

**NAVIGATING SUDDEN DEATH:
A ROADMAP FOR GUIDING CLIENTS
THROUGH UNEXPECTED TRAGEDY**

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State Bar of Texas, 2011

State Bar of New Mexico, 2012

United States District Court for the Western District of Texas, 2013

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Professional Associations and Memberships

Texas Bar College

Texas Bar Foundation

Midland County Bar Association

Midland County Young Lawyers Association, President 2014-2015

Texas Young Lawyers Association

Midland/Odessa Business and Estates Council, President 2017-2018

Real Estate, Probate & Trust Law Section, State Bar of Texas

Decedents' Estates Committee, Member 2019-2020

REPTL Leadership Academy, Participant 2016-2017

Real Property, Trust & Estate Law Section, State Bar of New Mexico

Legal Awards and Honors

Bob Black Bar Leaders Award, 2015, Presented by Texas Tech University, School of Law

Judge Ken G. Spencer Award, 2011, Presented by Texas Tech University, School of Law

Adjunct Professor, Paralegal Program, Midland College, Midland, Texas.

Presentations

- Author/Presenter**, *I Do Declare! Using Declaratory Judgments to Solve Probate Quandaries*, 32nd Annual Estate Planning & Probate Drafting Course; TexasBarCLE, State Bar of Texas, October 21-22, 2021; Dallas, Texas.
- Author/Presenter**, *Representing Miss Daisy: Ethical Considerations When a Client Has Diminished Capacity, and Estate Planning for Incapacitated Individuals With Plenty of Actual Marbles (And Other Assets Too!)*, 23rd Annual Estate Planning, Guardianship and Elder Law Conference, The University of Texas School of Law and the Texas Chapter of the National Academy of Elder Law Attorneys, August 5-6, 2021; webcast.
- Co-Author/Presenter**, *Oil & Gas in Estate Planning and Probate, or Dealing With What Comes Out of the Ground Before (and After) They Go In*, Intermediate Estate Planning & Probate, TexasBarCLE, State Bar of Texas, June 8, 2021; webcast.
- Author/Presenter**, *Will v. Trust: Decisions on the Front End*, Handling Your First (or Next) Trust, TexasBarCLE, State Bar of Texas, April 16, 2021; webcast.
- Author**, *Uniform Partition of Heirs' Property Act: Partition with an Acetate Overlay*; 13 Tex. Tech Est. Plan. & Community Prop. L. J. 233 (2020).
- Presenter**, *Uniform Partition of Heirs' Property Act: Partition with an Acetate Overlay*; Midland/Odessa Business and Estates Council; October 20, 2020; webcast.
- Uniform Partition of Heirs' Property Act: Partition with an Acetate Overlay*; 44th Annual Advanced Estate Planning & Probate Course, Chapter 8, TexasBarCLE, State Bar of Texas; June 3-5, 2020; webcast.
- Panelist**, *Examples of Weird Things Clients Want in Their Documents*; 30th Annual Estate Planning & Drafting Course, TexasBarCLE, State Bar of Texas; December 13, 2019; Dallas, Texas.
- Panelist**, *Administering a Trust: Stuck in the Middle with You*; Handling Your First (or Next) Trust; TexasBarCLE, State Bar of Texas; February 1, 2019; Austin, Texas.
- Co-Presenter**, *Murder in the Heir: Application of the Slayers Rule in Texas*; Webinar; TexasBarCLE, State Bar of Texas; December 6, 2018; Austin, Texas.
- Author**, *When the Estate Reaches the Land of Enchantment: Issues of Estate Planning and Probate Across State Lines*; Intermediate Estate Planning & Probate: Practical Applications, TexasBarCLE, State Bar of Texas; June 12, 2018; Dallas, Texas.
- Panelist**, *Estate Planning & Probate Across State Lines*; Intermediate Estate Planning & Probate: Practical Applications, TexasBarCLE, State Bar of Texas; June 12, 2018; Dallas, Texas.
- Co-Author**, *To Will or Not to Will and Newly Added To Trust or Not to Trust: What You Need to Know About Texas Probate Law, Wills, Trusts, and Incapacity Planning*; Project of the Inaugural REPTL Leadership Academy 2016-2017, Real Estate, Probate, and Trust Law Section, State Bar of Texas.
- Presenter**, Paralegal Association of the Permian Basin; *Help Me Help Your Client, How Your Practice Affects The Estate Planning and Probate Attorney*; September 21, 2016; Midland, Texas.
- Presenter/Author**, National Business Institute; *The Probate Process From Start To Finish, Probate Disputes and Litigation: We're Gonna Play the Sue Me, Sue You Blues*; August 27, 2015; Midland, Texas.

