BEWARE OR BE BLINDSIDED: AVOIDING ESTATE PLANNING PITFALLS

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I. INTRODUCTION

Together, a power of attorney1 and a health care proxy2 are two of the most basic and essential estate planning documents for people of any age.3 Unlike other planning documents, the power of attorney and health care proxy are “utilized while the client is still alive.”4 Therefore, ensuring these documents provide properly for the client’s wishes is “one of the most important functions of an attorney.”5 Through the execution of these two documents, clients provide an agent with the crucial powers needed to make the most personal healthcare and property decisions for a client,6 seeking to guard against the uncertainties of life.7

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1 A power of attorney is a written instrument whereby an individual (the “principal”) appoints another person (the “agent” [or “attorney-in-fact”]) to act on his or her behalf. N.Y. STATE LAW REVISION COMM’N, REPORT ON POWERS OF ATTORNEY 1 (2012), http://www.lawrevision.state.ny.us/PowersofAttorneyFinalReportJanuary2012.pdf.

2 A health care proxy is a written instrument by which an individual delegates the authority to make health care decisions to another, subject to certain limitations. N.Y. PUB. HEALTH LAW § 2880(8) (McKinney 2013).

3 “From the point of view of a client there is, in most cases, no part of an estate plan that is more important than the selection of an agent for a power of attorney and/or health care proxy.” Ira Salzman, Your Money and Your Life: Who Do You Trust?, N.Y. ST. B. ASS’N J., July–Aug. 2011, at 24, 24.

4 Id.

5 Id.


7 Recognizing the importance of these and other estate planning devices, the New York State Bar Journal published a special issue in July/August 2011 entitled “Are You Prepared for the Elder Years? A Special Issue for Attorneys, Their Loved Ones and Their Clients.” Throughout the issue, the importance of every person having a health care proxy and power of attorney was made clear. See, e.g., Charles Fahey, A Prayer, a Hug and a Martini: Dealing With the Realities of Aging, N.Y. ST. B. ASS’N J., July–Aug. 2011, at 10, 11 (positing that the health care proxy is the preferable directive to allow someone to make health care decisions
But, do these documents really protect against such uncertainties? At first blush, it would seem so since that is the documents’ very purpose. However, recent case law has demonstrated that the operation of these estate planning documents may not be so certain. For example, even if your irrevocable trust prohibits amendments from being made, your attorney-in-fact may be able to make amendments to it. If you are your mother’s attorney-in-fact and health care agent, you still may not be able to decide in which nursing home she should live. If your attorney-in-fact transfers your real property to himself in accordance with your express wishes, this transfer may still be questioned. In addition, despite a lawyer’s best efforts to meet a client’s estate planning goals by using these documents, case law shows that the plan can also be thwarted by a family member’s dissatisfaction. To address these situations, the lawyer may now need to anticipate the unexpected to protect the client’s estate plan from unfavorable interpretations and family challenges.

Parts II and III of this note focus on the power of attorney and health care proxy and uses case illustrations to highlight how the operation of these documents has become uncertain. Further, Part IV explores the inherent uncertainty created by third party dissatisfaction and how it can thwart the goals of an estate plan. Part V then discusses implications of these uncertainties and how they can damage the client and the attorney. Finally, Part VI closes with some recommendations on how the estate planning practitioner can predict these potential pitfalls, and eliminate or at least minimize the associated effects.

for you in the event of incapacity and comparing the relationship between agent and principal to an engagement); H. Patrick Leis III, From ESQ to IP: Attorneys and Judges Need to Prepare for the Possibility of Incapacity, N.Y. St. B. Ass'n J., July–Aug. 2011, at 12, 13, 14 (noting the importance of executing a power of attorney and health care proxy before incapacity occurs to avoid a guardianship action in addition to protecting the “individual’s assets, dignity, desires, privacy and even family harmony”); A. Gail Prudenti, Lawyer, Plan for Thyself and the People You Love, N.Y. St. B. Ass'n J., July–Aug. 2011, at 8, 8 (“Continuing to pester our friends . . . to execute the proper documents . . . is not only a demonstration of our friendship and caring but perhaps our obligation as colleagues.”).


10 Certainly, an agent, principal, or attorney may be male or female. However, for consistency and ease of reading, masculine pronouns are used throughout this note except when discussing parties in particular cases.

II. POWERS OF ATTORNEY

A. Background

Beginning as a common law principle of agency, the power of attorney was first codified in New York in 1948 with the advent of the statutory short form power of attorney.\(^\text{12}\) By 1975, the statutory instrument was amended in the General Obligations Law to provide for its “durability,” allowing the instrument to remain in effect despite the principal’s incapacity.\(^\text{13}\) In 1996, the General Obligations Law was further amended to allow the principal to bestow gifting powers upon his attorney-in-fact.\(^\text{14}\) The evolution from a common law principle to a statutorily defined instrument reveals the changing role and importance of the document in modern society.

It is precisely this growing importance that led to the 2009 revisions of the power of attorney law. In 2000, the New York State Law Revision Commission\(^\text{15}\) conducted an extensive study to explore the weaknesses in the existing law.\(^\text{16}\) Recognizing the enhanced powers the 1996 amendments bestowed on attorneys-in-fact, the Commission noted, “the breadth of the authority granted under a power of attorney has evolved over the years far beyond those originally envisioned.”\(^\text{17}\) These amendments allowed “an agent to

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\(^{13}\) N.Y. STATE LAW REVISION COMM’N, supra note 1, at 2.

\(^{14}\) Id.

\(^{15}\) “The Law Revision Commission was created by Chapter 597 of the Laws of 1934, which enacted Article 4-A of the Legislative Law.” Id. at 1 n.1; see Act of May 16, 1934, ch. 597, 1934 N.Y. Laws 1289.

\(^{16}\) See N.Y. State Law Revision Comm’n, Memorandum in Support 3 (May 23, 2008), http://www.lawrevision.state.ny.us/reports/2008_Memo_In_Support.%28May_23_2008%29.pdf (“For the past eight years the Commission engaged in a study of the use of powers of attorney in New York. During that time, the Commission . . . had numerous meetings with attorneys from trust and estates and elder law practices, members of the Judiciary, prosecutors and adult protective service investigators from around the state, and representatives from various state agencies and the Legislature.”).

