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### Pennsylvania Legal Update

Winter 2009/2010

#### Guardians and Health Care Decisions

The natural parents of a profoundly mentally disabled 50-year-old man recently were denied the authority to make end-of-life decisions for him. The parents were court-appointed as "plenary guardians" of their son because he

The physicians disregarded the parents' preferences because they had not been appointed as "health care agents" for their son.

##### Request to Expand Guardianship Powers

The parents went to court to expand their guardian status to in-

clude powers to act as health care agents for their son. By the time of the hearing, their son was recovering from the pneumonia and was no longer dependent on the ventilator.

The parents argued that, as plenary guardians, they had the right

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*The parents went to court to expand their guardian status to include powers to act as health care agents for their son.*

#### Gun Laws



A disgruntled customer who claimed that he was sickened by food that he ate at a Pennsylvania buffet restaurant returned to the restaurant to lodge his complaints. While the customer was trying to explain his concerns, the restaurant manager interrupted the customer and then attended to other patrons. The customer became angry and walked through the restaurant, randomly discharging a handgun toward the ceiling.

The customer was charged with numerous firearms violations, including carrying a firearm without

a license, discharging a firearm into a building, and recklessly endangering others. After his conviction, the customer appealed, artfully arguing that the crime of discharging a firearm into a building can be committed only by persons who shoot into a building from a location outside the building.

While his argument did little to reduce his fairly lengthy prison sentence from the other charges, the customer was successful on his appeal of discharging a firearm into a building. The Pennsylvania law that forbids discharging a firearm

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#### Proving Medical Negligence

A Pennsylvania man sued his doctors and his hospital for medical malpractice after he suffered what he said was an inexplicable injury during surgery that his doctors performed to correct a condition that rendered the man's arms cold and paralyzed on an intermittent basis. The man claimed that he suffered a serious chemical burn to the left side of his shoulder during the surgery.

The man was not able to explain how or why he suffered the chemical burn, and so he turned to a concept in Pennsylvania negligence law known as "res ipsa loquitur" to prove his case. Literally translated, res ipsa loquitur means "the thing speaks for itself."

The legal concept of res ipsa loquitur is that an injured person can prove negligence if he or she has suffered an injury that ordinarily does not occur in the absence of negligence, and no other responsible causes explain the injury. The man argued that anyone who comes out of surgery with a major chemical burn has to have been treated negligently because no other cause can explain such an injury. However, he lost his claim because the experts in the case hotly disputed whether he even had a chemical burn.

The man's expert diagnosed his injury as a chemical burn that was caused by his lying in a pool of antiseptic solution for an extended period of time during the surgery. But the expert who testified for the doctors and the hospital concluded that the man did not suffer any burns at all; instead, the expert testified that the man had a serious outbreak of shingles, caused by the herpes virus. The pattern of the

blisters and lesions was consistent with the random pattern of a shingles outbreak, according to the expert, and not with the "flooding" pattern of a chemical burn.

The court dismissed the man's claims. Because he was unable to prove that he actually was left lying in a pool of antiseptic liquid during the surgery, he had no direct proof

of negligence. And since the hospital's expert disagreed with the nature of the injury, the court concluded that the man did not have a res ipsa loquitur case. Negligence is presumed under the res ipsa loquitur theory only where there is no other plausible explanation for the injury.

#### Deferred Compensation Plans

Of the many types of benefits available through employment, the deferred compensation plan is available to many high-level employees. Under such plans, the employee agrees to have part of his or her pay withheld by the company, deferring the payment of such money until retirement or the end of the employment relationship. The employee does not owe any income tax on the deferred compensation until he or she actually receives it—so deferred compensation plans can work very well as retirement savings.

The plans also operate to keep highly skilled employees in the ranks—the taxman shows up only when the employee takes the money out of the plan. The entitlement to put off paying taxes tends to prolong employee loyalty to the company.

IRS regulations provide that deferred compensation plans can be included in employees' benefits packages only when the employer needs an incentive to keep highly qualified employees in the ranks.

