If there are any treatments specific to their health issue they wish to authorize, language should be included to that effect. For example, if the client might wish to have even experimental medical treatments if they might help. The client might even be willing to be moved overseas for treatments that are available in other countries that have not yet been approved in the U.S.
    b. Discuss how a client feels about "heroic measures" (i.e., the use of life-sustaining equipment, ventilators, dialysis machines, etc.) and whether they wish for their health care agent to be able to remove those measures if there is no, or little, chance that they will recover. The client will need to consider what they consider a sufficient triggering event for the cessation of heroic measures if they approve of removal, when would they be comfortable with their health care agent removing life-sustaining equipment?
    c. Language might be included to address this as follows: "If I have an incurable or irreversible, severe mental or severe physical condition; or am in a state of permanent unconsciousness, or profound dementia; or am severely injured, or have a terminal illness, (For purposes of the above, "terminal illness" shall be defined as an irreversible, incurable and untreatable condition caused by disease, illness or injury when an attending physician can certify in writing that, to a reasonable degree of medical certainty, there is no hope of my recovery or death is likely to occur in a brief period of time if life-sustaining treatment is not provided. For purposes of the above, "Permanently unconscious" is defined as a state that, to a reasonable degree of medical certainty, an attending physician certifies in writing that I am irreversibly unaware of myself and my environment and there is a total loss of cerebral cortical functioning resulting in my having no capacity to experience pain)."
    d. In contrast, the client might instead wish that life-sustaining equipment never be withdrawn and that all actions be taken to preserve the client's life? If so, that should be affirmatively stated.
    e. Would the client want specific language incorporated for nutrition and hydration, or would the client feel comfortable with allowing the removal of nutrition and hydration under similar standards to other life-sustaining heroic measures? A client may believe for religious, philosophical, or other reasons

that they want nutrition and hydration provided no matter what other medical decisions are made. If that is their belief, then the living will should state that.

f. What is the client's belief regarding pain medication? Do they wish to be administered pain medication to ensure they are comfortable at all times, even if administering medication may hasten death?
g. If the client can become pregnant, what is their belief regarding medical procedures while they are pregnant? Should the health care providers place an emphasis on the mother's life, or the life of the fetus? Some religious beliefs expressly provide that the life of the mother is to be given priority over the life of the fetus, But, after the recent overturning of Roe v. Wade in the June 24, 2022 United States Supreme Court decision of Dobbs v. Jackson Women's Health, it is unclear whether the inclusion of language that states the life of the individual should be preserved over the fetus will be respected. The applicability of this language may become a state specific question, but the law is in flux.
h. What wishes does the client have for end-of-life treatment? Do they wish to spend their last days in their home, with any medical assistance needed provided in their home? Do they wish to be provided with hospice services and palliative care? If the client lives in a state where dignified demise statutes have been enacted, do they wish to indicate their desire to avail themselves of those statutes? While having a statement in writing may assist a client in endeavoring to show their intent, and that their desire for dignified demise has been contemplated for a period of time, the laws in these states have very specific criteria as to residency and other steps that must be adhered to avail oneself of this. There are nine jurisdictions that have enacted death with dignity statutes (i.e., assisted suicide statutes), Colorado, District of Columbia, Hawaii, Maine, New Jersey, New Mexico, Oregon, Washington, Montana, two states that have passed legislation and amendments, California and Vermont, and 5 jurisdictions with pending bills, Arizona, Delaware, Rhode Island, North Carolina and Massachusetts. Discussions on the status of dignified demise statutes are discussed at **https://deathwithdignity.org/states/**.