\(^{17}\) N.Y. STATE LAW REVISION COMM’N, supra note 1, at 3.
create trusts, change beneficiaries to a life insurance policy, and establish joint bank accounts and toten trusts.” 18 In addition, the amendments permitted an agent to gift the principal’s assets to another or to self-gift assets to himself, including assets such as securities, real property, bank accounts, and life insurance contracts. 19 Essentially, by executing a very simple document, a principal was granting his agent expansive powers, especially in terms of gifting, without being expressly aware of doing so. 20 After executing the document, the principal might believe the agent could act for him in routine matters when the agent had in actuality been given a free pass to alter the estate and potentially gift away the principal’s assets! 21

As a result of the study, the Law Revision Commission successfully urged that changes be made to the power of attorney law. 22 The 2009 changes to the power of attorney law heighten both the responsibility of the agent to the principal, and the awareness of the principal as to the breadth of powers he is giving to his agent. 23 One significant change in terms of the principal’s awareness is the Statutory Gifts Rider, which requires the principal to execute a separate, supplemental document to the power of attorney so that the principal specifically considers the gifting powers to be given to the agent, including the ability to self-gift. 24 The statutory short form power of attorney also expanded upon the “Caution to the Principal” provision, providing a precise warning to the principal about the power of the document and the associated consequences. 25

The 2009 changes also affect the agent and interested third parties. The “Important Information for the Agent” explains to the agent his role as the principal’s fiduciary and the limitations on his

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18 Id. at 2.
19 Id.
20 Id. at 3.
23 See Rose Mary Bailly et al., There’s a Reason It’s the POWER of Attorney, N.Y. St. B. Ass’n J., July–Aug. 2011, at 18, 18 (noting that the complexity of statutory power of attorney is aimed at informing the principal of the powers he is giving to the agent to prevent misuse).
24 N.Y. GEN. OBLIG. LAW § 5-1514(1) (McKinney 2013).
25 Id. § 5-1513(1)(a).
authority as agent. An expanded definition of “financial institution[s]” is enumerated in the updated law, and requires such institutions to accept a validly executed power of attorney.

Essentially, these revisions to the power of attorney law sought to fill in where the prior law was silent or ambiguous in order to clarify the document’s powers. These extensive clarifications “reflect[] the evolution of the power of attorney into an instrument to accomplish complex financial and estate planning” and thus provide a clear picture to the principal, agent, and (if involved) attorney of what is and is not allowed under the document. Such clarity in the operation of the document is of paramount importance, especially given the popularity and wide use of the document. This is especially true for the drafting attorney, who is charged with ensuring that a client’s power of attorney provides the client’s agent with the powers the client desires, while also ensuring that the agent is not given powers the client does not want the agent to have.

Unfortunately, despite these efforts at clarity, a recent case has demonstrated that some ambiguity remains. This 2012 case, Perosi v. LiGreci, illustrates not only that the actual powers an attorney-in-fact may have under the power of attorney are still not clear, but also that there is not a clear consensus among the courts about the...
extent of these powers. The practical result is that the attorney must now anticipate and guard against such uncertainties.

B. Case Illustration: Perosi v. LiGreci

“Nicholas LiGreci created an irrevocable trust in 1991.” The trust agreement explicitly stated that the trust “shall be irrevocable and shall not be subject to any alteration or amendment.” The respondent and brother of the settlor, John T. LiGreci, was named trustee and the settlor’s accountant, Jack A. DeSantis, was named successor trustee. Upon Nicholas LiGreci’s death, the trust proceeds were to be evenly distributed to his three children.

In April 2010, Nicholas LiGreci executed a New York Statutory Short Form Power of Attorney naming Linda Perosi, his daughter, as agent and naming her son and his grandson, Nicholas A. Perosi, as successor agent. The document provided Linda full authority to act on his behalf. Nicholas LiGreci executed a Statutory Gifts Rider, enabling his agent to make major gifts and to self-gift.

Fifteen days before the death of Nicholas LiGreci, Linda Perosi executed an amendment to Nicholas LiGreci’s irrevocable trust as Mr. LiGreci’s attorney-in-fact. The amendment removed John T. LiGreci and Jack A. DeSantis from their respective roles as trustees and in their place appointed Linda’s son, Nicholas A. LiGreci, as trustee and Ericalee Burns as successor trustee. Though all three beneficiaries (Linda and her two brothers) consented to the amendment to the trust, Nicholas LiGreci himself never executed it.

The former trustees objected to Linda’s action, and moved to set aside the amendment. Linda argued that under New York’s
Estates, Powers and Trusts Law (“EPTL”) section 7-1.9(a), she could amend the trust as the settlor’s agent under the power of attorney. The trial court found otherwise, noting that the right to revoke an otherwise irrevocable trust is a personal right unless trust language provides for the contrary and, since Nicholas LiGreci did not reserve the right to amend or revoke his irrevocable trust, he clearly intended it to be irrevocable. Using strong language, the court asserted, “the petitioner has not cited any New York law or precedent which would support [her] proposition that an agent may use a power of attorney to modify an irrevocable trust instrument executed by her principal utilizing EPTL 7-1.9.”

