SELECTED SENIOR ISSUES

By

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I. Marital Issues

A. Divorce

1) Many marriages of long duration may fail for a variety of reasons. One reason may be longevity. Half a century ago, an unhappy couple in their mid-60s might have stayed together because they thought it wasn't worth divorcing if they had only a few years left to live. Now, 65-year-olds can easily envision at least 20 more active years – and they don't want them to be loveless, full of frustration or disappointment, especially with the children now out of the house. So-called "gray divorces" are increasing. In 1990, only one in 10 people who got divorced was 50 or older; by 2009, the number was roughly one in four.

2) The baby boomer generation is different from the 50-year-olds who lived before them who soldiered on even if they were very unhappy. The baby boomers gave up on the concept of the dutiful-but-unhappy spouse a long time ago and were the originators of the high divorce rate in this country.

3) Furthermore, the statistics on second and third marriages ending in divorce are over 60%.

4) Unless a testament provides to the contrary, if a testator is divorced from his or her spouse after his or her testament is executed and at the time of his or her death, any legacy or other testamentary provision to such spouse (including testamentary designations and appointments such as executor, tutor and Trustee) are automatically revoked. La. Civil Code art. 1608. However, the same is not true for beneficiary designations of non-probate assets, such as IRAs and life insurance. The divorced spouse – owner should consider changes, if any, to his/her beneficiary designations,

subject to any limitations under the divorce decree or property settlement. See Standard Life Ins. Co. of the South v. Franks, 278 So.2d 112 (La. 1973).

B. Remarriage

1) More and more seniors are finding love later in life, particularly after losing a spouse. Improved health status allows older adults greater socialization and mobility which enhances the chances for remarriage. Although remarrying later in life can bring happiness, it also can create unintended financial consequences. In some instances, it can produce disappointment and acrimony between children and the new spouse. Remarriage requires proper advance planning to address many issues, such as finances, children, assets, housing, retirement and possible long term care needs to name a few.

2) Estate Planning for Blended Families

a) In first marriages, the couple generally has the same goals: take care of the surviving spouse for as long as he or she lives, then whatever is left will go to the children. But second marriages (after divorce or death of the first spouse) are different. There may be his children, her children and sometimes their children. Whatever is left to the surviving spouse may wind up on the side of the surviving spouse's family. Furthermore, there is the possibility of a prolonged delay in children receiving their inheritance, particularly if the second spouse is closer in age to the children than to their parent and, in larger estates, QTIP planning is used to defer estate taxes. Step-children don't often appreciate that they will have to await their inheritance until the step-parent dies.

b) In Louisiana, if a married individual dies without a Will or without a valid Will leaving descendants, descendants inherit subject to a usufruct in favor of the surviving spouse over any community property until the survivor's death or remarriage, whichever first occurs. La. Civil Code arts. 888 and 890. Forced heirs who are not children of the surviving spouse may request the usufructuary to furnish security as to legitime. La. Civil Code art 1514. If the deceased has no descendants, the surviving spouse inherits any community property. La. Civil Code art. 889.

All property acquired during the marriage is presumed to be community property owned one-half by each spouse, regardless of

how title is reflected. La. Civil Code art. 2340. The fruits and revenues from separate property generally belong to the community. However, a spouse may reserve fruits of separate property by recording a declaration of separate property after furnishing a copy to the other spouse. La. Civil Code art. 2339. Commingling of separate and community assets can convert separate into community, subject to certain reimbursement rights at the termination of the community.

c) Marital Portion

(1) Estate planners must consider the applicability and impact of Louisiana marital portion rules on older clients who remarry, particularly where one spouse has a much larger estate than the other and/or there are children (usually adults) from prior marriages.

(2) Even with a valid Will, a surviving spouse may be entitled to demand a marital portion of the deceased spouse's estate if the deceased spouse dies "rich" in comparison to the surviving spouse. La. Civil Code arts. 2432, et seq. While no concrete test has ever been devised by Louisiana courts, the survivor ordinarily will be awarded the marital portion when the comparison of patrimonial assets shows a ratio of five to one or more. Revision Comments (1979) to La. Civil Code art. 2432.

(3) The marital portion is ¼ of the succession if the deceased spouse dies without children, the same fraction in usufruct for life if the decedent is survived by 3 or fewer children, and a child's share in usufruct if the decedent is survived by more than 3 children, but in no event more than $1 million. La. Civil Code art. 2434. The marital portion is reduced by any legacies left by the deceased to the surviving spouse and payments due to the surviving spouse (including benefits derived from life insurance, social security and pension plans) as a result of the death. La. Civil Code art. 2435.

(4) A party to the marriage contract, whether executed before or during marriage, cannot renounce or alter the marital portion. However, the surviving spouse may waive rights

to marital portion after his/her spouse dies. La. Civil Code art. 2330.

d) Much of estate planning in the past has focused on death taxes and technical solutions to pay, reduce or defer such taxes. However, with a multi-million dollar equivalent exemption amount, a large portion of our clientele no longer requires such planning, unless Congress allows the tax exemption amounts to revert to $1 million in 2013 and thereafter. Nevertheless, the prevalence of multiple marriages for older clients still presents unique problems and planning in the family context.

(1) His, her and our children, and all of their combinations, coupled with children with different financial needs and resources, abilities, substance and alcohol abuse issues, etc. and how to provide for the new spouse.

(2) Step-children and step-grandchildren.

(3) Trusts for surviving spouse's lifetime but due to longevity or age differentials, ultimate principal beneficiaries may not inherit until their 70's or 80's.

e) Joe M. Goodman, an attorney with Adams and Reese's Nashville office and author of "Rich Widows Live Forever", has noted several popular myths of remarried couples:

(1) "We've agreed to leave everything outright to the survivor of us and the survivor will leave it equally to all of our combined children."

(2) "I love my spouse's children like my own."

(3) "My children are already well-provided for by the half of my assets I had to give their (mother) (father) in our divorce."