In fact, in order to postpone tax liability, the company must need a "sweetener" to hold on to its highly valued or experienced employees. While there are no precise limits on the number of employees who can be included in a company's plan, usually only the top 5% to 10% of high-ranking employees in a company are included.

What many such employees do not realize is that deferred compensation plans are very different from 401(k)s and employee-sponsored IRAs. How? If the company goes bankrupt, the company's creditors usually can get all of the funds in the deferred compensation plan.

Despite the fact that a deferred compensation plan literally is composed of the saved wages of the working employees, the federal laws that protect retirement funds from seizure do not protect most deferred compensation plans. In fact, federal law generally recognizes that deferred compensation

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## Injured Worker Deserves a Job

A Pennsylvania worker who suffered a broken forearm was out of work for over a year, and his treatment included several surgeries. His treating physician released the worker to return to full-time unrestricted job duties, but the worker's employer did not have any job openings. Nevertheless, because the worker was medically released, the employer petitioned to stop payment of all workers' compensation wage and medical benefits.

At the hearing on the worker's claims to continue to receive his wage and medical benefits, the worker's physician testified that the worker was released to do any kind of work; the physician placed no restrictions on the worker's ability to perform all of his job duties. The physician acknowledged that if the worker actually experienced physical problems or limitations once he did return to work, the physician might find it necessary to change his opinion.

The worker testified that he did not feel capable of performing fully at work and that he believed that his employer did not have a job for him. The employer failed to produce any evidence of a job opening, taking no position at the hearing if it did or did not have a job opening available. Instead, the employer simply argued that when a worker is fully medically released, all benefits must cease.

The court sided with the worker, finding that where a recovered worker remains unemployed

and available for work, the employer must prove the existence of an available job at the hearing. If there is no available job, then the worker is entitled to continued benefits. The employer may meet its burden by showing that it referred the worker to a suitable job that would fit the worker's ability and experience. If such a referral is proven, the worker must demonstrate that he or she has in good faith followed through on the job referral but remains unemployed.

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## Deferred Compensation

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plans are an asset of the company until actually paid out to the employees.

Of course, the employees are also creditors in any bankruptcy and, as such, they have the right to file a claim to be paid their deferred compensation. But the company's large creditors usually have far more powerful and secured claims. In a bankruptcy meltdown, employees are often the last to receive any portion of the company's assets.

What is a highly paid employee to do? If company bankruptcy appears likely, an employee can quit and withdraw his or her money from the plan. But, in such cases,

If you are a recovering injured worker, be sure to pursue all job referrals from your employer. If you are cleared for light or sedentary work, you must take suitable jobs offered for such work. If you are an employer with a recovering injured employee, you will remain responsible for all benefits until the employee is actually employed, or until you can prove that he or she has failed to secure any employment that is actually available.

the bankruptcy courts later can force the employee to return the money; the court can "recapture" the money if it appears that the employee knew that the bankruptcy was coming.

Most importantly, all employees who enjoy deferred compensation must understand their plan. Every deferred compensation plan is based on a written document. If you have such a plan, get a copy of the plan documents. If your company is struggling, consider whether the sudden departure of the highest-ranking employees will precipitate the company's failure. The risks of a deferred compensation plan are not avoidable, and a full understanding of the plan is the foundation for wise decision making.

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## Guardians

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to exercise all of their son's legal rights, including his right to refuse medical treatment. They claimed that a person incapacitated from birth is entitled to refuse medical treatment, but has no power to do so unless he or she can exercise that right through a guardian.

The Department of Public Welfare opposed the parents' request and claimed that guardians cannot make choices that do not advance the interests of an incapacitated person. Since the son was not terminally ill or in a persistent vegetative state, medical treatment, including mechanical ventilation, was in his best interests, according to the Department.

The Department also argued that, in 2006, the Pennsylvania legislature passed the Health Care Agents and Representatives Act, clarifying and updating Pennsylvania law on medical treatment choices, including end-of-life decision making. The Act provides that everyone has a right to make decisions regarding their own health care, including the right to appoint an agent or representative. The Act has specific rules for the appointment of an agent, and the son obviously had never made any such appointment.

