

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1913

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From: Steve Leimberg's Estate Planning Newsletter

Subject: [Jeff Baskies & George Luck: Taking a Closer Look at Our Living Wills and Advance Directives](#)

“All estate planners use Living Will forms in our practices, but how many of us have directed that before their implementation, the agents and/or physicians should consider the financial and tax consequences of their actions? Is it even appropriate or ethical to do so? Would it possibly be malpractice not to do so?”

On a practical level, end-of-life care can be extremely costly and have only marginal utility. Already, the decision to maintain life support for a period of time is often motivated by issues having little to do with the patient’s recovery. Some families want to use life support to prolong the decision-making on ending life to “come to grips” with it. Some families wish to use life support for some period of time “just to see” what happens to the patient’s condition before terminating support. Some families wish to use life support until other family members can travel to be there to support the family, say good bye to the patient or otherwise be involved in the process.

As expressed by Dr. Luck who sees end-of-life decision-making in his every-day practice, all of these reasons for life support are routine and appear reasonable and ethical. Thus, we suggest drafters of Living Wills should consider making this an express provision in the Living Will forms they create.

We believe clients’ financial and tax intentions should be a consideration in Living Wills. Absent such a direction, treating physicians and the agents named cannot assume all clients prefer financial considerations be taken into account, or that financial considerations be given the paramount concern.”

Now, **Jeff Baskies** and **George Luck** join force and provide **LISI** members with insightful commentary that examines the extent to which financial and tax considerations should be addressed in living wills and advanced directives.

In light of the recent changes in estate and gift tax laws, should estate planners be adding financial and tax considerations into their Living Wills and Advanced Directives (“Living Wills”)? We all know U.S. transfer tax laws have undergone extreme volatility in the past few years and outrageous changes of fortune have occurred based on the fundamental fortuity of the date when a

client dies.

But what should be done when the date of death is perhaps less a fortuity and more a matter for debate? By that we mean, what should an agent under a health care power of attorney, a surrogate under a designation of health care surrogate or the person directed to carry out a living will (for the purposes of this article, calling either an “agent” and focusing on directions in “Living Wills”) do if end-of-life decisions have vast tax and estate planning consequences and the Living Will is silent as to whether or not the patient wished such to be taken into account?

While this commentary focuses a great deal on the issue of including a provision in Living Wills to consider the financial and tax consequences of end-of-life decisions on the wealthy, the issues likely are equally if not more important for the less-wealthy. For clients of more moderate wealth the decision to continue medical treatment may mean the difference between having any wealth at all and being completely impoverished – as the costs of medical care may quickly drain a modest estate. Thus, when considering the issues, we should not simply think of our richest clients.

The role of taxes in end-of-life decision-making under advance directives was highlighted in a previous article co-written by **Dr. George Luck**, entitled: “**Dying Tax Free: The Modern Advance Directive and Patients’ Financial Values**”. Dr. Luck shared his concerns and his writings on the subject with **Jeff Baskies**, and Dr. Luck assisted in the preparation of this commentary.

Jeffrey A. Baskies is an honors graduate of Trinity College and Harvard Law School. Jeff is a Florida Bar certified expert in Wills, Trusts and Estates law who practices at **Katz Baskies LLC**, a Boca Raton, FL, boutique trusts & estates, tax & business law firm. In total, Jeff has more than 100 published articles. He has been a frequent **LISI** contributor, and his articles have also been published in Trusts & Estates, Estate Planning, Probate Practice Reporter, Probate and Property, the Florida Bar Journal, Lawyers Weekly USA and other journals. He's been frequently quoted as an expert estate planner in the Wall Street Journal, the New York Times, the Boston Globe, Forbes Magazine and other news publications. Jeff has been listed in Best Lawyers in America, in the Worth magazine list of the Top 100 attorneys, in Florida Trend's Legal Elite, in Florida SuperLawyers (including inclusion as one of the “Top 100” attorneys in Florida – 2009, 2010 and 2011) and in other similar publications. He can be reached at www.katzbaskies.com.

George R. Luck, MD, is a graduate of Tulane University and Tulane University School of Medicine. He practices anesthesiology and palliative medicine in Boca Raton, Florida, where he is involved with Boca Raton Regional Hospital and Hospice by the Sea. Dr. Luck is also an associate professor at the new medical school at Florida Atlantic University in Boca Raton. Dr. Luck obtained board certification from the member board for Anesthesiology and Anesthesiology -Hospice & Palliative Medicine.

Here is their commentary:

EXECUTIVE SUMMARY:

All estate planners use Living Will forms in our practices, but how many of us have directed that before their implementation the agents and/or physicians should consider the financial and tax consequences of their actions? Is it even appropriate or ethical to do so? Would it possibly be malpractice not to do so?

