MARTIN M. SHENKMAN & AMY C. O'HARA: HOLISTIC VIEW OF CO-COUNSELING WITH AN ELDER LAW AND SPECIAL NEEDS PLANNING ATTORNEY

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From: Steve Leimberg's Estate Planning Newsletter
Subject: Martin M. Shenkman & Amy C. O'Hara: Holistic View of Co-Counseling with An Elder Law and Special Needs Planning Attorney

It is vital for an estate planning attorney to collaborate with an elder law and special needs attorney to ensure comprehensive and holistic planning for clients. This collaboration leverages specialized knowledge to address complex issues such as long-term care, government benefits, and protection of assets for individuals with special needs or long-term care needs. By working together, attorneys can craft plans that not only manage the distribution of assets but also protect the future well-being and financial stability of elderly clients and those with special needs. This integrated approach ultimately provides clients with peace of mind, knowing that their unique needs and circumstances are thoroughly addressed and safeguarded.

Martin M. Shenkman and **Amy C. O Hara** provide members with commentary that examines whether and when to co-counsel with an attorney who focuses on special needs planning.

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Here is their commentary:

COMMENT:

When and How to Bring in a Specialist

When a client□s plan includes a beneficiary with disabilities the estate planning practitioner should consider whether to co-counsel with an attorney who focuses on special needs planning. The Rules of Professional Conduct 1.1 require an attorney to provide competent representation. □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□□ [i]

Practitioners must evaluate whether they have the competency to handle the matter at hand. If the estate plan is general with no known beneficiary with disabilities, as discussed below, there likely is no need to bring in another attorney with particular expertise. However, if the estate plan involves a known beneficiary with disabilities, the practitioner is ethically bound to determine whether they have the competency to fully represent the client with estate plan. In some instances, it may be essential while in other instances is may not. One challenge practitioners face is the pressure to generate billing may weigh against co-counseling with the required skills even if the attorney or firm handling the matter does not have the expertise. Caution is certainly in order.

Co-Counsel versus Referral

Shenkman Law□s practice, as a small boutique firm, is to routinely co-counsel on most of such matters. 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. 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.

The Flip Side of Bringing in a Special Needs Expert

Conversely, not all special needs planning counsel have the knowledge necessary to serve all of a client□s estate planning needs in that they may lack the ability to handle complex business succession, estate and gift tax planning, or other needs of the client. As such these practitioners must be recognizant of client matters that require them to bring in co-counsel.

Every Plan Should Incorporate Special Needs Planning

Most estate plans make no reference to special needs planning. Clients should consider special needs planning on two levels. First, many trusts are created to last for as long as state law permits. The trend has grown to create trusts in so-called trust friendly jurisdictions. These are typically viewed as any of the nineteen states and counting that have enacted self-

settled trust legislation. As part of that environment these states have extended the common law rule against perpetuities to longer or indefinite periods. The old-style trusts of paying out principal at specified ages is not recommended by many estate planning practitioners. Thus, if a trust is to last for one hundred years or more where there is no rule against perpetuities, special needs planning cannot be ignored. Statistics suggest that 4.3% of the under eighteen population in the United States had a disability in 2019.[ii] The prevalence of developmental disabilities increased from 7.40% in 2019 to 8.56% in 2021.[iii] 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.[iv] 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 reference the topic ensuring that any necessary reformation or modification of the irrevocable trust to better reflect the circumstances or then applicable law is clearly with the settlor's original intent.

Integrate Mechanisms to Facilitate Change to Supplemental Needs Provisions

The likelihood of clients moving to a different state that might have different special needs rules is significant, coupled with the fact that there is great uncertainty of where future descendants will live, it is imperative for modern trusts to provide as much flexibility as possible. For example, according to the United States Census Bureau, about 8.2 million people moved between states in 2022.[v]

There are several mechanisms that can be built into irrevocable trusts on a routine basis to assist with these matters. The trustee can be given express powers in the instrument to decant. That avoids the issue of whether or not state law decanting provisions may suffice. If the

trustee decants, it can be used to modify supplemental needs provisions, change governing law and situs, etc. Further, consider empowering a trust protector to modify supplemental needs provisions in any instrument.

