

Chapter Five

Advance Planning – Financial Matters



A. Planning for Everyday Financial Matters After Incapacity

1. *Current law*

The common law of agency has long permitted a person with capacity, as principal, to vest another, as agent, with the power to conduct business transactions on the principal's behalf. Under the common law, however, these powers of attorney became ineffective if the principal lost capacity.¹ They were thus unsuitable as a device for preventing financial disruption in the event of long-term incapacity.

Consequently, a new statutory tool was created: the durable power of attorney (DPA). Under Maryland law, a DPA is defined as “a power of attorney by which a principal designates another as an attorney in fact or agent and the authority is exercisable notwithstanding the principal's subsequent disability or incapacity.”²

A DPA is surely a valuable planning tool for a person with early AD. The combination of a well-drafted DPA and a well-chosen agent can assure that income will be managed and bills paid after the individual is no longer able to handle these financial matters personally.

2. *Preprinted forms*

In reality, ... many people are likely to fill out a DPA form obtained from a stationery store, the Internet, or some other source. While there is nothing inherently wrong with the use of a stock form for this purpose, the danger – especially for someone whose capacity for processing complex material may be diminished – is that the individual will sign the form and grant an agent broad authority without sufficiently understanding the consequences of the action.

Ideally, someone with early AD will obtain legal and, if need be, financial planning assistance in preparing a DPA, so that the DPA can be tailored to the person's individual needs. In reality, however, many people are likely to fill out a DPA form obtained from a stationery store, the Internet, or some other source. While there is nothing inherently wrong with the use of a stock form for this purpose, the danger – especially for someone whose capacity for processing complex material may be diminished – is that the individual will sign the form and grant an agent broad authority without sufficiently understanding the consequences of the action.

In several states, legislatively required disclosure statements help address this problem (Calvo 2002). Two years ago, a bill was introduced in the Maryland Senate to achieve this result. In addition to other provisions on powers of attorney not relevant here, Senate Bill 105 of 2001 would have required preprinted DPA forms to include a specified notice, describing the purpose and scope of a DPA and urging the reader to consider getting help: "If there is anything about this document that you do not understand, you should ask a lawyer to explain it to you." Senate Bill 105 would also have required a preprinted DPA to include substantive provisions specifying the basic fiduciary duties of the agent. The bill failed in committee; it is not clear whether any of the opposition in the committee focused on the disclosure provision.

RECOMMENDATION 5-1: The General Assembly should enact legislation requiring preprinted durable power of attorney forms (other than those used by lawyers or financial institutions under circumstances that allow for personal explanation of the document's significance) to contain a plainly

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worded disclosure about the effect of executing the document.

B. Planning for the Cost of Future Care: Long-Term Care Insurance

1. Current law

As of January 28, 2003, 52 insurers were approved to offer individual long-term care insurance policies in Maryland.³ Long-term care policies are subject to a comprehensive set of regulations, adopted by the Maryland Insurance Administration to reflect model regulations of the National Association of Insurance Commissioners.⁴

These regulations offer a variety of protections. A long-term care policy, for example, may not impose a “limit or exclusion for Alzheimer’s disease or senile dementia disorders.”⁵ Other provisions in the regulations broadly benefit both people with AD and others with serious chronic disease. For example, the regulations require that insurers offer a home health care benefit and set certain minimum standards that might foster the kind of in-home care that most people prefer.⁶

One important issue about long-term care insurance is whether consumers understand the nature of the insurance, its costs and limitations, and its relation to other aspects of personal financial planning. While many consumers will find long-term care insurance to be a valuable tool for protecting their assets, especially if a policy is purchased when they are comparatively young and premiums are affordable,

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long-term care insurance is by no means the best choice in all circumstances. Consequently, potential purchasers need access to reliable, understandable information to help them decide.