There are many stories regarding the impact of the date of death on estate plans, and the significant consequences such had on taxes and charitable planning as well. For example, it has been reported that prior owners of the Miami Dolphins and Washington Redskins franchises were “forced” to sell their teams to pay estate taxes. However, George Steinbrenner’s family inherited the Yankees estate-tax-free after his death on July 13, 2010.

Dan Duncan of Texas died in March 2010 with an estate worth nearly \$10 billion. And Janet Morse Cargill, John Kluge and Walter Shorenstein also died in 2010 with estates in excess of \$1 billion, according to Forbes magazine.

Imagine if any of them became terminally ill with a Living Will in December of 2009, when there was an estate tax exemption of only \$3.5 million and an estate tax rate of 45%?

If the Living Will did not state some sort of consideration for the financial and/or tax consequences of carrying out its terms, how could an agent not carry out the terms of the Living Will? Without some direction from the client, could an agent ethically substitute her own judgment in making a decision to implement or continue life sustaining treatments even in a case where there is no expectation of preserving or protecting the quality of life for the patient – but merely prolonging life (in this example, until January 1, 2010) to preserve wealth for her heirs?

Take this another step: what if a wealthy client became terminally ill in

December 2010? Would an agent under a Living Will perhaps hasten the decision-making to terminate life-prolonging efforts for purposes of implementing estate/tax planning for the patient's beneficiaries? Would an agent be justified in sacrificing the principal's comfort in order to hasten her death – to save some tax dollars?

These are hard issues to address, and most of us have likely never considered them in our documents. Moreover, even for those drafters who wish to add directions in their documents allowing or directing the agent to consider the tax consequences of end-of-life decisions, they should consider some ameliorating provision to focus on the comfort of the patient, if we can assume that is the over-riding intent of our clients.

While looking back at December 2009 and December 2010 put the issue of end-of-life decision-making in its starkest relief (as it is the difference between \$0 tax and a very large tax), tax and financial issues may be pertinent nevertheless to future decisions. For example, if the laws don't change, death in December 2012 vs January 2013 could have a multi-million dollar tax swing due in some part to the exemption change, but in large part due to the rate change which could have swings of 100s of millions of dollars - or more - in certain families.

Again, without an expression of the declarant's intentions to consider the financial and/or tax consequences of such decisions, what should an agent do? Without such a direction what can an agent legally do?

FACTS:

We all draft Living Wills and follow forms often provided by state statutes or offered by bar associations. Yet, how many of us have considered adding a clause regarding the tax and financial planning consequences of end-of-life decisions under our Living Wills? Most planners have never addressed the topic. In his practice of palliative care, Dr. Luck became involved with a case in which this issue was in fact pertinent. Dr Luck was an expert in a case involving an end-of-life decision that had significant financial and tax implications. His story led to an article he published on this subject in the Journal of Pain and Symptom Management, in March 2010, entitled: "Dying Tax Free: The Modern Advance Directive and Patients' Financial Values".

Dr. Luck's story and his excellent article highlighted an issue that many estate planners simply overlook.

However, the frantic pace of tax law changes and the dramatically divergent

consequences of certain medical decisions impacting end-of-life planning make the need to consider this topic more acute and more relevant. As a result, estate planners should consider whether (or not) to incorporate a direction regarding tax and financial planning considerations in their Living Wills.

COMMENT:

Financial Values May Be Taken Into Consideration

Your first question should likely be: Is it even ethical to consider financial values in a Living Will? After all, shouldn't quality of life, comfort and other medical issues be the sole concern?

The answer is: Yes and no.

While making a patient comfortable and providing the best and most effective care should be considered, those issues cannot be resolved in a vacuum. Moral, ethical, religious and even economic circumstances are already a factor in many end-of-life decisions.

For example, many courses of treatment and end-of-life decision preferences are expressed in a patient's moral and/or religious terms. Many of us have seen or drafted Living Wills for particular faiths. We've seen a very particular Catholic Living Will, and we've also seen the unique issues of Living Wills in the observant Jewish community. Religious and moral values are relevant and inform health care decision-making, particularly end-of-life issues, in many ways already. Their consideration is not deemed unethical.

Regarding the role of economics in health care decision-making, let's not be naïve. Consider how many patients and their families insist on care "in-network" to maximize insurance coverage and minimize exposure to costs? We'd all agree that seeking a physician or treatment "in-network" is an ethical financial consideration in the context of health care decision-making. How about the issues of name-brand vs generic medicines? If a physician believes a more expensive name-brand drug is preferable, but the family pushes for a less-costly generic, isn't it ethical for a hospital or physician to consider the family's request?

