O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

TAX AND WEALTH ADVISOR ALERT: ESTATE PLANNING DURING THE COVID-19 CRISIS–ENSURING YOUR DOCUMENTS ARE LEGALLY ENFORCEABLE

The estate planning team at O'Neil Cannon is safely helping clients create estate plans, or update existing estate plans, during this COVID-19 crisis. Estate planning documents must comply with Wisconsin's strict signing requirements to be legally enforceable. For example, some documents require two witnesses or a notary to witness a testator's signature. To date, Wisconsin's strict signing requirements have not been relaxed during the COVID-19 crisis. Therefore, it is important to keep in mind Wisconsin's signing requirements during these uncertain times. This post will give an overview of each estate planning document and Wisconsin's signing requirements.

Requirements to Sign a Last Will and Testament or Codicil

A valid Will in Wisconsin must be signed by the testator in the "conscious presence" of two non-relative, disinterested witnesses. Alternatively, Wisconsin does permit the testator to direct someone else to sign his or her name on the Will, but this person must do so in the "conscious presence" of the testator and two non-relative, disinterested witnesses. Neither the courts nor legislature have addressed whether witnessing a Will over video conferencing (like Zoom or Skype) would satisfy the "conscious presence" requirement to create a valid Will. Notarization is not required unless the Will contains a self-proving affidavit or acknowledgment. Codicils to Last Will and Testaments are required to follow the same signing formalities as a Last Will and Testament.

Trust Signing Requirements

A Trust is a document that holds your assets on behalf of a beneficiary or beneficiaries and tells the trustee how to manage and distribute those assets. A Trust may be signed without a witness or a notary.

Certification of Trust Signing Requirements

A Certificate of Trust is a document that confirms the existence of a Trust. A trust certification

must be signed or authenticated by any trustee of the Trust to be valid. A trust certification may be signed without a witness or a notary.

Marital Property Agreement Signing Requirements

A Marital Property Agreement is used to classify ownership of a married couple's assets and liabilities, as well as governs how each spouse's assets will be distributed upon his or her death. Wisconsin law simply requires both spouses to sign the Marital Property Agreement. Thus, a Marital Property Agreement may be signed without a witness or a notary.

Health Care Power of Attorney Signing Requirements

A Health Care Power of Attorney authorizes another person to communicate with your health care providers what medical treatments you do and do not want. A valid power of attorney for health care must be signed by two non-relative, disinterested witnesses, but it does not need to be notarized. It is unclear whether witnessing a power of attorney for health care over video conferencing (like Zoom or Skype) would satisfy the statutory requirements.

HIPAA Release Authorization Signing Requirements

A HIPAA Release and Authorization allows you to authorize other individuals to have access to your medical records. A HIPAA Release and Authorization may be signed without a witness or a notary.

Declaration to Physicians (Living Will) Signing Requirements

A Living Will allows you to state your preferences for life-sustaining procedures and feeding tubes in the event the person is in a terminal condition or persistent vegetative state. A Living Will requires you to sign in front of two non-relative, disinterested witnesses, but it does not need to be notarized. It is unclear whether witnessing a Living Will over video conferencing (like Zoom or Skype) would satisfy the statutory requirements.

Authorization for Final Disposition Signing Requirements

An Authorization for Final Disposition allows you to designate a friend or loved one to make funeral arrangements on your behalf. This document also allows you to state your preferences for final disposition and funeral service. This document can be signed in front of either (a) two non-relative witnesses or (b) a notary. It is unclear whether witnessing an Authorization for Final Disposition over video conferencing (like Zoom or Skype) would satisfy the statutory requirements, and online notaries have not been approved for estate planning documents.

Currently, our team is meeting our estate planning clients and prospective clients over

teleconferences to ensure the safety of our community. After the initial consultation, clients are provided drafts of their estate plans for their review. When the estate planning documents are finalized and ready to sign, we are meeting our clients at their homes to witness and notarize their signatures through a glass door or window. Until Wisconsin authorizes electronic witnessing and notarization for estate planning documents, this process ensures that estate plans are properly drafted and executed during these uncertain times.

If you would like to create an estate plan, or review your current estate plan, please contact Attorney Kelly M. Spott at 414-276-5000.