

Illinois Legal Update

Insights and Developments in the Law

Winter 2008

Power of Attorney for Health Care and Living Will

In This Issue

Power of Attorney for Health Care and Living Will 1

Vacation Home Tax Treatment..... 2

A Sign Does Not an Employee Make 2

Illinois Courts Increase Warranty Protections..... 3

Good Guys Can Finish First 3

Small Business—Maintaining a Safe Workplace 4

Under Illinois law, two methods for protecting your rights and wishes are available when you are unable, due to medical reasons, to make decisions yourself. The Power of Attorney for Health Care (POAHC) and the Living Will allow you to specify, in advance, the

The POAHC has a broader scope of available options than does a Living Will.

medical measures to be taken to preserve your life should you become unable to yourself. While both methods ensure that your wishes will be respected, there are significant differences between the two.

Power of Attorney for Health Care

The POAHC allows you to designate an agent to make medical decisions or to take care of your affairs on your behalf should you

be unable to do so. The POAHC has a broader scope of available options than does a Living Will. You designate a trusted individual, usually either a family member or a close friend, to make decisions on your behalf.

In drafting your POAHC, you can designate the power of attorney to take effect when you sign it or at some future time, such as a specific date or upon the occurrence of a specific event. For example, you could designate your power of attorney to take effect on your 70th birthday, or when you are unconscious or otherwise unable to make decisions regarding your medical treatment.

The POAHC also allows you to designate the specific powers granted to your agent. You can designate as little or as much power as you want. Some people may only be comfortable allowing their agent to make decisions on the appropriateness of medical treatment to be administered, while others may want their agent to be able to pay their bills and take care of their

Continued on page four.

Vacation Home Tax Treatment

An owner of a second home that is both rented out and put to personal use at different times in any given year should bear in mind the considerable differences in income tax liability that flow from how the two types of uses are allocated. Each year, for tax purposes, the home will be considered as either a

The bottom line is that treatment of a vacation home as rental property is advantageous for the owner.

residence or rental property, with important differences in the resulting tax calculations. The bottom line is that treatment of the home as rental property is advantageous for the owner, and keeping down the personal use of the property allows it to be so characterized.

If personal use of the second home is less than the greater of 14 days or 10% of rental days, the home will be considered rental property. Flowing from this classification is the ability to deduct repairs, maintenance, insurance, and depreciation costs. In addition, if the expenses exceed the income from the property, the taxpayer can deduct the loss, subject to passive loss rules. Generally, passive losses up to \$25,000 may be deducted if the adjusted gross income (AGI) is under \$100,000. The ability to deduct passive losses declines as the AGI increases, eventually phasing out at an AGI of \$150,000.

If the owner exceeds the personal use threshold for treatment of the home as rental property, the home is treated as a “residence.” In that case, the owner can deduct expenses only up to the amount of rental income, and no loss deductions are allowed. In addition, before there can be any deduction for operating expenses, the owner must use up the property’s share of mortgage inter-

est and property taxes to offset the rental income, which effectively wastes deductions.

In short, if as an owner of a second home you rent the home for a substantial part of the year, but you also just cannot stay away from the place (that’s why it’s called a vacation home, isn’t it?), enjoy the time away but be prepared for tougher treatment by the IRS.

A Sign Does Not an Employee Make

Employer Not Liable for After-Hours Collision

Employers are generally liable for injuries caused by the employees working for them. However, this liability is not unlimited. Usually, employers are only liable for injuries caused by employees who are within the scope of their employment when the injury occurs. A recent Illinois case illustrates the limitations on an employer’s liability.

The case involved an automobile collision caused by an employee of a home builder. At the time of the collision, the employee was “off duty” and was running an errand in his personal truck. However, his truck had magnetic signs with his employer’s name and telephone number on them.

The people whom he injured sued the employer, claiming that he was responsible for their injuries. According to the plaintiffs, the evidence showed that the employer

required his employees to keep signs on their vehicles even when they were not working, and that the purpose of these signs was to advertise the builder’s business. This advertisement benefited the builder and, therefore, the employee was acting for his employer at the time of the collision.

The Illinois court disagreed. Although it assumed that the employer had told the employee to keep the signs on his truck even when he was not working, it found that any benefit the employer received from advertising while the employee was off duty was a benefit occurring outside the “time and space limits” of the employee’s employment. Unwilling to make employers liable under these circumstances, the court ruled that any benefit the employer received was too incidental to support his liability for the negligence of his off-duty employee.

Illinois Courts Increase Warranty Protections

Today, almost any product you purchase—a car, a computer, a television—comes with a warranty. However, a warranty is not worth a thing if it is not honored when you need it. Thanks to two recent decisions, both involving warranties given by DaimlerChrysler, more Illinois consumers will be protected by the warranties they bought.

The first case involved a used car that the plaintiff purchased. The car had about one year left on the factory warranty. When the car had problems, the new owner took it to be repaired, but the dealer was unable to correct the problems. Three years later, the owner sued.

DaimlerChrysler argued that the plaintiff had waited too long to file a suit. In Illinois, a complaint about a warranty usually must be brought within four years from the time that the complaint arises. DaimlerChrysler argued that this time period is measured from the date that a car was purchased as new, and that the plaintiff's suit was too late.

