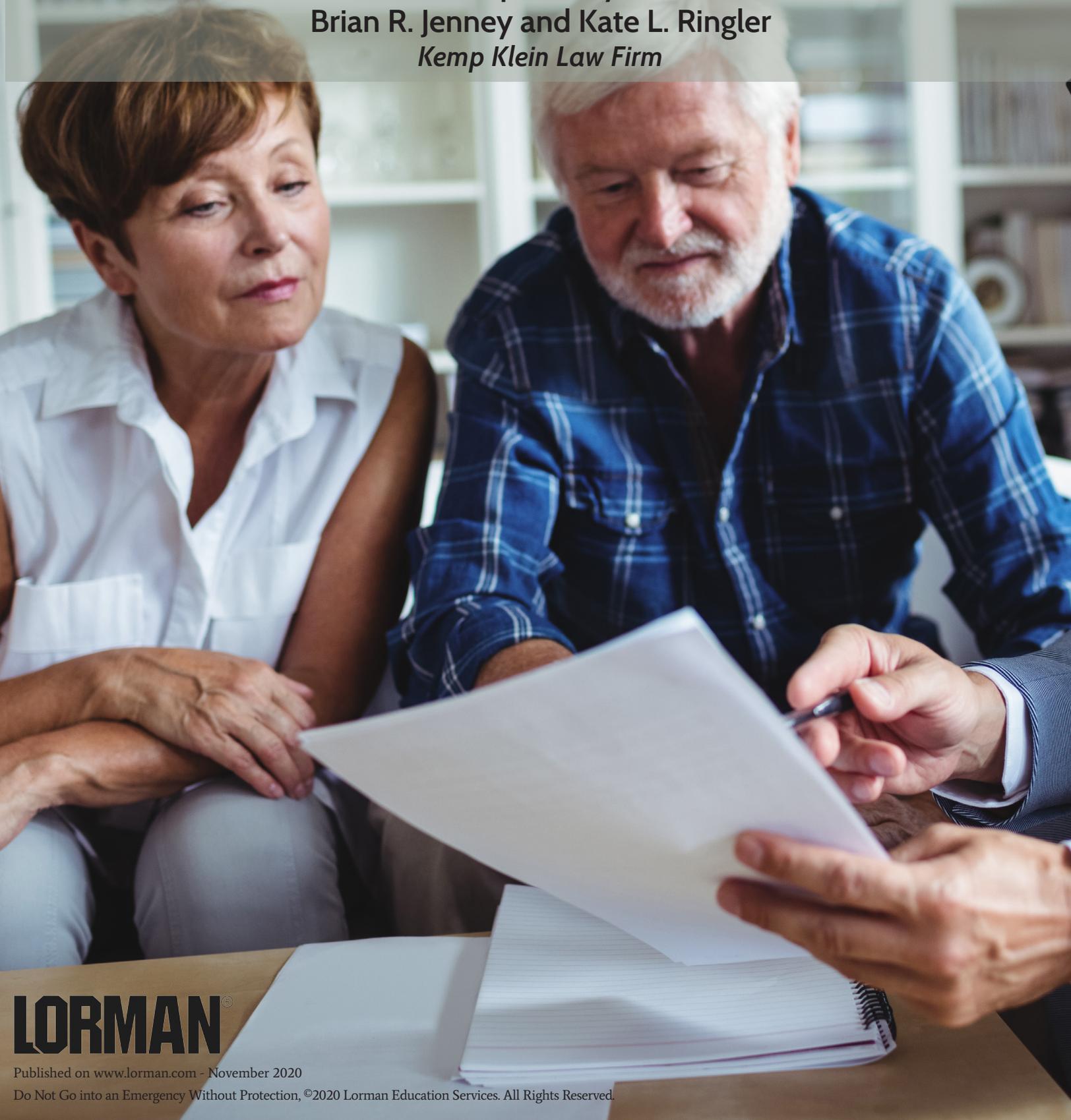


Do Not Go Into an Emergency Without Protection

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When clients think of the most important estate planning document, they most often think of a will. Lawyers tend to think of trusts as the most important. The COVID-19 epidemic has shown that we were all wrong; the Power of Attorney and Patient Advocate have proven to be the most important estate planning documents to have completed. No, it isn't because you need someone to act on your behalf in the event you cannot make your own decisions (although that is, of course, important).

The statutes that govern the execution of estate planning documents in Michigan set forth the requirements for witnesses and notaries when executing each document. MCL §700.2502 requires that a will be signed by at least two individuals, however these witnesses do not need to be present when the testator signs. They must merely sign a reasonable amount of time after witnessing the signing of the will OR witnessing the testator's acknowledgement of their signature or an acknowledgment of the will itself. The statute goes on to allow for holographic (or "handwritten") wills that do not have a witness requirement at all. There is also another statute (MCL §700.2503) that allows a document that the testator intended to be a will to be treated as a will for probate purposes. Thus, it is

possible for our clients to create or execute a will without the customary two witnesses present.

On the other hand, a Durable Power of Attorney must be signed in the presence of two witnesses or acknowledged by the principal before a notary public (MCL §700.5501). A Designation of Patient Advocate must be executed in the presence of and signed by two witnesses (MCL §700.5506). The statute pertaining to the Designation of Patient Advocate also limits who may serve as a witness. Health Care Workers, including doctors and nurses, are not authorized to serve as witnesses for a patient attempting to execute a Designation of Patient Advocate.

The electronic notarization statutes passed by the State of Michigan in recent years require that notaries use one of a selected group of pre-approved notarization services. Most of these services are limited in use for mortgages and real property, and one of the electronic notary statutes even prohibits its use for things like wills and trusts. So in light of the “in the presence of” requirements, executing estate planning documents are impossible without action taken by the courts or the state legislature. This lack of ability to witness and notarize highlights the importance of having powers of attorney (both medical and financial) in place, regardless of your age, prior to an emergency situation.

Governor Whitmer’s Executive Order (2020-74) gave temporary relief in the “presence of” requirements. This relief is only temporary and helps during this current situation. Until the

law is changed, “presence” could prove to be a continuing hurdle for executing estate planning documents. Now is also a good time for our clients to pull out their will and trust and review the terms of the will and trust to ensure that their wishes and intent are properly written in their documents. We have procedures in place and are able to execute estate planning documents remotely with our client.

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