

WHEN DEATH DOESN'T FIND YOU ON THE BATTLEFIELD: PROTECTING VETERANS WITH POST-TRAUMATIC STRESS DISORDER DURING THE ESTATE PLANNING PROCESS

Comment

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I. PREFACE

*"In war, there are no unwounded soldiers."*¹

Loren Christensen served as a military policeman from 1969 to 1970 in one of the most dangerous cities in the world: Saigon, Vietnam.² During that time, Christensen experienced "rocket attacks, snipers, terrorist bombings, anti-American riots, bar fights, [and] racial violence."³ When the Vietnam

* This comment is dedicated to my parents, CW3 R. Alan Burroughs and Deanna Burroughs. Without your unfailing support, encouragement, and love, this would not be possible. To the moon and back.

1. Jose Narosky, *Shell Shock, In War There Are No Unwounded Soldiers*, WAR HIST. ONLINE, (Oct. 23, 2010), <https://www.warhistoryonline.com/articles/shell-shock-in-war-there-are-no-unwounded-soldiers.html> [https://perma.cc/35L8-ACLX].

2. See DAVE GROSSMAN, ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND PEACE 280–81 (3d ed. 2008) [hereinafter GROSSMAN, ON COMBAT].

3. *Id.*

War ended, Christensen returned to the United States, bought a house, and began working as an instructor for a local firing range.⁴ Over the next ten years, a large Vietnamese community moved in close to his house, and although he passed the community every day on his way to work, it never caused him any concern.⁵ However, one morning he saw a large group of traditionally dressed Vietnamese children crossing the road.⁶ The sight of the children caused Christensen to have a panic attack—he began breathing rapidly, his heartbeat started to race, and his hands were trembling.⁷ Christensen immediately turned his truck around and took a different route to work.⁸ After several minutes, the panic attack faded.⁹

Two weeks later, while Christensen was shopping in a military surplus store, he experienced another panic attack.¹⁰ While he was looking through a bin of clothes, the familiar smell of the fatigue pants caused him to be “nearly overpowered with a sense of unexplained panic,” and it took him several minutes to calm down.¹¹ Over the next few weeks Christensen experienced two more panic attacks, and after researching his symptoms on the Internet, he realized that he was experiencing the symptoms of Post-Traumatic Stress Disorder (PTSD).¹² Christensen recognized that the sudden and unexpected sight of the group of traditionally dressed Vietnamese children had shocked him into re-experiencing the trauma he had undergone in Saigon.¹³ Once those memories resurfaced, even little things began to trigger crippling panic attacks.¹⁴

Loren Christensen’s story is all too familiar for many veterans who have experienced combat.¹⁵ Whether the symptoms begin immediately following the traumatic event, or years later, they exacerbate the original trauma.¹⁶ Research shows that PTSD can lead to social disability and impact occupational functioning.¹⁷ Additionally, veterans diagnosed with PTSD are almost twice as likely to develop neurodegenerative diseases, such as Dementia and Alzheimer’s disease.¹⁸ Almost 20% of the 2.8 million

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *Id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. Elbert Geuze, et al., *Neuropsychological Performance Is Related to Current Social and Occupational Functioning in Veterans with Posttraumatic Stress Disorder*, WILEY ONLINE LIBR. (Sept. 17, 2008), <http://onlinelibrary.wiley.com/doi/10.1002/da.20476/full> [https://perma.cc/W29N-24-BQ].

17. *Id.*

18. *PTSD in Veterans Linked to Dementia in Later Life*, ELEMENTS BEHAV. HEALTH, <https://www.elementsbehavioralhealth.com/trauma-ptsd/ptsd-in-veterans-linked-to-dementia-in-later->

Afghanistan and Iraq war veterans are officially diagnosed with PTSD, however the estimated number is twice as high due to lack of self-reporting.¹⁹ Due to these high numbers, it is essential for estate planning attorneys to recognize PTSD symptoms in order to draft an estate plan that will protect the veteran, the veteran's family, and the veteran's assets.²⁰

II. INTRODUCTION

*"The military teaches you how to have PTSD."*²¹

Due to the advancements in medical science and body armor, as well as battlefield evacuation rates, more veterans than ever are returning to civilian life after surviving significant trauma.²² Head injuries in particular are more prevalent among veterans returning from the wars in Afghanistan and Iraq due to the high proportion of explosive weapons used in combat, such as Improvised Explosive Devices (IEDs).²³ Unlike other physical injuries, head injuries are difficult for physicians to detect, especially among the veteran population.²⁴ American military culture that has traditionally viewed asking for help as a weakness, as such veterans are less likely than civilians to seek treatment when they experience psychological problems.²⁵

Classified as a trauma disorder, PTSD is caused by a traumatic event, or series of events.²⁶ Veterans who develop PTSD often avoid situations where they have little control over their environment, especially where

life/ [https://perma.cc/RL64-9BBV] (last visited Jan. 21, 2016).

19. See *How Common Is PTSD?*, PTSD: NAT'L CTR. FOR PTSD, <http://www.ptsd.va.gov/public/PTSD-overview/basics/how-common-is-ptsd.asp> [https://perma.cc/2CY7-ENDW] (last updated Aug. 13, 2015); *About Us*, IAVA, <http://iava.org/about/> [https://perma.cc/YEW5-28F] (last visited Feb. 3, 2016).

20. See *How Common Is PTSD?*, *supra* note 19; *About Us*, *supra* note 19.

21. F. Don Nidiffer & Spencer Leach, *To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*, 29 DEV. MENTAL HEALTH L. 1, 12 (2010).

22. See Marta Hoes, *Invisible Wounds: What Texas Should be Doing for the Mental Health of Its Veterans*, 13 TEX. TECH. ADMIN. L.J. 369, 375 (2012). American soldiers wounded in Iraq and Afghanistan have a 90% survival rate compared to the 76% survival rate of soldiers in Vietnam and the Persian Gulf War. Lee Bowman, *Iraq War 10 Year Anniversary: Survival Rate of Wounded Soldiers Better Than Previous Wars*, KJRH-TV (Mar. 16, 2013, 12:00 PM), <http://www.kjrh.com/news/local-news/iraq-war-10-year-anniversary-survival-rate-of-wounded-soldiers-better-than-previous-wars> [https://perma.cc/LW8R-CKJT].

23. See Hoes, *supra* note 22, at 371. In 2010, more soldiers were wounded from explosive devices than gunshot wounds and rocket-propelled grenades. C.J. Chivers, *In Wider War in Afghanistan, Survival Rate of Wounded Rises*, N.Y. TIMES (Jan. 7, 2011), <http://www.nytimes.com/2011/01/08/world/asia/08wounded.html> [https://perma.cc/88BN-28VJ].

24. See Paul Freese & Natalie Klasky, *Best Emerging Holistic Advocacy Practices to Break the Cyclical Trauma, Depression, Alienation and Criminalization Afflicting Our Returning War Heroes*, 5 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 85, 88 (2014–2015).

