Estate Planning News and Information

(updated December 15, 2013)

Wills, Trusts, Powers of Attorney and Guardianships

The Commonwealth of Virginia implemented a change to its governing law, the Code of Virginia, which affects all Wills, Trusts, powers of attorney and guardianships in the Commonwealth. Effective October 1, 2012, Virginia has consolidated and re-codified various titles of the Code of Virginia and placed them all in a brand new title – Title 64.2.

Many Virginia Wills incorporate broad fiduciary powers by reference to Code of Virginia Section 64.1-57. If your current Will says “64.1-57,” check with your attorney to see if your document needs to be updated. The new Code section for broad fiduciary powers by reference is “64.2-105.”

Uniform Power of Attorney Act

Virginia adopted the Uniform Power of Attorney Act as of July 1, 2010. Documents drafted and signed before the enactment date are still valid; the main change was to make powers of attorney more acceptable by banks and other third parties, going so far as to impose penalties on third parties for not accepting validly presented powers of attorney in certain circumstances.

HIPAA – Health Insurance Portability and Accountability Act of 1996

It is difficult, if not impossible, for a loved one to get access to your medical records, unless the health care provider has a waiver of HIPAA liability. My powers of attorney and the advance medical directive incorporate HIPAA waivers, which should make the release of medical records by health care providers to agents easier. You should give a copy of your advance medical directive to your health care provider. Some health providers and health insurance companies have their own HIPAA forms, so it is a good idea to check with them on their requirements.

Guardianships for minors

The appointment of a guardian for a minor after both parents are deceased must be done by a Will. The Will must be valid under state law. This type of guardianship appointment is called a ‘testamentary guardianship.’ There are actually two guardianships. First, there is a “guardian of the person” of the minor child (under age 18) who is in charge of the physical custody and personal affairs of the child. Second, there is the “guardian of the estate” of the minor child, who is responsible for the minor child’s financial assets. Many times, the “guardian of the person” and “guardian of the estate” is the same person. This is not always the case and is determined by the facts and circumstances of each individual case.

Virginia law states that the guardian of the person of the minor *must* have physical custody. The guardian of the minor’s estate (i.e., assets) *must* have the possession, care, and management of the minor's real and personal property. The task of the ‘guardian of the estate’ is to be the financially responsible person for the minor. He or she must first take into account the minor's other sources of income, support rights, and other reasonably available resources of which the guardian is aware, and then must provide for the minor's health, education, maintenance, and support from the income of the minor's funds and, if income is not sufficient, from the principal of the minor's funds.

Notaries Public

The Commonwealth of Virginia is now allowing specially-commissioned electronic Notaries to perform online electronic notarizations. Under the new law, which took effect July 1, 2012, Virginia’s rule for “personal appearance” can now be satisfied by live, two-way audio-video conferencing.

The US Postal Service may soon be offering notary services to increase revenue, based on a recommendation from the Office of the Inspector General. Stay tuned.