FOULSTON SIEFKIN LLP

ATTORNEYS AT LAW

Foulston Siefkin Estate Planning: PLANNING FOR A LEGAL DISABILITY

Proper estate planning not only includes planning for disposition of property at death, but also for management of assets in the event that an incapacity should occur prior to death. When a person loses the legal capacity to make responsible decisions concerning his or her personal and financial needs, in the absence of having properly and legally authorized another person or party to act in such person's behalf, no other person (including a spouse) would have the authority to act on that person's behalf regarding such person's financial affairs or personal care. Consequently, in such circumstance legal authority to act on such person's behalf could only be granted by a court. A court-appointed conservator manages business and financial affairs for an incapacitated person (referred to as a person under a "legal disability") who lacks the ability to make or communicate responsible decisions concerning the management of their assets or personal care, while a court-appointed guardian handles personal needs, including medical care, for a legally disabled person.

Often an individual serves in both capacities. Corporate fiduciaries (i.e., banks and trust companies) may serve as conservators in Kansas, and provided they meet certain conditions and qualifications, also as guardians. When more than one person petitions to serve as guardian and/or conservator, the Court must select between competing persons according to statutory guidelines and priorities, with family members of the closest relationship normally being favored absent extenuating circumstances.

An involuntary conservatorship and guardianship proceeding for an incapacitated person may cost $3,500 or more, depending upon the circumstances. Further, a conservator must normally post a bond (a normally expensive insurance policy that the conservator will faithfully discharge the conservator's statutory duties, the cost of the annual premium coming out of the conservatorship estate), file annual accountings or reports with the court and upon the death of the incapacitated person, file a petition and final accounting to close out the conservatorship and guardianship. In addition to the time, effort and expense incurred in fulfilling statutory requirements during the term of the conservatorship, conservators are limited by statute as to permissible investments. They must also seek court approval prior to taking certain actions, e.g., selling real estate owned by the legally disabled person. Finally, a conservatorship or guardianship procedure can be emotionally draining for the participants and is a matter of public record, thereby compromising privacy objectives.

Avoiding such detriments, insuring that the desired person or corporate fiduciary is legally given the authority to manage one's business, financial and personal affairs during a legal disability, and dictating in advance what medical procedures are to be utilized in the event of a terminal illness, requires the execution of legal documents termed "Advance Directives." Included in this category are Durable Powers of Attorney for Business and Financial Decisions, Durable Powers of Attorney for Health Care, Living Wills, and Do Not Resuscitate Directives. The discussion that follows will address the goals and benefits that can be attained by each type of Advance Directive.

Although assets held in a Revocable Trust may be managed by the named Trustee for the benefit of the Grantor (the person creating the trust) in the event of a legally disability, such authority does not extend to all financial matters, e.g., assets not properly titled in the trust, assets which cannot be legally owned by the trust such as qualified retirement plans and individual retirement accounts, personal litigation involving the Grantor such as a negligence claim, or personal income tax matters as a revocable trust does not file a separate income tax return during the life of the Grantor.

POWERS OF ATTORNEY FOR ASSET MANAGEMENT AND FINANCIAL DECISIONS

Planning for management of one's personal financial matters in the event of a legal disability involves the execution of a durable power of attorney. The term "durable" means the power of attorney is valid during a legal disability. A person or corporate fiduciary

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(referred to as the "attorney in fact" or "agent") is authorized in the instrument to manage business and other financial affairs for the benefit of the person (the "principal") giving the authorization. Although powers of attorney do not have quite the high degree of acceptance among third parties to whom they are presented as do Revocable Trusts (due primarily to a fear of lawsuits by persons accepting them in the event the power was invalid), they are generally accepted.

The following discussion should be of assistance in evaluating a current power of attorney or in considering provisions to be included in a new power of attorney. In 2003, Kansas passed a new Durable Power of Attorney Act (the Act). Although this new legislation does not govern existing powers of attorney executed prior to its effective date, July 1, 2003, most of the following discussion is equally applicable in evaluating powers of attorney created prior to such effective date.

"SPRINGING" V. "NON-SPRINGING"

There are two basic types of durable powers of attorney. A "springing" power of attorney is a durable power of attorney that does not become effective, i.e., authorize the agent to act, unless the principal (the one giving the power of attorney) is legally disabled as defined in the instrument. A "non-springing" durable power of attorney is a power of attorney which is effective at time of execution and remains effective despite any subsequent incapacity of the principal. The power of attorney must specify which is the case or the power of attorney will not be effective during a legal disability.