2. Does the client want health care decisions to be made based upon their religious beliefs? Practitioners should consider having a conversation with clients what such restrictions may entail, as if such restrictions are included, it may affect the treatments that healthcare providers are willing to provide or curtail the ability of the client to get certain procedures completed. These decisions can be personal and even individuals of the same faith may have different views based upon their interpretation of their religious scripture as well as the beliefs of their religious adviser (i.e., priest, rabbi, imam, etc.). See Ali and Shenkman, "Religion and Estate Planning," Estate Planning, Oct. 2022, Vol. 49, No. 10.
3. Are there any funeral or burial related desires the client has? Even if the client does not wish for religious restrictions to apply to their health care decisions, they might still desire a traditional religious burial in accordance with their faith tradition, and such a desire should be addressed. Has the client purchased a burial plot they wish to be interred at? Listing any specific desires of the client and referencing with specificity any plans the client has made while alive can assist family members after

the client's demise in case the Living Will is identified, but other informational documents are missing.

4. Does the client wish for the agent to be able to move the client to a different health care facility, or even to change the client's domicile to a different state? If a particular procedure is rare, or unable to be completed in the client's current location, such authority may facilitate the agent's ability to get the client the care they need.

Relationship to Other Documents. The living will is interconnected with any other health care related documents that the client may choose to sign. As it includes information on decisions that the agent named under a health care proxy or medical power of attorney will, the named agent should be aware of the existence of the client's living will. If the client has or will signed a POLST because they are in a terminal state, review both documents to whether there are any inconsistencies in decisions between them as revision to avoid ambiguity might be advisable.

The client's health care professionals should be provided with a copy of the living will and if it is possible to have the document added to the client's medical chart, which should be done.

Special Circumstances that May Affect the Document. As the living will is a statement of the client's wishes, each circumstance that affects the client's life may affect the living will. If the client is diagnosed with a significant health issue, the client may have a changed perspective on their life, and in particular end of life, that they may want to incorporate into their living will. The client might wish to make specific provisions for treatments their health issue requires to ensure that those procedures are more clearly and precisely indicated then what had been included in general provisions prior to their diagnosis. Significant events such as a new drug therapeutics or medical procedures may also affect the nuances of living will provisions. For example, the treatments of COVID has made what initially was likely deadly for many, more management. In the early stages of the COVID pandemic the use of ventilators was a common part of treatment. If a living will defined a ventilator as constituting a heroic measure, an issue could have arisen that if the client's living will contained a blanket statement that they should not be put on a ventilator, when in fact if they were not terminal and the use of a ventilator might have enabled them to survive the particular health problem, they might not have received the lifesaving treatment they may well have wanted. Procedures that may have been considered risky and extraordinary at one point in time may become routine. Practitioners should consider drafting a living will with flexibility in mind.

HIPAA Release.

Description. A HIPAA Release is a supplementary document that practitioners may prepare for clients to use in addition to a health care proxy and living will. The Health Insurance Portability and Accountability Act of 1996 is a federal law that provided national protection of health care information for individuals that endeavors to prevent their sensitive information from being released without their knowledge. Health care providers are required to protect client data pursuant to the law.

See **https://www.cdc.gov/phlp/publications/topic/hipaa.html**.

A HIPAA release might be a relatively short document that authorizes the client's agent to have access to medical records and to communicate with medical providers. Without this release medical providers may not be willing to disclose information to the client's agent. While a health care proxy may include HIPAA provisions, providing a client with a short document dealing specifically with the HIPAA regulations may be a practical step to assist the client's agent in ensuring medical providers will discuss the client's care with them. Also, it is possible that since the HIPAA release does not permit decision making that the client may authorize different or additional people to act under the HIPAA release then under their health care proxy.

Decisions for a Client to Consider. As the HIPAA Release is designed as a short, practical document, the decisions for the client should be easier and more limited than those for a health care proxy or living will. The agents named (both the initial and successor) might be the same as the agents named in the Health Care Proxy, but not always.

Relationship to Other Documents. The HIPAA Release provides for access to information, the health care proxy authorizes a person to make health care decisions, and living will is a statement of health care and related (e.g., religious, burial, end of life) decisions. While there should be some coordination between all of these documents differences might exist, but inconsistencies should be avoided. For example, the client might name a child who lives nearby as an agent under a HIPAA release to facilitate quick action, but might prefer a child who has a medical background as the first decision maker under their health proxy.