NAVIGATING SUDDEN DEATH: A ROADMAP FOR GUIDING CLIENTS THROUGH UNEXPECTED TRAGEDY

I. INTRODUCTION

As a probate attorney, it is the very nature of our practice to represent and assist individuals through the process of handling the financial affairs and last wishes of a deceased individual. And aside from the professional fiduciary, these clients were often close enough to the decedent to be chosen and entrusted with a great obligation out of love and affection. It is in these instances we sit in the splash zone of tears of grief and, at times, in the cross hairs of displaced anger. Raw emotional responses to grief are ubiquitous to our practice; however, these can be particularly intense when the client (or clients) are suffering from a sudden tragic loss. When representing a client through the estate administration process who is in the mist of the emotional turmoil of unexpected loss, there are some additional considerations both as attorney and counselor which will allow us to better represent the client. The hope of this outline is to provide some insight into the unique role we can play in both roles while representing the client who is experiencing transformational grief.

II. LAWYER'S ROLE AS COUNSELOR

“Lawyering culture, more than any other, epitomizes a lack of comfort with – and distaste for – emotional vulnerability.”¹ Our profession has all too often trained our successors in fierce rationality and emotionally sterile analysis. “Lawyers are hired to fix problems because they are perceived to be infallible and invulnerable; there is a significant amount of pressure to hide emotions in the name of maintaining a professional demeanor.”² However, assisting clients with the process of probate necessarily requires us to interact with the clients emotions given that their need for representation is often the direct result of the passing of a loved one.

This realization is not new. In 1978 the Real Estate, Probate and Trust Law Section of the State Bar of Texas adopted a Statement of Principles Concerning the Responsibilities of the Estate Planning Attorney in Texas³ and a Statement of Principles Concerning the Responsibilities of an Attorney in the Administration of a Decedent's Estate.⁴ Though both were quickly ‘repealed,’⁵ the language is useful to review in contemplating the issue of ‘counselor’ to a grieving client.

“In order for an individual to hold himself out to the public as an estate planner [or probate attorney for the purposes herein], he must be thoroughly skilled in the law pertaining to wills, trusts, property rights and estates; he must be capable of concise and unambiguous draftsmanship; he must understand the broad trends and the applicable rules of income, estate, inheritance and gift taxation; he should be acquainted with the practices and customs of the professional fiduciaries in his area; he should be schooled in the law of business entities and prepared to continue, dispose of, or dismember a business; he should be familiar with the essentials pertaining to pension and profit sharing plans and deferred compensation arrangements; he must have knowledge and experience and be familiar with the basic essentials of investments, insurance and accounting, and the sources of specialized advice in those areas; he should have a good understanding of the basic principles of business operations and financing; *he should be a counselor with a good understanding of psychology*; and finally he should be willing to cooperate with the other members of the estate planning team in creation and implementation of the estate plan.”⁶ [*Emphasis added*].

¹ Cover, Danielle, *Good Grief*, NYU Clinical Law Review, Vol 22:55, citing Nancy R. Hooyman & Betty J. Kramer, *Living Through Loss: Interventions Across The Life Span* 78 (2006).

² *Id*, citing Paul Brenner, When Caregivers Grieve, in *LIVING WITH GRIEF: AT WORK, AT SCHOOL, AT WORSHIP* 81 (Joyce Davidson and Kenneth J. Doka eds., 1999).

³ Bandy, pg. 169, *TEXAS BAR JOURNAL* (February 1978).

⁴ Pg. 42, *TEXAS BAR JOURNAL* (January 1978).

⁵ Apparently there was concern that the Statements would become a road map for legal malpractice claims. See Brink, Rhonda H., They Don't Call Me Counselor for Nothing – Adding Value to Your Product and Strengthening Your Client Relationships, 43rd Annual Estate Planning & Probate Course, TexasBarCLE, State Bar of Texas, Chapter 17.2, June 18-20, 2019, San Antonio.

