TRANSCRIPT:

Mary: On today's episode. My guest is Rachel Truhlsen. Rachel is one of my co-members at Vandenack Weaver Truhlsen Rachel, and I share a variety of passions, particularly in relation to helping families, address state tax issues, income tax issues in capacity planning and connecting the dots between the various aspects of the legal issues related to planning. And when the plans actually come into play on today's episode, we're going to talk about some of the legal issues to be considered related to aging. On a later episode, we are going to discuss our life care planning group and how we are building that to help connect the dots between legal issues and the living reality of how the tools work when an issue arises. Welcome, Rachel, thank you.

Rachel: Thanks for having me.

Mary: As we talk about legal issues for the aging today. One of the things we are intentionally avoiding is using the term elder law, right? And we've talked about that. Is there a better term than elder law? Because a lot of times when people hear the term elder law, they think that means poverty law for old people that have no money but the fact is that we have a good segment of the population that's aging, and there are a whole host of legal issues that arise for clients, whether they have hundreds of millions of dollars or whether they have a hundred thousand dollars and so the word elder law is poverty. Law is really not quite appropriate. So, what are your thoughts on that? Can we, can you explain why we've made a conscious decision to talk about this area differently?

Rachel: Right. Right. You know, and with our aging pop population you know, I prefer to think of it as, issues related to aging rather than elder law itself. Because as we age those, it looks the same whether you have wealth or whether you are of a person of not as much means. So that issues related to aging are, are the same across the board the planning may look different, but with respect to healthcare or having power of attorney documents in place, or having an estate plan in place planning for incapacity, all of those things are the same across the board, regardless of your wealth status, the planning just might look different.

Mary: So, the issues of vulnerability related to aging, whether you have a little bit or a whole lot are actually fairly similar, correct? Correct. You might just have a, and I used to say, well, you have a bigger impact if you have a lot, but actually if you have only a hundred thousand, somebody steals it from you. That's everything that might matter more than if you have a hundred million and somebody steals a hundred thousand from you. Right.

Rachel: Right.

Mary: Well, you and I joke a lot about use the term asset protection. We hear the term asset protection in various methods, and we've said, that's another area. We should figure out how to refer to you differently because there's different meanings of asset protection as a big generality, it's helping protect your assets, whatever they might be. Right. And for whatever purpose you're trying to protect them. But can you clarify a little further why asset protection really does apply to everyone and where it might be different?

Rachel: Right. Right. So if you're talking about people who have more means, then you would be looking at asset protection from a standpoint of protecting assets during their lifetime. So there are certain professions, for example, that have maybe higher risk, whether it's doctors or even lawyers, or, other people that may have a risk associated with the type of work that they do and you would want to plan for asset protection around those types of, of careers. Then you have people who maybe have larger wealth that want to protect assets from taxes, for example. So that type of asset protection looks different and then when we do Medicaid planning, we have clients who have very limited resources. So that with a hundred thousand dollars example that you have, that may be all that they have so if they have long-term care needs down the road, we want to try to protect that as much as we can from a Medicaid planning standpoint and then we talked in a different episode about asset protection for, for beneficiary. So if you have a beneficiary who may have a creditor concern or marital concern or likes to spend a lot of money, then you may want to put some protections in place for that beneficiary so that's how it looks a little bit different depending on the type of client that we have, or the level of wealth that they have.

Mary: Which I'm just going to make a point about that with the child who might have challenges in trying to protect, we see a lot of times an aging client who decides to name their child as a joint tenant   on an agency account or a checking account or things like that and let's say that you do that and there's, there's a whole bunch of technical rules about their bill of void, but technically you've made them an account owner. Correct. Right. And all of a sudden, they go through a divorce or they get sued. You have created a risk of that asset thinking you're making things simple.

Rachel: Right, right. And we've both seen that happen.