25. See *id.*

26. Nidiffer & Leach, *supra* note 21; *Posttraumatic Stress Disorder*, AM. PSYCHIATRIC ASS'N: DSM-V DEV. 1, 2 (2013), <http://www.dsm5.org/Documents/PTSD%20Fact%20Sheet.pdf> [https://perma.cc/RXP7-8H6L].

conditions may be similar to the event, as this can cause flashbacks and frequently leads to further symptoms such as anxiety, depression, and paranoia.²⁷ While the ongoing wars in Afghanistan and Iraq make it difficult to ascertain the exact number of veterans suffering from PTSD, the government has estimated that as high as twenty percent of returning veterans have the disorder.²⁸ In reality, however, researchers believe this number is significantly higher, as it is currently “primarily diagnosed by self-report and interview measures.”²⁹ Estimates show that only half of the veterans suffering from PTSD seek help, due to a combination of an over-taxed medical system, a distrust of that system, and a veterans’ culture that does not condone seeking help.³⁰ In addition, because PTSD can manifest months or even years after the traumatic event, high rates of veterans from prior wars are also living with the disorder.³¹ The large number of veterans with diagnosed and undiagnosed PTSD has turned attorneys into “PTSD First-Responders.”³²

Overall, this comment’s purpose is to educate the estate planning community on PTSD and how attorneys can help their veteran clients protect themselves through an effective estate plan.³³ To do this, attorneys must recognize the special circumstances surrounding legal work for veterans, such as the necessity of incorporating therapeutic jurisprudence to prevent legal complications.³⁴ The first part of this comment will provide attorneys with information about how professionals diagnose PTSD.³⁵ Second, this comment will discuss the progression of the disorder to help attorneys understand how the military and the American public’s attitude and perception of the disorder have developed and affected veterans and their treatment.³⁶ Third, this comment will address the estate planning concerns that attorneys must consider when drafting an estate plan for a veteran with PTSD.³⁷ Finally, this comment will provide attorneys with initial client-counseling techniques to help screen clients to determine whether they are suffering from PTSD.³⁸

27. *Posttraumatic Stress Disorder*, *supra* note 26.; *see* Freese & Klasky, *supra* note 24, at 85.

28. *How Common Is PTSD?*, *supra* note 19.

29. Nidiffer & Leach, *supra* note 21, at 13.

30. *See* Robert N. Davis, *Veterans Fighting Wars at Home and Abroad*, 45 TEX. TECH. L. REV. 389, 394 (2013).

31. *See* *How Common Is PTSD?*, *supra* note 19.

32. *See* Evan R. Seamone, *The Veterans’ Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Posttraumatic Stress Disorder*, 202 MIL. L. REV. 185, 186–87 (2009) [hereinafter Seamone, *Veterans’ Lawyer as Counselor*].

33. *See* *infra* Part V.

34. *See* Seamone, *Veterans’ Lawyer as Counselor*, *supra* note 32.

35. *See* *infra* Section III.A.

36. *See* *infra* Section III.B.

37. *See* *infra* Part IV.

38. *See* *infra* Part V.

III. WHAT IS PTSD?

A. *Getting Past the Media Headlines: The Medical Diagnosis*

*“The mind is its own place, and in itself, can make a heaven of hell, a hell of heaven.”*³⁹

The Diagnostic and Statistical Manual of Mental Disorders (DSM) first recognized PTSD in 1980, and the current edition of the manual—the DSM-V—recognizes PTSD as a trauma or stressor-related disorder.⁴⁰ In order to classify as PTSD, the individual’s trauma must result from “actual or threatened death, serious injury or sexual violation” that the individual experienced, witnessed, or learned had “occurred to a close family member or close friend.”⁴¹ Moreover, the event must cause the individual “clinically significant distress or impairment” in important areas of functioning, such as social interactions or the ability to work.⁴²

The DSM separates PTSD’s behavioral symptoms into four categories: negative cognitions and mood, avoidance, re-experiencing, and arousal.⁴³ The first category, negative cognitions and mood, includes symptoms such as not remembering details of the trigger event, as well as feeling detached and estranged from others.⁴⁴ Avoidance behavior occurs when individuals attempt to avoid internal thoughts or feelings, and external situations or activities, which could potentially remind them of the trigger event.⁴⁵ Re-experiencing happens when individuals have “spontaneous memories of the traumatic event, recurrent dreams related to it, flashbacks or . . . prolonged psychological distress.”⁴⁶ Finally, arousal includes individuals

39. *John Milton Quotes*, GOODREADS, http://www.goodreads.com/author/quotes/9876.John_Milton [<https://perma.cc/W5GP-7T52>] (last visited Feb. 3, 2016).

40. See Nidiffer & Leach, *supra* note 21, at 12–13; *Posttraumatic Stress Disorder*, *supra* note 26.

41. *Posttraumatic Stress Disorder*, *supra* note 26.

42. *See id.*

43. *See id.*

44. *See id.*; Bryan A. Laing & Mark S. Boyd, *PTSD in Returning Warriors: Ensuring Medically Appropriate Evaluation and Legal Representation Through Legislative Reform*, 22 STAN. L. & POL’Y REV. 177, 187 (2011). Veterans have reported detachment due to the loss of emotional support and community from fellow soldiers, which is emphasized upon returning home to a social group consisting of civilian family members and friends who have not changed and do not understand what the veteran has experienced. Benjamin Sledge, *Ghosts (Suicide, Veterans, and Invisible Wounds)*, HEARTSUPPORT (Sept. 10, 2015), <http://heartsupport.com/blogs/ghosts-suicide-veterans-and-invisible-wounds/> [<https://perma.cc/2VCG-5MQY>]. This realization of how much they have changed during deployment leads to isolation from former social groups and subsequent estrangement. *Id.*

45. *See Posttraumatic Stress Disorder*, *supra* note 26; Laing & Boyd, *supra* note 44. Often self-medicating techniques for internal avoidance behavior manifests itself in drug and alcohol abuse, while external avoidance behavior manifests itself as reclusive behavior, such as avoiding interaction with other people. Sledge, *supra* note 44.

46. *See Posttraumatic Stress Disorder*, *supra* note 26. Most commonly, this factor results in nightmares where the individual re-experiences the trigger event, and severe re-experiencing can include prolonged flashbacks where the individual relives the event. *See id.*

that suffer from “aggressive, ‘reckless or self-destructive behavior, sleep disturbances, [and] hyper-vigilance or related problems.’”⁴⁷ To receive a diagnosis of PTSD, individuals must re-experience at least one of these symptoms for longer than three months.⁴⁸ Furthermore, while many veterans begin to experience the symptoms immediately after the event, some veterans have reported first experiencing the symptoms of PTSD as many as twenty or thirty years after the traumatic event.⁴⁹

Strong reactions to stressful situations are normal as our bodies are wired to protect us when we feel threatened; however, individuals with PTSD continue to experience these strong reactions long after the event occurred and when the threat is no longer present.⁵⁰ Recent studies indicate that veterans diagnosed with PTSD are 3–5 times as likely to suffer from depression, and 70% struggle with sleep disorders such as insomnia and nightmares.⁵¹ Not surprisingly, studies also show a significant link between PTSD and substance abuse, as well as increased risk of developing diseases such as heart, liver, and cardiovascular disease.⁵² Veterans “diagnosed with PTSD [are also] nearly twice as likely to develop Alzheimer’s disease and dementia as they age than veterans without PTSD.”⁵³

Due to the nature of military training and the probability of experiencing a traumatic event in combat, soldiers are more susceptible to developing PTSD than the civilian population.⁵⁴ For instance, to survive on the battlefield soldiers are trained to be hyper-vigilant at all times which

47. *See id.*

48. Jessica Hamblen, *What Is PTSD?*, PTSD: NAT’L CTR. FOR PTSD 2, <http://www.ptsd.va.gov/professional/continuing-ed/transcript-pdf/what-is-ptsd.pdf> [<https://perma.cc/M6D9-M8DU>] (last visited Oct. 1, 2016). While re-experiencing one symptom is required, “combat veterans typically report symptoms in all these areas.” Margaret Lindorff, *After the war is over . . . PTSD symptoms in World War II veterans*, 2002-2 AUSTL. J. OF DISASTER & TRAUMA STUD., (Nov. 7, 2002) available at <http://www.massey.ac.nz/~trauma/issues/2002-2/lindorff.htm> [<https://perma.cc/W3UU-ZWPD>].

