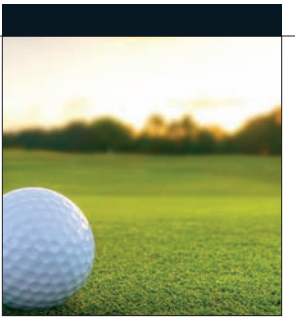

Prepare for the Growing "Risk" of Living Longer

As clients age, practitioners encounter more situations of diminished capacity complicating the implementation of estate plans.

CAROLYN ROSENBLATT

Amazing longevity as exists today is something of a new problem for those practicing law, particularly in estate planning. Law schools teach wills, trusts, and estates. They cover client confidentiality and loyalty. But no one teaches attorneys about the minefield of advanced age, the growing incidence of Alzheimer's disease and other dementias.

People are living longer than ever before in history, and this has created a problem for estate planners that is referred to as "the gray zone." This is the period between a client's complete capacity for all decisions and complete incapacity, particularly for financial decisions. Historically, any such gray zone was short, and the family could handle a member who was sliding downhill because usually the elder died sooner rather than later.

That has changed. With advances in science, medicine, and technology, people survive the things that used to take them earlier: heart attacks, strokes, and cancer. Living on and on has a downside every estate planner needs to consider carefully. The longer a client lives, the greater the risk of Alzheimer's or other dementia.

Attorneys may be thinking, so what? The will and trust are done. The couple's estate plan is all set up. Why is this the *attorney's* problem? The issue is that the standard estate documents do not account for slow deterioration of the trustee's mental capacity. With diminished capacity comes increasing vulnerability to poor and dangerous financial decisions and financial abuse.

CAROLYN ROSENBLATT is the author of *Working With Aging Clients: A Guide for Legal, Business, and Financial Professionals* (ABA, 2015) and a co-author of *Succeed With Senior Clients: A Financial Advisor's Guide to Best Practices* (www.aginginvestor.com). Ms. Rosenblatt is a registered nurse and elder law attorney in San Rafael, California, and has more than 45 years combined experience in her professions.

Common scenario

Imagine a couple in their 80s whose financial plan was done over 20 years ago. It contains language that specifies what happens when one of the trustees becomes incapacitated. Typically, incapacity must be verified by a doctor, two doctors, or a combination of someone else and the treating physician.

Although different lawyers draft these trusts in somewhat different ways, the provision about the trustee becoming incapacitated and having this verified is standard. What is wrong with that? It requires that the elderly individual, the trustee in question, has to go to the doctor and have his or her mental status verified. In the gray zone, an elder who is losing capacity often refuses to see a doctor. Then what?

Some lawyers believe that every client should be able to make every financial decision, even the worst decisions, because that is the client's right. That sounds fine in theory. But suppose the husband is devel-

oping dementia; his worried wife wants him to go to the doctor for an evaluation but he says he is fine and refuses to go. Is it alright for him to destroy their financial assets as his mental capacity declines? After all, he is still the trustee.

The focus is on what happens years down the road, after the plan is done and the typical couple begins to experience changes of aging that destroy the *capacity to safely perform as trustee.*

The dangers

If he is impaired for financial decision making, he can fall for Internet scams, get swindled, get taken by predators posing as charities, or get ripped off by unscrupulous family members who easily manipulate him. This leaves him and his wife destitute. If he truly could understand the consequences of the decisions he is making, he would never destroy his or his wife's security. These scenarios happen daily. The amount stolen from elders every year according to a recent study is over $36 billion.[1]

Practice tips. Estate planners need to anticipate the risk of diminished mental capacity for aging clients and prepare documents that build in protections when the elder refuses to be evaluated. One solution is to put a clause in the trust stating that the co-trustee could make a written request to the other trustee (in this case, her elderly husband) that he see his treating physician or any other doctor for a mental status evaluation. If he refused, the powers of trustee passed exclusively to the other trustee in 30 days.

An alternative is to include a provision calling for a committee of three people the client trusts to meet and jointly decide whether the client should step down as trustee, upon request by the co-trustee. No doctor is needed. This idea came from a client who figured that her committee would do better than a doctor who knew little about her daily life.

Surely other approaches will work with clients. Innovative drafting means breaking away from long-established habits of using boilerplate language in trusts and creating new provisions to accommodate the risks of a long stretch when a client is increasingly dangerous in the gray zone, still making financial decisions.

What level of capacity? Alzheimer's disease can last for as long as 20 years. At this time, medical science has not found a way to stop or slow the disease. Its insidious development brings up issues that can harm a client and his or her loved ones, as well as any plans the individual had for the estate. The trustee who develops this disease, if aware of it, typically tries to cover it up and hide the problem from those around him or her. There is a fear, if not terror of losing control over one's life. Some people who have dementia find it so painful to realize that they are losing their basic abilities that they remain in denial that anything is wrong. Some people with Alzheimer's do not even recognize that they have any problem at all. Should these impaired people be serving as trustees? Certainly not. Their judgment about the family assets they themselves control, sometimes totally, is sure to be impaired in the earliest stages of the disease.

Some attorneys do not understand well the difference between testamentary capacity and financial capacity. A client with brain disease can certainly have testamentary capacity, as the standard is relatively low for determining whether someone can make a will or trust. The focus here is not on whether a person is capable of creating an estate plan with the attorney. The focus is on what happens years down the road, after the plan is done and the typical couple begins to experience changes of

[1] *The TrueLink Report on Elder Financial Abuse 2015* (True Link Financial, January 2015), page 25, available at www.cambiahealth.com/sites/default/files/resources/whitepapers/The True Link Report on Elder Financial Abuse 2015_0.pdf (last visited on 11/7/2016).

aging that destroy the *capacity to safely perform as trustee.* The usual trust or will typically assumes that a trustee who becomes incapacitated by brain disease or any other damage to cognition will gracefully go to the family doctor and be evaluated when asked. Or the trustee will know he or she has a problem with his or her thinking and will seek a doctor's evaluation.

