

## Focus FAMILY LAW

# Don't neglect planning for mental capacity changes

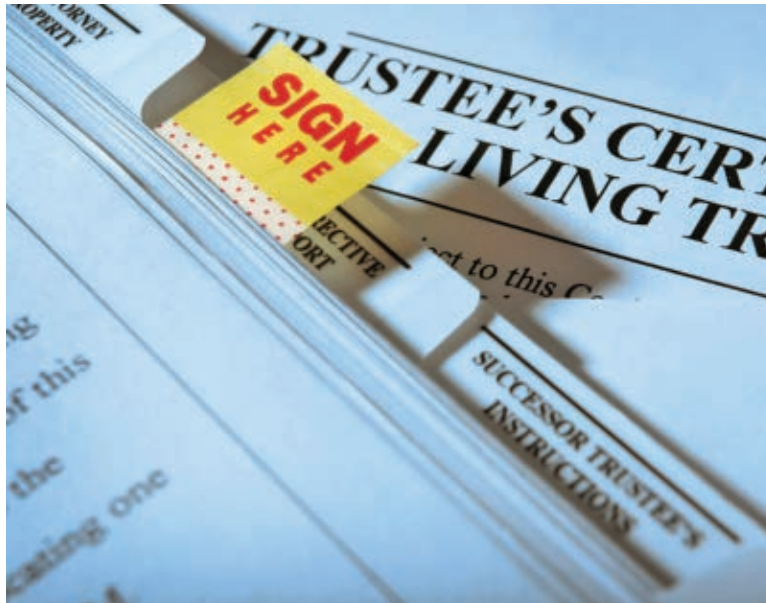


Joanne Stewart

Charlie worshipped Ginger. They started living together when they were in their 70s. Charlie's first wife, Dolly, had died when he was 68. Before Dolly died, Charlie did estate planning. The house, the cottage and the cash were put in a trust for Dolly's benefit during her lifetime and then for the benefit of their adult children. At age 80, Charlie had an aneurysm that marred his brain function. His adult children took over his care, kicked Ginger out of the house (that the trust owned), and cut off the money. They loved Charlie, but they hated Ginger, and with the powers of attorney they had for Charlie and the fact his assets were largely "theirs" through the trust, they had control and Ginger was homeless and broke, neither of which Charlie wanted.

As the population ages, plans put into place years ago for family, tax or estate planning can lead to unforeseen and unimagined consequences.

In another scenario, Tom was 84. His housekeeper, Sue, was 55. Tom married Sue. They travelled the



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world. Then Tom had a stroke. Mentally sound, but physically frail, Tom needed a full-time attendant, which Sue would not be. The romance died. Tom was left on his own. Sue travelled. Tom paid the bills. Tom worried Sue might ditch him. To protect his wealth, before he married Sue, Tom transferred all his property but \$100,000 to his adult children with the deal they would loan him money as long as he wanted. He wrote a will leaving what he had to Sue, showed her the will, and gave her powers of attorney over his personal care and property. She wouldn't stand for

less. Tom's next stroke left him mentally incapable. Legally, Sue took over, assuming she would have millions to manage. Within weeks, Sue was furious to find how little money Tom had, and she would have on his death. Sue moved Tom into the cheapest nursing home she could find. Outraged, Tom's adult children sued to take control of Tom's health care.

Family lawyers know that lack of mental capacity is not limited to seniors. Sarah, 58, has a 42-year old boyfriend by the name of Gil. After a head-on car crash, Sarah had a brain injury that left her feeling the

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“love” for every one she met. She had no children, two siblings, no will, no powers of attorney, and \$3 million she'd earned on the sale of a start-up. Sarah's love was so great that she started to freely make gifts as random acts of kindness: \$100,000 each to 12 of Gil's cousins in 12 days, and \$500,000 to Gil. On day 13, her siblings panicked. Sarah had to be stopped before she went broke and they had no idea what to do, especially since Gil said he was taking control as her “spouse” and would “manage” her and her money.