49. *See* Nidiffer & Leach, *supra* note 21, at 10–12. One World War I veteran reported experiencing PTSD symptoms for 75 years with the symptoms increasing in frequency toward the end of his life. J.D. Hamilton & R.H. Workman, *Persistence of combat-related posttraumatic stress symptoms for 75 years*, J. OF TRAUMATIC STRESS 11, 763 (Oct. 1998).

50. Hamblen, *supra* note 48.

51. *Depression, Trauma, and PTSD*, PTSD: NAT’L CTR. FOR PTSD, <http://www.ptsd.va.gov/public/problems/depression-and-trauma.asp> [<https://perma.cc/VN4T-Q4VS>] (last visited Jan. 23, 2016); Brandon Peters, *How Does Post-Traumatic Stress Disorder (PTSD) Effect Sleep?*, ABOUT HEALTH (June 18, 2014), <http://sleepdisorders.about.com/od/causesofsleepdisorder1/a/How-Does-Post-Traumatic-Stress-Disorder-PTSD-Affect-Sleep.htm> [<https://perma.cc/V944-EVW>].

52. Matthew Tull, *The Connection Between PTSD and Alcohol and Drug Use*, ABOUT HEALTH (Dec. 30, 2014), <http://www.verywell.com/the-connection-between-ptsd-and-alcohol-and-drug-abuse-2797535> [<https://perma.cc/4E27-FM4N>]. Over fifty percent of men and almost thirty percent of women with a history of PTSD also reported alcohol abuse or dependence at some point during their lives. *Id.* In addition, almost thirty-five percent of men and over twenty-five percent of women with a history of PTSD also experienced drug abuse or dependence. *Id.*; *PTSD in Veterans Linked to Dementia in Later Life*, ELEMENTS BEHAVIORAL HEALTH, <https://www.elementsbehavioralhealth.com/trauma-ptsd/ptsd-in-veterans-linked-to-dementia-in-later-life/> [<https://perma.cc/K7BB-77AQ>] (last visited Jan. 21, 2016).

53. *PTSD in Veterans Linked to Dementia in Later Life*, *supra* note 52.

54. *See* Nidiffer & Leach, *supra* note 21, at 12–13.

“create[s] and sustain[s] high levels of adrenaline” that do not automatically turn off when the soldier’s deployment ends.⁵⁵ Moreover, soldiers are less likely to seek medical help because military culture does not tolerate any form of weakness—especially mental weakness.⁵⁶ Many veterans fear their fellow soldiers will view them as weak and they could potentially be “[d]eemed unfit for duty” and removed from their positions if their superiors found out about the diagnosis.⁵⁷ In an attempt to combat this stigma, military leaders and doctors have requested that the American Psychiatric Association change the name to “posttraumatic stress injury” instead of PTSD, as they believe that the term “disorder” may discourage veterans from seeking help.⁵⁸ So far, the Association has refused.⁵⁹

B. PTSD: A Not So New Frontier

“Societies which ask men to fight on their behalf should be aware of what the consequences of their actions may so easily be.”⁶⁰

Although PTSD was not officially recognized until 1980, the disorder has existed in the United States since the Revolutionary War.⁶¹ Historically, the disorder was labeled by the situations that surrounded the trauma, such as “shell shock,” “battle fatigue,” and “war neurosis.”⁶² While it was understood that many soldiers had difficulty readjusting to civilian life when they returned home, it was not until the 20th century that researchers made the connection between the length of time a soldier spent on the battlefield, the lack of social support upon returning home, and the development of what is now recognized as PTSD.⁶³

During both World Wars, almost 350,000 military personnel were killed in battle, yet “the chances of becoming a psychiatric casualty . . . were greater than the chances of being killed by enemy fire.”⁶⁴ Due to the many psychiatric casualties, the military began to notice a connection between the

55. *See id.*

56. Sledge, *supra* note 44.

57. *See id.*

58. *See Posttraumatic Stress Disorder, supra* note 26; “In this author’s work with many combat and postdeployment veterans, in order for a person to feel normal while still suffering the sequels of trauma, s/he must be able to view the symptoms as a normal reaction to an external threat, rather than an illness. . . .” GROSSMAN, ON COMBAT, *supra* note 2, at 294.

59. *See Posttraumatic Stress Disorder, supra* note 26.

60. DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 282 (1st ed. 1996) [hereinafter GROSSMAN, ON KILLING] (quoting RICHARD HOLMES, ACTS OF WAR: THE BEHAVIOR OF MEN IN BATTLE (New York, Free Press 1985)).

61. *See Nidiffer & Leach, supra* note 21, at 12–13; Hamblen, *supra* note 48.

62. *See Hamblen, supra* note 48.

63. *See Nidiffer & Leach, supra* note 21, at 2–4.

64. DEBRUYNE & LELAND, CONG. RESEARCH SERV., RL32492, AMERICAN WAR AND MILITARY CASUALTIES: LISTS AND STATISTICS 2 (2015), available at <https://fas.org/sgp/crs/natsec/RL32492.pdf> [<https://perma.cc/R7F-4R8F>]; *see GROSSMAN, ON COMBAT, supra* note 2, at 11.

frequency and length of exposure to combat and the increase in psychological trauma.⁶⁵ In response to a shortage of soldiers due to large numbers of fatalities, the military began providing preemptive care and rotating soldiers from the front to rear lines to prevent extended exposure to combat and subsequent psychological trauma.⁶⁶ In addition, when soldiers returned home, the widespread approval of the war created a more conducive atmosphere for recovery because soldiers had a strong support network throughout the rehabilitation process.⁶⁷ However, even with increased awareness of the problem and improvements in treatment, very few understood the long-term psychological effects of combat trauma, and it is estimated that 56% of veterans from World War II were chronically ill or had passed away before the age of sixty-five.⁶⁸

The military learned from World War II that preventing soldiers from exposure to constant combat during the war decreased the amount of psychological casualties, and so it attempted to implement this technique during the Vietnam War.⁶⁹ While rotation to rear lines was made impossible due to the guerilla-style warfare used during the Vietnam War, the military decreased battlefield deployments to twelve or thirteen month tours.⁷⁰ However, even with these precautions, the rates of PTSD in Vietnam veterans were higher than those of World War II veterans.⁷¹ For the first time, researchers conducted studies of what was then known as “Post-Vietnam Syndrome,” and these studies demonstrated how crucial public support is to a veteran’s psychological health.⁷² Significantly, the studies established that preventing isolation from social support when veterans return home is more critical in preventing PTSD than the intensity or length of combat experienced.⁷³ It should be no surprise then that the American public’s widespread anger over the Vietnam War, and their hostile treatment of returning veterans, “produced more psychiatric casualties than any other war in American history.”⁷⁴

65. See Nidiffer & Leach, *supra* note 21, at 8–10. During World War I, nearly 25% of American soldiers were sent home for PTSD symptoms and approximately 30% were sent home during World War II. *Id.*

66. See *id.* World War I was the first war in which planes, tanks, and machine guns were used. *Id.* During World War II, psychologists were sent to the front lines and during both wars physicians began attempting to treat PTSD symptoms caused by combat, with partially successful results. *Id.*; see GROSSMAN, ON KILLING, *supra* note 60, at 268.

