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Trust & Estates Insights

IN THIS ISSUE

Fiduciaries Inherit Lots
of Responsibility

1

A Prescription for Your
Estate Plan

1

Here We Grow Again

3

A Dozen Questions
to Think About

4

How Often Should I...?

5

Introducing
Our New Format

6

Firm Merger!

6

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FIDUCIARIES INHERIT LOTS OF RESPONSIBILITY

M. Powell Peters

It is a great honor to be asked to serve as an Executor. We call individuals, such as an Executor, who serve as the representative of another individual or entity a fiduciary. Other examples of fiduciaries include Trustees, Agents acting under a Power of Attorney, Guardians etc.

As honorable as it may be to be named as a fiduciary, it is a great responsibility as well. Whether you are planning your own estate or have been asked by someone to serve in these capacities, you should think carefully about the responsibility associated with the designation. Sometimes, the person who has named you in their documents has not informed you of this designation so this development may be a surprise to you.

THE LONG VIEW. When we are advising individuals, we suggest they take the long view and then work backwards from the horizon. Often, an individual you might want to name in your documents may not be able to serve for the period of time which will be needed by your plan. For example, what if you want to name your brother as Trustee for monies for your grandchildren's college fund and your brother is in his seventies?

Since we have such a large number of military families, another problem often develops in this community. If the person you have named is serving in the military - even in the reserves, they could easily be transferred around the world.

continued on page 3

A PRESCRIPTION FOR YOUR ESTATE PLAN

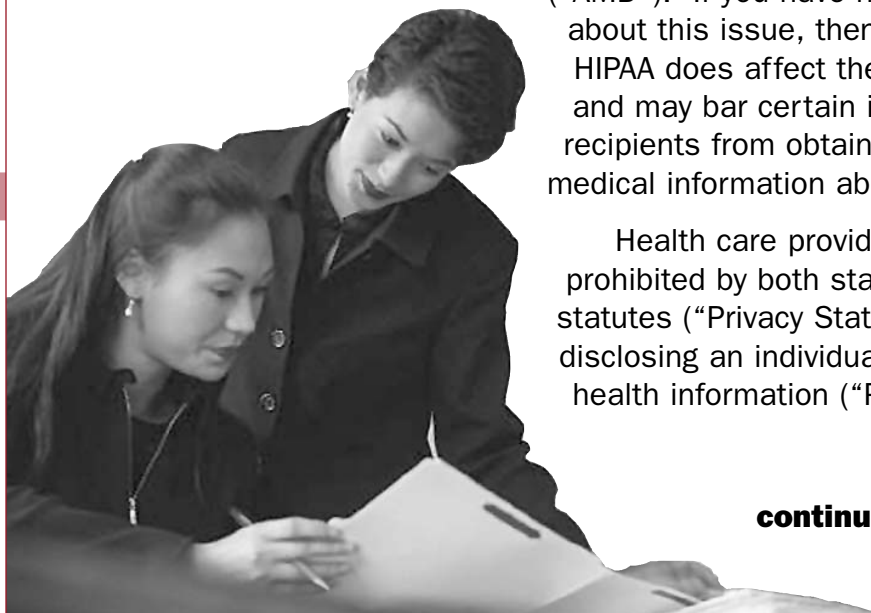
David M. Bastiaans and Steven L. Brown

If you signed your Estate Plan, whether it included a Will, a Trust, a Power of Attorney or an Advance Medical Directive ("Estate Plan") before April 2003, or if you used a form from a book your brother-in-law gave you, or filled in the forms on a computer program you purchased for \$19.99, you should review your Estate Plan. Both tax and privacy laws have changed recently, so that your Estate Plan or Form Documents may not include these recent changes. Also changes in your family situation may affect your Estate Plan.

You may have wondered if the Health Insurance Portability and Accountability Act (known as "HIPAA") does affect your Estate Plan, especially your Power of Attorney and your Advance Medical Directive ("AMD"). If you have not thought about this issue, then you should. HIPAA does affect these documents and may bar certain intended recipients from obtaining certain medical information about you.