The common threads in these stories is that lack of good planning leads to bad results, and unplanned-for loss of mental capacity creates havoc.

Charlie planned on Dolly dying last when he did the trust and powers of attorney, but she died first, as a result of which he lost control and power, and with marred brain function he could not protect Ginger.

Tom outsmarted Sue when he gave away what he had before he married her, but he outsmarted himself when he gave her powers of attorney, which she misused, putting his well-being in jeopardy and forcing his “kids” to the expense and effort of taking her on legally.

Sarah left herself vulnerable to being exploited when she made no plans at all, allowing Gil to potentially be a predator boyfriend who would use her then lose her.

As advisors, we need to ensure our clients understand potential consequences of their planning that could lead to situations they would never have wanted for their spouses, children, other beneficiaries or themselves. Some suggestions:

■ Employ an estates lawyer and a family law lawyer, and ask them to work together.

■ Consider the use of a trust settled while still alive. But use it carefully. If it's done, like Charlie, the client will no longer own what goes into the trust.

■ Consider who, in the event of loss of mental capacity, should have power of attorney for property and for personal care. Consider an independent person or persons, not a relative, who will not benefit on the client's death or incapacity.

■ Consider whether a domestic contract is a good planning tool. It can provide for events while together, on separation, death, loss of mental capacity. It can overrule a will, so a will should at least match, or be more generous.

■ An effective domestic contract needs full financial disclosure. Will the client make it?

■ Is a will more beneficial to a spouse than a domestic contract? Can the person(s) with the power of attorney for someone who has lost mental capacity try to trigger a separation or divorce to minimize the money paid out?

It's important to explain to clients that “loss of mental capacity” is tough to prove. It's okay to be knowingly foolish, like Sarah. And just because Charlie's brain function was marred does not mean he lost mental capacity.

Our clients need to know that a person's autonomy will only be rejected in the clearest of cases. Of course capacity may come and go; however, as long as the person in question had capacity at the “time,” that's likely good enough. Capacity may also be issue-specific—the person understands one task, but not another, and that's not considered loss of capacity for the particular task.

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## Survey: Most respondents not asked to testify

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of confidentiality with a child. All lawyer respondents indicated that they respect children's requests that statements be withheld, but a significant portion of mental health professionals stated that they might disclose information in their reports even if the child requested that it not be disclosed.

Most respondents indicated that they have never been asked to testify about their written reports. Respondents generally believe that these reports are influential, as reflected in the comment that “[judges are] very receptive to the reports and consider them to be a real value in making decisions.” Mental health professionals indicated that their reports can also help parents to better understand the perspectives and needs of their children: “the report can assist parents in being child focused.”

Policies need to be developed to establish a more consistent approach to the reports. Both parents should get the same clear instructions prior to the commencement of the process; they

should be warned not to pressure or coach their child before the meeting, or to “debrief” the child afterward, and should be instructed on how to prepare their children for the meeting and explain why it is taking place. There is also a need for confidentiality policies as practices vary widely, particularly between lawyers and mental health professionals. We believe it is preferable to offer the child the choice about what will be included in the final report. Protecting the confidentiality of the children's statements to interviewers is likely to encourage frank dialogue and allow children to participate in the crafting of language on sensitive issues. Further, disclosure of information contrary to a child's expressed wishes may harm a child's relationship with a parent.

These reports can be a useful, expeditious and cost-effective way of engaging children in justice processes, allowing their perspectives to be shared with parents and dispute resolution professionals, including lawyers, judges, and mediators. However, there must also be

awareness of the intrinsic limitations. Views of the Child reports may not reveal the true views of children who are subject to parental pressure or manipulation, or whose views may be changing, and in some cases may actually mislead.

Views of the Child reports have a place in the continuum of services provided to children and families and can be an effective means of ensuring their voices are heard in family law disputes. However, there is very limited research about their use and impact, and further discussions need to take place with judges, professionals, government and youth, so that children's participation can be truly meaningful to them, to their parents and to the courts.

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