Details Matter

By Penny B. Kassel

For the first four years of my legal career, I handled medical malpractice matters almost exclusively. For the past 33 years, my practice has been devoted entirely to elder law matters. Perhaps because of my experience with malpractice cases, I often think to myself that the field of elder law is ripe for committing malpractice.

First of all, most elder law attorneys see a high volume of clients. Each case presents with different facts and issues, all of which must be addressed with a full command of current laws. Elder law practitioners must keep up to date with changes to the laws related to: Medicaid, Medicare, taxes (gift/estate/capital gains), trusts, wills and guardianships, among other things. On top of that, we must follow up with our clients to ensure that they complete a proposed estate plan, sign all documents properly and file the documents in the appropriate place. Just keeping track of all of the clients, the status of their documents, estate plan, Medicaid application, for example, is a monumental task. It is so easy to miss details, but the consequences of overlooking just one small thing can be great and can create a tremendous amount of exposure to liability for the attorney.

Many clients come to the office alone, many come with their children. When a client comes to the office to execute a document alone, such as a Power of Attorney, we supervise the execution knowing that we must follow up with the agents, often children, to sign as well. Often that can be done at a later time without any problem.

While meeting recently with two clients who retained me to prepare and submit a Medicaid application for nursing home care, I noticed a problem—a big problem. Both clients had been to other well-established and respected elder law attorneys. Both had executed a properly drafted Medicaid asset protection trust and funded it with their homes. The transfers of the respective properties had been done more than five years prior. Naturally, both clients were under the impression that their homes were protected, and now their spouse needs nursing home care.

Since the terms of the trusts were proper and I noted that the deeds to the homes were dated more than five years prior, I concentrated on gathering other relevant information about the potential applicant's assets and transfers. Toward the end of the meetings, I looked more closely at the dates of the trusts, deeds and the signatures of the parties. The trusts were dated at the beginning of the instrument and that date was the same as the date of the deeds. Then I looked a little further and noticed that although the grantors signed the date of the deed and the "date" of the trust, the trustees did not sign the respective trust instrument until a later date. Probably eager to get everything signed with the client in the office, the attorneys apparently supervised the signing, dated and notarized, without thinking about the fact that the respective trust was not yet in effect as it had not been fully executed. As a result, in both instances the transfer of the real property to the "trust" was never effectuated because there was no trust yet in existence. Of course, the clients were shocked to learn that their largest asset, which they thought was protected, was not.

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Per New York's Estates, Powers and Trust Law § 7-1.17:

> (a) Every lifetime trust shall be in writing and shall be executed and acknowledged by the person establishing such trust and, unless such person is the sole trustee, by at least one trustee thereof, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument.

This is a mistake that any of us could make, but it is a reminder of how important it is to pay attention to all the details, no matter how routine they may appear to be at the time.

Penny B. Kassel is a partner with McLaughlin & Stern, LLP. Prior to joining M&S, Kassel had her own law firm for 30 years. With a Master's Degree in Counseling and after working for a pharmaceutical company, Kassel spent many years handling personal injury and medical malpractice cases. For more than 33 years she has devoted her time to estate planning and administration and to elder law matters. Kassel presents seminars and discussion groups to attorneys and lay people with regard to elder law matters and guardianships for elderly or infirmed/handicapped family members. She is a frequent lecturer for medical facilities, bar associations, financial planners and community organizations.