

**SURROGATE DECISION MAKING:
ETHICAL ISSUES WE NEVER THOUGHT ABOUT IN LAW SCHOOL
- Long Term Care, Medicaid and Special Needs Trust Issues -**

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Who's Your Client?

Mary, a client for whom you've done estate planning in the past, comes to see you. She begins to talk about her elderly mother, whose assets are modest - a home, a \$50,000 IRA, a \$150,000 brokerage account. She lives on her Social Security payments and a modest pension from her days as a teacher, totaling just over \$2,000 a month. Her husband died last year, but as a retired state employee, his pension stopped when he died. Mom's health is failing and she's having trouble with her memory.

Mary says she and her sister, who lives in another state, have talked about how to care for Mom, and they're not sure she'll be able to live on her own much longer. She says their brother isn't much help. He's in the middle of a failing marriage, has tax problems and has been in and out of trouble with the law over the years. But, Mom loves him and trusts him. Her other brother is severely handicapped and receives state Medicaid assistance. He lives in a group home.

Mary says Mom wants to make sure there is "something left for the kids" when she dies, but worries about the cost of her care. She's heard something about Medicare and long-term care insurance, but says she really doesn't understand it all, and couldn't Mary "just take care of things for her." Mary asks for your help.

"Who's your client" is the question typically asked to start the ethics portion of a CLE program. Often the response is "hey, how hard can that be?" Even in classic estate planning situations, where multiple representation of family members is often present, the issues are relatively straight forward. But in elder law and disability planning, the question regularly presents itself in ways that are quite complex.

While the Rules of Professional Conduct come into play in many representation situations, they are really written for the litigation situation, and often are of vague or minimal help when applied to the estate planning and elder law situation. The American Bar Association (Real Property, Probate and Trust Law Section), The American College of Trust and Estate Counsel (ACTEC), and the National Academy of Elder Law Attorneys (NAELA) have each recognized this deficiency. The American Bar Association's Commission on the Evaluation of the Rules of Professional Conduct (ABA E2K) attempted to deal with ethics in the new millennium, including issues of nonadversarial representation. ACTEC has published the ACTEC Commentaries on the Model Rules of Professional Conduct (3rd Edition, 1999, The ACTEC Foundation). NAELA has addressed the issue with its own Ethics and Professionalism Committee and comments on the Rules of Professional Conduct. (See *NAELA Quarterly*, Vol. 14, No. 1, Winter 2001). Rules 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: General Rule), and 1.14 (Client Under Disability), and their associated comments, each provide us some insight into the question, but must be interpreted within the elder law setting, as the above hypothetical shows.

It is important to determine early on whom the lawyer is to represent. The senior's competency plays an important part in this decision. It is not at all unusual (in fact, it may be the most common situation) for the adult child of the senior to be the first contact with the attorney. In many cases the adult child expects to have a plan essentially in place prior to communication with the parent, especially where the parent's mental condition is deteriorating. But, is this acceptable, given that the real purpose (the real client?) is planning for the senior?

Giftting Issues

Often the adult child who comes to the attorney has some vague knowledge that by making transfers of assets from the senior to the adult child(ren) the senior can qualify for Medicaid long term care assistance. If the attorney is fortunate, the adult child, with or without the help of a durable power of attorney, hasn't already begun to make these transfers on their own. Unfortunately, because Medicaid qualification and transfer planning are quite complex and subject to numerous administrative rules and regulations, such transfers often complicate the planning, rather than simplify it. Often the attorney will find him/herself unwinding transactions that the adult child has already made, in order to qualify the senior for Medicaid assistance.

But, it is not just the Medicaid planning client who has gifting issues. Most states have laws governing what amounts may be transferred through use of a power of attorney. Often state law will limit such transfers to the federal annual exclusion amount for gifting without tax consequences (currently \$11,000 per person, per year). But some states, (see for example § 35-1-2, *Code of Alabama*) also have laws which prohibit such transfers by power of attorney if the end result is the impoverishment of the principal. Other states will limit transfers in other ways. (See for example, § 15-14-427, *Colorado Revised Statutes*). But, before the attorney even reaches the issue of the limits on transfers, the inherent conflicts that exist when the agent under the power of attorney or trustee in a revocable living trust situation comes into play.

