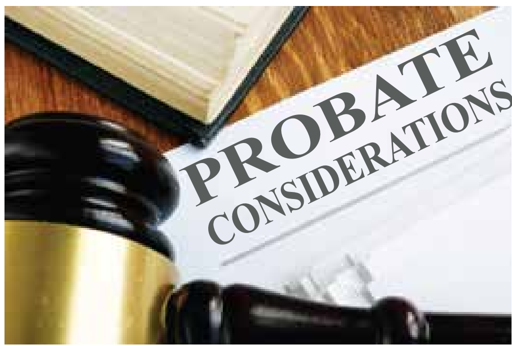

By Julie M. Ryan

Probate is a legal process for distributing a deceased person's estate. Depending on the circumstances, it can be lengthy and costly. For example, documents must be prepared and timely filed with the probate court; assets must be located and inventoried according to the value of the asset on the date of the death of the decedent; bills, expenses, and applicable taxes must be paid; and, eventually, assets must be distributed properly to the beneficiaries or heirs in accordance with the terms of the decedent's will and/or Nebraska law.

In Nebraska, a deceased person's estate generally must pass through probate, whether the person had executed a valid will during his or her lifetime or not. But there are exceptions for when a probate action can be avoided as to some or all of a deceased person's assets. For instance, you may opt to distribute your estate via a trust. An attorney can assist you with including language in your trust tailored to your unique needs and estate planning goals. You may consider adding a payable-on-death beneficiary designation to your bank account to the extent you have an account that allows such designation. You may also choose to name one or more beneficiaries via a transfer-on-death form for your investment accounts. There are similar options available to pass on real estate and qualifying types of motor vehicles to individuals outside of the probate process. You may also consider naming beneficiaries on your life insurance, retirement plans, and/or annuities. Any property or share in property you own jointly with another person during your life generally automatically passes to any surviving joint owner.

Further, Nebraska allows some small estates to be transferred to heirs via a small estate affidavit. Keep in mind any asset to which you name a beneficiary will become an asset subject to probate if all named beneficiaries predecease you. Consider adding contingent beneficiaries when possible.

Regardless of the size of your estate, you should consider discussing with an attorney what estate planning options are right for you. Abrahams Kaslow & Cassman LLP has over 75 years of experience in helping its clients create and execute wills and trusts as well as carry out complex wealth transfers. Contact jryan@akclaw.com to learn more.

Starting a new business?

By John Herdzina

Starting a new business can be challenging. A new business owner is often not only the chief executive officer but the janitor as well. A new business owner is burdened with many obstacles, including federal, state, and local laws and regulations, capital requirements, cash flow, and gaining business savvy. On top of those responsibilities, there are more personal unknowns to deal with, such as personal health issues, accidents, death, divorce, marriage, the economy, and pandemics.

Buying a franchise can make your entrepreneurial journey go a bit smoother, from the beginning and onward. A franchisee benefits from operating a business with the franchisor's research, development, operating history, name-brand recognition, products, and services. A franchisee also has a license to use the franchisor's trademark(s), operations, and procedures, all with the franchisor's support.

When you purchase a franchise, life's other issues can be easier to overcome. The whole concept of franchising is a repeatable business model. Instead of reinventing the wheel, the franchised business format services or the traditional or product distribution franchise is a tried-and-true system based on the franchisor's business model.

Choosing the type of franchise business that fits your desires and abilities is the first consideration because there are franchises in virtually every sector of business, (e.g., automotive services, hotels, restaurants, healthcare, fitness, education, and residential services). Then, research the particular franchise that best fits your standards and evaluate competitors in the marketplace. It may be helpful to get the advice of a professional franchise consultant to help you complete your due diligence.

Once you have decided on a franchise, you can obtain the franchise disclosure document, franchise agreement, and related agreements (collectively, the "FDD") for the particular franchised business you have chosen. The FDD is a document required by the Federal Trade Commission known as the FTC Franchise Rule (several states have additional rules). The FTC Franchise Rule imposes pre-sale disclosure obligations and restrictions on a franchisor, but it also requires the franchisor to provide important disclosures/information to potential franchisees. The FDD must be read in detail by you, your lawyer, accountant, and financial advisor to understand the contractual obligations and costs of buying and operating the franchise.

The FDD will disclose a wealth of knowledge about the franchisor, including:

- The franchisor's length of time in business
- Key business persons involved in the franchise
- Business operations, support, and services provided by the franchisor to the franchisee
- Any lawsuits among the franchisor and other franchisees
- The number of franchises sold ; and
- A list of all franchisees and their contact information so you can contact them.

Many FDD's even give you an idea of how much money a franchisee can make.