⁶ Bandy.

Tucked in with all the technical knowledge which we have worked to hone as necessary skills of our craft and tools of our trade is an admonishment that we are to be a counselor with a good understanding of psychology. No, this assuredly does not mean that we are to replace the therapist, but it does mean that our ability to issue spot and to guide a client in understanding of their own emotions (and reactions thereto) to the extent that they affect the legal representation is as important as our understanding of the Texas Estates or Internal Revenue Codes. Unfortunately this acknowledgment of the obligation to recognize and navigate client emotions has generally not informed our legal education or professional training as much as it should.

With that in mind, a brief primer of the grief process will help enlighten our understanding and heighten our compassion to the grieving client. Then a contrast of the ways in which grief from sudden, unexpected loss may have a different presentation and, therefore, effect on the representation of a client experiencing the grief of sudden loss when compared to expected loss.

A. The Grief Process

It is certainly fair to say that on an individual level the grief process from person to person can look significantly different (for example think of siblings mourning the loss of a shared parent). How grief and loss manifests itself depends on an individual's personality, relationship with a decedent, the age of the decedent, how the grieving individual came to learn of the passing (and whether or not that person witnessed the death or the scene shortly thereafter), and past experience with loss or death. Additionally, larger social constructs including religious and cultural beliefs can make a significant difference in the grieving process. But any individual response to grief is likely to manifest itself very differently if the individual is faced with expected versus unexpected death.

1. General Principles of the Grief Process

Most people are at least somewhat familiar with Elisabeth Kübler-Ross' Five Stages of Grief⁷ (being Denial, Anger, Bargaining, Depression, and Acceptance) which has, as the earliest in depth work on the subject, become the most pervasive model. Given the relative familiarity, another framework which may provide a new understanding and context of the grief process is Colin Murray Parkes model which draws parallels to John Bowlby's forms of attachment. Parkes opines that any moment in the grieving process falls into one of four (non-linear) phases:

- **Shock and numbness:** Loss in this phase feels impossible to accept. One is overwhelmed when trying to cope with their emotions. Parkes suggests that there is physical distress experienced in this phase as well, which can lead to somatic (physical) symptoms.⁸
- **Yearning and searching:** As one processes loss in this phase, they may begin to look for comfort to fill the void the loved one has left. They may try to do so by reliving memories through pictures and by looking for signs from the person to feel connected to them. In this phase, they become very preoccupied with the person they have lost.⁹
- **Despair and disorganization:** One may find oneself questioning and feeling angry in this phase. The realization that their loved one is not returning feels truly real, and they can have a difficult time understanding or finding hope in the future. One may feel a bit aimless in this phase and find that they retreat from others as they process the pain.¹⁰
- **Reorganization and recovery:** In this phase, one feels more hopeful that their hearts and minds can be restored. As with Kübler-Ross's acceptance stage, sadness or longing for our loved one doesn't disappear; however, one moves towards healing and reconnecting with others for support, finding small ways to reestablish some normalcy in their daily lives.¹¹

⁷ Kubler-Ross, Elisabeth; *On Death and Dying*; Collier Books/Macmillan Publishing Co. (1970).

⁸ Clarke, Jodi; *The Five Stages of Grief, Learning about emotions after loss can help us heal*, Updated February 21, 2021; <https://www.verywellmind.com/five-stages-of-grief-4175361>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

Additionally, it is important to note that loss has a physiological effect on the brain. Traumatic loss is perceived as a threat to survival and, as a normal protective process, our brain defaults to protective survival mechanisms by engaging the fight/flight(/freeze/fawn) response.¹² The nervous system triggers the body to increase blood pressure and heart rate and release specific hormones in preparation of the survival response to the perceived life threatening situation.¹³

“Grief and loss affect the brain and body in many different ways. They can cause changes in memory, behavior, sleep, and body function, affecting the immune system as well as the heart. It can also lead to cognitive effects, such as brain fog. The brain’s goal? Survival.”¹⁴

While low to moderate (and relatively intermittent) stress works to strengthen the brain through nerve growth and can improve memory, chronic stress causes compression of the nervous system with significant time and energy devoted solely to survival.¹⁵ Long term, grief can damage memory, decision making, and slow information processing.¹⁶ These physical responses to grief provide an additional layer of concern in representing the grieving client.

