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Substantive Law Track – Session 8

Myths about Elder Law & the Power of the POA

Presented By:
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About the Presenters...

Margaret W. Hickey practices in the areas of divorce, family law, and elder law including trusts for the disabled, title 19 and guardianship. She is a shareholder in the law firm of Becker, Hickey & Poster, S.C., Milwaukee, and received her B.A. from Marquette University (1982, *summa cum laude*), where she was *Phi Beta Kappa*, and her J.D. from the University of Wisconsin Law School (1986, *cum laude*). Margaret is a past Chair of the State Bar of Wisconsin Elder Law Section Board of Directors and a past Chair of the Family Law Section Board of Directors. She is a past President of the Milwaukee Bar Association (President 2004-05) and served on the Board of Directors from 1999-2005. Margaret currently serves on the State Bar of Wisconsin Board of Governors (District 2, 2005-09, Chair 2006-07) and will serve as Treasurer of the Board from 2009-11. Margaret also serves on the Board of Directors of the Legal Aid Society and public radio station WUWM. Margaret lectures frequently at local, state and national bar meetings and to community groups and other professionals on elder law and family law topics. She has served on the board of Aurora Family Service, Rosalie Manor and the Village of Shorewood. Margaret is a member of the American Bar Association, the State Bar of Wisconsin, the Milwaukee Bar Association, the National Academy of Elder Law Attorneys, and the Association for Women Lawyers and she is a Fellow of the American Bar Foundation and the American Academy of Matrimonial Lawyers (President for the Wisconsin Chapter, 2005-06.) She is named in the Best Lawyers in America for family and elder law and has been named as a "Super Lawyer" in elder law. She was also named in the top ten lawyers in Wisconsin by Super Lawyers (2012).

Dayna J. Lefebvre is a shareholder at Becker, Hickey & Poster, S.C., Milwaukee, and practices in the areas of elder law, special needs planning, estate planning, guardianships, and probate and trust administration. Dayna speaks and writes extensively on the topics of elder law and special needs planning and was an adjunct professor at Marquette University Law School, where she taught Estate Planning and Gift & Estate Tax courses. Dayna serves on the Board of Directors for the Wisconsin Chapter of the National Academy of Elder Law Attorneys and co-chairs several committees and workgroups for the Chapter. She also serves on the Insurance and Member Benefits Committee for the State Bar of Wisconsin and previously served as Co-Chair of the Elder Law Section of the Milwaukee Bar Association from 2015 to 2019.

MYTHS ABOUT ELDER LAW AND THE POWER OF THE POA

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WHAT DOES AN ELDER LAW ATTORNEY DO?

Estate Planning v. Elder Law

Guardianship & Conservatorship

Long-Term Care Planning
- Long-Term Care Insurance
- Facility Choice
- Transition Planning
- Home Care Planning & Case Management
- Public Benefits
  - Medical Assistance
  - Veteran's Benefits
  - Social Security Benefits

Special Needs Planning
- Special Needs Trusts
- Transition Planning
- Supported Decision-Making

MYTHS ABOUT ELDER LAW

MYTH #1: Medicare and private health insurance cover long-term care costs

FACT: Medicare covers short-term rehabilitation stays after a qualifying hospital stay and covers hospice services, but does not cover long-term care outside of these two extremes. Private health insurance generally provides no long-term care coverage. Some policies offer limited rehab coverage. Medicaid (i.e. Medical Assistance or Title 19) is the federal health insurance program. There are many types of Medicaid, one of which is long-term care benefits. The Medicaid long-term care program fills the gap between short-term rehab and end-of-life hospice care.

MYTH #2: Medicaid is only for poor people

FACT: Medicaid is a means-tested program, meaning that recipients must meet assets and income limits to qualify for coverage. The Medicaid program does not count all assets in determining eligibility for benefits, and not all assets are created equal under Medicaid rules. The classification and structure of assets can create planning opportunities and even result in some high-net-worth individuals being eligible for Medicaid benefits with no planning required.

