

# THE BEGLEY LAWYER ALERT

(800) 533-7227



*Begley, Begley &  
Bookbinder, PC*  
ATTORNEYS AT LAW  
COMMITTED TO EXCELLENCE

Specializing in Elder & Disability Law

October 24, 2008

Please visit us on the World Wide Web at: [www.begleylawyer.com](http://www.begleylawyer.com)

## *ESTABLISHING EFFECTIVE FIDUCIARY RELATIONSHIPS*

*By Thomas D. Begley, III, CELA*

### **Introduction**

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.

A few weeks ago, I provided a basic overview of the issues in this area and discussed the types of fiduciary relationships which exist. Today's installment sets forth how fiduciary relationships are properly established.

### **Establishment of Fiduciary Relationships**

#### **Which Documents to Utilize**

When representing any competent client, an attorney should prepare at least three estate planning documents:

(1) Will – to dispose of the client’s assets after his or her death;

(2) Advance Directive – to provide guidance to third parties as to medical decisions which may need to be made in the event of the client’s incapacity, especially in regards to the issue of withdrawal or withholding of life-sustaining treatment; and

(3) General Durable Power of Attorney – to provide the ability for a third party to manage the financial (and, if properly drafted, personal) affairs of the client in the event of disability.

In this day and age, it is arguably malpractice not to suggest that a client have each of these three documents as a bare bones estate plan. In an era where approximately 40 to 50% of our aging population will require some level of long term care, the effectiveness of the best drafted will or trust can greatly diminish if lifetime fiduciary planning is not undertaken.

Certainly, other documents, such as those mentioned in the preceding section, will need to be drafted to respond to the understandable needs of clients to minimize or avoid exposure to probate, death taxes and long term care costs. In order to identify and respond to these needs, it is imperative for an elder law practitioner to acquire accurate and complete information from his or her clients at the outset of the attorney-client engagement. Such information must include the client or clients’ personal and medical background as well as a listing of assets, income and significant liabilities.

### **Drafting Documents**

One of the greatest shortcomings of attorneys, when representing estate planning or elder law clients, is the over reliance on simple form documents. Attorneys must recognize that our clients have spent a lifetime earning their estate. As such, our document preparation on their behalf must honor that commitment and exceed sloppy forms.

Without question, there is a value to forms. Attorneys should not have to reinvent the wheel each time he or she meets with a new client. However, forms should be used as a model and only good forms should be used in any system.

Arguably, the most important document for many of our clients is a general durable power of attorney. This document authorizes one or more individuals to make personal and financial decisions on behalf of our client. Unfortunately, many attorneys use one or two page forms which are generic in nature. Forms need to be customized and expanded in order to meet the needs of our client base. It must be impressed that the power of attorney asks a host of financial, medical and business institutions to rely on the representations and actions of a third party who is purportedly acting in the best interests and on behalf of our client.

As our society increasingly sees more government regulation and litigation, many of these institutions have becoming cautious in accepting powers of attorney and more frequently insist on detailed language that corresponds to the action the agent therein wishes to take on behalf of the client. Moreover, the ability to plan for a client who has become disabled may be limited if a power of attorney is not thorough. The Internal Revenue Service has consistently taken the position that it will not recognize gifts given through a power of attorney absent express language within the power of attorney authorizing same or a state statute which allows an inference on behalf of gifting. Without express language allowing an agent to participate in gift giving, many states take the position that gift giving, to the extent it includes an agent, is self-dealing and voidable. This position is certainly ironic in light of the fact that the agent typically appointed by a client is a spouse, adult child or other potential estate heir.

In light of the foregoing, it is clear that powers of attorney should be carefully drafted. In our next installment, I will discuss how one should properly select a fiduciary.



---

## Announcements

“Begley, Begley & Bookbinder, P.C.” has expanded its representation of our senior citizen client base to advocate them in claims for veterans benefits, particularly those for Aid and Attendance. Over the past month, Thomas D. Begley, Jr., Thomas D. Begley, III, Dana E. Bookbinder and Austin DuBois have been designated as accredited attorneys authorized to undertake this work.

---

## 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

Begley, Begley & Bookbinder, P.C. is an Elder & Disability Law Firm with offices in Moorestown, Stone Harbor and Lawrenceville, New Jersey and Huntington Valley, Pennsylvania and can be contacted at 800-533-7227. The firm services southern and central New Jersey and eastern Pennsylvania.

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.

Begley, Begley & Bookbinder has prepared **Special Reports** concerning:

- ❖ *Planning for Long Term Care*
- ❖ *Estate Planning for Parents with Children with Disabilities*
- ❖ *Understanding Estate Planning*
- ❖ *Estate Administration*
- ❖ *Blended Families*
- ❖ *Bloodline Trusts*
- ❖ *Vacation Area Homes – Tax and Management Issue*
- ❖ *Special Needs Trusts*
- ❖ *Utilizing Special Needs Trusts in Matrimonial Cases.*

- ❖ *Using Special Needs Trust to Protect Public Benefits*
- ❖ *Resolving Your Nursing Home Medicaid Application Challenge*
- ❖ *Domestic Partners*
- ❖ *Providing for Your Pet*
- ❖ *Providing for Your Grandchildren*
- ❖ *Charitable Giving*
- ❖ *Planning for Your Business*

Please contact Begley, Begley & Bookbinder at 800-533-7227 or visit our website at [www.begleylawyer.com](http://www.begleylawyer.com) to obtain a **Special Report**.

Our web site contains a library of firm newsletters, articles, on-line forms for Medicaid, Estate Planning and Guardianship, as well as our upcoming speaking engagements, our products, and other relevant information.

If you have any comments, e-mail us at [ccaruso@begleylawyer.com](mailto:ccaruso@begleylawyer.com)

---

### **Distribution of this Newsletter**

Begley, Begley & Bookbinder encourages you to share this newsletter with anyone who is interested in the issues contained within the newsletter. This newsletter may be copied or distributed but with appropriate citation to Begley, Begley & Bookbinder, P.C. If you are interested in being added to our e-newsletter mailing list, please e-mail us at [ccaruso@begleylawyer.com](mailto:ccaruso@begleylawyer.com) or by telephone at 800-533-7227.



Member, National Academy of Elder Law Attorneys

Copyright © 2008 by Begley, Begley & Bookbinder, P.C., 509 South Lenola, Building 7, Moorestown, NJ 08057

***This newsletter is expressly produced to be sent electronically. If you know someone who would also like to receive this electronic newsletter, please have him or her e-mail us [ccaruso@begleylawyer.com](mailto:ccaruso@begleylawyer.com)***