Client and Friend Newsletter

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LAW OFFICES OF
BETH A MCDANIEL
Professional Limited Liability Company

Advanced Dementia Directives. By Beth A. McDaniel, JD, CELA

A comprehensive estate plan encompasses more than planning for the event of death, such as the creation of a Last Will or Living Trust. It also entails planning for the event of incapacity – whether resulting from a temporary or permanent injury or illness, through…

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Electronic Wills. By Beth A. McDaniel, JD, CELA

On January 1, 2022, Washington's Uniform Electronic Will Act ("WEWA") became effective. An 'Electronic Will' is "a record that is readable as text as of the time of the signing." A "record" is information that is inscribed on a tangible medium or that is stored in electronic or other medium and is retrievable in a perceivable form."

Despite being electronic, the execution of an electronic Will in Washington still has the requirement of two witnesses to its execution. execution. The witnesses must be "in the testator's physical or…

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New Reporting Requirements under the Corporate Transparency Act. By Beth A. McDaniel, JD, CELA

Effective January 1, 2024, many U.S. companies will be obligated to report information to the U.S. Government regarding the individuals who control and own the companies. This requirement…

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Cont: Advanced Dementia Directives. By Beth A. McDaniel, JD, CELA

documents like durable powers of attorney and healthcare directives. Another document which we have offered to estate planning clients in recent years is an advanced dementia directive.

An advanced dementia directive is optional planning that empowers an individual to provide specific guidance to the individual's healthcare agent regarding comfort and medical decisions faced after an advanced dementia diagnosis. Unlike an advance health care directive, which addresses end of life wishes, an advanced dementia directive recognizes that an individual with an advanced dementia diagnosis may live a long time if they are otherwise in good physical health. By including this document, my objective is to equip clients' healthcare agents with the tools to advocate effectively while ensuring peace of mind from knowing their actions align with the clients' expressed wishes.

The catalyst for offering this document to clients stems from a 2017 Oregon case involving Bill Harris, a retired tech worker who found himself in court when the facility that housed his 64-year-old wife (who received an Alzheimer's diagnosis in 2008), refused to comply with his request to stop spoon feeding her. Unfortunately, the court did not side with Mr. Harris as Mrs. Harris's advanced health care directive did not explicitly address spoon feeding. I vividly remember reading a statement from a nurse at that facility who said, 'we'll keep feeding her, even if she is choking.'

From a liability standpoint, I empathize with the facility's reluctance to expose itself to potential lawsuits by permitting a resident to risk starvation.

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Simultaneously, I recognize the profound frustration and sense of helplessness experienced by Mr. Harris, as he was unable to act according to what he believed were his wife's wishes.

I, like many others, have experienced the impact of advanced dementia within my family. My late mother-in-law, a retired librarian known for her avid reading, vibrant social life, and physical activity, experience a sudden and unexpected onset of dementia. The suddenness left family members to guess what she would have wanted for her healthcare and end of life. Currently, my thoughts extend to an uncle, presently in a skilled nursing facility under hospice care due to advanced dementia. I think too of the recent passing of esteemed local weather forecaster Steve Pool, who on November 22, 2023, succumbed to early Alzheimer's disease at the age of seventy. Contemplating the possibility of an advanced dementia diagnosis is undoubtedly difficult. Nevertheless, it is important to proactively provide clear instructions for loved ones and caregivers while still possessing the capacity to do so.

For additional information about an advanced dementia directive, which we recently updated with valuable insights from hospice nurse clients, please contact our client care specialist, Margo Passeau, at (425) 296-3121.

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CONT: ELECTRONIC WILLS. BY BETH A. MCDANIEL, JD, CELA

electronic presence." The testator (individual making the Will) and both witnesses must all sign the electronic Will. Under WEWA, "sign" means to "with present intent to authenticate or adopt a record, to affix to or logically associate with the record an electronic symbol, or process.′

Like traditional Wills, electronic Wills must be "self-proving," meaning they must be accompanied by a declaration signed under penalty of perjury or sworn affidavit that that testator was of sound mind, not acting under duress, and that the Will was witnessed at the direction of the testator. Otherwise, the witnesses must submit declarations at the time the Will is admitted for probate for the Will to be valid.

The Uniform Electronic Wills Act was created by the Chicago based Uniform Laws Commission. Washington was the second state to adopt this Act (after Utah). Currently, the Act has been adopted by eight states and there is pending legislation proposing its adoption in six other states.

Although it is possible that electronic Wills may become more popular, as of now, I have never helped a client execute an electronic Will nor am I aware of any other attorney who has helped a client execute an electronic Will. The chief reason for this is that the State of Washington has an unique, additional requirement for maintaining electronic Wills.

In Washington, for an electronic Will to be valid, it must be maintained by a "qualified custodian." Under RCW 11.12.460(1), any of the following would be a "qualified custodian":

- (a) Any suitable person over the

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age of 18 years, who is a resident of the state of Washington at the time the electronic Will was signed

- (b) A trust company regularly organized under the laws of this state and national banks when authorized to do so
- (c) A nonprofit corporation, if the articles of incorporation or bylaws of that corporation permit the action and if the corporation is in compliance with all applicable provisions of Title 24 RCW
- (d) Any professional service corporations, professional limited liability companies, or limited liability partnerships, that are duly organized under the laws of this state and whose shareholders, members, or partners, respectively, are exclusively attorneys
- (e) A will repository in the county in which the testator is domiciled.

