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POWERS OF ATTORNEYS & NURSING HOME CONTRACTS— BEWARE!

A recent New York case, *Troy Nursing & Rehabilitation Center, LLC v. Naylor and Gaetano*, 2012 NY Slip Op. 03243 (App. Div. 3d Dept., April 26, 2012) deals with a situation where the nursing home sued not only the nursing home resident but his daughter as agent under a Power of Attorney for \$80,509.55. The nursing home sued on the basis that the daughter agent had signed the Admissions Agreement with the nursing home whereby she agreed to use her authority to access her father's funds to pay the facility's charges and to pay damages if she failed to do so.

At issue is the fact that the daughter agent used her father's income for other purposes, such as maintaining his prior residence (including paying for telephone, housekeeping, newspaper and cable costs) for which she nor her father had any responsibility to pay, since the house had been transferred to an irrevocable trust prior to his entering the nursing home. The Trial Court granted summary judgment in favor of the nursing home and against Mr. Naylor and Ms. Gaetano for the \$80,509.55. On appeal, the Appellate Division, 3d Dept., reversed the summary judgment holding and remanded the case back to Supreme Court to make a determination of what assets were now owned by Mr. Naylor's Estate, ostensibly to see if those assets were sufficient to pay the nursing home debt. Presumably, if there were sufficient assets in Mr. Naylor's Estate, the nursing home can be paid and there will be no further issue.

However, if there are not enough assets in his estate, then I suspect the Supreme Court would still hold the daughter agent responsible for the balance due to the nursing home and on appeal, it would be very likely the Appellate Division would feel the same.

So what does all this mean? Be very cautious when acting as an agent under a Power of Attorney for someone else and dealing with nursing home contracts. Our first advice would be to have the nursing home resident sign his or her own contract, if possible. Failing this, we recommend that any agent in the position of having to sign a nursing home contract consult with a qualified attorney first to understand fully what the agent's obligations are going to be and how best to protect themselves from potential claims that may arise pursuant to the contract. It is important for any agent to understand that he or she must act in the best interest of the principal. That is the new (2009) standard imposed on agents under a Power of Attorney. However, equally as

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Merry Christmas & Happy New
Year from all of us at
Brooks & Brooks, LLP

Teddar, Kameron,
Judy, Linda, Val, Lauren,
Mary & Amber

HEALTH CARE PROXY LAW UPDATE

In our September-October 2012 newsletter, page 2, we reported that a recent amendment to the Health Care Proxy Law had been passed by the legislature and had been sent to the Governor for signature. Once it was sent to the Governor, the legal community's expectation was that he would sign it. After several weeks, I was able to confirm that the Governor in fact did not sign the bill, thus is not the law. No explanation was given. We will continue to follow this situation and advise if new legislation is proposed and passed that will somehow pass muster with the Governor. It seemed to us that this was a rather benign addition to the Health Care Proxy Law, which would certainly benefit New Yorkers. Why the Governor did not sign the bill is a mystery and no explanation has been offered.

DIGITAL ASSETS:

Plan for Passing them on like you would any other asset.

Digital assets are now the new kid on the block and are beginning to cause a stir in the estate planning world. So, what are these "digital assets"? They include data, internet accounts, contractual rights and intellectual property rights such as manuscript drafts, blogs, domain names, eBay accounts, in addition to email, social media and electronically created records.

Of biggest concern might be a person's own literary creations, exotic recipes or formulas. With more people working from home these days, there is an increasing likelihood that a person's work product on a computer or other electronic device may have intrinsic value, not to mention sentimental value. As I write this article, I am reminded of the thousands of pictures I have on my personal computer at home. What happens to all of these photos, some which may have commercial value, when the owner dies?

What provisions have we made in our trust or will that passes this type of asset on to beneficiaries?

New York has an estate exemption for immediate family members, N.Y. Estates Powers and Trusts Law § 5-3.1(a), which includes among other items electronic and photographic devices and computer tapes, discs and software, DVD's, CD's, audio tapes, record albums and other electronic storage devices. Does this also include a person's personal literary content on the computer's hard drive? It may or may not. In any event, these items by law pass to close family members (spouse or children, etc.). But what happens to Flickr photo albums, Facebook profiles, YouTube videos residing in cyberspace and locked behind passwords and security settings? These must be addressed separately.

This "new" class of assets is something we all must consider and make sure that we pass them on with deliberate thought and certainty.

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important is understanding what contractual relationship one is entering into when signing a contract on behalf of the principal. Typical nursing home contracts impose liability on agents for failing to use the principals' income and/or assets to pay for nursing home care. We have had numerous clients contact us to review nursing home contracts and many times we prepare addendums to the contract to be sure the agent, on behalf of the principal, can exercise all of the principal's rights under Federal and New York Law to do Medicaid Planning.