However, on appeal, the Appellate Division, Second Department, came to the opposite conclusion. In its decision, the Second Department noted that the supreme court’s reasoning hinged on the power of attorney granting “forward looking powers” and was therefore “silent as to the restructuring of past estate planning devices.” While the court acknowledged that neither the power of attorney nor the General Obligations Law specifically authorized the agent to amend a trust, the court relied on the absence of a prohibition for the agent to amend the trust. Noting “[a]n attorney in fact is essentially an alter ego of the principal,” the

47 New York’s Estates, Powers and Trusts Law section 7-1.9(a) allows for the settlor of a trust to revoke or amend the trust if all beneficiaries to the trust consent in accordance with the statute. EPTL 7-1.9(a) (McKinney 2013).
49 Id.
50 Id. at 599, 918 N.Y.S.2d at 299.
52 Id. at 234, 948 N.Y.S.2d at 632 (internal quotation marks omitted) (citing Perosi, 31 Misc. 3d at 599, 918 N.Y.S.2d at 298).
53 Id. at 236–38, 948 N.Y.S.2d at 634–35.
54 Id. at 237, 948 N.Y.S.2d at 634 (quoting Zaubler v. Picone, 100 A.D.2d 620, 621, 473 N.Y.S.2d 580, 582 (App. Div. 2d Dep’t 1984)) (internal quotation marks omitted). In In re Elsie B., the court was tasked with deciding whether a guardian of an incapacitated person under New York’s Mental Hygiene Law section 81 could be authorized “to exercise the right retained by the incapacitated person as settlor of a revocable inter vivos trust to modify the trust by adding cotrustees.” In re Elsie B., 265 A.D.2d 146, 147, 707 N.Y.S.2d 695, 696 (App. Div. 3d Dep’t 2000). The court found that the power to amend the trust was retained by Elsie as settlor and that it was therefore proper for the court to authorize her guardian to exercise the right to amend on her behalf. Id. at 149, 707 N.Y.S.2d at 697. Though the court noted that language in the trust agreement evidenced that Elsie may have desired a sole trustee, the lack of disabling language in the trust instrument allowed for Elsie’s rights to be exercised through a proxy. Id. Thus, the Elsie B. court, in similar fashion to Perosi, extended rights to an agent that were not specifically enumerated by the principal. However, Elsie B. had expressly retained the power to amend for herself and in later bestowing this power on her guardian, the court had the privilege of continued supervision and monitoring of her agent’s actions under the guardianship. Perosi went much further in that it extended a right
court held that the General Obligations Law granted Linda Perosi, as attorney-in-fact, the authority to amend the trust, since such authority was not otherwise prohibited.\(^{55}\) In so holding, the court essentially stated that the right to amend or revoke by the settlor is not a “personal right,” but is instead among the other rights a principal shares with the attorney-in-fact.\(^{56}\) In closing, the court also called on the legislature to address the issue, noting that it is the legislature which would have to act to create a presumption that a creator cannot act through his agent in amending or revoking a trust.\(^{57}\)

III. HEALTH CARE PROXIES

A. Background

Getting a later start than that of the power of attorney, the health care proxy was first codified in New York State in 1991.\(^{58}\) The health care proxy allows a principal to appoint an agent who can make health care decisions for the principal in the event of the principal’s incapacity and allows for the agent to provide specific instructions to the agent if desired.\(^{59}\) Because a power of attorney does not allow an agent to make health care decisions, a health care proxy is a vital element of an estate plan to address this area of uncertainty.\(^{60}\)

The health care proxy is favored over a living will, in that it allows the agent to make a broad range of health care decisions, instead of being limited only to decisions regarding life-prolonging

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\(^{55}\) Perosi, 98 A.D.3d at 238, 948 N.Y.S.3d at 635 ("[W]e hold that since the Trust did not prohibit the creator from amending the Trust by way of his attorney-in-fact, the attorney-in-fact, as the alter ego of the creator, properly amended the Trust.").

\(^{56}\) This premise is interesting and confusing, in that it has long been established that the agent cannot act in all matters for the principal, and thus is not an alter ego in any real sense. See, e.g., Cymbol v. Cymbol, 122 A.D.2d 771, 772, 505 N.Y.S.2d 657, 659 (App. Div. 2d Dep’t 1986) (prohibiting an attorney-in-fact from executing an affidavit on the principal’s behalf, based on personal knowledge of the principal and of which the agent has no personal knowledge himself); Mallory v. Mallory, 113 Misc. 2d 912, 915, 450 N.Y.S.2d 272, 274 (Sup. Ct. Nassau County 1982) (prohibiting an agent from entering into a marriage or divorce on the principal’s behalf).

\(^{57}\) Perosi, 98 A.D.3d at 238, 948 N.Y.S.2d at 635.


\(^{59}\) PUB. HEALTH LAW § 2981(5).

In making most health care decisions for the principal, the agent must act in accordance with the principal's express wishes, or, if those wishes are not known, must act in accordance with the principal's best interests. In regards to decisions involving the administration of artificial nutrition and hydration, the principal's wishes must be reasonably known or ascertained, or the agent will not have the authority to make decisions about such life-sustaining treatments. However, the principal's wishes regarding artificial hydration and nutrition need not be written on the health care proxy and can be based on prior oral statements and reasonable knowledge of the principal's wishes. The agent is not required to have clear and convincing evidence of the principal's wishes, as was required prior to the health care proxy law.

As with the power of attorney, the health care proxy law was enacted to eliminate ambiguities in the law and to allow for family members to make necessary health care decisions without court approval. Essentially, unless provided otherwise, “[an] agent will be able to make any health care decision that [a principal] could have made if [the principal] w[as] able to decide for [him]self.” In this way, the health care proxy is the power of attorney’s “other half,” providing the principal with peace of mind regarding healthcare decisions not permitted by the power of attorney. The result is an estate-planning “dynamic-duo,” allowing a principal to feel that, in the event of incapacity, his agents will be empowered to

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61 Robert L. Wolff, Elder Law Planning Tools, N.Y. St. B. J., Sept.–Oct. 1993, at 12, 13. The health care proxy is favored over the living will by some practitioners, but a combination of both documents may also be preferred. In fact, “[t]he combination of Health Care Proxies and Living Wills provides an effective tool to deal with health care decision making and can insure to a substantial degree that the client’s wishes will be carried out.” Id.

62 PUB. HEALTH LAW § 2982(2).


65 See id.; see also S.I. v. R.S., 24 Misc. 3d 567, 570, 877 N.Y.S.2d 860, 863 (Sup. Ct. Nassau County 2009) (“[T]he legislature rejected the clear and convincing standard when a health care proxy has been created . . . .”).

