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Seniors and Special Needs News - November 13, 2015

1 message

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With help, seniors and people with special needs can keep some of their assets in the family rather than lose their entire life savings to the costs of long term care. They can use these protected assets to enhance their quality of life beyond what long term care alone will provide.

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The Koewler Law Firm
 JAMES L. KOEWLER, JR.



Seniors and Special Needs News

Legal Issues when someone has Dementia

"Incompetence" Determination in Guardianships

This week's newsletter continues the discussion of Legal Issues when someone has Dementia. The introductory installment ([April 30, 2015](#)) put forth the issue of "Who can speak for someone with dementia?" The [May 14, 2015](#) installment discussed the situation where the person with dementia has Advance Directives in place. The [May 21, 2015](#) installment discussed the legal issues in determining whether a dementia sufferer can choose to have new Advance Directives prepared. The [May 30, 2015](#) installment discussed options in preparing a Health Care Power of Attorney. The [June 4, 2015](#) installment discussed how to decide whether to prepare a Living Will. The [June 11, 2015](#) installment discussed some of the basic issues in preparing a General Power of Attorney. The [June 18, 2015](#) installment discussed the importance of making the General Power of Attorney "durable." The [June 25, 2015](#) installment discussed the importance of NOT making the General Power of Attorney "springing." The [July 2, 2015](#) installment discussed revoking prior Powers of Attorney. The [July 9, 2015](#) installment discussed Do Not Resuscitate orders. The [July 16,](#)

2015 installment discussed the Right of Disposition designation. The July 23, 2015 installment discussed the Will (or Last Will and Testament.)

The July 31, 2015 installment discussed beneficiary designations on life insurance policies, IRAs, annuities, etc. The August 6, 2015 installment discussed whether to pre-plan a funeral. The August 14, 2015 installment discussed choosing a final resting place. The August 27, 2015 installment discussed pre-planning a funeral ceremony. The September 3, 2015 installment discussed when and how to pay for the pre-planned funeral. The September 10, 2015 installment discussed medical insurance choices. The September 17, 2015 installment discussed long term care insurance. The September 24, 2015 installment discussed obtaining the services of an elder law attorney. The October 1, 2015 installment introduced the topic of guardianship. The October 8, 2015 installment discussed the guardianship application. The [October 22, 2015](#) installment discussed the family conflicts that can arise during a guardianship proceeding. Today's installment will discuss the Probate Court's examination of the alleged incompetence of the proposed ward in a guardianship proceeding.

When the person's disease has taken away the decision-making ability and the person has not prepared advance directives appointing someone else to make decisions, the next legal alternative is guardianship. A guardianship proceeding forces the Probate Court to determine whether the proposed ward is, in fact, unable to handle his or her own affairs. Such a finding is called "incompetence" in eyes of the law.

In determining whether the proposed ward is incompetent, the probate court must decide whether the person is "so mentally impaired [as to be] incapable of taking proper care of the person's self or property." (Ohio Revised Code section 2111.01(D)) If the application for guardianship has an accompanying statement from a health care professional supporting the applicant's claim that the proposed ward is incompetent and the court investigator supports the claim of incompetence, the court must have a hearing.

In order to rule that the proposed ward is incompetent, the court must receive "clear and convincing evidence." Anything short of "clear and convincing" is not enough to judge someone incompetent (in Ohio, anyway.) How tough is the "clear and convincing" standard? If you hit me with your car and I sue

you for car repairs and medical costs, I must give the court evidence that shows the collision to be, more likely than not, your fault. This more likely than not is called "preponderance of the evidence." Any evidence that leaves the court more than 50% convinced that the collision was your fault allows the court to rule in my favor. Now, let's imagine that the county prosecutor believes that you hit me on purpose and wants to imprison you for attempted murder or vehicular assault or any other crime he or she can find to fit the circumstances. The prosecutor must convince the court more than the "preponderance of the evidence" standard. To convict you of a crime, the prosecutor must convince the court that you intended to hit me by providing evidence that leaves the court "beyond a reasonable doubt" that you wanted to hit me. Unless you've never seen Perry Mason or Law & Order, I suspect that you have some familiarity with "beyond a reasonable doubt." While the law does not assign a percentage on how sure the court must be to find something "beyond a reasonable doubt," I describe it as 75% sure.

Actually, there is a real life example of the difference between "beyond a reasonable doubt" and "preponderance of the evidence." O.J. Simpson was not penalized criminally for his alleged murder of Nicole Brown Simpson and Ronald Goldman because the jury in the criminal court was not convinced beyond a reasonable doubt that he killed the victims. The Goldman family, though, sued Mr. Simpson for its personal losses from the death of Mr. Goldman, and the court in this civil case ruled that the Goldman family had proved by a "preponderance of the evidence" that Mr. Simpson had killed Mr. Goldman. As a result, Mr. Simpson didn't go to prison for murder, but virtually his entire net worth (and future earnings) were awarded to Mr. Goldman's family. The difference was the burden of proof.