Certain institutions may have a client sign their form HIPAA release. For example, an insurance company may request a client to sign a HIPAA release so that they can check the client's health care records. Practitioners should consider cautioning clients to carefully review any HIPAA releases institutions provide them with to be sure that they are only giving the institution access to records the institution needs and for the specific purposes involved. Some of these supposedly "standard" HIPAA release documents are incredibly broad and invasive, and it may be feasible to narrow them to more reasonable scope.

Special Circumstances that May Affect the Document. If the client has any certain medical issues, they might want the HIPAA release limited to avoid those issues. For example, the client might expressly not want the agent to have access to mental health records if the client is or was dealing with an addiction issue that the family was not aware of.

Physician Order for Life Sustaining Treatment ("POLST").

Description. This is a document intended to reflect health care decisions for individuals with serious illness and frailty. In contrast to a Living Will and Health Care Proxy, a POLST is intended to be created with the client's physician's involvement and is made a part of the client's medical record. see NAELA Journal, POLST: Co-Piloting, Not Hijacking; the Advance

Directive, by Fay Blix, CELA, CAP, and Susan W. Tolle, MD, National Academy of Elder Law Attorneys, Volume 15, e-Issue, Fall 2019.

Decisions for a Client to Consider. The decisions the client will need to make shall be discussed with their physician. The decisions in the POLST may be specific to their particular health care needs and if they have been diagnosed with a particular illness or cognitive disease. The process of obtaining a POLST document should result in the client having discussed a range of medical decisions, their health condition, prognoses, etc. with their physician. Remember, a POLST is prepared by medical providers not counsel.

Relationship to Other Documents. Practitioners could determine if the client has created a POLST, and confirm that the decisions that were made in the POLST, do not conflict with health care decisions contained in the health care documents the practitioner has created.

Special Circumstances that May Affect the Document. The client's particular health care situation will affect the decisions in the POLST. While that conversation will involve the client and their physician, counsel should be aware of any implications as noted above.

Child Emergency Medical Form.

Description. There may be no particular document that addresses the need for medical care for a minor. However, some schools, camps and other child centered activities may have forms they request be completed by the adults responsible for a particular child. Practitioners should consider discussing if any documentation was completed and if appropriate create a custom document for their clients addressing health care decisions for their minor children. Such a document may be drafted to facilitate medical care and decision making for the client's children if the parents are traveling and an emergency occurs. This document would not address decision making following the death of the responsible adult as that would be addressed by the appointment of a guardian under the client's Will. Rather, the child emergency medical form would seek to provide critical information to help medical providers, and request that in the absence or disability of the responsible adult that a particular person's directions be followed.

Decisions for a Client to Consider. The decisions that may be required for such a document will be dependent on what the practitioners document provides, but examples of some items that can be included are:

1. Which individuals would the client entrust to make medical decisions on their child's behalf if the client is unable to do so? The document can also provide that person's contact information.
2. A checklist could be incorporated that the client might complete with information on the children, such as their allergies, specific medical needs, and other personal information, like favorite toys or things that can be done to comfort them, so in an emergency situation there is information on hand to help.

3. Should HIPAA provisions be incorporated to allow the individual named to see the child's medical records?
4. How long should such a document be in effect? If it is for emergency purposes, should it only be in effect for a certain period of time? State law may govern in such a situation, as certain states may require a guardianship proceeding for decisions to be made beyond a certain point.

Relationship to Other Documents. As this would be a custom document the practitioner is preparing themselves, the contents of the document should be carefully considered as they may affect the relationship the document has to the client's other documents. For example, the individuals named to make temporary decisions for the child might be coordinated with the individuals named as guardians in the client's will. If different individuals are named as guardian in the will and in the child medical document, might conflicts warrant addressing? The client's financial agent might be instructed under the financial power to respect medical decisions made by the person designated in the child medical form.

