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April/May 2008

Updates in the Law

- **Civil Union Law** – January 1, 2008 New Hampshire *Civil Union Law* went into effect.
- **New Hampshire Advance Directives** – January 1, 2007 New Hampshire law adopted new statutory form combining Living Will & Health Care Power of Attorney.
- **Worker's Compensation Law Adjusted for Corporations and LLC's Engaged in Building Trades** – January 4, 2008 Worker's Compensation law was amended for corporations and limited liability companies engaged in building trades.
- **Shoreland Protection Act Amended**- April 1, 2008 New Hampshire Shoreland Protection Act amendments effect waterfront property owners.

Announcements from NCO

Attorney Scott M. Aronson joins United Way Board of Directors.



Attorney William D. Woodbury elected Belknap County Governor for the New Hampshire Association for Justice.



NCO Welcomes **Attorney Doria DiBona Aronson** from large Manchester law firm to its Estate Planning, Probate, and Charitable Organizations Practice Groups.

Attorney Jerry O'Neil, Jr. recently selected by his peers for inclusion in The Best Lawyers in America® 2007 (Copyright 2007 Woodward/White, Inc. Of Aiken, S.C.)



Upcoming Events/Seminars

May 5, 2008 - The Probate Process from Start to Finish for Paralegals. Attorney **Susanne M. Weldon-Francke** to present at this Manchester, NH Seminar

May 9, 2008 - Litigating Auto Accident Cases. Attorney **William D. Woodbury** chairs Concord, NH Seminar

June 3, 2008- Trust Administration. Attorney **Doria DiBona Aronson** to present at this Manchester, NH Seminar

You're INVITED to Learn About Updates in Estate Planning

When: Thurs. May 22nd, 2008: 5:30 -6:30
Where: NCO, 213 Union Avenue, Laconia
Presenters: Susanne M. Weldon-Francke, Esq. and Doria DiBona Aronson, Esq.

RSVP: 524-4380 (ask for Sara Azzara)

Do Civil Unions Put Same Sex Couples at an Even Playing Field Under the Law?

The New Hampshire Civil Union bill, signed by Governor Lynch May 31, 2007, came into effect January 1st of this year. New Hampshire Civil Unions are similar to marriages but “between one unmarried man and another unmarried man” or “between one unmarried woman and another unmarried woman.”

The new law, codified at New Hampshire’s Revised Statutes Annotated Section 457-A:1, delineates the rights, obligations, and responsibilities of same sex couples choosing to enter into a civil union in the State of New Hampshire. These rights, obligations, and responsibilities are the same enjoyed by New Hampshire’s married couples. In addition, civil unions and gay marriages legal in other states will be recognized in the State of New Hampshire.

Although New Hampshire civil union laws aim to equalize the rights of married couples and those in a civil union, federal law continues not to recognize civil union partners as “spouses” under federal law. The federal Defense to Marriage Act, enacted in 1996, specifically defines marriage as “a legal union of one man and one woman as husband and wife” and the term spouse as “a person of the opposite sex who is a husband or a wife.” These federal definitions become important when analyzing the true rights of those in a civil union and those in a marriage.

Under federal tax laws spouses are awarded an unlimited marital deduction. This means that a husband with an estate worth Three Million Dollars (\$3,000,000) can leave it all to his wife and not pay a federal estate tax because of the unlimited marital deduction. However, a partner in a civil union, with an estate worth Three Million Dollars (\$3,000,000) cannot leave it all to his partner at his death without incurring a federal estate tax. If the partner dies in 2008, leaving Three Million Dollars (\$3,000,000) to his partner, his estate would be taxed Four Hundred and Fifty Thousand Dollars (\$450,000). This is just one example of how the

Defense to Marriage Act’s definitions of marriage and spouse adversely effect civil union couples.

Although Civil Unions are not recognized at the federal level, the adoption of civil unions in New Hampshire awards civil union couples the same state law statutory rights as married couples. For example, if a civil union dissolves resulting in the transfer of real property owned jointly by the couple to one of the partners, the transfer should not be subject to real estate transfer tax. Another example would be the laws of intestacy. If one civil union partner dies intestate (not having executed a will) the other partner shares the intestate succession rights of that of a spouse. In New Hampshire, if one spouse dies and the couple has no children, the surviving spouse is entitled to the deceased spouse’s total estate.