Considering ways to provide health care while minimizing costs is generally considered ethical. And if financial and other economic values of the client can be ethically considered in the context of their health care, such should be ethical in the context of their Living Wills.

In “Dying Tax Free” the authors take the position that a patient’s financial values should be given no less weight than other values. Why, they posit, can clients express their preference to have end-of-life decisions made that are consistent with their religious values but not their economic values?

Therefore, they conclude, as Living Wills are often tailored to and are driven by client’s religious values, how and why would a client’s financial values not be valid and ethical considerations?

On a practical level, end-of-life care can be extremely costly and have only marginal utility. Already, the decision to maintain life support for a period of time is often motivated by issues having little to do with the patient’s recovery. Some families want to use life support to prolong the decision-making on ending life to “come to grips” with it. Some families wish to use life support for some period of time “just to see” what happens to the patient’s condition before terminating support. Some families wish to use life support until other family members can travel to be there to support the family, say good bye to the patient or otherwise be involved in the process. As expressed by Dr. Luck who sees end-of-life decision-making in his every-day practice, all of these reasons for life support are routine and appear reasonable and ethical.

Therefore, taking it to the next step, assuming a client definitely would have preferred to preserve her estate for her family, wouldn’t utilizing life support on December 31, 2009 have been ethical as well?

Expressions in Living Wills

While financial values can and often are taken into consideration by agents and physicians in end-of-life situations currently (even without some direct expression), it seems prudent to include a statement to that effect in the Living Wills we draft. If that’s a value of our clients, then isn’t it best if the value is affirmatively expressed by the client in her Living Will?

Without an affirmative statement of some sort, family members, agents and physicians are forced to make assumptions based on information not presented by the client. While most clients wish to save taxes, not every client would be willing to be artificially maintained on life support to do so. Said another way, we should probably not assume most clients would prefer to suffer indefinitely simply to save money for their heirs.

Thus, we suggest drafters of Living Wills should consider making this an express provision in the Living Will forms they create. We believe clients’

financial and tax intentions should be a consideration in Living Wills. Absent such a direction, treating physicians and the agents named cannot assume all clients prefer financial considerations be taken into account, or that financial considerations be given the paramount concern.

Conversely, look at the client with a much smaller estate. Is it fair to assume that client would prefer to have life terminated as quickly as possible to preserve what the client has for her beneficiaries – even if such means increased pain or suffering? Taking away palliative care that might otherwise relieve pain (but which may prolong treatment and life – thus increasing costs) seems a leap of faith that should not be taken without guidance. It is quite possible, instead, the client would prefer efforts be made to provide the best care and the most comfort, even if such exhausted her assets.

Financial Values Cannot Be the Sole Consideration

While it is argued herein that the financial and tax preferences of a patient can and perhaps should be expressed in a Living Will, and if they are so expressed that they should be afforded consideration, at the same time, economic interests cannot be the exclusive considerations.

As Dr. Luck in “Dying Tax Free” highlighted, medical interventionists are guided by a combination of principles, including patient values and clinical indications, coupled with a commitment to reducing suffering and doing no harm. For instance, honoring a patient’s expressed values may be perceived as a benefit that in some cases sufficiently balances the potential “harms” of a course of action, but such costs and benefits are not easily measured and this calculation is not a simple calculus.

If honoring a request to either prolong or terminate life based on a financial consideration would likely produce significant harm (outweighing any potential benefits in the mind of the health care provider), then the health care provider may have to ignore the personal value.

Moreover, as stated previously, for many clients other personal values may outweigh financial considerations, including religious preferences. The bottom line is clients should provide some guidance in the Living Will as to which values they consider most important.

Drafting a Financial and Religious Values Clause

While everyone's drafting tastes will differ, here is a rough draft of a clause that might be a jumping-off point for a Living Will form:

As part of informing my agent herein regarding making decisions as to the application or withholding (or termination) of certain life-prolonging procedures, I direct that my agent may consider any particular religious directions or doctrines that my agent knows to have been important to me. Further, I authorize my agent to consider the financial and tax consequences of such life-prolonging decisions and to take into account my general preference for reasonable measures to be taken to preserve my wealth and reduce taxes for myself and my family. In addition, however, I also direct my agent to consider taking measures to maximize comfort and minimize suffering based on whatever my condition may be. Unless the financial or tax consequences are materially and consequentially different, my agent should be guided by the principal of increasing comfort and reducing suffering where possible.

If others have more comprehensive provisions in their advanced directives, perhaps they would be willing to share.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Jeff Baskies

George Luck

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CITES:

Timothy W. Kirk, PhD and George R. Luck, MD, “Dying Tax Free: The Modern Advance Directive and Patients’ Financial Values”, Journal of Pain and Symptom Management, Vol. 39, No. 3 (March 2010).