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A GUIDE TO THE LAW FOR DENTISTS

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Who are all these people?

You can't know the players without a scorecard. And without this handy guide, you may have trouble distinguishing guardians from trustees, trustees from executors and executors from agents.

FIRST IN A TWO-PART SERIES

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A key part of your estate plan is deciding who will represent your interests after you die, or if you become disabled. There are four types of representatives to consider: guardians, trustees, executors and agents. Each representative performs a different role.

The person you name as guardian will not necessarily be the same one you name as trustee—or as executor or as agent. It's critical to select carefully the individuals or banks you want to act in these capacities because of the importance of their responsibilities.

On guard for your children's welfare

Guardians are people who act on behalf of and make decisions for those who cannot legally act for themselves. Children under a certain age—18 in most states—cannot act for themselves in a legal sense. Decisions for minor children typically are made by their guardians.

While you (or your spouse) are alive and capable of taking care of your children's welfare, there is really no need for a court-appointed guardian. You perform that role.

The need for guardians normally arises after you and your spouse are gone. In particular, any of your children who are minors at that time will require a guardian. There are two types of guardians: guardian of the person and guardian of the estate. A guardian of the person is the person allowed to make decisions for your children on matters of health care, religious upbringing and education. The guardian of the estate will determine how your children's money will be spent.

Illustration by Rob Colvin, courtesy of The Stock Illustration Source

Your choices for guardian of the person and guardian of the estate are made under your will. The same person can—and in many cases should—be named to serve in both capacities.

You may also want to name a person who will act as successor guardian in the event the first guardian you name cannot or will not act. Although the eventual decision remains with a judge, the judge will almost always follow the designation you make in your will.

What the guardians do

You may already feel comfortable with the role of and need for the guardian of the person.

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Decisions related to the health, education and religion of your children seem to be the natural work of a guardian.

What you may not fully appreciate is the role of the guardian of the estate. To understand why a guardian of the estate may be necessary, suppose you are married with children ages 2 and 5 years. If tomorrow both you and your spouse were killed in an automobile accident, what would happen to your property left outright to the children?

By leaving property to your minor children, you would create an estate for them. Because the children are minors, however, they should not actually own property. This is where a guardian of the estate becomes necessary.

The guardian of the estate would hold title to the funds on behalf of your children until they reach the age of majority. Also, the guardian of the estate would distribute funds for your children's benefit—for books, food, school supplies and other purposes.

The guardian of the estate is under court supervision and can't use the money you leave to your children without the court's authorization. Because the guardian must get court approval to use estate funds for the children's benefit, the process is slow and expensive.

Guard who you name

Whom should you name as guardian of the person and guardian of the estate for your minor children? There are a number of possibilities. You and your spouse might want to consider your parents, relatives and close friends.

Even if you have strong positive feelings about your choice for guardian of the person, you may believe that person would be inappropriate as guardian of the estate because he or she lacks knowledge of financial matters.

If you anticipate that there will not be a guardianship estate because the funds will be held in a trust for the minors, there is really no issue. But if there could be a guardianship estate, it might be appropriate to select someone else to serve in that capacity.

If you want to select a professional money manager, you could name a bank as guardian of the estate for your minor children. A downside to this: banks charge a fee to act in that capacity.

I'm not a child anymore

Guardians may also be needed for disabled adults. The definition of "disability" varies from state to state but generally refers to an inability, because of sickness or otherwise, to manage one's own financial affairs or personally take care of oneself. For example, an adult with a severe case of Alzheimer's disease often will be considered disabled under state law.

If you want to select a professional money manager, you could name a bank as guardian of the estate for your minor children. A downside to this: banks charge a fee to act in that capacity.

Because a disabled adult cannot manage his or her financial or personal health decisions, someone else needs to do it. The disabled adult may have previously nominated an agent to act for him or her by using a document known as a power of attorney. If so, that agent then has authority to, for instance, sign checks for the adult or make health care decisions.

If the disabled adult is a beneficiary of a living trust, the trustee can continue to manage the trust for the adult's benefit, even if the adult is disabled. In that case, the trustee would pay the adult's bills directly from the trust assets.

But if the disabled adult has not previously set up a trust or power of attorney, then a guardian may need to be appointed by the court to act for the disabled adult.

As with minor children, a disabled adult will need both a guardian of the person and guardian of the estate. Typically, an adult can designate in writing, before becoming disabled, who he or she wants to act as a guardian.

When the court steps in

What happens if you don't designate a guardian of the person and guardian of the estate for your minor children, or for yourself in the event you become disabled?