## Guardians Have Limited Decision-Making Authority

The court first decided that the Act does not permit a guardian to assert an incapacitated individual's right to appoint a health care agent. In fact, the court observed, a separate statute relating to guardians specifically limits guardians from many categories of decisions. Guardians may not consent to cer-

tain medical procedures, including abortions, sterilization, and psychosurgery. Guardians also cannot admit an incapacitated person to a psychiatric institution. Guardians cannot prohibit marriage, consent to divorce, or agree to the termination of parental rights on behalf of an incapacitated person.

The court also noted that, unlike properly appointed health care agents, a guardian is the court's "bailiff or agent in protecting an incompetent and his estate." Guardians are always under the court's control and are subject to the court's direction. Guardians are permitted to act against the express wishes of the incompetent person, but always must follow the guidance of the court.

By contrast, a health care agent must follow the directives of the individual who appointed him, and he or she is usually given broad powers. Health care agents do not require any supervision from the courts. A health care agent literally stands in the shoes of the individual who appointed the agent, and is charged with doing the will of the individual.

In concluding that guardians should not be given the broad powers granted to many health care agents, the court noted that guardians can "potentially abuse their authority to an unparalleled magnitude." Because courts are obliged to supervise guardians and cannot efficiently intervene in time to preserve the life of an incapacitated person if a guardian makes an end-of-life decision, the court found that guardians should not be given such extensive authority.

Guardians who believe it is best to refuse medical treatment for their incapacitated person must petition the court to hear the matter,

and they must prove by clear and convincing evidence that their health care preference is best for the incapacitated person. If approved by the court, an incapacitated person's right to refuse medical treatment can be asserted.

Properly appointed health care agents can exercise all of the powers in the appointing document without seeking any approval of the courts. If you do not have a living will or an advanced medical directive appointing a health care agent, you should. You and your family, as well as any physicians, are best served if you make important decisions now and identify an agent. If you are a guardian of an incapacitated person, your ability to control health care decisions is limited by the fact that the ultimate decisions must be made by a judge.

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## Gun Laws

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into a building was apparently drafted to criminalize drive-by shootings, and it reads that it is a crime to discharge a firearm "into" a building "from any location." The Pennsylvania Supreme Court found that all criminal statutes must be strictly and narrowly interpreted. In a lengthy and painstaking analysis, which included an exploration of the dictionary definition of the words "into" and "any," the court concluded that the crime of discharging a firearm into a building only occurs when the shooter is firing into the building from some location outside the building.

*Resolution of legal issues depends upon many factors, including variations of facts and interpretations of Pennsylvania law. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.*

## New Law Expands Benefits for Taxpayers

The new Worker, Homeownership and Business Assistance Act of 2009 contains several key provisions affecting individuals and business owners. Here is a brief summary relative to the Homebuyer's credit.

Under prior law, an eligible first-time homebuyer could claim a maximum credit of \$8,000 for a principal residence purchased before December 1, 2009. But the credit began to phase out for single filers with a modified adjusted gross income (MAGI) above \$75,000 and joint filers above \$150,000.

Under the new law, the credit is available for home purchases made before May 1, 2010 (July 1, 2010, if a binding contract exists before May 1). Also, the phase-out threshold increases to \$125,000 of MAGI for single filers and \$225,000 for joint filers. The homebuyer credit may be elected on a 2009 tax return for a qualified purchase in 2010.

Not just for first-timers: If you buy a home after November 6, 2009, and have owned and used the previous home as your principal residence for five consecutive years in the last eight years, you may claim a credit of up to \$6,500. New limit for everyone: No credit is allowed for purchases after November 6, 2009, if the price exceeds \$800,000.

## Elder Law Questions and Answers: Protecting the Home and the Spouse at Home

There are certain questions asked from time to time regarding long-term care planning and Medicaid. What follows are answers to these common questions which may be of interest. This is especially so with the hard times we are experiencing these days during the economic turn-down, when knowing what the law allows you to do to protect your life savings is more important than ever.