67. See Nidiffer & Leach, *supra* note 21, at 9–10.

68. See *id.* at 10–12.

69. See GROSSMAN, ON KILLING, *supra* note 60, at 269.

70. See *id.* at 268.

71. See *id.* at 269.

72. See Nidiffer & Leach, *supra* note 21, at 10–12. The congressionally-mandated National Vietnam Veteran Readjustment Study found that 30% of the male veterans and 26% of the female veterans that served in Vietnam will develop PTSD symptoms at some point during their lifetime. *Id.*

73. See GROSSMAN, ON KILLING, *supra* note 60, at 277.

74. See *id.*; see Nidiffer & Leach, *supra* note 21, at 10–12.

One of the most beneficial changes from the Vietnam War to the wars in Iraq and Afghanistan was the American public's recognition that supporting combat veterans does not necessarily entail support for the war they fought in.⁷⁵ This change, combined with an increase of public awareness of the psychological toll that warfare has on veterans, has substantially increased public support, including personally volunteering and funding projects that help veterans adjust once they return home.⁷⁶ Additionally, increased public support has led to a large number of studies on PTSD, and the results have improved the level of care that the military and the Department of Veterans Affairs (VA) offers to returning veterans.⁷⁷ Perhaps most importantly, the public's increased attention—and PTSD's prevalence—have created a reduction in the stigma, and as a result more soldiers are seeking help.⁷⁸

IV. ESTATE PLANNING CONSIDERATIONS

*"Prepare for the unthinkable, as though it was the inevitable."*⁷⁹

With the increase of veterans returning from Iraq and Afghanistan, civilian attorneys are quickly becoming "PTSD First-Responders."⁸⁰ While the military does offer retired veterans legal assistance through the Judge Army General Corps (JAG), it is not always an option for retired veterans to travel to the nearest military base for legal assistance.⁸¹ For example, states like Montana, Wyoming, and Indiana only have one military base in their state that offers legal assistance to retired veterans.⁸² Additionally, veterans that separate from the military before they reach retirement status do not retain access to legal assistance for estate planning.⁸³ As a result, civilian attorneys are very likely to see retired and separated veteran clients for their estate planning needs, and these attorneys must be prepared to counsel

75. See Nidiffer & Leach, *supra* note 21, at 11–13.

76. *See id.*

77. *See id.*

78. *See id.*

79. See GROSSMAN, ON KILLING, *supra* note 60, at 282.

80. See Seamone, *Veterans' Lawyer as Counselor*, *supra* note 32.

81. *ArmyJagCorps*, U.S.ARMY, <http://www.goarmy.com/jag/about.html> [https://perma.cc/H49V- XBKC] (last visited on Jan. 21, 2016). The Judge General Corps (JAG) is the legal branch of the military. *Id.* Each branch of the military has its own JAG and the attorneys, or Judge Advocates, represent military members in a variety of different situations, such as representing soldiers during a court-martial, or acting as the legal counsel for the base. *Id.*; see *Location*, MILITARY.COM, <http://www.military.com/base-guide/browse-by-location> [https://perma.cc/42QE-K42E] (last visited Nov. 12, 2016).

82. *Legal Services Locator*, U.S. ARMED FORCES LEGAL ASSISTANCE, <http://legalassistance.law.af.mil/content/locator.php> [https://perma.cc/R3LV-LJDY] (last visited Nov. 12, 2016).

83. See Jayme M. Cassidy, *Suddenly Discharged the Combat Continues: Eliminating the Legal Services Gap to Ensure Veterans' Success After Leaving Military Service*, 45 U. MEM. L. REV. 837, 842–43 (2015).

them.⁸⁴ Practitioners must know the areas of estate planning that are potentially problematic for veterans—with or without a PTSD diagnosis—and how to effectively counsel them on creating an estate plan that solves current, and prevents future, complications.⁸⁵

A. Wills

One of the main estate planning documents affected by a client's status as a combat veteran is the will.⁸⁶ In order for a veteran to have his estate distributed according to his wishes, and avoid having his estate distributed under his state's laws of intestate succession, the veteran must have a valid will.⁸⁷ Most state statutes regarding will creation require strict compliance with the conditions listed in the statute in order for the will to be valid.⁸⁸ In these states, sometimes even a "trivial deviation" can cause the will to be deemed invalid.⁸⁹ A valid will contains four main requirements, "(1) legal capacity, (2) testamentary capacity, (3) testamentary intent, and (4) compliance with statutory formalities."⁹⁰ Of the four elements listed above, veterans' wills are at the greatest risk of a will contest based on testamentary capacity, due to some common symptoms of PTSD.⁹¹ Accordingly, this comment will address testamentary capacity only and which preemptive measures practitioners should implement to prevent a successful will contest against their veteran clients' estates based on this requirement.⁹²

1. Testamentary Capacity Concerns

As very few state legislatures define testamentary capacity, courts have had to determine the parameters of the element for themselves.⁹³ Although the elements in each state vary, testamentary capacity typically encompasses the following four elements: "the testator (1) comprehended the action being taken and its effect, (2) knew the nature and extent of the testator's property, (3) recognized the natural objects of the testator's bounty, and

84. *See id.*; *see* Seamone, *Veterans' Lawyer as Counselor*, *supra* note 32.

85. *See* Seamone, *Veterans' Lawyer as Counselor*, *supra* note 32.

86. *See supra* Section III.A.

87. *See* Gerry W. Beyer & John K. Hanft, WILLS, TRUSTS, AND ESTATES FOR LEGAL ASSISTANTS 59–61 (Wolters Kluwer, 4th ed. 2013).

88. *See id.*

89. *See id.*

90. *See id.* at 60.

91. *See supra* Part III.

92. *See supra* Part III.