Health care providers are prohibited by both state and federal statutes ("Privacy Statutes") from disclosing an individual's protected health information ("PHI").

continued on page 2



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A PRESCRIPTION FOR YOUR ESTATE PLAN

continued from page 1

Although it may seem burdensome and time consuming for you to read these privacy notices you receive from your doctor and hospital; believe it or not the Privacy Statutes are for your protection. The primary purpose of these Privacy Statutes are to protect your privacy and information. As such it is intended to restrict unauthorized or unintended recipients from receiving or accessing your PHI which includes both medical and personal information.

Unfortunately, that protection may be the reason that your Agent, Trustee, Personal Representative (“Fiduciary”) named in your Estate Plan, or family member, may not be able to receive your PHI necessary to carry out the direction in your Estate Plan or discuss your medical condition and treatment with your physicians.

Your Fiduciary named in your Estate Plan is often the person authorized to act on your behalf upon your mental or physical capacity, but if your Estate Plan does not comply with the Privacy Statutes, then your physician may not be able to share your PHI and care with the Fiduciary or family member.

These Privacy Statutes provide a litany of permissible disclosures and recipients of a patient’s PHI. Because there is similar legislation enacted under both, Virginia and Federal legislation, it is somewhat confusing for the health care provider to determine which privacy rules they must follow. For instance HIPAA allows for disclosure to a patient’s Personal Representative whereas in addition to a Personal Representative for a deceased person Virginia law allows for disclosure to an agent appointed under the patient’s Advance Medical Directive (“AMD”), or certain family members if there is no Personal Representative. A Personal Representative for HIPAA is a person who under applicable law has authority to act on behalf of an individual in making decisions related to health care. Thus, it appears that an agent named in your AMD, Personal Representative who qualifies under your Will or select family members, if no Personal Representative qualifies for the deceased, may access your PHI.

The Privacy Statutes do not refer to nor mention other agents or fiduciaries such as an Agent named pursuant to a Durable Power of Attorney or a Trustee named in a Revocable Trust. These Agents and Trustees will have a problem in that they may need a physician’s letter to provide to a third party to evidence that they have the authority to act. The problem is that your physician may not discuss your medical condition without an AMD with your Agent or Trustee. Therefore, without access to your PHI your Agent or Trustee may be powerless to carry out their duties on your behalf.

We recommend that you specifically refer in your Estate Plan the authority for your Fiduciaries to act as your agent for HIPAA and privacy purposes. So what should you do to fix this ailment in your Estate Plan? There are some simple solutions that you can remedy the problem with your Estate Plan. First, you should review, or have someone review for you, your Estate Plan now. Second, if you find that the Estate Plan does not provide the necessary authority to your Fiduciary to access your PHI, you can amend your Estate Plan or execute an Authorization form to name your Fiduciaries as your agent for HIPAA and Privacy Statute purposes. Third, you should review your Estate Plan regularly, yearly and upon a life cycle event.

The next time you visit your physician or receive a privacy notice from your insurance company or health care provider, this should be a reminder for you to review your Estate Plan. **WIRG**

FIDUCIARIES INHERIT LOTS OF RESPONSIBILITY

continued from page 1

To help you select the right fiduciary and to help the individuals that may be named in these relationships, I have outlined a number of common relationships where an individual is asked to serve as a fiduciary.

POWER OF ATTORNEY. In Virginia, the Power of Attorney statutes do not expressly state that the person acting under the Power of Attorney is a fiduciary; however, there are many statutes under Virginia law which govern the authority of Agents. The person you name as your Power of Attorney is considered your Agent under state law. The person who creates a Power of Attorney is called the Principal. Similar statutes and laws apply to our North Carolina clients. These statutes will affect what are considered prudent investments, and if accountings are required to family members for the agent's actions. The Agent's duties require providing information to the Principal, acting only as authorized, obeying instructions, keeping records etc.

Obviously, in determining who should be named, you should consider whether the individual is trustworthy, where the parties reside, the expertise required for serving in this capacity and will there be a potential conflict of interest.

MEDICAL AGENT. Like the appointment of an Agent to serve under a Power of Attorney, the individual named in your documents to manage your healthcare has similar agency and fiduciary obligations to the Principal. It is important the

person being named reflect the philosophy and be willing to honor the wishes of the Principal with regard to administering or withholding medical treatment. This can be very difficult and emotional; especially if other family members do not support your wishes.