Individuals who are currently managing all aspects of their financial affairs often utilize a "springing" power of attorney, as they do not wish to authorize anyone else to manage their affairs unless they later become incapacitated. If a "springing" power of attorney is desired, it should clearly provide how the legal diability of the principal is to be determined. Otherwise, the instrument may not accomplish its intended objective of avoiding a court determination of legal disability, as third parties would not be presented with a "bright line" standard to rely upon as to whether the agent is currently authorized to act on behalf of the principal. A normal triggering mechanism is to require legal disability to be determined by a written determination of two physicians, one of whom must be the principal's personal physician, if the principal has a personal physician.

Other individuals, however, are quite comfortable with an agent possessing additional authority to act on their behalf while they have capacity and they desire either to provide for a seamless transition in the event of their legal disability (as no determination of legal disability is required to activate the agent's authority) or for such person to be able to act on their behalf while they are not under a legal disability. A medical determination of legal disability can sometimes be difficult to secure given the complexity of federal regulations (known as "HIPAA") governing the adequacy of medical releases which permit such determination. The desire for a seamless transition in the former circumstance is a frequent occurrence when a spouse is named as agent. Examples of the latter circumstance include situations where a spouse, child or other person or financial fiduciary is already assisting the principal in financial matters due to some cognitive impairment or the principal desires for the agent (normally a spouse) to be able to act on the principal's behalf should the principal be unavailable, e.g., on a business trip.

COMPLETENESS OF AUTHORIZATION

There is nothing favorable which can be said about a simple "short form" financial power of attorney. A power of attorney is only as effective as a third party's willingness to accept it. Although it should be legally sufficient to provide for a "general" power of attorney and state simply in the instrument that "anything I can legally do, my agent can do in my behalf," frequently such a broad authorization is not accepted by third parties unless the power of attorney additionally authorizes the specific transaction the agent is attempting to effectuate on behalf of the principal. This is particularly true of governmental authorities, such as the IRS and Veterans Administration. If the agent's authority is not accepted by a third party, it will fail to accomplish its objective.

Thus, financial powers of attorney, in addition to any general authority, should provide comprehensive examples of such authority. Although authorizing basic financial management such as cashing checks, depositing money and buying and selling assets, many financial powers of attorney frequently fail to include the following specific authorizations:

1. Power to deal with all taxing authorities, including the IRS, Kansas Department of Revenue and County Appraisers, with respect to signing tax returns, protesting taxes, and generally handling all tax matters.

2. Power to represent the principal in litigation matters.

3. Power to apply for and collect all governmental benefits, including Social Security, VA benefits and Medicaid.

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4. Power to handle all insurance matters.

5. Power to handle all investment accounts with stockbrokers and mutual funds.

6. Power to continue charitable gifting, if desired.

7. Power to make non-charitable gifts or transfers to family members (although this authority must be carefully drafted to avoid abuse, distorting the estate plan, or causing adverse estate tax consequences if the agent is also a permissible donee), if desired, or to divide resources with spouses, in order to accelerate Medicaid eligibility or minimize federal estate or state death taxes.

8. Power to deal with qualified retirement plans and IRAs, including directing investment, "rolling over" to another IRA, or making withdrawals.

9. Power to access safe deposit boxes.

10. Power to transfer property and change beneficiary designations to a revocable living trust (if previously executed) to avoid probate.

11. A spouse's consent to the conveyance of the homestead of a married principal, which is required for such authority to be effective.

12. Medical releases sufficient in form and authority under "HIPAA" necessary to determine the legal disability of the principal (in the event of a "springing" power of attorney) or that of an agent (in order to prove the legal disability of an agent to activate a successor agent's authority).

Even if a third party was otherwise willing to accept general authority without specific authorization, general authority is insufficient under the Act to make gifts or change beneficiary designations. Under prior law, it was unclear but doubtful such general authority would be effective in such circumstances.

Caution: To avoid potential abuse, one should be careful in authorizing the making of gifts for estate tax or Medicaid purposes unless they are clearly defined and limited to specific circumstances and objectives. This caution should also extend to the granting of the ability to make or change beneficiary designations (other than to a Revocable Trust). Although often desirable for their intended purpose, these provisions are often too broadly drafted to the extent an agent might be inadvertently authorized to alter the intended disposition of the principal's estate. It takes careful drafting to ensure such authority is only exercisable consistent with the principal's estate plan.