Mary: And my other one is when you do it, like with a, you know, $10 million account and you name one kid as a joint owner with the idea that they're going to give it back to the other kid then suddenly that child has to make taxable gifts right. To their siblings to resolve that. So that's one of my least favorite strategies, but so asset protection, it's asset protection and financial coordination has a variety of different meanings. But at the end of the day, it's trying to keep it, you know, keep as much as yourself rather than going to the IRS, which is perfectly legal. Sure. There's tax fraud and there's tax planning, tax planning is certainly appropriate asset protection trying to protect from creditors, there's tax. You know, again, there's a creditor avoidance that might be illegal, but protecting your assets legitimately totally appropriate, absolutely. Keeping your assets from being dissipated for the government, because you need some government aid at some point also there's perfectly legitimate ways to do it. Right. Right. Well, let's talk a little bit about one of the key things that every, not just every aging client, but everybody ought to have something in regard to, and we've been through a pandemic in recent years. It makes me really highly aware of the importance of thinking about how your affairs should be managed in the event. You can't manage it. Right. Even if it's short term, whether you're 35 50 or whether you're 80. Right. So can you talk a little bit about what we refer to as the financial power of attorney? Right.

Rachel: And the financial power of attorney is something that everyone age here in Nebraska 19 and older should have.

Mary: Is that correct across the country for all states or is that very by state? No, vary states. So You need to look at the state law, correct and the state in which you're a resident in correct.

Rachel: I believe I was 18. We happen to be 19 and then I don't know that I've ever shared this with you, but my son who turned 19 last year for his birthday got power of attorney documents. So he got to come into my office and sign his power of attorney documents as part of becoming age of majority.

Mary: That's a really great point right there because it's really common and not just the financial power of attorney, but the healthcare power of attorney. So for anyone, who's had a child turn legal age, whatever that might be in the state that you're located in and then go off to college and have an injury and you try and get involved in decisions about the medical care. You're the parent of say a 19 year old. Right. And they won't give you information about your child's status because you don't have a power of attorneys. So one of the things that we do is docket it when you have kids turning age 19 or whatever the appropriate age is in your state, and you get a little letter from us suggesting powers of attorney for the children. Right.

Rachel: Right. So, I know we're talking about in the context of having older clients, but it's important for everybody. Include that so in the event, having financial power of attorneys in place is, is very important because again, if there's an incapacity issue, even if it's a short term incapacity issue, it's important to have those financial power of attorney documents in place it’s important to have them updated on a regular basis because sometimes banks won't honor them if they call, if they consider them two old. Staleness, I think five years. Yeah. It's typically five years. Right and also the, the general durable power of attorney law was , modified in Nebraska several years ago, so that we have to include certain powers in a financial power of attorney in order.

Mary: To do a clarifying. So I think there's actually a uniform powers of attorney act. Right. Right. And when that gets updated, it's really common for in every state, again, varies on whether they adopt the uniform act of whatever type it might be. I'm currently an observer for several uniform acts. Right. And so it's a really interesting process, but so each state has the ability to adopt its own version. So whatever state you're in, you really have to look at the act of that state when you're working through those issues. Right. Right. But you were going to mention that there's certain powers that you have to because I always, this is my joke about a power of attorney is the first paragraph should be all that you have to do, which says, I give my agent all the powers that they can have under the act. Then some court says, oh, you couldn't have possibly meant to give them this power. So if you really need to give them really mean to give them this power, then you need to add a paragraph. Right. Right. But what would be some of the important powers that people really need to think about particular or aging?

Rachel: Exactly and part of it stems from asset protection too. So there's a gifting power that should be in the power of attorneys. So if we're gonna do any type of asset.

Mary: It always be in it?

Rachel: No, It shouldn't always be, but I mean for younger people, I don't tend to put that in there. Although gifting is, I see it as a broader power too, because even to make gifting to your charities for church, for example I think that power should be included if you're going to have a spouse as your primary agent, maybe there's less risk of including a gifting power in there. If you are going to have a child.

Mary: What if you have a spouse with the power to gift to others than the kids ?

Rachel: Right. And you can limit that. You could limit that.

Mary: That's what I wanted you to talk about

Rachel: Was so we could limit that. Right? Absolutely. So it doesn't have to be a broad gifting power.

Mary: Do you recommend that you just go out on the internet and find a template, power of attorney and use that? No. No. And what about a lot of, of states actually have a statutory power of attorney that people think is enough   and in some cases it certainly could be right. But for most people, do you think that works or they should think through those powers?

Rachel: I never recommend a statutory power of attorney because I think it's too limiting and it could be risky too, if you don't understand what you're doing so that's why you need to consult with an attorney who you can actually share your information, share what your needs are and they can anticipate maybe what you might need going forward and include all of those in a power of attorney.

