



COMMITTEE REPORT: THE MODERN PRACTICE

By **Marvin E. Blum**

Filling in the Gaps

Create a “red file” for clients to cover issues beyond traditional estate planning

Most estate planners will agree that one of the most formidable obstacles to the planning process is the general reluctance of clients to discuss their own mortality. There’s one significant motivating factor, however, that drives clients to confront their mortality and plan for their incapacity and death: control. Clients want to ensure that on incapacity, they’re cared for as they wish and on death, their assets pass exactly how they would like. While crafting an estate plan, both planners and clients tend to focus on the effective and tax-efficient distribution of the client’s assets. It’s all too common for a client to walk away with a perfectly crafted portfolio of estate-planning documents that expertly disseminates the client’s property but fails to provide the control so desperately desired. How is it possible for a perfect plan to be so imperfect? The answer lies outside of the formal estate-planning documents and accordingly often goes overlooked by planners and clients alike, but the answer, itself, is simple. By adding a “red file” to the traditional batch of estate-planning documents, clients increase their level of control in two key areas: (1) incapacity, and (2) administration of the estate at death.

As part of the planning process, estate planners should encourage clients to create a red file and guide them on how to do it. Essentially, a red file is a notebook or other centralized source of information that will not only aid an executor in navigating the waters of estate administration, but also will make very clear the wishes of a client in the event he becomes incapacitated in the future.

While only clients can actually establish the red file, estate planners should provide their clients with a framework of guidelines for what it should contain. There’s no specific formula for what makes a red file effective, but clients should know that the more information they include, the more helpful it will be to those managing their assets or making care decisions on their behalf.

Control Over Future Incapacitation

In many instances, clients may actually be more willing to discuss preparations for their death than they are preparations for the possibility of becoming incapacitated. The term “incapacitated” often invokes images of nursing homes, hospital beds and beeping medical machines. The truth is, however, that incapacitation most frequently comes in the form of cognitive deterioration. Although individuals are living longer than ever, advances in medical care for physical ailments have far outpaced advances in medical care for mental ailments, and the reality is that almost half of those who reach the age of 85 have “measurable cognitive impairment.”¹ In fact, more U.S. dollars are spent on care for dementia patients than on “heart disease and cancer combined.”²

With 10,000 Baby Boomers reaching age 65 every day³ and a projection that cases of Alzheimer’s will increase over 170 percent by the year 2050 in those over the age of 65,⁴ estate planners should be helping clients prepare for the possibility that they or someone they love will be affected by Alzheimer’s or some other form of dementia during their lifetime.

Unfortunately, cognitive deterioration generally occurs slowly and, in its early stages, can often be overlooked or ignored by family members. Parents may appear on the surface to be in full control of their lives, while behind the scenes, the tasks they used to complete seamlessly, like balancing a checkbook or keeping up



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with their finances, are becoming increasingly challenging. And, because it's more common in today's world for families to live in different cities or states, the danger of loved ones missing the early signs of dementia has grown. Mom and dad may seem perfectly well and cheerful over the phone, while an extended visit would reveal a troubling amount of information they can no longer remember.

In addition to dementia or Alzheimer's, catastrophic events such as strokes, aneurysms and traumatic brain injury likewise cause incapacity, but rather than setting in gradually, these traumas are sudden and can occur without warning. Approximately 80,000 individuals per

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year become permanently disabled as a result of suffering from a traumatic brain injury, most often caused by a fall or motor vehicle accident.⁵ Although it may be tempting, especially for younger clients, to wait until early signs of incapacity appear to prepare for it, playing the waiting game is risky. By the time an actual diagnosis occurs, it's often too late for the individual to make plans for future care without some level of assistance.

Many individuals assume a family member will take care of them in the event of incapacitation, but few appreciate the number of decisions a guardian or caretaker must make on behalf of an incapacitated person. From housing situations to medical treatment to simple living and eating preferences, without a plan in place, a family member is left to simply guess at what their loved one would have wanted. As author Debbie Pearson states in *Age Your Way*, those who fail to "make a con-

scious decision for control will inevitably default to no control."⁶ Estate planners must stress the importance of putting a plan in place that will allow clients to exercise control over their lives despite any future incapacities.

Control of Estate Administration

From a legal perspective, estate administration is a straightforward process. Documents are filed with the court, proper procedures are followed and the deceased's wishes are carried out in accordance with his estate plan. From a practical perspective, however, the day-to-day tasks of wrapping up the affairs of someone else's life can be daunting and overwhelming.