In conclusion, although New Hampshire civil union laws afford same sex couples equality of rights on a state law level, civil union partners still face inequality with regard to some federal laws.

**Written by Doria DiBona Aronson, a member of the Estate Planning and Probate Departments*

**Should You Consider Updating Your Living Will
and Health Care Power of Attorney?**

New Hampshire Advance Directive

On January 1, 2007, the New Hampshire legislature revised RSA 137-J, the statute which addresses living wills and durable powers of attorney for health care. Previously, the Living Will and the Durable Power of Attorney for Health Care were two separate documents. Under the revised statute, the two documents are incorporated into one document with two sections and the document is now called a New Hampshire Advance Directive.

The first section of the New Hampshire Advance Directive is the Durable Power of Attorney for Health Care and the second section is the Living Will. You may complete and sign only one section or both sections. The Durable Power of Attorney for Health Care specifies an agent that you want to make medical decisions for you if you are incapable of making health care decisions yourself. In that document you name a health care agent who is empowered to make decisions for you including decisions about life sustaining treatment. You should also name a back up agent in case your primary agent is unable to serve for some reason. In that document there are several questions which require you to specify whether your agent has the authority to make certain kinds of decisions for you. Keep in mind that your health care provider, residential care provider or nonrelative who is an employee of your health care provider or residential care provider may NOT serve as your agent.

The Living Will section is an expression of your desires with regard to life sustaining treatment. If you sign this document you are stating that you do not wish to be kept alive artificially if death is imminent or you are in a permanently unconscious state. There is a specific question about tube feeding, however. While you may wish to discontinue life sustaining treatment, some clients are not comfortable stopping artificial hydration and nutrition (tube feeding) as well.

There were multiple changes made to RSA 137-J.

Perhaps the biggest change is that an advanced registered nurse practitioner (ARNP) can now certify that you are in a permanently unconscious state or that death is imminent. Previously, ARNPs did not have that authority. This change was made due to the fact that many rural areas are only serviced by ARNPs. Another significant change was that the document only needs to be signed by a notary **or** a justice of the peace **or** two witnesses. Previously, the document had to be signed by two witnesses and a notary public or two witnesses and a justice of the peace. This change was made to make it easier to sign these documents outside an attorney's office.

While Living Wills and Durable Powers of Attorney for Health Care that were signed prior to the revision of RSA 137-J were grandfathered in by the revisions and are still valid, there are some improvements in the new document of which you might want to take advantage. First and foremost, the New Hampshire Advance Directive can contain a statement that you do not wish to be able to contradict your health care agent once you have been determined to be incompetent. Under the old statute, if you were determined by two medical doctors to be incapable of making health care decisions, you could still contradict your health care agent even though you had been declared incapable of making health care decisions. Under the old statute, this created many issues. For example, if you were declared incapable of making health care decisions and your agent wanted to move you to a different nursing home and you disagreed, the nursing home could take the position that your Durable Power of Attorney for Health Care was revoked.

Keep in mind that the NHAD is not the same as a Do Not Resuscitate Order. A person who is appointed as your health care agent can sign a Do Not Resuscitate Order for you, but those orders are entered into your medical record by a ARNP or doctor. These orders are normally signed at the time of admission to a health care facility.

Having a New Hampshire Advance Directive (NHAD) makes sense for many reasons. If you have signed a New Hampshire Advance Directive, then your health care provider knows what your feelings are regarding end of life decisions. Also, by signing a NHAD, you have selected the person to make important health care decisions for you if you are unable to make those decisions yourself. Last, but not least, having a NHAD should avoid the prospect of a family member having to petition the Probate Court to obtain guardianship over you should you become incompetent.