Mary: Okay. Let's continue our episode. So when I gave you the example of you have a second, third, or maybe fourth spouse and kids by various marriages and you have certain powers that you certainly want your current spouse to take care of. There might be the ones who are there taking care of you, but there's other things you might not want that particular person to do. Can you have multiple powers of attorney giving different people, different powers?

Rachel: I have never done that before.

Mary: So then I'll answer my own question. The answer is yes.

Rachel: Yeah. I would say yes, but that would be tricky. Wouldn't it?

Mary: So not what you do have to do is refer to the fact that you've created other powers of attorney. Otherwise again, if you look at the standard template, it often says, I hear by revoke all other powers of attorneys that I've drafted. Right? So when I do it, like I might give spouse a surviving spouse, let's say somebody's been married six years, all the powers that they need, but then in case both get incapacitated at the same time, I might give a second power of attorney to one or more of the kids with more limited powers in that situation of second or third spouse, kids by different relationships. I might give a, somebody who's acting as a corporate power of attorney, certain powers that we don't want to because we don't want to set up a situation where spouse and kids from a different marriage suddenly are fighting over things, right? So sometimes you, you can in fact bifurcate the powers of a power of attorney into different documents and that's something that I do. If you were to list some of the best practices, you mentioned that mm-hmm five years down this doctrine. So even if there's no changes to a document, somebody should print that out every five years and just resign it. Right.

Rachel: Well, they should go into the lawyer's office just to make sure there hasn't been any changes in the law and to get those updated on a basis, significant issue because they're almost always is right and then again, just double checking that your agent, whoever you've picked in that power of attorney is still able to act sometime your agent will either not be the best person because whatever life circumstances have changed between the last time you updated the document in now. So it's good to evaluate your agents and, and their availability and then of course, when you, if you're changing agents, you need to notify that prior agent that you've revoked that power so that they understand that they're no longer have authority under that prior document and then provide copies of those documents to your financial institutions and, and whoever might need that. So they know the document's been updated

Mary: And a lot of times we draft what are called durable powers of attorney which mean they, those powers exist at the time the document signed. So let's say if I give Rachel a durable power of attorney, she has the authority now, but maybe I really don't want her to do anything with my financial accounts, unless I can't but what I've done by creating the durable is avoided having to define incapacity and getting letters of incapacity. So I give you all that power. So what I do sometimes is say, Hey, Rachel, I made you my attorney in fact today, by the way, here's where the power of attorney is in case you ever need it. And, but I don't necessarily hand it to that. Sure, sure. And that can kind of depend on the situation, but that's one of my approaches to do it. What about this situation, Rachel, where a lot of times an investment advisor, you go to the bank or something this says, well, I know you have a pat of attorney, but we want you to sign ours.

Rachel: Right. Well, and that would be with a bigger bank and that would be a limited power of attorney with respect to, to banking and we run into that, like I mentioned, with some larger banks and sometimes

Mary: They're very insistent about it.

Rachel: They are, they are and I don't know what the downside necessarily might be as long as it's consistent.

Mary: If's inconsistent. Yeah. That's what I saying. Okay. That's where you're going.

Rachel: Yeah. Unless there's inconsistencies between the two and the client may not recognize that difference in, in looking at the document. Um, and so that might be, you know, require an attorney to look at that, to make sure we don't have any inconsistencies between the two.

Mary: Really prefer they don't sign those. Right, right now through the pandemic. Sometimes if they had not, then we are having huge fights with institutions to get powers of attorney respected. But I will note that that was a really significant issue after the 2009, 2010 financial issues and that's when a lot of financial institutions started insisting on their own documents. But fortunately the uniform laws commission responded to that by incorporating that if you have a power of attorney that complies with your state law, then you are not required to sign one with a financial institution. So I do make that argument. But as you said, sometimes it's just easier. Mm-hmm as long, the big qualification that you made that I think is so important is as long as it's consistent. Right,

Rachel: Right, right. I agree.

Mary: Let's talk about another topic that you and I are both super passionate about, which is elder abuse. There's nothing worse. It's like kicking a helpless dog. Mm-hmm to see what some of the things that we see. Right. Can you explain what it is? Mm-hmm, what to watch for and what you can do if you suspect it or what can be done to prevent it even more importantly.