While the issue of whether or not permitting gifting to the agent under a power of attorney to him/herself, or by the trustee under a revocable living trust to him/herself, actually constitutes a general power of appointment, has sometimes been raised in the

large estate situation, a more common problem exists. Does such a transfer from the agent to the agent (or trustee to the trustee) constitute a breach of fiduciary duty? Is the attorney subject to sanction for advising the client to make such gifts (or conversely, for not advising the client against such transfers) under Rule 1.2(d) of the Rules of Professional Conduct? While the answer to this is situation dependent, the attorney must become acutely aware of such a potential problem, especially where the agent/trustee makes such transfers in amounts that favor the agent/trustee over other potential heirs and beneficiaries of the same degree of kinship. Because the typical elder law/estate planning situation involves not just the client (whether that client is an adult child or the senior) but also the spouse and other children/siblings of the client, such transfers often come under significant scrutiny. Often, however, such scrutiny does not come until much later, and when the money is either spent or not traceable.

Even assuming a well written durable power of attorney, one which permits gifts to the agent/trustee and in amounts exceeding the annual exclusion amount, the advisability of making such transfers needs to be carefully considered. Where the senior is of very limited means and facing assisted living or nursing home care, a Medicaid qualifying transfer plan seems quite logical. Where the client has significant wealth, annual exclusion amount transfers make sense whether to eliminate the specter of estate taxes or simply as a way to benefit the next generation by transferring unneeded funds, annual gifts, and in very large estates, utilizing the gift tax exclusion may be advisable. But, what of the modest estate, which makes up so much of the typical client base.

What planning can be done with the estate of, for example, \$200,000 to

\$750,000? Multiple issues affect the advisability of making lifetime transfers to children, including the potential health problems of the senior, financial stability of the next generation, and even the geographical residence of the senior. The cost of medical care, especially nursing home care varies widely across the country, from less than \$4,000 a month in some southern states to upwards of \$10,000 a month in parts of the northeast and California. So, as in the hypothetical, understanding where the senior plans to spend their later years seriously impacts decision making concerning estate planning. A family oriented approach to estate planning becomes essential. What is the relationship between the senior and each of the children? What is the stability of the children's personal and financial situation? Where do the children live and what is the likelihood of the senior moving from his/her current location to that of a favorite child?

Significant time should be spent discussing these issues with the senior. Where geographical relocation is a potential issue, the attorney may need to consult with a qualified elder law attorney in other parts of the country to determine how costs and other legal issues might affect the senior. All of these issues need to be considered and information gathered prior to contemplating gifting. Simply providing a fill-in-the-blank estate planning questionnaire is insufficient.

Planning Issues

Looking back to our hypothetical, the competency of the senior is of vital importance in determining the appropriate course of action. Clearly, where the senior is competent, discussions need to be conducted with the senior directly. But, what does one do about the senior who insists on the presence of one or more of his/her adult

children at meetings? Typically, this might be considered a problem involving destruction of attorney client privilege. Nevertheless, it is the client's privilege and the client may feel more secure with the adult child present. Further, if the adult child is the agent under a durable power of attorney and/or is trustee under a revocable living trust, presence of the adult child might, in fact, enhance the quality of the estate planning process by placing the adult child agent/trustee "in the loop" as to the intent of the senior and the mental process used to arrive at certain estate planning decisions.

