PENNSYLVANIA LEGAL UPDATE

SUMMER 2007 ISSUE

NEW LAWS ON LIVING WILLS

The language of Pennsylvania's recently updated law on living wills starts with the clear reminder that "[y]ou have the right to decide the type of health care you want." The new law, which went into effect in January 2007, does not make your existing living will invalid, but it clarifies and expands the previous preferred legal format for living wills.

"Living wills" are not wills at all—they have nothing to do with passing on your money and assets to your heirs. Instead, living wills are documents that state your preferences for end-of-life medical care.

The new law renames the recommended document title. The new title, "Durable Health Care Power of Attorney and Health Care Treatment Instructions," more accurately describes the far more comprehensive document now recommended for use by Pennsylvania residents. The new document covers not only end-of-life decisionmaking, but also permits you to appoint a health care agent to make medical decisions for you even if your condition is not life-threatening. It also permits you to give specific directives and requests to your health care providers, as well as to include language regarding organ donation.

Because the newly recommended language for living wills is substantially expanded in the new law, it is a good time to review your living will or, if you do not have an existing living will, to arrange to draft one. All medical directive documents are an important part of your health care and financial planning and should be tailored to your specific personal preferences, as well as to your health care philosophy and spiritual beliefs.

SPOUSAL PRIVILEGE

One of the most ancient legal privileges is the spousal privilege. Pennsylvania law still recognizes that a husband and a wife may refuse to testify against each other in a criminal proceeding—the privilege belongs to the witness spouse.

Pennsylvania also recognizes that where "confidential communications" have been made by one spouse to the other, neither spouse may testify in any civil or criminal proceeding unless the other spouse waives the privilege. Communications between spouses are presumed to be confidential unless proven to be otherwise.

As with all rules, exceptions exist. Where a spouse seeks to avoid testifying about facts that he or she observed, he or she has no privilege if the charges include murder or serious sex crimes. The privilege also does not apply to cases involving certain kinds of domestic violence. In all such cases, a spouse can be subpoenaed and required to testify about facts that he or she observed. However, in all cases, both criminal and civil, unless the non-witness spouse waives the spousal privilege, spouses can never testify against each other about their confidential communications. The blanket protection given to confidential communications arises from social respect for the intimacy and privacy of marriage.

The extent of the spousal privilege was recently tested in a case where a husband drove across a four-lane highway and struck another car, killing its driver. The husband was injured and had no recollection of the accident.

During the investigation, the husband's wife called the police and voluntarily shared information regarding the husband's former drug use, his current participation in a methadone program, and his treatment for bipolar disorder, depression, and dementia. She disclosed the names of the prescription drugs that the husband was taking for his psychiatric conditions.

At the time of trial, the wife refused to cooperate further and refused to testify. The court first determined that the legal issues were not related to confidential communications because the wife was simply refusing to testify about all of her knowledge and observations. However, because

the husband was not charged with murder, serious sex crimes, or domestic violence, the wife was entitled to exercise her privilege to refuse to testify. When she did so, her former statements were not admissible at trial.

The privileges between attorneys and clients, health care providers and patients, counselors and clients, and clergy and parishioners are all similar to the spousal privilege and are all subject to different exceptions. The entire body of law surrounding witness privileges focuses on the social values placed on the relationships and on the need to protect the privacy and trust inherent in those relationships.

HOME BUYERS AND SELLERS: READ YOUR AGREEMENT OF SALE

Most Pennsylvania home buyers and sellers sign a written agreement of sale as part of their negotiations. A buyer signs the agreement as part of making an "offer," while a seller signs the agreement to signify acceptance of the buyer's offer. In most residential real estate purchases, the agreement used is the Pennsylvania Association of Realtors Standard Agreement for the Sale of Real Estate. Home buyers and sellers can view a sample of the form at *www.parealtor.org*.

While it may seem long and confusing, all buyers and sellers should read and thoroughly understand their entire Standard Agreement of Sale (SAS). In addition to establishing the obvious terms, such as the price of the home and the timing of the buyer's responsibility to make a down payment, the SAS identifies just what is being bought and sold and to whom. All parties should pay careful attention to the property description and address. All owners must be listed as sellers, and anyone taking title must be listed as a buyer.

What Are Fixtures?

"Fixtures" are items that are considered part of the real estate. Upon closing, a buyer is entitled to all of the fixtures in the home. Chandeliers, ceiling fans, pool and spa equipment, and

window shades all are listed in Paragraph 4 as items that are included in the sale as fixtures. Recent changes to the SAS added the following items to the list of fixtures: sump pumps, storage sheds, mailboxes, existing window screens, storm windows, screen/storm doors, and awnings.

Buyers and sellers may add items to the list of fixtures and may also delete them. Reviewing Paragraph 4 of your SAS is an important part of making sure that you understand the deal you are entering into. A seller who wants to keep his or her storage shed or a buyer who expects to get the dining room curtains each needs to make changes to Paragraph 4.

Contingencies

The “contingencies” in the SAS are very important. These are the various paragraphs that permit a buyer or a seller to back out of the deal if certain things do not happen. If, for example, the buyer opts for the homeowners’ insurance contingency paragraph, he or she will be entitled to back out if homeowners’ insurance is not available on reasonable terms.

