Trusts & Estates

IN THIS ISSUE

TRUSTS AND ESTATES GROUP

Attorneys

Arthur P. Bergeron	abergeron@mirickoconnell.com
Tracy A. Craig, Chair	tcraig@mirickoconnell.com
Christine P. Keane	ckeane@mirickoconnell.com
Robert J. Martin	rmartin@mirickoconnell.com
Janet W. Moore	jmoore@mirickoconnell.com
Paul R. O'Connell, Jr.	poconnell@mirickoconnell.com
Andrew B. O'Donnell	aodonnell@mirickoconnell.com
Jason J. Port	jport@mirickoconnell.com

Paralegals

Kimberly A. Bates	kbates@mirickoconnell.com
Patricia E. Bridgeo	pbridgeo@mirickoconnell.com
Pamela A. Oliveri	poliveri@mirickoconnell.com

Elder Law Coordinator

Brenda Costa	bcosta@mirickoconnell.com

This newsletter is drafted in its entirety by the attorneys in the Trusts and Estates Group.

MIRICK O'CONNELL

ATTORNEYS AT LAW

800.922.8337

www.mirickoconnell.com

WORCESTER | WESTBOROUGH | BOSTON

MIRICK, O'CONNELL, DEMALLIE & LOUGEE, LLP

Massachusetts Voters Take Note: Proposed Death with Dignity Act on the Horizon

BY ARTHUR P. BERGERON & TRACY A. CRAIG

If a current ballot initiative proves successful, this November Massachusetts voters will be asked to decide whether the state should adopt the Massachusetts Death with Dignity Act (the "Act"). Two other states, Oregon and Washington, have already adopted similar laws.

The Act, which is based on the Oregon law, allows Massachusetts residents who are terminally ill — and mentally competent — to request and receive a prescription for a lethal dose of drugs to be self-administered. Assisted suicide is specifically prohibited and doctors who object to writing such prescriptions can opt out. Additionally, the Act requires individuals to go through a process designed to ensure they are not being coerced and that they fully understand the nature and ramifications of their actions.

Before an individual's attending physician (meaning the doctor with "primary responsibility" for care) may write a fatal prescription, both the attending physician and a "consulting physician" (a specialist in the individual's particular disease) must certify in writing that the individual is dying from a "terminal disease." Under the Act a terminal disease is an incurable or irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months.

Three separate requests must be made by the individual in order to obtain the prescription, two oral and one written. Once the first oral request is made, there is a required 15-day waiting period before the prescription can be released. There is also a required 48-hour waiting period after the written request is made; however, the written request may be submitted during the 15-day waiting period after the first oral request, but cannot be honored until the 15-day period has expired. In addition, the written request must be made on a special form that is included as part of the Act

and must be witnessed by two people who confirm that the individual is competent and signing of his/her own free will. At least one of the witnesses must be someone who is not a relative, a beneficiary of the individual's estate, or an employee of the health care facility where the individual is living or receiving treatment.

The attending physician must take a number of steps prior to writing the prescription, including:

- Confirm that the person is a Massachusetts resident. Some form of verification such as a driver's license, passport or income tax returns will likely be needed;
- Confirm, along with a consulting physician, that the individual has a "terminal disease";
- Inform the individual of his/her current diagnosis/ disease, the likely prognosis, the risks associated with the prescription requested, and any available alternatives such as hospice, pain management, and palliative care;
- Verify that in the physician's opinion immediately before writing the prescription, the individual is making an informed decision;
- Inform the individual that when the request is first made it can be rescinded within 15 days and that no prescription will be written during that time;
- Inform the individual, again, after the 15-day waiting period that the decision to fill the prescription or take the medication may be rescinded at any time;
- Recommend that next of kin be notified of the individual's intention; and
- Recommend that the patient have another person present when the patient ingests the medicine and to not take it in a public place.

If at any time either the attending or consulting physician determines that the individual making the request may be suffering from a psychiatric or psychological disorder or depression causing impaired judgment, that physician must refer the individual to a counselor. No prescription may be issued unless the counselor (who must be a licensed psychiatrist or psychologist) has concluded in writing that the individual is not suffering from a psychiatric disorder or depression that is impairing judgment.

