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Subject: Marty Shenkman & Sandra Glazier on the Lack of Coordination in Estate Planning Documents & the Potential for Best Laid Plans to Go Awry

"Planning for aging (and incapacity) requires more than just the traditional preparation of a Will, durable power of attorney ('DPOA'") (and perhaps a revocable trust). The multitude of fiduciary and quasi-fiduciary appointments clients make, almost entirely without professional input, can create conflicts and inconsistencies in the administration of the client's affairs. Practitioners can provide great assistance to their clients when they expand the scope of their inquiry and client discussions to address issues relating to such appointments and the importance of coordination of fiduciaries named under primary legal documents. Doing so can forewarn the client of pitfalls that could undermine the safeguards the planning team is endeavoring to create. As estate planning remains extremely relevant in implementing client desires, it's important for practitioners to evolve and consider a broader range of practical, non-technical, considerations that can make our services beneficial to all spheres of client echelons.

Agency relationships can be created in a myriad of ways. Some come about formally via specific nomination in an instrument, while others result from a repose of trust and authority in less formal ways. It's not uncommon for "checklists" to cue us to ask who the client wants as their personal representative, trustee, agent under a general durable power of appointment, medical proxy and perhaps as trust protector, but have you considered as part of the planning process who will: (i) be empowered to make funeral arrangements; (ii) be the representative for receipt of social security benefits; (iii) have access to the client's safety deposit box; (iv) be designated as long term care insurance lapse designee; (v) have access to their tangible personal property and important documents and records; (vi) be the successor "owner" under 529 accounts; or, (vii) act as guardian or conservator for a minor or developmentally disabled adult child?

The practical advice is for planners to proactively address these issues with the client and add them to their checklist as a reminder to guide clients to coordinate and consider their potential ramifications. Clients often think they're 'covered' simply because an issue is addressed in one of the documents you draft (or perhaps they've downloaded from the internet). But, just because a document indicates something doesn't mean it's intended effect won't be undone or undermined by other documents or actions. Going the extra mile to discuss these issues can help the client to better understand the considerations and import of choices they make during the estate planning process and beyond."

We close the week with commentary by **Marty Shenkman** and **Sandra Glazier** on the lack of coordination in estate planning documents.

Martin M. Shenkman, CPA, MBA, PFS, AEP, JD is an attorney in private practice in Fort Lee, New Jersey and New York City who concentrates on estate and closely held business planning, tax planning, and estate administration. He is the author of 42 books and more than 1,000 articles. Marty is the Recipient of the 1994 Probate and Property Excellence in Writing Award, the Alfred C. Clapp Award presented by the 2007 New Jersey Bar Association and the Institute for Continuing Legal Education; Worth Magazine's Top 100 Attorneys (2008); CPA Magazine Top 50 IRS Tax Practitioners, CPA Magazine, (April/May 2008). His article "Estate Planning for Clients with Parkinson's," received "Editor's Choice Award." In 2008 from Practical Estate Planning Magazine his "Integrating Religious Considerations into Estate and Real Estate Planning," was awarded the 2008 "The Best Articles Published by the ABA," award; he was named to New Jersey Super Lawyers (2010-15); his book "Estate Planning for People with a Chronic Condition or Disability," was nominated for the 2009 Foreword Magazine Book of the Year Award; he was the 2012 recipient of the AICPA Sidney Kess Award for Excellence in Continuing Education; he was a 2012 recipient of the prestigious Accredited Estate Planners (Distinguished) award from the National Association of Estate Planning Counsels; and he was named Financial Planning Magazine 2012 Pro-Bono Financial Planner of the Year for his efforts on behalf of those living with chronic illness and disability. In June of 2015 he delivered the Hess Memorial Lecture for the New York City Bar Association. His firm's website is www.shenkmanlaw.com where he posts a regular blog and where you can subscribe to his free quarterly newsletter Practical Planner. He

sponsors a free website designed to help advisers better serve those living with chronic disease or disability which is in the process of being rebuilt: Chronic Illness Planning

Sandra D. Glazier, Esq. is a partner at **Lipson, Neilson, Cole, Seltzer and Garin, P.C.** in its Bloomfield Hills, Michigan office. An attorney for more than 35 years, she is known for her expertise and successful track record in probate litigation, estate planning, trust and estate administration, and family law matters. The cases she works on tend to be very complex and require technical as well as legal expertise. Sandra has represented contestants and proponents of estate planning documents, as well as fiduciaries, in significant trust litigation proceedings. An AV-Rated attorney, Sandra is also a “Super Lawyer” in probate litigation and rated a “Top Lawyer” by DBusiness in the areas of probate, estate and family law. Sandra has had numerous articles published by some of the legal industry’s leading publications. In addition, Sandra has presented on estate planning and probate litigation related topics for the ABA, Notre Dame Tax and Estate Planning Institute, Kansas City Estate Planning Symposium, Michigan’s Institute of Continuing Education, Oakland County Bar Association, Wayne County Probate Court, Wilmington Trust’s New York Trust Symposium and the Bloomberg BNA Estate and Gift Tax Advisory Board. Sandra also taught "Valuation for Federal, Estate and Gift Tax Purposes" in a Masters level course.

