Recent Developments in Elder Law

by Attorney Michael Hooker

There are several recent elder law developments. I will address two today: 1) simpler probate rules 2) long term insurance protection against Medicaid estate recovery.

Probate: A Will is a document that determines who inherits your estate and who is in charge of it. But in order to be put into effect it has to be processed through court. That process is known as Probate.

Historically it has been a cumbersome and expensive process characterized by judicial bureaucracy and delays. It has been my practice to take great pains with my clients to set up their estate so that assets pass outside the Will and we avoid Probate. For example: deeds retaining a life estate, life insurance, Trusts, annuities with beneficiary designations, transfer on death provisions and brokerage accounts.

However, after 23 years of practice in elder law I have finally witnessed something that has gotten easier! There is now a process known as "informal" probate. This is a much more streamlined approach to dealing with an estate. But it can only be pursued if all interested parties agree to it. In the past the person in charge of the estate was known as an Executor. Now the title is called "personal representative". Even though it is now easier to get a will allowed by the court and a personal representative appointed, that does not mean actually dealing with the estate's financial affairs is going to be an easy process. This process is known as settling the estate. Some examples of projects are: selling the house, liquidating stock, filing claims on life insurance policies, paying end of life expenses, filing tax returns, preparing an accounting to the beneficiaries and getting their assents. That stuff still needs to get done. So getting appointed through the simpler probate process might only be a tenth of the battle if there are still significant financial issues to deal with post mortem. But at least it is something.

Long Term Care Insurance - Protection against Estate Recovery

Long Term Care insurance (LTC) has only been available in the last couple of decades and is becoming much more prominent. It will continue to become more so as the baby boomer population continues to age. The policies generally cover nursing home costs and Alzheimer's facilities. They may also cover home care, assisted living, adult day care, respite care and hospice care (depending on the benefits you choose). In Massachusetts a qualifying LTC policy with a $50/day benefit may protect an elder's house from the Commonwealth seeking to recoup Medicaid benefits paid during the elder's life.

However, a LTC policy now must have a daily benefit of $125 to protect an estate from the Masshealth debt incurred during the end of life. ($50/day policies are grandfathered). The good news is that the elder CAN use benefits in the community and only have a modest amount of benefit left upon entry to a nursing home. That was not the case before. Prior to recent legislation a qualifying LTC policy had to have two years of benefits unused when an elder was placed in a nursing to get the protection from the Commonwealth. Now the policy just needs to be in place. So an elder can use benefits in the community and the policy will still protect against estate recovery.

You must keep in mind that having the minimum policy will not protect the assets you currently have if you are over the Medicaid threshold. In other words, if you have $300,000 in assets and only a $390/day policy, you are still going to have to pay the nursing home up to $200/day until you spend down to $2,000 ($115,000 if you are a couple) because you have too many assets to qualify for Medicaid in the first place. Estate recovery is only an issue when an elder has successfully been on Medicaid.

That said, the protection of your home against lien and your estate from recovery by even a minimal LTC policy is a pretty darn good benefit provided by the state and should not be overlooked when planning for one's future

Attorney Michael Hooker, Elder Law | 25 Main St, Suite 439 | Northampton, MA 01060
T 413-582-0200 | F 413-582-9006