Increasingly, buyers are finding that insurance carriers may require repairs or improvements to an existing home before agreeing to issue a policy of homeowners’ insurance. The insurance contingency permits the buyer to act quickly in applying for homeowners’ insurance and gives the buyer a chance to refuse to buy the home if homeowners’ insurance is too expensive or if the insurance company requires considerable repairs or alterations to the home. Buyers who opt for this contingency must strictly meet the deadlines for notices and for termination of the agreement. Otherwise, the contingency fails.

Inspections

Buyers should always use the inspection contingency clauses of the SAS. Inspection clauses for property condition, wood infestation, radon, water, and sewer are all included in the SAS. The inspection section starts by identifying various options that the parties will follow if the inspections reveal defects. Each of the inspection sections has a blank space for the deadline date for inspection completion. The dates do not have to be identical. Before agreeing to any deadlines,

wise buyers will find out how much time their various inspectors need. Buyers using more than one inspector should take the time to set different completion dates for inspections if necessary to meet the needs of their various inspectors. Buyers must also appreciate that most sellers do not want long inspection periods no matter how busy a buyer's chosen inspectors may be.

Location for Closing

The SAS also provides that the final closing will occur where the property is located or in an "adjacent" county. "Adjacent" is not the same as "adjoining." Believe it or not, Pennsylvania courts have been called on more than once to determine what "adjacent" means. An adjacent county is one that is "close to or lying near" the county where the property is located. An adjoining county is one which is "next to or contiguous to" the county where the property is located. Therefore, the reference in the revised SAS to an "adjacent" county means nothing more than a nearby county—it does little to clarify where your closing should take place.

Because lenders and title companies can influence where a settlement takes place, a seller who does not want to have to travel out of town to attend the closing may want to insert language in the SAS at Paragraph 3 identifying precisely the county and/or town where the closing will be held.

Zoning Issues

Paragraph 18 requires that, where the township, borough, city, or any local governing body has issued a notice of any municipal code or zoning violation, the seller has an absolute responsibility to share the notice with the buyer. Failure to share the notice triggers an automatic responsibility on the part of the seller to make all required repairs.

Where a zoning violation is concealed by a seller, even innocently or due to an oversight, a "repair" certainly is not an option since it is probable that the municipality will not forgive a zoning violation. But other municipal violations may be solved by repairs. This responsibility for "repairing" extends beyond and after the closing and is a serious and long-term liability for sellers.

However, since a seller can meet his or her obligations simply by sharing all municipal notices with the buyer, this provision is a problem only for sellers who attempt to conceal or who are remarkably careless about municipal violations.

Buying or selling a home is exciting and full of time pressures. Taking the time to slow down and read the Agreement of Sale is fundamentally important for buyers and sellers alike.

AUTO ACCIDENTS AND POST-TRAUMATIC STRESS

Automobile insurance policies carry "first-party medical benefits," which are the benefits owed by automobile insurance companies to pay for medical care for those injured in automobile accidents.

Recently, a woman suffered post-traumatic stress disorder following her husband's death. The woman and her husband were crossing a busy street when he was struck by a car and killed. The woman was not physically injured at the scene of the accident but shortly thereafter was diagnosed as suffering from post-traumatic stress disorder, for which she received ongoing medical treatment.

When she tried to collect first-party medical benefits to pay for her treatment, the insurance company refused to pay, taking the position that first-party benefits are available only for "bodily injury" claims arising from automobile accidents. The insurance company assumed that the woman was not entitled to coverage because she suffered no bodily injury. She sued for coverage and won. The Pennsylvania Superior Court ruled that post-traumatic stress disorder is a "disease," and, as such, it fell within the policy definition of "bodily injury," which included the term "disease."

Post-traumatic stress disorder is a serious condition. While most people who experience traumatic stress do not develop post-traumatic stress disorder, medical treatment is necessary for those who do. Pennsylvania law now recognizes that first-party medical benefits must be made

available to people whose injuries in automobile accidents include post-traumatic stress disorder.

SLIP AND FALL AND A DUTY TO WARN

Landowners and occupiers are responsible for keeping their buildings and grounds reasonably safe for visitors. Pennsylvania courts have noted that owners of businesses open to the public do not have to guarantee the safety of all customers and business visitors—they are not the "insurers" of the public's safety. But a business owner is responsible for the injuries suffered by patrons if the owner either knows of a potentially dangerous condition of the business premises or should know of the condition, and fails to correct it or warn customers about it.

Recently, a Pennsylvania grocery store chain was sued by a shopper who was badly injured when she fell after colliding with a store employee's cane. The employee, who was blind, was at the end of a store aisle and extended his cane into the path of the shopper. The shopper was rounding the corner, coming out of an adjacent aisle, and did not see the blind employee or his cane.

The injured shopper claimed that the grocery store chain had a duty to warn its patrons of the risks associated with the presence of a full-time, blind employee who frequently walked the aisles of the store. The Pennsylvania court dismissed the shopper's lawsuit. The court found that the shopper "essentially classifies blind people as a harmful condition," and the court soundly rejected that characterization.

Instead, the court focused on a shopper's duty to exercise ordinary care. Because grocery stores, "with aisles bordered by high shelves stacked with merchandise," pose obvious dangers, shoppers must be on the lookout for hazards. Those hazards, the court noted, include shopping carts that "suddenly jut out," other customers' feet, or even someone's cane. Shoppers must exercise extra care when entering or exiting aisles, looking for obstacles before moving ahead.

The court also noted that everyone realizes that disabled people are capable of work and

that everyone expects to encounter disabled people in public places, either in the role of a patron or in the role of an employee.