



Ancillary Estate Planning and Critical Questions

By J. Grant Coleman

Almost every lawyer understands the importance of a will. However, clients are often surprised at the priority of inheritance in intestate successions. Clients also can be unpleasantly surprised when a loved one becomes incapable of handling her financial or other affairs for extended periods of time (or permanently), as the administration of assets can be tricky without proper advanced planning.

While this goal can be accomplished through jointly owned or administered accounts, the prospect of an interdiction hearing is unpleasant and can easily be avoided by the use of relatively simple powers of attorney as ancillary documents to the will. It is noted that clients can also use a revocable “pour-over” trust approach to estate planning, where the trust is funded prior to the death or incapacity of the client, which can ameliorate the need for powers of attorney. However, such a trust adds a level of complexity to the estate planning that is beyond the scope of this article.¹

Helping Your Client Organize the Estate to Help the Executor

There are a few simple things that your client can do in advance to make life easier for those who will be handling the estate after she has passed away or become incapacitated. Helping your client organize for estate planning can very effectively simplify the administration of her succession. This can be extremely important in the context of a client who is not married or whose family is not in the local area. Following is a list of items or documents that the client should collect and identify the location of to the executor or agent in advance:

- ▶ Copies of and location of original executed estate planning documents (will, general power of attorney, health care power of attorney, living will).
- ▶ Information on advance funeral arrangements.
- ▶ Copies of beneficiary designa-

tions of IRAs and qualified plans such as 401(k) plans.

- ▶ List of all digital assets or digital accounts, with user IDs and passwords.
- ▶ Copies of life insurance policies and beneficiary designations of life insurance policies.
- ▶ Copies of acts of sale or deeds of real estate owned (if real estate is located out of state, consider transferring it to a revocable trust or a family entity to avoid ancillary probate).
- ▶ List of bank and brokerage accounts.
- ▶ List and location of other valuable assets.
- ▶ Location of bank safe deposit box (and key).
- ▶ Copies of ownership agreements relating to closely-held businesses (shareholders’ agreements, operating agreements, partnership agreements, buy/sell agreements).
- ▶ Addresses or contact information for legatees or beneficiaries.

Financial Management Documents

Absent the revocable trust approach discussed briefly above (where substantially all of the assets of the client are placed into a revocable trust prior to death or incapacity), it is highly recommended that clients have in place financial management documents prior to incapacity. These consist of either an immediate or “springing” power of attorney for financial matters. The power of attorney would authorize appropriate family members or other advisors to handle a broad range of financial and business transactions on behalf of the client.

If the client is healthy and is not in any need of immediate assistance, the power of attorney can be contingent on the client’s incapacity. Otherwise, the power of attorney can be immediate and the appointed agent can begin handling the affairs as may be necessary on behalf of the client. Louisiana powers of attorney (mandates) are governed by Louisiana Civil Code Article 2989 *et. seq.*

The springing or conditional power of attorney only goes into effect when the client is determined to be incapacitated. Thus, it is extremely important to have a mechanism for determining incapacity. La. R.S. 9:3890 authorizes a conditional power of attorney if two licensed physicians provide notarized affidavits attesting to the client’s inability to handle her affairs. Springing powers of attorney are commonly acceptable to third parties if they are accompanied by statements of two licensed physicians, and the incapacity as so determined is consistent with the statutory requirements. In this regard, it is extremely important that the method of determination of incapacity is consistent across all ancillary documents, particularly if a revocable trust is used.

If a client owns real estate in a state other than Louisiana, it may be necessary to have a power of attorney which complies with that state’s law regarding the handling of real estate transactions.

Healthcare Management Documents

In addition to financial management documents, it also is recommended that the client have a health care power of attorney which is immediately effective. This is very useful if the agent needs to obtain the determination of incapacity documentation from the treating physicians, as, depending on the relationship of the agent to the principal, federal medical privacy laws may prevent the providers from advising the agent regarding the capacity of the principal to allow for the effectiveness of the power of attorney.

An additional document which complements the foregoing is the so-called living will or advance directive, which is authorized under La. R.S. 40:1151, *et seq.* This document provides for certain end-of-life decisions to be made by the client rather than pursuant to a medical power of attorney or other authority. Careful attention should be made in drafting and executing the living will as the Louisiana statutory form provides

for a choice between withholding all treatment or withholding all treatment except for nutrition and hydration.²

There was a well-known case in South Florida a few years ago where the patient was removed from a ventilator but continued to live for a long period of time through an artificial feeding method. There followed a lengthy court battle over who had the authority to terminate her artificial feeding, raising fundamental issues of right to life.³ Miss Schiavo suffered a heart attack at a relatively young age and, due to a lack of oxygen during the episode, suffered irreversible brain damage. After several months, she was determined to be in a persistent vegetative state and kept alive only through the use of a feeding tube. After several years, her husband petitioned the courts to remove her feeding tube but he was opposed by her parents. There followed a series of legal actions including multiple trials and appeals in both state and federal courts and both state and federal legislation. The ultimate result was her feeding tube was permanently removed and she died. This case is a lesson for why a living will is essential so that disputes between family members regarding actions to take in similar situations will not be necessary.

Most clients will opt to have all artificial means of support terminated, but the occasional client, either for religious reasons or otherwise, does not want nutrition and hydration withheld and some do not wish to have an advance directive at all. Indeed, the author had one client who proclaimed he wanted all of his wealth (which was substantial) to be used to prolong his life, even cryogenics, as long as possible, in hopes that a future cure may be found.

After Death Organ Donation, Custody of Remains

If the client wants to have an organ or tissue donation, it is very important to have written documents to provide for that in order to make certain the client's wishes are upheld. Registration with the



Louisiana Organ Procurement Agency is advised.⁴ In addition, any desired funeral instructions should be in writing, if not handled in advance by the client, and include the person who has the authority to manage the funeral, especially in situations where the classic husband/wife relationship does not exist. Funeral instructions should not be kept in a safe deposit box, which likely will not be opened under after the funeral.

Conclusion

When discussing estate planning with your clients, one should consider the following critical questions:

- ▶ Is the appointed executor adequately prepared to handle the administration of the succession?
- ▶ Is there a plan for dealing with financial and health care management for the client in the event of incapacity before death?
- ▶ Is there a mechanism to determine the client's incapacity under the financial management documentation?
- ▶ Has the client made an educated decision regarding end-of-life issues?
- ▶ Who will be in charge of the funeral?

FOOTNOTES

1. For an excellent overview on the use of revocable trusts, see *Louisiana Estate Planning, Will Drafting and Estate Administration, Section 10.1* (Matthew Bender), authored by Max Nathan and Carole Neff.

2. See, La. R.S. 40:1151.2 for form.

3. See, *Schindler v. Schiavo* (In re Schiavo), 916 So.2d 814 (Fla. Dist. Ct. App. 2005) (outlining this matter's extensive legal history).

4. The Louisiana Organ Procurement Agency (LOPA) is an independent, not-for-profit organ and tissue recovery agency. Its website is located at <https://www.lopa.org>.

J. Grant Coleman, a member in the New Orleans office of King & Jurgens, LLC, practices primarily in the areas of taxation, estate planning, fiduciary litigation and business law. He has been certified by the Louisiana Board of Legal Specialization as a tax law specialist since the inception of the Louisiana Specialization Program in 1985. He also is a Fellow in the American College of Trust and Estate Counsel. (jcoleman@kingjurgens.com; 201 St. Charles Ave., 45th Flr., New Orleans, LA 70170)