(4) "His (her) ex-wife's (ex-husband's) family is wealthy and will take good care of these children."

(5) "I am scared to give (leave) assets to my children from my prior marriage because my ex will talk them out of their money."

(6) "I want to keep my assets in the bloodline because my father/grandfather would want it that way."

(7) "I don't want to include adopted grandchildren unless I have a chance to know them and decide whether to include them in my estate plan."

f) Some factors in addressing whether to leave assets to children of a prior marriage or to treat children equally include the children's financial success, financial need, relationship with the parent (and step-parent), previous receipt of financial aid and/or inheritances, etc.

g) A properly drafted Will or revocable trust can address a variety of these issues, such as providing for a new spouse, children of a prior marriage, and/or grandchildren, the continued use of the matrimonial residence and contents by the survivor, and avoiding family conflicts over personal, family or sentimental assets, such as jewelry, antiques, collections and family heirlooms. For larger estates, a QTIP trust in favor of the surviving spouse can preserve unlimited marital deduction planning while allowing the deceased spouse to control the ultimate beneficiaries upon the surviving spouse's death. Beneficiary designations on all non-probate assets, including life insurance, annuities, retirement accounts and IRAs, should be coordinated with the older client's overall planning, particularly where a previous spouse is designated as beneficiary provided, in the case of divorce from such previous spouse, the divorce decree does not restrict any changes. The beneficiaries could be a trust providing income to the spouse but which allows the client to control to whom the assets will be distributed after the termination of the spouse's income interest as well as protection from irresponsible spending by the spouse, creditor protection and even the possible remarriage of the surviving spouse. Although QTIP treatment requires that trust income be payable to the surviving spouse currently for the spouse's lifetime, a Trustee's power to make discretionary distributions of principal to the spouse could terminate upon the spouse's remarriage.

h. For larger estates, the wealthier spouse could leave an amount up to his/her available equivalent exemption amount to children of a prior marriage without a usufruct or income interest to the

surviving spouse or could place a term limit on the surviving spouse's income interest.

i. Consider using new or existing life insurance and/or retirement benefits, including IRAs, to fund amounts left to surviving spouse (including marital portion) or for children of a prior marriage so that the beneficiary receives immediate benefits. Typically, the surviving spouse is interested in retaining the home and most of the contents. Naming the spouse as beneficiary of retirement benefits affords the opportunity for income tax deferral through a spousal rollover IRA. Alternatively, leaving life insurance to the surviving spouse or making the surviving spouse the owner of the life insurance on the other's life may give some comfort to the spouse that he/she need not be concerned about changes to the other spouse's Will or co-ownership of assets with the other spouse's children. Likewise, life insurance payable to children of a prior marriage enables the client to provide a significant benefit to his/her children. The issues, of course, with new life insurance for older clients are insurability and affordability.

j. For parents who desire that their children not interfere with their intentions to provide for their new spouse, consider an in terrorem, or "no contest" clause, in their trust and Will documents.

k. In QTIP planning, consider the impact of the right of recovery by the surviving spouse's estate under I.R.C. Sec. 2207A.

3) Marriage Contracts

a) Individuals may enter into marriage contracts before marriage without court approval to modify or terminate a matrimonial regime. The marriage contract must be by authentic act or by an act under private signature duly acknowledged by the spouses. La. Civil Code art. 2329. A post-nuptial acknowledgement cannot validate a pre-nuptial agreement lacking the proper execution formalities. Muller v. Muller, 10-CA-540 (La. App. 5th Cir. 2011), 72 So.3d 364.

b) Married individuals can subject themselves to the legal regime (community property) at any time without court approval, but during marriage need court approval to modify or terminate a matrimonial regime. Court approval is not required to modify or terminate the matrimonial regime if the couple moves into and

becomes domiciled in Louisiana, provided the marriage contract is executed within one year after acquiring a Louisiana domicile. La. Civil Code art. 2329.

c) Although the general rule is that the succession of a living person cannot be the object of a contract, one exception is a marriage contract, but not as to marital portion rights. La. Civil Code art. 1976.

d) The marriage contract is an excellent tool to identify which assets belong to whom during the marriage as well as in the event of a divorce, how expenses of the marriage are to be handled, spousal support if the couple divorces, and utilization and sharing of gift and estate exemption amounts. Marriage contracts may provide for a phasing of assets to a divorced spouse dependent upon the length of the marriage.

e) To reduce the threat of challenge, the marriage contract should make full disclosure of both parties' assets, their values, and liabilities as schedules to the contract initialed by the parties and each party should have their own independent legal counsel.

4) Retirement Benefits and Survivor Annuities

a) Widows and widowers of public employees, including military service personnel, police, firefighters and federal civil servants, can lose their survivor annuity if they remarry or remarry before reaching a certain age.

b) Certain qualified retirement benefits, such as the death benefit under a defined benefit pension plan or 401(k) plan (but not an IRA), automatically pass to a surviving spouse under ERISA unless the survivor signs a qualified waiver of such benefits. See Cajun Industries, LLC 401(k) Plan v. Kidder, (U.S.D.C. M.D. La. 4/26/2011). (Plan participant's wife dies and he designates his children as beneficiaries but subsequently remarries, and dies 6 weeks later. Plan did not limit spousal rights to a spouse married for at least one year as permitted under ERISA).

(1) A waiver in a pre-nuptial agreement may not be valid since the waiving party was not a "spouse" at that time.

(2) A waiver in a post-nuptial agreement may not be valid unless it meets the requirements of a "qualified" ERISA waiver.

5) Social Security

a) If an individual remarries before age 60, they will lose any current widow or widower's benefit.

b) But if the individual remarries after age 60 (or age 50 if disabled), the individual still will be entitled to benefits based upon their former spouse's work history. In addition, at age 62 or older, the individual may be entitled to Social Security based upon their new spouse's work history, if higher.