EXECUTOR. The Executor is the individual who is named in a Will and is qualified by the court to supervise the administration of a deceased person's estate. If there is no Will, the term that is used for this person is the Administrator. The fiduciary responsibilities for an Executor and an Administrator are similar. Where they may differ is that under the terms of the Will many of the Executor's fiduciary responsibilities may be reduced or eliminated. The Administrator must follow all applicable state laws as there is no Will to limit the liability. A person serving as an Executor may be sued and in some cases they are required to return not only their Executor's fees, but damages to the estate.

Often, we have seen the Executor attempt to handle the estate in a way they thought was consistent with the Decedent's wishes only to learn they had not handled the estate in a prudent fashion. This created a dilemma. The Executor thought they were doing the right thing - making investments or disbursements, but later the Executor learned that they had exceeded their authority or taken imprudent actions.

continued on page 4

HERE WE GROW AGAIN!



Ohio Northern University School of Law, Juris Doctor

Old Dominion University, Undergraduate

We are pleased to announce that Paula M. Bruns has joined our Firm and will be working predominantly out of the Virginia Beach office. Ms. Bruns was admitted to the Virginia Bar in 1994 and has been practicing in the local area ever since. She was a prosecutor in the Virginia Beach Commonwealth's Attorney's Office for over ten years. She began her work there as an Assistant Commonwealth's Attorney and was promoted to Deputy Commonwealth's Attorney after seven years. In September 2004, she began private practice handling cases involving domestic relations and family law such as divorce, custody, visitation, spousal and child support, domestic assault, protective orders and other matters. She has also been serving as a certified guardian ad litem for children in local courts. Her practice also includes representation in criminal and traffic matters.

continued from page 3

Settling an estate is a difficult job. This is especially true if someone is being disinherited, family members are in conflict, creditors are everywhere, etc., you can plan on there being problems.

TRUSTEE. The role of a Trustee may last for years - if not a lifetime. A Trustee handles assets or duties on behalf of the beneficiaries named in the document. The Trustee may be handling monies for a charity, a minor, a disabled relative or perhaps an individual who is not able to handle finances in a prudent manner. As a result, the Trustee relationship can go on for years depending on the terms of the trust.

Trusts created by a Will are called Trust Under Wills. Usually, these types of trusts are under the supervision of the Commissioner of Accounts in Virginia or the Clerk of the Superior Court in North Carolina. As a result, the Trustee may have the added benefit of having their shortcomings pointed out early by the party that reviews their annual accountings.

It has been my experience that many Trustees' actions or inactions that violated their fiduciary duties were not fully disclosed in the accountings. A fiduciary is not protected where the violation of the relationship was not disclosed. As a result, a liability may be lurking for the individual who served as Trustee and it may not be discovered for years to come.

Where the trust is a revocable trust or one of the many types of trusts not under the court's supervision, this problem is exacerbated. Often, those trusts are handled informally and inadequate disclosure has been made to the beneficiary. This may allow the beneficiary many years to perfect their claims against the Trustee for failure in office. By the time the claim is discovered, the Trustee may lack the records to defend himself.

OTHER FIDUCIARY RELATIONSHIPS. Are you named as a Guardian? Often, an individual is asked to serve in another capacity where they are acting as fiduciary. Do you serve as a Board Member of a charity, an officer for your corporation or advise clients with regard to their finances? Any and all of these relationships may lead to classification as a fiduciary.

SUMMARY. When you name a fiduciary in a document, realize you may be laying a minefield for the person you have selected? If you are selected, consider not qualifying or resigning if you are unable to serve in the role that is outlined in the document. Depending on the situation, you should consider the liability. Is the liability associated with your duties appropriately covered by either legal protection or insurance? When in doubt, you should consult legal counsel with regard to these concerns. **WIRIG**

A DOZEN QUESTIONS TO THINK ABOUT

C. Arthur Robinson, II

- 1** Do I have children?
- 2** Do I have children who have special needs that I need to address?
- 3** Or, are my children grown, doing well thus, they don't "need" my property?
- 4** I don't have children. I don't know who should get my property?
- 5** Will I become disabled?
- 6** What's the chance I'll ever need medical care and not be able to request it in advance?
- 7** Do I own any property out of state?
- 8** Have I lived in a community property state?
- 9** Have I ever married, divorced or remarried?
- 10** Is my net worth greater than \$1.5 Million Dollars?
- 11** Have I updated my estate plan in the last five (5) years?
- 12** Have I had a death in the family in the last five (5) years?

