

ESTATE PLANNING & ELDER LAW NEWS

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SERIES: KEY ELEMENTS OF AN ESTATE PLAN

Many people have not prepared estate plans. There are many excuses for not planning for the inevitability of death and the possibility of incapacity: lack of time or energy; discomfort of facing uncomfortable topics; or inadequate information. But the result of failure to plan for death and incapacity can result in unnecessary expense and added burdens to loved ones at a time of great stress.

In the next few newsletters, we will introduce some of the key elements of any thorough estate plan, including Wills, Trusts, and Advance Health Care Directives. In doing so, we hope to encourage readers to review their current documents or possibly prepare them for the first time. In this issue, we discuss Powers of Attorney which, for some people, end up being their most important estate planning document.

GENERAL DURABLE POWERS OF ATTORNEY

Naming a “Helper” to Manage Finances, Property and Affairs

In a Power of Attorney, one person delegates authority to another to make decisions or take action. The person who gives the authority is the *principal*. The one to whom authority is given is the *agent* (also called *attorney in fact*). If the Power of Attorney is *durable*, the agent can make decisions for the principal if the principal becomes incapacitated and is no longer able to act. In order to be durable, Maine law requires specific language.

Does a Power of Attorney Take Away My Rights?

Only a court can take away your rights to manage your own affairs, typically in a guardianship or conservatorship proceeding. With a Power of Attorney you do not give up the power to make your own decisions and act for yourself. You are simply authorizing your agent to act and make decisions for you, just as you could do for yourself. With a Power of Attorney, the agent has the power to act with you. And as long as you are competent, you can revoke any Power of Attorney you have given.

What Authority Is Given to the Agent?

If you give a *general* Power of Attorney, you are usually granting broad authority to your agent. But you can also choose to give only a very *limited* Power of Attorney which may authorize one transaction or a few types of actions. Whether the powers given are broad or limited, the agent must do what is in the principal's best interest.

(Continued on next page)

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MISSION

The mission of Skelton Law Offices is to provide legal services of the highest quality, professionally, efficiently and compassionately, with the goal of preserving the independence, the dignity, and the emotional and financial security of older and disabled Mainers.

The powers delegated may include the power to deal with your money and property, including the power to pay bills, receive income, deposit and withdraw from your bank accounts and brokerage accounts, buy and sell investments, buy and sell real estate, borrow money, give mortgages, sign tax returns, open and close your accounts, and take other steps to invest and manage your wealth.

A Power of Attorney may also include the power to establish your place of residence and to arrange for a home or home care services for you. A Power of Attorney also might include the power to make your health care decisions, although this is best done in an Advance Health Care Directive.

One thing your agent cannot do for you is to write your Last Will and Testament. And the authority of your agent ends when you die. At that point, a personal representative is usually appointed by the Probate Court to administer your estate.

Can An Agent Give Away My Assets?

In Maine, if the principal wants to permit the agent to give away the principal's assets, that authority must be explicit in the Power of Attorney. This makes sense. Since your agent has a general duty to preserve your assets and use them for your benefit and objectives, gifts are not permitted unless clearly authorized.

A durable Power of Attorney with gifting powers can be an invaluable tool to provide for your financial management and asset preservation in the event of incapacity. In fact, the creation of a thorough Power of Attorney is often recommended by elder law attorneys when a client asks whether there are steps that should be considered now in the event of a future need for long-term care.

On the other hand and as the name implies, Powers of Attorney are "powerful" documents. This is especially true when a Power of Attorney includes authority for the agent to make gifts. This power should be included in the document only after careful consideration.

How Do I Choose an Agent?

When deciding whether to name a particular person to serve as your agent, consider that person's ability to responsibly handle your finances, his or her willingness to serve, and, most important, that person's trustworthiness and loyalty to you.

When appointing an agent, consider the fact that he or she may be unable or unwilling to serve in the future. You should consider naming one or more alternate agents who could fill the shoes of the primary agent. You can also choose to have multiple, concurrent agents. In that case, decide whether you will permit them to act independently of one another or require that they act and make decisions together.

When Is My Agent Authorized to Act?

Your Power of Attorney can be effective as soon as you sign it. If you give an *effective immediately* Power of Attorney, your agent can act and make decisions for you as soon as you sign the document, even though the understanding may be that the Power of Attorney will not be used unless and until you are incapacitated.

Or you may choose to give a *springing* Power of Attorney which, by its language, only becomes effective upon the happening of a future event, usually the incapacity of the principal as documented by a letter from a physician.

What If I Become Incapacitated and Have No Power of Attorney?

If you are unable to manage your own affairs, it may be necessary for your spouse, a child or a friend to petition the Probate Court to be appointed as your guardian and conservator. This process takes several weeks, at least, and there are expenses. Moreover, the judge may not choose the person you would have chosen to manage your affairs. In many cases, a court-appointed conservator has to be bonded and is required to give accountings and reports to the Probate Court.

What Is Required in a Power of Attorney?

Maine's Power of Attorney statute requires that every durable financial Power of Attorney created on or after September 19, 1997, include specific language clearly explaining the rights of the principal and the duties of the agent. That language was amended in 2005. The notice to the principal cautions you that the powers being given to the agent may be broad. The agent is warned that he or she is under a legal duty to use the principal's money and property only on the principal's behalf. Unless the exact statutory wording is used, the document may not be valid.

Maine law requires that a Power of Attorney for finances be signed by the principal in front of a Notary Public. Although a Power of Attorney for health care must be witnessed, Maine law does not require that a Power of Attorney for finances be witnessed. However, we recommend that the Power of Attorney be executed in front of two witnesses and a Notary Public in the event that the agent needs to use the document in a state that has these execution requirements.

