



Elder Law & Estate Planning

Newsletter

WINTER 2008

Our First Newsletter

Nay & Friedenbergs has designed this newsletter for people who have an interest in elder law and estate planning. We hope that it educates and becomes a resource for our friends, clients and partners in this area.

In each issue we will have an article that will stand alone as a self-contained treatise on a specific topic. In this issue the topic is "What everyone needs to know about estate planning". It will be written in plain English so that the non-specialist will understand it. We hope that you will copy it and distribute it for your own use. Please feel free to do so. All we ask is that you give our office credit for authorship.

We also plan on having another article or two on an interesting topic that is more appropriate to a specialist or a person with the particular problem.

We will also post the newsletters to our website, www.naylaw.com, in the case you lose the paper copy or wish other issues. Feel free to contact us with suggestions: chad@naylaw.com.

ODD BEHAVIOR: What to do?

P. B., a computer engineer, began receiving visual and auditory hallucinations that he had been chosen by God to save the world from the ineptitude of world leaders. He was instructed to marshal an army to stop the Armageddon that would occur on September 18, 2005. To do so he was to recruit his wife, family and friends to his divine cause. His behavior became agitated, sleepless, frantic and irrationally compulsive. As his wife and others were not cooperative, he became aggressive and even threatened their lives, though he did not act on the threats.

At the urging of family, twice P.B. voluntarily admitted himself into a hospital for treatment. He was diagnosed as having bi-polar disorder, formerly known as manic-depression. A mental health investigator concluded that P.B. was a danger to himself and to others, could not provide for his basic needs and that he should be committed to Oregon State Hospital. A hearing was held before a judge and P.B. was committed for up to 6 months.

While P.B.'s case is atypical, it highlights that any one of us could be confronted with a loved one who is acting erratically and even dangerously. It might be a result of a stroke, Alzheimer's confusion, the symptoms of Huntingtons, a brain tumor, or as with P.B., a mental health breakdown. What are our legal options to assist our loved one and protect him, her and ourselves?

P.B. WAS A DANGER TO HIMSELF AND TO OTHERS, COULD NOT PROVIDE FOR HIS BASIC NEEDS

1. If it's an emergency, call 911. Police are specially trained for these situations and there is no second guessing when safety is concerned.

2. In the alternative, take your loved one to the hospital, if need be in an ambulance. Do not drive an automobile if it puts anyone at risk.

3. Be sure that all adults in your family have an Advanced Health Care Directive, sometimes called a 'living will.' The person named in the document can access information, communicate for the client and advocate.

4. If there is a history or risk for mental illness, be sure that person has a Declaration for Mental Health Treatment. It allows a person to name family who can commit the person against his will for up to 17 days for mental health treatment. It allows for the person signing to name treatment options.

5. In the absence of advanced directives, next of kin may be able to advocate for the individual but there is a high chance of failure.

6. If the individual has a cognitive disorder, is unable to partake of the activities of daily living (provide for food, shelter or clothing) and physical injury or illness is likely to occur, the remedy is a court guardianship. A family member or someone must seek to be appointed guardian through the court system

Continued on page 3



Our Lawyers

TIM NAY, M.A., M.S.W., J. D.
Willamette University School of Law, 1984

SAM FRIEDENBERG, J.D.
Lewis & Clark Law School, 1985

GARVIN REITER, J.D.
Lewis & Clark Law School, 1996

AMY DAVIDSON, J.D.
Lewis & Clark Law School, 2003

DOUGLAS A. HARRISON, J.D.
Willamette University School of Law, 1982

HILARY NEWCOMB, J.D.
Santa Clara University School of Law, 2001

DARIN DOOLEY, J.D.
Willamette University School of Law, 2007

6500 SW Macadam Ave., Suite 300
Portland, OR 97239-3565

www.naylaw.com

Editor - Chad Connors
chad@naylaw.com

What everyone needs to know about estate planning.

Sooner or later we all face the possibility or certainty of disability and death. Consequently, we all need to do basic estate planning for peace of mind, to make it easier on our loved ones and to save money. In particular we should plan for the possibility of incapacity. "Incapacity" means losing the ability to process information as a result of an automobile accident, Alzheimer's, massive stroke or a number of other events. This area of planning has been greatly neglected.

PLANNING FOR HEALTH CARE INCAPACITY

If we have a medical emergency, the medical professionals will take all steps to make us better. However, when our status has stabilized or continues to progressively decline with no chance of improving, difficult decisions need to be made. If we are capable of making them ourselves, we are in the driver seat. If not, we must rely on a surrogate. In Oregon that surrogate is named through the Oregon Advance Health Care Directive (there are other documents, but they are not as effective.)

The directive does two things. First, it allows an individual to name a surrogate decision maker. One can also name any number of alternates. Second, it allows an individual to state whether or not one wants heroic measures, such as tube feeding or a ventilator, in end of life scenarios. Those

would be where death is inevitable, being in a coma, Alzheimer's in it's last stages, or having extraordinary suffering.

If an individual does not have a health care directive, it is possible that the next of kin can effectively make health care decisions for him or her. However, any problem or doubt on the part of the medical provider will require going to court to file a guardianship. While this procedure may be necessary, it is best avoided.

PLANNING FOR FINANCIAL INCAPACITY

The simplest planning for financial incapacity is adding a trusting, responsible person to a checking account and safe deposit box. However, it's generally not a good idea to add them to our other assets and there are some assets, such as IRA's and pension plans where one cannot create joint ownership. Hence, for the vast majority of our financial life it is important to execute a financial power of attorney. This document allows someone to be our financial surrogate for all financial decisions.

