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Elder Law and Special Needs Planning

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Graying of America

- 55 million Americans over age 65
 - 25% of these people will live past 90
 - 10% will live past 95
- By 2050, over 65 population expected to increase to about 73 million
 - 10,000 a day
 - Fastest growing segment is age 85 and older
 - Over 6 million Americans diagnosed with Alzheimer's
 - By 2050, this number will triple
 - Capacity issues will increase in coming years due to demographics

Possible Causes of Diminished Capacity

- Delirium and confusion
 - May be temporary due to drug interactions, stress, trauma, alcohol, anxiety
- Mental illness
- Intellectual or developmental disability
- Physical illness or frailty
 - Vision, hearing, etc.
- Depression
- Dementia
 - Association of symptoms resulting in a decline in mental ability
 - 1 in 3 seniors dies with some form of dementia

Model Rule of Professional Conduct 1.14

- When client capacity to make decisions is diminished, maintain normal client-lawyer relationship, as far as reasonably possible
 - Client may be able to handle certain routine matters
- If lawyer reasonably believes client has diminished capacity, lawyer may take protective action
 - Appointment of guardian
 - Permitted; not required
 - Existence of diminished capacity
 - Risk of substantial harm, financial or otherwise
 - Inability to act adequately in one's own interest
 - Risk of "inaction"

Model Rule 1.14

- Information still protected by Model Rule 1.6
- When taking protective action, lawyer is impliedly authorized to reveal information about the client to the extent reasonably necessary to protect the client's interests
- ABA Op. 96-104
 - Disagreement with client's decision is not reason to take protective action
 - Does not mean client cannot act in his own best interest even if lawyer believes it to be an error in judgment

Defining Diminished Capacity

- Rule 1.14
 - No definition of diminished or diminishing capacity
- Wikipedia
 - Criminal law; defense to crime
- Merriam Webster Dictionary
 - Abnormal mental condition that renders a person unable to form the specific intent necessary for the commission of a crime
- Cambridge Dictionary
 - Condition in which someone's mental state causes them not to be in full control of their actions

Defining Diminished and Diminishing Capacity

- Diminished Capacity – commonly accepted concept – an individual whose intellectual abilities are impaired because of illness, condition, or injury such that the person lacks the ability to make informed financial, medical or personal decisions
- Diminishing Capacity – harder to define – someone who is exhibiting signs of impaired decision-making but who in the opinion of the attorney/advisor could make informed decisions regarding financial, medical or personal matters

Determining Diminished Capacity

- Model Rule 1.14 (comment 6)
 - Client's ability to articulate reasoning leading to a decision
 - Variability of state of mind and ability to appreciate consequences of a decision
 - Substantive fairness of a decision
 - Consistency of a decision with the long-term commitments and values of the client
 - May be temporary or treatable
- In appropriate circumstances, lawyer may seek guidance from an appropriate diagnostician
 - When to seek guidance

ACTEC Commentaries Rule 1.14

- Lawyer who represents a competent client in EP matters should provide client with information regarding documents and strategies client could employ to protect his interests in the event of diminished capacity
- Authorization to communicate to designated parties concerns re: client's capacity
- Testamentary capacity
 - No capacity; lawyer should not prepare will
 - Borderline capacity; importance of testamentary freedom; lawyer may assist
 - Preserve evidence re: capacity

Capacity

- Capacity to hire attorney
 - Speak with client alone
- Capacity to complete the legal transaction
- Capacity to terminate attorney/client relationship
- For existing clients – review of historical decisions, family considerations and changes
- New clients – far more challenging

Process

- Identifying Diminished or diminishing capacity
 - Legal or medical determination?
 - Different standards for different documents
 - Testamentary capacity
 - Donative capacity
 - Contractual capacity
 - Capacity to execute a durable power of attorney
 - Health care directives
- Guardianship
 - Presumption of capacity
 - Burden of proof

Process

- Common sense approach
 - I know it when I see it
 - Avoid ageism stereotype
 - Would you come to same conclusion if client was 55 instead of 95
 - Avoid value judgements
 - Bad judgment not the same as lack of judgment
- Mini-Mental State Exam
 - ABA/APA handbook lists several reasons not to use
 - Lack of training, over-reliance, false negatives and positives, lack specificity to legal incapacity

