Acosta Law Firm, PLLC

Estate Planning & Elder Law

Welcome

DAY 4: Wednesday, April 28, 2021

2:00pm – 4:00PM

Elder Law Boot Camp for Health Care Professionals

Caregiver Support

Elder Law Boot Camp for Health Care Professionals

Caregivers

Two classes of caregivers

- Family Caregivers
- Third Party

Statistics on Caregivers: from AARP Public Policy Institute - Across the States 2018: Profiles of Long-Term Services and Supports

- 65 million people:
  - provide care for a chronically ill, disabled or aged family member.
  - Equal to 29+% of the U. S. population (2013)
- $375 billion a year:
  - The value of the services family caregivers provide for "free,"
    - Is almost **twice as much** as is actually spent on homecare and nursing home services combined ($158 billion). (AS2013)

Caregiver Agreements

An agreement between caregiver(s) and care recipient to provide care and/or lodging for care recipient.

Valid Caregiver Agreements

- Written
  - rebuts presumption done out of love and affection
- Fair consideration (a/k/a compensation)
  - for Family Caregiver Agreement compare services and housing to community rates (local SNF's ALF's, HHA's)
- Specify Services
- Length of Services
- Executed by both parties
  - DSS: wants to see that actual care recipient signed Family agreement; not POA if POA is also a caregiver

Detail Expectations of Parties

- **Accommodations:**
  - Where provided?
  - Bedroom or suite?
  - Private bath?
  - Use of kitchen/common areas?
  - Use of garage?

Services (What's included?)

- **Meals**
  - Included? How many? Different on weekends?
- **Cleaning**
  - How frequent?
- **Laundry**
  - How often?
- **Transportation**
  - Where to? How often?

Services (What's included?)
CONTINUED

- **Financial**
  - Pay bills? Investments?
- **Medical**
  - Is caregiver able to provide and at what level? (e.g. nurse)
  - Monitor Health?
- **Vacation**
  - For both caregiver and recipient – still get paid?
  - Alternate caregivers

What Happens if Things Don't Work Out?

- Trial period?
- Money back?
- What if caregiver dies and living in child's home?
  - Does spouse take over? (son-in-law)
- What if recipient needs to go to facility?
  - Services continue at some level? (No duplication)
  - What happens to personal property if going to facility?

Compensation

- What's it based on?
  - Per hour or lump sum?
  - When paid?
  - Per hour/Periodic payments (preferably monthly) for services preferred for Medicaid — rebuts argument that it is a gift)
- Reimbursement for care recipient's use of utilities and taxes
  - Gas, water, sewage, homeowners /renter's insurance
  - Divide by number of people in home

Taxes

A. INCOME TAX:

Payments to caregiver subject to income tax

- Have 1099 issued (very important for DSS)

Payments for caregiver may reduce care recipient's income tax liability

- Deductible medical expense if exceeds 7.5% of adjustable gross income
- Definition of "Medical Expense" is broad

TAXES
Continued

Payment of lump sum triggers tax on whole amount.

ALTERATIVE:

- Pay lump sum to third party. Third party would then make distribution to caregiver child
- Unclear under Federal law if tax triggered on full amount.
- Estate Recovery. Unclear whether unearned lump sum held by third party for distribution to caregiver when services rendered are subject to estate recovery.

TAXES
Continued

B. Estate Tax

Transfer of assets including lump sums probably not subject to Estate tax if made pursuant to terms of written care agreement because consideration for money for services.

- Alternative View: Transfers within one year from date of death for life care subject to estate tax.

C. Gift Tax

Should not be subject to gift tax if made for good and valuable consideration.

Death Of A Loved One

Elder Law Boot Camp for Health Care Professionals

What survivors need to do

- Notify relatives, employers, clergy
- Determine if autopsy or organ donation are issues
- Check for Will
- Find out assets and date of death value
- Contact Legal Counsel

Organ Donation/Anatomical Gifts

Article 43 of the NY Public Health Law

Who makes the decision? NY Pub Health L § 4301 (2012)

- Decedent prior to death.
  - Individual of sound mind, 18 years of age or older
  - Agent acting under a power of attorney that authorizes it.
  - Minor 16 years of age or older provided parent or guardian consents.
- *As noted on donor Card, driver's license, etc.*

Organ Donation/Anatomical Gifts

CONTINUED

- Who makes the decision?
- **After Death**, if not in above class or available and absent contrary intent in priority
  - Spouse
  - Adult son or daughter
  - Either parent
  - Adult brother or sister
  - Guardian of decedent
  - Any other person authorized or under obligation to dispose of the body.