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.□[vi]
According to AARP and the United States Census Bureau, the U.S. population age 65 and over grew nearly five times faster than the total population over the 100 years from 1920 to 2020, according to the 2020 Census. The older population reached 55.8 million or 16.8% of the population of the United States in 2020. By 2030 20% of Americans will be age 65 or older.[vii] The U.S. Department of Health and Human Services (□HHS□) confirms that 70% percent of Americans turning age 65 will need some form of long-term care during their lifetime.[viii] It is estimated 6.7 million Americans are living with Alzheimer□s, with this number expecting to double by 2050.[ix]

Thus, it should be assumed that every client will either personally or have a family member 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 and their families, especially for clients of more advanced age.

A Common Gap in Special Needs Planning

A common error in special needs planning is neglecting to address the risk of a parent-caregiver becoming incapacitated. This is a heighted issue because 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 caregiver disability poses an enhanced risk in these circumstances. This issue is often overlooked. 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

At the core of documentation to protect the aging or infirm client living with or facing a potential disability should be a robust revocable trust. While all practitioners are familiar with revocable trusts, in many cases they are not used, with the plan relying on merely a durable power of attorney. Many of the revocable trusts plans that are used are quite standard and not tailored to address many of the aging or health challenges of the client.

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. However, this is increasingly not reality. The family unit has disintegrated and spread geographically. Clients are outliving family members were to be named in such capacities. For example, by age 85 women will outnumber men by 4 to 1. As a result, planning for the elderly will focus largely on the unique perspectives and concerns of elderly women whose husbands have predeceased them. Female life expectancy in the U.S. has increased from 78.0 years in 1985 to 80.2 years in 2022, and male life expectancy increased from 71.0 years in 1985 to 74.8 years in 2022.[x] In 1985 the gap between female and male life expectancy was 7.0 years; this narrowed progressively, beginning in 2002, to only 4.6 years in 2010. But in planning terms that is still a potentially significant time gap.

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. A modem revocable trust can provide a technique to build an incredible safety net to ensure proper future fiduciary appointments . This requires rethinking, not only of the office of trustee but also of other steps, as explained below.

It is often assumed that aging clients can rely on their children to provide care as they age. The statistics suggest otherwise. In 1950, 78% of families consisted of a married couple. By 2010 that figure had declined to merely 48%. The married family with children, the presumed paradigm for most estate planning discussions, was the norm in 1950 with nearly half, or 43%, of families fitting that description. By 2010 only 20% of families could be described as married with children.

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 fifty has doubled, and more than doubled for those over the age of 65. The trend has become so pronounced that it has been dubbed "silver divorce." Although a revocable trust does not provide protection from the claims of a client's former spouse, it can serve as an inexpensive tool to segregate premarital, gift and inherited assets from marital assets and thus reduce the risk that a spouse might succeed in a claim to those assets under state law. Retaining assets under trust name, and under a separate trust tax identification number rather than the client's Social Security Number, may serve to maintain the integrity of the immune nature of those assets.

Aging: There are seventy-five 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% of

the population by 2030. Every day since 2011 more than 10,000 people have turned age 65. Making the two, three or more decades of post-retirement life these clients will have as secure as possible can be helped by a properly structured revocable trust plan. The fastest-growing demographic cohort in the U.S. is single women aged 85 and over. For these older clients, this planning is even more important. Planning for these later years or decades of life is referred to as later life planning.

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. A modem revocable trust can help address the challenges of these later years.

Identity Theft: Identity theft has grown significantly in recent years. It seems that a major government agency or corporation regularly announces that its database has been hacked and confidential information stolen. In many cases identity thieves use Social Security Numbers to unlock illicit access to client assets. Using a revocable trust with a distinct tax identification number might make it more difficult for a criminal to pilfer accounts.

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. A common tool used in committing elder financial abuse is the ubiquitous power of attorney. In many cases after the agent has made transfers or payments, it is uncertain whether the principal intended those transactions or not. When the agent's actions were inappropriate, redress is often impractical or impossible. Creating a broader-based and more comprehensive plan may offer the needed protection, not only for the vulnerable or isolated client but also for all clients. This is important to consider because there is

no certainty as to which client will become vulnerable, or when.

Case Study in Elder Abuse: A New York power of attorney/elder financial abuse case illustrates the challenges that aging clients face. In this particular case, the agent closed out multiple Totten trust accounts (so cash deposits in the decedent's name passed under the will to different beneficiaries); sold property that was specifically bequeathed under the decedent's will; paid for the renovation of one of the agent's homes; and paid herself compensation for her services as agent Although the court noted that an agent must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing, not all actions of the agent were undone.[xi]

What can be done differently to protect the client/principal? A modern revocable trust with the checks and balances discussed later in this article may have prevented the abuse by the agent in the above case, abuse that was not fully redressed in the case.