6) Disability and Long-Term Care

a) Older couples, and perhaps their children, should discuss health care issues before they marry since they face a greater likelihood of becoming disabled or requiring long-term care than younger couples. This includes health and financial procurations and deciding who will be appointed as Agent (and possible backup Agent) for decision-making in the event of incapacity. It is likely that the new relationship changes how the parties feel about who should be empowered to make health and/or financial decisions if one of the spouses becomes incapacitated. Some adult children fight to retain control over these decisions, especially if their relationship is hostile to the new spouse.

b) Medicaid counts the assets of both spouses in determining financial eligibility for nursing home benefits, regardless of community or separate property laws and any provisions in a marriage contract. However, a marriage contract may be helpful in assigning responsibility of costs among family members who are parties to the contract. Older couples who remarry should consider the availability and affordability of long-term care insurance to avoid or minimize the devastating costs of possible long-term care, including home care.

7) Spousal support from a former spouse generally ceases upon remarriage.

8) Family Home

a) Older couples should consider in whose home they will live, or whether they will purchase a new home (perhaps in Louisiana or another state), how sale proceeds will be divided and utilized if an existing home is sold, who will be responsible for the costs associated with the home (mortgage payments, insurance, property taxes, repairs, maintenance and utilities), what happens about future occupancy if the couple divorces or one spouse dies or goes into a nursing home, etc. These and other dwelling decisions should not be taken lightly or informally, especially if there are children of prior marriages who may have different expectations and/or already own a portion of the home by virtue of an inheritance from a predeceased parent.

b) If the older couple intends to move to another state, consider the impact of the laws of such other state, such as that state's elective share and homestead rules and, for unmarried couples, whether such state recognizes common law marriages and the rights which flow therefrom (e.g., Alabama, Colorado and Texas).

9) Finances

a) Elderly clients who remarry should consider how they will handle their finances during their marriage, including the source of funds to pay household expenses, new furniture, clothing, vacations, monthly credit card bills, a new car, medical bills, medical insurance, income taxes, sharing income, establishing joint or separate bank and brokerage accounts, storage of furniture, investment responsibility and strategies, and the expenses of children and/or grandchildren of prior marriages. Generally, each spouse contributes to the expenses of the marriage in proportion to their means, except as may be provided in a marriage contract. La. Civil Code art. 2373. It is best to formalize these decisions in a written agreement, even for persons who merely cohabitate with each other.

b) Filing joint tax returns may lower income taxes but could subject one spouse to liability for unreported income of the other.

10) Exploitative Marriages

a) High profile cases, such as Anna Nicole Smith's 14-month marriage to Texas oil tycoon J. Howard Marshall, who was 63 years her senior and worth $1.6 billion, illustrate a growing problem – the ease at which elderly individuals can enter into marriages which present an opportunity for unscrupulous individuals to gain control over a spouse's financial affairs, make transfers of assets during lifetime and to inherit from the elder's death by changes to the elder's estate planning documents or by virtue of state laws giving spouses elective shares (marital portion) or intestacy shares and various federal property rights, such as under ERISA and Social Security. See generally, Turnipseed, "How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America," 96 Kentucky Law Journal 277 (2008).

b) What type of mental capacity is required to enter into a valid marriage in Louisiana? A valid marriage requires the free consent of the parties expressed at a marriage ceremony. La. Civil Code art. 87. Consent is not free when given under duress or when given by a person "incapable of discernment" at the time the marriage is contracted. La. Civ. Code art 93. Comment (d) to La. Civ. Code art. 93 states that a person incapable of discernment may include, but is not limited to, a person under the influence of alcohol or drugs or a mentally retarded person. Capacity to marry is a much lower level of capacity than contractual or testamentary capacity. Although marriage in Louisiana is defined as a legal relationship created by civil contract, the mental condition of the contracting party bears on his or her ability or inability to give free consent rather than on lack of capacity to contract marriage. For example, only an insane spouse may seek annulment of a marriage on the grounds of lack of free consent, not the other "contracting" spouse. Comment (c) to La. Civ. Code art. 93.

c) Can a third party such as a subsequently approved curator or a child challenge the marriage?

(1) A marriage contract by a person incapable of discernment is only relatively null, not absolutely null. Only the party whose consent was not free can bring an action of nullity.

(2) It appears that after death, only the succession representative of the deceased spouse who allegedly lacked free consent has standing to bring an action to annul. The right to demand nullity on the grounds of lack of free consent does not pass to heirs. La. Code Civ. Proc. art. 685; Succ. of Ricks, 2003 CA 2580 (La. App. 2d Cir. 2004), 893 So. 2d 98, rehearing denied, February 22, 2005. In the case of an exploitative marriage, where the surviving spouse is appointed succession representative, is it likely that such spouse would bring an action to annul? Some elder friendly states, such as Florida, authorize a four year posthumous challenge to marriages by interested parties but the burden of proof is still on the contestant.

C. Co-Habitation

1) The number of people over age 50 who are living together romantically has more than doubled in a decade, from 1.2 million to 2.75 million, according to an analysis of government data done by Bowling Green University. The U.S. Census Report indicates that co-habitation numbers for people 65 and older have tripled in the past decade, jumping from 193,000 in 2000 to 575,000 in 2010. In 2010, about 12% of unmarried adults ages 50-64 were living together but not married, up from 7% in 2000.

2) In their 70s, 80s and beyond, older couples meet in seniors-only housing and live together unencumbered by marriage vows. Grandpa is living with someone else's Grandma. Their relationships are committed and bonded, meant to last the rest of their lives. Sometimes even informally blessed by clergy. If the elderly couple is not going to formally marry, they should consider a co-habitation agreement similar to a marriage contract.

3) If the couple is not married, the significant other has no legal right to make healthcare or financial decisions for the other in case of incapacity, absent a procuration (power of attorney).

D. Ethical Issues for Attorneys – Conflicts of Interest and Client Confidentiality

1) Children of prior relationships contacting attorney.

2) Joint representation of husband and wife.