The Illinois Supreme Court rejected this argument because the warranty involved promised future action—repairs if a warranted part failed—and, therefore, the claim did not arise until the dealer tried and failed to make the necessary repairs. The court ruled that the lawsuit was valid because it was filed within four years from the time that the promised repair actually failed. This sensible decision

means that a person who receives a “10-year, 100,000-mile” warranty on a car can bring a warranty claim even after the first four years of ownership.

In the second case, a buyer purchased a new truck, but it had to be returned to the dealership for repairs 12 times in 18 months. The truck owner sued the manufacturer, DaimlerChrysler, for breach of warranty. He eventually traded in the truck for a new one, and he was paid more than the market value of the truck as part of the trade.

The manufacturer argued that the owner was not damaged, because he received more for the truck than it was worth. The Illinois court rejected this argument, find-

ing that the question was not what was the truck worth when the owner got rid of it but, rather, what it was worth when he bought it.

The evidence showed that the truck was defective when it was sold and that these defects caused it to be worth less than the owner paid for it. As a result, his damages were the difference between what a truck in good condition would have been worth and its actual value at the time.

Both of these decisions increase the practical protections that warranties provide in Illinois, and should ensure that more Illinois consumers will get what they pay for.

Good Guys Can Finish First

Twelve crew members who worked for the Overseas Shipholding Group (OSG) were awarded \$437,500 each for reporting illegal dumping by OSG oil tankers. OSG is one of the largest oil tanker firms in the world. The company pleaded guilty to dumping thousands of gallons of waste oil and sludge into the ocean and systematically altering its logs to hide the activity.

The 12 “whistleblowers” were appalled by the illegal activity and

took steps to report the crimes. One crew member, who was threatened with firing if he did not participate in the polluting, kept a secret record of the dates of the polluting. Another crew member called the Coast Guard and described how an oil sensor was being “tricked” to appear as if no oil were being discharged. OSG agreed to pay a fine of \$37 million for the dumping.

Sometimes, the good guys do win.

Resolution of legal issues depends upon many factors, including variations of facts and interpretations of Illinois law. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Small Business—Maintaining a Safe Workplace



In theory, and often in practice, the safety of the workplace is a top priority for any business.

But while large companies may have personnel devoted exclusively to the subject, safety is but one of many responsibilities for the owners of small businesses. In some cases, the matter of keeping workers safe slips down the list of priorities. There to make sure the issue is not neglected is the federal Occupational Safety and Health Administration (OSHA).

OSHA has written very detailed standards for maintaining workers' safety. It also has an expansive mandate to enforce those standards and the various provisions of the Occupational Safety and Health Act. Removing dangerous conditions is only common sense from any point of view, including employer-employee relations and a calculation based solely on dollars and cents.

The first step for any small employer is to be informed and educated as to workplace dangers, not all of which may be obvious. OSHA maintains an extensive website (www.osha.gov) that includes information that is especially pertinent to small businesses and guidance about specific threats to safety. Insurance companies provide another good source of information, since these companies have a vested interest in enhancing workplace safety and thereby minimizing insurance claims.

While exotic threats such as anthrax or legionnaire's disease capture headlines, the leading causes of serious workplace injuries are

more ordinary. They include overexertion, such as excessive lifting, pushing, pulling, holding, carrying, or throwing an object; falls on the same level (as distinct from falls from a height); and "bodily reaction," which covers injuries from bending, climbing, slipping, or tripping without falling. Regular inspections and repairs, not to mention a vigilant workforce, can head off many such injuries.

Apart from monetary penalties that may follow an OSHA investigation, many billions of dollars

each year are paid by employers in medical costs, wage payments, and insurance claims management as a result of workplace injuries. Small businesses get some breaks from OSHA, in the form of smaller monetary penalties and some exemptions from recordkeeping requirements for employers with 10 or fewer employees. Still, given their smaller financial reserves, small businesses, in particular, are well advised to live by the truism that an ounce of prevention is worth a pound of cure.

POAHC and Living Will

Continued from page one.

children.

Once it becomes effective, your POAHC will continue to grant your agent the powers you designate until your POAHC indicates that you wish those powers to cease. Generally, a POAHC is effective until your death. You may also include a clause to allow your agent to arrange for and carry out the disposition of your remains. In some cases, the POAHC may terminate the agent's power upon some specific event, such as when you become able to conduct your own affairs again. Just as you can designate when the agent's powers begin, you can also designate when they end.

Living Will

A Living Will gives specific instructions to your doctor. The Living Will dictates that the doctor should not use life-saving resusci-

tation when your condition is terminal. When your condition is incurable or irreversible, making your death imminent, a Living Will assures that your wish not to have your life prolonged is respected. The Living Will does not create an agent to make decisions on your behalf, but instead directs the doctor to respect the decision you have already made. A Living Will does not allow input from your family and friends, but saves them from having to make the decision not to resuscitate you, should that be necessary.

A Living Will complements your POAHC. The POAHC allows you to decide the powers to give your agent to act on your behalf, while the Living Will allows you to decide how far your doctor should go to sustain your life when death is imminent.

Always consult a qualified attorney when making a Living Will or a Power of Attorney for Health Care.