HEALTH CARE ISSUES IN ESTATE PLANNING
First Run Broadcast: October 8, 2015
Live Replay: May 9, 2016
1:00 p.m. E.T./12:00 p.m. C.T./11:00 a.m. M.T./10:00 a.m. P.T. (60 minutes)

Estate and trust planning can be an exercise in planning for the health care choice of clients – and not just elderly clients. There are sensitive issues of making life-and-death health care decisions many years in advance of when those decisions will be needed. There are equally delicate decisions about the appointment of trustees or conservators and planning to avoid disputes between them and health care providers. Planning for long-term care – and how to fund that care – is also a major challenge for most clients. If clients are not carefully counseled about their choices and their decisions not carefully drafted, their most important estate decisions will go unfulfilled. This program will provide you with a real world guide to the most important health care issues in estate and trust planning, including common traps.

- Health care issues in estate planning – counseling and drafting issues
- Drafting advance health care directives, health care powers-of-attorney, living wills, and revocable trusts
- Defining objective health care “triggers” in documentation to ensure client’s health decisions are fulfilled
- Essential issues in appointing trustees, guardians and conservators – and common mistakes
- Choosing among home health care and institutional care alternatives and financing long-term care
- Tension between health care providers and trustees – areas of competence, conflict, and cooperation, and practical techniques to avoid disputes

Speakers:

William Kalish is a partner in the Tampa office of Akerman, LLP. His practice focuses on advising individual clients and their families on their estate and trust plans, including wills, revocable trusts, irrevocable trusts, charitable trusts, private foundations, and limited partnerships. He also practices in probate administration, asset preservation, business succession planning for family-owned entities, and the division of business interests in the context of divorce. He is a Fellow of the American College of Tax Counsel, formerly served as chair of ABA Tax Section, and has served as an Adjunct Professor of Law at Stetson Law School teaching estate planning. Mr. Kalish received his B.A. from the University of Pittsburg and his J.D. with honors from George Washington University Law School.
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Health Care Issues in Estate Planning  
Teleseminar  
May 9, 2016  
1:00PM - 2:00PM  
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Program Minutes: 60 General

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Health Care Issues in Estate Planning: Documents Needed
Advice Given

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This Session Will Cover

- Drafting advance health care directives & revocable trusts
- Defining objective health care “triggers” in documentation
- Key issues in appointing trustees, guardians & conservators
- Availability & financing of home health care & institutional care
- Tension between health care providers & trustees – areas of competence, conflict & cooperation
Must you have an advance directive?

Should you have an advance directive?

What about just telling someone what you want?

What happens if you don’t have one?

If you do have one, is it “fool-proof”?
Things to Discuss with Client

- Wishes for health care and end of life decisions
- Religious & personal preferences
- Preferences for or against specific medical procedures.
- Appoint agent who will follow directions even if family members, medical professionals or friends disagree.
- Why not “do it yourself”?


Client Decisions

- Who will serve as Agent? Alternate?
- Medical treatments or pain control measures? Even if impaired or limited ability to communicate?
- Particular directions re: specific health care facilities, religious preferences, disposition of body, organ donation, etc.?
- Directions specifically regarding:
  - Ventilator, artificial feedings & hydration, bedridden, lack cognitive ability?
In Drafting, Is It More Than “Filling in the Blanks” for Your Client?

- What’s a coma? PVS? Do you need to know?
- What religious or spiritual perspectives are important to your client?
- Quality of Life factors such as independence, self-sufficiency, impact on physical or mental abilities
- Problems with too much specificity re: treatments and conditions?
Dying is complicated, personalized & fluid
  - No crystal ball re: medical condition.
- No substitute for discussions with family & health care provider.
- Not eliminate personal ambivalence
  - Client’s goals & wishes change.
- Not control health care professionals
  - Ambiguity in document
  - Dr. overrules, ignores or objects.
Catalyst for thinking & discussing
  - Clarifying values.
- Enables choice of agent.
- Guidelines for course of treatment
  - If directive true reflection of wishes &
  - Not generic one-size-fits-all form.
Know the questions to ask—including the hard questions & be comfortable in asking them.

Advance planning is routine part of practice: clients don’t bring it up? You do.

Give clients guidelines:
- Is value history helpful here?
- How to talk to family.
- How to select agent.

Agent—do you talk to agent about role?
Ten Things to Tell Clients

- Advance directive only as good as family’s willingness to honor it
- Having conversation with family about wishes & reason for them gives client best chance of directive being honored.
- Client must talk to agent about wishes.
- Client lives in more than one state. Is there a need for a directive for each state?
Ten Things to Tell Clients

- Pre-hospital DNRO separate?
- Directive isn’t end—and it isn’t the beginning
  - It’s the middle of the process.
- Keep directive where it can be found.
- You’re not tempting fate.
- Don’t make your family guess what you want.
- Writing it down & talking about it are way to get wishes honored.
What is the best use?
Who should be trustee? Alternate?
Why should lawyer draft?
Need to be done as part of estate planning or planning for capacity, not piecemeal.
Is it more than a probate avoidance device?
What are the tax traps in drafting?
Not just for the free lunch....
Required by law?
- For example, a living will typically has triggers.
- Operates when the client is unable to make health care decisions.
  - How is that determined?
- Are there triggers the client wants? How do they ensure enforceability?
Key Issues in Appointing Guardians, Conservators & Trustees

- Similar to those when considering health care agent.
- For trustee-who is going to be best for the job?
  - What powers are to be given?
  - Not a time to worry about hurt feelings among kids.
  - Who can fulfill the duties of trustee?
  - Family disputes.
  - Is a professional the best choice?
  - How big is the trust?
Key Issues in Appointing Guardians, or Conservators

- What does law allow regarding advance designation?
- Should it be the same individual for person and property?
- Who is going to be best for client’s individual situation?
- What documents are needed for the advance designation?
- Does the law mandate the appointment if not in best interest?
If no advance designation but court appointment, how does court decide “who”?

What impact, if any, will a health care directive or DPOA have:

- In “avoiding” need for guardianship or conservatorship (does your statute require least restrictive alternative consideration) or
- In giving court guidance as to who should be appointed?

As estate planner/drafter, is there a role for you?
Why does estate planner need to know options?

How to choose and pay for care:
- Medicare?
- Medicaid?
- Long Term Care Insurance?
- Private pay?
Home Health Care & Institutional Care

- Resources for clients in learning about & choosing.
- Need for financial planner.
- Availability of long term care insurance.
- Aging in place policy.
Consider the role of fiduciary with the health care provider.
- For example-health care agent or guardian of person.
- But, trustee, conservator of property or agent under DPOA?
- HIPAA compliant (see sample language)?
- Goal of planning is typically to have plans made and implemented, not to litigate.
Tension between health care providers & fiduciary: competence, conflict, & cooperation

- How communication may facilitate cooperation and eliminate conflict.
- Health Care providers have copies necessary documents?
- Need for ethics committees?
- Family meeting with health care provider?
- Are you documents clearly drafted so no ambiguity in implementation?
- Decisions made daily-not all end up as disputes.
Concluding Thoughts

- Importance of choice of fiduciary.
- Why lawyer rather than “d-i-y” (do it yourself)?
- Continued review of documents.
- Conservations with those involved.
- Storage of documents.
Thanks so much!