E. See generally, Casteel and Manterfield, "Estate Planning for Second Marriages" (ALI CLE 2011); Hood and Bouchard, "Estate Planning for the Blended Family" (2011).

II. Planning for Incapacity

A. In General

1) Traditional estate planning focuses on the transmission of assets and the minimization of death taxes. Planning for the older client also includes quality of life decisions and protecting and preserving the older client's assets, particularly if the older client suffers or is likely to suffer impaired decision making.

2) Due to advances in nutrition and medical care, people are living longer. However, as people age, most are going to suffer some mental or bodily dysfunctions, particularly those who live past 80, including Alzheimer's disease, Parkinson's disease, and the effects of strokes or other ailments. While for many persons the period of incompetency will last only for a few minutes or days immediately before death, others will be incompetent for months and even years.

3) CDC reports U.S. life expectancy is about age 78. The U.S. Census Bureau estimated in a report released on June 23, 2009 that the U.S. population age 65 or older will more than double by 2050, rising from 39 million today to 89 million, or 20% of the total U.S. population. The age group 55 and over is expected to constitute nearly one-third (31.1%) of the population by 2030. The Census Bureau also issued a December 2008 update to its 2002 Report on Americans with Disabilities which indicated that 18.1 million people 65 or older, or 52%, had a disability. Of this number, 12.9 million, or 37%, had a severe disability. For people 80 and older, the disability rate was 71%, with 56% having a severe disability. An estimated 5.2 million Americans have Alzheimer's disease – one in twenty over the age of 65 and one in three over the age of 80. Fourteen percent (14%) of all people age 71 or over suffer from some form of dementia. See generally, "Health Characteristics of Adults Aged 55 Years and Older: United States, 2004-2007," National Health Statistics Reports, No. 16 (July 8, 2009), issued by the U.S. Dept. of Health and Human Services.

B. Professional advisors should be sensitive to the fact that the older clients we are counseling typically have or are experiencing a profound sense of loss:

1) Loss of lifelong friends due to death, illness or relocation;

2) Loss of a spouse, sibling or perhaps even a child;

3) Loss of employment and loss of status and pride which flow from being a wage earner;

4) Loss of physical vitality;

5) Loss of hearing and/or vision;

6) Loss of driving privileges (night and/or day) and thus loss of mobility;

7) Loss of memory and ability to manage one's affairs;

8) Loss of personal dignity if help is needed for personal care;

9) Loss of economic security and dignity;

10) Loss of respect from children who might become caregivers.

C. The paramount concerns for most older clients are:

1) The desire to be independent;

2) To maintain personal autonomy over decisions affecting themselves;

3) To be cared for in their own home; and

4) To leave something of them behind for younger generations.

D. It is not uncommon in the course of the long-term representation of older clients that they begin to exhibit diminishing capacity. Our challenge is to fashion planning devices which preserve client autonomy and independence, but at the same time protect the older client as much as possible from the losses mentioned above. For lawyers, Rule 1.14 of the Louisiana Rules of Professional Conduct governs the ethical requirements of representing clients with diminished capacity and the primary obligation of maintaining a normal attorney-client relationship.

E. Historically, the planning team for the older client consisted of the attorney, accountant, trust officer, insurance agent and investment counselor. However, in planning for the disability of the elderly, a certified social worker specializing in geriatric issues should be considered as part of the team. They can provide a great contribution in identifying community resources which permit elderly persons to

stay in their residences rather than being shuffled off to a nursing home. They are also familiar with family support groups, respite care, and long-term nursing care. Finally, they can assist in critical family and client counseling as disabilities become more severe and family members must make hard choices.

F. The traditional documents used in planning for incapacity (commonly referred to as "advance directives") include a financial power of attorney, a healthcare power of attorney and a Living Will or LaPost.

III. Durable General (Financial) Power of Attorney ("Procuration").

A. Formalities. A procuration is a written instrument by which one person ("principal") appoints another ("agent") as his/her representative and confers upon the agent the authority to act in place of the principal for the purposes stated in the instrument. La. Civ. Code art. 2987.

1) A procuration is subject to the rules governing mandate to the extent compatible with the nature of the procuration. La. Civ. Code art. 2988.

2) May be in any form, including a writing. However, where the law prescribes a certain form for an act, such as an authentic act for a donation or a written act of compromise, then the procuration must be in the same form. La. Civ. Code art. 2993.

3) The procuration may be general (to perform every act the principal could perform) or specific (to perform only specified acts, such as the sale of a particular piece of real estate). La. Civ. Code art. 2994.

4) The principal must be competent to execute the procuration, that is, must have the requisite capacity to understand the nature and significance of his/her act at the time of execution.

B. Procuration can be "immediate" (sprung) or conditional (springing).

1) A conditional procuration could be used by a person who does not want the agent to act on his/her behalf until absolutely necessary. The conditional procuration becomes effective on a specified date or upon the happening of some event (usually incapacity).

a) The advantage of an "immediate" or "sprung" power is that it is effective immediately without the numerous issues surrounding the determination and certification of the principal's incapacity.

b) The disadvantage with a sprung power is the potential for abuse by the Agent. However, if the principal fears that the Agent would act

improperly before the principal's incapacity, shouldn't the principal anticipate that the Agent would act improperly later and therefore consider appointing a more trustworthy Agent?

2) La. R.S. 9:3890 provides statutory authorization for a "conditional" procuration which becomes effective upon the principal's disability. The principal's disability must be established by an authentic act signed by two physicians who are licensed to practice medicine in Louisiana and who personally examined the principal or, if the procuration so provides, signed by the principal's attending physician who is licensed to practice medicine in Louisiana and the Agent appointed in the conditional procuration. The parties to the authentic act must state that due to an infirmity, the principal is unable consistently to make or to communicate reasoned decisions regarding the care of the principal's person or property. Does the statute mean that no other springing power is authorized in Louisiana? Note that the Uniform Power of Attorney Act adopted by several states defines "incapacity" to include the inability to manage one's property or business because the individual is missing, detained or unable to return to the U.S. See definition of "other condition" in La. Civil Code art. 3026 regarding durability.