Rachel: Right. Right. Well, and, and there's different forms of elder abuse and the one that I think that we're going to focus on today is the financial abuse or exploitation and you'll see that in a, in an adult either they are compromised from a mental capacity or they're just under the influence of someone who may just have a very strong personality and they're not brave enough to stand up to that person. So you could see those in those, in those two different types of situations and trying to prevent that looks different. I think on maybe two different levels from the family level, if you have a loved one who may be susceptible to undue influence, I think it's a good practice to stay in regular communication with that person. So you can put your eyes on them on a regular basis and make sure that they're taking care of themselves. If you see any weird mail come to the house if you just see weird things that are out of character for them you won't recognize that if you don't see them on a regular basis also make sure that they have power of attorney documents in place. Like we're talking about encourage them to do that in case they haven't done it already and then again try to encourage them to be more open about their personal finances too, because if they allow you to have information about their finances especially if it's the power of a per power of attorney person that they've appointed, then you can monitor those to the extent that they're comfortable so that you can learn what is normal with their spending and with their income and when there's some type of something that happens, that's not normal in, in their financial situation, you'll be able to pick up on that more quickly. So families, I recommend that for families and us too, as advisors can be a little proactive with our clients, too, our clients, we don't always see on a fairly regular basis. Sometimes they're going to see their financial advisor and I think you alluded to that too, in a prior episode but working collaboratively with our financial advisors and our tax preparers, working with a mutual client if a client needs money, they're not often going to go to their lawyer, they're often going to go to their financial advisor. So if they're taking advantage of, by say a phone call that comes to their house, the, with someone wanting to wire $10,000 somewhere where they're going to have to go to the bank, or they're going to go have to go to their financial advisor for that. So if the financial advisor picks up on those types of things then collaboratively maybe we could work together to try to minimize that type of exploitation.

Mary: And one of the things that we've done is also at an internal family office. Mm-hmm, , mm-hmm who is not doing the same thing as the financial advisors, but we are sometimes receiving copies of the statements and doing some auditing of what's going on and checking in on amounts of distributions and amounts being taken out as well for a variety of reasons and keeping track of the overall assets so that we would be able to identify whether there's a change in assets, right. Is one of the things that I started getting more serious about that when I had a client, a couple sitting in my office and they were completely competent at the time, as far as I'm concerned, but they were wise enough to be very concerned about the situations where somebody might knock on their door and they were these kind caring people mm-hmm and ask them to make donations, or, you know, they're capable of living independently. They don't have dementia, they're just vulnerable, older kind. Right. And I thought, do we really have what we need for clients for that situation? I get that, you know, if the one, if it's a big amount, hopefully financial advisor or family office will pick it up. Is there anything else?

Rachel: Well, and, and again, I just think keeping family members, just advising family members to try to stay connected with their loved ones as best they can and you know, our, our parents our elders can our tend to be protective of that information. So sometimes it's a very de delicate conversation to have. So maybe that happens in more baby steps, you know, one step at a time. But other than being able to monitor their finances and understand what's normal for them, it would be hard to pick up on those types of things unless they made a comment. So that's why it's important to stay in contact with them. They may make a comment where they had so, and so stop by. And, and that just leads, um, opens a door to a conversation that you can ask a little bit, a few more questions to see exactly what the nature of that contact was.

Mary: Well, another one of the things they like lately is there's this do it yourself ring product, where you can videotape anybody who comes up to so I have it myself. And I actually like, you know, have a friend who'll know if I didn't turn my alarm on or off or things like that. Okay. So you can get notifications. So I always say to the elder clients as well, if you're really worried about somebody knocking on your door and taking advantage of it, stole a ring system and give your kid access to it, because they can hear when somebody rang your doorbell and checking, Hey dad, soon as you write a check to the guy who knocked on your door, well, another one is we both do a lot of work helping with clients and I've done a lot of presenting on interference with testamentary intentions of clients and this is something that you often seen in conjunction with elder abuse and a lot of times you might have a client whose capacity is limited or they're simply really ill and very vulnerable and worried about what happens to them if they don't cave into somebody's demands. So can you explain briefly what testimony intent is and how interference with testamentary intent occurs?