66 Memorandum of Senator Michael J. Tully, Jr., S. 6176-A, 213th Sess. (1990), reprinted in N.Y. State Legislative Annual 1990, at 361, 363; see also Executive Memoranda of Mario M. Cuomo, Governor of N.Y., on approving L. 1990 c. 752 (July 22, 1990), reprinted in 1990 N.Y. Sess. Laws 2743 (McKinney 1991) (“[T]he added anguish of legal uncertainty and confusion will be removed for patients who have created a health care proxy.”).

make the vast majority of his healthcare and property decisions. However, a recent case has demonstrated that the powers an agent may have under a health care proxy are, similar to those under the power of attorney, also uncertain. *In re Julia C.* shows that some healthcare decisions may not be accounted for in the health care proxy, leaving an incapacitated principal without a voice and leaving the attorney with another planning challenge.68

**B. Case Illustration: Julia C.**

*In re Julia C.* was a “proceeding for the appointment of a guardian.”69 However, part of the underlying dispute was a disagreement between Julia C.’s son and daughter about her place of abode.70 Following a recent hospital stay, Julia was discharged to a nursing home in Nassau County, New York.71 Julia’s daughter wanted her mother to continue to live near her in Nassau County, while her brother wanted their mother to live closer to her son, friends, and family in Brooklyn.72 Prior to her incapacity, Julia had executed a health care proxy naming her daughter as her health care agent and a power of attorney naming her son and daughter as co-attorneys-in-fact to act separately.73 Her daughter argued that these documents should enable her, as agent, to choose Julia’s place of abode.74

Interestingly, the court found that neither document granted the agents the ability to make a decision on Julia’s place of abode.75 The court quickly dismissed the possibility that the power of attorney granted such authority, noting that “the power of attorney must be strictly construed” and since “no power to choose her place of abode [was] designated,” the agents did not have any such power.76 Even though the power of attorney did indicate that the agents had authority with regards to “all other matters,” the court found that this provision does not “give carte blanche authority to an attorney-in-fact to exercise powers clearly outside the

69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 *Id.*
contemplation of the power of attorney.”

The court then focused most of its analysis on the question in terms of the health care proxy, but also found that the health care proxy did not grant authority to the agent to choose Julia’s place of abode. The court noted that under the Public Health Law, the agent has the authority to make health care decisions on the principal’s behalf that are defined as “any decision to consent or refuse to consent to health care [defined as ‘any treatment, service or procedure to diagnose or treat an individual’s physical or mental condition’].” Given this definition, the court reasoned that the selection of a place of abode is a choice that goes beyond a health care decision since it includes other considerations such as the social environment. Therefore, the court felt the health care agent also had no authority to select Julia’s place of abode. Like Perosi, the decision indicates how a principal’s voice may be silenced in the face of a challenge to the estate plan.

The court’s interpretation of New York’s health care proxy law was the determinative factor in Julia C., but federal case law provides an interesting (and opposing) interpretation of this same statutory language. The Eastern District of New York found in Stein v. County of Nassau that first responders had to “honor a health care proxy’s decision outside of a hospital setting,” including the proxy’s selection of which hospital to transport the principal to. Though this holding was vacated in part after it was determined the principal may not have been deemed incapacitated—meaning the agent’s authority had not yet commenced—the court recognized that an agent’s power may very well extend to non-hospital settings, including where a principal should receive treatment. The court further noted that, if it

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77 Id. To the contrary, in Perosi, such all-encompassing authority is precisely the power that the agent under a power of attorney was found to have. See Perosi v. LiGreci, 98 A.D.3d 230, 237–38, 948 N.Y.S.2d 629, 634–35 (App. Div. 2d Dep’t 2012).
78 In re Julia C., N.Y.L.J., Mar. 15, 2004, at 20, col. 3.
79 Id. (alteration in original) (quoting N.Y. PUB. HEALTH LAW § 2980(4), (6) (McKinney 2004)).
80 Id.
81 Id.
84 See Stein, 419 F. App’x at 69–70.
needed to conclusively determine what an agent’s authority under a health care proxy is, it would likely be appropriate to certify the question to the New York Court of Appeals.\textsuperscript{85} This comment is quite telling, as it indicates that the scope of the authority of a health care agent in New York is truly not known.

The insights provided by Stein are difficult to reconcile with Julia C. Though not in an emergency setting, the real issue presented by Julia C. was in which facility Julia was to receive her medical treatment. The court felt that selecting the place of abode was an improper decision for the health care agent to make, because it dealt with the “social environment and other such aspects” of the principal.\textsuperscript{86} It would seem the selection of a skilled nursing facility is a non-hospital decision about where a principal should receive medical care. Certainly, some have expressed it this way.\textsuperscript{87} Viewed in this light, the ideas of the Stein court seem to confer the power to decide upon the health care proxy. Regardless, the results of these cases provide evidence that the true extent of the agent’s powers under the health care proxy is not yet resolved.

IV. A WILD CARD

As discussed, the power of attorney and health care proxy are advanced estate planning documents utilized to effectuate specific wishes of the principal. The attorney is the documents’ steward, functioning to ensure that the documents are used to develop an estate plan that is properly and validly executed and that meets the client’s express needs. However, despite such planning in both Perosi v. LiGreci and In re Julia C., the actions of a dissatisfied family member brought the case to the attention of the court, exposing (or creating—depending on how you view the courts’ decisions) a hole in the estate plan. Similarly, the case of Weber v. Burman provides another cautionary tale, indicating how even an attorney’s best efforts seem futile in the face of family dissatisfaction.

\textsuperscript{85} Id. at 70.
\textsuperscript{86} In re Julia C., N.Y.L.J., Mar. 15, 2004, at 20, col. 3 (Nassau County Ct. 2004).
\textsuperscript{87} See Wolff, supra note 61, at 13 (“[T]he health care proxy allows the principal to appoint a health care agent to make a broad range of health care decisions, such as which doctor to use, preference for a particular nursing home, to accept or not to accept tube feeding, and other such health care decisions that may have to be made.”).
In 1971, following the death of his first wife, George Weber married Virginia Weber.\textsuperscript{88} The couple executed mutual reciprocal wills and, upon George’s death in 1991, Virginia Weber inherited his entire estate, including certain real property that was the childhood home of George’s son, Raymond.\textsuperscript{89} Virginia executed a new will in 1992 that was consistent with the mutual wills, leaving the property equally to her stepson Raymond and her daughter, Diane Burman.\textsuperscript{90} Raymond Weber asserted that Virginia showed him this will in 1992, and assured him that the provisions of the mutual will would remain unchanged.\textsuperscript{91} Raymond also asserted that Virginia was later diagnosed with Alzheimer’s disease after 1995.\textsuperscript{92}