INITIAL AND SUCCESSOR AGENTS

The same considerations that go into the selection of individual versus corporate fiduciaries also factor into the selection of individual versus corporate agents under business and financial powers of attorney. Normally, the initial agent is the same as the Executor under the Will and if one has a Revocable Trust, also the named Trustee who is to serve in the event of the legal diability of the Grantor creating the trust. This is because Trustees, Executors and agents under business and financial powers of attorney are essentially performing the same functions. Having the same individual(s) or corporate fiduciary serve in all capacities avoids potential conflicts and duplication of fees. However, before naming a corporate fiduciary as financial agent, make sure it is willing to serve in that capacity. Many will not, particularly a bank or trust company that does not have a local or regional office.

Many powers of attorney fail to provide for a successor if the agent is deceased or under a legal disability. Even if a power of attorney provides for a successor if the named primary agent is unable to serve as agent, many fail to specify how such determination is to be made, particularly if it involves a legal disability of an agent. Without adequate provisions for a successor agent, or a "bright line" standard in the financial power of attorney that is acceptable to third parties that a successor agent has succeeded a prior agent (e.g., providing for an affidavit of the successor agent stating that the prior agent is deceased, missing, has refused to serve as agent, or is under a legal disability), the power of attorney may be ineffective in avoiding a conservatorship should the agent for any reason

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be unable to serve. As with the initial agent, successor agents normally should also be the same as successor Trustees under a Revocable Trust and successor Executors under a Will.

PROVISION FOR DESIGNATING A CONSERVATOR

Kansas law permits the principal to designate in a power of attorney the individual or corporate fiduciary who or which is to serve as conservator should a court-appointed conservator become necessary. This provision should be included in a power of attorney for two reasons. First, in the unlikely event a conservatorship becomes necessary despite having a well-drafted financial power of attorney not effectively addressing the entirety of the principal's business and financial affairs, it is important to ensure that the named agent is also appointed as conservator, rather than someone else the court might otherwise appoint. Secondly, a conservator's authority might supersede the agent's authority with respect to managing the principal's affairs should someone other than the agent be appointed conservator.

AUTHORITY OF MULTIPLE AGENTS

Having two co-agents can create problems. If two agents are named to serve simultaneously, the instrument should specify whether their authority is joint (requiring signatures of both agents) several (each agent may act alone), or requires the consent of both agents but permits third parties to rely on the signature of one agent to implement such decision. Permitting each agent to act alone may be convenient, but it can create significant problems if agents are acting independently and adverse to each other. On the other hand, if actions require the concurrence of two agents, there could be a total impasse in the event of a disagreement. If more than two agents are named to serve simultaneously, to avoid an impasse it is normally best to appoint an odd number of agents and require that a majority of agents must concur in any action (but possibly permit any one agent to implement the authority of the decision of the majority).

EXONERATION OF LIABILITY

When family members are named as an agent, the principal will usually desire to exonerate the agent from liability for "good faith" decisions which do not involve gross negligence or intentional wrongdoing. Otherwise, other family members could end up suing the family member who was serving as agent for the loss of the principal, even though the family member serving as agent was acting in good faith.

COMPENSATION

A power of attorney should state whether or not the agent is to be compensated when serving. If an agent is not to receive compensation, so specifying clears up any misconception that might otherwise occur. If no compensation is permitted under the power of attorney, however, it should be determined in advance whether the agent is willing to serve under those terms. Obviously, corporate fiduciaries would be unwilling to serve without compensation. Under the Act, an agent is entitled to compensation unless the power of attorney provides otherwise; nonetheless, specifying such authority in the instrument avoids confusion for agents unfamiliar with the law or questions regarding the principal's intent in this regard. If it is desired that the agent receive compensation, it may be desirable not only that the instrument should specifically authorize compensation, but state the basis upon which it is to be determined, e.g., the same rate as a conservator is entitled to under probate procedure.

REPRESENTATIVE SIGNATURE OF AGENT/ACCEPTANCE OF AGENCY BY AGENT

Given the reluctance of third parties to accept powers of attorney, it is helpful, but not legally required, for the power of attorney to include a representative signature of the agent (attorney-in-fact). This gives third parties some comfort that the agent is genuine, simply by comparing signatures. Under the Kansas Power of Attorney Act, such signature will be provided by the Agent's specific acceptance of the Agent's authority, which is specifically required for such authority to be effective.