Special Circumstances that May Affect the Document. The particular needs of the client's children may effect the approach taken for such a document. If the child has certain health challenges, or developmental challenges, additional provisions may be included to address those issues in the document.

Financial Institution Documentation and Ancillary Follow Up.

Often a client will assume that estate planning is completed once documents are signed. However, there are a myriad of ancillary documents that may significantly affect the likelihood of the client's wishes being respected. Unless additional steps and/or documents are addressed, the overall client plan (as to successor decision makers, disposition of assets, etc.) the client's desires may not be achieved. Practitioners should consider communicating with clients the need to address several practical follow up steps in addition to securing appropriate estate planning documents. While assuring that a client's planning and documents reflect changes in economic circumstances, the law, family circumstances, etc., is an obvious benefit, there is often more to do. There are a potentially many issues and loose ends that affect almost everyone, law changes (not just tax laws) occur with considerable frequency, asset values change, and a client's personal goals and objectives evolve, health conditions of the client and heirs change, etc. Accounts are often changed requiring review of new account titles and beneficiary designations. Below are several considerations for some aspects that may need to be addressed by a client after documents are signed. However, each client's financial and personal situation is unique, so the follow up a client may need to perform will vary significantly.

Beneficiary Designation Forms.

Description. For a client that has retirement plan assets (IRAs or otherwise), life insurance, etc. there will be a beneficiary designation form ("BDF") identifying who should inherit those

assets. These assets will pass based upon the terms of the BDF and the client's will or revocable trust may not govern the inheritance of those assets. Even if a conduit or accumulation trust is provided for under the client's revocable trust to serve as the receptacle for retirement plan assets, unless the BDF directs the assets to that intended trust, those provisions may prove irrelevant. Some clients do not address the methodical follow up BDFs should be given. Also, some clients view BDFs as simple DIY (do it yourself) forms, but they are often complex documents. For example, if a BDF designates children equally if a particular child predeceases, or disclaims do the assets pass to that child's issue, or to his or her siblings? What does the client want done? So-called "standard" forms can differ significantly from each other and also from the clients assume they provide. If an administrative person at a financial firm is relegated the task of explaining the institutions BDF to the client, how accurate will the explanations be? If trusts are to be used it will be best for the client to defer to a professional adviser for guidance and not rely on administrative clerks, or their own acumen.

For many people, BDFs may determine how most of their wealth passes on their death. For some people, the manner in which their assts are owned and how beneficiary designations are completed may govern most of their wealth, rendering the will they gave so much attention to superfluous. A client may have not updated the BDFs for their various accounts for many years, or potentially have accounts where the BDF was never completed in the first place, or misplaced through bank or other financial institution mergers, etc. In certain states, even if someone divorces their ex-spouse, if they do not remove their ex-spouse from a qualified plan BDF then the ex-spouse may inherit that asset. Practitioners should consider communicating with clients how important updating these documents, and periodically reviewing them, may be to their planning. The complex and changing rules of the Secure Act have made such reviews even more important.

Decisions for a Client to Consider. While the BDF may seem deceptively simple, just determine whom will receive the account on the client's death, there are numerous points for the client to consider including:

1. If a client is worried about divorce or liability exposure of heirs, or if the beneficiary has challenges, the client might consider providing that a trust will receive the assets on their death, or upon the death of their surviving spouse. This would require that the receptacle trust include retirement planning language and may have legal and tax implications which should be discussed with the client.
2. Does the client wish to have the BDF follow the dispositive plan established under their will or revocable trust, or do they wish to leave the assets in the account in a different manner? For example, if the client is charitably inclined and the client has a significant IRA account, rather than leaving a bequest for their desired charities under their will or revocable trust they may choose to leave a portion, or all, of the funds in the retirement account to the charity so they receive a charitable deduction on the untaxed assets held in the account.
3. Should the BDF reference specific individuals, or a class of individuals? For example, if a client wishes to leave the proceeds from a life insurance policy to their nieces and nephews, should the BDF list each of their nieces and nephews, or state a class? Does

the client wish for any nieces and nephews born after the BDF is signed to be included in receiving the proceeds of the insurance policy?