A modern revocable trust can help protect clients as they age. It can protect them from elder financial abuse and identity theft, all while keeping the client in maximum control of his or her financial and legal decisions.

Drafting Considerations for A Robust Modern Revocable Trust

To more broadly address the evolving and riskier circumstances facing the aging client, relying on a mere durable power of attorney may not suffice, nor might a simple or common revocable trust without further tailoring. Consider the following:

Trustee Selection: The traditional revocable trust often names the client as sole initial trustee and a child or other individual as successor. A modern revocable trust should take 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 in the modern revocable trust. The law treats a revocable trust as a will substitute.[xii] As a result, the remainder (successor) beneficiaries cannot obtain an accounting or otherwise 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.[xiii] The state of the law makes it difficult for interested parties to protect the settlor and their wishes. This is contrary to the application of revocable trusts to safeguard aging or infirm clients.

Build in Safeguards for the Settlor/Client: What if a settlor is incompetent? Perhaps an interested party, trust protector or remainder beneficiary can request that a court appoint a guardian to raise issues on behalf of the settlor, but this is cumbersome, costly and takes time. Furthermore, the current trustee of the settlor's revocable trust may well expend trust assets to convince a court that they should be so named or that there is no basis to name a guardian.

Proactive steps should be taken when planning and drafting a modern revocable trust to address this shortcoming in the law and thereby ensure that while a settlor/beneficiary is alive but "fading" that protections are in place. Consider an institutional trustee or co-trustee, a CPA in a formal role as monitor, and especially naming a trust protector to serve in a fiduciary capacity. This latter step is a significant and vital change in the application of a modern revocable trust. 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 reduce the liability the person serving as trust protector faces. But the analysis in the context of a revocable trust to protect an aging and infirm settlor may be different and suggest a different status and structure for the protector.

Consider an Institutional Trustee: The growing importance of addressing later life planning should be reflected in a more detailed discussion as to who should be named trustee and the structure of the fiduciary positions in the trust. The typical default approach of simply naming the client as sole initial trustee is often 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, which are most difficult.

If the client is already paying a wealth manager based on a percentage of assets to professionally manage his or her portfolio, the incremental cost of having an institution manage assets and serve as co-trustee may not be significant. It is preferable to have an institution appointed before problems occur. If the client agrees with the concept of naming an institutional trustee but prefers not to have the institution serve until necessary, the risks of "passing the baton" can be reduced by consolidating assets with that institution now before the need to transition becomes critical.

As a client ages, is it really fair to impose the responsibility of paying bills and handling other administrative tasks on a family member, assuming that the client even has one capable of these tasks? Too often clients do not evaluate the time and responsibility imposed on a family member by tasks that might be better handled by a professional trustee. Is it really appropriate to burden a family member with investment decisions? Has the client realistically considered the burdens all this will place on a loved one? Paying bills, investing and other fiduciary tasks are often not so simple.

Even assuming a family member has the knowledge to make investment decisions, if there are other heirs, there is liability exposure. Saddling one heir with investment decisions could create significant exposure. Many individual trustees do not adhere to the processes and procedures that institutional trustees have to comply with under the Prudent Investor Act and other trust formalities. Helping an aging client understand the additional safeguards that an institution can bring, the potential to eliminate issues that might cause family strife, and the reduction or elimination of burdens and responsibilities for heirs may create comfort with what might be a better approach.
A bank or trust company can, with proper planning, provide for significant services and benefits to an aging, infirm or isolated client. An institution can assist not only with investment management but also with financial forecasting to ensure that the client's financial goals will be met, maximize assets to be bequeathed to intended heirs, and also help with many other aspects of that client's finances, such as bill paying, credit card management, and more as is appropriate for any particular phase of the client's aging, incapacity, or disease.

The family members who traditionally might have been named as a successor trustee might then serve in the capacity of trust protector as discussed later in this article. This approach can transform the protective features that a revocable trust can provide to an aging, infirm or at-risk client. This can retain family, friends, or others in vital fiduciary positions, reduce the responsibilities and demands that they face, and better

protect clients. Individuals serving as a trust protector with the unfettered right to terminate and replace the institutional trustee provide a powerful check and balance on any institutional trustee, and this mechanism alone may resolve the concerns that some clients have over naming an institution.