SUMMARY

If a power of attorney is incomplete in any of the above significant respects, it may need to be redone to ensure its effectiveness. A well-drafted and complete power of attorney normally will give authority to an agent in many circumstances which may have no current application, e.g., dealing with retirement plans in circumstances where the principal is not a participant in a retirement plan. Even if such authority has no immediate application, including such authority incurs no detriment and allows for the possibility that such authority might be needed later should the principal's financial or asset situation change.

It cannot be overemphasized that the agent should be financially stable, possessed of good character and have sound business judgment. As agents acting under powers of attorney are normally free from court supervision, an abuse of authority might not be

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discovered until long past the time any resultant damage can be rectified. This factor should be considered in the selection of an agent. If desired, provisions of the durable power of attorney can appoint an "independent agent" who has the authority to demand an accounting from the agent and discharge the agent and appoint a successor agent in the event the independent agent at any time determines that the agent is not properly discharging the agent's authority. Often in circumstances that there is an independent agent named to serve the role of a "watchdog," the principal names the principal's attorney or accountant to serve in that capacity.

POWER OF ATTORNEY FOR HEALTH CARE DECISIONS

Since 1989, Kansas law has permitted a person to grant to another the authority to make health care decisions in the event of a legal disability. This is effectuated under an instrument known as a "Durable Power of Attorney for Health Care Decisions." The agent under a Durable Power of Attorney for Health Care Decisions can be authorized to determine all aspects of personal care during lifetime should the principal incur a legal disability. Such personal care would include medical and psychiatric procedures and nursing home care. This authorization should avoid the need for appointment of a legal guardian through the court which otherwise might be required to make personal care decisions in the absence of such authority.

A durable power of attorney for health care may also authorize the agent following death to determine burial and funeral arrangements, consent to autopsies, and make organ donations (although organ donations can also be made by separate document, as well as on the back of a driver's license). A durable power of attorney for health care decisions is the only power of attorney which can be exercised following the principal's death.

The agent under a durable power of attorney for health care decisions is sometimes not the person named as Trustee of a Revocable Trust, Executor under the Will or agent under a durable power of attorney for financial decisions. This is because the attributes one desires in a financial agent, e.g., financial acumen, are different than those desired for a health care agent, an empathetic desire to provide the best personal care. Thus, even if a corporate fiduciary who is named to serve as Executor or Trustee and financial agent would otherwise agree to assume the role of health care agent, a corporate fiduciary would often decline to serve in such capacity and an individual is normally preferable to a corporate fiduciary as a health care agent. Further, the financial agent may either not have the requisite level of personal closeness, empathy or it may simply be logistically difficult for him or her to serve due to living a considerable distance from the principal.

Although the durable power of attorney for health care decisions should avoid the need to appoint a legal guardian to make personal decisions, for the same reasons a durable power of attorney for financial decisions should name a conservator, the health care power of attorney should name the agent also as legal guardian of the principal in the unlikely event the appointment of a guardian should become necessary.

Further, as also was the case with durable powers of attorney for financial decisions, provisions should specify both a successor agent in the event the initial agent is unwilling or unable to serve or continue to serve, and also how the legal disability of the agent is to be determined in order that the successor agent may appropriately assume such responsibility.

Although sample short forms are frequently distributed by health care providers and other third parties, they rarely provide for a successor agent or the appointment of a guardian, and are incomplete in addressing many of the same issues discussed above with respect to durable powers of attorney for financial decisions, i.e., provisions as to compensation and exoneration from liability. They also omit authority for many personal care matters, including authorizing changes in domicile of the principal to another state, home health care, religious arrangements, and authority to withdraw certain medical procedures, and the aforementioned HIPAA authorizations to clearly provide that the agent for health care decisions will have access to all medical records of the principal. Finally, such simple short forms do not resolve the conflict which could occur should another fiduciary, e.g., the agent under the financial power of attorney or the Trustee of the Revocable Trust, determines that such fiduciary does not want to use the principal's resources to pay for care authorized by the health care agent due to the financial agent deeming such expenditures to be imprudent.

Note: Naming a beneficiary of one's estate as health care agent creates an inherent conflict of interest, for the less the amount of expenditures the agent authorizes and makes in meeting the health care needs of the principal, the more the agent will eventually inherit. Abuse arising out of such conflict is far more prevalent than it should be. This factor should be considered in naming an agent. If desired, as was discussed above with respect to a power of attorney for financial decisions, provisions in the durable power of attorney can appoint an "independent agent" who has the authority to discharge the agent and appoint a successor agent in the event the independent agent determines that the agent is not properly discharging the agent's authority and responsibility.