Here is their commentary:

EXECUTIVE SUMMARY:

In 1786 Robert Burns wrote his insightful poem commonly referred to as “Mousie.” In it he reflects that upon plowing his fields he undoes the foresight of mice who unfortunately built their nest in Burns’ field. He pens the oft used phrase that “the best laid plans of mice and men often go awry.”[1] In the realm of estate planning, a lack of coordination in the designation of agents, assets and/or beneficiaries frequently causes even the best laid plans to go awry. While subsequent changes to designations made by a client may be beyond our control, attention to the potential difficulties arising from conflicting directions and designations of agents may be a discussion worth having. At least the client who is “forewarned is forearmed.”[2]

Generally, clients come to us with some general, or perhaps even specific, ideas of how they wish to dispose of their property upon death. As part of a comprehensive approach to the client's estate plan, it's incumbent upon us to ask who they want to be responsible for administering those assets, not only upon death but also in the event of incapacity. Because the issue of asset management and control can fall under the auspices of different fiduciaries, consideration of who they will be and how they might interact and relate can be extremely important. Creating a comprehensive plan for clients often goes beyond simply drafting estate planning documents.

Planning for aging (and incapacity) requires more than just the traditional preparation of a Will, durable power of attorney ("DPOA") (and perhaps a revocable trust). The multitude of fiduciary and quasi-fiduciary appointments clients make, almost entirely without professional input, can create conflicts and inconsistencies in the administration of the client's affairs. Practitioners can provide great assistance to their clients when they expand the scope of their inquiry and client discussions to address issues relating to such appointments and the importance of coordination of fiduciaries named under primary legal documents. Doing so can forewarn the client of pitfalls that could undermine the safeguards the planning team is endeavoring to create. As estate planning remains extremely relevant in implementing client desires, it's important for practitioners to evolve and consider a broader range of practical, non-technical, considerations that can make our services beneficial to all spheres of client echelons.

Agency relationships can be created in a myriad of ways. Some come about formally via specific nomination in an instrument, while others result from a repose of trust and authority in less formal ways. It's not uncommon for "checklists" to cue us to ask who the client wants as their personal representative, trustee, agent under a general durable power of appointment, medical proxy and perhaps as trust protector, but have you considered as part of the planning process who will: (i) be empowered to make funeral arrangements; (ii) be the representative for receipt of social security benefits; (iii) have access to the client's safety deposit box; (iv) be designated as long term care insurance lapse designee; (v) have access to their tangible personal property and important documents and records; (vi) be the successor "owner" under 529 accounts; or, (vii) act as guardian or conservator for a minor or developmentally disabled adult child?

Changes in asset titling and beneficiary designations can have a profound effect on even the best drafted plans. Do you have discussions regarding the import and potential ramifications of asset titling on the plans you've created? Have you discussed the impact of joint ownership, tenancy in common, accommodating party designations and beneficiary designations on the plans you crafted? Have you warned the client about the potential implications of signing documents at financial institutions that may have agency powers contained therein which conflict with those contained in the documents you've drafted? Importantly, have you discussed the ramifications of signing any document which contain language of revocation or otherwise modifies any form of prior agency designation created by the client? This consideration also applies to DPOA which we draft for clients. Perhaps they've executed a limited power of appointment with a financial institution, or over a life insurance policy, or in regards to a membership interest in a business endeavor, a global revocation of all prior financial powers of appointment might adversely impact the operation of those powers, which the client might wish to remain in effect.

The practical advice is for planners to proactively address these issues with the client and add them to their checklist as a reminder to guide clients to coordinate and consider their potential ramifications. Clients often think they're "covered" simply because an issue is addressed in one of the documents you draft (or perhaps they've downloaded from the internet). But, just because a document indicates something doesn't mean it's intended effect won't be undone or undermined by other documents or actions. Going the extra mile to discuss these issues can help the client to better understand the considerations and import of choices they make during the estate planning process and beyond.

COMMENT:

Authorized Signer on Safe Deposit Box

Who are the authorized signers on the client's safe deposit box? The bank application may have been completed decades ago and the client may not even recall who they authorized to have access to their box. If a former partner or former close friend is listed, or perhaps a child who is now alienated, what might the consequences be? If the box is jointly titled, will the co-owner be entitled to claim ownership of the box's contents? Will

important documents (such as list dispositions, Wills or other documents) disappear when the authorized signer decides they'd fare better if the client is found to have died intestate or without having designated an agent to act during periods of incapacity? Consider the implications to a now alienated child being listed as successor agent and a different child is named executor and charged with distributing personal tangible property on death. Will that property be there? Further, many clients do not list the details of tangible property in their wills or revocable trusts but rather provide general language authorizing an executor (or successor trustee of a revocable trust) to distribute property. In these situations, determining what the signer on the safe deposit box may have done versus the executor may be challenging. If the client/testator left a detailed list, and perhaps more so if that list was expressly incorporated by reference into the will, how might that impact the result if what is in the safe deposit box does not include valuable items on the list? What if there is both a list and scheduled property on the homeowner's insurance indicating the same property? Do your documents consider the possibility that items enumerated on the list and/or scheduled tangible personal property might be disposed of or gifted to another before the dispositive instrument becomes operative? Does the client wish for the bequest to adeem or is some form of replacement of the devise desired?

