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Vandenack Weaver LLC Guidance on Foundational Estate Planning for Clients in the face of COVID-19

By Mary E. Vandenack, on Behalf of Vandenack Weaver LLC

"COVID-19 is on a rampage through the United States. The risk of serious illness or death has many clients focused on making sure their estate plan is in order. While many exciting estate planning strategies arise when the economy changes, a priority should be making sure your foundational tools are in order."

Because we are receiving numerous requests to finalize or change estate planning documents, we are aware of how many of our clients are thinking of the possibility of being ill or dying in the face of a pandemic.

One of the challenges currently is getting updates executed in the absence of personal meetings. This bulletin is intended to provide clients information on estate planning priorities at this time and additionally, to provide you information on how we are assisting clients in getting documents or changes thereto in place at this time.

BACKGROUND:

COVID-19 is impacting everyone in the United States in some way currently. Schools are closed. Restaurants are closed. March Madness has been cancelled. Many people are self-quarantined. The workforce has gone largely remote.

Illness, infection and death are real possibilities for all of us in the face of this pandemic. Most law offices are not permitting anyone to come in to their offices. Most states have not adopted the Uniform Electronic Wills Act. This is understandable given the fact that the Uniform Act was just finalized December 30, 2019. Many states require notaries to personally witness signatures on documents that must be notarized. Most powers of attorney require notarization. Trusts require notarization.

ESTATE PLANNING PRIORITIES AT THIS TIME:

The Health Care Power of Attorney, Living Will ("right to die will") or Other Advanced Directives

If you become ill with COVID-19, having a current written expression of one's wishes and a designated agent will matter. Regardless of when you finalized you power of attorney for health care, you should review the document currently. If your document is over five years old, you should update the document.

Almost every state provides for some form of health care power of attorney or other advance directive. In Nebraska, there are two types of advance directives. One is the power of attorney for health care. The other is referred to as a declaration. The declaration is what most people know as a living will or right to die will.

Health care powers of attorney allow you to appoint an attorney-in-fact to make certain health care decisions for you in the event you become incapable of making health care decisions. (Different states have varying limitations on what those decisions can be.) In Nebraska, “health care” means any treatment, procedure, or intervention to diagnose, cure, care for, or treat the effect of disease, injury and degenerative conditions. A health care decision is defined to include consent, refusal of consent, or withdrawal of consent to health care. Health care decision does not include the decisions generally included in a living will, which are: withdrawal or withholding of the usual and typical provision of nutrition and hydration, withdrawal or withholding of any life sustaining procedures, withdrawal or withholding of artificially administered nutrition or hydration. Any authority of the agent to make such decisions must be specifically indicated in your power of attorney for health care.

The most common approach is to create a power of attorney and incorporate living will provisions into the power of attorney. This approach provides you an attorney-in-fact to act for you in dealing with health care providers but ensures that your ultimate wishes are respected in the event that you are in a persistent vegetative state or terminally ill.

Having the right person or persons to act as attorney-in-fact is extremely important. This merits significant discussion. Historically, clients often named the spouse, if one, the child who lives the closest or the child with health care knowledge. You should challenge your own assumptions about the right agent. You should also consider the possibility of using co-agents.

As noted previously, many powers of attorney incorporate provisions of a living will. A common approach is to provide that a determination that you are in a persistent vegetative state or are terminally ill will be made by an “attending physician and one additional physician”. The issue with such approach is that most patients are seen today by hospitalists that they have never met. Such hospitalist might be rounding with a resident. Two people who have never met the principal can conclude that a patient is terminally ill, and the living will directions can go into effect without the agreement of the agent. To resolve this possibility, we typically required that the consulting physician must be chosen by the attorney-in-fact. This avoids the hospital and resident scenarios while still providing a method to assure that your end of life directives are followed.

Consider these steps:

- Review your current power of attorney for health care. If you don’t have one, create one. Vandenack Weaver offers this service online at vwattys.com.
- Give thought to who is the right attorney-in-fact and successors. If you are married, consider the possibility that you and your spouse, could both get ill at the same time. You cannot name any of the following as an attorney-in-fact: Your attending physician; an employee of your attending physician (unless the person is related to you by blood, marriage, or adoption); a person who owns a health care provider in which you are a resident (unless the person is related to you by blood, marriage, or adoption); Someone who is serving as attorney-in-fact for ten or more people (unless the person is related to you by blood, marriage, or adoption).
- Have open discussions with your attorney-in-fact and successors about what you want to happen if you are ill.
- If there are particular procedures you want or don’t want, identify those procedures in supplemental documents and provide the same to your attorney-in-fact.

- Some states allow for physician end of life sustaining orders. Nebraska currently does not; however, we typically provide clients a sample document that can be used to discuss particular treatment protocols with family members and physicians.