A judge will appoint the guardian after hearing evidence from family members concerned about the appointment. But it's best not to leave the decision to chance. The judge's selection may not be the choice you would have made.

Example: Lou is an elderly man who has had a series of massive strokes leaving him unconscious. Lou and his sister, Trudy, are very close, and Trudy has assumed responsibility for taking care of Lou. Lou also has a brother, Steve. Lou doesn't like Steve and hasn't talked to him in 10 years. Sensing an opportunity to get to Lou's assets, Steve asks the court to appoint him as Lou's guardian. Trudy challenges this request. Although Trudy is the logical choice to act as guardian in this situation—she would certainly be Lou's first choice—it's uncertain who the court will select after hearing all of the evidence. As bizarre as it may seem, the court could choose Steve, a decision that Lou would consider terrible.

Don't take it lightly

Whether you set up a trust effective during your lifetime or one that will only take effect at your passing, you need to name a trustee of the trust. Normally, you will name both an original trustee and one or more successor trustees.

A successor trustee will step in if the original trustee can't or refuses to perform. Who to name as trustee is a decision you should consider carefully because the trustee performs many important functions.

First, at least for a trust created under your will, the trustee is responsible for collecting the assets that will go into the trust. In these situations, the trustee will make sure that the executor distributes the proper amount to the trust.

A second job is to invest trust assets. A trustee should be knowledgeable about the returns and risks of various investments and should possess sound judgment. You probably wouldn't want a trustee who would consider putting your total life savings into extremely risky investments, like gold or silver, for example.

Although you can direct in the trust instrument which investments the trustee should make, often you are better served by giving the trustee broad authority over investments. You can't predict the future economic climate. And you can then rely on the trustee's expertise to make proper decisions in light of changing economic conditions.

Under the trust terms, a trustee may be required to distribute income periodically to the beneficiary or beneficiaries of the trust. The trustee must be diligent in keeping records and deciding whether to make these distributions. To do so, the trustee must know the difference between income and principal for trust accounting purposes.

Also, a trustee typically needs to file income tax returns for the trust. Except in situations where the trust is the alter ego of the grantor, the trust is a separate taxpayer, and annual tax returns typically are required.

Although the trustee often hires an accountant or lawyer to do the return, it's important to choose a trustee who knows that these tax

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returns are required and will make sure the returns are filed.

Finally, the trustee may be required to, or find it desirable to, send reports to the beneficiaries or to a court. These reports, known as accountings, list assets received by the trustee, income and principal growth, distributions made to the beneficiaries and expenses incurred by the trust. This is another reason why the trustee should have knowledge of trust accounting.

A trustee should be able to carry out all these tasks, plus have the ability to make decisions. So you should choose a trustee who is diligent, has some knowledge of finance and investing, and is trustworthy. In addition, you should ask yourself, "What is the purpose of the trust, and who are the main people I intend to benefit from the trust?"

For example, if a trust set up for estate tax purposes is mainly for the benefit of your spouse, you have to decide who should act as trustee for your spouse. This is different from asking who should act as trustee for your minor children's trust. You may name your brother and his wife as trustees for your minor children's trust. But your brother and his wife may not be the right people to be trustees of your spouse's trust.

If a trust is set up for the benefit of your children, you may name the guardian of your children's person or estate as the trustee of this trust. But you should be confident that this guardian is able to perform the trustee's functions.

Likely candidates for trustees

A trustee must have the ability to perform the many roles of a trustee. Possible choices include a trusted friend or close relative. Such a person is referred to as an individual trustee.

Another possibility is a corporate trustee—a bank or trust company that has expertise with managing trusts and is willing to assume the role of trustee.

Your decision to use an individual as opposed to a corporate trustee should take into account that trustees have the right to be paid for acting in that capacity. Although many individual trustees waive any right to a salary or ask for a reduced salary, corporate trustees want adequate pay for their services.

But your decision should not be based solely on whether the trustee charges a fee. If you can't select qualified original and successor individual trustees, corporate trustees should be considered. They have the resources to perform the trustee role well. And the fees that they charge may be worthwhile, considering the losses the trust might sustain if an unqualified individual trustee is chosen.

Another consideration is the duration of the trust. The trusteeship continues for as long as the trust continues. For example, if you have a trust for a minor child which is to continue until he or she is 35, and that minor child is 2 years old at the time the trust is created, then the trust could continue for 33 years.

An individual may be unwilling to act as trustee for that long, or may die during that period. That's one reason why it's so important to name a successor trustee or trustees.

The second part of this series, coming in the March, will review the roles of executors and agents.

