

private client services update

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PRACTICAL PREPARATIONS FOR CLIENTS PRUDENTLY PLANNING FOR THE RISK OF INCAPACITY

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Attorneys and other professionals in the private client (trusts & estates) area only too frequently see poor decision making by clients in their last years of life. And only too often, the results of these decisions are financially and otherwise catastrophic.

In planning, there is a built in tension between 1) wanting to have clients retain maximum control over their lives, with all of the independence and mental and physical stimulation that provides, and 2) protecting them and their assets, often from themselves. The best situation is when the client puts into place structures (planning, documents, asset titling) and teams (family and professional) while competent. The client then can stay the course with prior made decisions, with structures and teams available to gradually step into any voids created by the client's lessening ability to manage his affairs.

Of course, even with good structures and teams, clients are often in denial or fearful about their worsening condition when it actually arises and try hide such from their families and advisors. They are embarrassed, don't want to be a burden on their families, or fear losing their driver's license and the freedom to get around. Spouses are often surprisingly complicit in the cover-up. In addition, rare is the family without internal tensions, poor communication habits, sibling rivalry, etc., all of which typically come to the front when the parent cannot keep it all together by his or her moral and/or financial authority.

As advisors, the below is a checklist of items that might be helpful for our clients planning for this significant risk.

1) Have discussions and plan with the client while they are competent, can think rationally and dispassionately and can make decisions. This should most likely be done prior to a client reaching age 70. Due to the nature of the degeneration here, many clients can be competent and rational, but have lost the ability to make difficult decisions (this is often an early skill that is lost), and thus if you are too late, there can be lots of intelligent and thoughtful discussions, but nothing gets implemented.

2) Have in place thoughtful wills, trusts, powers of attorney and/or advance medical directives. As a reminder, powers of attorney are extremely powerful documents. The greater the level of assets, the more checks and balances are needed on the people granted power under any of these documents. Should power holders be required to account or at least show the check book activity periodically to another party? Should there be processes in place for the removal and replacement of a power holder that becomes abusive?

In addition, while this raises very difficult issues, contemplate whether an estate plan should be drafted to only be changeable with the consent of another party, preventing changes caused by bad actors exercising undue influence. These improper changes, often made on the edge of full incapacity, are often difficult, if not impossible, to undo once discovered.

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Thought needs to be given to how the family and professional teams will communicate, especially given medical and legal confidentiality issues. These groups will need a way to effectively and easily share information.

3) Due to the power of the computer, many clients now easily create (and annually update) very detailed lists of all relevant information an executor, trustee or power of attorney holder might need. Obviously, keeping this information private and out of the wrong hands is crucial.

4) It could be argued that now is the time to clean out all old, festering family wounds and communication pathologies. Soon enough the children will need to “become the parents” to their parents. Our clients, while they have the emotional energy and intelligence to do so, need to clean up their family’s inner workings first. A much more connected, loving and meaningful old age will result.

5) At an early stage, parents need to involve their children with their medical care and condition. Making it a habit for a child to go to the doctor with the parent while competent, makes it much more likely that the parent is unable to hide bad news when it comes. In addition, the children are able to ensure actual treatments recommended are fully and accurately implemented, as well as be strong advocates for their parents in the medical process.

6) Finally, having the client visualize and plan for a variety of scenarios helps take some of the unknown and fear out of aging. “If you had a major stroke tomorrow, what would you want to have happen?” “Where would you live?” “How would you get around if you cannot drive any more?” The plans help give the caregiver team both direction and the comfort that what is being provided is what the client actually chose while competent.

The potential for economically and emotionally stressful problems as part of the aging process is high. Many of these risks can be significantly ameliorated through thoughtful and thorough planning. Future articles will address 1) how to plan around and address these situations when you are trying to help the child of the parent making bad decisions, and then 2) looking at the brutal dynamics caused by the introduction of a black sheep family member or new love interest/second spouse with bad intent into the mix of a person with diminished capacity.



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