In 2002, Virginia hired a new attorney (who was not involved in the drafting of the mutual wills) to assist her in finalizing her estate plans.\textsuperscript{93} The attorney testified that Virginia was “coherent and lucid” and “made it clear . . . that she wished to change her estate plans.”\textsuperscript{94} Specifically, Virginia wished to leave all her assets to her daughter Diane.\textsuperscript{95} In fact, “[Virginia] did not want to leave her home to . . . [Raymond] and wanted to take immediate action to ensure that . . . [Raymond] would not receive a share of said premises” because he “never contributed to the home or assisted her or cared for her in any way.”\textsuperscript{96}

To effectuate these wishes, the attorney advised Virginia to revoke her old will, execute a new will, and execute a power of attorney in Diane’s favor.\textsuperscript{97} The attorney advised Virginia of the consequences of failing to revoke her will and Virginia vowed to revoke it “immediately.”\textsuperscript{98} She was also advised that she could transfer the property before her death so it would not pass through

\textsuperscript{89} Id.
\textsuperscript{90} See id. at *1–2.
\textsuperscript{91} Id. at *2.
\textsuperscript{92} Id.
\textsuperscript{93} See id. at *6–7.
\textsuperscript{94} Id. at *7–8.
\textsuperscript{95} Id. at *8.
\textsuperscript{96} Id.
\textsuperscript{97} Id. at *9.
\textsuperscript{98} Id.
probate, or by intestacy should she not execute a new will.\textsuperscript{99} The attorney “had no concerns about Virginia’s understanding” and believed Virginia “under[stood] the advice that she was given to effectuate her wishes and under[stood] the ramifications of her actions.”\textsuperscript{100}

Virginia executed the power of attorney in 2002 in the attorney’s presence, but she did not execute a new will.\textsuperscript{101} Using the authority as agent under the power of attorney and with the assistance of the attorney, Diane transferred title to the real property to herself in May of 2004.\textsuperscript{102} Virginia Weber died intestate in 2005, since her 1992 will was not found and was presumed revoked.\textsuperscript{103}

After his stepmother’s death, Raymond Weber brought suit insisting that Diane’s transfer of the real property via the power of attorney was “unlawful self-dealing . . . [and] a breach of her fiduciary duty.”\textsuperscript{104} Weber also asserted that Virginia had Alzheimer’s disease and argued that the conveyance of the real property to Diane as well as the presumed revocation of Virginia’s last will should be set aside based on Virginia’s compromised mental capacity and Diane’s undue influence over Virginia.\textsuperscript{105}

Though the court found “that Virginia was competent and coherent when she gave her the Power of Attorney,” an issue of fact remained as to whether Diane’s gift to herself of the real property was proper and in Virginia’s best interest.\textsuperscript{106} Additionally, despite the fact that the attorney’s testimony could support summary judgment dismissing the capacity and undue influence claims, Virginia’s medical records\textsuperscript{107} created “an issue of fact concerning her mental capacity when she gave [Diane] the Power of Attorney as well as when she allegedly revoked her will.”\textsuperscript{108} These issues of fact precluded summary judgment.\textsuperscript{109} There is no further record of how this case was resolved.

\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at *7, *9–10.
\textsuperscript{102} Id. at *2.
\textsuperscript{103} Id. at *1–2.
\textsuperscript{104} Id. at *2.
\textsuperscript{105} Id. at *2–3.
\textsuperscript{106} Id. at *13.
\textsuperscript{107} Id. at *24–25.
\textsuperscript{108} Id. at *25.
\textsuperscript{109} Id. at *27.
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The court’s decision in Weber shows that even a well-considered estate plan can go awry when third party interests become involved. Here, there is no direct statement by the court that the attorney provided anything but competent representation. In fact, the court recognized that the attorney “attested to Virginia’s capacity” and properly supervised the changes to Virginia’s estate plan. Nevertheless, the attorney’s efforts became the subject of great scrutiny upon a challenge to the plan by a disgruntled family member. The “wild card” of the family (or other interested third parties) creates an inherent ambiguity in an estate plan, regardless of the planning devices used. Thus, in addition to the uncertainties surrounding the operation of the estate planning documents, it is also vital to combat the uncertainty created by the family dynamic that is part of every estate plan.

V. IMPLICATIONS IN ESTATE PLANNING

Taken together, these cases shed light on what may be “planning pitfalls” in some of the most basic and widely used estate planning documents. The cases also demonstrate that third-party dissatisfaction is a threat that lingers over every estate plan. These two threats, which could potentially endanger any estate plan, could have significant adverse consequences for both the client and attorney. Therefore, it is important to consider, and combat, these implications.

A. Failure of the Estate Plan—Frustration of Intent

Arguably, achieving a client’s goals is the most critical element of a successful estate plan. The power of attorney and health care proxy are key “lifetime tools” of this estate plan, fundamental in providing for a client’s property management and health care.

In each of the above cases, we cannot say with absolute certainty that the principal’s goals, in terms of their health care proxies and power of attorneys, were frustrated. Unfortunately, the inevitability of incapacity and/or death will often prevent this from being confirmed. But, with each of the cases, the evidence suggests that the principal’s goals were not met, meaning the estate plan that he or she (and his or her attorney) spent significant time and

110 Id.
111 Wolff, supra note 61, at 12.
money on, was, at least in part, wasted.

For instance, Nicholas LiGreci created his irrevocable trust almost twenty years before his death, explicitly stating in the instrument that the trust “shall not be subject to any alteration or amendment.” While New York law provided him an avenue to make an amendment to his irrevocable trust with the consent of his beneficiaries, he never chose to take advantage of that right. Although no facts expressly indicated that he contemplated the possibility of his attorney-in-fact having the power to amend his trust, LiGreci’s failure to make or express his desire for any amendments to his trust seems to indicate that an amendment was not within his wishes. Nevertheless, only fifteen days before his death, LiGreci’s attorney-in-fact amended the trust, removing the trustee and successor trustee who had, assumedly, so faithfully served LeGreci for the past two decades. Perhaps Nicholas LiGreci thought that through his clear direction in the trust instrument, the trust could not be amended. Perhaps he thought that, since he did not give the authority to amend his trust to his attorney-in-fact and because the trust agreement explicitly stated it was not to be amended, the trust would not be amended. Either way, the ultimate outcome was that LiGreci’s attorney-in-fact was able to change fundamental terms of his trust, wiping out his intended plan.