MYTH #3: I have to use all of my assets before I can apply for Medicaid

FACT: There are numerous planning strategies to protect assets from long-term care costs and assist individuals and couples to qualify for Medicaid while retaining ownership or the benefit of their assets. Some of these options include:

1. Carefully planned gifting
2. Short-term loans and promissory notes
3. Annuities
4. Family law strategies, such as divorce, property division, and spousal support
5. Special needs trusts
6. Irrevocable trusts
7. Marital property agreements
8. Purchase of exempt assets

MYTH #4: The social worker knows the rules for Medicaid and should complete the Medicaid application

FACT: Social workers are not trained in Medicaid planning strategies. While they are sometimes familiar with the basic financial eligibility requirements, they are rarely familiar with the nuances of Medicaid eligibility. In addition, especially in the past years, caseworkers make frequent errors in the processing of Medicaid applications. Without assistance, this can lead to eligible individuals not receiving Medicaid benefits for which they qualify. In most cases, clients will benefit from working with an experienced elder law attorney in their Medicaid planning and application.

MYTH #5: I can give away $17,000 per year to protect my assets from long-term care costs

FACT: Divestment (i.e. giving away assets or income for less than fair market value) in the five years prior to applying for Medicaid can result in serious penalties. The tax and Medicaid gifting rules are different and have different penalties. Examples of divestment that result in denial or delay in qualifying for benefits include gifting, paying relatives for services or care, paying expenses of other people, funding a trust, refusing to accept assets or income to which a person is legally entitled, and selling assets for less than fair market value. There are exceptions to these divestment rules. In addition, with careful planning, these divestment rules and the associated penalties can be used in the client's favor.

MYTH #6: The State will take my home if I receive Medicaid

FACT: This may be the most common concern clients have when they meet with us, especially in the case of married couples. In fact, the State does not “take” Medicaid recipients’ homes. Especially in the case where a Medicaid recipient or his or her spouse is still living in the home, the State has an interest in the Medicaid recipient or couple being able to continue to live in and support the cost of their home. However, there are circumstances where the State can file a lien against a Medicaid recipient’s home for repayment of Medicaid benefits (“Estate Recovery”). In other cases, the Medicaid patient liability or cost share can make supporting the expenses of home ownership, especially in the case of a single person, difficult. Luckily, we are often able to work with clients to protect the value of what is usually one of their most significant assets: their home.

MYTH #7: My revocable trust will protect my assets from long-term care costs.

FACT: All trusts are not created equal. Revocable trusts popular tools to transfer assets at death outside of the probate process. However, they do not generally offer protection from long-term care costs. Most assets in revocable trusts are <u>countable</u> assets for purposes of Medicaid eligibility.

MYTH #8: I don’t need powers of attorney. My family knows what I want.

FACT: Powers of attorney are <u>vital</u> estate planning documents for every individual age 18 and older. If an individual is unable to make his or her own decisions, and if he or she does not have valid powers of attorney, court-supervised guardianship will be required. Wisconsin does not have a default statute that allows a spouse or other family member to make decisions without a valid power of attorney or guardianship.

MYTH #9: Medicaid provides free long-term care.

FACT: Most people are required to pay a portion of their income toward long-term care costs while they are on Medicaid. This is generally called “patient liability” or “cost share.” There are planning strategies to reduce the patient contribution in some cases. However, the patient liability or cost share will be a fraction of the private pay cost of long-term care and is limited to the Medicaid recipient’s available countable income.

MYTH #10: It’s too early (or to late) for us to protect our assets from long-term care costs.

FACT: In most cases, we can engage in planning that will help to protect assets from long-term care costs, regardless of when we are brought into the process. We have significant opportunities for pre-planning, such as establishing robust powers of attorney, carefully planned gifting and trust strategies, estate planning, long-term care insurance, and strategic use of assets for expenses. However, the vast majority of our clients have not engaged in pre-planning and we are being consulted when they are in crisis or the need for long-term care is imminent.

<u>THE MOST IMPORTANT TOOL IN ELDER LAW:</u>
<u>GENERAL DURABLE POWER OF ATTORNEY</u>

WHAT IS A GENERAL DURABLE POWER OF ATTORNEY?

