

What is a Fiduciary?

[Workshop E]

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PAULA'S AREAS OF PRACTICE

- Estate Planning
- Guardianships
- Medicaid/Elder Law Planning
- Special Needs Trusts
- Will Contests
- Estate/Trust Administration

So, what is a Fiduciary?

- A person
 - “serving to handle money & property to benefit another party.” – Black’s Law Dictionary
 - “in whom special confidence is reposed, who is bound... in good conscience to act in good faith with due regard to the interest of the person reposing the confidence.” Ballantine’s Law Dictionary (citing 1956 case).
- Someone with “a legal relationship” beyond mere confidentiality, who operates for and to the benefit of another
- Often referred to as “serving” or a “fiduciary obligation”

Fiduciary Obligation

A fiduciary obligation is when someone (a fiduciary) is held to a higher standard of conduct than the average person when dealing with matters related to the source of the obligation (i.e., a trust). The fiduciary has a requisite level of care and can never put their own personal interests above the beneficiary or the source of the obligation.

Common Abuse Scenarios/Concerns

- Predatory Marriage
- Financial Abuse
- Undue Influence
- Psychological Abuse
- Physical Abuse
- Neglect
- Sexual Abuse

Common Abuse Scenarios/Concerns

- Some models have 82 million people with dementia worldwide by 2030
 - That's California, Florida, & New York
 - ...or 10 Virginias
 - ...or the 30 least populated states

Recently:

On May 20, 2022, a Virginia Beach woman who had been part of a sweepstakes scam was sentenced to four years and nine months in prison.

The sweepstakes scam netted Miller and co-conspirators roughly \$220,000 between June 2019 and March 2021, court documents said. More was on the way, but law enforcement intercepted nearly \$90,000 sent through the mail.

-Source: Virginia Pilot

Hence, Fiduciaries

Creation of Fiduciary Role

- Created in certain legal or financial roles
- Person taking on the role must accept the higher duty
 - They can almost always decline or resign
- Can take effect upon the execution of the underlying document, recording the document, judicial appointment, or other circumstances
- Lasts until discharged (which, again, can occur different ways)

Power of Attorney

THE GENERAL **POWER OF**
ATTORNEY IS THE MOST
IMPORTANT LEGAL DOCUMENT
AN INDIVIDUAL CAN HAVE

What Is A Power of Attorney?

- A legal document in which you designate another person to act for you

Important Aspects of a Durable Power of Attorney

- Must include language that it will not terminate upon incapacity of the Principal
- Should you waive accountings?
- The agent must be responsible, honest, and trustworthy
- Should not be used prematurely
- Should be prepared by a professional

Abuse Concerns with a PoA

- **Poor Judgment**
- **Unfettered access to money while you are alive**
- **Becomes immediately active upon execution of document**
- **Non-prudent investments**
- **Action after death**
- **Waiving accountings**
- **Gifting authorization**

Agent under
Advanced Medical Directive

What is an Advance Directive

Virginia Code Section 54.1-2982

- Witnessed written document
- Authorization to withhold or withdraw life prolonging procedures
- Person is suffering from a terminal condition

Fiduciary Role in AMD context

- Not handling money, but handling your health
- Proper execution of this role is functionally equivalent the fiduciary role

Who can make a decision if the Advance Directive is **NOT** executed?

- Patient's spouse
- Adult child or children
- Brother or sister
- Any other relative in the descending order of blood relationship
- Court appointed guardian or committee

Disagreement Between Members of the Advance Directive

- When two or more persons listed above in the same class inform physician they disagree on treatment, physician may rely on authorization of majority of reasonably available members of that class

Abuse Concerns with an Agent under AMD

- **Not technically a fiduciary**
- **Unsure about your medical wishes**
- **Squeamish / Difficult Choices**
- **Push back from other family members**
- **Substitute Decision Making Hierarchy of § 54.1-2986**
 - **Guardian, spouse, child, parent, adult sibling....**

Fiduciary for Competency Concerns

Guardian

- Court appointed “fiduciary” role
- Oversees treatment and care of the individual