Similarly, in the Julia C. case, Julia had executed a health care proxy and a durable power of attorney, likely to ensure that her personal and property needs would be met. Whether or not Julia C. could foresee her need for nursing home care in the future is unknown. However, it is not a far stretch to guess that if Julia C. had taken the time to execute a power of attorney and health care proxy, she likely thought (as many rational people would) that in the event she did need skilled nursing care, her agent would be able to make any related decision. However, the court found that neither an agent under a power of attorney nor an agent under a health care proxy could make a decision regarding her “place of abode,” leaving Julia C. (or any other person in a similar circumstance) without a voice in where she would live and receive


\[113\) Id. at 596–97, 598–99, 918 N.Y.S.2d at 297 (citing EPTL 7-1.9 (McKinney 2011)).

\[114\) Id. at 596, 918 N.Y.S.2d at 297.

care.\textsuperscript{116} This would not only be personally frustrating to Julia C., but certainly also a frustration of her intended wishes for the operation of her health care proxy and power of attorney.

Finally, in Weber v. Burman, the facts seem to clearly indicate that Virginia Weber wanted her daughter—and her daughter alone—to inherit the real property.\textsuperscript{117} In fact, Ms. Weber expressly stated as much to her attorney, who provided thorough estate planning to accomplish this very goal.\textsuperscript{118} The court’s question as to the propriety of the attorney-in-fact’s actions, despite those actions accomplishing Virginia Weber’s exact wishes, led to the possibility of the property falling into the step-brother’s hands, and a potential charge of undue influence.\textsuperscript{119}

\textbf{B. Guardianships}

Another area of concern is the extent to which gaps in an estate plan will result in the need for a guardianship. A guardian may need to be appointed if the court determines such supervision is “necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person.”\textsuperscript{120} However, guardianship is an option of “last resort,” and a guardianship should not be imposed if there are other resources and alternatives to protect the person and provide for their personal and property management needs.\textsuperscript{121} Therefore, before appointing a guardian, the court will consider other alternatives including “powers of attorney, health care proxies, trusts, [and] representative . . . payees” that may be sufficient in providing for these needs.\textsuperscript{122} If a person has executed a valid estate plan prior to incapacity, the court will often find that the estate planning documents provide a preferable and less restrictive alternative, obviating the need for guardianship.\textsuperscript{123}

\begin{footnotesize}
\textsuperscript{116} Id.
\textsuperscript{118} Id. at *8.
\textsuperscript{119} Id. at *26–27.
\textsuperscript{120} N.Y. MENTAL HYG. LAW § 81.02(a)(1) (McKinney 2013).
\textsuperscript{121} Rose Mary Bailly, \textit{Practice Commentaries, in N.Y. MENTAL HYG. LAW § 81.02} (McKinney 2013).
\textsuperscript{122} MENTAL HYG. LAW §§ 81.02(a)(2), 81.03(e).
\textsuperscript{123} \textit{See In re Kurt T.}, 64 A.D.3d 819, 822, 881 N.Y.S.2d 688, 691 (App. Div. 3d Dep’t 2009) (holding that lower court properly concluded a guardian was not needed where a power of
\end{footnotesize}
If estate planning documents fail, however, a guardianship may be implemented.\(^{124}\) Although an Article 81 guardianship is considered a much-improved alternative in comparison to its predecessors Articles 77 and 78, especially in terms of recognizing and respecting the rights and wishes of the incapacitated person, the imposition of a guardian remains an undesirable alternative that should be avoided if at all possible.\(^{125}\) Moreover, a guardianship has the potential to override the wishes and desires of a client which can create additional problems—most significantly the destruction of personal relationships and the burden of continuous court oversight.\(^{126}\)

Further, as evidenced by *In re Julia C.*, even what appear to be validly executed estate planning documents may not obviate the need for a guardianship. Certainly, there are circumstances in which no amount of planning could address the needs of an alleged incapacitated person. Julia C., however, seemed to have provided for her needs by executing a valid power of attorney and health care proxy.\(^{127}\) This was especially prudent of her given that it appears her adult children had significant disagreements about how to care for their mother.\(^{128}\) Nevertheless, the court found that those

\(^{124}\) For example, in *In re Walter K.H.*, Rosalie H. validly executed a power of attorney and health care proxy. *In re Walter K.H.*, No. 900763/2010, 2011 N.Y. Misc. LEXIS 2531, at *1 (Sup. Ct. Erie County May 31, 2011). However, Rosalie’s daughter was found to have engaged in self-dealing and violated her fiduciary duty as an agent under the power of attorney, so the power of attorney was revoked by the court. *Id.* at *10–14.* Though the health care proxy remained in limited effect, there was no successor agent appointed by the power of attorney so the court was forced to appoint a guardian of the person and property to provide for Rosalie H.’s needs. *Id.* at *16.*


\(^{128}\) *Id.*
documents did not expressly allow her agent to choose her place of abode, resulting in a guardianship proceeding.\textsuperscript{129} Apparently, the court felt Julia C. and her attorney were expected to have some sort of exquisite foresight to contemplate and integrate into her plan a provision for her agent to choose her place of abode. Having failed to reach this level of clairvoyance, Julia C. was subject to the very proceeding her planning was, at least in part, designed to avoid.