A General Durable Power of Attorney (GDPOA) is a document in which a principal grants authority to an agent to act in the place of the principal. *See* Wis. Stat. §244.02(9). The statute does not require that the document be specifically identified as a power of attorney.

Wisconsin Statutes Chapter 244 governs the creation and operation of a General Durable Power of Attorney (GDPOA). In 2010 Wisconsin adopted the Uniform Power of Attorney Act developed by the National Conference of Commissioners of Uniform Laws. The purpose of this Act was to provide default definitions, a statutory form Power of Attorney for Finances and Property document, and default guidance where documents were silent as to termination, the authority of co-agents, and other issues. This presentation will provide an in-depth review of select sections of the statutes. However, we strongly advise that you take the time to familiarize yourself with these statutes fully prior to preparing a GDPOA.

A General Durable Power of Attorney <u>is not</u> a signature card at the bank or a joint owner on a bank account. In addition, the bank's Power of Attorney form for a bank account is not a substitute for a GDPOA, and could, in fact, invalidate a client's GDPOA.

The State of Wisconsin Department of Health Services has prepared a form Power of Attorney for Finances and Property, which can be found at https://www.dhs.wisconsin.gov/forms/advdirectives/f00036.pdf. While this document may be acceptable for some clients, in our opinion the vast majority of clients will benefit from an attorney-drafted GDPOA document.

EXECUTION REQUIREMENTS
§244.05

To execute a GDPOA, the principal must sign the document. Alternatively, if the principal cannot physically sign, the principal can direct another individual to sign on behalf of the principal in the principal's conscious presence. The signature of the principal is presumed to be genuine if the principal's signature is notarized. Many financial institutions will not accept a GDPOA if it has not been notarized.

In many cases, the attorney will be making a determination as to the capacity of the principal. Proper planning at an earlier date will avoid potential challenges to the document due to allegations of incapacity. If there is doubt, the attorney may consider consulting with the principal's physician or suggesting that the family retain a geriatric social worker or caseworker to assess the capacity of the principal.

EFFECTIVE DATE
§244.09

Immediate Power

The GDPOA is effective when executed unless the principal provides in the GDPOA that it becomes effective at a future date or upon the occurrence of a future event or contingency (a "springing power"). *See* Wis. Stat §244.09. For most clients, making the GDPOA effective when executed will be preferable. The most common reasons that individuals find it helpful to make the power effective immediately are:

1. International Travel. We live in an extremely mobile society. When individuals are traveling overseas and need assistance accessing their finances or personal information in the event of robbery, lost passport, etc., it is helpful to have an individual in the U.S.A. who can assist with coordination of replacement passports and sending funds. In addition, those in the military may find it helpful to have a person named stateside to handle their financial affairs while they are deployed.

2. Physical Impairment. For individuals with physical disabilities, it is often helpful to have the assistance of the agent under the GDPOA, even though the principal retains capacity to make financial decisions him or herself. In addition, as individuals age, they sometimes no longer want to manage their own financial affairs, even though they retain capacity.

3. Missing Principal. In cases where a principal cannot be located, for whatever reason, it is helpful to have an individual in place to pay bills, manage financial and contractual matters, etc. until the person can be located or is declared deceased.

4. Convenience. Especially in spousal cases, it can be helpful if the spouses can act for one another, even if both have capacity. For example, if an offer is received on an asset that is being sold and one spouse is traveling or otherwise unavailable, the spouse who is present can sign for the absent spouse.

Springing Power

However, in some cases the principal may not feel comfortable knowing the agent has the ability to act now. In those cases, a springing power may be more appropriate. It is important to be very precise when drafting springing GDPOA language so that the triggering event can be clearly identified and documented.

If a springing GDPOA does not clearly define a triggering event, Wisconsin Statutes §244.09 makes the determination that the GDPOA will be effective upon a determination that the principal is incapacitated. Incapacity is defined in §244.02(7) of the statutes. If the GDPOA does not nominate a person to make the determination of incapacity, the statute allows a physician, psychologist, attorney, judge, or governmental official to make the determination through a written statement.

It is also important for the client to understand that fulfilling the requirements of the triggering event may involve delay. For example, if a physician decision is required, it may take weeks or even months to get an appointment with the physician required. Alternatively, the principal may refuse to visit the physician or otherwise be evaluated.