93. Beyer & Hanft, *supra* note 87.

(4) simultaneously held the first three elements in the testator's mind long enough to make a reasoned judgment regarding property deposition."⁹⁴

Dissatisfied heirs or former beneficiaries are prone to contest a will "on the ground that the testator lacked capacity," and did not fulfill the four elements, if the testator was demonstrating unusual behavior at the time of drafting or revising the will.⁹⁵ As unusual behavior can include any behavior that the testator has demonstrated that mainstream society would not consider "normal," this element should prompt serious concern for practitioners with veteran clients.⁹⁶ As discussed above, many veterans suffering from PTSD have reported that they find it difficult to reintegrate into the civilian world, and they often feel estranged from their immediate family members and former friends upon their return from combat.⁹⁷ This difficulty readjusting, which is sometimes drastic and long lasting, and in some cases permanent, has the potential to give former or dissatisfied heirs under the new will grounds for questioning the veteran's testamentary capacity during probate.⁹⁸ Consequently, preventing will contests based on testamentary capacity is a serious concern for veterans, and practitioners should take as many of the precautions discussed below as possible during the execution of the new will to prepare for this possibility.⁹⁹

Additional precautions are necessary if the new will contains an "unnatural disposition" of the veteran's property, such as veterans distributing their estate among friends or others and disinheriting their close family.¹⁰⁰ As veterans continue to report feeling estranged from immediate family, practitioners need to be aware of additional precautions that unnatural dispositions necessitate.¹⁰¹ Wills that disinherit close family members—such as spouses, parents, or children—are gaining acceptance; nonetheless, naming someone outside of the "traditional family" as the beneficiary still raises suspicion and is a prime target for a will contest.¹⁰² Although courts do consider the "unique characteristics and habits of the testator," the relationship between the testator and the parties contesting the will, and other

94. *See id.*

95. Gerry W. Beyer, *Will Contests – Prediction and Prevention*, 4 EST. PLAN. & COMMUNITY PROP. L.J. 1, 7 (2011).

96. *See id.*

97. *See supra* Part II. *See* Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 202 MIL. L. REV. 144, 162 (2009) [hereinafter Seamone, *Attorneys as First-Responders*]. It is estimated that twenty percent of military marriages end in divorce or separation after veterans return from deployment. *Id.*

98. *See* Beyer, *supra* note 95.

99. Judith G. McMullen, *Keeping Peace in the Family While You are Resting in Peace: Making Sense of and Preventing Will Contests*, 8 MARQ. ELDER'S ADVISOR 61, 64–66 (2006).

100. Joyce Moore, *Will Contests: From Start to Finish*, 44 ST. MARY'S L.J. 97, 104 (2012); Sledge, *supra* note 44.

101. *See supra* Part II. *See* Seamone, *Attorneys as First-Responders*, *supra* note 97.

102. Beyer, *supra* note 95, at 5.

factors that might have influenced the testator's decision, taking some additional precautions is a good idea.¹⁰³

2. Preventing Will Contests

While the threshold for testamentary capacity is low, will contests based on testamentary capacity occur frequently and they can cost the veteran's estate a significant amount of money defending the will during probate.¹⁰⁴ Will contests arise when close friends or family are unhappy with how the testator has disposed of property under the new will, usually because they have been disinherited or did not inherit as much as they had anticipated.¹⁰⁵ The former or dissatisfied heirs then challenge the will's validity through a will contest, either hoping that the court will find the will invalid or that they can induce the devisee, or the devisee's executor, to settle rather than risk litigation and more expense.¹⁰⁶ If the court determines that the will is invalid, then the court reverts back to the previous will, or if there is none, to the state's intestacy laws.¹⁰⁷

Estate planning attorneys can take many precautionary measures to prevent a will contest from succeeding.¹⁰⁸ The easiest and most frequently used method is to include an *in terrorem* provision, otherwise known as a no-contest clause, to the will.¹⁰⁹ Under an *in terrorem* provision, a beneficiary that challenges the will loses all, or most, of the beneficiary's inheritance depending on the provision's terms.¹¹⁰ Providing an explanation for the new disposition is also helpful, as long as the explanation does not give disgruntled heirs ammunition for the will contest.¹¹¹ In addition, carefully selecting witnesses is another way to preempt a will contest.¹¹² Selecting witnesses that are young, reliable, and traceable increases the chances that, if required, the witness could provide information on the testator's state of mind at the time the testator executed the will.¹¹³ Finally, one of the best ways to establish testamentary capacity—if it is allowed in the attorney's state—is to videotape the will execution ceremony.¹¹⁴ Videotaping allows the testator to

103. Moore, *supra* note 100, at 106.

104. See Ralph C. Brashier, *Conservatorships, Capacity, and Crystal Balls*, 87 TEMP. L. REV. 1, 10–11 (2014); see Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 31 (2006).

105. See Beyer, *supra* note 95, at 6.

106. McMullen, *supra* note 99, at 66–67; see Champine, *supra* note 104.

107. See Beyer, *supra* note 95.

108. See *id.* at 7.

109. See *id.*

110. See *id.*

111. See *id.* at 11–12. Attorneys should be careful that the explanation does not give rise to other will contest concerns, such as undue influence. See *id.*

112. See *id.* at 40.

113. See *id.*

114. See *id.* at 22–23.

“clearly and convincingly” demonstrate to the court that the testator satisfied the element of testamentary capacity when executing the will.¹¹⁵

B. Planning for Life as Well as Death

While estate planning has traditionally emphasized “death planning”—concentrating on the disposition of an individual’s estate after their death—over the last few decades the field has undergone a “radical transformation” and expanded to also include “life planning” or “preparing for the possibility of the client’s future mental or physical disability.”¹¹⁶ Estate planning attorneys now generally accept that both life and death planning documents should be included in a client’s estate plan for the protection of both the client’s person and property.¹¹⁷ Due to the health risks of veterans who suffer from chronic PTSD, attorneys with veteran clients should include a discussion of the various “life planning” options available when counseling their client.¹¹⁸ This section discusses the various options generally available.¹¹⁹

1. Durable Powers of Attorney

Originally, the only way for a person to act on behalf of a disabled or incapacitated individual was to obtain a court order that designated the person as the individual’s guardian.¹²⁰ The drafters of the Uniform Probate Code (UPC) recognized the need for a more “functional and expedient” option to the “cumbersome and expensive legal proceedings” required to obtain a guardianship and modified the basic power of attorney to create the durable power of attorney.¹²¹ Since then, all fifty states adopted some version of the durable power of attorney, and most of the state statutes are “virtually identical” to the UPC.¹²²

The basic power of attorney allows the grantor, or the principal, to establish an agency relationship between the grantor and the grantee; this relationship gives the grantee the power to act on the principal’s behalf.¹²³ However, attorneys could not use a basic power of attorney for estate

115. *See id.* at 23. The testator’s attorney accomplishes this by asking the testator questions designed to demonstrate competency. *Id.*

116. Marsha G. Madorsky, *FLORIDA GUARDIANSHIP PRACTICE* § 1.1 (8th ed. 2014).

117. *See id.*

118. *See id.* *See PTSD in Veterans Linked to Dementia in Later Life*, *supra* note 52.

119. *See supra* Section IV.B.3.

120. Michael A. Schmitt & Steven A. Hatfield, *The Durable Power of Attorney: Applications and Limitations*, 132 *MIL. L. REV.* 203, 204 (1991).

121. *See id.* at 205.

122. *See id.*; Gerry W. Beyer, *Enhancing Self-Determination Through Guardian Self-Designation*, 23 *IND. L. REV.* 71, 82 (1990).