C. Uncertainty for the Attorney

In addition to the potential for undesirable effects on clients, these cases also reveal serious implications for attorneys.\textsuperscript{130} What may be most disconcerting is that these cases seem to insert considerable uncertainty into an area of law where there has been a concerted effort for clarity and transparency. In Perosi, for example, a comparison of the Richmond County Supreme Court’s decision against the appellate division’s highlights a fundamental uncertainty that is yet to be conclusively resolved. The supreme court precluded Linda Perosi from amending her father’s trust on the basis that the power of attorney lacked “enabling language” that expressly permitted her to do so.\textsuperscript{131} However, the appellate division’s reversal rested on the fact that the document lacked “limiting or disabling language” that would restrict Linda Perosi’s ability to act.\textsuperscript{132} Therefore, the practical result of this case is that the power of attorney may now “encompass transactions that are not enumerated, and/or might not have even been contemplated by the attorney and principal at the time of the execution.”\textsuperscript{133} Thus, while practitioners in the Second Department can count on the court giving an attorney-in-fact broad authority unless limited in the power of attorney, others in New York will have to wait to determine who will win the “enabling” versus “limiting” language battle in their jurisdictions.\textsuperscript{134}

While the Perosi decision indicates that a court may be inclined to extend a document’s reach beyond the statutory language, the Julia

\textsuperscript{129} Id.
\textsuperscript{130} Considerations of repercussions such as malpractice liability or violations of the rules of professional responsibility are beyond the scope of this paper.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
C. court was inclined to strictly limit this agent’s ability within the confines of the statutes. There, because the power to choose her place of abode was not designated on the power of attorney and because a health care proxy does not allow for the agent to make “decisions regarding the social environment . . . of the incapacitated person,” Julia C. was without a family representative to choose her skilled nursing facility. But this reasoning seems to be against the plain language of the statute and, as the Stein case evidences, is not the interpretation adopted by all courts. In addition, New York’s Public Health Law, in allowing a health care agent “to make any and all health care decisions on the principal’s behalf that the principal could make,” appears to bestow upon an agent the power to make medical decisions in any setting in which such decisions are necessary. Arguably, this would include whether to receive medical treatment, and where to receive such treatment. In fact, the health care proxy has been described as affording an agent broad discretion to make health care decisions for an incapacitated principal, including “which doctor to use, preference for a particular nursing home, to accept or not to accept tube feeding, and other such health care decisions that may have to be made.” Nevertheless, in Julia C., the court strictly limited the agent’s discretion, leaving the principal without a representative on some of these very issues. Again, this leaves the estate planning attorney with uncertainty about what a health care proxy will or will not be able to provide a principal. If decisions by an agent such as a selection of a nursing home will not be allowed by an health care proxy, what else should the attorney incorporate into the estate plan to ensure that an agent will have this power?

Lastly—and perhaps most elusive—is the uncertainty created by Weber. Weber illustrates that even an experienced attorney who composes an estate plan for a client that specifically voices her planning goals can still be subject to the pitfalls of uncertainty.

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136 Id.
137 See supra Part III.B.
138 N.Y. PUB. HEALTH LAW § 2882(1) (McKinney 2013).
139 Wolff, supra note 61, at 13 (emphasis added).
140 In re Julia C., N.Y.L.J., Mar. 15, 2004, at 20, col. 3.
141 This issue is especially perplexing considering that the Julia C. court found that a power of attorney was also incapable of meeting this need. See id.
142 See Weber v. Burman, No. 20875/06, 2008 N.Y. Misc. LEXIS 7273, at *7–10 (Sup. Ct. Nassau County Dec. 18, 2008) (describing the attorney’s testimony that Virginia Weber was coherent and lucid and that the estate plan was based on specific changes that Virginia
Though the estate plan executed by Virginia Weber and supervised by an attorney met those goals, the court still questioned whether Virginia was competent to sign the power of attorney, “demonstrating that even supervision of the execution of a power of attorney by an attorney will not necessarily establish . . . competence.” Moreover, because the attorney was not aware of Virginia’s mental health history, the attorney’s “attestation to Virginia’s capacity [was] not determinative of whether” Virginia was unduly influenced by her agent.

While these findings raise a larger issue not addressed herein (namely the extent and means by which an attorney must ensure a client is competent and has the capacity to execute planning documents), it also indicates that despite an attorney’s best efforts, an attorney may still wind up involved in protracted litigation revolving around the very documents that attorney drafted. Despite clear goals and what would seem to be a solid plan, uncertainty was again injected into process by the court. This ultimately subjects the estate planning documents to scrutiny and possible invalidation, and creates an area of uncertainty where the attorney did not expect one to arise.

In sum, these cases reveal uncertainties in the estate planning attorney’s daily practices that may be inconsistently resolved in the courts. While this realization may point out some undesirable possibilities, it also means that such risks can be planned for and hopefully eliminated, or at least mitigated.

VI. RECOMMENDATIONS

The elder law or estate planning attorney can employ various strategies, including defensive and offensive planning tactics, to defend against the pitfalls highlighted herein. On a broader scale, attorneys may also consider certain policies and legislative options to create more clarity in this area of law.

A. Defensive Planning

The attorney (and the estate planning documents he drafts) is the...
first line of defense against uncertainties that may frustrate a client’s plan and/or damage an attorney’s reputation.\textsuperscript{145} A lawyer must understand what the client hopes to achieve and the means by which those goals can be met. Therefore, “critical elements of a successful estate plan include . . . having a detailed counseling conversation with the client concerning the client’s goals and fears, as well as teaching the client about the many planning options available to achieve those goals.”\textsuperscript{146}

In terms of a power of attorney, despite the significant revisions to the statutory short form, the attorney must think outside of the form to ensure a client’s needs are addressed.\textsuperscript{147} Client counseling may reveal certain limitations that a principal wants to impose on an agent. \textit{Perosi} essentially serves as a warning “that if there are to be limitations in a power of attorney, they must be enumerated from the principal himself with the advice and counsel of an attorney fully familiar with the client’s affairs and desires.”\textsuperscript{148} However, neither an attorney nor a principal may have the necessary clairvoyance to anticipate and incorporate all the necessary limits into the power of attorney. In addition, limiting the agent’s authority may prohibit the agent from acting in an unforeseeable circumstance in which the principal would have wanted the agent to act.\textsuperscript{149} Therefore, if a client wants to limit an agent’s powers, the attorney may suggest that the client select another agent who the client “trust[s] to exercise broad powers.”\textsuperscript{150}

In regards to a health care proxy, a common defensive maneuver practitioners often employ is to also recommend that a client execute a living will, to serve as an authoritative expression of the principal’s wishes relating to life sustaining treatments if such a medical circumstance arises.\textsuperscript{151} For certain clients, particularly those who are seriously ill, an attorney may also recommend that a client discuss with his or her physician the appropriateness of executing a Medical Orders for Life-Sustaining Treatment

\textsuperscript{145} See Richard J. Shapiro, \textit{Counseling-Based Estate Planning: A Modern Approach}, in \textit{Strategies for Trusts and Estates in New York} 25, 42 (2013) ("Inadequate planning can lead to a damaged reputation for an attorney among the public and the legal community.").

