Leimberg Information Services, Inc.

Steve Leimberg's Estate Planning
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Subject: Mary Vandenack & Foundational Estate Planning Priorities in the Face of Covid-19

"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 client foundational tools are in order."

Mary E. Vandenack provides members with commentary regarding assisting clients with foundational estate planning when covid-19 is preventing meetings and creating a demand.

Mary E. Vandenack is founding and managing member of **Vandenack Weaver LLC** in Omaha, Nebraska. Mary is a highly regarded practitioner in the areas of tax, benefits, private wealth planning, asset protection planning, executive compensation, equity fund development, business and business succession planning, tax dispute resolution, and tax-exempt entities. Mary's practice serves businesses and business owners, executives, real estate developers and investors, health care providers, companies in the financial industry, and tax-exempt organizations. Mary is a member of the American Bar Association Real Property Trust and Estate Section where she serves as Co-Chair of the Futures Task Force, Co-Chair of the Law Practice Group and on the Planning Committee. Mary is a member of the American Bar Association Law Practice Division where she currently serves as Editor-in-Chief of Law Practice Magazine. Mary was named to ABA LTRC 2018 Distinguished Women of Legal Tech, received the James Keane Award for e-lawyering in 2015, and serves on ABA Standing Committee on Information and Technology Systems. Mary is a frequent writer and speaker on tax, benefits, asset protection planning, and estate planning topics as well as on practice management topics including improving the delivery of legal services, technology in the practice of law and process automation.

Here is her commentary:

EXECUTIVE SUMMARY:

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 client foundational tools are in order.

FACTS:

Covid-19 is impacting everyone in the United States in some way currently. Schools are closed. Restaurants are closed. March Madness has been cancelled.

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, which 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.

How do we assist clients in making sure their foundation is in order during this time? What items should be prioritized? Certain estate planning tools should simply be put in place immediately if they are not already in place.

COMMENT:

The Health Care Power of Attorney, Living Will or Other Advanced Directives

If a client gets sick with covid-19 (or something else during this crisis), having a current written expression of one's wishes and a designated agent will matter. If a client's last health care power of attorney was executed 6, 7 or 8 years ago, it should be updated. An excellent summary of state health care power of attorney statutes exists at the American Bar Association website.[i]

Health care powers of attorney allow your client, typically the principal, to appoint an attorney-in-fact to make certain health care decisions. (States have varying limitations on what those decisions can be.)

Having the right person or persons to act as attorney-in-fact is extremely important. This merits significant discussion. Historically, we often named the spouse, if one, the child who lives the closest or the child with health care knowledge. Assumptions about the right agent should be challenged. Using co-agents should be considered, at least with respect to any decisions that involve end of life.

Many powers of attorney incorporate provisions of a right to die will. Such a power of attorney usually provides the attorney-in-fact authority to make decisions when the principal is incapable of doing so but then directs that various actions will be taken or not taken ((1) discontinue extraordinary life support measures; (2) discontinue artificial nutrition and hydration; and (3) total relief from pain even if life is shortened) if the principal is in a terminal condition or persistent vegetative state. I have reviewed many documents that allow this end of life direction to control if an “attending physician and one additional physician” determine that the principal is terminally ill or in a persistent vegetative state. The challenge with that language 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 life ending directions go into effect. To resolve this possibility, provide that the consulting physician must be chosen by the attorney-in-fact.

Consider these steps for clients regarding health care powers of attorney:

- Visit about the right attorney-in-fact and successors, especially for married couples who could both get ill at the same time.
- Encourage clients to have open discussions about what they want to have happen if they are ill, especially if a determination is made that they are terminally ill or in a persistent vegetative state.
- Avoid including detailed provisions about particular procedures in a health care power of attorney. Include those in directions to the agent or successor agent.
- For states that allow for physician’s order for life sustaining treatment, provide the form and encourage review and discussion with family and family physician (by telephone these days). In states that don’t

have provisions for such orders, consider providing a generic one that the client can use to discuss health scenarios with those individuals that will be involved in making health care decisions if the client cannot.

Financial Power of Attorney

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

Many states have adopted some form of the Uniform Power of Attorney Act.[ii] 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.

Financial Powers of Attorney can be valuable client tools in a variety of ways. If a client becomes incapacitated, an expensive, public and possibly contested conservatorship can be avoided. The client will have made a conscious decision about who to appoint to handle financial and legal matters upon incompetency of the client. For a client whose estate planning process is in flux, an attorney-in-fact can be provided powers that will allow the attorney-in-fact to implement the client's testamentary plan if the client becomes 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 a client has an old financial power of attorney, the document should be updated. If the client has no financial power of attorney, one should be put in place.

The following matters should be specifically discussed with clients:

- Who should the attorney-in fact be?

- 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. I now prefer a 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? Historically, I was concerned about providing too much power, and that is always a concern; however, if the power of attorney may be used to help a client finalize the estate planning process, then broad powers should be considered. Protection can be built in with cross checks such as co-attorneys-in-fact. Additionally, the client can create more than one power of attorney and provide different powers to different attorneys-in-fact.
- 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 the client has 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. The issue of who should be guardian for a minor or disabled beneficiary is left open to a court to decide.

Clients (and non-clients) 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 foundation that every client should have in place is:

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

How Do We Get Estate Planning Documents in Place when We Aren't Letting Anyone Come Into Our Offices?

Many states require two witnesses and a notary for wills. 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 sending respiratory droplets containing covid-19 about the room.

Some options:

- Holographic Wills. Guide clients through the holographic will rules if they live in a state permitting the same. States that allow for holographic wills have specific rules on the validity of such a will. If the will must be handwritten, discuss (on the phone or videoconferencing) what should be written.
- Have your client create a trust. The Uniform Trust Code provides for the creation of an oral trust if its terms can be satisfied by clear and convincing evidence. Create a trust document and have the document signed electronically or assist the client in creating documentation of his or her intention to create a trust and the terms of the trust. Then, guide the client in creating a holographic will.
- Use will substitutes to the extent that documents can be executed electronically. Typically, I am not a fan of will substitutes (if you use 100 transfer on death deeds and then the client changes his or her mind on distribution, you have a lot of changes to make and it is easy to miss one.)
- If you have an incapacitated client who has a financial power in place providing the attorney-in-fact the authority to create testamentary documents and transfer assets, have the attorney in fact create a trust and transfer the client's assets to the trust. (Attorneys-in-fact cannot create wills.) Obviously, such effort should comport with the principal's testamentary plan.

- Most asset transfer documents can be signed electronically. If a notary is required, check state rules on whether the notary can witness via videoconference.
- If you must have a personal meeting, create a safe space and limit the number of attendees to the minimum possible. Engage in all general discussions electronically prior to the meeting so that the meeting can be as brief as possible.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Mary Vandenack

CITE AS:

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CITATIONS:

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[i] https://www.americanbar.org/content/dam/aba/administrative/law_aging/state-health-care-power-of-attorney-statutes.authcheckdam.pdf

[ii] Uniform Power of Attorney Act (Uniform Law Commission 2006)