2. Differences in Sudden Loss and Expected Loss

While grief almost universally accompanies loss, the manner in which loss occurs may have a profound effect on the emotional and physical response as well as on the process of healing and recovery. While a great deal of research has been performed on the grief process and even differences in the process when responding to expected or sudden loss, I anticipate that each reader can, in their own mind, juxtapose a personal relatively sudden loss with a more anticipated loss and how the reader was able to process on each. I can, in a particularly vivid example.

a. What is Expected Loss?

Expected loss is an anticipated death of a loved one. For example, the passing of an elderly relative or someone who has lost a long fight with a diagnosed disease. It could even be a tragic loss but not unexpected, as in the case of the addict who eventually succumbs to their disease through an overdose. These expected losses allow the grieving individual to be able to experience anticipatory grief. Anticipatory grief provides family members with time to gradually absorb the reality of the loss.¹⁷ Individuals are able to complete unfinished business with the dying person such as mending past wrongs with forgiveness or just expressing love and affection.¹⁸ This anticipation allows the grieving individual to process earlier. They may experience little losses (such as the inability to share in a cherished past time) prior to the passing of the loved one and essentially have an opportunity to experience the emotional responses to grief prior to losing the individual. This additional time also allows for both the grieving and the dying to prepare for death and ensure that wishes are voiced and perhaps even a proper estate plan implemented taking the guess work and pressure off of the grieving to make the laundry list of decisions which follow the end of one's life like an epilogue. This is in no way meant to minimize the emotions of the grieving in response to the death of a loved one, but it is easy to see the ways in which a period of time to prepare for the passing of a loved one, prior to their last breath, can affect the emotional response (and associated physical manifestations) of the bereaved.

b. What is Sudden Loss?

In contrast, sudden loss is an immediate unexpected (often tragic) death. These can be caused by seemingly senseless acts of violence (homicide) or unfathomable acts of self-harm (suicide) or a tragic act of chance (an accident) or an unsolved riddle (an illness diagnosed too late). Whatever the circumstances creating the

¹² *Healing Your Brain After Loss: How Grief Rewires the Brain*, American Brain Foundation, <https://www.americanbrainfoundation.org/how-tragedy-affects-the-brain/>, September 29, 2021 citing Shulman, Lisa M., *Before and After Loss: A Neurologist's Perspective on Loss, Grief and Our Brain*, John's Hopkins University Press (2018).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ National Cancer Institute. Grief, Bereavement, and Coping With Loss (PDQ®) – Health Professional Version. http://www.cancer.gov/about-cancer/advanced-cancer/caregivers/planning/bereavement-hp-pdq#section/_164.

¹⁸ *Id.*

sudden loss, the emotional responses of the grieving process are often amplified. Sudden loss can be significantly more confusing and cause a flood of emotions. This could manifest itself in recurring thoughts or dreams or fears of similar occurrences. This may lead to a desire for answers, and seeking details about the how in the hopes of finding a why. The loss of someone young often leads to a sense that the loss, and perhaps life itself, lacks fundamental fairness. Sudden loss often elicits concerns over one's own mortality and fragility of life. Missed opportunities to share feelings or heal wounds are now beyond reach which may elicit guilt or shame. The shock and disbelief associated with the loss may be comparatively prolonged. As such the 'fog' of grief may be thicker and tougher to navigate as an attorney.

3. Ethical Rules for Attorney as Counselor and Intermediary

With this framework in mind, a review of the Texas Rules of Professional Conduct for specific guidance and limitations on our role as counselor and even intermediary can ensure that the ethically represent the client grieving sudden loss to the maximum extent possible.

a. Counselor

Rule 2.01 states "In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice."¹⁹

Comment 1 elaborates on the delivery of advice. "A client is entitled to straightforward advice expressing the lawyer's honest assessment."²⁰ However, the comments note that legal advice often involves unpleasant information that a client may be disinclined to confront; this is particularly true of one in the midst of grief.²¹ In presenting such necessary advice, "a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits."²² While we are admonished in the comments not to be deterred from giving candid advice based upon the prospect that the advice will not be well received that doesn't mean that we are not obligated to deliver such news in the best way possible. Providing the information and advice from the standpoint of a neutral party or even the attorney's own experience may help provide necessary legal information in a manner less likely to directly touch exposed emotional nerves.