123. Schmitt & Hatfield, *supra* note 120, at 203–04.

planning because it automatically terminated upon the disability or incapacity of the principal.¹²⁴ The drafters of the UPC recognized the advantages of modifying the basic power of attorney so it was no longer effected if the principal became disabled or incapacitated, especially as this is when principals would need the most help managing their affairs.¹²⁵ To fix this problem, the drafters created the durable power of attorney, which allows the principal to include language stating: (1) the powers granted vest immediately and continue through the principal's future disability or incapacity, or (2) the powers vest at the time the principal is disabled or incapacitated.¹²⁶

The principal can execute a durable medical power of attorney, a durable power of attorney, or both.¹²⁷ The durable medical power of attorney gives the principal's agent the power to make all medical decisions for the principal as designated in the document, whereas a durable power of attorney gives the agent the power to handle the principal's property, such as selling the property on the principal's behalf.¹²⁸ Executing both a durable medical power of attorney and a durable power of attorney are as comprehensive as a regular guardianship, and many courts and attorneys prefer executing these documents for several reasons.¹²⁹ First, this method saves the principal the expense and humiliation that a guardianship hearing causes.¹³⁰ Second, a durable power of attorney is more flexible and principals retain more rights than they would under a guardianship.¹³¹ Lastly, a durable power of attorney is easier to modify and revoke than regular guardianships.¹³² As long as the principal is not disabled or incompetent, the principal retains the power to modify or revoke both documents.¹³³

The durable power of attorney is the best option for veterans in other ways as well.¹³⁴ Due to frequent deployments, veterans are already familiar with basic powers of attorney, which they utilize to allow their spouses to pay bills and access information in their absence.¹³⁵ In fact, it is usually mandated during pre-deployment briefs that soldiers verify their spouse or "whomever is handling [their] financial affairs" has a current power of

124. *Id.* at 204–05.

125. *Id.*

126. *Id.*

127. Beyer, *supra* note 95.

128. *See* Beyer & Hanft, *supra* note 87, at 474–75.

129. TEX. EST. CODE ANN. § 1002.005 (West 2015); TEX. EST. CODE ANN. § 1101.101(a)(D) (West 2015).

130. Schmitt & Hatfield, *supra* note 120, at 203–04.

131. *Id.* at 204–05.

132. *Id.* at 207.

133. *Id.*

134. *See id.* at 210–11.

135. *See id.*

attorney on file before they deploy.¹³⁶ Additionally, as soldiers are encouraged to only authorize the power of attorney for the length of the upcoming deployment, they have usually executed several of them before they separate or retire from the military.¹³⁷ A durable power of attorney is identical to a power of attorney except the powers continue after disability or incapacity, thus most veterans will be more receptive to including durable powers of attorney in their estate plans.¹³⁸

2. Uniform Veteran's Guardianship Act

The 1942 Uniform Veterans Guardianship Act (UVGA) is an alternate option for veterans who only need help keeping track of the various benefits and services provided through the VA.¹³⁹ As of 2012, thirty states have enacted veteran's guardianship laws originally based on the UVGA.¹⁴⁰ The UVGA provides guardianship procedures for both veterans and the "incompetent and minor beneficiaries" of veterans; it was enacted to provide a more "practical, speedy, and economical procedure for the appointment" of guardians to veterans and their dependents.¹⁴¹ Under the UVGA, veterans appoint a guardian of their choosing to solely manage their veteran's benefits.¹⁴² The VA also states the UVGA does not create a presumption that the ward lacks testamentary capacity, which is a concern for most veterans.¹⁴³ Veterans who obtain a guardianship under the UVGA are considered "financially incompetent" because they require help adequately administering payment benefits.¹⁴⁴

While the VA claims that the UVGA's purpose is to create an alternative to the standard guardianship proceedings for veterans who only require help navigating the VA's complicated benefits system, there are some serious concerns regarding the UVGA that attorneys should discuss with every client.¹⁴⁵ For example, the VA does not inform veterans that once they

136. Kate Horrell, *Powers of Attorney*, PAYCHECK CHRONICLES (Feb. 4, 2012), <http://paycheck-chronicles.military.com/2012/02/04/powers-of-attorney-2/> [https://perma.cc/R52E-JE8B].

137. *Power of Attorney Basics*, MILITARY ONE SOURCE, http://www.militaryonesource.mil/f?p=MOS3:CATEGORY:0:::EKMT_ID:333.25.40.30.40.0.0.0.0content_id%3D269356 [https://perma.cc/38X9-CAFR] (last visited Jan. 21, 2016).

138. See Schmitt & Hatfield, *supra* note 120, at 210–11.

139. UNIF. VETERANS' GUARDIANSHIP ACT § 3; see Marjorie A. Shields, *Annotation, Validity, Construction and Application of Uniform Veterans' Guardianship Act*, 113 A.L.R. 5th 283 (2003).

140. *State Adult Guardianship Legislation: Directions of Reform-2012*, AM. BAR ASS'N 4 http://www.americanbar.org/content/dam/aba/administrative/law_aging/2012_state_adult_guardianship_legislation.authcheckdam.pdf [https://perma.cc/LNX9-8BVA] (last visited Nov. 12, 2016).

141. See Shields, *supra* note 139.

142. See *id.*

143. See *id.*

144. Joshua Flynn-Brown, *Analyzing the Constitutional Implications of the Department of Veterans' Affairs Process to Determine Incompetency: Is the Federal Government Violating the Second Amendment and Due Process?*, 41 HASTINGS CONST. L.Q. 521 (2014).

145. 77 AM. JUR. 2D. *Veterans and Veterans' Laws* § 49 (2015).

qualify for a guardianship under the UVGA they fall under a federal guideline that allows the VA to report the veteran's name to the National Instant Criminal Background Check System (NICBCS), which prevents individuals in the system from obtaining licenses and firearms.¹⁴⁶ This has severely diminished the UVGA's effectiveness as most veterans will not exchange help with their benefits for their ability to own and purchase firearms.¹⁴⁷ In addition, the recent scandals regarding the VA's treatment of veterans and their healthcare have caused veterans' confidence in the medical care that the VA provides to plunge.¹⁴⁸ This is especially concerning considering the VA has demonstrated that under the UVGA it can dismiss a guardian (even if the guardian was previously requested by the ward) if it considers the guardian unfit and then replace the guardian with an attorney of its choosing.¹⁴⁹ Due to these concerns, attorneys should discuss these drawbacks with their veteran clients during the estate planning process.¹⁵⁰

3. Guardianships

Guardianships are the most extreme life planning option available due to the process required to obtain one and its effects on the ward's freedom of choice.¹⁵¹ In general, courts appoint guardians to individuals who are no longer able to care for themselves or manage their property and assets effectively.¹⁵² Usually family or friends of the proposed ward request a guardianship hearing in which the court determines whether a guardianship is appropriate and, if so, what type.¹⁵³ There are two types of guardianship: guardianship of the person and guardianship of the estate.¹⁵⁴ Guardians of the person control the ward's person.¹⁵⁵ For example, guardians of the person have the right to establish the ward's domicile, the duty to provide care and protection—food, clothing, shelter—and the duty to obtain medical care for

146. See Flynn-Brown, *supra* note 144. "A mentally incompetent person is one who . . . lacks the mental to contract or to manage his or her own affairs, including disbursement of funds . . ." 38 C.F.R. § 3.353(a).

147. See Flynn-Brown, *supra* note 144.

148. Susan Page, *Poll: Confidence in veterans' care plummets to new low*, USA TODAY (June 2, 2014, 3:57 PM), <http://www.usatoday.com/story/news/politics/2014/06/02/poll-americans-view-of-va-health-care-scandal/9863621/> [<https://perma.cc/D9P6-58QE>]. According to a USA Today poll, seven out of ten Americans now rate the healthcare provided to veterans by the VA as "only fair" or "poor." *Id.* This is the lowest rating since the poll started in 2007. *Id.*

149. See William R. Levesque, *VA guardian program comes under fire*, TAMPA BAY TIMES (May 14, 2012, 4:21pm), <http://www.tampabay.com/news/military/veterans/va-guardian-program-comes-under-fire/1230057> [<https://perma.cc/24B5-UTL5>].

