Wiggin & Dana

Estate Planning Advisory

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A periodic publication of our Trusts & Estates Department, the Wiggin & Dana Estate Planning Advisory is intended to inform clients and other interested persons about issues and developments in the law affecting trust and estate administration and estate and tax planning for individuals and their families, fiduciaries, investment advisors and business owners.

Planning for Incapacity

Revocable "Living" Trusts

A typical estate plan focuses on ensuring that at your death the proper people inherit your assets at the smallest possible tax cost. However, one traditional estate planning tool, a revocable trust (also known as a living trust), can also be useful during your lifetime in the event you become incapacitated or otherwise unable to manage your own financial affairs.

The terms of a living trust are spelled out in a written trust agreement. Under the agreement, property is transferred by the grantor (or creator) of the trust to a trustee to be held for the benefit of the grantor and other beneficiaries. The transfer of property to the trust may take place at the grantor's death as directed in the grantor's will (this is the classic estate planning arrangement of a "pour over" will coupled with a revocable trust), or it may take place during the grantor's lifetime. In the latter case, if the grantor becomes incapacitated or incompetent, a means of managing the grantor's assets is already in place, because the trustee has the authority to manage the trust assets. In this way the grantor's financial needs can continue to be met without going through the expense and delay of a court-appointed conservatorship. If the grantor has not transferred assets into his or her living trust prior to incapacity, an agent acting under the grantor's power of attorney may transfer the grantor's assets into the living trust. (See "Powers of Attorney" on page 3.) Significantly, however, a living trust will not provide asset protection from creditors or for Medicaid purposes, nor will the use of a living trust reduce federal estate taxes or statutory probate court fees at the grantor's death. A revocable trust may be revoked or amended by the grantor at any time, so changes in the tax laws or family circumstances can be reflected. At the grantor's death, however, the trust becomes irrevocable, and if the trust is a beneficiary of the grantor's will, the trust agreement will direct how those assets will be managed until their ultimate disposition.

After death, a living trust continues to provide advantages to the grantor's family. If a trust already holds title to a decedent's assets, estate administration may be simpler and less expensive than if assets must be transferred under a will. A living trust can also reduce expenses for people who own real estate located in another state by avoiding the need for a second probate proceeding in that state. If the grantor intends to leave property in trust for his or her family at death, trusts created under a revocable trust instrument (as opposed to under a will) usually have less ongoing court supervision, and, hence, may have lower administrative costs. Finally, many people value the privacy accorded living trusts, which, unlike wills, do not have to be filed as a public document after the grantor's death.

Because the legal and tax implications of trusts can be extremely complicated, you should seek professional advice before establishing any trust.

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Planning For Nursing Home Care: Medicare, Medicaid and Long Term Care Insurance

The Wiggin & Dana Estate Planning Advisory is a periodic newsletter designed to inform clients and other interested persons about issues and developments in the law affecting trust and estate administration and estate and tax planning for individuals and their families, fiduciaries, investment advisors and business owners. Nothing in the Estate Planning Advisory constitutes legal advice, which can only be obtained as a result of personal consultation with an attorney. The information published here is believed to be accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues. If you would like to be added to the distribution list for the Wiggin & Dana Estate Planning Advisory, please contact Gail DeNardis at 203.498.4427.

In Connecticut and throughout the Northeast, it is not uncommon to pay more than $100,000 annually for nursing home care. Understandably, many seniors and their families are concerned about how to pay for skilled residential nursing care. Governmental assistance programs and long term care insurance may be potential resources for such payment.

Medicare. Most individuals over the age of 65 are enrolled in the Medicare program. Medicare Part A provides payment for post-hospital nursing home care for up to 100 days for each spell of illness. If eligibility requirements are met, Medicare will provide full coverage for the first 20 days of nursing home care. Nursing home residents must pay a co-pay of $101.50 per day for care from the 21st through the 100th day. (Supplemental health insurance often covers this co-pay.) In order to be eligible for Medicare nursing home coverage, the following requirements must be met: (1) a physician must certify that the patient needs skilled nursing care (not merely custodial care); (2) generally, the resident must be admitted to a nursing home within 30 days of a three-day hospital stay; (3) the resident must require daily skilled nursing or rehabilitation; and (4) the care needed by the resident must only be available in a nursing home. Medicare also offers an often overlooked home health care benefit which provides full payment for home health care if eligibility requirements are met.