We recommend that Massachusetts voters take the time to familiarize themselves with this proposed new law. ■

The MUPC: The Brave New World of Probate

BY TRACY A. CRAIG & CHRISTINE P. KEANE

On January 15, 2009, Governor Deval Patrick signed into law the new Massachusetts Uniform Probate Code (the "MUPC"). The MUPC substantially reforms Massachusetts probate practices and procedures, and has been implemented in two stages. Article V of the MUPC went into effect on July 1, 2009, and it governs the protections for incapacitated persons and the appointment and supervision of guardians and conservators. The Articles governing estate administration and intestacy laws were originally set to go into effect on July 1, 2011, but were delayed twice, and became effective on March 31, 2012.

The goal of the MUPC with respect to estate administration is to update and streamline the probate process. This means that for the majority of estates, the court will have reduced oversight during the administration of the estate. With respect to incapacitated persons, however, the MUPC imposes an increased amount of court control and reporting to protect against abuse of people who are unable to protect themselves. Article V also makes a significant change to the roles that guardians previously performed for incapacitated persons by bifurcating the guardian's two major functions — making health care decisions and financial decisions — into two separate positions that can be held by two different people. Now, all health and personal care decisions will be made by a guardian(s) for an incapacitated person, and all financial decisions will be made by a conservator(s) for a protected person. The MUPC prefers giving the guardian or conservator the minimum amount of power necessary to accomplish these tasks. The MUPC also increases the reporting requirements for guardians and conservators, with the court monitoring the submission of all required reports.

Conversely, the MUPC streamlines the estate administration process by recognizing that the vast majority of estates proceed without controversy. As a result, the court generally will not intervene in an estate administration unless requested by an interested party. If all parties agree, except in certain circumstances, an estate can generally proceed through an administrative process known as informal probate. Theoretically, under informal probate, a fiduciary (now known as a Personal Representative) can be appointed by a Magistrate to administer the estate within 7 days of death. In practice it may take a couple of weeks for the Personal Representative to be appointed administratively. If any interested party, however, requests formal probate, it will be required. The involvement of a minor or incapacitated person

in any way may also necessitate proceeding formally. Formal probate is similar to the prior law, because it (i) is a process involving adjudication by a judge of whether a will is valid and (ii) requires between two and three months to appoint a Personal Representative.

Under the MUPC, whether estate administration is informal or formal, after a Personal Representative is appointed the administration becomes an "in" and "out" process, without continuing court supervision. Parties can come to the court if authority is needed for any single matter of the estate. For example, if a person died without a will and his home needed to be sold by a Personal Representative, a License to Sell Real Estate could be presented to the court in order for the court to authorize the sale. If no court supervision was needed after the initial appointment of the Personal Representative and the granting of the License, the court would not be involved again with the estate. Alternatively, if the estate was contested or complicated, supervised administration could be ordered by the court. Supervised administration means that the court would oversee the estate administration from the appointment of the Personal Representative until the ultimate distribution of the assets.

Another major change under the MUPC is that a formal accounting is no longer required under a Personal Representative's bond in order for the Personal Representative to be discharged from his or her duties at the end of estate administration. A Personal Representative may give a more informal form of accounting to estate beneficiaries, and the accounting does not need to be filed with the court. Similarly, filing an Inventory with the court detailing the estate assets is no longer necessary in all circumstances.

Other noteworthy changes made by the MUPC include:

- There are a number of changes to the terminology used with estate administration. All permanent fiduciaries administering an estate are now known as the Personal Representatives (regardless of gender), with a temporary fiduciary known as a Special Personal Representative. These titles replace all previous titles, including Executor, Executrix, Administrator, Administratrix, Special Administrator, and Temporary Executor. The term "issue" will be replaced with the more commonly understood term "descendant." The term "devise" is now used to convey tangible, intangible and real property.
- There are also significant changes to the intestacy laws, which apply when a person dies without leaving a will. For example, the surviving spouse will inherit 100% of the probate estate if (i) all the children of both the surviving spouse and the decedent are the only children of each individual; or (ii) there are no surviving descendants or parents of the decedent.
- The appointment of a guardian ad litem to represent the interests of minor, incompetent, unborn and unascertained beneficiaries is no longer presumed due to virtual representation. In general, a competent beneficiary with substantially the same interests can now represent the interests of an incapacitated beneficiary.
- Separate memorandums disposing of tangible personal property (e.g., jewelry, cars and furnishings) become legally binding.
- Pourover trusts no longer need to be executed prior to the will.
- The term "by right of representation" changes from a modified per stirpes (by the stocks at the first generation with living descendants) to the more modern approach of per capita at every generation (equal shares at equal generations).
- Upon divorce, trust provisions and beneficiary designations in favor of an ex-spouse are automatically revoked.