Social Security Representative Payee

The Social Security's Administration (SSA) has a Representative Payment Program that provides for financial management for a recipient of Social Security and SSI payments who is not capable of managing their Social Security or SSI payments. The SSA website states that "…we look for family or friends to serve as representative payees."[3] A representative payee completes the Representative Payee Accounting Report online. You must be 18 or older to complete the Representative Payee Accounting Report online.[4] An FAQ on the website contains the following:

> We try to select someone who knows you and wants to help you. Our main concern is that your payee is someone who can see you often and knows what you need. For that reason, if you live with someone who helps you, we usually select that person to be your payee. In most cases, someone who knows you asks us if he/she can be your payee. It may be a family member, a friend, a legal guardian or a lawyer. In some cases, social service agencies, nursing homes or

> other organizations offer to serve as payees. If you know someone you would like to have as your payee, tell a Social Security representative and we will consider your wish.[5]

There is no indication on the SSA website which reflects that the agent who was selected with the guidance of legal counsel will be the person named as “Representative Payee,” or that a DPOA is even considered in the evaluation. Nonetheless, specific reference in a DPOA that the agent nominated by the client is to also act as their “Representative Payee” for purposes of social security benefits may be helpful and instructive. If the client depends upon social security benefits to meet ongoing needs, a disconnect between the acting “Representative Payee” who receives the benefits and the agent under DPOA can be nettlesome.

Long Term Care Insurance

Long term care lapse rates are surprisingly high and the main cause is incapacity.[6] Generally, an insurer cannot cancel a policy for failure to pay premiums unless the grace period provided for in the policy passes and notice of the premium due is given. While traditionally the premium notice has been only sent to the insured, that has not proven sufficient to prevent large lapses in long term care policies. For example, an elderly insured might have mobility challenges or start experiencing cognitive issues before being diagnosed as having dementia, when presumably the policy would begin payment. The industry has responded by permitting the insured to designate someone as an alternate payee. Long term care insurance companies are now permitting policyholders to name a person who can receive notice if the premium has not been paid called a “lapse designee.” In some instances, the insurance contract itself may provide for the designation of a person to receive secondary notice before a lapse can occur. Some state laws require such a procedure. A review of some of the general terms of one such statute may assist practitioners in understanding and helping clients plan for this issue. For example, consider the Washington state statute:

Unintentional lapse.

As a protection against unintentional lapse, each issuer offering long-term care insurance must comply with all the following:

(1)(a) Notice before lapse or termination. No individual long-term care policy or certificate may be issued until the issuer has received from the applicant either a written designation of at least one person in addition to the applicant to receive notice of lapse or termination of the policy or certificate for nonpayment of premium, or a written waiver dated and signed by the applicant electing not to designate additional persons to receive notice.

(i) The applicant has the right to designate at least one person to receive the notice of termination, in addition to the insured.
(ii) Designation does not constitute acceptance of any liability on the third party for services provided to the insured.
(iii) The form used for the written designation must provide space clearly designated for listing at least one person.
(iv) The designation must include each person's full name and home address.
(v) If the applicant elects not to designate an additional person, the waiver must state: "Protection against unintended lapse. I understand that I have the right to designate at least one person other than myself to receive notice of lapse or termination of this long-term care insurance policy for nonpayment of premium. I understand that notice will not be given until thirty days after a premium is due and unpaid. I elect NOT to designate a person to receive this notice."
(vi) No less frequently than once every year the issuer must notify the insured of the right to change this written designation or to add a lapse designee, if the insured has not already designated a lapse designee.[7]

The Washington statute permits designating successive agents. Perhaps you might recommend that the client consider listing the same person (and successors) which are nominated as their agent under their durable general power of attorney and in the same order. Should power of attorney forms include an express designation of the agent as the person to act for the principal's long term care policy as a designee? Will the insurance company accept that type of appointment? Will the effectiveness of designation depend upon whether the DPOA is an active one or springing in nature? What if the nomination in the DPOA conflicts with the person named under the insurance company form? Given the contractual nature of the designee on the insurance company's form, when a conflict between the nomination under the form and the DPOA exists, the power of the agent may be emasculated. Perhaps the checklist wealth advisers, attorneys and others use for an annual review meeting should include a question as to the status of this designee.

Agent for Funeral Decisions

Some states recognize or permit the appointment of an agent to control the disposition of a person's remains. Historically the right to make final arrangements and funeral decisions was within the purview of the executor or perhaps the decedent's spouse, children or other members of immediate family. In a mobile society, the inclusion of funeral directives in an estate planning document may conflict with the statutory regime provided for in the locale of death. A failure to consider the potential for conflict between formal designations and local statutory regimes can lead to battles over the body and significant conflict that impinges on the mourning process.

Some states have considered the cost and formality of creating a will, the fact that many consumers do not sign wills, and the cost and difficulty of changing a will if final wishes change. As a consequence, some states have attempted to provide for other alternatives. For example, New York's statute permits the agent to provide special directions for the decedent to be cremated, that the body be buried in a particular grave at a specific cemetery, or that a particular funeral home handle the final arrangements.[8] The New Jersey statute permits the appointment of a funeral representative in a Will, even if it has not yet been admitted to probate.

