



LEGAL PERSPECTIVES

ABRAHAMS KASLOW & CASSMAN LLP OMAHA'S BUSINESS LAW FIRM · SPRING 2021

Choosing the Right Person for the Job



By Andrew Deaver

Many clients enter an estate planning meeting having thought through the questions of who will care for minor children, who will receive assets, and how assets will be dispersed.

But there is much more to consider – like choosing who will serve in the positions of responsibility created in each of the client's

estate planning documents. An estate plan can consist of a:

- Will – may require a Guardian and a Personal Representative (commonly referred to as an Executor)
- Financial Power of Attorney – requires an Agent
- Health Care Power of Attorney – requires an Attorney-In-Fact
- Trust - requires a Trustee.

Each of these positions carries with it a unique and important set of responsibilities. These responsibilities may require different skill sets for each of those appointed to the roles.

Guardians need to care for a client's children in a manner that the client would approve. Personal Representatives need to be able to handle financial matters, court documents, and deadlines. Agents need to be able to manage a great deal of financial information and often to act very quickly. Attorneys-In-Fact must work under challenging health situations where life and death decisions may be necessary. Trustees need to work with beneficiaries to make appropriate distributions while managing



assets and handling taxes, potentially over many years.

In the end, each position is very different, which can become a complication for clients who want to nominate the same person or persons for the majority of these roles. While one person may be well suited for some of these positions, the client should think through each position carefully to ensure the person he or she nominates is the best fit. This can lead to difficult conversations among family members where one member is selected for one position but not for another, and someone's feelings may be hurt. It is up to each client to weigh the consequences of bruised egos versus best fits. It's not easy, but it must be done.

While the initial prodding to create an estate plan can come from different advisors, having the guidance of an experienced estate planning attorney can help clients through the difficult choices of nominating individuals for these positions or responsibilities.

The attorneys of Abrahams Kaslow & Cassman LLP have been having these conversations with clients for over 75 years. Contact Andy Deaver at adeaver@akclaw.com or by phone at 402.392.1250 for more information.



Harvey Cooper to Present at National Conference

Harvey Cooper leads the Employment Law Team at Abrahams Kaslow & Cassman LLP. He has been selected to lead a discussion on *When do we get back to the New Normal? and what is the New Normal anyway?* at the Defense Research Institute's (DRI) 2021 Employment and Labor Law Virtual Seminar being held this May.

DRI is an international membership organization for attorneys that holds conferences, seminars, and webcasts for their 16,000 members.

Harvey is a partner at the firm and specializes in Employment, Corporate and Business, and Manufacturing Law.



EMPLOYMENT LAW

State Income Tax Withholding Implications for a Remote Workforce



By Peter M. Langdon

It is common for businesses that employ a mobile workforce or that are located near borders where employees frequently cross state boundaries to keep careful records of the locations where their employees live and work.

They are accustomed to tracking state tax reporting and payment obligations. But now, as the COVID-19 pandemic has resulted in many employees working remotely, the tax compliance landscape has changed almost overnight.

At a result of the pandemic, businesses were forced to move to a remote workforce, and employees began to work from home or another remote site instead of their traditional work location. Sometimes, this remote location is in another state.

Employers are generally required to withhold and remit state income tax from an employee's compensation to the state where the employee is performing services for the employer, provided the

state imposes a state income tax. However, due to the pandemic, some states have issued guidance suspending income tax withholding for remote workers who are teleworking in a different state than their employer. But, as this trend continues on longer than initially anticipated, an employer's state income tax withholding obligation becomes an issue.

Some employers may view a remote workforce as a temporary reaction to the pandemic. However, many employers are considering a move to longer-term or even permanent work-from-home or work-from-anywhere policies. If your business is thinking about a structural change in working conditions, you should pay attention to the guidance published by states where you have employees working remotely and consider speaking with an attorney skilled in such matters. Peter M. Langdon is an employment law attorney at Abrahams Kaslow & Cassman LLP and can be reached at plangdon@akclaw.com or by phone at 402.392.1250.

