Title Insurance *(continued)*

lender) and the name of the person or entity who owns the real estate as of the effective date of the title commitment. Finally, Schedule A includes a legal description of the real estate covered by the title commitment.

II. SCHEDULE B-REQUIREMENTS

Schedule B-I of the title commitment contains the requirements that must be satisfied before the title company will issue the title policy. Requirements typically include establishing the buyer's and seller's authority to enter into the transaction. In addition, the release of existing mortgages and other liens and encumbrances such as construction liens, are typically included in Schedule B-I of the title commitment.

III. SCHEDULE B-II: EXCEPTIONS

Schedule B-II contains exceptions from coverage. Schedule B-II contains two types of exceptions, the so-called "standard exceptions" that are pre-printed exceptions found at the beginning of Schedule B-II and the so-called "special exceptions" which follow the standard exceptions.

The standard exceptions apply to real estate interests generally and are not specific to the subject real estate. The special exceptions are matters specific to the subject real estate such as real estate taxes, easements, covenants, restrictions and other matters which affect the subject real estate and are recorded in the public records.

The special exceptions will often be the basis for objecting to the state of title pursuant to a real estate contract, and should be carefully reviewed. Title companies generally provide the parties receiving the title commitment with a copy of each recorded document listed as a special exception. If such so-called "exception documents" or "underlying documents" are not delivered with the title commitment, they should be requested from the title company.

Any restrictions and covenants affecting the real estate will also be excepted from coverage under Schedule B-II. Exception documents require review to determine if there are any restrictions or covenants which restrict or adversely affect the buyer's or borrower's use or intended use of the real estate. Schedule B-II also discloses whether real estate taxes are current or delinquent.

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ABRAHAMS KASLOW & CASSMAN LLP
ATTORNEYS AT LAW

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Legal Perspectives

from Abrahams Kaslow & Cassman LLP

Directives for Health Care Options in Nebraska

From the Estate Planning Group (Howard Kaslow, Ron Parsonage, Tom Malicki, Mary Vandenack, James Tews)

The recent publicity concerning Terri Schiavo has many clients raising questions about the validity, enforceability and effectiveness of their directives concerning health care. The purpose of this article is to summarize the current options under Nebraska law.

Nebraska law provides for two types of Advanced Directives: The Health Care Power of Attorney and the Declaration (commonly referred to as a Living Will). Different states have different options regarding health care directives. Clients who travel often or who winter/summer in another state should have their documents designed to be effective wherever they are. The following is a brief discussion of the Advanced Directives authorized under Nebraska law.

HEALTH CARE POWER OF ATTORNEY

What is a Health Care Power of Attorney?

A Health Care Power of Attorney allows you to appoint someone else (your "Agent") to make certain health care decisions on your behalf if you are "incapable" of making your own health care decisions.

The Agent's authority to make health care decisions for you arises when a determination has been made that you are "incapable" of making your own health care decisions. You are considered "incapable" of making health care decisions when you cannot understand and appreciate the nature and consequences of health care decisions or cannot communicate in any way an informed health care decision.

What kinds of decisions can the Agent make on your behalf?

A health care decision is defined to include consent, refusal of consent, or withdrawal of consent to health care. Health care means any treatment, procedure or intervention to diagnose, cure, care for, or treat the effect of disease, injury and degenerative condition. Health care decision does not include the withdrawal or withholding of the usual provision of

Continued on page 2.

What is Title Insurance? *by James Pfeffer*

Many real estate-related transactions involve title insurance. A title insurance policy covers loss or damage caused by the state of title to the real estate covered by the title policy not being as it is described in the policy on the date the policy was issued. The two types of real estate interests most commonly insured by a title insurance policy are an owner's interest and a lender's interest.

Generally, an owner's title policy insures (i) the vesting of title of the real estate in the buyer (or owner), (ii) to the extent not excluded or excepted from coverage, the non-existence of defects in title, liens or encumbrances, (iii) marketable title and (iv) the right of access to and from the real estate. A loan policy of title insurance insures the four matters insured by an owner's policy and also insures that the mortgage lien is valid and enforceable and the priority of the mortgage lien (subject to the exceptions to and exclusions from coverage).

ANATOMY OF A TITLE COMMITMENT

A commitment for title insurance is the title insurance company's agreement to issue a title policy subject to the requirements, exclusions and exceptions shown in the title commitment. A title commitment contains a Schedule A and Schedule B, with Schedule B consisting of Schedule B-I and Schedule B-II.