"Clear and convincing evidence" is even stricter than "beyond a reasonable doubt." Unfortunately, I can't think of any examples, in real life or in fiction, to demonstrate "clear and convincing evidence." However, I describe it as 90% sure. (As a public policy concern, it takes less proof to send someone to prison or even to the death penalty than it does to declare someone incompetent to handle his or her own affairs.)

As a practical matter, the standard of proof does not matter if the proposed ward does not oppose the guardianship request. If there is no opposition, the

medical statement attached to the application and the probate court investigator's findings provide enough evidence for the court to make a ruling. If the proposed ward opposes the guardianship request but does not receive help from family members or friends, the probate court can get a pretty good look at how the proposed ward handles himself or herself and can make a reasoned determination on the proposed ward's ability to "take proper care" of himself or herself. If, though, a family member or friend helps the proposed ward oppose the guardianship request, the "clear and convincing evidence" standard is such a high hurdle that the guardianship application can usually be defeated. The involvement of the family member or friend can help a proposed ward, even a proposed ward who should be declared incompetent, avoid (metaphorically) stumbling over himself or herself in court.

Suggest a Newsletter Topic

I try to write something new (and useful) in my newsletter every week. So, I know that I will sometimes have writer's block. I'd like your help, please.

If you have a topic for my newsletter that you'd kindly suggest, I promise to consider it. (I don't promise to pursue it. I just promise to consider it.) I try to write about issues concerning seniors, health care, long term care, special needs, Veterans Pension (aka Aid and Attendance) benefits, and Veterans Compensation benefits. Please keep your suggestions within or near to those topics.

Please submit your suggestion [here](#). If I use your topic suggestion, I'll put the content in both my blog and newsletter.

Thank you for your help.

Social Media Posts from the past week

11-12-2015 Instability of #Military life especially tough when family has child with #Autism <http://ow.ly/TNCRC>

11-11-2015 #FamilyActivities that can include #AgingParents <http://ow.ly/U5tLM>

11-10-2015 Explanation of #LongTermCareInsurance <http://ow.ly/Uni6C>

11-09-2015 Possible sources of money to help pay for
"LongTermCare <http://ow.ly/UnjvX>

11-08-2015 #ColdWeather #Safety tips for #AgingParents <http://ow.ly/U5u7n>

11-07-2015 Connection between #LouGehrigsDisease and
#Veterans <http://ow.ly/U5t68>

11-06-2015 "My Care Ohio" (People on both #Medicare and #Medicaid)
Enrollment for 2016 <http://wp.me/p47F09-fY>

Older social media posts can be found in the [social media post archive](#) on the
firm's website, ProtectingSeniors.com.

The Koewler Law Firm News

11-10-2015 Jim Koewler discussed VA Benefits that can help pay for Long
Term Care at Marymount Hospital in Garfield, Heights, Ohio. Continuing
education credit is available for Certified Case Managers, social workers,
counselors, and nurses.

11-12-2015 Jim Koewler discussed Ethical Issues in Case Management and
Discharge Planning at Mercy Medical Center in Canton, Ohio. Continuing
education credit is available for Certified Case Managers, social workers,
counselors, and nurses.

11-13-2015 The Koewler Law Firm will have a table display at the
Wadsworth Community Center Field House & Soprema Senior Center in
Wadsworth, Ohio and, during the event, will offer chair massage for care
partners.

11-24-015 Jim Koewler will discuss What Seniors Know about Long Term
Care that is Wrong at the Summit County Senior Services Network in Akron,
Ohio. Continuing education credit is available for social workers,
counselors, and nurses.

11-25-2015 Jim Koewler will discuss Ethical Issues in Case Management
and Discharge Planning at Medina General Hospital in Medina, Ohio.
Continuing education credit is available for Certified Case Managers, social
workers, counselors, and nurses.

11-30-2015 Jim Koewler will discuss Medicare, Medicaid, and the

Affordable Care Act ("ObamaCare") at Nelson Stud Welding in Elyria, Ohio.

12-3-2015 Jim Koewler will discuss Veterans benefits that can help pay for long term care at the Donna Smallwood Activities Center in Parma, Ohio. The program is open to the public and organized by the CommuniCare family of companies.

Older items of firm news can be found in the [news archive](#) on the firm's website, ProtectingSeniors.com.

