

New Caregiver Authorization Affidavit Offers Options to Parents and Guardians

Earlier in 2009, Chapter 210F of the general laws of Massachusetts, Caregiver Authorization Affidavits, was enacted into law. This law allows parents and guardians to give temporary authorization in the form of an affidavit to enable another to make medical and educational decisions for the minor (the "Affidavit"). Previously in Massachusetts, no such option existed, which often created issues when parents or guardians were in a situation where they entrusted the care of their children to another.

Under the new law, a parent, legal guardian or legal custodian of a minor may appoint a caregiver (defined as an adult with whom a minor resides) to exercise certain parental rights concerning the minor's education and health care. Execution of the Affidavit creates a shared arrangement of responsibility between the parent or guardian and the caregiver. In the event the parent or guardian and the caregiver disagree regarding a specific decision, the parent's or guardian's decision would control.

An Affidavit may grant any or all of the following rights to a caregiver:

- The ability to consent to medical, surgical, dental, developmental, mental health or other treatment.
- The ability to obtain records or other information concerning health care services or insurance provided to the minor.
- The ability to access educational records and to participate in all aspects of educational decisions concerning the minor, specifically including the power to sign school permission slips.

The Affidavit can be effective for up to two years or for any shorter time period. It may be amended or revoked in writing at any time. Upon expiration of the two-year period, it can be renewed for subsequent periods of time. Finally, the statute provides sample language and a form for the Affidavit.

Practically, the Affidavit offers a solution to parents and guardians in a variety of situations. For example, the Affidavit would allow a caregiver who is looking after children while their parents are away on vacation the ability to make medical decisions. Use of the Affidavit enables parents and guardians to have peace of mind by knowing that the needs of their children will be taken care of during their absence. ■

Required Minimum Distributions from Retirement Plans Suspended for 2009

The state of the economy has most, if not all, current and soon-to-be retirees worried about investments in their retirement plans. In order to ease this anxiety, last December the federal government passed the Worker, Retiree, and Employer Recovery Act of 2008 (the "2008 Act"). The 2008 Act was structured to ease the burdens resulting from the current economic crisis, and specifically, to assist retirees with retirement plans.

The 2008 Act temporarily suspends applicable penalties for failure to take a required minimum distribution from a retirement plan in 2009. Specifically, those enrolled in retirement plans, such as §401(k) plans, §403(a) and (b) annuity plans, §457(b) plans that are maintained by a governmental employer, or an Individual Retirement Account ("IRA") may choose to forego all or part of their normally required distribution for 2009, without incurring the usual penalty imposed for failing to take the distribution. The suspension of the penalty helps to avoid liquidating investments in a down market. Without the suspension, account holders would be faced with two bad options: (1) sell investments at what would likely be a loss in order to receive the distribution; or (2) face a 50% tax penalty on the amount that should have been distributed.

Under the usual rules governing distributions from retirement plans, distributions must begin no later than April 1 following the year when the individual attains the age of 70½. Similarly, participants of employer-provided retirement plans generally must start to receive distributions by April 1 following the year in which that individual retires or reaches the age of 70½, whichever is later. Required minimum distributions must then be taken over the recipient's life expectancy; however, in certain circumstances pertaining to the death of the account holder, distributions may need to be taken over a five-year period.

Under the 2008 Act, required distributions need not be taken in 2009. A person who attains the age of 70½ in 2009 is not required to take a distribution by April 1, 2010, (as would have been required without the passage of the 2008 Act), but the individual would be required to take the minimum distribution for 2010 no later than December 31, 2010. In addition, the suspension of the distribution requirement for 2009 extends the five-year distribution period in any circumstance it applies. For example, if a five-year period began after an individual's death in 2007, it will end in 2013, instead of 2012. ■

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If you have any questions regarding the articles in this Newsletter, please feel free to contact one of the attorneys in the Trusts and Estates Group.

Attorneys in the Mirick O'Connell Trusts and Estates Group counsel individuals and families in all matters concerning estates, gift, charitable and fiduciary income tax planning. Our attorneys have extensive experience in drafting sophisticated estate planning documents and implementing wealth planning strategies. The integration of our experienced trust and estates lawyers with our skillful litigation and trial lawyers enables us to provide sound legal advice and creative dispute resolution strategies.