I. SCHEDULE A

Schedule A sets forth an effective date of the title commitment. The information and contents of the title commitment are current to the effective date of the title commitment. Schedule A also describes the type of policy to be issued (an owner's and/or a lender's policy), the amount of such policy and the premium that will be charged for the policy. The amount of the title policy is the maximum amount the title insurance company is obligated to pay if there is a claim on the title policy. In a lender's title policy, the amount of the policy is generally the amount of the loan. In an owner's title policy, the amount is generally the purchase price for the real estate. Care should be taken to ensure that the insured is getting an adequate amount of title insurance.

Schedule A lists the name of the proposed insured (the owner or

Continued on page 4.

Attorney Spotlight

John Herdzina elected to the Executive Council of the Omaha Bar Association

Sandy Maass nominated as YWCA's Business/Entrepreneur Women of the Year

Tyler McLeod re-elected for another term on the City of Omaha Parks & Recreation Board

Mary Vandenack represented the Nebraska State Bar Association at the American Bar Association Business Bar Leaders Conference in Chicago in May and was named to Chair the Development Committee at St. Stephen the Martyr

Donna Wilcox elected to the American Lung Association Board

Congratulations to ***John Herdzina and Howard Kaslow*** for being recommended for the Chambers USA Directory of America's Leading Lawyers. This directory is a compilation of firms and attorneys who are considered leaders in their field. Over 7,000 telephone interviews are conducted and researchers spend a year talking to clients and lawyers across the U.S. to compile this directory designed to reflect market opinion.

Directives for Health Care *(continued)*

nutrition and hydration or the withdrawal or withholding of life sustaining procedures unless you specifically authorize your agent to make such decisions.

You may authorize or direct your agent to withdraw or withhold artificially administered nutrition or hydration or to withdraw or withhold life sustaining procedures only when you are suffering from a terminal condition or you have lapsed into a persistent vegetative state.

Is my Agent required to consider my wishes when making health care decisions?

The person you designate as your Agent has a duty to act consistently with your desires as you state them in the Power of Attorney. If your wishes on a particular issue are not stated or otherwise known, then your Agent has a duty to act in a manner consistent with your best interests. You can include as many specific directions as you desire in a health care power of attorney; however, one of the key advantages of naming an agent is that you can communicate with the agent rather than delineating detailed directions in your power of attorney.

DECLARATION

What is a Declaration (also known as a Living Will)?

The Nebraska Declaration allows you to specify, in writing, your desires in regard to the type of life support to be provided to you if you become terminally ill or are in a persistent vegetative state.

When does a Declaration become effective?

For a Declaration to become effective, (1) the Declaration must be communicated to your attending physician; (2) you are determined to be in a terminal condition or persistent vegetative state; (3) you are determined to be unable to make your own decisions concerning life sustaining treatments; and (4) the attending physician has notified a reasonably available member of your immediate family or guardian of your diagnosis.

What directions can be made pursuant to a Declaration?

You may specify your wishes concerning the withdrawal or withholding of life sustaining treatments, the withdrawal or withholding of artificial nutrition and hydration, and relief from pain.

Are there certain medical interventions that cannot be withheld?

Yes. Regardless of what the Declaration may state, the attending physician has a duty to continue providing treatment for your comfort and alleviation of pain.

ADVANCE DIRECTIVES COMPARED

What is the difference between a Health Care Power of Attorney and a Declaration?

A Health Care Power of Attorney names an Agent to make decisions for you at such time as you are incapable of making your own health care decisions. A Declaration is only effective upon a determination that you are terminally ill or in a persistent vegetative state. The "right to die" provisions of a Declaration (life sustaining treatments, nutrition and hydration, and pain relief) may be incorporated into your health care power of attorney. Typically, you should consider either (1) incorporating the Declaration provisions into a health care power of attorney or (2) executing both a Declaration and a Power of Attorney. The best approach for you depends upon your personal situation.

SOME CONSIDERATIONS

Give some thought to health care decisions while you are well. Communicate your thoughts on health care to your family or friends. It is wise to execute formal documents describing your wishes. Review your documents at least once a year to be sure they reflect your current perspective. Consider an annual review of your health care directives in conjunction with annual tax returns.

Religion may play a significant role for some. Most churches, synagogues and other religious organizations have information readily available. There are also a variety of websites containing information on the perspectives of various religions.

Supreme Court Paves Way for More Age Discrimination Claims

From the Employment Law Group (Harvey Cooper, Sandy Maass, Tyler McLeod)

On March 30, 2005, the U.S. Supreme Court ruled that the "disparate impact" theory of liability is available to plaintiffs under the Age Discrimination in Employment Act (ADEA) which prohibits discrimination against employees over age 40.