3) Consider appointing the physician, Agent or other person making the incapacity determination as the principal's "personal representative" under HIPPA in order to obtain access to medical records and to talk with the principal's other health care providers.

4) Consider provisions, such as presumptive incapacity, if the principal refuses to cooperate and submit to a medical examination.

5) Problem of satisfying third party that the conditional procuration has become effective ("sprung").

6) Problem of determining if and when the Principal's capacity has been restored.

7) Conflict of interest issues if drafting lawyer represents the Agent, particularly if there is a dispute as to principal's incapacity.

C. Durability. Unless the procuration provides otherwise, it is not revoked by the principal's incapacity, disability or any other condition making express revocation impossible or impractical, that is, it is automatically "durable" in Louisiana. La. Civ. Code art. 3026. "Other condition" may include mental illness or deficiency, physical illness or disability, advanced age, chronic use of drugs or alcohol,

confinement, disappearance or detention by a foreign power. Unlike an interdiction, the client retains autonomy by choosing his/her agent(s) and successors, not a court.

D. Disadvantages of Procuration.

1) Effective only to the extent a third party is willing to recognize it.

a) Age of Procuration

b) Specificity of Procuration

(1) The property or the location of property does not have to be specifically described in the procuration when the agent is given express authority to exercise acts of ownership (e.g., sell or mortgage). La. Civ. Code art. 2996.

(2) Nevertheless, real estate title examiners, financial institutions, and stock transfer agents may follow the "Golden Rule," that is, "he who has the gold makes the rules."

c) Joint Agents – banks may be unwilling to open personal accounts requiring two or more signatures.

d) Consider having client execute forms furnished by financial institutions in which client has accounts, even though this is duplicitous. May avoid necessity and delay of financial institution referring the POA to its own legal counsel for review and approval.

e) Many financial institutions, concerned about potential liability, reject procurations that are over six months old, or from out-of-state, or for other reasons. Poison pen letters by the Agent threatening a lawsuit for failing to honor the procuration may not work. Louisiana needs a legislative solution, recognizing that financial institutions may lobby against liability for failure to recognize or honor a procuration.

2) Procuration is generally revocable by the principal at any time. La. Civ. Code art. 3025. This may present problems if the principal has diminished or diminishing mental capacity and there are rival family members who desire to be the agent and induce the elderly person to keep changing the designated agent ("ping-pong" scenario). In addition, the procuration is automatically revoked upon the qualification of a curator for the

interdicted principal (although the principal may designate whom he/she wants as curator in the procuration should the principal be interdicted – La. Code Civ. Proc. art. 4550). La. Civ. Code art. 3024. The mere fact that a less restrictive procuration is in effect does not end the inquiry as to whether an interdiction nevertheless is appropriate to determine if the principal's interest can be protected by the procuration or only through a more restrictive means, such as an interdiction. Womack v. Stephenson, 08-CA-493 (5th Cir. 1/13/2009), 8 So.3d 1.

3) Migrant Client or Migrant Assets.

a) According to census reports, about one in six Americans move every year, and the average American moves almost a dozen times in his/her lifetime. For older clients, the move may be necessitated by the loss of a spouse or to be closer to other family members. NCCUSL promulgated a Uniform Power of Attorney Act in 2006 which is slowly being adopted by other states.

b) If the older client spends a substantial amount of time in another state or country or has assets in other states or countries (e.g., bank accounts or real estate), a procuration that meets the formal requirements of Louisiana law may not meet the requirements of the other state or country. Some states require powers to be witnessed, notarized or both or may limit the persons who can act as agent. Unlike Louisiana, some states do not recognize "durability" of a Power unless specifically stated in the instrument.

c) Banks are more comfortable with a Power executed in the form customary for the state.

d) Consider executing multiple Powers which can be used for specific states.

4) Hot Powers. A general procuration confers only the power of administration. The following powers are not granted to the Agent by a general procuration unless expressly stated in the instrument. La. Civ. Code arts. 2996-98.

a) To alienate, acquire, encumber or lease a thing.

b) To make inter vivos donations, either outright or to a new or existing trust or other custodial arrangement, and, when also expressly so provided, to impose such conditions on the donation,

including, without limitation, the power to revoke, that are not contrary to the other express terms of the mandate. But see, Arnold v. Fenno, 94-1658 (La. App. 4th Cir. 3/16/95), 652 So. 2d 1078.

c) To accept or renounce a succession.

d) To contract a loan, acknowledge or make remission of a debt, or become a surety.

e) To draw or endorse promissory notes and negotiable instruments.

f) To enter into a compromise or refer a matter to arbitration.

g) To make health care decisions.

h) To contract with himself with respect to the principal.

5) Power of Agent to Donate Principal's Property. Consider whether it is appropriate to authorize the Agent to make donations of the principal's property.

a) May be important for estate tax planning (e.g., annual gift tax exclusion gifts and unified tax credit) or to reduce the principal's countable resources to qualify the principal for means-tested governmental assistance, such as Medicaid, but subject to applicable transfer of asset penalties under such governmental benefit programs.

b) Should there be any restrictions on the Agent's gifting power (e.g., permissible donees, amount of gifts, consent of a third party, exclusion of specific items of property, such as heirlooms or the family farm, etc.)? Consider whether the Agent, the Agent's spouse and/or the Agent's descendants should be specifically included as permissible donees.

c) Should any gifting be limited to effectuate the principal's estate plan, if any, and is the Agent directed to consult with the principal's estate planning advisors (coupled with a waiver of attorney-client privilege)? Should the power to change beneficiary designations on all non-probate assets be granted or precluded?

d) If the principal created a revocable trust, consider provisions specifying the Agent's authority, such as the Agent's authority to exercise powers the principal could have exercised while

competent, including the power to revoke, add or withdraw property from the trust and amend or modify the trust and whether the Agent's exercise of such powers is limited by the principal's estate plan.

e) Tax consequences.