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Roth IRA Conversion Rules Create Planning Opportunities

Although Roth IRAs are arguably the most flexible form of retirement plan available, the income limits imposed by Congress regarding who may utilize this kind of retirement plan have made most highly paid individuals ineligible to take advantage of the Roth IRA. The income limitations have taken two forms: first, a limitation on who may establish and contribute funds directly to a Roth IRA; and second, a limitation on who may convert existing retirement plans to a Roth IRA. Effective in 2010, Congress has removed the income limitations that apply to the conversion of existing IRAs and other forms of retirement plans into Roth IRAs (although the income limits on contributions to Roth IRAs continue in effect). As a result, all taxpayers, regardless of the level of their income, will be eligible to convert some or all of their existing retirement plans into a Roth IRA beginning in 2010, but the conversion will be subject to income tax.

Roth IRAs are attractive because both the assets contributed to the Roth IRA and the income earned by those assets inside the Roth IRA will not be subject to income tax when withdrawn, assuming the participant is over 59½ years old and has held the Roth IRA for at least 5 years at the time of withdrawal. In addition, the owner of the Roth IRA is not required to take out minimum distributions from the IRA each year. However, when the Roth IRA owner dies the balance in the Roth IRA will be subject to estate tax and the beneficiaries of the Roth IRA will be required to withdraw the funds remaining in the IRA over their life expectancies.

Married individuals with modified adjusted gross income in excess of \$176,000 currently are not permitted to contribute funds to a Roth IRA. For single individuals, the income ceiling is \$120,000. In addition, individuals with modified adjusted gross income in excess of \$100,000 currently

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are prohibited from converting an existing IRA or other type of qualified retirement plan into a Roth IRA.

While the income limits that apply to conversions are repealed effective January 1, 2010, the conversions remain subject to income tax. Since most retirement plans have decreased dramatically in value in the past year and income tax rates may be at a historical low, it may be that the cost of conversion at 2010 income tax rates and plan values is worth the extra flexibility provided by a Roth IRA, such as controlling when and to what extent the IRA funds must be withdrawn and the income tax-free nature of all post-conversion earnings and appreciation realized by the Roth IRA.

The new conversion rules do not require taxpayers to convert all of their existing retirement plans to Roth IRAs, or to convert all of the funds in an existing plan — partial conversions are permitted. In addition, taxpayers may either pay income tax in a lump sum in 2010 on the full amount converted, or elect to pay no tax in 2010 and instead pay the tax in two equal installments in 2011 and 2012 (at the income tax rates in effect in each of those years). However, this special rule only applies to conversions that take place in 2010.

Although it is possible to use retirement plan funds to pay the income taxes associated with the conversion of the plan to a Roth IRA, the funds used will not be available for conversion and will be subject to income tax (and also a penalty tax if the conversion occurs before the plan participant reaches age 59½). Therefore, to maximize the amount that may be converted (and thereafter withdrawn income tax-free), it is advisable to pay the income tax attributable to the conversion with other, non-retirement plan funds.

The decision to convert to a Roth IRA involves analysis of a number of variables. For example, since the amount con-

verted will be taxable at the highest marginal income tax rate to which the taxpayer is subject (or possibly a higher tax rate if the amount converted pushes the taxpayer into a higher tax bracket), is it better to prepay the tax on this amount in the year of conversion or elect not to convert and pay the tax in the year in which these amounts are withdrawn from the retirement plan, presumably after the taxpayer has retired and is in a lower tax bracket? What if income tax rates increase in subsequent years — is it better to prepay the tax at what will presumably be lower 2010 income tax rates? When will the taxpayer need to begin to withdraw the funds in the Roth IRA and how many years of income tax-free growth will the converted funds be able to enjoy in the Roth IRA post-conversion?

The analysis also is complicated by other tax rules that may apply to the conversion, such as the extent to which the converted retirement plan assets involve assets that were not deductible when originally contributed to the plan (and hence, originally subject to income tax). As a result, taxpayers are advised to consult with their tax advisors to quantify the tax costs of conversion before proceeding with a final decision on whether, and how much, to convert.