4. Should qualified plan assets be left to a charitable remainder trust to endeavor to mimic the stretch IRA that has largely been obviated post-Secure Act for all by five eligible designated beneficiaries?

Relationship to Other Documents. Any BDF the client may have should be reviewed to coordinate them with the client's dispositive wishes established in their will and revocable trust. There have been situations where a BDF bequeathed retirement plan assets to a trust that may have been terminated or superseded. That could be problematic. If the BDF or the trust to which is has been designated to pass has not been updated to reflect the current laws, that should be addressed. Whether that means the BDF has a similar disposition, or has a disposition determined to be different for a specific reason, will depend on the client. In addition, if the client's power of attorney may provide the agent with the ability to change the beneficiaries under the client's BDF (assuming the plan will permit that). What power should the agent have? What if the agent is also one of several beneficiaries? Might the agent be restricted in lessening the economic interests other beneficiaries have under the plan unless they consent? For example, if the client determines they wish to have specific provisions in their BDF that may benefit charities or individuals beyond their children, does the client want their agent to be able to make changes to that customized plan in the BDF?

Special Circumstances that May Affect the Document. In many situations people sign BDFs for ordinary bank and brokerage accounts in addition to their retirement accounts, life insurance policies, etc. In certain situations, this arrangement way work fine for the client, and provide the benefit of avoiding probate without having to prepare and fully fund a revocable trust. However, it also may be a disaster as then those funds avoid the dispositive plan established in the client's will or revocable trust and may not pass in the manner the client wishes. In addition, assets passed in this manner are typically passed outright, and not in the trusts that may be established under the client's Will or Revocable Trust to protect their heirs. Often these important considerations are overlooked, or simply not addressed because the client does not inform the practitioner of the steps taken, which may lead to disputes following the client's death. Advisers also must collaborate and coordinate. If the BDF directs assets to a trust formed under the clients estate planning documents and the attorney updates those documents without communicating to the wealth adviser who had maintained the BDFs for the client, problems may ensue.

Deeds and Other Documents of Title.

Description. Similar to the discussion of BDFs above, discussing deeds for real estate, ownership of bank accounts, investment accounts, may not be seen by a client as a traditional discussion for estate planning. However, these documents can be just as imperative to review for the effects they have on the client's estate as a BDF. If a client jointly owns a real estate with their spouse, their spouse may receive that property on death and the trust or other provisions under the client's will that were intended to govern could be obviated.

Decisions for a Client to Consider. When determining how to title an asset, consider the following:

1. Often a client will own their personal residence jointly with their spouse. In some states, if the tenants by the entirety form of ownership is available, owning the property in such a manner may provide a measure of asset protection during both spouse's lifetimes. However, after the first spouse's death the property will pass outright to the surviving spouse. The property at that point will be exposed to the creditors of the surviving spouse, and if the surviving spouse were to remarry could be reachable by the new spouse in the event of divorce. Practitioners can consider discussing with clients if they have any particular concerns that may warrant the administrative burden of having a portion of the residence, or other asset, being held in a trust.
2. Does the client own real estate with anyone other than their spouse? For example, what if the client owns half of a property, along with their sibling, that their parent currently lives in? Is that property ownership structured in a way that their half of the property will pass to their family, or will the client's sibling receive the client's share by operation of law on the client's death? Which option would the client prefer take place? Similar considerations should be made for any investment properties that the client may have with partners. In such family ownership arrangements is their even a governing document confirming the intent? What about appropriate property, casualty and liability insurance? Should the property be held in an entity, such as a limited liability company ("LLC") to reduce contain liability exposure?
3. Some clients add a child, such as the caregiving child, as joint owner of a bank or investment accounts so that the particular child can assist the client with bill paying and other financial matters. If a child is added as a joint owner on an account with significant assets, and that account is a that may change the intended dispositive plan. When the client dies, the child would receive the funds in the account outright, exposing those assets to the child's creditors or ex-spouse in the event of divorce. If the client attempts to equally divide funds between their children and avoid probate by naming their children as joint owners on separate accounts (i.e., if the client has three children, establish three accounts and name each child as a joint owner on one account) and one of the client's children uses those joint funds during the client's lifetime to support the client, the child that helped their parent the most would then receive a smaller inheritance for their efforts. There are a myriad permutations of the scenarios clients can create to accomplish reasonable goals that professional advisers could much better assist with. Too often the professional advisers do not discover the "arrangements" the client has created until after the fact. Sometimes this is done as the client may not imagine the complex ramifications that some steps might create, or in other situations because the client believes they are saving professional fees by handling what they view as simple matters on their own.
4. Practitioners should consider guiding a client as to the ramifications that such a "simple" designation can cause. Collaboration of all advisers can be valuable to identifying some of the self-created "plans" a client might have so that corrective steps might be taken.