Per RCW 11.12.460(2), the following are disqualified to serve as a qualified custodian:

- (a) Minors, persons of unsound mind, or persons who have been convicted of (i) any felony or (ii) any crime involving moral turpitude
- (b) An individual who is an heir, beneficiary, or otherwise has an interest in [the] testator's estate
- (c) Corporations, limited liability companies, limited liability partnerships, except as provided in subsection (1) of this section.

In short, unlike a traditional Will which can store with your other important papers, an electronic Will necessitates storage by a "qualified custodian" who has the duty to provide the Will to the Court or named personal representative within 30 days of being notified of the testator's death and furnish a notarized affidavit which states:

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(i) the manner in which the qualified custodian received the electronic will; (ii) that the electronic will was at all times in the custody of the qualified custodian; and (iii) that the electronic will in the possession of the qualified custodian has not been altered in any way since the custodian received the electronic Will.

I appreciate the legislative concern about the possibility of fraudulent electronic Wills; however, the requirement for a 'qualified custodian' seems impractical. Like most, if not all lawyers, my serving as "qualified custodian" for clients entails a level of responsibility I am not prepared to assume. If an electronic Will is determined to not have been maintained by a qualified custodian, the Court will treat it as a 'lost Will,' which requires the named personal representative to submit additional proof to the Court that the electronic Will submitted to the Court for probate is in fact valid.

Another consideration regarding electronic Wills is that different counties may have different requirements as to the filing and submission of an electronic Will for probate. King County, for instance, has not adopted a local rule permitting the electronic submission of such a Will. Thus, to submit an electronic Will to probate in King County, the electronic Will would first have to be printed and be accompanied by certification, executed by an appropriate individual (like the drafting attorney), that the printed version is a true, valid copy of the original electronic Will.

In conclusion, while the enactment of a statute permitting the execution of an electronic Will appears relevant and 'cutting edge,' the current maintenance requirements are too onerous. Consequently, electronic Wills will likely only be used when a testator has a communicable disease or is under quarantine, making an in-person meeting challenging.

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Cont: New Reporting Requirements under the Corporate Transparency Act. By Beth A. McDaniel, JD, CELA

entails reporting beneficial ownership information through a "BOI Report" to the Financial Crimes Enforcement Network ("FinCEN") (fincen.gov). FinCEN is a bureau under the U.S. Department of the Treasury. The intent with the BOI reporting is to make it more challenging for bad actors to conceal their activities through shell companies or 'opaque' ownership structures.

For companies created between January 1, 2024, and January 1, 2025, there is a ninety-day window in which the initial BOI report must be filed. For companies created after January 1, 2025, there is a thirty-day window in which to file the initial BOI report.

It is important to note note that companies created prior to January 1, 2024, are not exempt from this reporting requirement. On November 29, 2023, FinCEN announced that businesses created prior to January 1, 2024, have until January 1, 2025, to submit their initial BOI report. Come January 1, 2024, a secure, electronic submission form will reportedly be available on the FinCEN website.

Per the FinCEN website, there is no BOI report filing fee. There is also no annual reporting requirement, but companies are required to file updated or corrected reports when necessary. Any such report must be filed within 30 days from the occurrence of a change or the discovery of any error.

The information provided in the submitted reports is accessible by federal, state, local, and tribal officials, as well as certain foreign officials who may submit a request to obtain ownership information for

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authorized activities related to national security, intelligence, and law enforcement. Supervising financial regulators will also have access to the information.

Who must report? Companies required to report are called reporting companies. There are two types of reporting companies:

1. Domestic Reporting Companies are corporations, limited liability companies, and any other entity created by the filing of a document with a secretary of state or other similar office in the United States.
2. Foreign reporting companies are entities (including corporations and limited liability companies) formed under the laws of a foreign country that have registered to do business in the United States by filing a document with a secretary of state or similar office).

Note: there are twenty-three entities that are exempt from this reporting requirement including larger companies, banks, credit unions, investment services, insurance companies, accounting firms, public utilities, and inactive entities. Law firms are not exempt. As Trusts do not need to be filed with a secretary of state, Trusts are not subject to this reporting requirement. Filing a Trust with the court does not trigger the reporting requirement.

The United States's government wants to know who the beneficial owners of companies are and who are the individuals who have substantial control of the companies. A beneficial owner is an individual who either, directly, or indirectly 1) exercise substantial control over the reporting company

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or 2) owns or controls at least 25% of the reporting company's ownership interests. An individual can exercise 'substantial control" if the individual 1) is a senior officer; 2) has the authority to appoint or remove certain officers; 3) is an important decision maker; or 4) has another form of substantial control as explained in FinCEN's Small Entity Compliance Guide.

This new BOI reporting requirement is part of the Corporate Transparency Act, which had bipartisan congressional support. Failure to report may bring civil or criminal penalties. Per the FinCEN website, the report is straightforward and should not require the assistance of an attorney or CPA to complete it. However, mistakes and errors should be addressed quickly. Briefly, bad actors mean less privacy and more regulation for all.

The Law Offices of Beth A. McDaniel, PLLC wish you and yours a wonderful holiday season and a happy and healthy New Year. If you have questions or wish to make an appointment, please contact our client care specialist, Margo Passeau, at (425) 296-3121.

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