> NJSA 45:27-22 Control of funeral, disposition of remains.

a. If a decedent, in a will as defined in N.J.S.3B:1-2, appoints a person to control the funeral and disposition of the human remains, the funeral and disposition shall be in accordance with the instructions of the person so appointed. A person so appointed shall not have to be executor of the will. The funeral and disposition may occur prior to probate of the will, in accordance with section 40 of P.L.2003, c.261 (C.3B:10-21.1). If the decedent has not left a will appointing a person to control the funeral and disposition of the remains, the right to control the funeral and disposition of the human remains shall be in the following order, unless other directions have been given by a court of competent jurisdiction:

(1) The surviving spouse of the decedent or the surviving civil union or domestic partner; except that if the decedent had a temporary or permanent restraining order issued pursuant to P.L.1991, c.261 (C.2C:25-17 et seq.) against the surviving spouse or civil union or domestic partner, or the surviving spouse or civil union or domestic partner is charged with the intentional killing of the decedent, the right to control the funeral and disposition of the remains shall be granted to the next available priority class as provided in this subsection.
(2) A majority of the surviving adult children of the decedent.
(3) The surviving parent or parents of the decedent.
(4) A majority of the brothers and sisters of the decedent.
(5) Other next of kin of the decedent according to the degree of consanguinity.
(6) If there are no known living relatives, a cemetery may rely on the written authorization of any other person acting on behalf of the decedent.

For purposes of this subsection "domestic partner" means a domestic partner as defined in section 3 of P.L.2003, c.246 (C.26:8A-3).”

In 2016, Michigan changed its statute regarding who was presumed to have authority to make dispositive arrangements of a decedent’s remains. A review of the statute reflects various conflicts that can still arise even when a Funeral Representative is nominated. Michigan Compiled Law § 700.3206, provides in pertinent part that:

(1) … a funeral representative designated under subsection (2), a person with priority under subsections (3) to (5) **or** a person acting under subsection (6), (7), (8), or (9) is **presumed** to have the right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body, including, but not limited to, decisions about cremation, and the right to retrieve from the funeral establishment and possess cremated remains of the decedent immediately after cremation. . . .

(2) Except as otherwise provided in this subsection and subject to the priority in subsection (3), an individual 18 years of age or older who is of sound mind at the time a funeral representative designation is made may designate in writing another individual who is 18 years of age or older and who is of sound mind to have the rights and powers under subsection (1). All of the following apply to a funeral representative designation under this subsection:

> (a) . . .[A]n individual who is named in a funeral representative designation to have the rights and powers described in subsection (1) is known as a funeral representative and an individual who makes a funeral representative designation is known as a declarant.
>
> (b) A funeral representative designation under this subsection must be in writing, dated, and signed voluntarily by the declarant or signed by a notary public on the declarant's behalf . . . **A funeral representative designation may be included in the declarant's will, patient advocate designation, or other writing.** If a funeral representative designation is contained in an individual's will, the will is not required to be admitted to probate for the funeral representative designation to be valid. A funeral representative designation must be 1 or both of the following:
>
> > (i) Signed in the presence of and signed by 2 witnesses. A witness under this section may not be the funeral representative or an individual described in subdivision (c)(ii) to (iv). A witness shall not sign the funeral representative designation unless the declarant appears to be of sound mind and under no duress, fraud, or undue influence.

(ii) Acknowledged by the declarant before a notary public, who endorses on the funeral representative designation a certificate of the acknowledgment and the true date of taking the acknowledgment.

***

(3) The following have the rights and powers under subsection (1) in the following order of priority:

(a) If the decedent was a service member at the time of the decedent's death, a person designated to direct the disposition of the service member's remains according to a statute of the United States or regulation, policy, directive, or instruction of the Department of Defense.

(b) A funeral representative designated under subsection (2).

(c) The surviving spouse.

(d) Subject to subdivision (e), the individual or individuals 18 years of age or older in the following order of priority:

(i) The decedent's children.

(ii) The decedent's grandchildren.

(iii) The decedent's parents.

(iv) The decedent's grandparents.

(v) The decedent's siblings.

(vi) A descendant of the decedent's parents who first notifies the funeral establishment in possession of the decedent's body of the descendant's decision to exercise his or her rights under subsection (1).

(vii) A descendant of the decedent's grandparents who first notifies the funeral establishment in possession of the decedent's body of the descendant's decision to exercise his or her rights under subsection (1).

(e) If an individual described in subdivision (d) had the right to dispose of the decedent's body under subsection (1), but affirmatively declined to exercise his or her right **or failed to exercise his or her right within 48 hours after receiving notification of the decedent's death**, the individual does not have the right to make a decision about the disinterment of the decedent's body or possession of the decedent's cremated remains.