Typically a spouse, child or other loved one takes on the role as executor with only half of the instructions he needs. He may know who's to receive mom's assets, but what exactly did mom own? How many bank accounts did she use? What insurance policies did she have? Was there a safety deposit box? What bills did she owe? Are there magazine subscriptions to cancel? How does he access her email or shut down her social media accounts? It quickly becomes clear that there's a mountain of information to which only the deceased was privy. Indeed, handing an executor a will without any other information is like telling someone exactly where to drive your car without telling them where the keys are located. When it comes to preparing for what will happen after you die, the truth is that even your closest friends and relatives often have no idea how to act as CEO of your life. Just as in any well-run business, there must be a succession plan in place. Planners must remember to incorporate strategies into a client's estate plan that will enable executors and family members to successfully carry out the client's wishes.

Solution: The Red File

The solution for clients desiring more control over their care during incapacity and their assets on death is a red file tailored to the client's unique situation. As a general rule, a red file should cover three main subjects: (1) a plan for future care; (2) a clear expression of financial intentions; and (3) a comprehensive list of personal information.

Plan for future care. Planning for future care necessitates a big picture outlook, as well as a detailed outlook. Big picture items include medical and living preferences.



Does the client prefer to live at home with home health care attendants or with a family member? If these options are physically or financially unavailable, which living facilities does the client prefer? Providing a list of specific senior living or nursing care facilities will ensure the client's loved ones have a clear understanding of how the client envisioned living out his life.

The more detailed the plan is, the more likely the client can ensure an enriched, comfortable life, despite the setting in which he'll find himself living. A list of favorite foods, music, colors, books, activities, sports and movies can communicate to future caretakers an idea of who the client is long after the client's lost the ability to voice an opinion.

In preparing this portion of the red file, it may help clients to confer with someone from the extensive network of consultants who assist with planning for the care of elderly family members. When clients who've never been incapacitated are planning for their own incapacity, it's easy to overlook important considerations. An aging life care professional (also called a "geriatric care manager") acts as a guide and resource for families caring for older or disabled relatives or planning for their care. These consultants know, for example, the going rate for in-home care, the physical obstacles to look for in a home environment and which walker would be best for your client. The Aging Life Care Association (ALCA) is a national non-profit association of such consultants. The ALCA website provides a resource to search for a list of aging life care experts near your client. Dallas-based Cariloop is another such resource. Cariloop provides educational materials and access to a planning coach who can help users work through the options depending on their needs. By speaking with a consultant, clients can identify issues to address in their red file that they might not have otherwise considered.

Financial intentions. Although the final disposition of a client's assets will be documented in the formal estate-planning documents, it's important for clients to express their wishes for how their money is to be spent prior to their deaths. The client should complete a power of attorney (POA) as part of his traditional planning documents. A POA, however, only authorizes someone to act financially for the client. It doesn't provide any guidelines for how the client would have wanted his designated agent to allocate funds. For example, if the

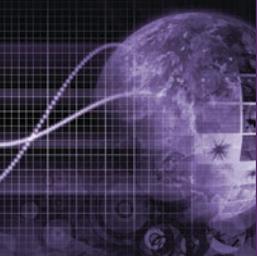
client prefers to live with a family member in the event of incapacitation, should a portion of the client's assets be used to remodel the family member's home or to purchase a larger home? Should a family member or close friend serving as caregiver receive financial support? Not answering these questions could lead not only to conflict among the client's family, but also to financial abuse of the client.

The unfortunate truth is that "an estimated one in five older Americans has been financially exploited,"⁷ and according to a survey conducted by Merrill Lynch Wealth Management, "a child was the suspected perpe-

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trator 71% of the time."⁸ In some instances, the abuse is a result of malicious intent, as in the well-known case of Brooke Astor. Brooke suffered from Alzheimer's, and her son took advantage of her mental disability to funnel millions of dollars to himself. Eventually, Brooke's grandson realized what had transpired and petitioned the court to remove the son as Brooke's guardian. Although this is an example of abuse on a grand scale, even those with modest-sized estates are at risk for exploitation.

The line for what constitutes exploitation can become muddled when a caregiving situation is involved. For example, if a child quits her job to serve as caregiver for a parent, is she entitled to help herself to a salary without the parent's consent? Another potential abuse situation arises when a parent expressly decides to give a salary to a child willing to serve as caregiver but the client later becomes so debilitated that a professional caregiving service must take over. Does the child get to continue taking the salary, even if her only job is to supervise



care?⁹ A well-planned red file will state clearly whether money paid to a family member in consideration for caregiving services will constitute compensation, a gift, an advance against a future inheritance or some combination of the three.¹⁰

Centralized information. For executors and other loved ones charged with managing a client's assets during a period of incapacitation or estate administration, a well-compiled list of information in a red file can prevent such a weighty responsibility from becoming a nightmare. In today's world, the number of online accounts and subscriptions an individual maintains can increase from day to day. From social media to paying bills online to shopping accounts, the list of passwords can be overwhelming for anyone, but especially so for someone who has to step into the shoes of another to manage his affairs.