This article only highlights some of the changes brought about by the MUPC. Many other laws and procedures have been changed as well. ■

Estate Planning in a Digital World

BY JANET W. MOORE

These days everyone has files and information stored on computers and smart phones, such as online accounts with banks and other financial institutions; email providers; social networking services, such as Facebook, LinkedIn, and Twitter; PayPal accounts; blogs; and music accounts. Moreover, the types of accounts and the identity of service providers seem to be ever changing. As a result, planning for the location and security of online assets is now becoming a consideration in estate planning.

Traditionally, when a person died or became incompetent, family members would search the person's home and office, looking through paper records of bills, account statements, and other important financial information. Today, many people pay bills online, receive paperless account statements, keep their checkbooks online, and file their income tax returns online. It is possible that these important records are kept only in a digital form, leaving no paper trail of assets or bills at all.

Further complicating matters is that due to the relatively new nature of digital assets, policies concerning access to these accounts upon the death or incapacity of an account holder are inconsistent and in flux. It is not uncommon for service providers to refuse to give out passwords for incompetent or deceased individuals. In addition, you often must act quickly to protect online accounts from being deleted or frozen if the account has not been recently accessed.

A main challenge can be to determine the identity of the digital assets. Another challenge can also be ascertaining the username and passwords for these accounts. Only by planning ahead can someone ensure that upon death or incapacity, his or her loved ones will be able to locate and obtain access to these accounts. If there is no record of passwords or online accounts, it could take a significant amount of time and effort to determine the identity of the digital accounts and to obtain access. In addition, what often can be overlooked is that a digital account, such as a social media account, may have emotional or sentimental value to loved ones.

To avoid these issues, individuals should prepare a list of all online accounts and other digital assets. This can be done with a written list. However, it can be inconvenient to update the list each time a password is changed or an account is added. Also, individuals must keep the list secure to ensure others cannot access it.

Electronic lists, either on a computer or online, of usernames, passwords and accounts might prove to be more convenient to update and more secure. Such lists can be secured by a master password. Consider keeping the master password and instructions for accessing the electronic list in a safe deposit box, home safe, or with your attorney, who would secure the master password along with your other estate planning documents.

To begin to plan for your digital assets, consider what would happen if your computer were lost or stolen. What important information would be lost? If you died or became incompetent tomorrow, could your loved ones obtain access to online accounts or information? What digital assets would you want your family to be able to access? Who would you want to have access to the information? These questions may help determine what information should be included in a master list. Planning ahead is always best to ensure that no account or asset is overlooked. ■

Is a Combination Life Insurance/ Long-Term Care Insurance Policy Right for You?

BY ANDREW B. O'DONNELL

One issue concerning long-term care insurance is that you only benefit from it when and if you need long-term care. If you are fortunate enough to never need nursing home care or other significant assistance with daily life, the money you spend on premiums over the years is effectively "wasted."

In an attempt to address this concern, many insurance companies have now begun offering policies that combine long-term care insurance coverage during life with a death benefit. Generally, these policies provide benefits during life when assistance is needed with certain activities of daily living, such as feeding, dressing, etc. To the extent that the coverage is not used during life, the policy will pay a death benefit to the designated beneficiaries. As a result, the premiums paid will never be "wasted."

It is important to understand that these combination policies are not a panacea. The long-term care benefits may not be as extensive as those provided by a standalone long-term care policy. In addition, adverse income tax consequences can occur if use of the long-term care benefits leads to cancellation of the life insurance coverage. Finally, as individuals age their need for life insurance coverage usually decreases, so the life insurance component of the combined policy may not be necessary unless it also satisfies the desire to provide an inheritance for loved ones.

Nevertheless, in situations where one needs life insurance as well as long-term care insurance, these new combination policies are worth exploring. Individuals may wish to investigate these policies with their financial advisors to determine if they provide an attractive solution in the context of their overall financial and estate plan. ■

How Trusts Can Help Achieve Eligibility for Veteran's Benefits

BY JASON J. PORT

Veterans and survivors of veterans may be able to obtain tax free income from the Department of Veteran Affairs (the "VA") to help pay for the cost of home health care, assisted living care, and nursing home care through the Improved Pension or Low Income Pension program ("Pension"). In addition, a veteran or a veteran's spouse who is housebound or in need of the assistance of another person with activities of daily living may receive supplemental financial support through Housebound Benefits or Aid & Attendance Benefits. To determine eligibility for these programs, the VA examines, among other factors, a claimant's income and assets to determine need. Unreimbursed medical expenses actually paid by the claimant can be used to reduce the claimant's income. Generally, the VA considers net worth above $80,000 to be excessive; however, a final determination depends on the facts of each individual case.