Medicaid. The payer of last resort for those requiring, but unable to pay for, nursing home care is Medicaid (also known as Title 19), a joint federal-state, "needs-based" program. The Medicaid eligibility rules are extremely complex, change frequently, and vary by state, but, in general, to qualify for Medicaid nursing home benefits in Connecticut, a single person may only own (1) $1,600 in cash; (2) personal belongings; (3) a funeral contract with a value not to exceed $5,400; (4) a burial plot; and (5) life insurance with a cash value of not more than $1,500. A married couple may each retain the same items as a single person. If one spouse does not need nursing home care and continues to live in the community, the couple may also retain the following: (1) a home of any value; (2) an automobile of any value; and (3) the lesser of $90,660 or one-half of the couple's non-exempt assets.

Under current Medicaid law and subject to certain rules, single individuals and married couples may transfer assets to accelerate Medicaid eligibility. A period of Medicaid ineligibility results from a transfer of assets to a non-spouse for less than fair market value made within 36 months of applying for Medicaid (or within 60 months for a transfer in trust). This 36 month (or 60 month) period is known as the look-back period. Under current law, for every $7,062 transferred during the look-back period, one month of Medicaid ineligibility is imposed. An individual or couple may transfer any amount of assets prior to the onset of the look-back period.

Long Term Care Insurance. Connecticut and New York each have a special "Partnership" program which provides that long term care ("LTC") insurance purchased by individuals through a state-approved policy will protect assets to the extent the policy provides LTC coverage. Some employers are also now making long term care insurance available to employees.

Among the things you should consider in evaluating long term care insurance are the following:

- *Indemnity vs. Per Diem Policies:* Indemnity policies reimburse actual expenses incurred. Per diem policies pay a set amount for each day long term care is required.
- *Benefits:* A policy usually should cover two-thirds to three-quarters of the cost of services in your area. In Connecticut, nursing home rates are typically around $250 (or more) a day. Most policies cover some home care (usually skilled nursing care, but sometimes home health aide services). Consider whether the policy requires pre-hospitalization and whether it covers mental as well as physical incapacities.
- *Length of Coverage:* Coverage from one to five years may be sufficient, as many people only spend a few months in a nursing home.
- *Elimination Period:* Choosing a longer elimination period (the period of time before the policy will begin coverage) may keep premium costs down.
- *Inflation Protection:* Although it may add to the premium cost, inflation protection is an essential

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Powers of Attorney

Planning for incapacity should be an integral part of your overall estate plan and, if you are a business owner or key employee, should also be a part of your business or career plan. In most cases, the best time to make arrangements for dealing with incapacity is well before the need arises. The attorneys in Wiggin & Dana's Trusts & Estates Department are prepared to assist you in all facets of estate planning, including helping you to set up ways for others to act on your behalf if you are incapacitated and to preserve your assets, to the extent possible, from being depleted by the costs associated with long term illness. The names and telephone numbers of the attorneys in our Trusts & Estates Department are printed on page four.

In its most general sense, the word "attorney" means one who is legally appointed by another to transact business on the other's behalf. Thus, if you give a power of attorney to another (commonly referred to as your attorney-in-fact), that person can take action on your behalf to the extent authorized in the document granting the power.

Powers of attorney come in many shapes and sizes, and can be tailored to fit a broad spectrum of circumstances. As part of a traditional estate plan, advisors often recommend that you have in place a general durable power of attorney. A power of attorney is general if it allows you, the principal, to convey broad powers to act on your behalf in business, financial, real estate, banking, insurance and "all other matters." A power of attorney is deemed to be durable if the document explicitly provides that it is to remain valid even if the principal becomes disabled or mentally incompetent. Absent such a provision, a power of attorney ceases to be effective when the principal becomes legally incompetent. In some cases, a probate court would then have to appoint a conservator to handle the principal's affairs.

In lieu of a general power of attorney, a power of attorney may grant specific or limited powers. For example, you might grant a limited power of attorney to a tax advisor to negotiate a settlement with the IRS on a tax-related matter. Other powers must be specifically enumerated in the document granting a power of attorney and will not otherwise be assumed to fall within the scope of the general power of attorney. A common example of this is the power to make gifts from the principal's assets, particularly if one of the possible beneficiaries of a gift is the attorney-in-fact. The authority to make gifts may become especially important for tax planning purposes (and, in some cases, to expedite Medicaid eligibility) if a principal becomes permanently incapacitated.