Finally, if you draft a springing power, you should also consider including language "unspringing" the power. For example, if the GDPOA is activated in the event of incapacity and the person subsequently regains capacity, is there a mechanism under the GDPOA to transfer authority back to the principal?

AGENT SELECTION
§244.11

Agent selection is generally the most important consideration when preparing a GDPOA. Some of the important things to consider are:

1. Trustworthiness. This should be the most obvious trait. If a principal has doubts or reservations about the agent's trustworthiness, nomination of that agent should be carefully considered. If the principal is adamant about his or her choice, then the GDPOA document must be carefully drafted to limit the agent's authority and protect the principal.

2. Relationship with the principal and with other members of the principal's family. We all know that people love to fight about money. This seems to be especially true when an agent is acting on behalf of a principal and a sibling, grandchild, friend of the family, etc. disagrees with or does not fully understand the actions taken by the principal. Therefore, it is important to consider relationship dynamics when choosing agents under a GDPOA.

3. Financial acuity. The nominated agent does not need to be a financial advisor or financial genius. However, the individual should be responsible with money and should understand the assets and income of the principal. If the nominated agent has filed bankruptcy three times, do you really want that individual managing the principal's finances? If the nominated agent has never owned or managed real estate and the principal owns several commercial rental properties, is the nominated agent going to be prepared to manage those properties?

4. Organizational skills. Again, this should go without saying. If a nominated agent has a habit of missing deadlines, losing documents, and other issues related to disorganization, does the principal really want to entrust that individual with his or her financial affairs?

5. Geographical proximity. This consideration has become less important in today's world of instant communication. Most financial affairs can be managed by fax, email, online banking, etc., so the ability to appear at a bank or other financial institution is rarely required. However, in some cases geography may still be an important consideration. If there is a business or similar hands-on endeavor that the agent will be expected to manage, geographical proximity can still be an important factor when choosing an agent.

A principal may designate two or more persons to act as co-agents. Under Wis. Stat. §244.11(1), unless the power of attorney states otherwise, each co-agent may exercise his or her authority independently. Therefore, if the client wants to require co-agents to work jointly, this desire must be explicitly stated in the document. That being said, most financial institutions are unaware of the statutes and the requirements contained therein. Often, if co-agents are named, the financial institution will require joint action, even though the statute states that the agents can act independently. Therefore, if the client's intention is to name co-agents to act independently, it is wise to include that language in the document, regardless of the fact that by default under the statute the co-agents have authority to act independently.

Use of co-agents should be carefully thought out and the risks and benefits should be discussed with the principal. For example, if the co-agents are required to act jointly, they will both have to sign every check, agree to every expense, and sign every document. This becomes administratively difficult if agents are spread across the country, or even internationally. It is extremely important that the co-agents get along, whether they are being asked to act jointly or independently. If you are naming co-agents, I strongly recommend including tie-breaking language in the GDPOA in the event that the co-agents are unable to agree.

A principal may and should designate one or more successor agents who will act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. Under Wis. Stat. §244.11(2), a principal may grant authority to an agent or other person to designate a successor agent if the event there is no agent willing to serve.

TERMINATION

Termination of Document: Wisconsin Statutes §244.10(1) provides that a power of attorney document terminates when any of the following occurs:

1. The principal dies.
2. The principal becomes incapacitated, if the power of attorney so provides.
3. The principal revokes the power of attorney.
4. The power of attorney provides that it terminates.
5. The purpose of the power of attorney is accomplished.
6. The principal revokes the agent's authority or the agent dies, becomes incapacitated or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

Termination of Agent's Authority: Wisconsin Statutes §244.10(2) provides that an agent's authority terminates when any of the following occurs:

1. The principal revokes the authority.
2. The agent dies, becomes incapacitated, or resigns.

3. An action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides.

4. The power of attorney terminates.

5. The domestic partnership of the principal and agent under Chapter 770 is terminated unless the power of attorney otherwise provides.

POWERS REQUIRING SPECIFIC AUTHORITY §244.41

Wisconsin Statutes §244.41 lists certain authority that must be expressly granted to the agent within the document. If the document does not specifically authorize the following actions, the agent cannot take these actions on behalf of the principal.