(1) State and federal gift taxes.

(2) IRS position is gifts by an Agent acting under a durable general power of attorney are invalid for tax purposes unless the Power or state law expressly authorizes the gifts. TAMs 9410028, 9347003 and 9231003; Compare Casey v. Comm'r., 948 F.2d 895 (4th Cir. 1941) with Estate of Ridenour, 36 F. 3d 332 (4th Cir. 1994). If the gift is deemed invalid, it can be revoked by the principal or the principal's representative and is therefore includable in the principal's estate for federal estate tax purposes under I.R.C. Sec. 2038(a)(1). Revision Comment (a) to La. Civ. Code art. 2997 states that it is clear under Louisiana law that a mandatary may be given authority to make gifts by virtue of an express mandate.

(3) If the mandatary has the power to gift the principal's property to himself or others and dies before the principal, will the principal's assets be included in the mandatary's estate for federal estate tax purposes as a "general power of appointment" under I.R.C. Section 2041? If the gifting power is limited by an ascertainable standard (e.g., health, education, support), the Power should not cause a gift or estate tax problem. I.R.C. Secs. 2041(b)(1)(A) and 2514 (c)(1).

6) Abuse by Agent. Is a POA a "license to steal?" See generally, Notes, "The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population," 82 St. John's L. Rev. 289 (Winter 2008). Powers of Attorney are potent documents and may be abused, usually by family members or caregivers, but even by attorneys or accountants acting as Agent. See Thomase v. State Board of CPAs, 2008-CA-1491 (4th Cir. 1/27/2010), 30 So.3d 1102, cert. denied, 34 So.3d 296 (CPA's license revoked and fined $16,000); In re Roxanne Andrus, 04-B-0403 (La. 6/25/2004), 876 So. 2d 745 (attorney disbarred for using Power

of Attorney of 92 year old resident in assisted living facility to go on personal shopping spree at Saks Fifth Avenue, Gap Kids, the Disney Store, Ritz Carlton Hotel, Mr. B's Bistro and Pat O'Brien's); In re James B. Aime, 95-0284 (La. 4/21/95), 653 So. 2d 1173 (attorney disbarred for using Power of Attorney of long-term client with bipolar disorder to convert $90,607 of client's funds); In re Frank Letellier, II, 98-B-2646 (La. 11/29/99), 724 So. 2d 544 (attorney disbarred for improperly using Power of Attorney from long-term client for personal benefit).

a) Manifestations of POA Abuse

(1) "POA abuse may occur because the Agent does not understand the Agent's role and duties owed to the principal, or because the Agent who understands the duties owed to the principal intentionally violates them. Adding to the complexity, intentional POA abuse may be opportunistic or targeted. Opportunistic abuse occurs when an Agent - whether a family member or not – takes advantage of an opportunity to exploit a vulnerable principal. Targeted abuse occurs when an individual – again, whether a family member or not – deliberately targets and develops or enhances a relationship with a vulnerable elder in order to become the elder's agent and then commit POA abuse." Stiegal and Klem, "Power of Attorney Abuse: What States Can Do About It," AARP Public Policy Institute and ABA Commission on Law and Aging (2008). Anthony Marshall, Sr., the son of the late Brooke Astor, and his attorney were recently convicted of defrauding Mrs. Astor of tens of millions of dollars, including using a POA to take a $1 million retroactive raise. Acts 2009, House Resolution No. 112 of the Louisiana legislature requested the Louisiana Law Institute to study the implementation of safeguards for elderly persons executing POAs so that they may be protected by law, even if they are unable to adequately protect themselves, and to determine if any legislative changes should be made. Still under study.

(2) Inherent risks of POA which facilitate exploitation:

(i) Broad decision making authority;

(ii) Lack of monitoring;

(iii) Unclear standards about agent's duties; But see La. Civil Code arts. 3001, et seq.

(3) External factors which facilitate exploitation:

(i) Lack of awareness of risks (e.g., use of forms from Internet or how-to-do books);

(ii) Delayed detection of abuse, often after principal has died;

(iii) Challenges to holding abusers accountable (e.g., costly civil litigation and reluctance on criminal side for government to expend scarce and dwindling resources).

b) Drafting Tips

(1) A "springing" Power, which only becomes effective upon certification of incapacity, may provide some protection against overreaching agents as compared to an "immediate" or "sprung" Power of Attorney.

(2) Consider whether a "special" Power is all that is needed to accomplish your client's goals rather than a "general" Power.

(3) The Power could contain a provision for periodic (and on demand) accounting of the Agent's transactions pertaining to the principal's estate, to the principal and/or some other designated individual.

(4) The Power could provide for the designation of a curator if the principal becomes interdicted to prevent an "end run" around your client's choice of designated Agent to make decisions. In fact, the client may want the Power to specifically exclude certain individuals from being appointed as curator, that is, it may be more important for the principal to keep the "evil" child from being appointed curator

than to specify exactly which of the "good" children has priority.

(5) Select the right person as the Agent and make sure the Agent is willing to serve. The Power could designate more than one person as Agent requiring joint action by the Agents.

(6) The Power should specifically address whether the Agent has the authority to exercise "hot powers" which have a high propensity for dissipating the principal's property or altering the principal's estate plan, such as making gifts of the principal's property and any limitations thereon, and authority or lack of authority to alter the principal's estate plan by changing beneficiary designation forms for assets such as life insurance, annuities and retirement benefits or amending or revoking revocable trusts. The Power could limit who would be a permissible donee, the maximum amount of gifts and/or require the consent of a third party other than the Agent.

(7) Consider a provision that a third party may refuse to honor a Power of Attorney when the third party has a good faith belief that the principal may be subject to abuse, or reports suspected abuse to a governmental agency or knows that someone else has made a report.