The power to make health care decisions on your behalf may be included in a general power of attorney, or may be in a separate document that addresses only health care matters. Depending on your personal situation, you may want the same person or persons making your financial and health care decisions, or you may prefer to have, for example, a business associate making financial decisions and a family member making health care decisions. Significantly, the authority to direct the withdrawal of life support for another in a terminal medical situation may not be granted under a power of attorney. Decisions about life support may be communicated in advance by an individual through the use of a living will, or an individual may appoint a special health care agent to communicate his or her wishes in that regard. (See IN FOCUS on page 4 for information about living wills and health care agents.)

A power of attorney may be drafted so that it comes into effect not at the time it is signed, but at some later time, upon the happening of a specific event or contingency. This type of power of attorney, known as a springing power of attorney, can be used, for example, if you wish to grant the authority to act only in the event of your incapacity. In such a case, the power of attorney might stipulate that it is activated when your physician certifies that incapacity has occurred.

In general, powers of attorney must be signed by the principal and two witnesses, and must be notarized. If more than one attorney is named in a given power of attorney document, the principal should specify whether the multiple attorneys-in-fact may each act separately, without the consent of the other(s), or whether all attorneys-in-fact named in a given document must consent to an action before the power to act is valid. Finally, it is important to keep in mind that under a power of attorney the attorneys-in-fact are authorized to act on the principal's behalf, but have no specific obligation to do so.

Planning for Nursing Home Care

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part of LTC coverage, especially for younger purchasers.

• *Guaranteed renewability and non-cancellability:* As with life insurance, the long term financial solvency of the insurer and its commitment to staying with the product and its customers are of critical importance in selecting an LTC policy.

IN FOCUS
Health Care Decision-Makers and Advance Directives

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Much of traditional estate planning focuses on financial and tax matters. Yet an estate planning client is often also concerned about more personal matters, such as obtaining adequate and appropriate health care and ensuring that one is able to die with dignity. This IN FOCUS column explains certain health care advance directives and the roles of conservators, guardians and health care agents.

What is a Living Will?

A living will is a document in which you may direct that if you are in a terminal condition or permanently unconscious, you should be allowed to die and not be kept alive through artificial life support systems. Most living wills expressly state that the document does not intend or authorize any direct taking of life; rather, the intent is that your dying not be unreasonably or unnecessarily prolonged.

How do I make an Anatomical Gift?

An anatomical gift can be made either by a separate document (often referred to as an organ donor card) or as part of a comprehensive document of health care instructions. Many states also permit people to indicate a willingness to be an organ donor when obtaining or renewing a driver's license. An anatomical gift may be of specific organs or parts or any needed organs or parts.

What is a Health Care Agent? What is an Attorney-in-Fact for Health Care Decisions?

In the event your attending physician determines that you are unable to understand and appreciate the nature and consequences of health care decisions or to reach and communicate an informed decision regarding treatment, a person you have appointed as your health care agent may convey your wishes concerning the withholding or removal of life support systems and may take whatever actions are necessary to ensure that those wishes are given effect. A person you have appointed as your attorney-in-fact for health care decisions may make decisions on your behalf concerning medical treatment. Often the same person will be authorized to act as both a health care agent and as an attorney-in-fact for health care decisions.

What is a Conservator?

A conservator is a person appointed by the probate court to take responsibility for the affairs of another adult. If the probate court determines that a person is unable to handle his or her financial affairs, a *conservator of the estate* of that person will be appointed. If the probate court determines that a person is unable to provide for shelter, clothing and other personal needs, a *conservator of the person* will be appointed. The same person may serve as both conservator of the person and conservator of the estate.

Once a conservator of the estate is appointed, any outstanding power of attorney is extinguished. Unlike attorneys-in-fact, conservators are not simply authorized to act on behalf of another; they are required to do so, and must periodically report to the probate court concerning their actions.

What is a Guardian?

A guardian of the person may be appointed in two situations: (1) for a minor, when both parents (*the natural guardians*) of the minor are deceased or have had parental rights terminated, or (2) for a mentally retarded adult. A guardian of the person has the legal authority and obligation to provide care and to ensure the health and welfare of the minor or mentally retarded adult.

A guardian of the estate may be appointed only for a minor. This occurs when a minor is entitled to receive more than $10,000 (such as through a personal injury award or an inheritance) not held in a custodial account or in trust. Typically, in such cases, the probate court will appoint the minor's parents to serve as guardians of the estate of the minor. Parents are not automatically the guardians of a minor child's estate.