Powers of attorney have a number of nuances. Because they can be abused, they are frequently rejected by banks, brokers, etc. Consequently, it is best to have them prepared by an attorney who will stand by their validity. Similarly, stationary store and internet forms are

**FOR THE VAST MAJORITY
OF OUR FINANCIAL LIFE
IT IS IMPORTANT TO
EXECUTE A FINANCIAL
POWER OF ATTORNEY**



very narrow and cannot be used for a number of necessary tasks such as transferring assets and planning for long term care benefits. Some powers of attorney are for narrow purposes such as funding a trust or selling a house. These are inadequate for incapacity planning. In summary, while a power of attorney seems like a simple document, many of them are inadequate unless prepared by a knowing professional.

PLANNING FOR DEATH

Planning for death has many components which are part of an “estate plan”. First, it is important to review assets and make sure that certain assets are in joint name. Second, it is important to review assets that have beneficiary designations, such as IRA’s and life insurance, to be sure that the proper beneficiaries are named. For example, it is common to name a minor in a situation where the owner really wants a trust for the minor to be named.

The necessary document for death planning is the will. It names an executor (personal representative) and alternates. It also addresses the various distribution provisions that the client wishes to have. Generally wills have specific distributions of household goods and personal belongings. Specific cash bequests are usually in nominal amounts and a residuary clause that covers the rest of the assets.

Wills frequently have subtrusts. These are trusts that are only created at death with the assets that are targeted to the trust. The most common example is trust for the support and education of minors. Generally these will stretch out to age 35 so that the individual will not spend the money irresponsibly.

A second category of subtrust is for disabled beneficiaries, whether minor or

adult. Typically these are special needs trusts which provide for quality of life through the purchase of goods and services that cannot be purchased with disability insurance or state health plans.

Wills also address a number of other situations, such as the nomination of guardian for children, rogue son in laws, spendthrift beneficiaries and vacation or other property that should remain in the family.

As the possibility of disability or death becomes closer, or we accumulate assets, clients trade in their wills for revocable living trusts. These documents serve as super-powers of attorneys and will-substitutes.

Their greatest strength is that they work more effectively than a financial power of attorney and avoid the administrative process of probate when an individual passes away. Contrary to the common marketing, these trusts are not best for everyone although they are best for most retired people.

As the size of an individual’s estate grows he or she will have to consider inheritance and estate tax obligations. The estate planner will strive to eliminate or minimize taxes of all sorts. This can be done through a number of established planning techniques, which are beyond the scope of this simple estate planning article.

FINAL THOUGHT

All clients should have an advance health care directive, a financial power of attorney and a will. Further, clients should have their assets reviewed so that their assets are in sync with the will. If other issues arise, such as the need to protect minor children or plan for inheritance taxes, the estate planner can address these within the existing documents or with additional planning. ■

Odd Behavior: What to do?

continued from page 1

in order to make treatment and placement decisions.

7. If the behavior is not just likely to lead to physical injury or illness but there is an immediate and serious danger to the life or health of the person, a family member can begin an “emergency” (or temporary) guardianship.

8. If the behavior is the result of a serious mental disorder, is a danger to the individual or to others, or is preventing the person from providing basic personal needs, or is part of a pattern of similar behavior, then the remedy is the involuntary hold for a commitment proceeding. It can be initiated by various persons, usually police or medical personnel, the county mental health officer or a judge. If the commitment is successful, the individual could end up placed at Oregon State Hospital though often a local facility will take a person who is improving.

9. If the loved one could cause economic harm, there are provisions for a court conservatorship or emergency (temporary) conservatorship.

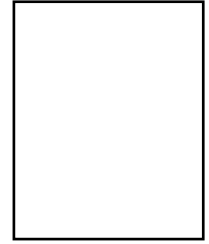
The spectrum of options is difficult for the layperson to navigate. Further there are other issues that need to be addressed such as eventual placement, family dynamics and the cost of treatment. These are best handled with legal consultation.

As to P.B., it turns out that he appealed his commitment and won his release from Oregon State Hospital. The Oregon Court of Appeals stated that the high standard of “clear and convincing evidence” had not been met on the danger issue. Although P.B.’s threats were credible and he had the potential for violence, there was insufficient danger to others, no danger to himself and the episode was a single “decompensation” brought on by stress and fatigue. In the Matter of. P.B., Case number A 129314, Court of Appeals of Oregon (2007). We don’t know where P.B. is today but we hope he is at home and doing well. ■



Law Offices of
Nay & Friedenber

6500 SW Macadam Ave., Suite 300
Portland, OR
97239-3565



CALENDAR OF EVENTS

WINTER 2008

MARCH 11TH *PRESENTATION*
LEGACY - MT. HOOD MEDICAL CENTER

Tim Nay will be presenting "Legal/Financial Planning for Mid-Life and Beyond" from 6:00pm-8:00pm. Mt. Hood Medical Center is located at 24800 SE Stark St., Gresham, OR 97030. To register please contact Legacy at (503) 335-3500.

MARCH 11TH *PRESENTATION*
GRACE HOUSE ASSISTED LIVING

Tim Nay will be presenting "Estate Planning and Elder Law Issues" from 6:30pm-7:30pm. Grace House is located at 680 NW 6th Ave., Estacada, OR 97023. For more information contact Chad at 503-245-0894.

MARCH 26TH *PRESENTATION*
GRESHAM ALZHEIMER'S SUPPORT GROUP
AT THE AGING & DISABILITY CENTER.

Amy Davidson will be presenting "Estate Planning Issues" from 1:00pm-2:00pm. The Aging & Disability Center is located at 600 NE 8th St., Gresham, OR 97080. For more information please contact April at (503) 988-3840.

Our Services

Elder Law

Medicaid

Estate Planning

Probate

Guardianships

Conservatorships

Living Trusts

Special Needs Trusts