By **Laura M. Brancato** & **Mary P. O'Reilly**

Redefining Our Approach to Mental Health and Estate Planning

Addressing long-terms needs can be a challenge

To be an effective estate-planning practitioner, an attorney must have an informed understanding of the multitude of challenges that their clients or their loved ones face. Proper planning for the vulnerable is a mandate that must be considered seriously. A good estate plan is only effective if it contemplates the long-term needs of both the client and the ultimate beneficiary of the plan, and a failure to consider the complexity of those with special needs—beyond the inclusion of a special needs trust (SNT)—might ultimately make even a superior estate plan ineffective. This additional "second stage planning" of ensuring comprehensive and enduring care for clients or beneficiaries with special needs is critical and should become part of our planning. While we all recognize that perfection in planning is impractical, and likely even impossible, as planners, we must push our practices to evolve to meet the needs of a rapidly changing client world. Although this need for second stage planning applies to all types of disabilities our clients and their beneficiaries face, this article will focus on the unique challenges of mental health disabilities, but the principles discussed apply more broadly to all disabilities.

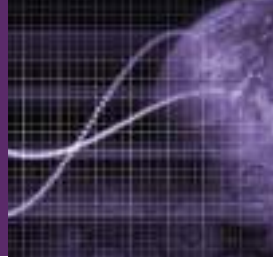
Possible Disability

Estate-planning practitioners might not consider mental health diagnoses as qualifying conditions that would cause a client or beneficiary to be classified as a disabled individual. In fact, an individual can be considered disabled by Social Security Administration (SSA) standards if they meet the SSA's definition of "disabled." As defined by the *SSA Blue Book*, an individual is disabled if they suffer from an illness or injury that prevents them from performing "substantial gainful activity" (that is, the ability to sustain paying work) for at least a year or that will likely result in death.[1] The SSA guidelines include as qualifying conditions the following cognitive and mental health conditions: bipolar disorder, anxiety and obsessive-compulsive disorders, depression, intellectual disabilities and schizophrenia. This isn't an exhaustive list, and a diagnosis of one or more of these conditions won't automatically trigger a determination of disability by federal SSA standards.[2]

Prevalent Issue

As planners, we must employ our critical legal skills to properly address the very unique needs of clients and their family members, who are (or who could become) disabled by reason of a mental health diagnosis. The issue is far more prevalent than one would think. In 2020, for the first time ever, behavioral health disorders became the number one cause of disability worldwide surpassing all other illnesses, including cancer, diabetes and heart disease.[3] The National Alliance on Mental Illness reports that more than 59 million Americans experienced mental illness in 2020, representing more than one in five American adults.[4] Studies also showed that 17 million U.S. adults experienced a co-occurring substance use disorder and mental illness in 2020.[5] Surely those numbers can only be expected to rise as a result of the many stressors brought on by the COVID-19 pandemic.

(From left to right) **Laura M. Brancato** and **Mary P. O'Reilly** are partners, both at Meltzer, Lippe, Goldstein & Breitstone, LLP with offices in New York in New York City and Long Island and in Florida in Boca Raton and Miami



Unfortunately, the issues pertaining to mental health aren't limited to the adult population. New Centers for Disease Control (CDC) data released at the end of March 2022 reveals that the mental health of teens declined further during the pandemic, and more than a third (37%) of high school students said they have experienced poor mental health.[6] CDC studies also revealed that more than one in three high school students had experienced persistent feelings of sadness or hopelessness in 2019, a 40% increase since 2009.[7] Some of the affected teenage population will most certainly develop serious, diagnosed mental health conditions that may well qualify them as disabled individuals once they reach the age of majority.

Mental health challenges are now the norm among employees across all organizational levels. A recent article in the *Harvard Business Review* revealed that 76% of respondents reported at least one symptom of a mental health condition in the past year, up from 59% in 2019.[8]

Creative Planning Solutions

As estate-planning attorneys, we're experts at establishing intricate and well-reasoned estate plans that minimize taxes and successfully pass the family business or wealth to the next generation. Trust planning plays a central role in effective plans and provides beneficiaries with access to their inheritances while ensuring that their wealth is protected from creditor claims and from future estate taxes when possible. Clients with beneficiaries who aren't financially savvy or who are spendthrifts can appoint trusted advisors or corporate fiduciaries as trustees to be stewards of assets for the beneficiary and the generations to come. To achieve a client's planning goals, practitioners will go to great lengths to create provisions that effectively carry out the client's intent. For example, they can establish trusts in other states or foreign jurisdictions to take advantage of favorable trusts laws and divide trustee investment and distributions decisions among different parties. Trust provisions can even include bespoke distribution terms to ensure beneficiaries are provided for but not spoiled and may name a trust protector to oversee the entire plan. Known as providing "dead hand control," trusts serve almost as a proxy for the client to ensure wealth can successfully pass from generation to generation.

This traditional trust planning can work wonderfully for the average beneficiary who might only need investment guidance and management of distributions. Consider the following, however: Recent CDC data indicates that nearly one in four Americans live with some type of disability.[9] Accordingly, practitioners must plan under the assumption that "average" beneficiaries aren't the only individuals who need be considered. Families who have a loved one suffering from a mental health disability may find that traditional trusts fall dreadfully short in meeting the needs of the most vulnerable beneficiaries.