The next critical piece of the due diligence process is discussing past and current franchisees' relationships with the particular franchisor. Relationships are an essential part of franchising. You should discuss the franchisor's brand value, how well the franchisor supports its franchisees, and whether the franchisor meets its delivery and support obligations.

Finally, if you are considering purchasing a franchise, you should be ready to comply with the laws, regulations, and multiple contractual issues that go along with it.

From a legal perspective, franchising is a contractual relationship between a licensor/franchisor and a licensee/franchisee that allows you, the business owner, to use the franchisor's brand and methods of doing business. The documentation contains all of the franchisee's duties and rights under the franchise. Therein lies the reason you should get the support of a qualified lawyer who knows franchising and will help you with the legal analysis.

AKC Law has a team of franchise attorneys who can help! Call 402.392.1250 to speak with one today, or visit us online at akclaw.com.

LEGAL PERSPECTIVES

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

Protecting Your Businesses' Most Important Asset

By Greg Schreiber

A trademark can be one of the most important assets that a company owns because it identifies and distinguishes the company and its products or services from competitors.

Business owners should consider registering the names, logos, taglines, and slogans (each, a "trademark," "service mark," or "mark") used in connection with their goods or services with either the United States Patent and Trademark Office (USPTO) or the appropriate state government to protect and enforce their rights.

Registering a mark with the USPTO offers the broadest form of protection by evidencing the owner's rights to use the mark and preventing others, including competitors, from using the same or a confusingly similar mark on a nationwide basis. Additionally, the mark will be listed in the USPTO database, alerting others of the mark's ownership.

Business owners may not be aware that a mark must meet certain criteria to be eligible for protection. To be registered with the USPTO, among other criteria, a mark must be distinctive and not be confusingly similar to an already registered mark. For example, a mark can be distinctive if it is fanciful (think "Lexus"), arbitrary ("Apple" for computers), or suggestive ("Netflix"). Registering a mark with the USPTO typically costs $350 per class for the initial application. Once a mark is registered, it must be continually used and maintained.

If protection of a mark nationwide is not necessary, a company can protect its mark by registering it in Nebraska. Registration of a mark in Nebraska is less onerous and expensive than registering with the USPTO, but only provides protection of the right to use the mark in Nebraska. This may be enough for a business that only operates and advertises locally. The filing fee for an application to register a mark in Nebraska is $100.

Additionally, if a company operates in Nebraska under a name other than its legal name, the business may register a trade name. The filing fee to register a trade name in Nebraska is $100.

Business owners must be aware that another business using a mark before registration with the USPTO or applicable state may have the right to continue using the mark under common law.

Before business owners adopt and use a new name, logo, tagline, or slogan, it is essential that a proper search is conducted to confirm the same or similar mark is not already registered or in use. Suppose your proposed mark conflicts with or is confusingly similar to another mark. In that case, use of the mark could be challenged, or an infringement action can be filed, costing you valuable time and potentially significant expense.

The attorneys at AKC Law can assist you through the process of registering a trademark or trade name with the appropriate government agencies. We can also counsel you on how to use and maintain your marks.

Contact Greg Schreiber at gschreiber@akclaw.com if you need help navigating the trademark or trade name process.

This newsletter is published by the law firm of Abrahams Kaslow & Cassman LLP to inform our clients and friends about various legal developments and to provide news about our firm. This newsletter is not intended to provide legal advice on specific matters but to provide insight into legal topics and issues of current interest. Please consult with legal counsel before taking action on matters covered in this newsletter. If you would like further information or would like to be added to our mailing list, please contact nbarrett@akclaw.com. The Nebraska Rules of Professional Conduct for Attorneys require the following statement on law firm newsletters:

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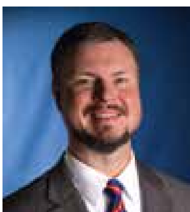

By Andrew Deaver

You make decisions every day. They may be small, easy decisions like deciding what to have for dinner. Or they may be significant, hard choices like deciding on a course of medical treatment or how to handle financial investments.

Usually, the hard decisions have to be made whether or not you want to make them. In fact, hard decisions have to be made whether or not you are *physically or mentally capable of making them*.

What happens if you are not physically or mentally capable of making the hard decisions? Who steps in to help? How does the helper have the legal authority to make these hard decisions for you?

In so many cases, the answer is "it depends." There are two general ways a helper is appointed and receives legal authority.

The first way is through a court process. A helper can be appointed as your "guardian" to manage your health care and day-to-day affairs.

A helper can also be appointed by the court as your "conservator" to manage your finances. Because the guardian or conservator is appointed after you have already become incapable of making the hard decisions, you cannot choose who will serve as your guardian or conservator. State law sets out a list of what individuals have priority to fill these roles, and it is usually a family member. However, it may not be the family member you would have chosen if you could still decide. And, the court process can be long and expensive.