If the answer to any of these questions is yes, then you need to consider an estate plan.

HOW OFTEN SHOULD I... ?

Neil Rose, Esquire

A frequent question asked by clients is, “How often should I update my estate plan?” As attorneys, we are often called upon to help with the administration of estate plans and can see the difference between up to date, well crafted documents that carry out the decedent’s desires and old documents that were signed and left in a drawer until they became obsolete.

A good rule of thumb is that you should re-read your documents once a year. Since it is now a new year, this would be a good time to visit the safe deposit box, pull out your estate planning documents and read them to see if they still reflect your current wishes.

While it is useful to review your estate planning documents once a year, we generally advise our clients that they should also be carefully re-read upon any life cycle event. To give an example, starting with a young client, upon getting married, that would be the time to update their estate plan to take into account their new marital status. Thereafter, when a first child is born, or any subsequent child is born, the estate plan should be reviewed to make certain it properly provides for guardians for the children and plans out the proper distribution of assets for descendants, as well as for a potential surviving spouse. Thereafter, should the client become divorced, this would obviously necessitate a change in the estate plan, as members of the spouse’s family or the spouse may have been listed as a fiduciary or beneficiary.

Thereafter, as either the client’s parents or the client dies, plans may need to be adjusted to take into account the fact that a client may have received an inheritance from his or her parents’ passing or the client’s spouse may have a need to update their estate plan to take into account that a party named as a fiduciary or beneficiary is no longer available. Thus, in general, we recommend that every time a person close to the client marries, dies, gives birth or divorces, the estate plan should be reviewed to make certain it still names proper fiduciaries and has a proper asset disposition plan.

Not only is a review of the estate plan documents themselves important on an annual basis or upon major life cycle events, it is also important to regularly review the titling of assets. January and February are excellent times to follow through on this process as, in anticipation of tax season, most of your investments will send out their annual statements in January or February. This gives you an opportunity to review your assets and how they are titled. First, in light of the currently increasing estate tax exemption, but

keeping an eye on the year 2011 and the reduction of the estate tax exemption to \$1,000,000 at that time, it is important for clients to continuously be aware of their net worth. It is equally important to note how one’s assets are titled. Excellent drafting by your attorney cannot fulfill your wishes if your assets are improperly titled.

Many of our clients use revocable trusts to set up a system for the avoidance of probate and to maintain privacy upon death. However, often our clients forget that merely creating a revocable trust does not effect your estate plan. If one creates a revocable trust but leaves one’s checkbook titled solely in one’s name or titled in one’s name with right of survivorship, or payable on death designation to a second party, the asset will

not automatically be in their revocable trust at the moment of death and, in fact, may pass outside of the estate plan designed with the attorney. While some clients consciously use pay on death accounts to transfer some assets outside of the revocable trust estate plan, the more common effect of a pay on death designation is to cause a deviation from the intended plan. Thus, as the statements come in this quarter, it is a good idea to review how the assets are titled and it is prudent to, from time to time, contact your financial institution and actually look at the death designation on file to determine it still fits within one’s estate plan.

Titling one’s assets in the name of one’s revocable trust alone may not satisfy the estate plan requirements. From an estate tax perspective, a couple should carefully look at the number of assets placed in each spouse’s revocable trust, with an eye to look at other assets such as IRAs and life insurance to determine how assets will flow as each dies. One must take into account the possibility that either spouse might be the first to die and plan to deal with the possibility that spouses might die in close succession. Thus, when one is doing the annual review of one’s estate plan, one should play some “what if” games assuming that one had died on January 1st and see what effect that would have. Married couples should also assume for a moment that one spouse died in January and one died in February and look at the effect of that as well.

If you would like to sit down with one of our estate planning attorneys to go over your assets and estate plan, we would be happy to assist you in determining whether you should make any changes in the titling of your assets or your estate plan documents. **WRIG**



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The law firms of Wolcott Rivers P.C. and Payne, Gates, Farthing & Radd, P.C. have merged their longstanding, Hampton Roads-based practices, to form Wolcott Rivers Gates. From their existing offices in downtown Norfolk and at the Town Center in Virginia Beach, the 25 experienced attorneys of Wolcott Rivers Gates are available to assist families and businesses with a host of expert legal services.

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