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ESTABLISHING EFFECTIVE FIDUCIARY RELATIONSHIPS (Part 4)

By Thomas D. Begley, III, CELA

A frequently contentious area in the elder law arena is the establishment of effective fiduciary relationships. In the elder law arena, such relationships are established through powers of attorney, living trusts and other inter vivos documents. Problems frequently arise when documents, establishing these relationships, are poorly drafted and when fiduciaries are not properly selected. Such problems are further compounded when no legal direction is either sought or given after the establishment of such relationships.

In Part I of this series, I provided a basic overview of the issues in this area and discussed the types of fiduciary relationships which exist. Part II covered how fiduciary relationships are properly established. Part III reviewed the proper selection of fiduciaries. Part IV covers the need for fiduciaries to be properly guided in performing their duties.

Post-Document Representation

After the establishment of a fiduciary relationship, many attorneys conclude their representation of the client. However, it is just as important to counsel a fiduciary on their obligations to their principal as it is to set up the relationship. Typically fiduciaries are family members who are likely not acquainted with the legal standards to which they are subject.

It is both an opportunity and an obligation to counsel clients on your availability to assist the fiduciaries they appoint. Obviously, issues of potential conflict of interest must be disclosed and resolved. However, most clients want their fiduciaries to utilize the services of the attorney who drafted their estate planning or elder law documents. Such services are typically limited to representing executors and trustees in post-mortem matters. Such limitation avoids and wastes the opportunity for lifetime representation.

Lifetime representation is extremely important for the client and beneficial to the attorney who provides ongoing representation. When a client becomes disabled, either his agent under his power of attorney or trustee under his living trust should be counseled about the steps they must take in managing and administering assets. This level of service is helpful in two areas: (1) the client needs to be protected during his or her lifetime, and (2) the fiduciary needs protection after the client dies.

The client obviously needs protection. If the fiduciary mismanages or wastes the assets of his or her principal, the principal=s quality of life will be impaired. It is uncanny, though, to see how many people merely Awing it@ when it comes to handling assets as a fiduciary. It must be clearly counseled that a fiduciary must handle such assets with care. Although the fiduciary may wish to invest his or her own finances without professional help, they need to be apprised of the common law standards as to asset management as well as the Prudent Investor Act. Especially in moderate to larger estates, communication with a financial professional is essential.

The fiduciary needs protection as well. After the death of a client (and sometimes even during lifetime), the actions of a fiduciary may be questioned by the heirs of the client=s estate. A fiduciary needs to be able to promptly and effectively address such questions when they arise. Unfortunately, many fiduciaries, if not counseled, keep extremely poor records.

Countless attorneys can recall countless instances where fiduciaries fail to keep receipts, bank statements and other financial records. Such shortcomings are often compounded by the fiduciary making checks payable to themselves or to Acash@ to pay for expenses of the client. When these shortcomings occur, delays occur in providing answers to family members and other heirs. Such delays frequently arouse suspicions of wrongdoing which, in turn, can be translated into actions to remove or surcharge the fiduciary. The cost of such litigation has an extremely high financial and personal cost. Since most of these actions involve fighting among siblings, the tensions are even more exacerbated.

Attorneys must counsel the fiduciaries to keep and maintain any and all financial records no matter how trivial they may seem to be. They must also counsel the fiduciaries to avoid or minimize payments to self and to Acash@. If such payments are truly necessary, they must be substantiated by receipts.

Bookkeeping should be recommended as on ongoing obligation. If questions are asked or if litigation arises, detailed entries from fiduciaries can be translated into effective communications with heirs as well as proper accountings.

An effective advocate should consider providing the following services to his or her clients, and their fiduciaries:

Ongoing tax preparation;

Periodic meetings to review trust or other fiduciary decisions;

Bookkeeping; and

Bill Payment.

Such services may sound risky or outside the practice of law. However, they can ensure that clients are protected. Although an attorney will typically be utilized for support for a fiduciary, an attorney can also serve as a fiduciary as well.

One of the more important tasks an attorney should do is remind his or her clients, as well as their fiduciaries to contact the attorney for help during lifetime crises as well as after death. The assistance of an attorney for Medicaid and tax planning during lifetime is just as important, if not more important, than assisting with the administration of a client=s estate.

Speakers

If you are interested in having an Elder & Disabilities Law Attorney from Begley, Begley, & Bookbinder speak at an event, please contact Colleen Caruso at (856) 787-4237.

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The Firm provides services in connection with protecting assets from nursing home costs, Medicaid applications, Estate Planning and Estate Administration, Special Needs Planning and Guardianships. If you have a legal problem in one of these areas of law, contact Begley, Begley & Bookbinder at 800-533-7227.

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