The second way is for you to execute a Health Care Power of Attorney and a Durable Financial Power of Attorney while you are still capable of making the hard decisions. By executing these documents, you get to choose who will make your health care and financial decisions if and when you become incapable of making these decisions yourself.

No court process is involved in executing a Health Care Power of Attorney and a Durable Financial Power of Attorney. These documents give the helper the legal authority they need to make the hard decisions and can be used as soon as you need help without the helper waiting for authority from the court. Also, the cost of having these documents prepared is usually much less than the cost of having the helper appointed guardian or conservator through a court process.

There is no way to know whether you will need someone to help you make the hard decisions in the future. However, by working with an experienced estate planning attorney, you can decide now who will help, and how they will help if it ever becomes necessary.

Abrahams Kaslow & Cassman LLP has over 75 years of Estate Planning experience. Contact Andrew Deaver at adeaver@akclaw.com or 402.392.1250.

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Protecting Your Interests in a Competitive Real Estate Market

By Callie Pancoe

The 2021 real estate market faces two conflicting pressures: an increased demand from buyers and a low supply of listings. These trends created an ultra-competitive market with soaring prices. To make a competitive offer, buyers must act fast. Even in the fast-paced market, prospective buyers should do their homework before consummating a purchase. Most real estate transactions proceed without complications. However, taking specific preliminary actions can help to avoid a negative outcome.

Real estate transactions usually begin with the parties entering into a written agreement for the sale/purchase of specific real estate. This document includes more terms than the purchase price and closing date; it defines each party's right to terminate the agreement under certain circumstances. It also outlines each party's legal remedies if the other party breaches the contract. The parties should thoughtfully prepare the agreement and include provisions to protect their respective interests. Once the purchase agreement is signed, it may be too late to include new conditions or address further issues.

Once the parties have signed the agreement, there are several next steps. First, the buyer may need to obtain financing to complete the purchase. Prospective lenders often analyze the buyer's current financial condition and the proposed deal before agreeing to make a loan. If willing to provide financing, the lender proposes the conditions under which it will make the loan. This includes the length of the loan, repayment schedule, and interest rate. Parties should draft the purchase agreement to include the minimum loan terms considered acceptable before being obligated to proceed with the contract. If not met, such protective contract terms would allow the buyer to terminate the agreement without penalty.

Second, the buyer should obtain a title commitment from a reputable title insurance company. The commitment states the conditions under which the title insurance company will issue a policy insuring clear title in the owner's name and any exceptions for which the policy will not provide coverage. The title company will research the current and previous ownership of the real estate and other public records that may affect the property to determine if there are any documented encumbrances or issues with the current title. A thoroughly prepared purchase agreement will set forth the title issues that, if determined to exist, will allow the buyer to terminate the contract without penalty.

Third, the purchase agreement should include rights of the buyer to conduct surveys and inspections to determine the suitability of the real estate for the buyer's needs and the physical condition of the real estate. For example, a buyer who intends to develop the real estate may want the right to have the real estate tested or inspected for suitability for building or to determine the presence of contaminants that may create potential liabilities. Among other things, a survey can locate the current boundaries of the real estate, which may be different from the boundaries that a visual inspection may suggest. Regardless of the intended use, the right to survey and inspect the property is valuable to any real estate transaction.

A buyer's or seller's protection begins, and if not carefully prepared, ends with the purchase/sale agreement. In today's fast-paced real estate market it is important to protect your interests. To consult with an AKC Law attorney knowledgeable about real estate law, call 402.392.1250, or online at akclaw.com.

Does Your Child's Special Needs Trust Need a Tune-Up?

Remember how satisfying it was setting up a trust for your child with special needs? You named a trustee, signed the paperwork, and then you rested easy at night knowing you had put a plan in place for your child. Done!

Well, not exactly. Because things constantly change, whether over time or suddenly.

It's easy to throw your special needs trust into a drawer and forget about it, especially if you are not planning on funding it until you pass away.

While having a plan in place is a great start, it needs to be maintained. You wouldn't buy a new car and then never change the oil. When it comes to special needs planning, even small changes in circumstance can have significant legal repercussions.

Here are a few examples of the types of changes that can impact your special needs trust.

Trustees and successor trustees: A significant life event such as divorce, physical incapacity, or job loss may make your chosen trustee or successor trustee unavailable.

Health care agent: Is that person still able to jump in at a moment's notice in the event of an emergency, or have they moved to another state or country? Do they still have the capacity and willingness to perform this critical role?