The assumption continues that the trustee, being told by the physician that there is a problem with capacity, will accept this and agree to no longer serve, or will willingly step down as trustee because the doctor thinks it's time. Or somehow, the family will have that trustee "declared incompetent" and that will end the impaired person's reign as trustee. The doctor is supposed to do this at the client's request, or at the family's request.

These imagined scenarios are not at all realistic for clients whose thinking becomes compromised. They may not realize that they are impaired and tell the family they feel fine. Maybe they do in fact feel well. Dementia itself does not make a person "feel sick." Rather, it quietly, invisibly, and relentlessly attacks brain cells and destroys their connection to pathways that enable clear thinking and judgment. The client experiences memory loss and those around him or her make excuses such as "she's just getting old" or "old people get forgetful, don't they?"

The trustee's spouse or family members may fear upsetting the elder who is losing capacity. They may fear being cut out as a beneficiary if they suggest that the older person resign. They may hesitate to try to stop an incompetent trustee even when they know her judgment is gone because they do not want to "disrespect" the elder.

The client does not want others saying that anything is wrong with him or her. The client does not perceive any reason to see a doctor. If he or she does see a physician for a medical issue, such as high blood pressure, the client may spend five minutes with the physician, who quickly asks if the medication is still effective or needs to be changed. The doctor makes a note in the record and is out the exam room door. Even if a family member is somehow able to corral the doctor and ask if he or she will give a statement as to whether the patient just seen is incapacitated, the doctor may decline to offer this opinion.

The appropriate kind of doctor to make a determination of mental capacity (for purposes of deciding whether someone should still serve as trustee) is a neurologist. Unless there is a good relationship with a physician who knows the patient well and is willing to commit to the opinion that the person just examined no longer has capacity to handle finances, the family may not be able even to get an opinion or statement to that effect.

Some neurologists refer to psychologists, who are the only licensed professionals permitted to do neuropsychological testing. Those tests, typically a set of two, three, or more

kinds of measuring tools, offer objective data that can substantiate an opinion as to the person's ability to handle finances or not. And some physicians, perhaps out of fear of reprisals, loyalty to a patient known for decades, or other reasons, simply will not say that the patient is incapacitated.

Lawyers need to be aware of unwittingly exposing a client or the client's loved ones to the risks associated with brain disease and dangerously diminished financial decision-making ability.

The idea of protecting a client from abuse in removing him or her as trustee by requiring that the client go to a doctor is reasonable. Asking for a mental status evaluation, getting a statement or even sworn declaration that the client is incapacitated is on its face a good measure. But it is also replete with assumptions, barriers, and pitfalls. If the incidence of cognitive impairment were not so widespread and longevity did not have such an impact in our society, things could continue as they used to in the past. But now, times have changed. We have a recurring problem with uncooperative elders who are living long enough to become cognitively impaired and dangerous to their families' financial wellbeing if remaining in the trustee's seat.

Lawyers are supposed to anticipate risks that lie ahead and plan for them. The risk of the appointed trustee not willing to see a doctor for evaluation of capacity is one of them. Estate planners need to plan for it.

Lawyers need to be aware of unwittingly exposing a client or the client's loved ones to the risks associated with brain disease and dangerously diminished financial decision-making ability. Lawyers are there to help clients plan ahead and protect what they have. Evolved thinking on this will get the job done better. It is not evolved thinking to simply leave every trust with the same provision in it that every client who is a settlor of a trust will act competently and safely as a trustee into advanced age. Nor is it evolved thinking to fail to build into the trust fallback positions to cover the situation of a trustee's refusal to do what is needed to protect the trust assets. Families do not understand all of this either. They need lawyers to help themselves avoid decimation of their assets by demented decision makers who are too impaired to do the trustee job any longer.

Estate planner's role

The problems with longevity present new challenges for the estate planner. Any wise lawyer has to figure out how to solve the individual client's anticipated future problems. What can the estate planner do?

Lawyers should consider reviewing all the trusts they have drafted for clients who are now age 80 or older. Why age 80? One could pick any age, but the risk of Alzheimer's disease doubles approximately every five years after age 65. By the time an individual reaches age 85, the odds of having Alzheimer's are at least one in three. Look at trust provisions for what happens in the event of incapacity of the trustee in those trusts for those older folks. Lawyers should ask themselves these questions:

1. What if the client refused to go to the doctor for a determination of incapacity? Consider including a requirement in the trust document that the trustee undergo periodic medical evaluations. It also may be prudent to discuss the risks with the client and come up with some alternatives.
2. What if the trustee did have dementia? Consider who could be harmed by decisions made by a trustee in an impaired condition. Also consider what planning measures have been taken for the possibility that the individual refuses to resign as trustee–and how the trust can better address this problem.

Perhaps no one wants to face the possibility of becoming cognitively impaired. But lawyers have to help clients keep their estates safe by actually planning for the clients' possible mental decline. This must go beyond the "go see a doctor" thinking. That is just too outdated to work in every case. Over 5.4 million people are currently diagnosed with Alzheimer's disease in our country. That number is expected to rise dramatically as Baby Boomers age. People with dementia can get very stubborn and resistant. They cover it up, deny it, or do not realize their own impairment. Lawyers must adjust to this reality. Best practices call for greater creativity in professional trust draftsmanship.[2] ■

[2] For a more comprehensive discussion of issues that arise in representing older clients, see Rosenblatt, *Working With Aging Clients: A Guide for Legal, Business, and Financial Professionals* (ABA, 2015).