Unfortunately, laws haven't kept up with technological advancements when it comes to legally accessing another individual's online accounts.¹¹ Due to company privacy policies and rarely read user agreements, trying to shut down a social media page or an email account can be nearly impossible without having the necessary passwords. These potential difficulties only increase the importance of having and maintaining an updated red file.

List of Categories

The best way for estate planners to aid clients in gathering all the pertinent information for the red file is to provide them with a list of categories they need to review. Below is an abbreviated list of classifications of information that clients should consider when compiling their red file:¹²

- **Assets:** checking and investment accounts, private business interests, location of safety deposit boxes, annuities, individual retirement accounts and 401(k)s, trust agreements, real estate, vehicles, collectibles
- **Liabilities:** credit cards, mortgages, car payments, cell phone bills, other recurring bills
- **Social media/online accounts:** passwords and login information for Facebook, Twitter, Instagram, Pinterest, LinkedIn, Amazon, PayPal, eBay, Netflix, Hulu, iCloud or other cloud storage accounts, online photo storage accounts
- **Miscellaneous subscriptions/memberships:** airline rewards programs, Sam's, BJ's or Costco member-
- ships, toll tag accounts, magazines, newspapers
- **Insurance:** life insurance, long-term care, disability, home, auto
- **Home maintenance:** water, gas, electricity, telephone, alarm, lawn care, cable television, Internet service
- **Medical:** medical conditions, medications, emergency contacts
- **Personal:** burial/cremation preferences, funeral plans, pre-paid funeral expenses, birth certificates, marriage certificates, Social Security card
- **Key contacts:** financial and legal advisors, doctors, family members, close friends

See "Red File Checklist," p. 41. This is by no means a comprehensive list, as each client's red file will require different information, but as clients review the checklist, they'll begin to appreciate the vast amount of information their loved ones may not know.

A Completed Red File

In addition to providing the checklist, estate planners should instruct clients what to do with the red file once it's completed.

In *Age Your Way*, Pearson recommends using a three-ring binder for the red file, which will allow the client to easily add and update information in the future. It's also wise to create both hard copies and digital copies of the red file and place a copy in a safety deposit box or other secure location that will be safe in the event of disaster at home. Most importantly, planners should remind clients to share the red file with family or close friends. Some clients may even wish to make copies to provide to family members. Remember, however, that the information contained in a red file is subject to change and should be updated at least twice a year. Clients should be careful to request old copies of their red file back from loved ones to avoid confusion.

Embarking on the journey of creating a red file may seem like an arduous task to some clients, but it's important to remind them of the peace of mind that will come from knowing friends and family have all the resources they need to ensure the client's wishes will be fulfilled exactly as planned. Children and loved ones will be relieved from much of the stress that comes with the care of an incapacitated person or the probate of an estate, and clients will likely feel that they've retained a sense of control over personal decisions that must



Red File Checklist

Your client should provide information and answer questions

Consolidation of Personal Information

- **Financial accounts**—Account number and bank contact information for checking and savings accounts, credit cards, brokerage accounts, retirement accounts and annuities.
- **Trusts**—Copies of trust agreements, contact information for trust officers/trustees for any trusts you created or will inherit from.
- **Private business interests**—Information on any business interests owned, including what's owned, how owner name is styled, contact information for manager and copies of any appraisals.
- **Real estate**—Deeds for any real estate owned, information on any mortgages including payment amount, contact information for bank and if mortgage payment is automatically debited from a bank account.
- **Jewelry, art and collectibles**—List of any valuable jewelry, art and collectibles; copies of any appraisals; copies of any insurance policies on these items.
- **Storage locations**—Location of any safety deposit boxes or storage units. Include location of keys and access information.
- **Important documents**—Copies of birth certificate, marriage certificates, prenuptial or postnuptial agreements, divorce agreements, driver's license, Social Security card, passport, tax returns for past three years, notes receivable, notes payable and estate-planning documents (will, trusts, powers of attorney, HIPAA authorization, beneficiary designations).
- **Home utilities and maintenance**—Account numbers and contact information for electricity, gas, water, telephone, cable television, Internet, alarm monitoring, lawn care and house cleaning services.
- **Vehicles**—Titles to any vehicles; information on any auto loans including payment amount, contact information for bank and if payment is automatically debited from a bank account.
- **Insurance**—Copies of policies, contact information of insurance agents and carriers, amounts of coverage and deductible amounts for any life insurance, health insurance, long-term care or disability insurance, prescription drug coverage, homeowner's policies and auto insurance; include all relevant Medicare and Medicaid information.
- **Veteran's benefits**—Copies of military service record and Veteran's Health Identification Card, information on benefits you're receiving (pension, disability compensation, medical), information on any additional benefits available (life insurance, health care, long-term care, rehabilitation, nursing and residential care, burial and memorial benefits); contact information for closest Veterans Affairs regional office.
- **Medical**—List of medical conditions, medical history, medications, doctor contact information and emergency contacts, health care directives (living will, durable power of attorney for health care, health care proxy).
- **Income**—List of income sources including Social Security, pensions, alimony, mineral royalties and trusts.

