Ruder Ware

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# Elder Law Advisor

Summer 2017

## What is probate and what does it involve?

Probate is the process of administering and settling an estate after a person dies. The probate process, in general, includes the following steps:

1. Filing the will and petition with the probate court in order to be appointed personal representative. In the absence of a will, heirs must petition the court to be appointed "administrator" of the estate.
2. Collecting the assets. This means you have to find out everything the deceased owned. You need to file a list, known as an "inventory," with the probate court. It's generally best to consolidate all the estate funds to the extent possible
3. Paying bills. Bills and bequests should be paid from a single checking account, either one you establish or one set up by your attorney, so that you can keep track of all expenditures.
4. Filing tax returns. You must file a final income tax return for the decedent and, if the estate holds any assets and earns interest or dividends, an income tax return for the estate as well. The estate will have to obtain its own tax identification number in order to keep track of such earnings. If a state or federal estate tax return is needed it must be filed within nine months of the date of death.
5. Distributing property to the heirs and legatees. Generally, personal representatives do not pay out all of the estate assets until the three to four month period runs out for creditors to make claims. Once the personal representative understands the estate and the likely claims, he or she can distribute a portion of the assets, retaining a reserve for unanticipated claims and the costs of closing out the estate.
6. Filing a final account. The personal representative must file an account with the probate court listing any income to the estate since the date of death and all expenses and estate distributions. Once the court approves this final account, the personal representative can distribute whatever is left in the estate and finish his or her work.

## What's the difference between a guardianship and a power of attorney?

Both a guardianship and a power of attorney (financial or health care) are tools available to you in order for someone to act on your behalf when you become incapacitated. With a power of attorney, you choose who you want to act for you. In a guardianship proceeding, the court chooses who will act as guardian.

A power of attorney is a document that is part of your overall estate plan. In it, you name the person you want to act (your agent) in your place to make financial or health care decisions for you. Your agent typically does not have any authority to act until you have been determined to be incapacitated. A financial power of attorney can be limited to a specific transaction (e.g., purchasing real estate) or give your agent very broad powers.

Power of attorney documents are meant to avoid the need for a guardian to be appointed. Sometimes, however, the appointment of a guardian is necessary. Guardianship is a legal relationship between the guardian and the person who because of incompetency is no longer able to take care of his or her own affairs (the "ward"). To help protect the rights of the ward, a court must determine whether a guardianship is appropriate and who should serve as the guardian.

In Wisconsin, a guardian can be appointed to make decisions related to finances (guardian of the estate) and related to health care (guardian of the person). The same person can be named to act as both the guardian of the person and the estate. At times, it is appropriate to name co-guardians. However, care should be taken to ensure there is a way for the guardians to break any ties when they each determine that a different course of action should be taken to care for the ward.

The court proceeding determines what rights the ward retains. The court must determine that the guardianship is the least restrictive means to care for the ward. The court will want to know whether other, less restrictive alternatives have been tried, such as a power of attorney.

## Can I create a trust in my will to benefit my husband if he ever needs Medicaid?

Yes, you can create a trust in your will for your husband's benefit. This type of trust is known as a testamentary trust. Under Medicaid rules, you can only leave assets in trust for your husband and have those assets not count against him for Medicaid purposes if the assets are left in a testamentary trust. Because only testamentary trusts receive this type of special treatment, this is one example of when subjecting your estate to the probate process can be advantageous. In addition, if you leave assets in a testamentary trust for your husband, he will not be able to be the trustee of that trust.

## *Save the Date: 2017 Fall Elder Law Seminars*

Protect Your Assets
Medical Assistance & Long-Term Care Planning

Presentations by Attorney Aric Burch

October 9, 2017 @ Holiday Inn & Suites, Rothschild, WI

October 5, 2017 @ Holiday Inn 94 South,
Eau Claire, WI

Visit www.ruderware.com for details.

## Around the State and Nation

Aric Burch attended:

- The NAELA Annual Conference in Boston, Mass. on April 22-28, 2017
- The WI NAELA Unprogram in Door County on June 22-23,2017

## *About the Author*

### Attorney Aric Burch

Planning for how you or a loved one will pay for nursing home care can be a daunting task. As an elder law attorney, Aric works with seniors and their loved ones to prepare for possible long-term care needs. His goal is to alleviate stress by helping clients develop a plan to provide for their long-term care needs, while preserving their assets to supplement their quality of life and pass to future generations. His motivation is to find solutions for clients who are preparing for future life transition and care needs or are in need of immediate qualification for medical assistance benefits.

## Elder Law Services offered by Ruder Ware include:

- Nursing home and long-term care planning
- Asset protection
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- Medicare and Medicaid benefits
- Social Security benefits
- Insurance analysis (including long-term care insurance)
- Residential housing and other living options
- Planning for individuals with special disabilities
- Tax planning
- Durable powers of attorney for property and finances
- Health care powers of attorney
- Wills
- Trusts
- Marital property agreements
- Real estate
- Guardianship
- Conservatorship

## Elder Law Team

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