(8) Consider involving an unbiased third party in the Power to whom financial records, such as monthly bank and brokerage account statements, must be sent.

(9) Educate the Agent on the Agent's duties, responsibilities, limitations and fiduciary obligations under the Power and applicable law. Consider having the Agent sign the Power or an Acceptance as a reminder of his/her obligations.

(10) Recognize that Powers of Attorney are revocable by the principal (the so-called "ping pong" game among family members who seek to be the

designated Agent and keep changing the Power of Attorney).

(11) Consider whether the Power should authorize or prohibit the delegation by the Agent of the Agent's powers to another who may be altogether unknown to the elder principal. Generally, the Agent does not have the power to delegate unless authorized in the POA. La. Civil Code arts. 3006-3007.

(12) Consider provision automatically revoking a spouse-Agent's authority upon divorce, annulment or filing a petition for divorce.

(13) Does the Agent expect to be compensated and, if so, is compensation to be based upon "reasonableness" or some specific amount or formula set forth in the Power? See, e.g., Succ. of Banks, 11-CA-26 (La. App. 1st Cir. 6/29/2011).

(14) Consider whether Agent should be authorized to have access to principal's online accounts and to change user name and password as may be necessary to access principal's accounts.

IV. End-of-Life and Health Care Decisions

A. Self-determination. Both the common law doctrine of informed consent and the 14th Amendment's protection of liberty interests under the due process clause as interpreted by the U.S. Supreme Court in the Cruzan case recognize an individual's right of self-determination in health care decision making, including the right to refuse a particular procedure or course of treatment for any reason. Many elderly persons, aware of the possibility that their lives may be sustained by costly and burdensome medical procedures, are seeking ways to maintain dignity and autonomy and avoid becoming an object for decision by others. Now it's not just doctors and patients in control - it is hospital administrators, in-house attorneys and risk managers. The three principal techniques for planning personal autonomy over medical decisions are the Living Will, the Louisiana Physician Order for Scope of Treatment (LaPost) and the Health Care Power of Attorney (collectively so-called "advance directives").

B. Living Will (La. R.S. 40:1299.58.1, et seq.).

1) A Living Will is a written declaration by a competent individual of his/her treatment wishes should he/she become incompetent and be suffering a terminal and irreversible condition. A "terminal and irreversible illness" is defined as a continual profound comatose state with no reasonable chance of recovery or a condition caused by injury, disease, or illness which, within reasonable medical judgment, would produce death and for which the application of life-sustaining procedures would serve only to postpone the moment of death. A "life sustaining procedure" includes the "invasive administration of nutrition and hydration and the administration of cardiopulmonary resuscitation."

2) A common misconception is that the Living Will is synonymous with "pull the plug" or "don't hook me up". This is not the case, although a majority of Living Wills do provide for this instruction. The Living Will can provide that every heroic effort should be used, but that under certain circumstances, certain procedures may be withdrawn.

3) Problems with Living Wills.

a) Improper witnesses - the Living Will must be executed in the presence of two witnesses who are competent adults, who are unrelated to the declarant by blood or marriage and who would not be entitled to inherit from the declarant.

b) To become operative, the declarant must be diagnosed and certified in writing as having a terminal and irreversible condition by two physicians who have personally examined the declarant. One of the physician's must be the declarant's attending physician. The diagnosis of a "terminal and irreversible" condition often may be a "gray" area.

c) What if the client is injured in another state which has different requirements for a Living Will?

d) Most emergency services (e.g., 911) are required to perform lifesaving techniques such as cardio-pulmonary resuscitation and will disregard a Living Will document. However, the Secretary of State is required to issue "do-not-resuscitate" identification bracelets to qualified patients. La. R. S. 40:1299.58.3D(1)(b).

4) A suggested Living Will form is provided in La. R.S. 40:1299.58.3 C(1), but is not required to be used. Since August 15, 2005, the declaration must contain an option to specifically initial a choice regarding nutrition and hydration. The form may include other specific directions, including, but not limited to, the designation of another person to make decisions concerning withdrawal or withholding of treatment.

5) If no written declaration has been made and if the patient is unable to communicate his/her desire orally or through some other nonverbal communication in the presence of two witnesses subsequent to the diagnosis of a terminal and irreversible condition, the statute sets forth a priority of individuals who are authorized to make a declaration on behalf of the patient.

6) The Secretary of State has established a Declaration Registry in which a person, or his attorney if authorized by the client, may file the original, multiple original or a certified copy of the declaration. The existence and contents of the filed declaration will be available to the declarant's attending physician or health care facility upon oral or written request. La. R.S. 40:1299.58.3D.

7) The Department of Public Safety and Corrections is required to provide Living Will forms at its driver's licensing offices and to provide a notation on a driver's license whether or not the applicant elected to make a declaration. La. R.S. 32:410 (C).

8) The Patient Self Determination Act of 1990 requires health care providers participating in Medicare and Medicaid, such as hospitals and nursing homes, to provide all adults, upon admission, with written information under state law about decisions concerning medical care and their right to formulate advance directives such as Living Wills and health care Powers of Attorney. The problem, of course, is whether the individual being admitted has legal capacity to execute a Living Will.

C. Louisiana Physician Order for Scope of Treatment (LaPOST)

1) The laws creating Living Wills are based upon a legal transactional approach, that is, an emphasis on standardized legal forms or mandatory disclosures, prescriptive language, required formulation and restrictions on who may be a witness or proxies, procedural requirements for certifying incapacity or medical condition, and limitation on decision–making, all intended to serve as protection against abuse and error. Over the past two decades, the legalistic approach has slowly moved toward a

communicative approach with the emphasis from the completion of legal forms to an ongoing process of interactive communication and dialogue over time among the individual, the health care provider, the proxy, and others who may participate in the end of life health care decision-making process to discern the individual's priorities, values, and goals of care and to insure that they are promptly implemented. See Charles P. Sabatino, "Improving Advanced Illness Care: The Evolution of State POLST Programs," ABA Commission on Law and Aging and AARP (April 2011); Report prepared by La. DHH in Response to HCR 102 of the 2009 Regular Session entitled "Use of Living Wills Among Medicaid Recipients" (January 11, 2010).