Finances: Think of significant changes in your financial picture, such as an inheritance, the liquidation of a family business, the purchase of a life insurance policy, retirement, bankruptcy, or litigation. You may consider transferring additional funds to the trust, adjusting the language to add an extra layer of protection, or rethinking how the fund's assets are managed.

Major life events: Any significant changes in your own life will impact your dependent with special needs. These include losing a spouse to death or divorce, remarriage, the birth of another child, retirement, or relocating to another state where the laws governing special needs trusts are different.

Changes in the beneficiary's situation: Your special needs dependent could develop more capacity through therapies and medical innovation, or conversely, your child may need more support and assistance as time goes by. An inheritance or a settlement from a lawsuit will have an impact on how the trust functions in the beneficiary's life. Does the language in the trust even allow provisions to be added or changed to meet any new requirements?

Then there is the ever-changing world of federal disability benefits, which can be challenging to keep track of. Your special needs planner should monitor shifts in disability benefits law and new policies on a local, state, or federal level. Such new policies may have a direct impact on your special needs plan.

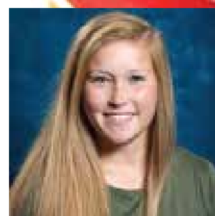
The good news is that special needs trusts are living documents that can be updated and changed regularly. But whatever happens,

DON'T:

- Put off reviewing the trust's provisions. Everything can change when you least expect it, whether as a result of global pandemics, extreme weather events, financial crises, or other emergencies. Don't wait for such an event before reviewing the plan; check it at least once a year to ensure everything is the way you want it.
- Think you can do it yourself by making handwritten changes in the margins. Changes must be properly noted and executed through your attorney. If done incorrectly, without a legal review, such amendments could complicate matters for your special needs beneficiary down the line and lead to expensive litigation.
- Assign successor trustees based on assumptions. Do not presume that a trustee's spouse will take over if the trustee passes away. Always plan for contingencies when making decisions.

If it has been a while since you took a peek at your special needs plan, take it out, dust it off, and schedule an appointment with Andy Deaver, a member of the Academy of Special Needs Planners, at adeaver@akclaw.com.

Collecting a Judgment by Garnishment



By Payton Hostens

Once a court enters a judgment, it is not the court's responsibility to collect the judgment. However, if the judgment debtor (the losing party) does not voluntarily pay the judgment, the judgment creditor (the winning party) will likely need to take affirmative action to collect the judgment. Nebraska statutes provide processes for a judgment creditor to collect a judgment. One method, garnishment, allows a judgment creditor to get a court order compelling a third party in possession of money or property belonging to the judgment debtor to pay the money or property to the court to satisfy the judgment.

To start a garnishment, the judgment creditor must first determine whether any person or entity, such as an employer or bank, is in possession of money or property belonging to the judgment debtor. Such person or entity is referred to as the "garnishee." Once a judgment creditor decides to pursue obtaining the judgment debtor's money or property from a garnishee, the judgment creditor must request that the court issue a garnishment to be served on the garnishee.

Typically, a garnishee is served by personal or certified mail service. If the garnishee is an entity, an officer, director, managing agent, or registered agent of the entity must be served. If the garnishee is a financial institution or bank, special service rules apply. A financial institution or bank must be served at its chartered office or, if its chartered office is located in another state, its designated office or branch (which can be found on the Nebraska Department of Banking and Finance's website).

The judgment debtor must also be given notice of the garnishment. The judgment creditor must send the garnishment documents to the judgment debtor via certified mail within seven days after the court issues the garnishment.

Once a garnishment is served, the garnishee has ten days to file an answer with the court. For example, suppose the answer states the garnishee has money or property belonging to the judgment debtor, depending on the type of money or property held by the garnishee. In that case, the court may issue an order (i) for delivery of the money or property held by the garnishee to the court or (ii) for placement of a continuing lien on the debtor's wages. On the other hand, if the garnishee's answer states it does not have money or property belonging to the debtor, there are no further steps to be taken unless the judgment creditor wants to challenge the veracity of the answer. Any challenge to the garnishee's answer must be filed within twenty days of the answer.

If a garnishee does not file an answer with the court within ten days of service of the garnishment, the garnishee is presumed to be in possession of money or property belonging to the judgment debtor. Therefore, within twenty days, the judgment creditor should file a motion to determine whether the garnishee should be held liable for the entire amount of the judgment for failing to respond to the garnishment.

Many factors can complicate a garnishment and a judgment creditor's ability to collect. For example, if a garnishment is not handled properly or timely, a judgment creditor may hinder his or her ability to garnish assets to satisfy a judgment.

If you have questions about garnishments or need assistance with enforcing a judgment, contact AKC Law at 402.392.1250 or visit us on the web at akclaw.com.