Finally, some banks and financial institutions have their own standard Power of Attorney forms and will resist honoring any others. To avoid this, you may want to ask if this is a requirement of the institutions with which you do business.

Disclaimer: We hope that you find the information in this newsletter to be helpful, but it is not the same as legal advice. A good estate plan or long-term care plan must take into account your individual circumstances and be sensitive to your personal goals and wishes.

Elective Share Case Decided in Cumberland County

When one spouse is facing the need for expensive long-term care, Maine elder law attorneys often recommend that the community spouse create a new will. Typically, the new will provides that the estate will be placed in a discretionary special needs trust for the benefit of the surviving spouse who needs long-term care. The intention is that the trust assets will not be treated as “available” to the surviving spouse and that public benefits (including MaineCare) will be the primary source of medical care and support. The trustee of the special needs trust is authorized to distribute from the special needs trust funds to enrich the surviving spouse’s life with goods and services that public benefits will not provide.

The Department of Health and Human Services (DHHS) recently challenged such an estate plan. Upon the death of a community spouse, DHHS warned that unless the institutionalized spouse petitioned to receive the statutory elective share (one-third of the augmented estate), DHHS would calculate a transfer penalty which would jeopardize continued eligibility for MaineCare benefits. In that case, the Cumberland County Probate Court found that the surviving spouse was incapacitated by severe progressive dementia, was in a nursing home, and was receiving MaineCare benefits. The Probate Court limited its decision to the question of whether it would exercise the elective share on behalf of the surviving spouse and direct a portion of the estate to her, outright, rather than to the special needs trust which was created in her late husband’s will. The Probate Court denied the elective share, finding that the exercise of the right was not necessary to provide for the surviving spouse’s needs during her probable life expectancy. DHHS has appealed the decision.

Lesson: If you have a spouse with an immediate or likely need for long-term care, consult an elder law attorney about creating a new will which provides that if you predecease your spouse, your probate estate will be protected in a testamentary special needs trust.

DHHS Pursues Estate Recovery from Life Estates

“Estate recovery” is the procedure by which a state seeks to reimburse itself for medical assistance provided to an individual after age 55. Estate recovery is only pursued after the death of the Medicaid recipient. Currently, estate recovery is not pursued if the decedent is survived by a spouse or a child with disabilities. Since 1993, the Maine estate recovery statute (22 M.R.S. §14 (2-1)(F)) has permitted the State of Maine to seek recovery not only from the decedent’s probate estate but also from “assets in which the recipient had any legal interest at the time of death ... including assets conveyed to a survivor, heir or assign ... through tenancy in common, survivorship, life estate, living trust, joint tenancy in personal property or other arrangement.”

Skelton Law Offices recently defended a Department of Health and Human Services (DHHS) estate recovery claim seeking to recover against the value of a life estate interest owned by a MaineCare recipient at the time of death. We asserted that DHHS was asking the Probate Court to do something it was powerless to do. Section 3-807(a) provides that a claimant whose claim against an estate has been allowed but not paid "may secure an order directing the personal representative to pay the claim to the extent that funds of the estate are available to pay it." But the definition of "estate" in the Probate Code only includes “the property of the decedent, trust, and other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration.” Since life estate interests cease to exist upon the death of the holder of the life estate, they cannot be in existence during administration. DHHS withdrew its claim.

Lesson: Representatives of DHHS have told Maine elder law attorneys that DHHS has decided not to pursue estate recovery against life estates and joint tenancies in real estate created prior to April 1, 2006. However, in neither case has DHHS adopted a rule to confirm this. Therefore, proceed with caution in using either life estates or joint tenancies to protect real estate from exposure to long-term care expenses.

WE ARE MOVING!

We are excited to report that as of March 30, 2009, Skelton Law Offices will be in its new location at 33 Mildred Avenue in Bangor. Drop by and visit us! Mildred Avenue is off Hammond Street. If you are coming from downtown Bangor or from I-95, drive toward the airport. Mildred Street is on the left, just before Maine Savings and across the street from Bangor Savings Bank. Our building is the former American Red Cross building and is pictured below.



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Tax Deduction Is Available for Assisted Living Expenses and Maintenance and Personal Care Services

Most consumers recognize that an income tax deduction is available for nursing home expenses, but too few realize that the medical deduction is available for other kinds of long-term care. In particular, in many cases the full cost of assisted living is deductible when it is necessary for an individual with physical or cognitive impairments. A taxpayer can also deduct costs associated with maintenance and personal care services for a chronically ill individual.

The Internal Revenue Code (IRC) provides an income tax deduction to the extent that medical expenses exceed 7.5% of a taxpayer's adjusted gross income. Medical expenses include "qualified" long-term care services which are described as follows: "[N]ecessary diagnostic, preventive, therapeutic, curing, treating, mitigating, and rehabilitative services, and maintenance or personal care services, which—

- (A) are required by a chronically ill individual, and
- (B) are provided pursuant to a plan of care prescribed by a licensed health care practitioner."

26 U.S.C. §7702B(c).

In order to deduct these expenses, a physician, a registered professional nurse, or a licensed social worker must certify that the individual is chronically ill. The IRC describes a "chronically ill individual" as one who is

- unable, for a period of at least 90 days, to perform two or more "activities of daily living" and
- requires substantial supervision to protect himself or herself from health and safety due to severe cognitive impairment.

The certification should be renewed each year.

Lesson: If you are paying for any form of long-term care for yourself or a dependent, provide details to your accountant.

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