Relationship to Other Documents. The title to the client's various financial accounts should be coordinated with their dispositive estate planning documents, as well as any BDFs they may have, and any business operational documents (i.e., operating agreements, by-laws, etc.), as applicable. The goal is for the broad spectrum of documents that the client has, many of which they may not have even considered as important for estate planning, are cohesive in reflecting the client's intent.

Special Circumstances that May Affect the Document. Asset protection considerations for both the client and the spouse or other joint owner should be considered. Not only for after the death of the client, but if a judgment is entered against a joint owner, it may potentially negatively impact the client's ownership of the property or account. If a child is made a co-account owner and divorces, will the child's ex-spouse be entitled to a distribution from the client's assets?

Does the client have any beneficiaries with special needs or challenges? For example, if the client has a child that has a substance abuse problem, the client may wish to review whether any of their accounts are listed joint with that child, as when they pass it would directly provide that child with funds, potentially harming the client's child.

Conclusion. The scope of basic estate planning documents and steps a client may need is broad and fact specific to each client. While many clients will benefit from some of the same documents and planning steps, advisers need to consider each client's unique circumstances. For example, depending on the circumstances, some of the additional documents or steps to consider discussing with clients might includes:

1. If the clients might face an estate tax, especially after the reduction in the exemption in 2026, more advanced estate tax oriented planning may be warranted.
2. If the client lives in a high tax state, moving if feasible, non-grantor trusts into low tax jurisdictions might provide current state income tax benefits.
3. If the client is seeking to protect their assets from a future divorce, lawsuits, malpractice claims, etc. they might wish to implement one or more irrevocable trusts and perhaps entities, e.g., one or more limited liability companies ("LLCs"). Common planning is to have different assets owned by different LLCs and have the LLC ownership interests fractionalized between various trusts.
4. For a client who owns large life insurance coverage, they might want their policies held from initial purchase in an irrevocable life insurance trust (or gift a current policy, keeping in mind the three-year claw back rule, or sell the policy).
5. For a client with a family business, they might need a shareholders' agreement, buy sell agreement, by laws, key person insurance, and more.
6. If a client has a private foundation, they might need to file Form 990PF with the IRS, have a written conflict policy and more. It might also, especially for foundations whose size was never large or which declined over time, be worthwhile to consider terminating the foundation and instead relying on a donor advised fund ("DAF") as that might avoid costly legal and accounting fees, etc.
7. For a client with young children, grandchildren, or others they wish to benefit, they might want to set up a 529 college savings plan for them.

When one considers the myriad of aspects that need to be considered in crafting a plan for a client, it highlights that estate planning can rarely be "boilerplate" even if some components are commonly used. There is no "one size fits all" plan that will protect a client, their finances, their families and achieve their goals. The best way for these messages to be communicated, and for as many issues as possible to be identified, is for the client's advisors to collaborate.