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ESTATE PLANNING NEWSLETTER

“HIPAA” CAN THWART ESTATE PLANS

New rules protecting medical privacy are inadvertently jeopardizing estate planning for a number of people.

Last year, a new body of national privacy standards was enacted under the Health Insurance Portability and Accountability Act. Under the new HIPAA rules, doctors are not allowed to talk freely about a patient's medical condition and they can be fined, or even jailed, for passing along private health information without consent. This creates the potential for significant problems for people who have granted someone a Power of Attorney to take care of their medical needs or finances in the event they are unable to do so themselves. Many people now need to revise their estate plans to get around the new rules. People who have named someone as Trustee or successor Trustee to a Trust may also want to add some protections to their plans.

The HIPAA problem arises when the Power of Attorney is drafted so that the power of someone else to act on your behalf only “springs” into action if you become incapacitated.

Under HIPAA, the person named in the Power of Attorney may not have access to your health care information and may not be able to prove that you are incapacitated.

It is a Catch-22 situation in that, with springing powers, that person's power comes into play only with incapacity, but you cannot determine incapacity without access to the medical records.

The first step in fixing this problem is to renew your Power of Attorney documents. A Power of Attorney is someone you have named to legally act on your behalf, as your agent, and make decisions for you. People often have two Power of Attorney documents - one that names someone to handle finances and one that names someone to oversee health care decisions. (It can be, but does not have to be, the same person).

The second step is to have a HIPAA authorization form — also called a HIPAA waiver — that allows the person named with springing powers to have access to your medical information. This will give that person the right to talk to your doctor and see your medical records but not the right to act on your behalf until the springing powers take effect.

For people with trusts and other managed entities, like family limited partnerships, the concerns are a little different: How do your heirs oust a Trustee who can no longer take care of the Trust? In the past, estate planning documents would often provide that if the Trustee is ever determined by a doctor to be unable to manage the Trust, he would step down. And heirs could count on calling the Trustee's doctor and getting that information. Not any-more. Under HIPAA, a doctor will not be able to provide this information.

How do we solve this problem? Generally, we recommend three solutions:

1. First, For Living Trusts, we specifically state in the Trust document that any physician or medical personnel treating the Grantor is hereby authorized to disclose the medical condition of the Grantor in order to allow for the replacement of the Grantor with the alternate Trustee, if the Grantor becomes incapacitated. This provision is worded like a waiver of the HIPAA regulations.
2. Second, the springing Power of Attorney document contains similar provisions. The attending physician is specifically authorized to disclose information concerning the capabilities of the signer of the document to handle his or her financial affairs.
3. Third, a separate authorization document can be signed by the client authorizing any physician or other medical personnel to disclose the medical condition of the client in order to carry out the estate planning goals of the client.

What about the client who truly does not want to have his or her medical condition disclosed, but wants to have springing Powers of Attorney and a built-in resignation provision in a Trust? Our recommended solution is that the authorization to the physician state the conclusion of the medical condition concerning the Grantor may be disclosed by the doctor without disclosing the specific, possibly embarrassing, underlying causes for it. In other words, the fact that the client is unable to manage his or her affairs, a medical conclusion, is all that must be stated without specifying the details of the disease process which has led to the medical condition.

What lies in the future? Will contests and "undue influence" probate litigation will probably be affected by the HIPAA regulations. If a family feels that they have been improperly deprived of an inheritance due to the improper influence upon a deceased parent, they would like to have access to medical information concerning their deceased family member. Ohio law has recently provided was for doctors to testify in these difficult cases, but some adjustments may have to be made to comply with the HIPAA regulations.

RECENT CHANGES TO OHIO LAW REGARDING DURABLE POWERS OF ATTORNEY FOR HEALTH-CARE AND LIVING WILLS

- Now allows for Do Not Resuscitate (DNR) orders.
- Now permits designation of Anatomical Gift (organ donation).

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