Comment 2 reminds us that advice, when couched in narrowly legal terms may be of little value to a client and may be inadequate given the circumstances.²³ "It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice."²⁴ While we are not moral advisors, such considerations are extremely relevant to most legal questions and may decisively influence how the law will be applied. Here social norms on morality, or even shared spirituality may provide context to the client's experience which can be utilized to provide information necessary to the representation.

Comment 3 states that "[a] client may expressly or impliedly ask the lawyer for purely technical advice."²⁵ It continues that we may accept such requests as stated from clients experienced in such legal matters (for example the financial advisor who is now serving as the executor of her mother's will); however, if the client lacks such relevant experience, we may be obligated to provide information that there may be more than purely legal considerations involved.²⁶

Important in handling clients dealing with grief, Comment 5 reminds us that matters that go beyond strictly legal questions may also be in the domain of another profession. In this instance, trained counselors, therapists, and psychologists may be necessary to provide the client with mental health support to work through the grieving process. "Where consultation with a professional in another field is itself something a

¹⁹ Tex. Disciplinary R. Prof. Conduct, (1989) reprinted in Tex. Govt Code Ann., tit. 2, subtit. G, app. (Vernon Supp. 1995)(State Bar Rules art X, §9), Rule 2.01.

²⁰ Cmt 1, Rule 2.01.

²¹ *Id.*

²² *Id.*

²³ Cmt 2, Rule 2.01, Tex. Disciplinary R. Prof. Conduct.

²⁴ *Id.*

²⁵ Cmt 3, Rule 2.01.

²⁶ *Id.*

competent lawyer would recommend, the lawyer should make such a recommendation.”²⁷ However, if the duty of the lawyer consists of recommending a course of action which is contrary to other experts, we are obligated to provide that information,²⁸ but should proceed to provide it in the most constructive manner possible.

On the issue of offering unsolicited advice, Comment 6 states “[i]n general, a lawyer is not expected to give advice until asked by the client.”²⁹ However, if you know that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client may require that the lawyer act if the client's course of action is related to the representation.³⁰ While, a lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated in unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.”³¹ This may mean providing an opportunity for discussion of how the client is doing emotionally. You may be surprised at the openness and honesty in response.

b. Intermediary

When dealing with several interested grieving individuals, it is sometimes useful for an attorney to act as an intermediary. When grief of sudden loss is involved, it may prove the best way to help the interested individuals move forward and hope to avoid the secondary emotions of anger or resentment. Rule 1.07 provides the limitations of such a course of action. Generally, an attorney may not serve as an intermediary without first consults with each client regarding the advantages and risks involved and obtains written consent, the lawyer reasonably believes the matter can be resolved without the necessity of contested litigation and that the common representation can be undertaken without improper effect on any other responsibility of the lawyer.³² Further, while acting as an intermediary, the lawyer shall consult each client on relevant considerations to any decisions made.³³

Serving as an intermediary can be particularly helpful in trying to resolve issues between siblings at odds with one another in the probate of mothers will, or in divorced parents in the administration of the estate of their teenage child to be distributed by intestate succession. Comment 1, specifically contemplates just such an occurrence in probate/administration matters.³⁴ As an intermediary “[t]he lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests.”³⁵

Comment 4 provides practical consideration for when an attorney may appropriately serve as an intermediary. Specifically, “[i]n considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination.”³⁶ In some situations, the high probability that intermediation would fail makes the option impossible, specifically, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.³⁷

4. Maintaining Boundaries in the Role as Counselor

In order to properly operate within our ethical rules and for the benefit of the client, a few broad tools and healthy boundaries are useful to support the emotional journal of the grieving client and provide legal representation in a manner which they need and frankly deserve.

²⁷ Cmt 5, Rule 2.01.

²⁸ *Id.*

²⁹ Cmt 6, Rule 2.01.