One strategy claimants can use to reduce the amount of their assets in order to qualify for benefits is to transfer assets into an irrevocable trust known as an Intentionally Defective Grantor Trust ("IDGT"). The IDGT is drafted so that it intentionally qualifies as a "Grantor Trust", a special type of trust whereby the person who creates the Trust (known as the grantor) is legally responsible for paying all of the tax on any income earned by the Trust assets (such as interest, dividends, and rent). Like any other trust, an IDGT involves transferring the actual ownership of an asset to a Trustee (who would become the legal owner of the property). The Trustee would then administer the assets for the benefit of the Trust beneficiaries, who cannot be either the claimant or his or her spouse.

It is important to understand that an IDGT is irrevocable. By establishing the IDGT, the veteran can initially set the parameters that determine how the assets in the IDGT may be utilized, although the claimant has no legal control over the assets once transferred to the IDGT and cannot directly benefit from the assets.

Using an IDGT for VA benefits

Although a claimant may transfer any financial asset to the IDGT, for most claimants their major asset is the home. As long as the claimant retains the home as a principal residence, it would not be counted as part of his or her net worth for VA eligibility purposes. However, if the claimant qualifies for the Pension benefit and later sells the home, the proceeds will increase the claimant's net worth and might disqualify the

claimant from receiving further benefits until the assets are spent down to an allowable level.

By transferring the home to an IDGT, the transferred home is excluded for VA eligibility purposes and not counted as part of net worth. Moreover, if the residence is later sold by the Trustee the sale proceeds would not jeopardize the continuation of benefits because the proceeds would belong to the Trust. Advantages of an IDGT:

- A veteran who transfers assets to an IDGT may be able to qualify for VA benefits immediately.
- The IDGT can sell the Trust assets and keep the proceeds without affecting the veteran's benefits.
- Any IDGT assets will be protected for Medicaid planning purposes 5 years following the transfer of assets to the Trust.
- Income tax exemptions for the proceeds of a sale of the primary residence during the grantor's life are preserved because the Trustee can take advantage of the capital gain exclusion of up to $250,000 for an individual and $500,000 for a couple.
- If desired, the IDGT can be drafted to provide that at the death of the grantor, the trust assets will receive a step-up in basis for income tax purposes.
- The veteran can protect assets for certain beneficiaries that are in need of additional protection due to special needs, creditor issues, or irresponsibility.

An IDGT can be a powerful tool to achieve a wide variety of estate planning and asset protection objectives. In order to determine whether an IDGT is an appropriate strategy, it is essential that the attorney you work with have knowledge of trust law, tax law, VA rules and Medicaid regulations. When implemented properly an IDGT can help achieve VA eligibility, favorable income tax effects, and peace of mind. ■

Excellence in our work.
Excellence in client service.
Excellence in value.

ABOUT US

Attorneys in the Mirick O'Connell Trusts and Estates Group counsel individuals and families in all matters concerning estate, gift, charitable and fiduciary income tax planning, elder law and special needs planning, and asset protection and Medicaid planning.

Our attorneys have extensive experience in drafting sophisticated estate planning documents and implementing wealth planning strategies. The integration of our experienced trusts and estates lawyers with our skillful litigation and trial lawyers enables us to provide sound legal advice and creative dispute resolution strategies.

TRUSTS AND ESTATES GROUP

Attorneys

Arthur P. Bergeron	abergeron@mirickoconnell.com
Tracy A. Craig, Chair	tcraig@mirickoconnell.com
Christine P. Keane	ckeane@mirickoconnell.com
Robert J. Martin	rmartin@mirickoconnell.com
Janet W. Moore	jmoore@mirickoconnell.com
Paul R. O'Connell, Jr.	poconnell@mirickoconnell.com
Andrew B. O'Donnell	aodonnell@mirickoconnell.com
Jason J. Port	jport@mirickoconnell.com

Paralegals

Kimberly A. Bates	kbates@mirickoconnell.com
Patricia E. Bridgeo	pbridgeo@mirickoconnell.com
Pamela A. Oliveri	poliveri@mirickoconnell.com

Elder Law Coordinator

Brenda Costa	bcosta@mirickoconnell.com

MIRICK O'CONNELL
ATTORNEYS AT LAW
100 FRONT STREET
WORCESTER, MASSACHUSETTS 01608-1477