(4) If the individual or individuals with the highest priority as determined under subsection (3) cannot be located after a good-faith effort to contact and inform them of the decedent's death,

> affirmatively decline to exercise their rights or powers under subsection (1), or fail to exercise their rights or powers under subsection (1) within 48 hours after receiving notification of the decedent's death, the rights and powers under subsection (1) may be exercised by the individual or individuals in the same order of priority under subsection (3). . . . For purposes of this subsection only, "exercise their rights or powers under subsection (1)" means notifying the funeral establishment in possession of the decedent's body of an individual's decision to exercise his or her rights or powers under subsection (1).
> ***
> (10) An attempt to locate a person described in subsection (3) or (4) is sufficient if a reasonable attempt is made in good faith by a family member, personal representative, or nominated personal representative of the decedent to contact the person at his or her last known address, telephone number, or electronic mail address.
> (11) This section does not void or otherwise affect an anatomical gift made under part 101 of the public health code, ...
> (12) An individual who has been criminally charged with the intentional killing of the decedent shall not exercise a right under subsection (1) while the charges are pending.
> (13) Except as otherwise provided in this subsection, **a person who has the rights and powers under subsection (1) and who exercises the right over the disposition of the decedent's body must ensure payment for the costs of the disposition** through a trust, insurance, a commitment by another person, a prepaid contract under the prepaid funeral and cemetery sales act, . . . or other effective and binding means. **To the extent payment is not ensured under this subsection, the person described in this subsection is liable for the costs of the disposition.** ...[9]
> Emphasis added. Internal citations omitted.

If the decedent was under guardianship at the time of death and didn't have a conservator (perhaps because the existence of a DPOA obviated such necessity), and the guardian has possession of money of the deceased ward (perhaps. because they are the SSA Representative Payee), a proceeding in the guardianship proceeding may occur with regard to burial expenses.[10] Could such a proceeding impinge upon the executor's general ability to determine reasonable burial expenses?

Clearly, even with statutory innovations intended to clarify burial authority, conflicts can still arise. Some advisers have suggested crafting a document separate from the last will and testament to address funeral and other last arrangements. That independent document could designate the person named in the will as the agent for these purposes. The document might also summarize the client's/decedent's wishes for any final ceremony, internment, etc. One commentator has suggested providing copies of a signed, witnessed and notarized funeral agent designation to the funeral home and others. While such advice is logical, consider the potential for conflicts. Perhaps the client wants his grieving 2nd spouse in charge of funeral arrangements, but not his finances or estate, what happens when a child from his first marriage appointed as executor or successor trustee disagrees with the funeral arrangements and costs associated therewith? Many if not most health proxies and living wills address last rites, ceremonies, funeral, cremation and other matters.

Does it make better sense to designate the funeral representative in a care proxy? That agent may well be empowered to make organ donations or even donate the body entirely for medical research. What if the care proxy and funeral separate funeral instrument conflict?

Consider whether the Will or a separate funeral instrument will be readily available and accessible to the persons who may need to make funeral arrangements within religiously or statutorily imposed short time parameters. Consider the potential for family strife (or even litigation) when a surviving spouse or child in good faith makes funeral arrangements only to find out after contracts have been entered that they lacked the authority to bind the estate because a different individual was appointed to act as funeral representative. What if the client (or the representative) wishes costly last arrangements? Does the agent or funeral representative have the authority to commit funds to funeral arrangements which the agent selects or does the authorization of that expenditure (and the determination of what is reasonable) still lay in the hands of the executor? If the financial aspects of the funeral arrangements remain within the purview of the executor, should the funeral direction indicate that the representative coordinate approval of expenditures with the executor (or trustee) or does the client wish the directives of the representative to be binding upon the estate (or trust)?

General Durable Power of Attorney

A DPOA generally designates an agent to handle legal, tax and financial matters. Some powers are drafted to become effective only when the client becomes disabled (i.e. springing powers). However, because of the problems of demarcating exactly when someone is “disabled” or the refusal of some financial institutions to recognize “springing powers” which aren’t presented to the institution during their client’s capacity, it may become more common for powers to be drafted to be effective when signed. This avoids the complications for the agent of proving disability but, perhaps, creates more potential conflict with the other appointments noted in this article or with actions which the client would rather reserve unto him or herself during capacity. The agent under the power may have overlapping or conflicting roles with the successor trustee under the client’s revocable trust (see discussion below), the designee under the client’s long term care policy, the Representative Payee for Social Security, the health care proxy and others.

Accounts with Financial Institutions

Accounts with financial institutions can present another source of conflict and confusion. When a client opens an account, often clerks encourage joint accounts, pay on death (“POD”), transfer on death (“TOD”), or other variations, to avoid probate. Too frequently clients open accounts at financial institutions which are convenient to them without consulting with their lawyer or other financial advisers. An elderly or infirmed client may be accompanied to the financial institution by a child, friend or care provider, whose been helping the client pay bills. Without knowledge of accommodating party accounts, the client may select to put that individual on the account as a joint tenant so that they might continue to pay bills during the client’s incapacity or immediately following death, without understanding the contractual rights and statutory presumptions created thereby. Even if the financial institution permits accommodating parties, or otherwise permits agents to act on a client’s behalf, they may require that the client utilize the institution’s own limited power of attorney. Care should be exercised to assure that such forms not operate to revoke or override other DPOAs and vice versa. If an account is opened in the joint name with another individual who is not the agent under the DPOA, how might that impact the agent’s ability to act? If a client has accounts that are denominated as POD or TOD, or joint with rights of survivorship, and funds are used out of one account, resulting in a disparate inheritance when the

client dies, what might the impact be? Might there be an inference that the agent inappropriately favored using one account over another thereby shifting, perhaps undermining, the client/principal's dispositive scheme? Some states require agents (such as conservators) to inventory and account for jointly held, POD and TOD accounts during the course of conservatorship proceedings.[11] They may require the conservator to respect the ultimate dispositive plan to the fullest extent possible.[12] Do such conservatorship directives represent public policy statements that might be found impact agents exercising authority under a DPOA? Even if the account titles do not themselves create a conflict in agent authority, if not properly planned they might create other difficulties.

