

## Fiduciary Litigation

According to the U.S. Census Bureau, there are more than 38 million citizens who are over 65 years of age, and 24 million more will join them over the next ten years. An inevitable result of this cresting of the so-called “age wave” of baby boomers is the increased incidence of incapacity in the aging population. Needless to say, the dementia and the demise of those in this generation will create circumstances ripe for disputes and litigation over their resources.

The fight for control over the financial assets of an incapacitated family member often starts with “dueling” powers of attorney (none of which are valid due to dementia) and culminates with a petition for judicial appointment as conservator for the senior. Unfortunately, that court order does not always end the turmoil, since the filing of the inventory and accountings (or the failure to do so) create new reasons for intra-family allegations. Quite often, the courts will appoint an independent third party, such as an attorney, charity or trust company, instead of one of the combatant family members.

If we assume that the senior appointed another to manage his or her financial affairs, health care decisions and estates in a valid legal instrument, we may also assume that some of those choices are perhaps ill-advised. For example, there are cases in which parents have named children with felony convictions to serve as their attorney-in-fact, trustee, and executor (to the bewilderment of the rest of the family).

The term, “fiduciary,” is often used to refer collectively to these roles, and with that term comes a higher standard of duty to the one being served. Thus, the breach of one’s fiduciary duty to his principal or beneficiary can occur with little effort on the part of one untrained in these standards. Few are willing to admit wrongdoing, much less resign such a position voluntarily, leading to litigation to remove the fiduciary and to demand accounting and, if appropriate, restitution.

The Virginia Uniform Trust Code sets forth the duties of a trustee, the procedures (and reasons) for removal of a trustee, and the possible remedies and sanctions to be awarded by a court in such proceedings. The removal of attorneys-in-fact and executors is less well defined, but the standards and the precedent for these remedies is well-documented in other sections of the Virginia code and in reported case decisions.

Our General Assembly may be expected to remain active in passing legislation with a focus

## Fiduciary Litigation (cont.)

on protecting the vulnerable aging population. Meanwhile, we should consider carefully the choices made in the appointment of our fiduciaries, if only to minimize the likelihood of fiduciary litigation among members of the family.

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