Are you hip to HIPAA?

If you offer your employees health insurance, you must now comply with the Health Insurance Portability and Accountability Act.

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Until recently, workers with serious or chronic illnesses—or dependents with such illnesses—were deterred from changing jobs because of "preexisting condition" exclusions in health care coverage.

Although they may have received health insurance benefits through their new job, exclusions in the new plan could prevent them from getting coverage for the preexisting condition, their main health problem or the main health problem of a dependent.

Such employees were victims of "job lock," an inability to move freely within the employment marketplace.

As a provision in an insurance policy or employer plan, the preexisting condition exclusion eliminated treatment coverage for an illness or condition existing before the first day of coverage. It generally excluded an illness or condition if the employee or dependent had received treatment for that illness for some period of time (say, one year) before becoming eligible for coverage under the new policy.

Some policies would exclude the person from eligibility for coverage altogether if he or she had received treatment for any illness on a list of serious illnesses.

Enter the HIPAA

In an attempt to eliminate the worst features of "job lock," Congress recently enacted the Health Insurance Portability and Accountability Act, or HIPAA.

The new law severely limits insurance companies and employers from establishing and enforcing preexisting condition exclusions in insurance policies and health plans.

The law accomplishes its purpose by imposing:

- restrictions on the preexisting condition exclusions; and
- additional administrative duties on plans that contain preexisting condition exclusions.

If you employ at least one worker (in addition to yourself) in your dental office, any health insurance plan that you offer your employees now must comply with HIPAA.

Restrictions on exclusions under HIPAA:

- the six-month look back rule allows certain exclusions;
- the period during which the exclusion can be effective is limited to 12 months;
- the 12-month period is reduced by aggregate periods of "creditable coverage";
- exclusions may not apply to

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and place for a hearing. He or she also is notified of the opportunity to file a written answer to the charges before the hearing. The notice must inform the dentist of his right to appear personally and be represented by counsel at the hearing, as well as his right to present evidence and witnesses.

The hearing panel must consist of at least five people, four of whom must be members of the state dental board. An administrative officer, appointed by the department, has the power to rule on all motions, procedures and other legal objections, and is responsible for drafting a hearing report for the panel's approval.

The hearing report must set out all findings of fact, determinations of guilt on all charges and a recommendation for punishment in any findings of guilt. A committee appointed by the Board of Regents then reviews the report. The dentist in question is entitled to seven days notice of this meeting and also is entitled to appear, again with or without counsel. This committee submits a final written report to the Board of Regents which, by majority vote, makes a final decision on whether the dentist is guilty or not guilty of each charge and what penalties, if any, are merited. Such decisions can be appealed through Article 78 of the New York civil practice laws.

Unlike Illinois, the New York statute provides for the confidentiality of all files relating to the investigation of possible professional misconduct. Such files are subject to disclosure only by court order. The statute does not, however, contain any provision allowing dentists to expunge their permanent disciplinary records, either by hearing or by sheer passage of time. Once disciplined, New York dentists, like their Illinois counterparts, are powerless to alter the record.

WHAT DENTISTS CAN LEARN FROM THIS ARTICLE:

- A dentist's permanent disciplinary records are not expungible in most states, including Illinois and New York.
- Dentists are entitled to certain procedural rights under the laws of the states in which they practice, including personal service of any disciplinary charges against them and advance notice of any proposed hearing on those charges. Dentists typically may appear with counsel in disciplinary hearings and may use the expertise of counsel in answering any disciplinary charges.
- Dentists should be aware of the provisions of their own state statutes on disciplinary proceedings and disciplinary records.

Who are all these people?

A guide to understanding the roles of—and distinguishing among—guardians, trustees, executors and agents

SECOND IN A TWO-PART SERIES

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In part one of this two-part series on estate planning, the author examined the roles of guardians and trustees, people who are willing and able to represent your interests after you die or become incapacitated. Part two explores the roles of two other important members of an estate planning team—executors and agents. Well-chosen people to fill these four roles will make the sad process of dealing with a compromised life and death's aftermath easier for your family and others you love. The key in all cases is to do it now.

Illustration by Rob Colvin, courtesy of The Stock Illustration Source

The executor

An executor is the person responsible for the probate of your estate, or, in other words, someone who consolidates and manages your assets, pays debt owed by you at your death and then distributes your property to the beneficiaries named in your will. If you have no will, the executor will conduct the process under the laws of your state that apply in such circumstances.