³⁰ *Id.*

³¹ *Id.*

³² Rule 1.07.

³³ *Id.*

³⁴ Cmt 1, Rule 1.07 (“For example, . . . in arranging a property distribution in settlement of an estate or in mediating a dispute between clients.”).

³⁵ *Id.*

³⁶ Cmt 4, Rule 1.07.

³⁷ *Id.*

- **Avoid therapizing.** We have a role to play in the healing process of the client. Ours is focused on assisting with closure related to the legal process of probate in a manner that is supportive to the client's mental health. But most of us don't have any further mental health training (professionally speaking). It is not our place to heal their wound, nor is it appropriate to blur those lines by trying to provide medical advice.
- **Avoid rescuing or fixing.** The person who is grieving is working their process and is not in need of fixing. It is generally within cultural norms to use humor or even uplifting thoughts or comments to diffuse emotionally tense situations in an attempt to ease pain or discomfort. However, this can leave a client feeling as if their pain is not seen, heard, or worse, is somehow invalid. Instead, offer space for clients to process and grieve, specifically to listen and converse, if asked, even if it extends beyond the necessity of legal representation.
- **Avoid forcing unnecessary issues.** Similarly, our nature may drive us to seek to help the client feel better and lead us to encourage them to talk and process their emotions before there are mentally and emotionally prepared. This can further stress the nervous system and be an obstacle to healing. Of course, some questions and conversations are necessary from the stand point of legal representation and these should be handled delicately and allowing the client time to process not only the decision, but the importance of why it needs to be made in that moment rather than in their own time.
- **Avoid minimization and comparison of grief.** As noted above, the grief process is not linear and everyone's journey (and their emotional response in any phase) is unique. While personal anecdotes or information related to others may be useful to the grieving client, they can also feel like a form of comparison and minimization. Loss is loss. Grief is grief. Be careful to engage the client to ensure that any personal stories are illustrative of a legal point or issue without comparing emotional response.

III. LAWYER'S ROLE AS ATTORNEY AT LAW

Understanding the role of a counselor for the client dealing with sudden loss is important and should inform the conversations as the legal representation progresses through the standard process of estate administration. In fulfilling our obligations as legal advisor to the client, the following principals outlined below are not necessarily unique to the client suffering sudden loss, the heightened emotional state that may be triggered by sudden loss should encourage us to rely more heavily on these tools.

A. General Principals for Assisting Grieving Clients

1. Be Patient

Often clients in the aftermath of sudden loss take one of two approaches to the legal issues of administration of the estate: it becomes a primary focus or a seemingly impossible burden. And sometimes, as in the case of parents who have lost a child, you may experience both responses simultaneously. Some clients seem to pour themselves into the process of putting the legal matter to bed as soon as possible. Perhaps it is the measure of control they have in the process and situation when so much of the facts leading to that moment were beyond their control. Other clients seem to view the probate process as an unnecessary form of torture in their present state. Perhaps they are not prepared to handle the realities that their loved one has passed or the process is a daily reminder of their painful truth. Whatever the reasons for these responses, it is important for us to provide advice to the client on items which need to be handled relatively quickly and those which can wait for any period of time. Both haste and delay have the potential to cause problems, but properly prioritizing and breaking down tasks will allow the client taking either response to methodically approach the administration and encourage reasoned rather than rash decisions in the legal process.

2. Be Persistent

Clients experiencing the stress of sudden loss can have a decline in cognitive function as discussed above. While providing the client room to process and contemplate actions, it is important to ensure the client is adequately informed. "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent

the client is willing and able to do so.”³⁸ The potential that clients may be less able to make well informed and reasoned decisions as readily as they might otherwise is reason to communicate important aspects of the representation more than once and potentially in various ways to ensure that the client has processed all relevant information in making a decision.

3. Be Prepared

Because a client in the shadow of sudden loss may be struggling with their own instrumentalities of daily life, there is a distinct possibility that you and your staff may be asked (or have) to take a more active role in the process of administration. This may mean having to garner more financial information from various institutions than might ordinarily be necessary or handle more contact with beneficiaries or heirs in order to minimize conflict in an already potentially tense situation. While these actions may not be the most economic at times, the legal obligation we have to our clients may necessitate such action.