US News & Best Lawyers® Recognizes Six AKC Law Attorneys as “Best Lawyers in America”[®]

Each year, Best Lawyers® and US News & World Report compile a list of the *Best Lawyers in America*®. This list represents 5% of lawyers practicing in the United States. The 2021 rankings are based on the highest lawyer and firm participation on record, incorporating 8.3 million evaluations of more than 110,000 individual leading lawyers from more than 22,000 firms. Awards were given in 75 national practice areas and 127 metropolitan practice areas. In addition to our attorney rankings, the law firm of Abrahams Kaslow & Cassman LLP received recognition as a Tier One Firm for Corporate Law, Municipal Law, and Trusts & Estates Law. The firm was also recognized as a Tier Three Firm for Franchise Law.



Howard J. Kaslow
Since 1989
Corporate Law
Trusts & Estates



John W. Herdzina
Since 2006
Corporate Law
Franchise Law



Thomas J. Malicki
Since 2008
Corporate Law
Trusts & Estates



Timothy M. Kenny
Since 2009
Municipal Law



Randall Hanson
Since 2010
Energy Law



Harvey B. Cooper
Since 2021
Corporate Law



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Liens - an Area of Law Ripe for Error



By Casey Jenkins

A young attorney in a Kansas courtroom was surprised when the judge lowered his glasses and proclaimed, "I've always been intrigued by liens; they are an area of law ripe for malpractice!" Of course, the young attorney took a second look at his filings and paperwork. It is true; liens are a very technical area of law. You have one shot at filing and perfecting the lien; if the lien is filed incorrectly and all statutory filing requirements are not achieved, the lien may be invalid.

A construction lien is generally an interest in property provided to assure payment for labor or material that was provided to, or for, a piece of property. The lien is created or perfected when the lien claimant satisfies certain statutory conditions and filing requirements. Since liens are created by statute, each and every condition must be met or the lien is invalid. A lien is a powerful tool because it is a preferred secured interest in the property, meaning the property cannot be sold with a "clear" title until the lien is resolved. If all of the required statutory provisions are followed to file a construction lien, then the lien can be foreclosed, giving the lien holder the right to force the sale of the property to satisfy the claim. In each case certain time requirements and notices are required before filing and perfecting a construction lien.

In Nebraska, liens must be filed within certain time periods and



must include certain notices.

- If you are a general contractor, subcontractor, or homeowner, certain rights, duties, notices, and obligations apply before a lien can be filed, attached, and foreclosed.
- If you are a property owner and a lien has been filed, you should get an experienced attorney to resolve the lien and protect your interest in your property.
- If you are a general contractor, subcontractor, or material supplier having issues getting timely payment, you should seek an attorney to potentially file a lien to ensure you are paid for your work.

At Abrahams Kaslow & Cassman LLP, we are well versed in construction lien filing and foreclosure. If you need assistance with filing a lien, please contact Casey at 402.392.1250 or cjenkins@akclaw.com.

NEGOTIATING EVENT CONTRACTS AMID COVID-19:

When One Party Does Not Perform



By Nicole Seckman Jilek and Julie M. Ryan

Nebraska businesses continue to require precautions such as mask-wearing, social distancing, and maintaining a high standard of cleanliness and sanitation. As a result, event planners have been wary of holding live events, including weddings, conferences, concerts, sporting events, fund raisers, and more.

However, the administration of COVID-19 vaccinations has begun, and some states have loosened COVID restrictions. You may even be thinking about planning an event in the future. Here are some things to consider when negotiating event contracts in 2021:

Force Majeure Provision. This provision can be

used when a party's performance may become impossible or impracticable due to something it could not have anticipated or controlled when executing the contract. Some courts limit triggering circumstances to those specifically listed in the contract. The clause should be specific but still include a properly drafted "catch-all" provision. Nebraska courts have not yet decided whether the COVID-19 pandemic can be relied on as a triggering event for a buyer or event "host" to escape duties without liability. It is unknown whether this pandemic is an "unforeseen" roadblock when other pandemics have happened before. Force majeure likely would not excuse non-payment of sums due under a contract, as money can still be easily transferred during a pandemic. Make sure your force majeure language is tailored to your needs for greater protection. Consider whether a force majeure occurrence should

let the non-performing party out of the contract altogether or allow that party more time to perform, such as a delay or rescheduling of the event. The provision should also include duties on the party claiming force majeure requiring the provision of timely notice, use of reasonable effort to overcome the effects of the force majeure and keeping the other party updated during the claimed force majeure event.

