Nov-Dec 2016 Volume 26, Issue Number 4

BROOKS & BROOKS, LLP

Estate Planning with Certainty

Brooks & Brooks, LLP
207 Court Street
Little Valley, NY
14755
Phone: 716-938-9133
Fax: 716-938-6155

www.brookslaw.biz

A Private Client Law Firm

Teddar S. Brooks, Esq.
tsbrooks @brookslaw.biz
Kameron Brooks, Esq.
kbrooks @brookslaw.biz
Jay William Frantz, Esq.
jfrantz@brookslsw.biz

New Department of Labor Rule Concerning Investment Advisors

The Department of Labor (DOL) has been considering a rule change for several years and has held over 100 meetings, hosted four days of public hearings and reviewed almost 400,000 comments. The new rule was adopted in April,2016.

The new rule **only** applies to retirement accounts, which the DOL estimates represents a total of over $1.7 trillion. It is important to note that the new rule **does not apply** to any investment accounts other than retirement accounts.

So what is the change in the rule? The *old* rule required financial brokers and advisors overseeing tax-advantaged retirement accounts to provide their clients with "suitable investments." This meant that an advisor was only required to advise a client to invest in a product that would meet the client's risk tolerance, time horizon, etc. It also mean that the advisor might be able to advise the client to invest any product that will produce a higher commission for the advisor, as apposed to another product that would not.

The New Standard - The new rule now requires brokers and advisors to act under a fiduciary standard and put their clients' interests ahead of their own. The new "*best interest*" rule will mean that advisors cannot recommend investment products that will favor the broker/advisors' interests over the client's interests.

We at Brooks & Brooks have been pleased over the years to have worked with client advisors that we believe truly put the client's interests first. This is important to us, because we do not want to recommend a particular financial advisor to a client unless we believe that the advisor will put the client's interests first.

Some Thoughts on Health Care Proxies

First some nomenclature— there are very few states that call an advanced directive for health care decision making a "*Proxy*." To our knowledge, only New York and Texas call it that. On the other hand, Florida calls it a Health Care "*Surrogate*" Appointment. Florida is alone in calling it a "*Surrogate*." We have researched 28 other states, who consistently call this kind of a document a "*Power of Attorney for Decision Regarding Health Care*" or very similar wording. We must recognize that we now live in a very mobile society and people vacation and visit relatives in many different states. Therefore, we believe it's important to use language in our Health Care Proxies that will help out of state medical professionals understand what it is, so they will accept and rely on it.

Free Workshops

End of year workshops

November 16, 2016

Bartlett Country Club, Olean
6:30 to 8:30 p.m.

December 8, 2016

Westfield YWCA
6:30 to 8:30 p.m.

Next year's workshops will begin in February, 2017

Happy Thanksgiving and Merry Christmas To all of our clients and friends!

SOME THOUGHTS ON HEALTH CARE PROXIES, contd.

Second capacity issues—can a person who lacks health care decision making capacity actually possess the capacity to make out a Health Care Proxy? Good question. As it turns out, the answer is yes. Capacity for making a decision means "*the ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and to reach and informed decision*." On the other hand, every adult is presumed to be competent to appoint a health care agent unless such person has been declared incompetent or has a guardian appointed for him or her pursuant to one of several different statutes. This creates the opportunity to allow a person who may lack health care decision making capacity to actually appoint a health care agent under a proxy. This can be quite valuable in appropriate cases.

Next, co-agents? - can a person appoint two or more co-agents and provide for decisions by agreement or by majority vote of co-agents? The answer is very clearly no. The statute provides for appointment of "a" health care agent, not two or more agents. This was intentional by the New York state legislature. Allowing two or more agents to make a group decision would impose enormous burdens and risks on health care providers who may need a prompt, clear and authoritative decision.

Further, what about HIPPA? - does a health care agent need a HIPPA authorization to access medical records? Presumably not, since New York Public Health Law §2982.3 gives a limited right to receive medical information and records necessary to make an informed decision. However, the Public Health Law is a state statute and we are dealing with federal law on this issue. At Brooks & Brooks, we prefer to specifically make reference to the HIPPA Law and its language concerning who is an authorized agent to "stand in the shoes" of the principal.

Next, the limits of decision making—can an agent override a decision previously expressed by the principal? Answer, generally no. If a principal directly tells the medical staff, or leaves a written instruction, as to some treatment he or she authorizes and then loses capacity, the agent is obligated to honor that decision.

Next, personal decisions— can a health care agent exercise other personal rights on behalf of a patient, such as deciding who can visit the principal or the power to remove the principal from a hospital against medical advice? The answers to these questions are no and yes. The agent has authority to make health care decisions, but not decisions as to who may visit the principal. On the other hand, an agent can remove a patient from a hospital as long as the decision to do so is consistent with the patient's reasonably known wishes.

Lastly, the MOLST form—can a health care agent complete a MOLST Form for a principal? Yes, if the patient has been determined to lack the capacity. A Medical Order for Life Sustaining Treatment (MOLST) is a medical order (physician's directive to staff) regarding end-of-life decisions that includes the necessary patient and agent consents. The benefit of the MOLST is that it is portable - it will remain valid if the patient is transferred from one hospital to another.

This newsletter is intended to provide information on estate planning, trust & estate administration, tax planning, and related subjects which may be of interest to our clients. It is not intended as legal advice.
If you desire more information, or have a specific question, please call our office at (716) 938-9133. © 2016 Brooks & Brooks, LLP. All rights reserved