4. Be Proposing

The potential lack of mental capacity the client may leave them with less available brain function to think creatively to solve issues which might arise in administration. This is where we can be the think tank of options and solutions that may have worked with other clients. The use of family settlement agreements where beneficiaries or heirs can make their own determinations can be extremely helpful in avoiding any unnecessary additional conflict.

5. Be Pointing

Lastly, we should be prepared to provide the client with additional information on resources and assistance that may be appropriate and beyond our expertise. I recommend adding a tab to the spreadsheet of your referral list (or rolodex for those more seasoned among us). While we all have the lists of accountants, financial planners, trust officers, insurance agents, and other estate planners, it is time we built a list of resources available to our clients mental health needs. Find those counselors, therapists, and psychiatrists in your community. Make a note of who works with children or who specialize in grief and loss in their practice. If the client is concerned about the idea of a standing appointment for an extended period of time, note that there are several “intensive” grief and loss programs throughout the country. A week long intensive counselling program is often equated to years of standing counseling sessions.³⁹ Find local peer support groups or an individual’s leading of such a group to provide to the client. Helping a client obtain the expertise they need is not new to the legal profession, we need only view mental health as an area of expertise where we can point clients in the right direction.⁴⁰

B. COMMUNITY SUPPORT AND MEMORIAL DONATIONS

Often tragic death is followed by an outpouring of community based support, whether that is from friends and family or from a larger community of individuals, who are searching for a way to provide comfort to those surviving following a tragic situation. Of course, flowers are a staple for funerals, but many people want to actually help the family and loved ones start to pick up the pieces of their lives and prefer to make monetary contributions to the family of someone tragically lost. This can take many forms, but three common options are discussed below as well as their strengths and weaknesses. Having conversations with grieving clients on the available options can be useful in helping the client prepare for the potential outpouring of support from those who wish to help but do not have feel like they have another means to do so.

1. Charitable Donations

For families with strong financial footing or exceptional planning (with savings and life insurance for example), the financial burden associated with the sudden death of a loved one (particularly a younger

³⁸ See Comment 1, Rule 1.03

³⁹ Anecdotally, those programs encourage finding a peer support group or making a standing appointment upon return home and at times that is just the encouragement a client needs to allow themselves to get the local support they need and deserve.

⁴⁰ For discussion of several other areas where we can improve our role as counselor and a guidepost for client services see *They Don’t Call Me Counselor for Nothing – Adding Value to Your Product and Strengthening Your Client Relationships*, written by Rhonda H. Brink and presented at the 43rd Annual Estate Planning & Probate Course, TexasBarCLE, State Bar of Texas, Chapter 17.2, June 18-20, 2019, San Antonio.

individual) may be small enough that the family prefer not to accept ‘charity’ of others. (Alternatively, for some the thought of accepting a ‘handout’ may be too much to accept.) Whatever the reason, many people choose to request that any one compelled to send donations provide those to a charity in lieu of direct receipt of funds (or of flowers). Here, we can counsel clients through the process of choosing a charity, perhaps it could be one related to the cause of their loved ones death such as suicide prevention or promoting recovery of those with substance use disorder. It could be an organization which the deceased cared deeply such as an animal shelter or park. Additionally, you could assist the client in partnering with a community foundation to set up a scholarship fund.

While this approach is certainly useful to allow those compelled to give to provide to a worthy cause in honor of a deceased individual, for many the expenses associated with sudden loss do not allow families to forego the kindness of others in this way.

2. Crowdfunding

Crowdfunding is simply the practice of obtaining funds by soliciting contributions from a large number of people.⁴¹ While the term certainly invokes the image of online platforms like GoFundMe, the concept is far from new. Passing the hat for those who have lost and are in need is the simplest form of charity and the best of humanity. This option for receipt of donations allows the deceased’s loved ones access to often necessary funds (at least short term) which would allow the family to pay for immediate needs such as funeral and last illness expenses and expenses for necessities of widowed spouses and children of the decedent until other forms of payment such as life insurance, pension benefits, or social security could be processed and available. It does, however, have several short comings as a funding mechanism and very limited checks on the use of the funds. While briefly and more generally highlighted below a more in depth analysis is available in Blake Scott’s comment *Save That Money: Ensuring Donations Received Through Crowdfunding are Properly Protected*, in Volume 10, Book 2 of Texas Tech University School of Law’s Estate Planning and Community Property Law Journal.