Rachel: Yeah testamentary intent is are, is the wishes that you set forth either in a will or a trust, um, as far as how you want your property distributed when you pass away and the way you can interfere with that is, and one of the examples that we had discussed here is say, for example, you have a client that has you know, a million dollars in investments and you have four children and you want that to go equally four ways. So instead of setting up an investment account for that million dollars, you have a separate, either separate investment account for each of the kids, or maybe you set it up in some form of, of annuity or life insurance policy or whatever that might look like and you appoint one of your children is your, is your financial part of attorney to handle your finances? Well over time? What if you need to use those assets to pay for long term care? As you mentioned earlier, that is a huge expense that could be 10, $12,000 a month. So if there's a resource there to pay for that, then your power of attorney is going to use your resources to pay for that. What if your financial power of attorney chooses to use the investment account or the annuity that doesn't, won't go to him or her when you pass away, but that uses the assets from the other siblings and starts spending that down well over a period of time, then those other assets will become diluted and when the client passes away, more of the money may go to the financial agent then goes to the rest of the kids. That isn't necessarily what the parent intended, but that's how the financial power of attorney acted when he or she was spending the assets. So in the end, that is gonna be not really what mom or dad wanted and cause a disparity cause a disparity that wasn't intended. So that's kind of an example of how you could you know, interfere with some testamentary wishes that mom or dad may have had.

Mary: And another thing we see is in that power of attorney that we talked about one of the optional powers in most states is changing beneficiary designations and so we sometimes see a sudden change in beneficiary designation on life insurance or failure to change mm-hmm the beneficiary designation, same thing with Iris. Right, right. So what about Medicare? That seems to be the annual nightmare of everyone mm-hmm 65 and older mm-hmm I know we're gonna do a separate episode on that. So just kind of interested in at least a general comment on Medicare from you.

Rachel: Right. Well, and I think for Medicare itself everyone who turns age 65 is eligible for Medicare. And the biggest decision on that comes within three months of applying for Medicare, where a person has to decide either between original Medicare or a Medicare advantage plan and what's right for each individual person varies on their circumstances and their health and a variety of different factors. So that is a really important decision and in our office we do Medicare consulting. So we work with people prior to applying for Medicare on what might be best for them. So we look at that there's pros and cons to each, depending on your situation. So that's important to evaluate and then again, I mentioned earlier,   in a different episode about reviewing your part D plans on an annual basis, that's during our open enrollment period, which is from mid-October to early December and the formularies in part DS change. So even if your prescriptions don't change from year to year, the coverage in your individual plan might change. So your premiums could go up or your coverage could go down. So it's really important to, to review those on an annual basis. And last year in our firm, I believe we saved our clients over

$87,000 in Medicare reviews last year.

Mary: And I know that that's an area that you have had the expertise in that I was leaving to the rest of the world. because it is really complicated. Well, is my last question today. What are the other issues that tend to be more unique to the elderly, right? The client should be thinking about.

Rachel: And I think it's healthcare. If it were one thing, I just think healthcare because as we age and again, this gets back to where we started this conversation aging as far as your healthcare issues does not look different, whether you're a client of more wealthy means or a client with less means because we all, as we age, we end up seeing the doctor more often, we, we have more doctors, sometimes we have a primary care doctor and then we have to add on all these specialists. So we're going to doctor appointments all the time. I've had clients in their retirement years move from their town that they grew up in and raise their family in. They'll move to Omaha because that's where all their doctors are. So that was the reason for their move and so I think that in and of itself, as far as just a population and with aging healthcare is the biggest thing that applies to everyone and I believe that we're going to do a different episode on at some point here in the future, on the care planning aspect of that. So that will be something that we'll look forward to talking to talking about.

Mary: And we've been playing with that both of us for a few years and finding that to be one of our most popular services, which is one of the reasons that we brought our firms together. And we are finding that to be, you know, both of us love helping people through life challenges and helping at that time by people, you know, in my practice and the same in yours, people in part of my life, some of them were clients of my father before me Uhhuh, and I've actually been named as agent for some. So having that added service is just to me a really meaningful thing. And I'm not sure why law firms haven't thought of it before because there is a huge disconnect, right? Well thanks Rachel as we reach the end of our episode 10.