Disparate impact cases involve employment practices that are facially neutral in their treatment of different groups but that in fact result in a discriminatory impact on a protected class. An employee, therefore, is not required to prove that his or her employer intended to discriminate but only that the effect of the employer's practice has a disparate impact.

In *Smith v. City of Jackson*, city police officers and public safety dispatchers argued that the city's pay plan that provided higher raises for individuals with less than five years of service resulted in disparate treatment and a disparate impact on older individuals, most of whom had more than 5 years experience. The city contended the purpose of its pay plan was to bring entry-level salaries in line with salaries offered by police departments in surrounding areas.

Since the early 1970's, courts have permitted disparate impact claims under Title VII which prohibits discrimination based upon race, color, national origin, sex and religion. Prior to *Smith v. City of Jackson*, however, courts had not addressed whether the disparate impact theory would apply in lawsuits brought under the Age Act.

The Supreme Court actually ruled in favor of the city because the pay plan was implemented for a reasonable purpose, i.e., to make salaries for newly hired employees more competitive with police departments in surrounding areas. The court was able to employ this rationale as the Age Act specifically permits employers to engage in otherwise prohibited conduct if the employer's reasons are "based upon factors other than age." Unlike the Age Act, employers are not afforded this defense in Title VII discrimination cases based on sex, race, religion, color or national origin.

The Court's decision is clearly a victory for plaintiffs because it expands the potential liability for employers under the Age Act by allowing plaintiffs to make disparate impact claims with the ADEA. The Court, however, also ruled that the protection against disparate impact under the Age Act is not as strong as under Title VII.

Like the *City of Jackson*, an employer may still successfully defend disparate impact claims under the Age Act by establishing that it relied upon reasonable factors in implementing a policy that has an adverse impact on older workers.

Protect Yourself from Personal Liability for your Company's Debts

by Mark Williams

When communicating with your customers, suppliers and others, always use the full legal name of your company. For example, if you have a corporation named Business, Inc., you should use the full name Business, Inc. in your advertising, contracts, signs, receipts and all other materials. If your company only uses the name "Business" or your name, you might be subjecting yourself to personal liability for the debts of your company. If you prefer to use a name other than the full legal name of your company, you must make the appropriate trade name and/or trademark filings and you must properly reference your company in order to avoid personal liability.

Tips for Employers Adopting Retirement Plans

From the Benefits Group (Sandra Maass, Mary Vandenack, Donna Wilcox, Nick Dafney)

1. Consider using your law firm's prototype. Doing so may be less expensive than using the prototype of an investment firm. Most investment firms are clear that legal advice is not being provided and that the employer remains responsible for the documents and for all legal issues. It takes less time for our retirement plan attorneys to review a document we are familiar with (our prototype) than it does to review unfamiliar documents. In addition, ongoing legal support is simplified and less expensive.
2. A law firm prototype provides an employer independence from a particular investment company. Many administrators and investment firms may initially tell employers that they won't administer documents that they did not create. Most will.
3. Employers should seek clarification on how all expenses work. Are your investment options limited to those that are more expensive? The Department of Labor has published a spreadsheet to help employers compare apples to apples when comparing retirement plans. The spreadsheet requires vendors to show total expenses and how such expenses are being paid. The Internal Revenue Service has recently given regulatory priority to helping employers understand plan expenses.
4. Discuss whether the Employer should be Trustee. The current trend is to establish self-directed plans whereby liability is supposedly shifted to participants. Many employers believe they are completely protected by naming an institutional trustee and offering self-direction. For a variety of reasons, the employer often does not achieve its goal of shifting liability.
5. Clarify investment responsibility. Discuss whether the plan financial advisor should be an Investment Advisor under ERISA.
6. Discuss exactly what services will be provided and by whom. Often, administrative services agreements provide essentially for recordkeeping services and specifically disclaim responsibility beyond that. Seek clarification.
7. In almost all cases, the Employer continues to be responsible for all aspects of plan oversight. Develop an internal checklist of issues and how to handle them. If your agreement with the administrator states that the administrator does not provide any legal services, don't rely on the administrator for legal issues.
8. Review the overall plan operations annually at a meeting of the board of directors. Review administration. Review investment structure. Discuss plan design. Review fiduciary responsibility. Document the review in the corporate minutes. Such documentation will satisfy auditors and help them highlight issues. Plan review by the employer is an important factor if a corrections procedure becomes necessary.