

YOUR YEAR-END LEGAL CHECKUP

© 2006 Richard A. Courtney, CELA

When you read this, you should have had your flu shot and you should be making a note to buy your new smoke alarm batteries before the end of the year. (If you have trouble remembering correct cooking times and temperatures, maybe you should replace those batteries before attempting Christmas dinner!) Yes, year-end is a great time to review and replace things that need maintenance – including your personal legal affairs. Your future financial and health-related security is worth the time and effort to plan well. Here is a checklist of essential components of every family’s legal security plan, with information about some options.

1. **Check your deeds.** Real property owned with someone else as “joint tenants with rights of survivorship” on the deed will automatically pass to the surviving owner at death and not through your will or trust. Without the “joint tenants with rights of survivorship” language, then you are a “tenant in common” with them and your proportionate share of the property will pass under the terms of your will. The surviving joint owner may receive an advantageous “stepped up” tax basis in the assets at your death, resulting in less income tax to pay when they later sell the assets. The surviving owner is not required to share the property with other family members. Also, both living joint owners of real property must sign any deed or mortgage, and a power of attorney or conservatorship will be required for a joint owner who becomes mentally incapacitated in order to sell or mortgage the property. Medicaid will count the entire value of joint property as assets of either owner. A related technique is a deed with a “retained life estate”, in which you may deed land to another and retain the right to use and occupy it during your lifetime. Land passes directly to the recipient at your death and does not pass through will or probate at death.

2. **Check your bank accounts.** Bank and financial accounts may be in the names of more than one person. If the bank documents state that the account is owned “with rights of survivorship”, the surviving joint owner will automatically become the sole owner of the funds at your death, without any legal requirement to share them with other children or family members. Without such survivorship language, your estate may have to be probated at your death and the funds will pass to your heirs or as you direct in your will. The other joint owner has complete access to jointly-owned accounts and generally can freely withdraw any jointly-owned funds (possibly leaving you without funds for self-support). Jointly-owned assets may become subject to the judgments, lawsuits and bankruptcy of any joint owner. Therefore, if you want another person on your bank account for convenience, you may prefer to list that person as an “authorized signer” only rather than a joint owner.

3. **Check your beneficiary designations.** Life insurance policies, retirement plans, and annuities will pass to the person(s) designated as beneficiary of those benefits, not under the terms of your will or trust. One or more secondary beneficiaries should be named in case the primary beneficiary dies first. There are special tax rules regarding taxes on such accounts after the owner’s death, and an experienced elder law attorney can

assist you with customized beneficiary designations or trusts for such benefits to maximize tax advantages. Also, CDs or financial accounts designated as “POD” (pay on death) or “TOD” (transfer on death) accounts are paid to the named beneficiary at death and do not pass through your will.

4. **Check your will.** Without a will or living trust, state law provides that your assets (other than joint, designated beneficiary or TOD/POD assets described above) will pass in equal shares to your surviving spouse and children at your death. A properly drafted will can allow you to change those who will inherit, protect the privacy of your financial information and establish trusts to hold and manage assets for a spendthrift child. A “special needs trust” can be created to hold assets for a disabled spouse or child who receives Medicaid or SSI benefits so that the trust assets are not counted as assets of the disabled person and do not disqualify him or her for SSI or Medicaid. Such a trust can prevent a conservatorship and should only be set up by an experienced special needs trust attorney. If you’ve been told you need a “living trust”, you need to get an opinion from an experienced estate planning attorney who will discuss the pros and cons of such a trust and your personal circumstances. There are specific reasons some people should have living trusts, but they are not for everyone.

5. **Check your “living will” or health-care directive.** An “advance health-care directive” allows you to control and direct decisions about your health-care (including life-sustaining treatments) after you become disabled by selecting the most appropriate person(s) to handle such decisions and by giving directions based on your personal values. The federal Health Insurance Portability and Accountability Act (HIPAA) created stringent privacy regulations governing the release of personal medical information. Therefore, it is wise to include specific language in your directive that identifies your personal agent as your “personal representative” who is entitled to request and receive your medical information for HIPAA purposes. Your attorney should be able to furnish guidelines to help you in selecting an appropriate agent, as well as guidelines for the agent to help him/her understand how to carry out such role in the event you become unable to make health care decisions for yourself.

6. **Check your financial power of attorney.** A “durable general power of attorney” (DPOA) allows you to control and direct your personal and financial affairs after incapacity by selecting the most appropriate person to carry out your affairs with individualized directions. In the durable power of attorney document, you appoint an agent (the “Attorney-in-Fact”) and give that agent authority to make decisions for you and act in your place for those purposes stated in the DPOA. The Attorney-in-Fact may continue to act for you after your incapacity. The DPOA may give the Attorney-in-Fact all powers over your affairs and property, or only certain powers. Two important powers are to take necessary actions to qualify you for governmental benefits for long-term care and to make transfers of your assets as part of your estate plan. Where there is no DPOA, if you become incapacitated a court will have to appoint a conservator to handle your affairs and assets. Powers of attorney should be customized for your particular situation and should only be drafted (or at least reviewed) by a knowledgeable attorney who understands your goals and objectives. Simple or “cookie cutter” power of attorney

forms which do not address your specific needs can actually limit or prevent certain actions on your behalf later.

7. **Check out a Care Manager.** If you or your family members are currently (or anticipate) caring for a spouse or parent with chronic health problems, you may find professional help and relief by consulting a Geriatric Care Manager (GCM) (www.caremanager.org). A GCM is a health and human services professional with a specialized body of knowledge and experience related to aging and elder care issues. The GCM delivers care-coordination and support services with sensitivity, and is an experienced guide and resource for families of older adults and others with chronic needs. Our firm's GCM provides personalized, client-centered services to identify client health needs, obtain resources to meet those needs, coordinate health-related services of the client, and assist family caregivers in on-going care for the client with chronic health problems.

Contact the author for a review of your legal affairs. A little time now to review and renew a good plan will pay dividends in peace of mind for the future.

Richard A. Courtney, CELA, the first Certified Elder Law Attorney in Mississippi, is an Adjunct Professor of Law at Mississippi College School of Law and a charter member of the Special Needs Alliance, LLC, a nationwide network of disability and special needs planning attorneys. Contact him at 866-ELDERLAW or www.elderlawms.com.