Above all, it is critically important to take great care in selecting an executor, be it an adult whom you trust, a bank or a trust company. The person, or entity, you name as an executor should be diligent, competent and trustworthy because his or her duties can be time-consuming and complex. It's also a good idea to have a trusted attorney in place

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who can advise and work with the executor to handle your estate efficiently and properly. In your will, you can direct your executor to select an attorney of your choice.

In addition to collecting, managing and distributing your probate estate, your executor also will perform other crucial duties including the legal opening and closing of your estate through the filing of necessary court documents and supervising the filing of your final income tax returns. If applicable, your executor also will file income and estate tax returns connected with your assets.

Your executor may be involved in some critical decisions as well, decisions that could include advising beneficiaries on whether to reject interests in property, making tax choices that could change the amount of property that goes to one beneficiary or another and deciding whether to make partial distributions of assets before the estate is actually closed.

You could name one of your trustees as your executor if you hold that person in high esteem, but be advised that the two roles differ in some ways. While a trustee may act for many years, depending on the longevity of the trust, executors generally complete their role in a typical probate term of one to two years, then have no further responsibilities. For that reason, a person who may have been unwilling to act as a trustee because of the long-term nature of that role may still be willing to act as an executor, so keep your options open.

Another difference: the executor's role extends to all probate assets, while a trustee's role is limited to trust assets. Despite the differences, however, the two roles are similar in that both serve to collect, manage and distribute assets.

The executor in action

Typically, your executor will begin the process by serving notice to third parties such as banks that hold your assets. The notice usually is known as "letters of office," a court document that proves the person has been appointed executor. The bank or other entity is then protected from liability when it releases your assets to your executor.

Normally, a spouse is named as the primary agent. But a successor agent should also be named in advance in the event that you and your spouse become incapable of making decisions.

Once your executor has control of the assets, he or she should manage them through investments during the administration of your estate. Your executor will receive instruction on permissible investments if your will is written properly. If your will contains no such instruction, the executor's choices are still limited by state law.

Let's say, for example, that you leave a $350,000 probate estate and $20,000 in debt. You have also designated that your executor invest what remains after the debt is paid in U.S. bonds until distribution. This is an example of why it is so important to choose your executor carefully; your executor must be sure that the declared debt you owe is actually owed by your estate. Ultimately, the amount, increased by growth and income earned, will be paid by your executor to the beneficiaries named in your will.

During this time, your executor also receives the funeral bill, as well as any medical bills connected to your last illness. He or she collects your various unpaid utility bills as well. These are all paid from your remaining assets by your executor, who has collected your assets from banks and other entities using the court-issued letters of office.

Sometime during this period, your executor also will pay your income taxes due for the year in which you die, if applicable. If you die with real estate, your executor also may need to pay real estate taxes at this time.

Once the probate process is completed, you executor will then move on to distributing your assets to your beneficiaries, which can include charities and foundations as well as family members, friends and other individuals. Your executor can decide at this time whether to take a fee for the duties involved. Once the distribution is completed, the executor will initiate the final step of the process by seeking court approval to close the estate.

The agent

If you have a formal agent, then you have signed a power of attorney (POA) document, which allows you to grant authority for someone else to act on your behalf.

Normally, a spouse is named as the primary agent. But a successor agent should also be named in advance in the event that you and your spouse become incapable of making decisions. If you choose one of your offspring, make sure he or she is willing and able to satisfy your specific wishes. If you're unmarried or childless, consider naming your parents or siblings as primary or successor agents.

The character of the person you name as an agent may differ greatly from that of someone you named as an executor. Why? Because there are different types of POAs with different requirements.

If you choose an agent to make health care decisions for you, for example, you should be less concerned with that person's financial acumen and more concerned with that person's sensitivity and empathy toward your wishes. To put it another way, who would you want making the decision on whether to take you off of life support, if it came to that?

You also could have a property agent, which grants POA for investment of your assets and use of them on your behalf. That agent should be a person whom you trust and has a working knowledge of financial ins and outs because he or she could wind up managing and distributing your assets for a large part of your lifetime.

Two heads better than one?

During many life events two or more people may indeed get the job done better than one. But should you name co-executors, co-agents or even co-trustees?

While you may have two or three equally good choices for these roles—and you find it difficult to decide on one individual for each—dual roles should be avoided except in rare cases.

You may be adamant, for example, that two qualified individuals in your life should share a position. If you believe that, such a decision is certainly your right. Or you might want to name an individual and a bank to act as co-decisionmakers, a check and balance setup with which you feel comfortable. That too, would be a legitimate decision. The downside, however, is that anytime you have more than one person making important decisions, you increase the risk of a deadlock that often ends up resolved only with court intervention.