Conservator

- Court appointed fiduciary role
- Oversees finances and manages money for the individual

Abuse Concerns with an Guardian

- **Not technically a fiduciary**
- **More concerned with health optimization rather than financial concerns**
- **Layperson**
- **Lapse is coverage**

Abuse Concerns with an Conservator

- **More concerned with finances than quality of life**
- **Layperson**
- **Lapse is coverage**
- **Non-prudent investor**

Representative Payee

- A type of fiduciary with power to assist someone with their Social Security / Supplemental Security Income / Disability payments
- Appointed by the SSA after application by person seeking to take on fiduciary role
- SSA has a hierarchy of preferred relationships (i.e. they prefer a spouse over an attorney, but an attorney over a bank). CFR § 416.621

Abuse Concerns with a Representative Payee

- **Choice is made by SSA**
- **SSA choice based on competency, which can change**
- **Can apply without beneficiary approval**
- **SSA only monitors via required accountings and communication**

Trusts

(not just for rich people!)

Trusts and Trustees

- A trust requires someone to oversee it. That person is the trustee.
- This is the classic fiduciary capacity.
- The trust is created for the benefit of someone or something. The trustee administers the trust so that this beneficiary gets the greatest benefit. That is their sole job (and hence why the “purest” form of a fiduciary).

Types of trusts

Revocable

- Created by a “settlor”
- Functions while still alive
- Settlor can change or end trust as they see fit
- Often settlor is own trustee

Irrevocable

- Cannot be changed or ended once created (without going to court)
- A revocable trust becomes irrevocable upon the death of the settlor(s)

Benefits of the different types of trusts

Revocable

- Avoid substantial probate & administrative expenses
- Delays in transfer of assets avoided
- Disability
- Privacy of trust assets
- Avoids probate in several states
- Portability of trust
- Will Contests
- Additional estate tax advantage for married couples

Irrevocable

- Protection of Assets
- Allows someone trusted to manage money or property for someone else *without* that person having access to those assets
- Peace of Mind
- Certain Special Needs contexts
- Avoids probate in several states
- Additional estate tax advantages

Special Needs Trust

(If you have a spouse or disabled beneficiary that needs Medicaid)

Create

- Testamentary trust (for spouse) in your will
- Part of a living trust
- Special Needs Trust

Establish

- Protect Government Benefits
- Provide for supplementary needs
- Assure a high quality of life and care

Benefits of a Special Needs Trust

Government

- Room and board
- Care and supervision
- Medical care
- Employment
- Basic personal needs

Trust

- Additional medical or companion care
- Dental care
- Vacations with relatives
- Gifts on special occasions
- Clothes and personal items

Abuse Concerns with a Trustee

- **Slow administration**
- **Incorrect distributions**
- **Excessive fees**
- **Using Powers not granted**
- **Overlooking powers**
- **Irresponsible investments**
- **Poor Judgment***

Fiduciaries Created by Will

Executor

- Named by the person who is creating the will
- Must record or probate the will for executor's role to take effect
- Lasts until estate is fully administered and closed

Administrator

- When there is no will, or the person named as Executor cannot serve, a party who seeks to administer the estate must apply for the role with the court
- Lasts until estate is fully administered and closed

Other Testamentary Considerations

- By Virginia Statute, can clawback erroneously paid amounts of joint/multiparty accounts within 2 years
- What makes a valid will?
 - Numerous factors, but often people write something on the eve of death and expect to avoid abuse

Abuse Concerns

Executor

- Naming a person creates less risk of theft / incorrect valuation
- Greatest danger arises from successor executors not being chosen carefully or at all
- Also, using or not using granted powers

Administrator

- Often, the first to apply for the role is the first to get appointed – so prepare a will!
- Per § 64.2-502,
 - Within 30 days, to sole beneficiary or person approved by all beneficiaries
 - After 30 days, can be first distributee (beneficiary)
 - After 45 days, any NPO operating as Guardian/Conservator
 - After 60 days, a creditor

Questions?

Feel free to contact me for more information:

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Thank you for your time today!