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LIVING WILL

Most individuals also desire to have a Living Will, known in Kansas as a Declaration, which declares that the person does not wish to be sustained by artificial means in the event of an incapacity and terminal illness. The need for this document was dramatically emphasized in the fairly recent situation of Terri Schaivo in Florida, in which the courts had to decide her intent in the absence of her execution of a Living Will. The Living Will can be drafted to specifically direct whether nutrition or hydration, through intravenous or tube feeding, is or is not to be provided when one is terminally ill and incapacitated. Without such specificity, the Living Will form provided in the Kansas statutes may or may not be construed by the attending physician to apply to such circumstance.

Many individuals also give consideration to authorizing, in an expanded Living Will, what medical procedures are to be provided in non-terminal situations. Every individual has a constitutional right to determine his or her medical care and thus may specifically determine which medical procedures will be administered even in the absence of a terminal condition when such individual is legally disabled and can not make such decisions. An example of such a non-terminal situation is a non-life-threatening mental disability rendering one totally incapable of communicating or recognizing people. Although an agent under a Durable Power of Attorney for Health Care Decisions can be authorized to make these decisions in that situation, leaving a Living Will can insure the client's wishes are carried out, relieve the burden of the health care agent having to make this often traumatic decision, and avoid family disagreements as to the principal's wishes in this regard.

DO NOT RESUSCITATE DIRECTIVE

Individuals in severely failing health or in a terminal condition who do not wish to be resuscitated in the event there is a cessation of heart functioning or breathing may utilize a procedure enacted by the 1994 Kansas legislature known as the "Do Not Resuscitate" Directives Act. The same constitutional right and common law right to self-determination which authorizes one to execute a Living Will prohibiting the use of heroic measures in the event of a terminal illness and incapacity, also allows one to self-determine whether resuscitative measures be utilized in the event breathing or heart functioning ceases. In the same manner the Kansas legislature statutorily recognized Living Wills, Kansas law similarly recognizes Do Not Resuscitate Directives.

Prior to the 1994 legislation, many individuals had already specifically included a Do Not Resuscitate Directive in their Living Wills, along with a general prohibition against the use of other heroic measures. Thus, this legislation does not provide for an entirely new right. What it does do is provide for an instrument which specifically addresses resuscitation measures alone and does not require, as a condition precedent to its effectiveness, a specific determination of one's health, e.g., a terminal condition. Consequently, it does not provide for a comprehensive approach to the issue of heroic measures to preserve life and there is a danger that an unanticipated cause may result in cessation of breathing or heartbeat, e.g., a chicken bone in the windpipe. Thus, a "Do Not Resuscitate Directive" or "DNR" should be used with caution and only after consultation with a physician. It is normally only exercised by individuals who have determined that their quality of life has ebbed to the point that they have concluded that no purpose would be served in resuscitating them under any circumstance.

FOULSTON SIEFKIN'S ESTATE PLANNING AND PROBATE GROUP

Foulston Siefkin LLP, the largest Kansas law firm having offices exclusively in the state of Kansas, has more than 90 attorneys and is headquartered in Wichita, Kansas. The firm has additional offices in Kansas City and Topeka. The firm's Estate Planning and Probate Practice Group consists of eleven attorneys who collectively practice in all significant estate planning, probate and trust areas.

The estate planning law summary above was authored by the firm's Estate Planning and Probate Practice Group. Provided as a service to viewers, it is intended to be a general discussion of one of the Group's major areas of emphasis, planning for a legal disability. However, the foregoing discussion is not designed to be an exhaustive discussion of all of the various issues involved or the strategies to address legal disability. Moreover, they are subject to exceptions for which space did not permit a discussion, often are Kansas law specific, and are subject to varying and changing federal and state laws which may alter or diminish the effectiveness of the approaches outlined above. This document has been prepared by Foulston Siefkin for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.

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FOR FURTHER INFORMATION

Foulston Siefkin regularly counsels clients on issues relating to Estate Planning and Probate. If you are interested in additional information regarding these matters, please visit our website at **www.foulston.com** or if you would like to discuss specific ways in which Foulston Siefkin can help you, contact **Tim O'Sullivan** at 316.291.9564, or at **tosullivan@foulston.com** or **Stewart Weaver** at 316.291.9736, or at **sweaver@foulston.com.**

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