We have a detailed summary regarding powers of attorney for health care on our website at vwattys.com.

Financial Power of Attorney

A financial power of attorney serves several key functions. The first is to designate an attorney-in-fact who can handle financial and legal matters for you. The power of attorney can be durable, which takes effect immediately and survives your disability or the power of attorney can spring into existence upon your incapacity. A springing power of attorney always raises the issue of how to define incapacity and whether your situation satisfies the definition.

Many states have adopted some form of the Uniform Power of Attorney Act. The Uniform Act provides a statutory form of a power of attorney. Such form can be useful in a pinch, but we often see the forms get used in a way that reflect a lack of understanding of some provisions. As a result, we recommend working with an attorney to create your power of attorney. Vandenack Weaver seeks to make this cost effective for clients by providing the ability to engage in the process online.

Financial powers of attorney can be valuable tools in a variety of ways. If you become incapacitated, an expensive, public and possibly contested conservatorship can be avoided. You will have someone that you chose designated to handle financial and legal matters if you cannot.

If your estate plan is in flux or you want someone to be able to make a change, an attorney-in-fact can be provided powers that will allow the attorney-in-fact to implement your testamentary plan if you become incapacitated. An attorney-in-fact can be provided the authority to create a trust for the principal, to transfer assets to the trust and to change beneficiary designations, to terminate joint tenancies and to disclaim inheritances.

If your financial power of attorney is more than five years old, the document should be updated. If you have no financial power of attorney, one should be put in place. This is less urgent if you have a fully funded revocable trust that has a successor trustee.

Consider the following:

- Is your power of attorney current?
- Are you comfortable with your attorney-in-fact?
- Should you add or change a successor?

- Should there be co attorneys-in-fact? (I used to prefer the simplicity of one attorney-in-fact until I had to tell a 91-year old woman that her son, as attorney-in-fact, had spent all of her funds and she was going to be evicted from her assisted living facility. I now prefer co-attorneys-in-fact with the ability to delegate to the other or a professional with integrity, insurance, and a high level of awareness and concern about fiduciary liability).
- What powers should the attorney-in-fact have? If you are concerned about an attorney-in-fact having too much power, you can have more than one power of attorney and provide different authority to different attorneys-in-fact. While I used to favor limiting authority in powers of attorney, I have concluded that it is likely you may want to have someone who can take actions to implement testamentary intentions or consider law changes. This can be done effectively and protectively by using more than one attorney-in-fact or additional powers of attorney that have more limits on certain broad powers.
- Will the attorney-in-fact be allowed to make gifts? Consider the specifics of who gifts can be made to and whether they should be equal among classes of gift recipients. If the attorney-in-fact is also a gift recipient, designate someone else to authorize any gifts to the attorney-in-fact.

The Will

What happens if you have no will? Assets will be distributed in accordance with state law. Many assume that all assets will go to the spouse in such a situation but that is often not the case. In Nebraska, $100,000 plus one half goes to your spouse if you have one. The balance goes to your children, even if they are minors or incapacitated. In addition, the issue of who should be the guardian for a minor or disabled beneficiary is left open to a court to decide.

You should simply have a will. The will should include the following provisions:

- Who will act as personal representative?
- How will personal effects be distributed?
- How will other assets be distributed?
- Who will act as guardian for any minor or incapacitated child for which the client has a right to name a guardian?

The Challenge Coming from COVID-19

The estate plan foundation that everyone should have in place is:

- A health care power of attorney
- A financial power of attorney
- A will

What Vandenack Weaver is Doing to Help Clients Get Estate Planning Documents in Place and Avoid Personal Meetings – We Are Providing Electronic Services

Many documents require notarization. Vandenack Weaver has notaries available via videoconference if witnessing of signatures by the notary is required. We also have electronic signature capabilities for almost all forms of documents for both client and notary.

Nebraska is one of many states requiring two witnesses and a notary for valid execution of a will. Some states have the same requirements for powers of attorney. No one wants to have testators, testatrixes, witnesses and notaries all gathering about wondering if each cough is a sign of COVID-19. If a will is required for your estate plan, a holographic will is an option and we are guiding clients through the process of creating holographic wills.

Additional options:

- Many of our clients use a revocable trust. A revocable trust can be created via electronic means. In addition, Nebraska's Trust Code allows for the creation of an oral trust. If you create a revocable trust and transfer all assets to the trust, you can avoid the need for a will. (We are recommending a holographic will regardless.)
- There are various types of documents that can be used as will substitutes that can be executed electronically. Will substitutes are beneficiary designations and transfer on death designations for various types of assets.

Additional updates on legal issues related to covid-19 are available at our website:

https://www.vwattys.com/covid-19-legal-guidance/