150. See Flynn-Brown, *supra* note 144.

151. Phillip B. Tor & Bruce D. Sales, *A Social Science Perspective on the Law of Guardianship: Directions for Improving the Process and Practice*, 18 LAW & PSYCHOL. REV. 1, 2 (1994).

152. See *id.*

153. See *id.*

154. TEX. EST. CODE ANN. § 1151.051 (West 2015).

155. *Id.*

the ward.¹⁵⁶ Guardians of the estate manage the ward's property, such as collecting debts or rent, enforcing obligations owed to the ward, and bringing lawsuits on behalf of the ward.¹⁵⁷

There are three levels of guardianship.¹⁵⁸ Some states, like Texas, have strict laws regarding the appointment of guardians and require the court to “find by clear and convincing evidence that” other alternatives to a guardianship, such as drafting a durable power of attorney, were considered and determined ineffective.¹⁵⁹ Other states have more relaxed guardianship laws, and appointing a guardian is a notably easier process.¹⁶⁰ For example, in Montana, “incapacity” is broadly defined as someone who is impaired for any reason as long as it is “to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions.”¹⁶¹ Most states have full guardianships, limited guardianships, and temporary guardianships, and the client's level of incapacity determines which guardianship is necessary to protect the client and the client's assets.¹⁶² In a full guardianship, the court gives the guardian complete control over the ward's person and estate.¹⁶³ A limited guardianship gives the guardian only the powers that the court designates in the guardianship order, and the court can increase or decrease these powers at a later hearing based on the ward's condition.¹⁶⁴ Lastly, the court will order a temporary guardianship in emergency situations when the proposed ward needs a guardian's help immediately; this usually lasts for a short period of time until a more permanent decision can be reached—in some states this could be as little as six months.¹⁶⁵

Like durable powers of attorney, individuals can designate their future guardian, however the individual must make the designation prior to incapacitation.¹⁶⁶ However, unlike durable powers of attorney, the disadvantages of a guardianship are significant and clients should carefully

156. *Id.* § 1151.051(c).

157. *Id.* § 1101.101.

158. MICH. COMP. LAWS ANN. § 700.5303(2) (West 2014); EST. § 1101.101.

159. MICH. COMP. LAWS ANN. § 700.5303(2); EST. § 1101.101.

160. MONT. CODE ANN. § 72-5-101 (West 2009). Montana is one of 14 states that have adopted the Uniform Probate Code (UPC) in its entirety, compared with Texas which is a non-UPC state. See *Uniform Probate Code*, LEGAL INFO. INST., <https://www.law.cornell.edu/uniform/probate> [<https://perma.cc/4LY6-8KRR>] (last visited Jan. 20, 2016).

161. MONT. CODE ANN. § 72-5-101 (West 2009).

162. MICH. COMP. LAWS ANN. § 700.5312 (West 2015); MICH. COMP. LAWS ANN. § 700.5303(2) (West 2014); TEX. EST. CODE ANN. § 22.018 (West 2014); MONT. CODE ANN. § 72-5-317 (West 2009); MONT. CODE ANN. § 72-5-305 (West 1981);

163. MICH. COMP. LAWS ANN. § 700.5303(2) (West 2014); MONT. CODE ANN. § 72-5-305 (West 1981).

164. EST. § 22.018; MONT. CODE ANN. § 72-5-305 (West 1981).

165. MICH. COMP. LAWS ANN. § 700.5312 (West 2015); EST. § 1251.001; MONT. CODE ANN. § 72-5-317 (West 2009).

166. Nina A. Kohn, et. al., *Supported Decision-Making: A Viable Alternative to Guardianship?* 117 PENN. ST. L. REV. 1111, 1117–18 (2013).

consider them.¹⁶⁷ Guardianships are established through the court system, and they normally require legal help and considerable time to prepare the documentation that most courts require before granting a guardianship.¹⁶⁸ Moreover, while the ward or the guardian can move the court to modify or terminate the guardianship, the process requires additional documentation to prove the ward either needs a modification or has regained competency and no longer requires the guardianship.¹⁶⁹ This process can be time consuming, and the additional time and money it costs to accomplish could be prohibitive for some wards.¹⁷⁰ As a result, obtaining and maintaining a guardianship is usually an expensive and time-consuming process that is difficult to modify or reverse.¹⁷¹

Attorneys and prospective guardians should always consider a guardianship as a last resort due to the limited rights left to the ward once a guardianship is implemented.¹⁷² As discussed above, guardians of the person are given the power to make all personal life decisions for the ward, including where the ward will live and what medicines the ward will take; while guardians of the estate strip the ward of any rights to make decisions regarding their property, including whether to sell it or how to invest it.¹⁷³ Moreover, the ward does not have the right to vote, the right to own a firearm, the right to marry, or the right to carry a driver's license.¹⁷⁴ Additionally, the process of establishing a guardianship is a humiliating experience for the proposed ward as it requires numerous interviews with doctors, physicians, and psychiatrists to determine whether or not the ward is incompetent, and the results are discussed and debated openly at the hearing.¹⁷⁵ Attorneys should always discuss these concerns with their clients when determining what options to include in their final estate documents.¹⁷⁶

While guardianships are the most extreme version of the life-planning options, attorneys should always discuss them, and the different options available, with their client.¹⁷⁷ For example, some veterans may need a temporary guardianship set up immediately.¹⁷⁸ Veterans diagnosed with PTSD have increased rates of alcohol and drug abuse, which studies show

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Guardianship and Conservatorship*, ELDERLAWANSWERS (Aug. 28, 2014), <http://www.elderlawanswers.com/guardianship-and-conservatorship-12096> [<https://perma.cc/GB2D-5ZGZ>].

173. TEX. EST. CODE ANN. § 1151.051 (West 2014); TEX. EST. CODE ANN. § 1101.101 (West 2014).

174. *Guardianship and Conservatorship*, *supra* note 172.

175. *See* Tor & Sales, *supra* note 151.

176. Kohn, et. al., *supra* note 166.

177. MONT. CODE ANN. § 72-5-317 (West 2015); MICH. COMP. LAWS ANN. § 700.5303(2) (West 2014); TEX. EST. CODE ANN. § 22.018 (West 2014).