**Written by Susanne M. Weldon-Francke,
Chair of the Estate Planning and Probate
Departments*



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Worker's Compensation Law Adjusted for Corporations and LLC's Engaged in Building Trades

For several years RSA 281-A:18-a allowed corporations and limited liability companies to exclude three executive officers or members from worker's compensation coverage. On September 14, 2007 the New Hampshire Legislature passed an amendment to RSA 281-A:18-a (HB 471), which provided that corporations and limited liability companies could no longer exclude any executive officers of the corporation or members of the LLC from workers compensation coverage where the executive officers or members engaged in on-site work on construction sites. This September 14, 2007 amendment imposed substantial increases in workers compensation premiums for those companies considered to be in the "construction" business. Fortunately, effective January 4, 2008, HB 692 was enacted by the New Hampshire Legislature to clarify the law regarding an exclusion from workers compensation for members of limited liability companies and executive officers of corporations. HB692 re-amends RSA 281-A:18-a to once again allow the exclusion of up to three members of an LLC or three officers of a corporation from workers compensation coverage for all limited liability companies and corporations, including companies engaged in the "construction" business.

If you have paid any additional worker's compensation premiums as a result of the original September 14, 2007 amendment, the current law provides for the possibility of a refund of such premiums. You should contact your insurance agent to determine if you qualify for a refund of any premiums paid as a result of the original amendment.

**Written by Scott M. Aronson, a member of the
Corporate/Business Law Department*

New Hampshire's Comprehensive Shoreland Protection Act Changes

As of April 1, 2008, important and significant amendments to the New Hampshire Shoreland Protection Act went into effect. These changes affect anyone with property within 250 feet of most water bodies, regardless of whether the property is actually situated on the shoreline. The revised Shoreland Protection Act 1) requires permits for activities within 250 feet of the shoreline, 2) places restrictions on removing vegetation within 150 feet of the shoreline, 3) imposes thresholds for total allowable impervious lot coverage, and 4) imposes a 50 foot Statewide shoreline setback for all new primary structures.

Scope of Law-Those Affected: Almost everyone commencing construction, excavation or filling activities within the 250 foot protected area will be required to obtain a permit from the State of New Hampshire. Under Department rules, construction is defined as the "(a) erection, demolition, reconstruction, or alteration of any building or structure; or (b) [a]ny activity that increases the impervious area on a property." On the other hand, certain activities are exempt from the required permitting. Under Department rules, there are exceptions which include the maintenance, repair, or modification of existing, legal, primary structures that do not alter the footprint or impervious area of the structure, require, or result in the removal of vegetation, result in an increase of residential units on the property, or require, or result in any excavation or filling within the protected shoreland.

New Restrictions: Some of the new provisions are as follows:

a) **Vegetation:** The revised Shoreland Protection Act divides the 250 foot protected area into three zones - Waterfront Buffer, Natural Woodland Buffer, and the Protected Shoreland. The Waterfront Buffer area is the land within 50 feet of the shoreline. Removal of vegetation in this area is prohibited, except for a foot path to the water. Tree removal is managed by creating a 50 foot by foot grid and points system, requiring a costly survey of existing tree locations, trunk diameter, and species. The Natural Woodland Buffer area is the land between 50 feet and 150 feet from the shoreline. 50% of this area, which is not covered by impervious surfaces cannot be disturbed.

b) **Lot Coverage:** Impervious surfaces are defined under the Statute as modified surfaces that cannot effectively absorb or infiltrate water, such as pavement, decks, patios, and other structures. Within 250 feet from the shoreline, impervious surfaces cannot exceed 20% to 30% depending on tree coverage.

c) **Site Specific Approval:** Any activity impacting 50,000 square feet will require Department of Environmental Services Site Specific Approval.

Permitting: For a project requiring a permit, an applicant should plan on the application process spanning four months at a minimum. To move forward, an applicant will first need to obtain any required local approvals, such as variances or special exceptions under the zoning ordinances, then submit an application to the State. The State application will require details including tree inventories and lot coverage calculations. The State has 30 days to make an initial review, but can request more information. The State will have another 30 days to determine whether or not to grant the permit after all information is received. The application fee will be \$100.00 plus \$0.10 per square foot of impacted area within the protected shoreline. In short, the new State permitting process will likely increase the cost of such projects, delay project commencement and, in some cases, prohibit projects altogether.

Future Legislative Changes: At the time this article was written, there was a pending amendment to the law which would suspend the permitting requirements and postpone them to July 2008. Regardless of any such amendment, these more burdensome provisions of the law will affect all shore front properties sometime in 2008.

**Written by Doria D. Aronson and Regina A. Nadeau, Chair of the Environmental and Real Estate Departments*

**For more information on any of these articles-
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