Finally, in addition to converting existing retirement plans to Roth IRAs beginning in 2010, taxpayers will be able to use the conversion technique for new contributions to nondeductible IRAs. Under current law, taxpayers can contribute to a nondeductible IRA without regard to the amount of their income and (for taxpayers age 50 and older) contribute up to \$6,000 to the IRA in 2009. In 2010 the IRA owner could then convert the IRA to a Roth IRA.

We encourage clients with retirement plans to evaluate whether the new conversion rules beginning in 2010 will provide them with advantageous tax benefits for some or all of their existing retirement plan accounts. ■

Durable Powers of Attorney – Their Use and Abuse

Durable powers of attorney (“DPAs”) are effective and popular estate planning documents that allow a person to grant another the authority to manage his or her financial affairs. In a DPA, a person known as the “Principal” grants authority to another, known as the attorney-in-fact (“AIF”), over the Principal’s property. The authority conferred may be broad and unlimited, or tailored to a particular transaction. Durable refers to the fact that the DPA will survive the incapacity of the Principal. In order to be durable, the DPA must specifically state that it survives the incapacity of the Principal.

Careful consideration must be given regarding who is appropriate and trustworthy to name as the AIF. Generally speaking, although ultimately subject to the review of a court, the acts of an AIF are unsupervised by any third party. As a result, an unscrupulous AIF can convert the Principal’s assets for his or her own use, effectively stealing property under the guise of a valid and enforceable DPA.¹ Despite this potential for abuse, the DPA remains an indispensable estate planning tool.

Why Execute a DPA?

The American Association of Retired Persons suggests that a DPA can be as important an estate planning tool as a will.² In fact, these documents are routinely included as part of a comprehensive estate plan. Without a DPA, your family would not have legal authority in most situations (other than jointly owned financial accounts) to act on your behalf should you become incapacitated. For example, without a DPA, even your spouse could not manage your retirement plans, bank accounts where the spouse was not named as a co-owner, or have authority to transfer or mortgage your interests in real property. As a result, if you were to become incapacitated, your spouse or another interested person would have to petition a court to appoint a conservator to manage your finances and act on your behalf. The process of having a conservator appointed involves a formal court proceeding that can be costly and time-consuming. (See article on page 4, “Significant Changes to Guardianships Under the New Massachusetts Probate Code.”) A DPA can be a cost-effective and practical alternative.

Authority and Duties of an AIF

A Principal may confer as much or as little authority to the AIF through the written provisions of the DPA as the Principal desires. However, generally, DPAs are drafted to give the AIF broad powers over the Principal’s property. Because the DPA is such a powerful document, the Principal must care-

fully choose who will serve as the AIF. As one court wrote, a DPA is viewed as an “extraordinary authority fraught with great possibilities of financial calamity.”³

In addition to those powers expressly written in the DPA, there are certain duties and obligations that exist under the law due to the relationship between the AIF and the Principal. Under the law, the AIF is considered to be a fiduciary⁴, and as such, must obey the will of the Principal, respond to the Principal’s wishes, and not act contrary to the Principal’s directions.⁵ The needs of the Principal should take precedence and guide the actions of the AIF. As a fiduciary, AIFs owe their Principals the duty of utmost good faith and absolute loyalty. This means that an AIF cannot engage in unauthorized self-dealing or derive any personal benefit from its position of trust without first obtaining the Principal’s informed consent.

Remedies Available When a Fiduciary Breach Occurs

Nevertheless, there are instances where AIFs violate their fiduciary duties and do not act in the best interests of the Principal. Therefore, Principals should consider whether to appoint co-AIFs who must act jointly under the DPA. The dual AIFs act as a safeguard against either AIF acting independently and in contravention of the DPA.

In addition, if someone close to or interested in the Principal’s property believes that the AIF is violating his or her duties, that person could petition the court to remove the AIF. Ultimately, the AIF could be held financially liable for breaches of his or her duties. However, such remedies can be time-consuming, expensive and emotionally exhausting to pursue. Consequently, the most effective safeguard is to choose wisely when appointing an AIF. ■

¹For example, some experts estimate that millions of dollars a year are stolen from seniors through DPA abuses. See sarasotaheraldtribune.com, June 22, 2008, (Bob Mahlborg) (“In cases throughout Florida, so-called “attorneys-in-fact” [AIFs] have taken advantage of their power by illicitly siphoning off fortunes or exploiting those they are charged with aiding. Formal statistics are lacking, but experts believe millions of dollars are stolen from seniors every year.”)

