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NJ's New Death With Dignity Act Explained

The Importance of Beneficiary Designations in Estate Planning

planning matters

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NJ's new death with dignity act explained

by Elizabeth Candido Petite, Esq.

New Jersey's passage of the "Aid in Dying for the Terminally Ill Act" makes it the eighth state in the nation to allow terminally ill patients to request medication to end their lives. The bill was signed into law by Governor Murphy on April 12, 2019, and became effective on August 1, 2019.

In brief, the new law allows New Jersey residents who are terminally ill to obtain medication from their physician that will likely result in death a few hours after it is ingested. Specifically, the law requires:

- The person must be a "qualified terminally ill patient," which is defined as a capable adult who is in the terminal stage of an irreversibly fatal illness, disease, or condition with a prognosis, based upon reasonable medical certainty, of a life expectancy of six months or less. This status must be determined by the person's attending physician and confirmed by a consulting physician.
- The patient must make two oral requests and one written request for the medication. At least 15 days must elapse between the two oral requests. The written request may be made at the same time as the first oral request or any time thereafter. It must be signed and dated by the patient and witnessed by at least two unrelated individuals. At the time of the second oral request, the physician must offer the patient the opportunity to rescind the request.
- The physician must inform the patient of the potential risks of ingesting the medication, the probable result of taking the medication, and alternatives to taking the medication, including additional treatment options, palliative care, hospice care, and pain control.
- The medication must be self-administered by the patient.
- Physicians' participation is entirely voluntary. However, those who choose to participate and comply with the requirements of the law are immune from civil and criminal liability.

It is important to note that the patient must be a capable adult. This means that a guardian, attorney-in-fact, health care representative, or other type of agent cannot act on behalf of the patient to request life-terminating medication. Only the patient can do so. The patient's instructions in an advance directive or living will for another person to seek such care on the patient's behalf will not be effective.

In addition, the medication prescribed must be administered by the patient himself or herself. This distinguishes the law from "assisted suicide," "mercy-killing" or "euthanasia," all of which imply that another person has helped cause the patient's death.

The law also provides that the patient's life insurance policy, annuity contract, and the like cannot be affected by the patient's decision to avail himself or herself of this law. For example, if a life insurance policy contains a provision that the company will not pay any benefits upon the insured's suicide, the patient's death under this law will not be considered a suicide and the benefits under the policy must be paid. It is also anticipated that the patient's death certificate will list the underlying illness as the cause of death, rather than the medication that was prescribed, to protect the patient's privacy. Doctors, however, are required to report to the state the number of prescriptions they write to patients and how many of their patients' deaths are a direct cause of ingesting the medication.

The New Jersey law also encourages doctors to counsel their patients on discussing their decision to terminate their lives with family members, although doing so is not mandatory.

Terminally ill New Jerseyans who are interested in obtaining life-terminating medication under the new law should consult with their physicians and discuss their decision with family members and any other trusted advisors. In addition, such individuals should review their estate planning documents (such as wills, trusts, and beneficiary designations) and make any desired changes before proceeding with their decision.

> Studies from Oregon, where a similar law has been on the books for over 20 years, show that about two-thirds of the patients who are prescribed life-terminating medication will in fact ingest the medication. It appears that many terminally ill Oregonians are comforted by the fact that they can end their lives at the time and manner of their choosing, even if some choose not to. In fact, the three most common end-of-life concerns that lead these patients to the decision to end their own lives include: (1) loss of autonomy; (2) no longer being able to participate in activities that make life enjoyable; and (3) loss of dignity.

the importance of **beneficiary designations** in estate planning

by Anne Marie Robbins, Esq.

When a person signs a will (or a will coupled with a revocable trust) in order to set forth a plan for the distribution of his or her estate following death, he or she often believes the estate plan is complete. But if the person has failed to carefully consider the beneficiary designations on life insurance policies, retirement accounts, and other assets, and coordinate those designations with the estate plan, the result following death may be quite different from what was intended.

Wills do not override beneficiary designations; rather, beneficiary designations ordinarily take precedence over wills. For example, if a will leaves everything a testator owns at the time of death to the spouse, and testator has a $1 million life insurance policy on which the couple's three children have been designated as equal beneficiaries, the life insurance passes to the children at testator's death, not to the spouse. This result arises because the language of the will works only to distribute the assets that are part of the testator's "probate estate," meaning those assets in testator's sole name without beneficiary designations.