Law of Impossibility/Impracticability. This refers to the situation when a party cannot perform its duties due to unexpected circumstances that make doing so severely impracticable or impossible. It can apply even if not included in contract terms. Proving a right to this defense can be difficult. For example, a buyer cannot cancel an event contract due to impracticability because event items or services have become inconvenient or more expensive during the pandemic. But if a government stay-at-home order or similar order makes holding an event illegal, this defense would likely apply to protect an event "host" from not holding the buyer's event. A party relying on this defense would have to show it used "reasonable" efforts to overcome whatever obstacle is at issue.

Law of Frustration of Purpose. Like the law of impossibility/impracticability, this doctrine can apply even when not included in a contract. It applies when a change in circumstances makes the very purpose of the contract frustrated so that the services one party was supposed to perform become worthless to the other party. How a Nebraska court would address this defense in regard to an event contract during a pandemic is still to be seen.

These are just a few things to consider before signing an event contract. For more information, please call 402.392.1250 to speak with Nicole (njilek@akclaw.com) or Julie (jryan@akclaw.com).

Considerations When Establishing a Special Needs Trust



By Tyler Johnson

If you are considering creating a special needs trust (SNT) for yourself, or your loved one, two critical considerations are:

- (1) whose assets are being used to fund the trust; and
- (2) who should serve as trustee.

ASSETS

It is important to consider whose assets are being used to fund the trust because the answer will determine which type of SNT is utilized. A first-party SNT and third-party SNT are two of the more common types of special needs trusts. A first-party SNT is funded with the assets of the beneficiary. These trusts can be created when the beneficiary stands to receive a settlement or an unexpected inheritance. First-party SNTs are subject to required Medicaid reimbursement. This means that when the beneficiary of the SNT passes away, the State Medicaid Agency or Agencies must be repaid for all benefits paid to the beneficiary.

On the other hand, a third-party SNT is created and funded with the assets of someone other than the beneficiary, such as a parent, grandparent, or relative, for the benefit of the beneficiary. These assets are not subject to Medicaid reimbursement because they never belonged to the beneficiary.

TRUSTEE

Trustees are responsible for managing the assets owned by the trust and administering those assets according to the terms of the trust and in accordance with the Nebraska Uniform Trust Code. Trustees of SNTs also need to know and understand how management and administration of the trust will impact the beneficiary's government benefits under federal and state public benefits laws, regulations, and policy manuals.

Most people typically choose between a relative, family friend,



or a professional trustee to serve as trustee. The benefit of having a relative or family friend serve as trustee is that he or she has already established a relationship with the beneficiary and has an intimate knowledge of the beneficiary's needs. However, relatives or friends need to have a working knowledge of the applicable state laws and regulations, not only to comply with laws but also to preserve the trust's intended purpose of benefiting the beneficiary. This can be a steep learning curve. As a result, people sometimes opt for a professional trustee.

A professional trustee is more familiar with the rules and regulations governing SNTs and can likely serve as the trustee for the life of the beneficiary. A professional trustee, however, is typically more expensive than a relative or family friend and does not have a relationship with the beneficiary at the outset. Ideally, the professional trustee will develop a relationship with the beneficiary over time, but that is not always the case.

Your special needs planner can help you determine which type of trust best suits your particular circumstances and can help you walk through the process of choosing a trustee. Abraham Kaslow & Cassman LLP has over 75 years of experience counseling individuals and families on estate planning needs. Our attorneys are members of the Academy of Special Needs Planners – a network of attorneys and financial planners who provide special needs planning services. Contact Tyler at 402.392.1250 or by email at tjohnson@akclaw.com.



Payton Hostens

AKC Law Clerk Payton Hostens was recently inducted into the Creighton Inn of Phi Delta Phi International Legal Honors Society. Phi Delta Phi celebrates academic excellence and embraces the finest attributes of professionalism and scholarship. Membership in Phi Delta Phi is a mark of honor and distinction. CONGRATULATIONS Payton!

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Abrahams Kaslow & Cassman LLP
8712 West Dodge Road • Suite 300
Omaha, NE 68114
402.392.1250 AKCLAW.com



Dianna Cupps

AKC Law recently celebrated two significant work anniversaries. Dianna Cupps has been a Legal Secretary at the firm for 35 Years and Cindy Suster has been a Legal Secretary at the firm for 25 Years!

A special Thank You to these two ladies - you have made a difference in our lives and your contributions to the firm have been immense.



Cindy Suster

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