a. Traditional Method

‘Historic’ crowdfunding involved someone opening a bank account where donations could be made. One major concern with this option is ensuring that the funds are used for purpose the donor intended. While immediate cash flow may be an issue, sources of non-donative funds to support a surviving spouse or children of a decedent eventually arrive. At this point, a significant amount of donative funds may still be in the memorial account and subject to potential uses (or abuses) beyond the donor’s intent. The funds having been given are subject to no further control of the donor and can be used for any purpose. Additionally, there are ownership questions in the account. If the account was set up by a couple who lost a child what happens to the account if the pain and grief of the loss is unbearable for the parents to the point of their separation? What is the marital property characterization?

b. Electronic Platform Method

As with almost every other aspect of modern life, crowdfunding has moved online with the creation of sites such as GoFundMe, Kickstarter, and IndieGoGo. For a fee, the site will process electronic donations and hold funds in an account for the benefit of the owner. Ownership of the account makes a huge difference in the rights and interest in the account. If the individual who initiated the campaign remained the owner of the account, then they have ultimate control. They may continue to use the funds received for the benefit of the decedent’s family or if unscrupulous they may not. Here the intended beneficiary may have little to rights or recourse. Further, if the owner was to pass away prior to expending the funds for the benefit of the intended party then it would be there estate and not the intended beneficiary with power over the funds.⁴²

Whether traditional or electronic, donative accounts have extreme limitations as to the protection of the intended beneficiary and use of the funds. The legal murkiness of these issues suggests a better alternative.

⁴¹ Scott, Blake, *Save That Money: Ensuring Donations Received Through Crowdfunding are Properly Protected*, 10 Estate Planning Journal 395(2018) citing Crowdfunding Definition, MERIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/crowdfunding> perma.cc/5RDLD-DZQD (last visited Sept. 26, 2017).

⁴² *Id* at 414.

3. Memorial Trusts

Using a memorial trust is a way in which to allow the intended beneficiary of the funds with not only access, but also with rights to enforce the beneficial use of the funds while ensuring that the use matches the donative intent. A memorial trust has a great deal of flexibility in drafting and can be tailored to the situation in order to provide some assurance that the donations will be used for the purposes expressed therein.

Structurally, a close friend or family member creates a trust. This trust can be more fully funded through crowd sourcing as well. The beneficiaries can be a limited class such as the parents and siblings of a deceased child or the surviving spouse. Parents or surviving spouses can be named as Trustees with all the fiduciary obligations protecting the intended beneficiaries and intended purposes as any other trust. Distribution provisions can be written so that they could be made for funeral, last illness, and even legal expenses in addition to health, education, maintenance and support of the intended beneficiaries. Additionally, it is possible to have any unused funds be donated to a charitable beneficiary if the settlor wanted to ensure the family of the deceased was cared for in the moment of need while recognizing that work to help others similarly situated may be warranted.

The memorial trust approach combines the positive of community financial support while more fully protecting the intended beneficiary and the intent of the donor. A form recently used to create a memorial trust is attached as **Exhibit A** and is for informative purposes only. Herein, the settlors were the grandparents of a deceased grandchild. The trustee was the child's aunt. The beneficiaries are the parents and siblings of the deceased child.

IV. CONCLUSION

As probate attorneys, we are called upon daily to help individuals navigate the legal process while they are in the midst of the grief of loss. However, for many clients experiencing sudden, unanticipated death, the grieving process may be significantly more emotional when compared to individuals who had an opportunity to being the process prior to their loved ones expected death. It is in these moments were we are called upon to serve our calling as counselors and attorneys in order to help clients navigate the legal process while experiencing the emotional processes of grief. We are all human and experience life with its ups and downs and yes doldrums, but understanding grief and sudden loss will help us help not only our clients, but also ourselves.

EMILY: Do any human beings ever realize life while they live it?—every, every minute?

STAGE MANAGER: No. Saints and poets maybe...they do some.

— Thornton Wilder, Our Town: A Play in Three Acts, Act III