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ESTABLISHING EFFECTIVE FIDUCIARY RELATIONSHIPS

By Thomas D. Begley, III, CELA

As the population of our country continues to age, it is imperative to provide proper estate planning for our parents and grandparents. To do so, the older generation needs to have solid protection in the areas of health care and financial decision making. The documents, utilized to accomplish these goals are advance directives (commonly referred to as living wills) and powers of attorney. Unfortunately, a number of major problems have arisen over the past two decades with these documents. Such problems range from inadequate drafting of these documents, poor selection of agents for them, and lack of guidance to individuals acting as agents. Over the next few articles, I will summarize the key components in establishing effective fiduciary relationships.

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.

Increasingly, legal challenges are asserted against a fiduciary for breach of fiduciary duty. At times, such challenges accurately attack a fiduciary who may have intentionally misappropriated

the funds of the individual to whom he or she is entrusted. However, many causes of action are raised over simple areas such as poor communication with interested parties and shoddy record keeping.

In this day and age, we must recognize that establishing effective fiduciary relationships does not start and end with the drafting of pedestrian legal documents. Establishing these relationships entails careful detail given to the following areas:

- (a) drafting effective documents including powers of attorney and living trusts, understanding their difference as well as their merits and shortcomings;
- (b) assisting in the intelligent and complete selection of fiduciaries and contingent fiduciaries;
- (c) providing on-going representation to either the principal and the fiduciary, ensuring that the fiduciary is able to do their job, yet remaining cautious of any potential conflicts of interest;
- (d) apprising the fiduciary of planning opportunities such as tax and Medicaid planning; and
- (e) representing a fiduciary in litigation over negligence and abuse.

Types of Fiduciary Relationships

The term, “fiduciary”, connotes a relationship established and based on trust. Certainly, there are a host of fiduciary relationships which can be established, such as guardians for minor children, as well as a host of relationships with trust departments at banks and brokerage houses. In the estate planning and elder law arena, the primary list of fiduciaries includes:

- (1) Executor under a will;
- (2) Administrator of an intestate estate or C.T.A. under a will;
- (3) Trustee under a will;
- (4) Trustee under a revocable living trust;

(5) Trustee under a sophisticated estate planning trust such as a Grantor Retained Annuity Trust, Grantor Retained Annuity Trust, Qualified Personal Residence In Trust, Irrevocable Life Insurance Trust, Charitable Remainder Trust or Charitable Lead Trust;

(6) Trustee under a sophisticated elder law trust such as a Miller Trust, Income Only Trust, Third Party Special Needs Trust, Self-Settled Special Needs Trust, Pooled Trust or Spousal Annuity Trust;

(7) Conservator of an Individual's Person and/or Property;

(8) Guardian of an Individual's Person and/or Property;

(9) Agent, either as a proxy or health care representative pursuant to an advanced directive; and

(10) Agent under a power of attorney, most notably a general durable power of attorney.

In my next installment, we will discuss proper document drafting. Following installments will discuss selecting qualified fiduciaries and providing such fiduciaries competent guidance.



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.

Begley, Begley & Bookbinder

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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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