529 Accounts can be an effective way for parents and grandparents to provide tax beneficial treatment of earnings utilized for certain educational expenses. Effective use of the client's annual gift exemption (via front end loading of the exemption) can be implored when funding such accounts, but these accounts actually represent a revocable gift. As such, an agent (or successor owner) may easily deviate from, or otherwise alter, the planned use of such funds by the intended beneficiary. Joe Hurley opined in 2006, that:

> When you fill out the enrollment application for a 529 plan you are asked to name a successor or contingent account owner. This is an important decision. If you were to die or become legally incapacitated, the successor account owner assumes all rights and responsibilities for the 529 account. The successor can be, but does not have to be, a spouse. (A very small number of 529 plans permit spouses to establish the account as joint owners.)
>
> For most 529 plans, the rights assumed by the successor include the right to request a refund of any or all account assets (subject to tax and penalty on the earnings). So, it's easy to see why your decision should not be made lightly. Consider the unfortunate situation where the money you intended to be spent on your child's or grandchild's college education was instead used by your successor as the down payment on a West Palm Beach condo.
>
> Also, be sure you understand what happens if you die without a successor. Even if you name a successor on your enrollment form, it is possible that the individual you name will not be available to take

> on that role because of their own death, incapacity, or simple refusal to accept the role. Read the program rules or call the 529 plan's toll-free number to ask about its procedures. In many, but not all, 529 plans, the beneficiary (or the beneficiary's guardian if the beneficiary is still a minor) is named the account owner by default.[13]

How many practitioners have heeded his call for attention and caution when engaged in estate planning where 529 accounts are involved? Also, consider similar issues for a 529A or ABLE account for a blind or disabled individual.

Revocable Trusts Create Potentially Further Issues

With an aging population, more isolated and vulnerable seniors, and for a variety of other reasons, it may become more common for clients to name institutions as successor trustees on a revocable trust to manage financial and other affairs as the client ages or grows infirmed. Corporate trustees are loath to assume the role of agent under a durable power; the practical consequence is the client may name a friend, family member, neighbor, attorney or other as agent under a DPOA and a corporate trustee as successor trustee under a revocable trust. As the client ages, what are the relative responsibilities of the individual agent under the DPOA and the successor trustee (or co-trustee) under the revocable trust?

Corporate trustees are increasingly named as successor trustees under client's revocable trusts and this will likely evolve into a growing trend. This can be a prudent step, and an approach that will provide more professionalism and safeguards (assuming that the corporate trustee performs as required). Will the relative roles merely depend on who has title to which assets? That seems to be an inadequate analysis as both the agent and successor trustee have overlapping responsibilities under the language in many trusts and powers of attorney. Both are often charged to provide for the principal's lifestyle and care. Is it reasonable to ever maintain that the corporate trustee has abrogated its authority or responsibility to the agent under the power of attorney? It would seem that most if not all clients who designate a corporate trustee are doing so with an intent that there be a level of independent corporate oversight on the principal's finances or why else would an institution be named. Further, if institutions almost uniformly refuse to serve as agents under a power of attorney, might the fact that an individual is serving as agent

contemporaneously with an institution serving as successor trustee perhaps suggest that the client/principal/trustee was merely left with no choice in designating an individual as agent even though they were seeking corporate professionalism for their finances? Might the relationship between an individual agent and corporate successor trustee be viewed more correctly as one akin to co-fiduciaries if the lines of responsibility based on the governing instruments overlap sufficiently? Might the interpretation of the relationship in part depend on the express language in each governing document relating to the relationship? For example, if the power of attorney contains express language authorizing the agent to modify or revoke the revocable trust might that suggest that the agent's power is paramount? On the other hand, consider the situation of a standard form power of attorney that includes a standard provision permitting the principal to check a box permitting the agent to modify or revoke the trust, but that box was not checked. Perhaps that might suggest that in fact it is the corporate trustee whose power should be paramount. What if the power of attorney includes the specific power to amend the client's revocable trust, but the trust doesn't authorize modification or revocation by an agent and instead reserves such rights solely to the settlor or individuals named within the trust instrument? Could this conflict give rise to litigation regarding the extent of the agent's power and the client's intent?

Another consideration may be which fiduciary has authority over tangible personal property, the corporate or other trustee under the revocable trust or the agent under the durable power of attorney? If the assets were transferred to the trust then perhaps the trustee has authority; if not, perhaps then solely the agent has authority.