Key to successful family-based estate planning, however, is to remember who is the client. Do not let age stereotyping cloud your judgment or your communication with the senior. It is a very typical scenario in dealing with a senior, especially one who might have slowed down in response time or who has hearing difficulties, for the senior to look to the adult child prior to responding or providing input and decision making to the attorney. The attorney needs to be cognizant of this and avoid the natural tendency to begin speaking to the adult child rather than to the senior. Slowness in response and reliance upon input from the adult child does not mean the senior is not fully capable of making his/her own decisions, and the attorney must avoid deferring to the adult child for discussion of the senior's estate planning. On the other hand, the attorney must carefully judge the interaction between the senior and the adult child and determine whether or not the presence of the adult child is of benefit to the senior, or whether in fact the senior's decision making is being abdicated to the adult child.

What of the senior who has lost capacity or is losing capacity? Again, the first step the attorney must take is to avoid age stereotyping and presume the incompetency of the senior. The Rules of Professional Conduct require that where the competency of

the client is diminished the attorney, as much as possible, must attempt to maintain a normal attorney-client relationship (Rule 1.14). While Rule 1.14 has been modified from state to state, it does recognize that competency is not a black and white issue, but subject to degrees of competency. (See, for example, Comments to Rule 1.14, *Colorado Rules of Professional Conduct*).

Most estate planners think in terms of testamentary capacity rather than contractual capacity. Yet, in creating a robust estate plan for the client, contractual capacity may often enter the picture. Contractual capacity is generally viewed as a higher standard of capacity than testamentary capacity. It is the standard necessary for the client to be able to purchase life insurance and long-term care insurance, or to purchase real property, prepaid funeral and burial arrangements or any other type of contractual arrangement. In general, the client entering into a contract must be capable of understanding the nature of the contract being entered into, the obligations of the parties to the contract, the effects and consequences of entering into the contract, and must have the ability to exercise free will with respect to the decision to enter into the contract. An entire body of law exists with regard to the capacity to contract, and when a party is placed into an unfair bargaining position such that the contract should be void. For the estate planning attorney this may be the most difficult situation to face, as these contracts are routinely entered into outside of the presence of the attorney, and often prior to the beginning of the attorney's representation of the client.

For the estate planner, recognizing whether a client has mental capacity to execute the documents in the estate plan is essential. The client may come to the attorney individually, in which case the attorney's perceptions of the client in the initial

interview will dictate the path to follow. But, the attorney should not be lulled into accepting the initial perception as proof of mental capacity. Many clients with limited mental capacity are quite practiced at “keeping it together” for a limited period of time, especially when they believe it to be important to impress others of their mental capacity. Estate and elder law attorneys should always be alert to changes in the behavior, memory and actions of clients which might indicate either that the initial assessment as to mental capacity was faulty, or that the mental capacity of the client has begun to diminish.

A Sound Basic Estate Plan

For the senior client, developing a sound, overall, estate plan is essential. A will or revocable power of attorney may be the core document. A carefully considered medical powers of attorney, a living will (under whatever name it may exist in your state), and a durable power of attorney are essential to any basic estate plan. But, it is important to tailor these documents to the senior’s situation. We must carefully avoid the tendency to provide a “canned” durable power of attorney for the senior. Depending on the financial situation of the senior, providing language in the document to authorize transfers for the purpose of Medicaid planning can be essential, especially in states which prohibit such transfers which result in impoverishment. The willingness of a court to permit such Medicaid planning transfers varies widely from state to state, ranging from outright prohibitions to statutory authority of a conservator to engage in such Medicaid planning. Often in durable powers of attorney language is included limiting the gifting authority to the annual exclusion amount. But, this can significantly hamper the Medicaid transfer planning process and separate language should be included in the

senior's durable power of attorney to permit larger transfers if the purpose is Medicaid planning. Some attorneys have objected to such language, worrying that larger gifts will impact the gift tax exemption amount of the senior. But, this is false logic. The senior who is doing Medicaid planning is extremely unlikely to have assets above the \$1,000,000 gift tax exemption amount.