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Speaking broadly in this context, practitioners are generally using either discretionary trusts and/or SNTs to meet the needs of a beneficiary who's already been deemed a disabled individual. Use of the SNT ensures that available assets won't disqualify a beneficiary from receiving government benefits or services, and the resources can instead be used to enhance and supplement the beneficiary's life in other ways. It's short-sighted for the estate-planning practitioner to assume that the job of proper mental health planning ends when the trust is executed. Rather, practitioners should consider and possibly implement a second stage plan to best support the total needs of the beneficiary. A second stage plan could include express trust provisions that speak directly to mental health intervention, treatment, support, financial management and other issues.

Sample Scenario

Beneficiaries who are disabled by reason of a mental health diagnosis present with unique estate-planning challenges. Take for example the following clients: Robert and Pamela seek to establish an SNT for Paul, their 31-year-old son. Paul has been living with bipolar disorder for more than 10 years and has struggled to find stability throughout life. He cycles through periods of wellness and doesn't maintain regular compliance with his prescribed medication. He lives a lifestyle completely funded by Robert and Pamela, and they intervene on his behalf in a variety of circumstances, including medical decision making at times. Paul has significant trouble managing his finances and, during periods of severe illness, will disappear from the home he shares with Robert and Pamela for periods of time. Robert and Pamela seek to establish a third-party SNT for Paul's benefit and desire to name Paul's sister Melinda as trustee. They haven't discussed this desire with Melinda, who's been distant from Paul as he causes strife among family members. They intend to rely on their trusted financial advisor and bank because they're well respected clients and have significant assets at the institution.

> A trust that only provides investment advice and financial management won't suffice for vulnerable beneficiaries.

A thorough practitioner would consider the many challenges Paul faces. First, traditional SNT provisions should be included to protect

any government benefits Paul may receive now or in the future. Beyond that, the proper plan should consider Paul's basic management needs, specifically those that center around proper mental health treatment. Carefully crafted provisions should consider how Paul's care can properly be managed in the community. Perhaps the trustee will be directed to a specific agency that can provide "boots on the ground" services to assist Paul when he has periods of instability. Perhaps the trust will provide discretion to the trustee to employ interventionists or other crisis management teams to attend to Paul in the event of a mental health crisis. Even better, perhaps the plan will actually name those individuals so the trustee has express resources at the ready to address any of Paul's needs. Said differently, sole reliance on the trustee in this specific fact pattern likely wouldn't produce the result that Robert and Pamela intended.

In this fact pattern, mere financial support would also not otherwise solve Paul's challenges. His nature of overspending will continually present problems for Melinda, who will be challenged constantly by her brother seeking additional funds. Even worse, Melinda as the named fiduciary is a sibling who already has a strained relationship with her brother. This creates an emotionally charged fiduciary relationship that will likely either end in litigation or the resignation of the individual trustee. Perhaps the planning practitioner should instead consider naming a financial management service that will assist Paul with budgeting, bill paying and day-to-day financial support to alleviate the burden on Melinda and allow her to interface with Paul through the financial management company. Perhaps the trust agreement will identify this company by name in the trust agreement so as to reduce uncertainty for Melinda. This would alleviate the burden on

Melinda to be the "bad guy" who must continually limit Paul's spending and, therefore, eliminate one of the most frequent sources of contention between trustee and beneficiary.

If the relationship between Paul and Melinda is irretrievably broken, can she resign in favor of a corporate fiduciary? In fact, it's rare to find a corporate trustee who will agree to manage the assets held in an SNT, in large part due to the complexity of managing assets on behalf of a beneficiary who's disabled.[10] More and more, it's become incredibly difficult to find a bank or trust company that will consider this responsibility, even for the wealthiest of clients. Among other reasons, this reluctance is because the needs of a disabled beneficiary in an SNT goes beyond needing someone to manage investments and distributions, and these institutions recognize that they don't have this type of expertise. Practitioners should also recognize that the typical trustees we name in trust documents—whether a bank or trust company, a family member or a trusted friend—likely also don't have the requisite skills to manage an SNT. As such, for these clients, they should endeavor to identify other qualified parties who can address the care and lifestyle needs of a beneficiary beyond managing finances. Perhaps the newly drafted trust instrument will identify advocates or advocacy agencies that agree to serve in the role of trustee for many individuals of a certain type of disability and will include language that mandates these care considerations. Additionally, practitioners could consider trust jurisdictions where the various roles of the trustee can be divided among different individuals or committees with expertise in their specific area. Regardless of the structure, including experts in mental health law and mental health care as trust decision makers would provide Paul with a much better chance of getting the support he needs throughout his life, including assuring that his government entitlements are preserved for his lifetime use—a task that's generally outside the purview of the average trustee.

As is evident, there are a host of specific considerations that apply to second stage planning in these unique circumstances. A trust that only provides investment advice and financial management won't suffice for vulnerable beneficiaries. The example provided here illustrates that our traditional planning approach is in need of refinement. Simply executing a trust instrument with an appointed trustee wouldn't be the most sufficient plan and would potentially cause unnecessary tension, waste of assets and even the potential for litigation. Creative drafting that contemplates the need for specialized mental health support and services will produce a document that's of great benefit to our clients, both as the creators and beneficiaries of these special trust documents.

Endnotes

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