To this end, the Insurance Administration’s regulations require delivery of a buyer’s guide to prospective applicants, the format of which is developed by the National Association of Insurance Commissioners or approved by the Maryland Insurance Commissioner.⁷ The regulations also require insurers to use a standardized disclosure form titled “Things You Should Know Before You Buy Long-Term Care Insurance,” which, coupled with a personal worksheet, is intended to enable prospective purchasers to decide whether long-term care insurance is suitable for them.⁸

In light of the Insurance Administration’s comprehensive regulatory regime, we offer no recommendations about State regulatory policy with respect to long-term care insurance and AD.⁹

C. Planning to “Age in Place”: Continuing Care Retirement Communities

1. Current law

One strategy for financing long-term housing and health care needs is moving to a continuing care retirement community (CCRC). A CCRC provides housing, meals, recreational and other amenities, transportation, and health care services, usually at a single campus. A CCRC allows “aging in place.” That is, assuming that a CCRC is financially stable and well-managed, its continuum of care enables a healthy

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older person to enter a community and live independently as long as possible, with assurance that necessary medical and other care will be available in the event of AD or other disabling condition (Martin 2000; Sanders 1997). One study has shown that CCRCs with prepaid long-term care coverage hold down use of nursing home services, even after controlling for potentially confounding factors (Sloan, Shayne, and Conover 1995).

There are 31 CCRCs in Maryland.¹⁰ The financing arrangements vary widely. One CCRC, for example, indicates that its entrance fees range from \$75,000 to more than \$200,000; the fees are refundable only on a prorated basis until four years of residency, when they are no longer refundable at all. This type of “extensive” contract ensures that an individual’s future health care needs will be met regardless of available resources at the time of need, because the costs are paid on behalf of all residents from the pooled entrance fees. Under other contractual arrangements, the entrance fee would be lower or fully refundable, but some health care and related services would remain payable on an individual fee-for-service basis.

Whatever the particulars of the funding arrangement, the objectives of someone deciding to live in a CCRC are thwarted if the CCRC becomes insolvent. Preventing insolvency is a key element of State regulatory policy. By statute, anyone who seeks to operate a CCRC must, among other registration requirements, submit a feasibility study for approval by the Department of Aging.¹¹ The Department is to approve the study only if it is satisfied that the provider has “a reasonable financial plan” covering both development of the CCRC and its ongoing operation;

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a “market for the facility appears to exist”; and an authoritative actuarial forecast “supports the projections for the project.”¹² Registration renewals require updated projections.¹³ Providers are also required to meet certain requirements for operating reserves.¹⁴

In addition, the registration statute, as implemented in the Department's regulations,¹⁵ provides oversight of a CCRC's contracts and advertising materials.¹⁶ Further, the statute specifies the elements of a disclosure statement to prospective residents of a CCRC and provides for the Department's review of the statement.¹⁷ These are important safeguards for so substantial an investment.

Maryland's CCRC statute was amended recently, in 2002.¹⁸ While it is always possible to identify ways in which a consumer protection regime might be strengthened, the Attorney General's Office does not have policy recommendations at this time.

References

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Endnotes

1. The theory was that the principal had to have the ability to safeguard his or her interests through exercise of general supervision over the agent.
2. § 13-601(a), Estates and Trusts Article, Maryland Code. The statute formerly required explicit language preserving the effectiveness of the instrument in order for it to be a durable power of attorney. Now, however, the statute reverses the presumption. A power of attorney is durable unless otherwise provided within the document. § 13-601(b), Estates and Trusts Article.
3. http://www.mdinsurance.state.md.us/documents/longterm_rev01-28-03-Web.pdf (accessed August 7, 2003).
4. COMAR 31.14. See Maryland Insurance Administration, Life and Health Bulletin 02-10 (April 12, 2002).
5. COMAR 31.14.01.04B(2)(b).
6. COMAR 31.14.01.11.
7. COMAR 31.14.01.19.
8. COMAR 31.14.01.25F and .30.
9. In Chapter 9 of this report, we recommend that the State law barring genetic discrimination be extended to long-term care insurance.
10. Senate Bill 355 of 2002, Fiscal Note.
11. Article 70B, § 10(d) of the Code.
12. Article 70B, § 10(d)(2), (3), and (5).
13. Article 70B, § 11(e).
14. Article 70B, § 11B.
15. COMAR 32.02.01 and 32.02.02.
16. Article 70B, § 10(e)(6), (e)(9), and (f).



17. Article 70B, § 11BC

18. Chapter 150, Laws of Maryland 2002.