Jim's available presentations

- Overcoming Seniors' Resistance to Long Term Care (Continuing Education credit available for social workers, counselors, nurses and Certified Case Managers)
- Ethical Issues in Case Management and Discharge Planning (Continuing Education credit and Ethics credit available for social workers, counselors, nurses, and Certified Case Managers)
- Preventing Senior Fraud (Continuing Education credit available for social workers, counselors, and nurses)
- My Care Ohio and Medicare/Medicaid "Dual Eligibles" (Continuing Education credit available for social workers, counselors, and nurses)
- Navigating Medicaid, Medicare, and the Affordable Care Act (Continuing Education credit available for social workers, counselors, and nurses)
- What people Know about Long Term Care that is Wrong (Continuing Education credit available for social workers, counselors, and nurses)
- Government Benefits that can help Pay for Long Term Care (Continuing Education credit available for social workers, counselors, and nurses)
- Legal Issues for People with Dementia (Continuing Education credit available for social workers, counselors, and nurses)
- Veterans Benefits for Long Term Care (Continuing Education credit available for social workers, counselors, and nurses)
- Advance Directives – Powers of Attorney, Living Wills, etc. (Continuing Education credit available for social workers, counselors, and nurses)
- Buying Long Term Care Insurance Wisely (Continuing Education credit available for social workers, counselors, and nurses)
- Planning Ahead to Protect against Long Term Care Costs (Continuing Education credit available for social workers, counselors, and nurses)
- Organizing for Long Term Care (Continuing Education credit available for social workers, counselors, and nurses)
- Pre-planning your Funeral (Continuing Education credit available for social workers, counselors, and nurses)
- Elder Law: A Primer (Continuing Legal Education credit available)
- Legal Lessons for Life
- Protecting your Money when you need Long Term Care and Essential Estate Planning Considerations (with free living wills for up to 20 audience members)
- Myths about Long Term Care Costs
- How to help your Parents Manage their Affairs

Upcoming meetings

11-16-2015 Medina County Senior Services Network's Education Committee, Yours Truly, Medina, Ohio, 11:30 a.m.

11-17-2015 UH Bedford Medical Center Senior Network, Solon Senior Center, Solon, Ohio, 8:30 a.m.

11-18-2015 Geauga Professional Association Specializing in Seniors ("PASS"), The Weils, Chagrin Falls, Ohio, 8:30 a.m.

11-19-2015 Parma Hospital Senior Resource Network, Hummingbird Pointe, Parma, Ohio, 8:30 a.m.

11-19-2015 Portage Senior Services Network, Family and Community Services Building, Ravenna, Ohio, 8:30 a.m.

11-20-2015 Eldercare Professionals of Ohio, Cornerstone of Hope, Independence, Ohio, 9:00 a.m.

11-24-2015 Summit County Senior Services Network, Anthony Kucko Kertesz Funeral Home, Akron, Ohio, 8:00 a.m.

11-24-2015 Professional Networking Group, Hospice of the Western Reserve, Cleveland, Ohio, 8:30 a.m.

11-24-2015 Wayne Holmes Senior Service Coalition, Wayne County Care Center, Wooster, Ohio, 8:30 a.m.

12-01-2015 Aging Services Network of Euclid, Euclid Hospital's Waltz Auditorium, Euclid, Ohio, 8:30 a.m.

12-01-2015 Summit Senior Sales, Administrators and Marketers Association social worker dinner, Rosemont Country Club, Fairlawn, Ohio, 5:00 p.m. (registration at 4:30)

12-02-2015 Stark Senior Services Network, Canton Regency, Canton, Ohio, 3:00 p.m.

12-02-2015 Richfield Chamber of Commerce luncheon, Days Inn and Suites, Richfield, Ohio, 11:45 a.m.

12-02-2015 Medina County Senior Services Network's Client Services Committee, Sully's, Medina, Ohio, 3:00 p.m.

12-09-2015 Medina County Senior Services Network, Medina County Office for Older Adults, Medina, Ohio, 8:00 a.m.

12-09-2015 Geauga Professional Association Specializing in Seniors ("PASS"), Care Corp, Chardon, Ohio, 8:30 a.m.

12-09-2015 Summit Senior Sales, Administrators and Marketers Association holiday party, West High Apartments, Akron, Ohio, 2:30 p.m.

12-10-2015 Professional Networking Group Holiday Luncheon, Grande Village, Twinsburg, Ohio, 12:30 p.m.

12-14-2015 Medina County Senior Services Network's Education Committee, Yours Truly, Medina, Ohio, 11:30 a.m.

Newsletter Archive

Past issues of this newsletter can be found in the [newsletter archive](#) on the firm's website, ProtectingSeniors.com.

Contact Jim Koewler

If you'd like to contact Jim, this newsletter has a dedicated [contact page](#) on the firm's blog site, ProtectingSeniorsNews.com.

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