178. MICH. COMP. LAWS ANN. § 700.5312 (West 2015); MONT. CODE ANN. § 72-5-317 (West 2015); EST. § 1251.001.

increase the symptoms of PTSD.¹⁷⁹ If the veteran becomes incapacitated due to addiction, or the severity of the accompanying PTSD symptoms, establishing a temporary guardianship is a possible short-term solution, such as through completion of an addiction rehabilitation program.¹⁸⁰ Other veterans may simply prefer to include guardianship documents in their estate plan that self-designates their future guardian should they become incapacitated.¹⁸¹

V. THERAPEUTIC JURISPRUDENCE

To successfully protect veteran clients through estate planning, attorneys must know how to recognize in the initial interview whether the client has PTSD.¹⁸² While the attention surrounding PTSD is more positive than in the past, media coverage surrounding the diagnosis is largely negative.¹⁸³ Many veterans are hesitant to seek help or admit that they might have the disorder because of the media coverage combined with the negative treatment that veterans diagnosed with PTSD deal with while on active duty.¹⁸⁴ While veterans' hesitance to discuss the disorder presents a challenge to practitioners in determining what safeguards to include in a client's estate plan, it is not insurmountable.¹⁸⁵ By improving client counseling techniques, practitioners can obtain the information they need from their clients to draft effective estate planning documents.¹⁸⁶

Over the last decade, the legal field has seen a shift as some attorneys and state legislatures have realized the benefits of enhanced client counseling, which requires more in-depth initial client interviews to better understand a client's condition.¹⁸⁷ Known as "therapeutic jurisprudence," attorneys who use this technique recognize that "therapeutic and ant therapeutic consequences . . . sometimes flow from legal rules, legal procedures, and the roles of legal actors," and to effectively represent their

179. *PTSD and Substance Abuse in Veterans*, PTSD: NAT'L CTR. FOR PTSD (Aug. 13, 2015), http://www.ptsd.va.gov/public/problems/ptsd_substance_abuse_veterans.asp [https://perma.cc/KH9X-YHYM].

180. MONT. CODE ANN. § 72-5-101(1).

181. *See* Beyer & Hanft, *supra* note 87, at 472. In a majority of states, courts will follow the proposed ward's guardianship document as it is the best way to determine what the ward preferred before becoming incapacitated. *Id.*

182. *See supra* Part IV. If the veteran has a history where a PTSD diagnosis could be claimed, attorneys should take preventative measures to prevent a will contest. *See supra* Part IV.

183. Harry Croft, *Combat PTSD Stigma Made Worse by Fort Hood Shooting Media Coverage*, HUFFINGTON POST (Apr. 18, 2014, 4:37 PM), http://www.huffingtonpost.com/harry-croft-md/ptsd-stigma_b_5147701.html [https://perma.cc/U953-KWD4].

184. Sledge, *supra* note 44.

185. *See* Seamone, *Veterans' Lawyer as Counselor*, *supra* note 32.

186. *See id.*

187. *See id.* In at least ten states, lawyers are classified as one of the few professions permitted by statute "outside the field of psychology to use techniques that fall within the definition of psychology practice." *See id.* at 202.

clients, attorneys need to understand the “client’s world.”¹⁸⁸ This technique helps attorneys to effectively counsel their clients to make decisions that maximize their well-being.¹⁸⁹ It also creates an easier legal experience for the client by alerting the attorney to any “soft spot[s]” or “any phase or issue in the legal process that could subject a client to stress or tension,” which the attorney can then try to alleviate or avoid completely.¹⁹⁰ Therapeutic jurisprudence is especially relevant for attorneys with clients that have PTSD, as they are more susceptible to stress and find it harder to cope with the stress of the legal process than civilians.¹⁹¹ Also, it allows the attorney to quickly get the answers they need to draft valid legal documents, which makes their job easier.¹⁹²

To accomplish this therapeutic jurisprudence, estate-planning attorneys must take the time to tailor and incorporate questions into their initial information-gathering stage of the attorney-client relationship to determine any concerns.¹⁹³ Attorneys should draft these questions to illicit answers that will alert the attorney to any problems or any additional information the attorney might need.¹⁹⁴ For example, to determine if a client has combat-based PTSD, one of the first questions attorneys should always ask their estate planning clients during their initial client-counseling session is whether they have any prior military service.¹⁹⁵ If the client does, this should alert the attorney to ask follow-up questions to determine whether the client has PTSD and will need additional protection.¹⁹⁶ Examples of effective follow-up questions are:¹⁹⁷

- Were you ever deployed to a warzone? If so, how many times were you deployed?
- What was your job during your deployment(s)?
- Has your relationship with your family and friends changed since you returned home?
- During your deployment(s) did you experience any events that have since caused “[r]epeated, disturbing memories, thoughts, or images” or encounter situations where you felt as though you were re-living the event?¹⁹⁸

As discussed above, veterans are often hesitant to discuss PTSD and may be vague or elusive in answering questions if they feel the attorney is

188. *See id.* at 188–89.

189. *See id.*

190. *See id.* at 218.

191. *See id.*

192. *See id.*

193. *See id.* at 186–87.

194. *See id.* at 207–08.

195. *See id.*

196. *See id.* at 212–13.

197. *See id.*; *See supra* Part IV.

198. *See Seamone, Veterans’ Lawyer as Counselor, supra* note 32, at 213–14, 244–45.

attempting to determine whether they have PTSD.¹⁹⁹ If the attorney suspects this is a problem, an effective technique would be for the attorney to explain to the veteran that the Model Rules of Professional Conduct binds attorneys to attorney-client privilege and client confidentiality regarding any information veteran shares. If the veteran's answers are still vague, attorneys should be prepared with open-ended questions, such as asking the veteran to describe family history or asking about the veteran's weekend activities.²⁰⁰ Asking veterans to describe their relationships, or lack of any, with a spouse or significant other can also initiate conversations regarding any changes in the veteran's behavior since the return from combat.²⁰¹ Throughout an attorney's relationship with their veteran client, they should always pay attention to their demeanor as significant changes are a persuasive indicator that other PTSD symptoms are present and, if not already diagnosed, could lead to a diagnosis.²⁰²

VI. CONCLUSION

Despite the large number of veterans currently experiencing PTSD, guidance for estate planning attorneys remains relatively non-existent for attorneys attempting to assist veterans with their estate planning needs.²⁰³ In addition, the numbers of veterans with PTSD are continuing to grow, and studies consistently reveal significant connections between PTSD and the development of neurodegenerative diseases.²⁰⁴ While this comment is not comprehensive, I have proposed that attorneys use therapeutic jurisprudence techniques in their daily client interactions, beginning with the initial counseling session and continuing throughout the entire legal process.²⁰⁵ Incorporating this technique will help attorneys identify veterans experiencing PTSD and advise them on various methods they can use to protect them and their estates.²⁰⁶ As discussed, fundamental to this technique is addressing a client's responses with the right follow-up questions.²⁰⁷ If at any point during the conversation the client demonstrates that a PTSD diagnosis is possible, the attorney should be prepared to advise the client of the effect the diagnosis can have on an estate plan.²⁰⁸ My hope is that through

199. *See id.* at 207–08.

200. *See id.* at 208. A “red flag” that attorneys should pay close attention to is whether the veteran has become distant from friends or family since returning from deployment. *Id.* Asking questions regarding weekend plans or hobbies can be followed-up with questions about what the veteran did pre-deployment, and if those answers are different, questions regarding why they have changed. *Id.*

201. *See id.*

202. *See id.*

203. *How Common Is PTSD?*, *supra* note 19.

204. Geuze, et al., *supra* note 16.

205. *See supra* Part V.

206. *See Seamone, Veterans' Lawyer as Counselor*, *supra* note 32.

207. *See supra* Part V.

208. *See supra* Part IV.

education, attorneys may identify problem areas in the veteran's estate to draft effective estate planning documents to protect their clients' interests.²⁰⁹

209. See Seamone, *Veterans' Lawyer as Counselor*, *supra* note 32.