The experienced estate planning attorney may normally rely on his/her own experience and knowledge of gift and estate tax law as well as state probate law in crafting wills. But, with a senior with disabilities, or a senior who has children with disabilities, that experience may not be sufficient. Drafting special or supplemental needs trusts, either self settled or third party, is a different breed of estate planning than drafting a standard discretionary or support trust. Such special and supplemental needs trusts are subject to state specific and federal regulations which if not correctly followed can have a serious negative impact on long term care financial assistance. Again, the attorney with a senior with such special needs must be prepared to consult with an attorney who works in the area of special needs planning rather than drafting a "canned" discretionary trust. Where the trust is to be a self settled special needs trust, consultation with a Medicaid law and trust law knowledgeable attorney is essential. Where the trust is a third party supplemental needs trust, the attorney must be cognizant of the limiting language necessary to protect the trust against governmental attack. Third party supplemental needs trusts are very different in their requirements than the typical support trust created for the benefit of a non-disabled child.

The natural tendency of parents tends to be to want to divide their estate equally among their children. But, where one or more of those children has a disability, such a

path may not be wise. Gifting an equal share to a disabled child, especially one receiving governmental benefits may result in that child losing the medical and other benefits which were available to the adult disabled child prior to the death of the parent. Careful drafting of supplemental needs trusts can avoid this situation, and in so doing result in the disabled child receiving an enhanced quality of life through the combination of governmental assistance and the additional benefits provided through the supplemental needs trust. Again, consultation with a disability benefits knowledgeable attorney may be essential in the estate planning process. Providing an outright gift to the disabled child may be counterproductive, resulting in loss of governmental benefits and requiring the complete expenditure of the testamentary gift in the least possible time in order to reestablish such benefits, defeating the intent of the testator in providing the gift to the disabled child.

Picking the Trustee - Private vs. Professional Trustees

A major consideration for the senior creating a self settled or third party special/supplemental needs trust is the naming of the trustee. Typically the question of whether to name a family member or close family friend, or whether to select a professional trustee, revolves around the investment and financial management expertise of the trustee. Those who favor the professional trustee, individual or corporate, cite the time and knowledge necessary to effectively manage a trust as the reason for professional trustee selection, while those favoring individual, family or family friend trustees cite the advantage of personal knowledge of the family situation and closeness to the beneficiary as the advantage of such a trustee, though cost is often

also cited. Where the beneficiary is disabled, careful selection of the trustee is especially important. It may be that in this situation having co-trustees, one professional and one family member is especially useful. But, in any event, selecting a trustee who is knowledgeable in governmental benefits, benefit planning, and social services programs is especially important. Standard professional trustee may not have the special expertise necessary to fully understand the difficulties of administering a disability trust, while a family/family friend trustee may simply be overwhelmed by the time involved in proper administration of such a trust and the intense involvement necessary to assist the disabled person.

The estate planner working with a senior who requires special needs planning (whether for the senior or a disabled child) must understand the entire range of social services skills necessary to properly assist the senior. Care planners outside the legal profession often must be brought into the planning process, to ensure proper care management for the senior. Selection of care facilities, whether assisted living or nursing home care, must be considered. Cost benefit analysis must often be done to determine which facility can provide the best care for the dollars available to pay for such care. All nursing homes are not alike. Depending on the condition of the senior, be it a physical ailment or a mental incapacity, will dictate which facility is appropriate for the senior's care. As with other areas of the estate planning, working with knowledgeable elder law attorneys in other locations where the senior may wish to reside may be essential. Comparison of available services in different geographical locations may be necessary to come up with the appropriate estate plan for the senior.

Conclusion

Estate planning is often as much art as it is law. This is especially so when the client is a senior with mental or physical impairments. The estate planning attorney needs to understand the multi-faceted nature of estate planning for seniors and seniors with physical and/or mental disabilities. Estate planning for seniors often requires a family oriented planning approach, rather than a traditional attorney-client privileged approach to clients. Determining who your client is, early on in the planning process, is an essential step, not an academic ethics discussion. Selecting and obtaining the assistance of individuals with specialized knowledge of seniors and disability planning, both inside and outside of the legal community is essential. We must never lose sight of the fact that proper and quality planning for the client is our purpose as attorneys.