For many people, retirement plan assets (an IRA, 401(k), etc.) make up the largest part of their estates.[14] What should be done with respect to retirement account assets? If the client's intent was for the institutional trustee to manage all finances but the agent is a different individual, might the individual's actions with respect to retirement assets impact the institutional trustee's functioning as successor trustee under the revocable trust? Might the agent's action even impact the ultimate disposition of this significant asset (whether via a rollover of the account to a different institution, withdrawals, or change of beneficiary if authorized under the DPOA)?

Healthcare Proxies, Living Wills, Medical Powers of Attorney and Other Such Directives

It's not uncommon for individuals to name a different person to act as agent under a medical durable power of attorney, healthcare proxy or living will (collectively "medical directive"). A different skill set may be required to make medical decisions than those handling finances. The child who can't balance a checkbook, may be the one who's most attune with the client's wishes and end of life considerations or most likely to carry them to fruition. Not every person has the wherewithal to "pull the plug". But what happens when the agent under a medical directive decides the client should stay home and contracts for services as authorized under the medical directive but the trustee or agent under a DPOA believes payment of such expenses is unreasonable; whose opinion/decision prevails? Might including a clause similar to the following mitigate these issues? "If I have executed a separate financial Power of Attorney form or document appointing any person or entity to serve as my financial agent or attorney in fact, I request that my Agent appointed herein cooperate with such financial agent, and keep such financial agent reasonably advised of expenses incurred, or likely to be incurred, in connection with my health care and related matters by my Agent under the powers granted in this Health Care Proxy."

Guardianship and Conservatorship Considerations for Minors and Developmentally Disabled Adults

While practitioners might consider the need for the appointment of a guardian or conservator for the client's minor child(ren) or developmentally disabled adult child, do they consider which document might best serve as the appointment vehicle and the potential that such a designation may be ineffective? If the client is divorced, his or her nomination may be eviscerated by the survival of a minor child's other parent, particularly if the surviving parent's rights weren't terminated or otherwise suspended.[15] Consultation with a family law attorney may be an important aspect of planning where significant concerns about the ability of the other parent to provide care for the child exists. Even if no other parent is entitled to the care and custody of the child, if the minor is over 14, the child may have the right to nominate a different individual as their guardian or otherwise object to the appointment of the individual nominated by the parent.[16] If the child is a member of an Indian tribe, the Indian Child Welfare Act (ICWA)[17] and other statutes (e.g. the Michigan Indian Family Preservation Act, MCL

712B.1-.41, and 25 CFR 23.2) may impose limitations upon who might be appointed the child's guardian and where the child might be placed.[18]

Consider the child with developmental disabilities. The surviving parent of a minor with developmental disability may appoint a guardian in his or her will, who may immediately assume the powers of a parent upon death (whether or not the will is subjected to probate), but such appointment terminates upon the minor attaining the age of 18.[19] If the Will is submitted for probate, but rejected, the probate court is supposed to immediately revoke the testamentary guardian's letters of authority.[20] If the parent was appointed guardian when (or after) their developmentally disabled child attained the age of majority, they may nominate an appoint a guardian for that child in his or her will, provided a standby guardian is not otherwise designated (and able to act) under a court order.[21] Therefore, it may be important to review orders entered in the child's guardianship proceeding, in order to effectively coordinate appointments for the benefit of that child.

Whether the child is a minor or a developmentally disabled adult, even if the client has the operative power to nominate and appoint a guardian for the child, the court may still eviscerate the appointment if it finds that the nominated person is unsuitable or incompetent for the appointment.

Consider, however, whether the Will is the best place to address guardianship and conservatorship issues for a minor or developmentally incapacitated child. What happens if the parent becomes incompetent? In Michigan, MCL 700.5202(1) permits the parent of an unmarried minor to appoint a guardian for the minor in a will or **by another writing** signed by the parent and attested by at least 2 witnesses.[22] But what if the separate writing and Will both contain nomination provisions and they conflict? Clearly, coordination is important when a separate writing is utilized. The Reporter's Comment to MCL 700.5202, with respect to §5202(2), reflects that since 2005 the use of either a Will or separate writing will be effective as a nominating tool if the parent is incapacitated[23], but not every state may recognize a nomination contained in the Will of a still living parent who is incapacitated. The Reporter's Comments also reflect the ambulatory nature of Wills such that an appointment under a separate writing should also be treated as revocable, and either may be superseded by a later appointment in a Will or separate writing.[24]

Coordination and consideration of who will represent a minor or incapacitated child's interests under a trust or beneficiary designations is also important if attempts to minimize possible conflict are desired. While a surrogate, guardian or conservator may be nominated to act as the child (or incapacitated beneficiary's) representative under a trust or Will, the child's parent or a court appointed surrogate may have conflicting rights which might override certain provisions in your client's estate planning documents with regard to such representation.

Other Considerations

While space does not permit a thorough examination of all possible conflicts which might arise between fiduciaries under the multitude of estate planning instruments available, consider the following example:

What if the client named Child-1 as agent under a DPOA, Child-2 as lapse designee on her long-term care policy, a sibling as Representative payee for Social Security and a neighbor on another financial matter, a corporate trustee as successor trustee, and a 2nd spouse as agent under a Medical Directive. What happens in terms of managing the incapacitated client's financial affairs? What becomes of the potential conflicts of authority? Who makes which decision? Do these individuals even have the emotional capacity to effectively communicate and work cooperatively with each other?