Organ Donation/Anatomical Gifts

CONTINUED

Documenting Anatomical Gift

- Will
- Other documents
  - signed by donor in presence of two witnesses

Organ Donation/Anatomical Gifts

CONTINUED

- Amendment or Revocation of Gift
- If Delivered to Donee may revoke or amend by any of following:
  - Signed statement
  - Orally before 2 persons and communicated to donee.
  - Statement during terminal illness or injury to an attending physician and communicated to donee.
  - Signed document found on the person or his effects.

Organ Donation/Anatomical Gifts

CONTINUED

- If Not Delivered to Donee
  - Any of above method or
  - Destruction, cancellation or mutilation of the document and all executed copies

Autopsy Rights (35 Pa.C.S. § 1111)

- Authorizations (5 different ones)
  - Written authorization of **decedent** during lifetime and written consent of spouse (if any) after death.
- OR
  - Written authorization by **any party decedent designated** to take charge of the body for burial and decedent's spouse (if any) after death.

Autopsy Rights (35 Pa.C.S. § 1111)

- Authorizations (continued)
  - Written authorization of **decedent's spouse**.
  - If incompetent surviving spouse, or unavailable or does not claim body or no surviving spouse, then next closest living relative as defined by statute:
  - If no one else, written authorization of any other relative or friend who assumes custody of body for burial.

Handling Estate Assets & Estate Administration

Testate Estate	Intestate Estate
Die with Will Will needs to be probated to distribute some or all of decedent's property	Assets owned by decedent that are not effectively disposed of by Will, operation of law or beneficiary designation pass to his or her intestate heirs

Handling Estate Assets & Estate Administration CONTINUED

- **Important Issues:**
- What was date of death?
  - Triggers potential due dates.
- Who are decedent's survivors and are they entitled to assets of decedent?
- Married at time of death?
  - Potential elective share issue

Handling Estate Assets & Estate Administration CONTINUED

- **Divorced?**
- Ends former spouse's right to elective share ***20 Pa.C.S. § 2204(c)
  - includes pending divorce actions
- Ends former spouse's right to beneficiary designated assets in his/her name provided actually divorced. ***20 Pa C.S. § 6111.
- Exception court orders certain assets to former spouse

Handling Estate Assets & Estate Administration CONTINUED

Kids?

- Minors?
- Disabled?
- Predeceased kids?
- If no spouse and no kids then who is entitled to assets?

Handling Estate Assets & Estate Administration CONTINUED

What are the assets?

- Three categories:
  - Personal property (including vehicles, boats, etc.)
  - Real property
  - Intangible personal property (bank accts., investment accts., stocks, bonds, life insurance, annuities)

Handling Estate Assets & Estate Administration CONTINUED

- What are the date of death values for the assets?
  - Important for valuation and tax purposes

Handling Estate Assets & Estate Administration CONTINUED

- How are the assets titled?
  - Decedent's name alone?
  - What assets?
  - How much?
- Beneficiary designated
  - Joint, TOD or POD?
  - What assets?
  - How much?

Handling Estate Assets & Estate Administration CONTINUED

- Determine whether need to open estate/if will needs to be probated
- Probate: formal proceeding if there is a will
- Surrogate's Court Procedure (SCP) defines probate as presenting testamentary writing to the Surrogate's Court

Handling Estate Assets & Estate Administration CONTINUED

- **Is Will valid?**
- Testamentary capacity:
  - 18 or older of sound mind
- Testamentary Intent
- Positive disposition of assets, and
  - In writing signed by decedent at the time of death *** (20 Pa. C.S. § 2502)
  - Note absence of witnesses for will validity
- Validity requirements not same as probate requirements.

Handling Estate Assets & Estate Administration CONTINUED

Probate of Will

- Initiated by person named executor appearing before Surrogate's Court in the County where person died
- Must supply Surrogate's Court with:
  - Original will
  - Petition for Probate
  - Pay Register's fee for probate of will.