1. Create, amend, revoke, or terminate an inter vivos trust.

2. Make a gift. In addition, if the principal wants the agents to be able to make gifts of the principal's assets to themselves, the document must specifically authorize that gifting authority. *See* Praefke v. American Enterprise Life Insurance Co., 257 Wis. 2d 637 (WI Ct. App. 2002). If the document does not specifically authorize the agent to gift to him or herself, any such gifting will violate the prohibition against self-dealing under Wis. Stat. §244.07(2)

3. Create or change rights of survivorship.

4. Create or change a beneficiary designation. Creating or changing a beneficiary designation may be a wonderful power to have if an obvious error is discovered in the client's estate plan or in the case of a change of circumstances. However, this is authority that could be abused and is an example of an authority that needs to be reviewed on a case-by-case basis and carefully drafted.

5. Delegate authority granted under the GDPOA.

6. Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.

7. Exercise fiduciary powers that the principal has authority to delegate.

8. Disclaim property, including a power of appointment.

ELDER LAW CONSIDERATIONS

This is where long-term care and public benefits planning opportunities can be maximized or limited. The GDPOA is often the most powerful tool in an elder law attorney's arsenal. Often, individuals in need of elder law assistance no longer have capacity to execute a GDPOA. In those cases, elder law attorneys are limited by the powers in the existing GDPOA. In cases where there

is no GDPOA or the GDPOA is severely limiting, guardianship is often required to move forward with elder law planning.

Below is a list of powers that Medicaid attorneys rely on when assisting clients to qualify for Medicaid benefits.

1. Marital Property Agreements: The authority to enter into, amend, or revoke Marital Property Agreements, including a Marital Property Agreement that relinquishes the principal's marital property rights. This authority is used in almost every spousal Medicaid case to protect assets from Estate Recovery. It is important to consider whether you want the spouse, acting as agent, to be able to sign the Marital Property Agreement on behalf of the principal. If yes, that must be clearly spelled out to avoid allegations of self-dealing.

2. Retirement Assets: The authority to liquidate retirement assets. Liquidation of retirement assets is often required in Medicaid cases as part of spend down planning.

3. Insurance: The authority to surrender life insurance policies, change ownership of life insurance policies, and change beneficiaries on life insurance policies. Surrender of life insurance policies is often required in Medicaid cases as part of spend down planning. In addition, changing ownership of the policy and changing the beneficiary can be helpful in funeral planning and in asset preservation in spousal cases. Many attorneys will also build in limitations on who the new owner or the new beneficiaries can be (i.e. in line with estate planning, upon the written advice of an attorney, etc.)

4. Annuities: The authority to purchase annuities and change beneficiaries. Annuities that meet the Medicaid requirements can be extremely helpful in Medicaid planning as they allow for a variety of strategies in both spousal and individual cases. Medicaid has strict rules about how the annuity must be set up and who must be named as beneficiaries when annuities are owned by Medicaid applicants or their spouses. *See* MEH §§16.7.4 & 17.11.

5. Loans: The authority to make loans on terms that the agent believes are fair and reasonable can be helpful in Medicaid planning, especially in spousal cases or cases where divestment occurred and care during a penalty period will need to be funded. Again, if the agent will be permitted to make loans of the principal's assets to him or herself, the GDPOA document must clearly spell that out to avoid issues of self-dealing.

6. Gifting: Planned gifting is often used by Medicaid attorneys. It is wise to include limitations on gifting to avoid abuse, such as requiring a third party to make the transfer or requiring the written advice of an attorney for tax or Medicaid planning purposes. However, at a minimum, gifting to the spouse should generally be included. In spousal cases, within a year of Medicaid enrollment, all but $2,000 in countable assets must be transferred to the non-Medicaid spouse's name. *See* MEH §18.4.6.

7. Trusts: The authority to create and fund irrevocable trusts, special needs trusts, and pooled and community trusts (such as WisPACT). Special needs trusts play an important part in Medicaid planning. Limitations on beneficiaries of these trusts can be included to protect clients from abuse.

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