\textsuperscript{146} \textit{Id.} at 34.

\textsuperscript{147} “The point of the new form is to focus the practitioner, but the practitioner should not be seduced by the form.” Interview with Rose Mary Bailly, Executive Director of the New York State Law Revision Comm’n, in Albany, N.Y. (Nov. 15, 2012).

\textsuperscript{148} Davis, \textit{supra} note 131, at 4 col. 1.

\textsuperscript{149} See Shapiro, \textit{supra} note 145, at 33.

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} Swidler, \textit{supra} note 6, at 22.
A MOLST form can address more specific clinical decisions and functions as an actual physician’s order. The MOLST can therefore overcome certain insufficiencies of the health care proxy and living will for clients facing end of life decisions. In addition, practitioners should counsel clients about the effects of the 2011 palliative care legislation. Specifically, the Palliative Care Acts require that a health care agent acting in the principal’s incapacity receive the same benefits mandated for patients, including palliative care information, counseling, and access to services to allow for the agent to make an informed decision for the principal.

More generally, a practitioner should anticipate an “evolution of wishes” as the client ages, and can counsel the client as to how the health care proxy can be drafted to allow for flexibility. By limiting descriptive language, the document will continue to be valuable as the principal’s wishes change. However, this approach requires periodic review to ensure the client’s wishes will be effectively carried out given the language of the document.

Another important aspect of defensive planning is an attorney’s continuing education. Though the issues in Julia C. and Weber do not have a concrete solution, consistently monitoring case law and other developments in the law will highlight potential weak areas of estate planning practices, and afford the attorney an opportunity to address them before they arise. Maintaining a database of such cases, as well as reviewing periodic publications that highlight important changes in the law, is an easy yet invaluable way for

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152 Id.
153 Id.
156 N.Y. PUB. HEALTH LAW §§ 2997-c(2)(b), 2997-d(2) (McKinney 2013).
159 Id.
160 Id.
161 For example, the Keeping Current Probate publication by the American Bar Association, the Elder and Special Needs Law Journal, and Estate Planning Journal publications of the New York State Bar Association.
an attorney to avoid potential planning pitfalls.

B. Offensive Planning

Continuing education and monitoring is also an important offensive strategy. Being “constantly vigilant” about changes in the law will enable the practitioner “to take advantage of new opportunities presented” by such changes, as well as “to take appropriate action on behalf of their clients when a new case renders existing planning less effective.”162

To combat a change that would negatively affect an existing plan, offering a formal client maintenance plan can be vital.163 By viewing the transactional estate plan as a “lifelong process,” attorneys can ensure that the client’s estate plan is updated to reflect changes in the law.164 While this oversight may be especially valuable when trust funding is involved, it is also a way to effectively monitor the value and continued validity of past plans the attorney has developed.

C. Legislative Fix

Legislation could be an answer that would provide for one common understanding of when authority is available under the health care proxy and power of attorney, and what is protected by those documents. In fact, the court in Perosi v. LiGreci stated, “[I]f there is to be a presumption that a creator cannot act through his or her agent in amending or revoking a trust, such a policy is for the legislature to enact, not the courts.”165

The issue with a legislative fix is that it is inconceivable for the legislature to contemplate and provide standards for all possible variations or issues in estate plans that may be affected by the health care proxy or power of attorney. Even if the legislature engaged in a thorough effort to provide for these eventualities, it is undeniable that certain fact patterns would remain unaddressed. These circumstances would then, as they are today, need to be resolved through litigation and consideration of the courts. Thus,

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162 Shapiro, supra note 145, at 26.
163 Id.
164 Though beyond the scope of this paper, an alternative consideration here is the extent to which, if any, such an approach has on the continuation of the lawyer-client relationship and the perpetuation of the related duties and obligations.
even if legislative action were an option, it would not obviate the need for an attorney to continue to pay vigilant attention to case law.

VII. CONCLUSION

Unfortunately, there is no crystal ball for estate planners, serving to forecast how a given document will be interpreted or what provision may be challenged. What is certain, however, is that the widely used forms of the power of attorney and health care proxy in New York present challenges that could trip up even a very thorough attorney. These documents are not, as we would like to believe, completely vetted or understood. In fact, powers of an agent may be subject to further interpretation as advancing technologies, both medical and otherwise, continue to present new health care and property decisions to a principal.

Nevertheless, the lawyer does have some tools to combat these uncertainties. Despite rather standardized forms, proper client counseling is necessary for every estate plan on which an attorney works, to ensure that a client’s goals are met and limits are honored. In addition, instructing the client on the operation and effect of each form will foster the lawyer-client relationship, increasing the likelihood that the client’s wishes will be accounted for in the plan. A lawyer should continue to follow case law and other relevant news to not only alter his approach to estate planning as necessary but to correct those mistakes that could lead to frustration of the client’s intent, an unintended guardianship, or other undesirable results. Such corrections will be made easier with use of a formal client maintenance system. Finally, the lawyer’s experience, judgment, and foresight play a vital role in the fight against planning uncertainties.

Any lawyer must realize that once a client executes a power of attorney, there is an immediate effect on the client. Similarly, once executed, a health care proxy can come into play any day if incapacity occurs. Therefore, the client lives with these documents every day. In this same sense, the lawyer must also be living with these documents every day, considering their impact, questioning their effectiveness, and foreseeing their trouble spots. It is with this vigilance that the lawyer can best guard against a planning pitfall, and ensure a client’s goals are always met.