Handling Estate Assets & Estate Administration CONTINUED

- **Unless will is <u>"self-proved"</u>**
  - the decedent and two witnesses to the will attest to their signature before a notary at time of signing.) two witnesses must prove the signature of the decedent ***(20 Pa. C.S. § 53132).
- **Will <u>signed by decedent.</u>**
  - "Subscribing" witnesses preferred over "non-subscribing" witnesses.
- **Will <u>signed by maker or by another:</u>**
  - Must be done in the presence of two witnesses who sign their names to the will in decedent's presence a/k/a subscribing witnesses*** (20 Pa. C.S. § 2502 and 3132).
- **Take away: Have it be self-proving and avoid problems.**

Handling Estate Assets & Estate Administration CONTINUED

- Get Short Certificates:
  - Documentary evidence for Executor of will (or Administrator of intestate estate) evidencing that person's authority to act.
  - Needed to obtain date of death values, close accounts, transfer assets.

Handling Estate Assets & Estate Administration CONTINUED

- **Legal Advertising:**
  - Do ASAP because personal representative may distribute assets without liability to a claim of who was not given notice of his claim within 7 months of obtaining Letters Testamentary from the Surrogate's Court. ***20 Pa. C.S. § 3532(a).

Handling Estate Assets & Estate Administration CONTINUED

- Notice of Estate Administration:
- 3 months of date of death.
  - All will beneficiaries
  - Spouse and children even if not named in will.
  - All intestate heirs so entitled if no will.
- File Inheritance Tax Return
  - 9 months from date of death.

Handling Estate Assets & Estate Administration CONTINUED

- File Inventory
  - Earlier of filing inheritance tax return or filing accounting
- Distribute assets
  - Cash or in kind (stocks, IRAs)
  - IRAs: Objective to stretch payments over longest possible period of time to defer income tax to beneficiary.

Handling Estate Assets & Estate Administration CONTINUED

Close Estate:

- Court accounting
- OR
- Family agreement

Handling Estate Assets & Estate Administration CONTINUED

Trust Administration

- Revocable Trust.
  - No later than 30 days after trustee of revocable trust learns that decedent who had a trust died, must send notice to:
  - Personal Rep. of probate estate, if any
  - Spouse, if any
  - Children, if any
  - Trust beneficiaries ***20 Pa. C.S. § 7780.3.

Handling Estate Assets & Estate Administration CONTINUED

Trust Administration

- Revocable Trust
  - Within 30 days of notice of date of death notice only to beneficiaries.
  - Creditors can still make a claim against revocable trust after decedent dies by notifying personal representative of testate estate or intestate estate or, if none, then trustee must advertise notice of estate administration

Handling Estate Assets & Estate Administration CONTINUED

Michigan Estate Tax

- ***
- Estate Administration expenses (funeral, legal, etc.) as well as last debts and expenses deductible against date of death value of all assets subject to inheritance tax. This gives net value subject to inheritance tax.

Handling Estate Assets & Estate Administration CONTINUED

Other Tax Considerations

- Federal Estate Tax:
  - Assets of individual over $11,400,000 taxed at rate of 40% through 2019; exemption increases with the CPI; married couple now $22,800,000 in 2019.
- Final Income Tax Return for Decedent:
  - Due October 14th of y ear of death

Handling Estate Assets & Estate Administration CONTINUED

Will Contests

- Caveat Before Probate:
  - Notice to Surrogate used to notify Surrogate that there is an objecting party to grant of letters or validity of the will and demand a hearing prior to admitting will to probate. Surrogate's Court Procedure (SCP) § 1409

Handling Estate Assets & Estate Administration CONTINUED

Will Contests CONTINUED

- Appeal From Probate:
  - After will has been probated.
  - Appeal must be within one year of probate decree.
- Two Steps:
  - 1. Notice of Appeal
  - 2. Petition for Citation for Rule to Show Cause why Surrogate's Decree of Probate should not be set aside.

Handling Estate Assets & Estate Administration CONTINUED

Will Contests CONTINUED

- Does not suspend the powers and acts of personal representative of estate.
- Must have standing to appeal.
- Grounds for contesting:
  - Testamentary capacity
  - Undue influence
  - Must prove by clear and convincing evidence.

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QUESTIONS?

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Thanks for Attending our Virtual Workshop!

This four-part virtual series is eligible for 7 continuing education credits. Attendees must attend all four sessions to receive their credits. (i.e.. Partial credit will not be given for attending less than all four sessions.).

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