Malpractice Issues

- Decisions made later become “second guessed” by others
 - Failure to properly assess client’s capacity
 - Privity
 - Attorney owes no duty to beneficiary
 - Principle of privity has been eroded over the years by case law
 - Standard of care
 - Violation of rule 1.14 by failing to take protective action does not give rise to legal malpractice
 - Document process to determine capacity

Other Advisors

- Team of Advisors
- Client meets with each member of the advisory team independently and explains the changes made and reasons
 - Evidence in support of the client's desired outcome
 - Each team member documents the client's desired outcome
- Could help defend any attacks against estate plan
- Attorney/client privilege issues

Proactive Steps

Planning for possible future incapacity:

- Health care directives
 - Health Care Proxy/Health Care Power of Attorney
 - Living Will
- HIPAA Authorization
- Revocable trust
- Durable financial powers of attorney
- Trusted Contact Person
- No contest clause

Revocable Trust

- Incapacity of Settlor
- Removal of trustee for incapacity
 - Sensitive issue for clients
 - Difficult to confront one's own mortality or incapacity
 - Concern that a third-party will too quickly judge them incapacitated and they will lose control of their own assets
 - Who determines
 - Method to determine
 - Failure to cooperate
 - HIPAA waiver
 - Consent of co-trustee to modify trust

Powers of Attorney

- Modify existing trusts
- Modify testamentary scheme
- Gift-giving
 - Carry out or continue an existing plan
 - Implement new plan based on changes in law or circumstances
- Remove, replace or appoint trustees

No Contest Clause

Proactive provision utilized when a contest is or can be reasonably anticipated (whether there is a belief that the client has diminished capacity)

A clause in a will or trust that leaves a subjectively significant bequest to an individual with the caveat that if the individual contests the instrument in any manner the contesting individual will be completely or partially disinherited

ACTEC Chart

Enforceable

Unenforceable

Contest based on probable cause

Elder Law Planning

- Medicare
 - Parts A, B, C and D
 - Medigap policies
- Medicaid
 - Strict income/asset requirements
 - Rules vary by state
 - Look-back period
 - Penalty period
 - Caregiver agreement
 - Estate recovery
- Long-term care insurance

Trusts

- Revocable
- Irrevocable
- Testamentary
 - Support
 - Unfettered discretion
 - Intent of settlor
 - Pot trust
 - Shall v. may
 - Sole v. absolute

Special Needs Planning

- More than 60 million Americans living with a disability
 - Mental
 - Physical
 - 26% of U.S. population
- One in 6 children ages 3 to 17 have one or more developmental disabilities
- One in 50 children have autism

Special Needs Trusts

- First Party
 - Disabled as defined by SSA
 - Sole benefit
 - Medicaid payback
 - Under age 65
- Third Party
- Pooled trust
- Inter-vivos
- Testamentary
- Selection of trustee
- Retirement accounts

ABLE Accounts

- IRC Section 529A
- Tax-free growth
- Favorable treatment for government benefits
- State specific
- Onset of disability prior to age 26
- Annual \$15,000 contribution limit
- No federal tax deduction
- Qualified disability expenses
- Used in conjunction with SNTs

Beneficiary with Diminished Capacity

- Trustee role in protecting beneficiary
- Establishment of fiduciary arrangement when diminished capacity or disability is known to the testator/grantor
 - Fully discretionary trust or SNT
 - Maintenance of government benefit eligibility
 - Fear of mismanagement or misuse by beneficiary
 - Fear of ill-intentioned person taking advantage of compromised beneficiary

Beneficiary with Diminished Capacity

- Courts give deference to a trustee when they have followed their established processes and protocols. That can break down when diminished capacity enters the picture
- Courts sometimes substitute their own judgment when reviewing discretionary decisions
- Trustee unsure how their decisions will be measured and often are reluctant to make them without court intervention
 - Drafting issue
- Communication

Protocol for Communication

- Trustees need to make informed decisions
 - When a beneficiary lacks the capacity to communicate effectively, and there is no guardian or agent under power of attorney, or that person is not reliable, how can the trustee obtain information? How does the Trustee communicate and remain informed?
- Establish a communication protocol that includes:
 - the beneficiary if capable
 - guardian/agent if available
 - concerned family member/friend if appropriate
 - educators/program staff if available

For SNTs – Assessing Adequacy of Alternatives

- Should a trustee supplement or supplant an available good or service?
- Availability vs. adequacy and appropriateness
- Before using trust assets to supplement or supplant a government funded good or service, trustees should have a process in place to confirm what the program is providing and a means to document the beneficiary would benefit from something better/different