Examples of assets not part of the probate estate are assets with beneficiary designations (usually life insurance and retirement accounts, and sometimes bank and brokerage accounts), any assets with a "POD" (pay on death) or "TOD" (transfer on death) designation, and any assets titled in the names of two or more people as "joint tenants with right of survivorship" or "tenants by the entireties."

examples of undesired consequences

The following are examples of undesirable results that can arise from a failure to coordinate the beneficiary designations and title of assets with the estate plan:

1. Your will provides that if one of your children predeceases you, that child's share of your estate passes to his or her descendants per stirpes (this means your child's children would share equally their parent's share of your estate). Your will also provides trusts to manage assets passing to your grandchildren under age 30.

   If you name your children as "TOD" beneficiaries on a brokerage account and one of your children predeceases you, whether your grandchildren receive their parent's share as you intend depends on the beneficiary designation form, which could provide that the other beneficiaries named (i.e., your other children) are the recipients of the predeceased child's share. Even if the beneficiary designation form provides what you want (that your grandchildren receive their deceased parent's share) there will be no trust to age 30—instead the institution itself could hold the funds until the grandchildren reach age 18, with no ability for anyone to access the funds for their benefit unless a guardian is appointed, and with full distribution to the grandchildren when they reach 18.

2. You are a widow with two children. Your will gives everything to your children equally. Your primary assets are your house and a large bank account, roughly equal in value. You change the title on your house to you and your daughter as joint tenants with right of survivorship, and you name your son as the POD designee on the bank account. When you die, the house has appreciated by 20%, but the bank account value has remained the same. At your death, the assets pass directly to your children as a result of the title and beneficiary designation, rather than to them under your will. You intended to treat your two children equally; however, the joint ownership title and POD designation had the effect of benefiting your daughter to the detriment of your son.

3. Your will gives all of your assets to your wife, or if she predeceases you, to your trustee to hold in a special needs trust for your adult son, who is developmentally disabled and resides with you and your wife. Your son is applying for Medicaid and other governmental benefits and should not receive any assets outright as this will disqualify him. You have a life insurance policy that names your wife as primary beneficiary with no contingent beneficiary named. However, the policy provisions indicate that in the absence of a named contingent beneficiary, the proceeds will pay to your then living descendants per stirpes.

   Your wife predeceases you. On your death, unless you change the beneficiary designation, the proceeds will be paid to your son outright rather than to the special needs trust under your will. While your son could create a Medicaid qualified trust for his own benefit, such a trust must include a payback provision.

4. New Jersey law provides that when a divorce judgment has been obtained, unless the parties have agreed otherwise the spouse is automatically removed as a beneficiary and fiduciary from any estate planning documents, and is also removed as a beneficiary of any life insurance policies; however, this is not the case regarding employer-provided retirement accounts. Assume you have a 401(k) plan and your marital settlement agreement with your second wife provides this account is entirely yours. You meant to change the beneficiary from your ex-wife to your children from your first marriage, but had not done so at the time of your death. New Jersey law does not automatically negate the 401(k) plan beneficiary designation as a result of the divorce, and your ex-spouse may be able to claim the account. While your estate and your children may have a claim against your ex based on the marital settlement agreement, the time and expense associated with proving that claim could have been avoided had the beneficiary designation been appropriately changed.

takeaways

(a) The way assets are titled can also serve, in effect, as a beneficiary designation. For example, an asset titled in two or more persons as "joint tenants with right of survivorship" will pass on one joint owner's death to the surviving joint owner or owners. Be careful how your title your assets, and be aware that if you name a joint owner, that person is the one who will receive the asset at your death.

(b) Do not fall into the trap of completing a beneficiary designation on an account that shouldn't have one because the account agreement gives the option of naming a beneficiary. Do not rely on the advice of a low-level bank or investment firm employee about completing a beneficiary designation—always check with your estate planning attorney and other professional advisors to be sure any beneficiary designation is in keeping with your estate plan.

(c) A judgment of divorce can override beneficiary designations in some states, but do not rely on the law. If you are divorced, be sure your beneficiary designations are updated to reflect the marital settlement agreement with your ex-spouse, and also work in concert with your post-divorce estate plan.

(d) Review your beneficiary designations periodically, and be sure to do so after a major event in your life, such as retirement, birth of a grandchild, death of a beneficiary, etc. Be aware that your beneficiary designations are as important as your will and other documents, and should be considered an integral part of your estate plan.

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