Client With Chronic Illness Serving as Trustee: A simple conclusion might be to avoid naming any client with chronic illness as a trustee from inception with appointing another to serve. While this can certainly protect the client and avoid the complexity of understanding the client□s personal challenges, it misses a fundamental principal of planning for clients with chronic illness. The illness itself disempowers the client. Practitioners should strive to make the estate planning process empower the client, not further disempower them by removing decision making and control that the client may still be able to exercise.

Selecting a trustee is a decision process which all estate planning practitioners are familiar with, but there are nuances to consider when planning for clients with chronic illness, and the nuances vary depending on the particular disease, and the stage of that disease the client is currently experiencing. Many practitioners draft revocable trusts with the client as the sole initial trustee. However, for a client living with a chronic illness the likelihood of future disability requiring a successor trustee may be so great that the mechanism to pass the baton to the successor becomes critical to the protection of the client. Often the transition can best be handled by having a co-trustee serving from inception with the client. But the analysis must consider the particular disease course.

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. Further, often the client living with dementia is not aware that they are not making prudent decisions and acting in their best interest. Thus, prudence might suggest a co-trustee at minimum who can have the unilateral power to remove the client as trustee. 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 be 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 be able to resist demands that may be made during these periods by the client whose money the trustee is charged with protecting.

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: Integrating a care manager provision into a revocable trust can provide important safeguards for aging or infirm clients. Care managers are typically social workers, registered nurses (RNs) or comparable service professionals. 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 understanding of the client's wishes. Care managers can be knowledgeable about the resources available to the client and the economic impact of the care required over time. Care managers can coordinate the experts in

different specialties so as to 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. In addition, care managers can assist in ensuring that the client receives eligible benefits. In particular, a modern 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.

Trust Protector: Trust protectors have become more common in recent years, but primarily in the context of complex irrevocable trusts. Applying the trust protector concept to a revocable trust can create a vital check and balance for aging or infirm clients and counter the legal issues of a lack of standing to challenge a trustee discussed above. A family member or friend might serve as co-trustee to mitigate some client's worries over the perceived impersonal nature of a corporate trustee. In this capacity the friend/family member's ability to undermine the security of the plan is protected by the policies and procedures of the corporate trustee so that this approach may be much safer than merely naming a friend or family member as sole trustee. Naming a trust protector (and successor) to monitor the institutional trustee and to have the right to remove and replace that institutional trustee provides balance in the other direction.

In some instances, it might be advisable to limit the trust protector's replacement power to solely naming a successor institutional trustee to avoid the risk of the protector appointing himself or herself or someone who will do his or her bidding, thereby undermining the safety of the client's plan. Also, consider having a CPA or attorney named as a monitor to receive regular reports

and to report any issues identified to the corporate trustee and trust protector.

Trust Assets: Many revocable trusts are structured as standby trusts with little or no current assets transferred to them. For clients living with chronic illness this may or may not be the appropriate approach.

In most cases, if the client is living with heart disease, diabetes, Parkinson□s disease, or other chronic illnesses the client may be capable of long-term management of his or her assets so that a revocable trust that is largely unfunded might be reasonable. In contrast, if the client has bi-polar disorder, it might be prudent to not only fund the trust, but to carefully limit and control the assets outside of the trust to minimize financial damage during a manic period.

Many chronic illnesses are marked by flare ups or attacks. These can result in periods, perhaps days or weeks long, when it is impractical for the client to handle his or her financial affairs due to the impact of disease symptoms or as a result of a short-term hospitalization. COPD, Crohn□s disease, multiple sclerosis or other chronic illnesses may be marked by episodic attacks. In these instances, if the client will require assistance with financial, legal, and other matters a co-trustee or successor trustee can handle, funding the trust with at least sufficient assets to facilitate management during these periods is advisable.

Distribution and Related Provisions: If a client is unable to serve as a trustee, but has the competency to establish a revocable trust, undoubtedly, he or she will want input as to distribution provisions. For many clients there may be express wishes relating to their health challenges that should be incorporated into the revocable trust as binding directives or as precatory language depending on the circumstances and relationship to the trustees. For many clients facing the challenges of chronic illness their house is more than a home, it is a refuge and sanctuary from a world that is far less accommodating than most of us think. Their home may reflect years of ongoing renovations at much expense and personal effort to make it as comfortable and safe as possible. For these clients, an express

directive to retain the home and facilitate the client□s continuing to reside in the home may be a priority.