Q: "Our mother needs to go into a nursing home. Will she have to sell her house to pay for her care?"

A: A single, unmarried person in a nursing home does not have to sell his or her home in order to qualify for Medicaid to pay for the nursing home care. (All that is required is to answer "Yes" to the question on the Medicaid application "Do you intend to return home?") However, if the home continued to be titled in that person's name alone, it would be subject to a Medicaid claim after that person's death and, unless the children had the money to pay the claim, it would have to be sold. This is because all State Medicaid Agencies have an "estate recovery" program that puts claims against the estates of deceased Medicaid recipients. (In Pennsylvania, this Medicaid agency is the Department of Public Welfare, or DPW.)

But even in such crisis situations, a qualified elder law attorney

can usually help you protect the home from Medicaid estate recovery. For a single person, this might involve transferring a one-half interest in the house to a child to be held as "joint tenants with right of survivorship." Or it might involve transferring a "remainder" interest in the house to one or more children, or to an irrevocable trust. In any of these cases, the home would then not be in the decedent's "probate" estate and so *under current law*, not subject to such a claim.<sup>1</sup> In some cases, the home can be transferred without creating any delay in Medicaid eligibility; for example, to a child with disabilities or to a "caregiver" child who has resided with the parent and provided care for at least two years prior to the parent going into the nursing home.

Q: "My husband needs to go into a nursing home, and I am afraid I will lose everything and even have to sell our house to pay for his care. What can I do to protect myself?"

A: Many couples are concerned that if one spouse needs nursing care, the spouse at home (the "community spouse") could lose everything. Although nursing home care is very expensive, often costing \$75,000 a year or more in northwest Pennsylvania, the law provides some protection for the spouse at home.

<sup>1</sup>Earlier this year, the DPW was backing a provision added to the Pennsylvania budget bill that, if passed, would expand DPW's authority to go after such non-probate property and force the sale of homes in which the decedent held only a joint interest or a life estate. While this provision was later removed from the budget, it is an issue that can come back at any time. You may want to ask your State Representative about this.

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## Elder Law

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When a spouse enters a nursing home, there is a "snapshot" done to the couple's assets for Medicaid purposes. (Medicaid is the only government program that pays for long-term nursing care.) A portion of the couple's assets will be considered protected for the community spouse, meaning those assets will not need to be spent in order for the nursing home spouse to be eligible for Medicaid. How much is protected depends on the couple's situation. In Pennsylvania, that amount is one-half of the couple's combined *countable* assets, with a minimum of \$21,912 and a maximum of \$109,560 (for 2009). Some things, such as IRA of the community spouse, one car, household goods and personal effects are not counted. But nearly everything else must be spent down to a few thousand dollars before the nursing home spouse can start receiving Medicaid.

The house is an exception. For a couple, the house is typically not at risk. There is no claim against the house while the community spouse is living, either during the nursing home spouse's life or after his or her death. The one exception is if the community spouse were to die first. In that case, if the house was titled in both spouse's names, then it would automatically belong to the nursing home spouse and so, as explained above, would become subject to a Medicaid estate-recovery claim after the nursing home spouse's death.

Again, a qualified elder law attorney could help you avoid this risk, for example by transferring the house into the sole name of the community spouse and having that spouse change his or her Will to "disinherit" the nursing home spouse. Such an attorney may also be able to help a couple protect a significant portion of their assets that would otherwise have to be spent paying for the nursing, even in a crisis situation with no time for advance planning. There are a wide range of strategies available, depending on the client's specific situation.

NOTE: With the new restrictions in the Deficit Reduction Act, it is more true than ever that "time works against you" when planning for long-term care. It is important that families who have a spouse, parent or loved one needing long-term nursing care contact a knowledgeable and experienced elder law attorney for advise as soon as possible. While ideally this should be done several years before such care will be needed, families need to realize that even in a crisis, there remain planning opportunities for seniors to protect a portion of their life savings that would otherwise go to pay for nursing care. Still, every day of delay represents a potential \$220 of irretrieveable loss.

Call Leventry, Haschak & Rodkey, LLC for assistance in this area.