2) In 2010, the Louisiana legislature adopted the LaPOST. La. R.S.40:1299.64.1 et seq. See Proposed Rule 48 LAC I.201-.211. at 37 La. Register No. 2 at p. 709 (2/20/2011).

a) In essence, the LaPOST is a method by which a patient or the patient's legal representative can communicate his/her end of life decisions concerning medical treatment through a physician's order. The LaPOST is a standard, brightly colored gold revocable form issued by the Louisiana Department of Health and Hospitals (although a photocopy or fax of the signed form in black and white is legal and valid). See, www.la-post.org.

b) A "life-limiting and irreversible condition" means a continued profound comatose state with no reasonable chance of recovery or a condition caused by injury, disease, or illness within reasonable medical judgment would usually produce death within six months for which the application of life-sustaining procedures would serve only to postpone the moment of death and for which the life-sustaining procedures could be a burden and not a benefit to the patient. Such condition must be certified in writing by the attending physician or the patient's personal physician. The administration of nutrition and hydration is required even if the patient chooses no artificial nutrition by tube or no IV fluids, except in the event another condition arises which is life-limiting and irreversible in which nutrition and hydration by any means become a greater burden than benefit to the patient.

c) The LaPOST must be completed by a physician based upon the patient's preferences and medical indications and must be signed by a physician. The LaPOST should be followed by health care

providers, including certified emergency medical technicians and certified first responders. If the attending physician refuses to comply with a LaPOST, he/she is required to make a reasonable effort to transfer the patient to another physician.

d) The LaPOST is intended to be reviewed periodically, such as when the person is transferred from one care setting to another, or there is a substantial change in the patient's health status. Unlike the Living Will, La. R.S. 1299.64.1(2) states: "Health care planning is a process, rather than a simple decision, that helps individuals to consider the kind of care they want if they become seriously ill or incapacitated, and encourages them to talk to their family members or legal representatives about such issues." Hopefully, LaPOST will encourage physicians to initiate discussions with patients (or their authorized representatives) about key advanced illness treatment options in light of the patient's current condition and to periodically update those options as conditions change over time.

D. Health Care Power of Attorney.

1) Living Wills address only a single health care decision — the withdrawal or withholding of life sustaining procedures when the declarant is in a terminal condition and death is imminent. It is not intended to address most of the health care decisions which will be made during our clients' lifetimes. The durable medical power of attorney fills the void left by the Living Will. However, the Louisiana Medical Consent Law (La. R.S. 40: 1299.53) provides a prioritized list of persons who may furnish consent to surgical or medical treatment if a patient is unable to furnish consent.

2) A principal may delegate health care decisions, including surgery, medical expenses, nursing home residency, medication, and the use of withholding of life-sustaining procedures. La. Civil Code art. 2997(6); La. R.S. 40:1299.58.3C(1). In the absence of a written declaration, La. R. S. 40:1299.58.5 A (2)(a) refers to any person or person previously designated by the patient in a writing signed before two witnesses as having the authority to make the declaration.

3) Of all the "tools" professional advisors have at their disposal, none is more personal, more intimate and more unique to each individual client's need than the health care power of attorney. While conventional documents such as Wills and trusts deal primarily with the client's property, the health care power of attorney literally deals with the client's body and life.

In this light, a document of such import should receive at least as much attention as the documents dealing with the client's assets. Unfortunately, few attorneys devote any time or attention that the health care power of attorney really deserves. Instead, they recommend that the older client execute a health care power of attorney and give the client a preprinted form from the word processor to execute, with little, if any, discussion with the client of his or her desires. Of course, a health care power of attorney does not have to express the client's desires or beliefs regarding medical care at all. It simply has to appoint an Agent with authority to make "any and all health care decisions" when the principal no longer has decisional capacity. However, it may be a disservice to clients if the professional advisor does not discuss the client's ability to exercise a great deal of latitude in expressing the client's particular beliefs without impacting on the legal efficacy of the proxy designation and empowerment. The Health Care Power of Attorney can be molded and tailored to reflect the concerns and preferences of each individual client. A cursory right of the Agent to make health care decisions for the Principal may not conform to the client's desires and is unlikely to be accepted as sufficient authority by many health care providers.

4) May not be advisable to incorporate health care power into a financial power of attorney.

   a) Client may want different person to make health care decisions.

   b) A separate health care Power will focus your client's attention on his/her desires.

   c) A separate document keeps the client's health care wishes more private.

   d) A health care provider may be reluctant to rely on the Power if it is just a small part of a much longer financial Power.

5) Health care powers should include a HIPPA authorization to release medical information to the Agent.

6) Consider what authorities will be conferred upon the Agent regarding the principal's living arrangements (e.g., nursing home) and client's desires as well as whether the same Agent or a "special" Agent should make living arrangement decisions.

7) Consider authorizing Agent to advise the principal's physician when the principal should no longer be driving. See Phelps, "Driving Miss Daisy," Trusts and Estates 18 (July 2011).

E. Funeral Planning Declaration. Some states (e.g., Indiana Code Section 29-2-19) have enacted statutes authorizing a Funeral Planning Declaration, similar to the Living Will statutes, covering the funeral and/or ceremonial arrangements desired by the declarant, including burial or cremation, from where funeral services are to be obtained, the selection of a grave memorial, and the designation of an agent to make all funeral arrangements. La. R.S. 37:876 provides a priority list of persons who may authorize the cremation of a decedent unless the decedent has left other specific written instructions in a notarized declaration, including a declaration that the decedent does not want to be cremated. HB 305 was introduced in the 2012 Louisiana Regular Legislative Session to allow a "majority" rather than "all" of the members of the class of priority authorizing agents to make decisions for cremation, but the bill did not get out of committee.