- **Reoccurring bills**—List of all reoccurring bills, including if any are set to be automatically debited from a bank account or charged to a credit card.
- **Subscriptions**—Information on any club memberships (including country club, Sam's, BJ's, Costco), airline rewards programs, toll tag accounts, magazine subscriptions and newspaper subscriptions; include if any automatically renew.
- **Digital accounts**—Passwords, login information and membership fees for any online accounts including email accounts, online banking accounts, social media accounts (Facebook, Twitter, Instagram, Pinterest, LinkedIn), online shopping accounts (Amazon, PayPal, eBay), online entertainment accounts (Netflix, Hulu), and iCloud or other cloud or photo storage accounts; include if any digital accounts automatically renew; include passwords and login information to log on to computers and mobile devices.
- **Financial contacts**—Contact information for financial advisors, attorneys, accountants, bankers, insurance agents and the person named as executor of your will.
- **Family contacts**—Contact information for family members and close friends.
- **Personal preferences**—List of favorite foods, music, colors, books, activities, sports, movies.
- **Funeral plans**—Burial/cremation preferences, grave plots owned, prepaid funeral expenses and contact information for anyone you want notified when you die.

Guidance for Future Care and Clear Expression of Financial Intentions

- Do you prefer to live at home with home health care attendants or with a family member?
 - If with a family member, who?
 - If with a family member, do you want a portion of your assets to be used to remodel the home (enlarge doorways to accommodate a wheelchair, hand rails in the restroom, ramps instead of stairs, a bedroom that could accommodate a hospital bed) or to purchase a larger home and, if so, how much?
 - Will this be considered a gift or an advance against a future inheritance?
- Do you want to provide financial support to a family member or close friend who takes on the role of caregiver?
 - Will this be considered compensation, a gift or an advance against a future inheritance?
- Is there an adult day care program available that you would consider going to?
- If you can't be cared for in a home environment, which living facilities do you prefer?
- If you don't have children who can take on one or more of these roles, who will implement your wishes for care during your remaining lifetime?

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ultimately be carried out by someone else.

There's no medical cure for aging, but there are ways to ease some of the challenges that come along with it. A red file is one way to prevent some of the heartache that can occur when a family member loses control. Although it's an easy task to put off, 59 percent of adults in one survey stated that they changed their own financial plans after watching an aging family member.¹³ The importance of planning now, before a crisis happens, can't be overstated. Estate planners can craft the most effective planning documents possible, but it won't matter how well off clients are from an estate-planning perspective if their friends and family are left in shambles trying to pick up the many pieces of their loved ones' lives. 

Endnotes

1. "Financial Abuse: The Silent Epidemic," *Barron's* (Nov. 12, 2016).
2. Debbie Pearson, *Age your Way* (Family Night Press 2016), at p. 35.
3. "Aging and Its Financial Implications," Legg Mason Global Asset Management (2015).
4. "Memory Loss ... Remember to Plan," *Fiduciary Insights*, Fiduciary Trust Company (2015), www.fiduciary-trust.com/insights/memory-loss-remember-to-plan/.
5. "Frequently Asked Questions," Brain Trauma Foundation, www.braintrauma.org/faq.
6. Pearson, *supra* note 2, at p. 15.
7. See *supra* note 1.
8. *Ibid.*
9. *Ibid.*
10. *Ibid.*
11. Gerry W. Beyer, "Cyber Estate Planning and Administration," presentation, Tarrant County Bar Association—Fort Worth Business & Estate Section (Nov. 17, 2016).
12. Pearson, *supra* note 2; *ibid.*
13. William Power, "The Difficult, Delicate Untangling of Our Parent's Financial Lives," *Wall Street Journal* (March 27, 2016), www.wsj.com/articles/the-difficult-untangling-of-our-parents-financial-lives-1459130770.