For practically every disease there is a charitable organization dedicated to serving those living with that illness. Many clients might wish to authorize charitable gifts to such organizations, especially to fund research to find a cure for the disease they struggle with. The purchase of gift annuities that benefit a particular charity may be something desirable to the client but which the prudent investor act and a lack of authorization for a trustee to make contributions could prevent.

For a client that faces the challenges of bi-polar disorder it might be empowering for the trust to expressly direct the trustees to fund a small dollar account outside the trust that permits the client to access funds via credit card, debit card, check or ATM. This can enable the client to conduct his or her personal affairs similar to anyone else and generally unencumbered by the fact that most or all assets are held in a trust with another person serving as trustee. But should the client have a manic period, the damage that can be done will be limited since the account is limited and not in the name or tax identification number of the trust. If the client reasonably spends down the funds the trustee can regularly replenish them.

Gifts: It is common to include a provision authorizing the trustees of a revocable trust to consummate gifts to effect estate tax minimization or other goals, including Medicaid planning, if applicable. While there may be no particular difference in how such a clause is drafted for the chronically ill client, consideration should be given to having an elder law attorney and care manager create a care plan for the client that can be incorporated into the client□s budget and financial plan, so that the appropriateness of gifts can be determined. Using standard budget assumptions may dangerously underestimate costs. Also, the impact of the client□s health challenges on longevity should be considered.

Settlor/Grantor□s Disability: Disability clauses must be treated with particular care. In many instances a client may be deemed disabled under various definitions of the term when the revocable trust is executed. Thus,

the operation of the disability clause would be oxymoronic in that the grantor/client may execute a document for which he or she is already disabled. A common and simplistic approach to defining disability could be based on something like: □The Grantor shall be deemed to be disabled when Grantor is unable to manage Grantor's affairs and property effectively.□ Revising or at least tailoring the clause may be essential.

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. This 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 significant 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.

If the grantor who is living with a chronic illness is to serve as a co-trustee consideration should be given to authorizing either co-trustee to conduct routine bill paying and banking transactions alone and without the requirement for action of the co-trustee. This will enable the co-trustee to handle the client□s trust matters during a flare up, or other period of difficulty.

Merger Clauses and Change in Situs: For clients particularly concerned about asset protection or state taxation, or for wealthy clients who have formed inter

vivos irrevocable trusts in trust friendly jurisdictions (e.g., Nevada, South Dakota, Delaware, or Alaska), revocable trusts can provide another important planning benefit. Trusts formed under a will, testamentary trusts, are formed under the laws of the client's home state and by the action of the client's home state court. It can be more difficult to move a testamentary trust to a better jurisdiction. In contrast, trusts for heirs created under a modern revocable trust should not require the action of the client's home state courts and can specify in the trust agreement that the laws of a better state will apply. This will be particularly useful if a client has trusts with merger provisions so that after death the trusts formed after the client's death can more readily be merged into the existing irrevocable trusts in the trust friendly jurisdictions. This same planning might be useful to move a trust formed at death of the client to a lower tax state.

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.

Financial Aspects of Disability Planning for Wealthier Clients

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: Our 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. Long term care insurance companies are routinely increasing premiums. It is important for the elder law attorney to evaluate rate increases with clients. In experience, clients, without proper advice will often decrease their inflation rider, or other options, which can be at a great detriment to the coverage when a claim is made on the policy, especially if they client can afford to keep their existing coverage.

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 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.

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 two 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.[xiv]

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. The 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 at 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?

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.

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 takes over bill paying and other administrative functions as the client's health fades or simply as the client becomes frail, automated financial records is invaluable. 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 institutional 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

It is vital for an estate planning attorney to collaborate with an elder law and special needs attorney to ensure comprehensive and holistic planning for clients. This collaboration leverages specialized knowledge to address complex issues such as long-term care, government benefits, and protection of assets for individuals with special needs or long-term care needs. By working together, attorneys can craft plans that not only manage the distribution of assets but also protect the future well-being and financial stability of elderly clients and those with special needs. This integrated approach ultimately provides clients with peace of mind, knowing that their unique needs and circumstances are thoroughly addressed and safeguarded.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Martin M. Shenkman
Amy C. O'Hara

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