The result of the various appointments and designations, often made without the benefit of guidance and coordination with any professional advisers, could become a disaster. Because there may be no coordination of the persons named in these various capacities it may be difficult to determine which agent or appointee has authority over which matter. Given how fractionalized, geographically dispersed, and dysfunctional families may be, the potentially lack of coordination and cooperation amongst agents could be for many a time bomb of financial confusion conflict, and litigation.

Gift provisions under durable POAs and Revocable trusts should be considered. Should gifts be precluded to minimize elder financial abuse? Should gifts be permitted to minimize state inheritance or estate tax? Should larger gifts be expressly authorized to facilitate planning and avoid a Powell[25] issue? Consider whether Medical Directives, DPOA's and Trusts

specify whose decision-making authority with regard to care expenditures should prevail, so that a specific delegation of authority is clearly delineated.

Consider what constitutes the best place to address a client's funeral preferences and the person authorized to take possession of and make arrangement for the disposition of the client's remains. Have you addressed the financial implications to a funeral representative of contracts entered pursuant to their appointment? Have you considered the potential impact of funeral arrangements made by the representative which the executor or trustee perceives to be unreasonable?

Are your clients forewarned and forearmed about the potential conflicts which might arise and the implications subsequent actions taken by the client may have upon the anticipated operation of well drafted estate planning documents? While this newsletter raises more questions than it may answer, the hope is that awareness and consideration of these issues will enhance communications with your clients since the "best laid plans of mice and men often go awry."[26]

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

Marty Shenkman

Sandra Glazier

CITE AS:

LISI Estate Planning Newsletter #2576 (August 24, 2017)
at http://www.leimbergservices.com

CITATIONS:

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[1] Robert Burns, "*To a Mouse, on Turning Her Up in Her Nest with the Plough,"* Kilmarnock volume, November, 1785.

[2] The saying is so straightforward in fact that it was originally simply 'forewarned, forearmed'. It is found in that form in Robert Greene's *A Notable Discovery of Coosnage (a.k.a. The Art of Conny-catching*), 1592: "forewarned, forearmed: burnt children dread the fire." http://www.phrases.org.uk/meanings/forewarned-is-forearmed.html.

[3]https://www.ssa.gov/payee/faqbene.htm, August 8, 2017.

[4] https://www.ssa.gov/payee/faqbene.htm, August 8, 2017.

[5] https://www.ssa.gov/payee/faqbene.htm, August 8, 2017.

[6] Hou, Sun and Webb, *"Why Do People Lapse Their Long-Term Care Insurance?"* Center for Retirement Research, October 2015, Number 15-17, page 1.

[7] WAC 284-83-025 http://apps.leg.wa.gov/wac/default.aspx?cite=284-83-025 , August 5, 2017.

[8] New York's Public Health Law § 4201.

[9] Michigan Compiled Laws (MCL) § 700.3206.

[10] MCL 700.5315(2).

[11] Under MCL 700.5419, the appointment of a conservator vests title in the conservator of all of the protected individual's property (or the part of the property specified in the order of appointment) held at the time of the appointed or acquired thereafter, "including title to property held for the protected individual by a custodian or attorney in fact.

[12] MCL 700.5428 directs that the conservator (and court) shall take into account the protected individual's estate plan as known to them, including a will, revocable trust of which the individual is settlor, and a contract, transfer, or joint ownership arrangement originated by the protected individual with provisions for payment or transfer of a benefit or interest at the individual's death to another or others.

[13] http://www.savingforcollege.com/top-tip/top-tip.php?top_tip_id=12. August 8, 2017.

[14] https://lsa.umich.edu/lsa/support-lsa/give-to-the-college/ways-to-give/planned-giving/retirement-assets.html. August 8, 2917.

[15] See MCL 700.5204(2)(a).

[16] See MCL 700.5203.

[17] 25 USC 1901 *et seq.*

[18] For purposes of the ICWA, guardianship is akin to foster care placement, when a child is to be placed with a person other than the parents or Indian custodian. See 25 USC 1903(1). In such proceedings, the child's tribe may be an interested party or otherwise permitted to intervene in the proceedings. See 25 USC 1911(c) and MCL 712B.7(6).

[19] See MCL 330.1642(1).

[20] See Michigan Court Rule (MCR) 5.406(B).

[21] See MCL 330.1642(2).

[22] MCL 700.5202(1). The Uniform Probate Code (UPC) §5-202 also provides for use of a separate writing witnessed by two witnesses as an alternative to nomination of the guardian in a Will.

[23] Reporter's Comment to MCL 700.5202, *Estates and Protected Individuals Code with Reporter's Commentary, January 2016 Update,* The Institute of Continuing Legal Education ©2010-2016, pp.358-359.

[24] Reporter's Comment to MCL 700.5202, *Estates and Protected Individuals Code with Reporter's Commentary, supra,* at p. 359.

[25] *Estate of Powell v. Commissioner of Internal Revenue,* 148 T.C. No. 18 (May 18, 2017).

[26] See "*To a Mouse, on Turning Her Up in Her Nest with the Plough," supra. fn*.2.