²http://www.aarp.org/families/end_life/a2003-12-02-endoflife-financialpower.html

³*Williams v. Dugan*, 217 Mass. 526, 527 (1914)

⁴A fiduciary is “one who owes to another the duties of good faith, trust, confidence and candor.” Garner, Brian, *Black’s Law Dictionary* (7th Ed.) (1999).

⁵Restatement (Second) of Agency, §§14, 33, 385.

Significant Changes to Guardianships Under the New Massachusetts Uniform Probate Code

On January 15, 2009, Governor Patrick signed into law the new Massachusetts Uniform Probate Code (the “MUPC”), which significantly reforms Massachusetts probate practice and procedure. This article will review some of the changes that affect guardianships in Massachusetts, effective beginning on July 1, 2009. As a whole, the purpose of these changes is to provide increased protections for the rights of incapacitated persons in Massachusetts.

Separation of Person and Property

Following in the footsteps of the Durable Power of Attorney, which allows you to appoint a person (called an attorney-in-fact) to handle your financial affairs should you become incompetent, and the Health Care Proxy, which allows you to appoint an “agent” to make health care decisions for you, the MUPC separates health and personal care from finances, with the “guardian” being responsible for the person and the “conservator” being responsible for the finances or “estate.” If an incapacitated person needs both personal (or medical) assistance, as well as financial assistance, the court will appoint both a guardian and a conservator. The same person may, but is not required to, be appointed in both capacities.

Nomination of Guardian and Conservator

You may nominate your choice of guardian and conservator in your Durable Power of Attorney. Unless the person you name is not qualified to act or there are other reasons or causes not to do so, the court will appoint the person or persons you have so nominated.

In the case of a minor child, in the past you could always appoint the guardian in your will. Under the new law, if a minor is over the age of 14, he or she may nominate his or her own guardian, unless the court finds this not in the best interest of the child, even if this nomination is different than the guardian you have chosen in your will. The guardian of the minor acts with the powers and responsibilities of a parent.

In the case of an adult child (over the age of 18) who is incompetent, a parent may now appoint a guardian in the parent’s will. This is an important change to the current law afforded by the MUPC.

Limitation of Guardian’s Powers

Following current Massachusetts law, the MUPC places certain limitations on a guardian’s ability to make medical decisions. Extraordinary treatments, commitment to a mental facility or the administering of antipsychotic medication must



be specially authorized. However, the MUPC also denies a guardian the authority to admit the incapacitated person to a nursing home without a special finding by the court that it is in the incapacitated person’s best interest. And, commitment to a mental health facility can now only be made by formal commitment proceedings. Both of these rules are new under the MUPC. The court may also impose other limitations it determines are appropriate.

Duties of Conservator

A conservator acts basically the same as a trustee and must follow the same standard of care as a trustee under the Uniform Prudent Investor Act. The conservator must also now file a financial plan with the probate court. This requirement is in addition to the previously required inventory and annual accountings, which must be submitted to the court.

Increased Court Supervision

Overall, in an effort to increase protection of the incapacitated person, the MUPC grants the court more authority to supervise guardians and conservators. This includes the requirement to file reports concerning the care and status of the incapacitated person (in the case of a guardian) and accountings of the assets (in the case of a conservator) at least annually. Initially, these reports must be presented in person. However, the court may, in its discretion, waive annual in-person presentation for future filings after the first year. Also new is that the court will be implementing procedures to monitor whether required reports are actually filed.

Broadened Rights of Incapacitated Persons

Finally, the MUPC grants every incapacitated person the absolute right to counsel and the right to be present at any hearing. If the incapacitated person cannot afford an attorney, the court may either appoint an attorney paid for by the Commonwealth or require the petitioner to pay for counsel.

Overall, the MUPC seeks to both limit and oversee the authority of guardians and conservators in order to protect the incapacitated person from exploitation and abuse. However, by doing so, the MUPC imposes many increased costs and burdens on guardians and conservators. ■

